

52d MILITARY JUDGES COURSE

PRETRIAL INVESTIGATIONS AND ADVICE

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52d MILITARY JUDGES COURSE

PRETRIAL INVESTIGATIONS AND ADVICE

Outline of Instruction

I. WHAT IS AN ARTICLE 32 PRETRIAL INVESTIGATION?

A. Article 32, UCMJ: “No charge or specification may be referred to a *general court martial* for trial until a *thorough and impartial investigation* of all the matters set forth therein has been made.”

B. Formal investigation conducted prior to trial.

C. It has been *compared* to a civilian grand jury investigation or a preliminary hearing. *See United States v. Powell*, 17 M.J. 975, 976 (A.C.M.R. 1984).

II. WHAT ARE ITS PURPOSES?

A. **STATUTORY PURPOSES.** UCMJ art. 32; RCM 405(a) discussion; RCM 405(e).

1. Inquire into the truth of the matter alleged in the charges.
2. Consider the form of the charges.
3. Make recommendations as to disposition of the charges.

B. **DISCOVERY AS A PURPOSE.** The investigation also serves as a means of discovery. RCM 405(a) discussion; *United States v. Roberts*, 10 M.J. 308 (C.M.A. 1981); UCMJ art. 32(b).

C. **PRESERVATION OF TESTIMONY.**

1. Article 32 testimony may be admissible as *substantive evidence* at trial, as a prior inconsistent statement under MRE 801(d)(1) or as prior testimony under MRE 804(b)(1). Use caution: *United States v. Austin*, 35 M.J. 271 (C.M.A. 1992). Child victim testified in detail at the Article 32 but recanted her testimony at trial and refused to talk about the offense. Over defense objection, trial court admitted 15-page transcript of Article 32 testimony as prior inconsistent statement pursuant to M.R.E. 801(d)(1)(A) and as former testimony under M.R.E. 804(b)(1). The transcript was read to the panel *and* then given to the panel to take

into the deliberation room. Held: reversible error to send transcript back to deliberation room with panel. The transcript was not an exhibit under RCM 921.

2. See also *United States v. Ureta*, 44 M.J. 290 (1996), cert. denied, 117 S. Ct. 692 (1997). Article 32 transcript admissible as prior inconsistent statement and substantive evidence on issue of guilt in case of rape and carnal knowledge of 13-year-old daughter, under Mil. R. Evid. 801(d)(1). Accused's wife testified at Article 32 that accused confessed. After Article 32 terminated, wife refused to discuss her testimony with Government. Unsure whether wife would recant her Article 32 testimony at trial, Government called wife as witness, she recanted, acknowledged inconsistency, and over defense objection, Article 32 transcript was admitted and taken into deliberations. CAAF held that Article 32 transcript was not admissible under M.R.E. 608(b) (no extrinsic evidence of prior inconsistent statement when witness available and testifies, admits making prior statement, and acknowledges specific inconsistencies), **but** Article 32 transcript admissible under M.R.E. 801(d)(1)(A) as substantive evidence and Government can call witness to establish foundation for admission. Error to send transcript into deliberations, but harmless because unlike *Austin*, transcript was not the only evidence against accused.

3. Article 32 testimony may be admissible at trial as former testimony under Mil. R. Evid. 804(b)(1), when the witness is unavailable. See *Austin* (above) and *United States v. Connor*, 27 M.J. 378 (C.M.A. 1989) ("If the defense counsel has been allowed to cross-examine the Government witness without restriction on the scope of cross-examination, then the provisions of M.R.E. 804(b)(1) and of the 6th Amendment are satisfied, even if that opportunity is not used, and the testimony can later be admitted at trial."). See also *United States v. Ortiz*, 35 M.J. 391 (C.M.A. 1992) (Government must establish that the witness was unavailable before former testimony may be properly admitted). *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989) (When Article 32 testimony is offered at trial, the proponent must establish the unavailability of the witness per M.R.E. 804(b)(1) and the 6th Amendment). The Government proves unavailability through serving a subpoena (with appropriate fees), and in the last resort, a warrant of attachment on the witness.

4. Article 32 testimony may be admissible at trial as residual hearsay for unavailable declarants under M.R.E. 804(b)(5). *United States v. Cabral*, 47 M.J. 268 (1997), affirming 43 M.J. 808 (A.F. Ct. Crim. App. 1996). Five-year-old victim of sexual abuse appeared for trial but refused to testify. Witness declared "functionally unavailable" and Article 32 videotaped testimony, which had "particularized guarantees of trustworthiness" (language suitable for 5 year old, described acts not common to experience of 5 year old, use of non-leading questions, no motive to fabricate) was admissible under M.R.E. 804(b)(5).

Caution: What is effect of *Crawford v. Washington*, 124 S. Ct. 1354 (2004) on the continued viability of this opinion?

D. IMPROPER PURPOSE. RCM 405(a) discussion.

1. Purpose is *not* to perfect a case against the accused.
2. *Rather*, the purpose is to ascertain and weigh all the evidence in arriving at conclusions and recommendations.

III. WHEN IS AN ARTICLE 32 INVESTIGATION NECESSARY?

A. Prerequisite to trial by general court-martial. UCMJ art. 32; RCM 405(a).

B. Not required for trial by SPCM or SCM. RCM 405(a).

C. Exceptions to the Article 32 Requirement.

1. *Adequate Substitute*. RCM 405(b). There has already been an investigation into the subject matter of the charges before the accused is charged.

a) *United States v. Diaz*, 54 M.J. 880 (N.M. Ct. Crim. App. 2000). After the Article 32, the accused identified a defect in the preferral of the initial charges, which were dismissed, and new charges preferred. The accused requested a new Article 32, contending that the preferral defect meant that no charges had been investigated by the first Article 32. The Navy Court held the first Article 32 was valid and satisfied the requirements of Article 32.

b) *United States v. Burton*, No. 36296, 2007 CCA LEXIS 281 (A.F. Ct. Crim. App. Jul. 16, 2007) (unpublished). A rape charge was preferred against the accused and the charge was investigated in accordance with UCMJ art. 32. At the investigation, the accused was represented by counsel and had an opportunity to cross-examine the victim. The charge was referred to trial, but subsequently withdrawn because the accused committed additional misconduct. The rape charge was re-preferred (along with several other charges) in an identical fashion except the accused's unit had changed. The charges were once again sent to an Article 32 investigating officer. The defense counsel noted that the Government intended to rely on the previous Article 32 investigation for the rape charge and objected, demanding further investigation into the rape charge under RCM 405(b) because of new evidence calling the victim's credibility into question. The investigating officer did not investigate the rape charge, but simply attached a copy of the previous Article 32 investigation to the report of the investigation for the three new charges. The defense objected that the original rape charge had not been re-investigated and filed a motion to dismiss at trial. The military judge

denied the motion to dismiss, finding that the original rape charge was identical to the new rape charge (except for the unit) and that charge had been properly investigated, so no new investigation was required. The AFCCA held that the military judge abused his discretion in failing to order a new Article 32 investigation into the rape charge. The court found that “[W]hen the government relies on a previously completed Article 32 . . . hearing to support re-referral of dismissed charges, with no new recommendations by an investigating officer, the investigation is covered by Article 32(c) . . . and an accused has the opportunity to demand further investigation.” However, the court held that the error was harmless beyond a reasonable doubt because the convening authority had been given the information concerning her credibility, the SJA had commented on the victim’s credibility in the Article 34 advice, and the defense conducted a detailed cross-examination of the victim at trial.

2. ***Accused May Waive the Investigation.*** RCM 705(c)(2)(E) and RCM 905(e).

a) Personal right of the accused. *United States v. Garcia*, 59 M.J. 447 (2004). Accused must personally waive right to Article 32 hearing (attorney cannot waive it for him). Court does not proscribe method for waiver.

b) May be waived as a condition of a pretrial agreement. RCM 705(c)(2)(E); *United States v. Shaffer*, 12 M.J. 425 (C.M.A. 1982). Article 32 is not a jurisdictional requirement. RCM 905(b)(1) Discussion.

c) May be waived for personal reasons. If waived for personal reasons, withdrawal of the waiver need only be permitted upon a showing of good cause. *United States v. Stone*, 37 M.J. 558 (A.C.M.R. 1993). *See also United States v. Nickerson*, 27 M.J. 30 (C.M.A. 1988).

d) Defense offer to waive is not binding on the Government; investigation may still be held. RCM 405(a) Discussion.

IV. SCOPE OF THE INVESTIGATION

A. IN GENERAL.

1. Should be limited to issues raised by the charges and necessary to proper disposition of the case. RCM 405(a) Discussion.

2. Not limited to examination of the witnesses and evidence mentioned in the accompanying allied papers (or to what the Trial Counsel initially provides the Investigating Officer (IO)).

B. INVESTIGATION OF UNCHARGED OFFENSES. RCM 405(e) and Discussion and Article 32(d). IO may investigate subject matter of the uncharged offense(s) without preferral of additional charge(s), provided notice and certain rights are afforded to the accused.

1. IO may investigate subject matter of the uncharged offense without preferral of new/additional charge(s).
2. Similarly, if charges are changed to allege a more serious or essentially different offense, further investigation should be directed with respect to the new or different matter. *See, e.g., United States v. Bender*, 32 M.J. 1002 (N.M.C.M.R. 1991).

C. ADMISSIBILITY DETERMINATIONS. May include inquiry into legality of searches or the admissibility of a confession. RCM 405(e) (Discussion).

1. *But* investigating officer not required to rule on admissibility.
2. Investigating officer should note the issue in the report of investigation.

D. BURDEN OF PROOF. RCM 405(j)(2)(H). IO determines whether “reasonable grounds” exist to believe the accused committed the offense. “Reasonable grounds” is best translated as “probable cause.” “Probable cause” means “more than a bare suspicion but less than evidence that would justify a conviction” BLACK’S LAW DICTIONARY 1239 (8th ed. 2004).

E. NON-BINDING RECOMMENDATION. IO’s recommendations are only advisory. RCM 405(a) Discussion.

V. PARTICIPANTS.

A. APPOINTING AUTHORITY. RCM 405(c).

1. Any court-martial convening authority (including summary court-martial convening authority) may direct an Article 32 investigation.
2. Usually, the special court-martial convening authority (SPCMCA) will order the investigation.
3. Appointing Authority need to be neutral and detached, within reason.

a) **Accuser** means a person who (1) signs and swears to charges, any person who (2) directs that charges nominally be signed and sworn to by another, and (3) any other person who has an interest other than an official interest in the prosecution of the accused. See UCMJ art. 1(9); RCM 601(c) discussion.

b) **Statutory Disqualification.** A convening authority is statutorily disqualified if he or she prefers charges or directs another to prefer charges (the first two types of accuser in UCMJ art. 1(9)). See, e.g., *McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997) (convening authority who becomes an accuser by virtue of preferring charges in an official capacity as a commander is not, *per se*, disqualified from appointing a pretrial IO to conduct a thorough and impartial investigation of those charges).

c) **Personal Disqualification.** A convening authority is personally disqualified if he or she has an other-than-official interest in the case (the third type of accuser in UCMJ art. 1(9)).

(1) *United States v. Nix*, 40 M.J. 6. (C.M.A. 1994). Accuser concept also applies to those who forward the charges. Special court-martial convening authority's (SPCMCA's) girlfriend (later spouse) was acquainted with accused. Record did not establish that SPCMCA acted without improper motives. SPCMCA must disclose any potential personal interests, and if disqualified, forward without recommendation.

(2) *United States v. v. Dinges*, 55 M.J. 308 (2001). A convening authority who becomes an accuser by virtue of having such a close connection to the offense that a reasonable person would conclude he had a personal interest in the case is disqualified from taking further action as a convening authority. At a GCM the accused was convicted of sodomy arising out of his activities as an assistant scoutmaster with a local troop of the Boy Scouts. The Scout Executive terminated his status as an assistant, and contacted the CA (who was a district chairman of the Big Teepee District, Boy Scouts of America) about the matter. Prior to preferral of charges, the accused was assigned to the CA's wing (a special court-martial convening authority level command). The CAAF ordered a *DuBay* hearing to determine whether the convening authority had an other than official interest that would disqualify him under UCMJ art. 1(9) and *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). Based on facts gathered at the *DuBay* hearing, the CAAF held the SPCMCA did not become an accuser because he did not have such a close connection to the offense that a reasonable person would conclude

he had a personal interest in the case. As such, he was not disqualified from taking action as a CA.

d) ***Fact that appointing authority has determined to send the accused's case to a general court-martial does not show he is biased.*** *United States v. Wojciechowski*, 19 M.J. 577 (N.M.C.M.R. 1984) (appointing authority was not personally disqualified after telling an NIS agent and the defense counsel, prior to completion of the Article 32, that he was “going to send (appellant) to a general court-martial”).

4. Why does statutory vs. personal disqualification matter? It will affect the range of options available.

<i>Action contemplated</i>	If statutorily disqualified -	If personally disqualified -
Appointing UCMJ art 32 investigating officer (IO)	May appoint Article 32 IO	May not appoint Article 32 IO
Dismissal of charges	May dismiss	May dismiss
Disposition by other means	May dispose of case via Article 15, Ltr of Reprimand, etc.	May dispose of case via Article 15, Ltr of Reprimand, etc.
Convening a court martial	May convene a SCM, but not a SPCM or a GCM	May convene a SCM, but not a SPCM or a GCM
Forwarding to superior	May forward with recommendation as to disposition (must note statutory disqualification)	May forward but may not make recommendation

B. INVESTIGATING OFFICER (IO). RCM 405(d)(1).

1. ***Must be a commissioned officer.*** In the Army, the IO cannot be a commissioned warrant officer. AR 27-10, para. 7-7d.

2. ***Preference for field grade officers or officers with legal training*** (judge advocates). RCM 405(d)(1) Discussion.

3. ***Controls the proceedings.*** It was not error for the IO to limit redundant, repetitive, or irrelevant questions by the defense counsel. *United States v. Lewis*, 33 M.J. 758 (A.C.M.R. 1991).

4. ***Disqualified from serving later in same case in any capacity.*** RCM 405(d)(1).

5. ***Must be impartial.***

a) May not be the accuser in the case.

b) IO must be impartial, but not disqualified merely because of:

(1) Prior knowledge about the case. *United States v. Schreiber*, 16 C.M.R. 639 (A.F.B.R. 1954).

(2) Investigated a related case. *United States v. Collins*, 6 M.J. 256 (C.M.A. 1979).

c) The IO *is partial* and *is disqualified* if the IO:

(1) Played a prior role in perfecting the case against the accused. *United States v. Lopez*, 42 C.M.R. 268 (C.M.A. 1970); *United States v. Parker*, 19 C.M.R. 201 (C.M.A. 1955).

(2) Previously formed or expressed an opinion about the accused's guilt. *United States v. Natallelo*, 10 M.J. 594 (A.F.C.M.R. 1980).

(3) Served as DSJA in the SJA office. *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985).

(4) ***Anytime his/her impartiality might reasonably be questioned.*** An IO is bound by the ethical standards applicable to judges, i.e. Code of Judicial Conduct and the ABA Standards for Criminal Justice. ABA Standards for Criminal Justice, Special Functions of the Trial Judge, Standard 6-1.6 (3d ed. 2000). *United States v. Castleman*, 11 M.J. 562 (A.F.C.M.R. 1981) (IO was close personal friend of accuser, purchased airplane and vacationed with accuser two days before Article 32); *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985) (IO was XO of NLSO and was defense counsel's supervisor.) *See also United States v. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996) (IO not biased, even though misapplied

100-mile rule as reason for not interviewing witnesses and considered sworn statements of unavailable witnesses and videotaped confession.)

6. **Advice.** With regard to *substantive matters*, any advice received must be from a neutral source. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977).

- a) Persons performing prosecutorial functions are not neutral. *United States v. Grimm*, 6 M.J. 890 (A.C.M.R. 1979).
- b) Advice must not be given *ex parte*. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977). ABA Standards, Special Functions of the Trial Judge 6-2.1 (1982). After receiving the advice notice must be given of the person consulted, the substance of the advice, and the parties must be afforded a reasonable opportunity to respond. Canon 3(A)(4), Code of Judicial Conduct (1972).

7. **Ex parte communication.** *Ex parte* contacts by the IO regarding substantive matters constitute error that will be tested for prejudice. *Ex parte* contacts have a presumption of prejudice that may be rebutted by the trial counsel, *but* actual prejudice to accused very unlikely to be found. See *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977) (seven meetings with trial counsel); *United States v. Whitt*, 21 M.J. 658 (A.C.M.R. 1985) (two “informal” *ex parte* interviews with three witnesses); *United States v. Francis*, 25 M.J. 614 (C.G.C.M.R. 1987) (meeting with CO, trial counsel, and accuser); and *United States v. Rushatz*, 30 M.J. 532 (A.C.M.R.), *aff’d*, 31 M.J. 450 (C.M.A. 1990) (contacting CID, visiting housing & finance offices, talking with potential witness),

a) *United States v. Argo*, 46 M.J. 454 (C.A.A.F. 1997). Staff Judge Advocate’s request to Article 32(b) IO (a subordinate officer not under his supervision) to: reopen investigation to look into issue of unlawful command influence; and reject the defense’s interpretation of precedent regarding “no-contact” order did not constitute unlawful command influence. Accused suffered no prejudice by a full investigation of the unlawful command influence issues. Although SJA’s *ex parte* contact violated the law, there was no prejudicial impact because the IO consulted her own SJA for legal advice and exercised independent judgment; and the defense did not enter an objection at any stage of the court-martial process.

b) *United States v. Holt*, 52 M.J. 173 (C.A.A.F. 1999). IO’s furnishing trial counsel with name and phone number of blood spatter expert who later provided helpful blood test and spatter testimony at trial created at least the appearance of impropriety by providing trial counsel with what was, in effect, a supplementary report that was neither transmitted to the

commander who ordered the investigation nor served on the accused. Such communication did not prejudice the accused, although the CAAF held that, in the future, such supplementary communications must be reported promptly to the command and to the accused. If such a matter arises after referral, the information shall be provided promptly to the commander who referred the case to trial, the military judge, and the accused. The parties will be in the best position to determine whether any motions or objections are warranted based upon the nature of the information.

8. **Delay Authority.** *United States v. Lazauskas*, 62 M.J. 39 (C.A.A.F. 2005). CAAF interprets RCM 707(c) to exclude, for 120-day calculation purposes, any delay approved by the ART 32 IO if the convening authority previously delegated authority to the IO to approve delays.

C. **ACCUSED.** RCM 405(f). The accused has the following rights:

1. To be informed of the charges under investigation.
2. To be informed of the identity of the accuser.
3. To be present throughout the taking of evidence unless the accused -
 - a) Is disruptive.
 - b) Is *voluntarily* absent (technically, cannot force accused to be present).
4. To be represented by counsel.
5. To be informed of the witnesses and other evidence then known to the IO.
6. To be informed of the purpose of the investigation.
7. To be informed of the right against self-incrimination under Article 31.
8. To cross-examine witnesses.
 - a) Accused given broad latitude to cross-examine. RCM 405(h)(1)(A).
 - b) This right is not absolute. *United States v. Lewis*, 33 M.J. 758 (A.C.M.R. 1991). The IO believed the defense counsel's questions were "going off into the ozone."

9. To have witnesses produced if they are reasonably available.
10. To have evidence produced which is within the control of military authorities, if reasonably available.
11. To present evidence in defense, mitigation, and extenuation.
12. To make a statement in any form, including an unsworn statement.

D. DEFENSE COUNSEL. RCM 405(d)(2).

1. Will be detailed.
2. Accused may also request individual military counsel (IMC), who will be provided if reasonably available.
3. Accused may be represented by civilian counsel at no expense to the Government.
 - a) Accused entitled to a reasonable time to acquire civilian counsel.
 - b) Investigation will not be unduly delayed to acquire civilian counsel. *United States v. Pruner*, 33 M.J. 272 (C.M.A. 1991).
 - c) Use of civilian counsel does not limit the accused's rights to military counsel.
4. Multiple representation of accused and three co-defendants at *joint* Article 32 did not demonstrate conflicts of interest. *United States v. Muma*, 5 M.J. 675 (A.C.M.R. 1978).

E. GOVERNMENT REPRESENTATIVE (Trial Counsel). RCM 405(d)(3)(A). Appointed or requested by the Appointing Authority to represent the Government.

1. Need not be an attorney.
2. May question witnesses at the hearing. DA PAM 27-17, *Procedural Guide for Article 32(b) Investigating Officer*, para. 1-2d (16 Sep. 1990).
3. Examine evidence considered by the IO. RCM 405(h)(1)(B).

4. Argue for an appropriate disposition of the case. DA Pam 27-17, para 1-2d.

F. **REPORTER.** RCM 405(d)(3)(B).

1. May be appointed by convening authority.

2. Assists the investigating officer in recording the proceeding.

VI. WITNESS AND EVIDENCE PRODUCTION.

A. **GENERAL RULE** (RCM 405(g)):

Any witness whose testimony would be relevant to the investigation and not cumulative shall be produced if the witness is “reasonably available.” This includes witnesses for the accused upon a timely request.

B. **DETERMINATION OF “REASONABLE AVAILABILITY.”** RCM 405(g)(1)(A).

1. **Availability within 100 miles of situs.** “A witness is reasonably available when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness’ appearance.” The IO makes the determination whether a witness is reasonably available. *Note, despite the “100 mile” language in RCM 405(g)(1)(A), the witness’ immediate commander may veto an Article 32 IO’s determination per RCM 405(g)(2)(A).

2. **Interpretation of 100-Mile Test.** *United States v. Marrie*, 43 M.J. 35 (1995). A witness located more than 100 miles away from the situs of an Article 32 investigation *is not per se unavailable*. IO’s determination that three child sexual abuse victims were not reasonably available based on the 100-mile rule was error (although harmless) in light of IO’s failures to apply the balancing test and obtain testimony through alternative form (*e.g.*, telephone, written sworn statement). The determination of reasonable availability for witnesses located more than 100 miles from the situs of the investigation is left to the discretion of the commander. The court effectively dissolved Change 5 to the MCM (established 100-Mile test). *See Discussion*, RCM 405(g)(1)(A) and RCM 405 (g)(2)(A).

3. *United States v. Burfitt*, 43 M.J. 815 (A.F. Ct. Crim. App. 1996). Not every ruling of unavailability premised on wooden application of 100-mile rule is fatal. IO’s error in applying the 100-mile rule *must cause some prejudice* to accused. It was harmless error for the IO to apply 100-mile test without determining if

importance of testimony outweighed the difficulty, delay, and expense of securing physical presence of witness because IO obtained evidence via telephone, permitted defense counsel to conduct cross-examination, and MJ allowed accused further opportunity to interview witnesses. Record should support IO's determination of availability when victim does not appear for Article 32 investigation. IO's determination must be carefully considered, clearly articulated, and amply supported in the record.

4. *United States v. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996). IO's misapplication of 100-mile rule, amongst other things, did not substantiate claims of IO bias.

5. ***Determining availability of witnesses.***

a) Military witnesses.

(1) IO makes an initial determination whether a witness is reasonably available.

(2) Immediate commander of the witness has the discretion and may exercise a "veto" and determine that the witness is not reasonably available.

(3) Unavailability determination is not subject to appeal, but may be reviewed at trial.

b) Civilian witnesses.

(1) IO makes initial determination.

(2) Final decision is within the discretion of the commander who ordered the investigation. Payment of transportation and per diem to civilian witnesses must be approved by the GCMCA. AR 27-10, para. 5-12.

(3) Cannot be subpoenaed to appear at an Article 32 hearing.

(4) Can be compelled by subpoena to testify at a deposition. RCM 702.

(5) Can be ordered to testify as an incident of employment if employed by the United States government and the Article 32 investigation concerns matters which are related to the civilian's

job. *Weston v. Dept. of Housing & Urban Development*, 724 F.2d 943 (Fed. Cir. 1983).

(6) Local status of forces agreements (S.O.F.A.) may provide a mechanism for compelling attendance of foreign nationals.

6. ***Immunized witnesses.*** Only a General Court-Martial Convening Authority (GCMCA) has the authority to grant immunity to witnesses to testify at an Article 32 investigation (or Court-Martial). RCM 704(c) and Discussion. *United States v. Douglas*, 32 M.J. 694 (A.F.C.M.R. 1991) (no abuse of discretion in denying defense requested immunity for two witnesses at Article 32).

C. **AVAILABLE WITNESSES.**

1. Must be compelled to testify if available and does not claim any privilege. *United States v. Colter*, 15 M.J. 1032 (A.C.M.R. 1983). Witness was a Government drug informant.

2. *United States v. Bell*, 44 M.J. 403 (1996). Appellant was not protected from prosecution for perjury by absence of Article 31 warnings at Article 32 investigation where he made statements during testimony as a defense witness. Article 32 investigations are judicial proceedings, not a disciplinary or law enforcement tool within the context of Article 31. The Article 31 requirement for warnings does not apply at trial.

D. **UNAVAILABLE WITNESSES AND EVIDENCE.**

1. IO must state in the report of investigation the reason(s) for an unavailability determination if the defense objects.

2. Witnesses who invoke their right to self-incrimination at the Article 32 are “not reasonably available” within the meaning of RCM 405(g)(1)(a); *United States v. Douglas*, 32 M.J. 694 (A.F.C.M.R. 1991). See also RCM 405(g)(1)(A) and M.R.E. 804(a)(1).

VII. ALTERNATIVES TO TESTIMONY AND EVIDENCE.

A. RCM 405(g)(4) and (5).

B. Alternatives to Testimony.

1. The following are admissible if there is no defense objection, regardless of availability of the witness.

- a) Sworn statements.
- b) Statements under oath taken by telephone, radio, etc.
- c) Prior testimony under oath.
- d) Depositions. RCM 702.
- e) Stipulations of fact or expected testimony.
- f) Unsworn statements.

2. The following are admissible even if there is a defense objection if the witness is *not* reasonably available.

- a) Sworn statements.
- b) Statements under oath taken by telephone, radio, etc.
- c) Prior testimony under oath.
- d) Depositions; and,
- e) in time of war, unsworn statements.

C. ALTERNATIVES TO EVIDENCE.

1. If no defense objection, regardless of availability of the evidence.

- a) Testimony describing the evidence.
- b) An authenticated copy, photograph, or reproduction.
- c) Stipulation of fact document's contents, or expected testimony.
- d) Unsworn statement describing the evidence.
- e) Offer of proof concerning pertinent characteristics of the evidence.

2. Over defense objection, if evidence *not* reasonably available.
 - a) Testimony describing the evidence.
 - b) Authenticated copy, photograph, or reproduction.

VIII. PROCEDURE FOR CONDUCTING THE INVESTIGATION.

A. GENERAL PROCEDURE.

1. CA is authorized to prescribe specific procedures for conducting the investigation. RCM 405(c). *See United States v. Bramel*, 32 M.J. 3 (C.M.A. 1990) (Appointing authority's instructions to IO to place a partition between the child witness and the accused okay).

a) Normally, DA Pam 27-17 (Sep 90) will be followed.

b) The CA will usually require expeditious proceeding and set the deadline for receipt of the record of investigation. Per RCM 707(c) and Discussion, have appointing authority delegate limited authority to approve delay to Article 32 IO. *See United States v. Thompson*, 46 M.J. 472 (1997), *affirming* 44 M.J. 598 (N.M. Ct. Crim. App. 1996). Defense requested delays that were granted by the Article 32 investigating officer and later ratified by the convening authority after the fact were properly excluded from the speedy trial calculations under RCM 707. The court leaves for another day the issue of whether the Article 32 Investigating Officer (IO) has inherent, independent power to exclude a delay from speedy trial consideration.

c) Report of investigation should be forwarded to GCMCA within eight days if accused in pretrial confinement. RCM 405(j)(1) discussion.

2. Investigating officer has broad discretion regarding sequence of events and other details. IO decides the –

a) Time and place of the hearing.

b) Order witnesses will testify.

c) Order in which evidence will be presented.

d) Order of examination by counsel.

e) Number of sessions needed to complete the investigation.

B. MILITARY RULES OF EVIDENCE. RCM 405(i). Military Rules of Evidence do not apply other than Mil. R. Evid. 301 (self incrimination), 302 (statements from mental examination), 303 (degrading), 305 (rights warning), 412 (rape shield) and Section V (privileges). *See United States v. Martel*, 19 M.J. 917 (A.C.M.R. 1985) (Error for Article 32 Officer to consider evidence which violated marital privilege).

C. RIGHT TO CONFRONTATION.

Art 32 investigation, while an important pretrial right, is not the equivalent of a crucial trial right for Confrontation Clause purposes. *See United States v. Bramel*, (above). It is not improper for accused to be separated from child witness by a screen at Art 32. Consider admissibility at trial of testimony obtained in this manner if witness is later unavailable in light of *Crawford v. Washington*, 541 U.S. 36 (2004).

D. OPEN vs. CLOSED HEARING.

1. RCM 405(h)(3). The proceedings may be closed or access restricted in the discretion of the appointing authority or the investigating officer. Ordinarily, though, the proceedings should be open. The analysis to RCM 405(h)(3) refers to RCM 806 (governing closure of the trial) for some reasons why the hearing may be closed.

2. *See ABC, Inc, v. Powell*, 47 M.J. 363 (1997). SPCMA's reasons (maintain integrity of military justice system, prevent dissemination of evidence that might not be admissible at trial, and shield alleged victims from possible news reports about anticipated attempts to delve into each woman's sexual history) supporting decision to close *entire* investigation were unsubstantiated. The CAAF holds that the accused has a qualified right to an open Article 32 hearing.

a) Closure determination must be a “‘reasoned,’ not ‘reflexive’” one, made on a “‘case-by-case, witness-by-witness, and circumstance-by-circumstance basis whether closure in a case is necessary to protect the welfare of a victim. . . .”

b) Absent cause shown that outweighs the value of openness (overriding interest articulated in the findings), the military accused is entitled to a public Article 32 hearing. The right is *not* absolute.

c) The press enjoys the same right to a public Article 32 and has standing to complain if access is denied.

3. *United States v. Davis*, 62 MJ. 645 (A.F. Ct. Crim. App. 2006), *aff'd*, 64 M.J. 445 (C.A.A.F. 2007). The IO closed the Article 32 hearing during testimony of two victims of alleged sexual assault “due to the sensitive and potentially embarrassing nature of the testimony and in order to encourage complete testimony about the alleged sexual offenses.” The IO failed to speak to either witness and no evidence existed that the witnesses were reluctant to testify in a public hearing. The MJ held that the IO’s decision was not supported by the evidence and was error, but the MJ declined to fashion any relief because he could determine no “articulable harm” to the accused. The AFCCA agreed that the IO erred in closing the hearing but held that once the MJ found that the accused’s rights to a public hearing were violated, however, that “the [MJ]—without a showing of prejudice or articulable harm—. . . should have dismissed the affected charges to allow for reinvestigation under Article 32.” The AFCCA, however, did not reverse or order a new Article 32 hearing because the closure did not adversely affect the accused’s rights at trial so setting aside his conviction was not warranted. On appeal, CAAF affirmed, clarifying that, on appeal, Article 32 issues will be reviewed under Article 59(a). CAAF noted that the AFCCA was correct in holding that the MJ erred by requiring a showing of prejudice before providing a remedy.

4. *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996) (cited with approval in *ABC, Inc. v. Powell*). Court denied newspaper’s extraordinary writ to reverse by mandamus IO’s decision to close hearing, over defense objection, concerning O-4 charged with murder of 11-year old girl. While Article 32 investigations are presumptively public hearings, the IO did not abuse discretion, and articulated good reasons supporting her action (citing a need to protect against the dissemination of information that might not be admissible in court; to prevent against contamination of a potential jury pool; to maintain a dignified, orderly, and thorough hearing; and to encourage the complete candor of witnesses called to testify). The court reasoned that RCM 405(h)(3) is unclear how competing interests are to be weighed in deciding whether to close a hearing, or whether the entire hearing could be closed, so mandamus was not appropriate for this area of law that is “developing” and “subject to differing interpretations.”

5. *See also United States v. Anderson*, 46 M.J. 728 (A. Ct. Crim. App. 1997) (adopting the “stringent test” for closure of court-martial proceedings (*citing Press-Enterprise Co. v. Superior Court*, 106 S.Ct. 2735 (1986))). A court-martial may be closed to the public provided the following test is met:

- a) The party seeking closure must advance an overriding interest that is likely to be prejudiced;
- b) The closure must be narrowly tailored to protect that interest;
- c) The trial court must consider reasonable alternatives to closure;

d) And it must make adequate findings supporting the closure to aid in review.

6. There is no “national security” exception to these principles. The appointing authority must still conduct a case-by-case, witness-by-witness, circumstance-by-circumstance determination.

a) *In re Halabi*, Misc Dkt. 2003-07 (A.F. Ct. Crim. App. Sep. 16, 2003) (unpub.) (granting writ of mandamus quashing blanket order excluding the public from entire investigation due to national security concerns).

b) *Denver Post Corp. v. United States*, No. 20041215 (A. Ct. Crim. App. Feb. 23, 2005) (unpub.). The IO conducted preliminary matters in an open forum and then closed the proceeding to hear testimony from a security specialist regarding classified information. After receiving the security specialist’s testimony, the IO closed the *entire* hearing. Additional witnesses testified to non-classified information in a closed session later in the day. *Denver Post* filed a writ demanding a stay of the proceeding until ACCA could rule on the hearing’s closure. ACCA granted the stay and ruled that the IO erred in closing the entire proceeding. Closing a proceeding is only warranted when a “compelling showing [exists] that such was necessary to prevent the disclosure of classified information.” *Id.* at *3 (quoting *United States v. Grunden*, 2 M.J. 116, 121 (C.M.A. 1977)). An IO may only close a proceeding “after consideration of the specific substance of the testimony of individual witnesses expected by the parties and a factual determination that all of the expected testimony of such a witness will reveal classified information.” *Id.* at *6. Additionally, ACCA ordered the Government provide *The Denver Post* a verbatim transcript of the testimony, with classified information redacted.

7. For a good analysis of the case law in this area, see Major Mark Kulish, *The Public’s Right of Access to Pretrial Proceedings Versus The Accused’s Right to a Fair Trial*, ARMY LAW, September 1998, at 1.

E. TESTIMONY BY WITNESSES. RCM 405(h)(1)(A).

1. All testimony must be under oath.
2. *Except* accused may make an unsworn statement.

IX. REPORT OF INVESTIGATION.

A. **AUTHORITY.** Per RCM 405(j), the IO must submit a timely report of investigation to the appointing authority.

B. CONTENTS. The report must include:

1. Names and organizations/address of defense counsel.
2. Whether defense counsel were present at proceedings, and if not, why.
3. Substance of the testimony. Usually summarized, though it may be verbatim. *See D.A. PAM 27-17, Procedural Guide for the Article 32(b) Investigating Officer*, paras. 3-3a(1) and 4-1, (16 Sep 90) (hereinafter DA Pam 27-17).
4. Any other evidence considered by the IO.
5. A statement regarding any belief that the accused was not mentally responsible at the time of the offense(s) or during the investigation.
6. A statement regarding availability of witnesses, including the reasons why any were unavailable.
7. IO's conclusion whether the charges and specifications are in proper form.
8. IO's conclusion whether reasonable grounds exist that the accused committed the offense(s).
9. Recommendation for disposition.

C. FORM OF THE REPORT. Usually consists of DD Form 457 (Investigating Officer's Report) and attached summarized testimony of witnesses and evidence considered. DA Pam 27-17, para 4-1.

D. DISTRIBUTION OF THE REPORT.

1. Original goes to the appointing authority.
2. One copy goes to the accused.

X. ACTION BY THE APPOINTING AUTHORITY.

- A. Reopen the Investigation.
- B. Command Options.

1. Dismiss the Charges.
2. Administrative Disposition.
3. Nonjudicial Punishment.
4. Referral to SCM or SPCM.
5. Forwarding with recommendations to GCMCA.

XI. TREATMENT OF DEFECTS.

A. OBJECTIONS MUST BE TIMELY MADE.

1. Defects discovered during the investigation. RCM 405(h)(2).
 - a) Must be raised promptly. Allows Government to take curative action.
 - b) Errors not promptly raised are waived absent a showing of good cause. RCM 405(k).
 - c) IO is not required to rule on the objection.
 - d) Objection must be noted in the report of investigation, if requested.
 - e) IO may require the objection to be in writing.
2. Defects in the report of investigation. RCM 405(j)(4).
 - a) Objections must be made to the appointing authority.
 - b) Must be made within five days of receipt of report by accused.
 - c) Failure to raise the objection within 5 days is a waiver absent good cause. RCM 405(k).
 - d) **NOTE:** Appointing authority not precluded from referring the charges or taking other action within the five days.

3. If error is alleged erroneous denial of witness, defense may be required to request deposition in order to preserve objection. *United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978)

B. MOTION FOR APPROPRIATE RELIEF MUST BE MADE AT TRIAL. RCM 905(b)(1).

1. Must be made before plea is entered.
2. Failure to raise before plea waives the error, absent good cause. RCM 405(k), RCM 905(b) and Discussion.

C. STANDARDS FOR MOTION.

1. *Broad standards.*

- a) “[N]o charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation . . . has been made in substantial compliance with this rule.” RCM 405(a).
- b) Failure to substantially comply with the requirements of Article 32, which failure prejudices the accused, may result in delay of disposition of the case or disapproval of the proceedings. RCM 405(a) Discussion.
- c) Motions for appropriate relief (including a motion to correct defects in the Article 32 investigation) are designed to cure defects which deprive a party of a right or hinder a party from preparing for trial. RCM 906(a); RCM 906(b)(3).

2. *Types of defects.*

- a) Investigation improperly convened. Accused is denied a substantial pretrial right when the Article 32 investigation is ordered by an officer who lacks proper authority. *United States v. Donaldson*, 23 C.M.A. 293, 49 C.M.R. 542 (1975) (jurisdictional error).
- b) Partiality of the IO. Partiality of the IO will be *tested for prejudice*. *United States v. Cunningham*, 12 C.M.A. 402, 30 C.M.R. 402 (1961).
- c) Denial of right to counsel/ineffective assistance of counsel.

(1) The right to the assistance of counsel of one’s own choice during the pretrial investigation is a substantial pretrial right of the

accused. *United States v. Maness*, 48 C.M.R. 512 (C.M.A. 1974); *United States v. Miro*, 22 M.J. 509 (A.F.C.M.R. 1986) (“An unprepared counsel is tantamount to no counsel at all”). There is no requirement to demonstrate prejudice, *but*

(2) Improper denial of counsel and denial of effective assistance of counsel at the Art. 32 investigation should be tested for prejudice. *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985); *United States v. Freedman*, 23 M.J. 820 (N.M.C.M.R. 1987).

d) Nonproduction of reasonably available witnesses.

(1) Failure to produce reasonably available defense requested witnesses is a denial of a *substantial pretrial right* of the accused. *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976); *but*

(2) Nonproduction of reasonably available defense requested witnesses will be assessed for prejudice to the accused. *See United States v. Burfitt*, 43 M.J. 815 (1996) and *United States v. Marrie*, 43 M.J. 35 (1995). *See also United States v. Martinez*, 12 M.J. 801 (N.M.C.M.R. 1981).

e) Minor/technical irregularities. IO’s improper limitation of defense counsel’s right of cross-examination was an error that did not prejudice the accused at trial. *United States v. Harris*, 2 M.J. 1089 (A.C.M.R. 1977).

D. REMEDY.

1. Ordinarily the remedy is a continuance to re-open the investigation. RCM 906(b)(3) discussion.

2. If the charges have already been referred, re-referral is not required following a re-opening of the investigation; affirmance of the prior referral is sufficient. *United States v. Clark*, 11 M.J. 179 (C.M.A. 1981).

XII. WHAT IS AN ARTICLE 34 PRETRIAL ADVICE?

A. **PREREQUISITE TO GCM.** Per UCMJ art. 34, “The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate. . . .”

B. Formal document containing the SJA’s written advice regarding the charges.

C. Not required for trial by special or summary court-martial. RCM 406(a) Discussion. **BUT NOTE:** In the US Army SPCMs involving confinement in excess of 6 months, forfeitures of pay for more than 6 months, or bad-conduct discharges the “servicing staff judge advocate will prepare a pretrial advice, following generally the format of RCM 406(b).” AR 27-10, 5-28b.

D. No civilian equivalent.

XIII. WHAT ARE THE PURPOSES OF THE PRETRIAL ADVICE?

A. SUBSTANTIAL PRETRIAL RIGHT OF THE ACCUSED.

1. Protects accused against trial on *baseless charges*.
2. Protects accused against referral to an *inappropriate level of court-martial*.
3. Limited veto over convening authority’s power to refer charges.

B. PROSECUTORIAL TOOL: provides *legal advice to the convening authority* regarding the charges.

XIV. CONTENTS OF PRETRIAL ADVICE

A. MANDATORY CONTENTS. UCMJ art. 34.

1. Although more may be included, the pretrial advice is streamlined and is only *required* to include:
 - a) Conclusions with respect to whether *each specification alleges an offense* under the code; **[binding]**
 - b) Conclusions with respect to whether the allegation of each offense is *warranted by the evidence* indicated in the report of investigation; the standard is probable cause. RCM 406(b) Discussion. **[binding]**
 - c) Conclusion with respect to whether a court-martial would have *jurisdiction over the accused* and the offense; and **[binding]**
 - d) *Recommendation* of the action to be taken by the convening authority. **[non-binding]**

2. The three legal conclusions are binding on the convening authority; the SJA's recommended disposition is not.
3. SJA need not set forth the underlying analysis or rationale for the conclusions. RCM 406(b) Discussion.

B. OPTIONAL CONTENTS. Per RCM 406(b) Discussion, "The pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations, by commanders or others who have forwarded the charges, for disposition of the case."

1. Failure to include optional information is not error. RCM 406(b) Discussion.
2. Whatever matters are included in the advice should be accurate. RCM 406(b) Discussion. *United States v. Foley*, 37 M.J. 822 (A.F.C.M.R. 1993). SJA's advice inaccurately reported that unit commander recommended referral to GCM. Court found that error was harmless in light of accused's light sentence. *See also United States v. Murray*, 25 M.J. 445 (C.M.A. 1988). Pretrial advice omitted a charge. Procedural error tested for prejudice.
3. Reference to race is inappropriate for inclusion in court-martial records, including the pretrial advice. *United States v. Brice*, 33 M.J. 176 (C.M.A. 1991) (summary disposition); reference to accused's "Racial/ethnic identifier." *See also United States v. Holt* and *United States v. Phillips*, both at 27 M.J. 402 (C.M.A. 1988) (summary dispositions).

C. CAPITAL CASES. Use pretrial advice to give *notice of aggravating factors* prior to arraignment per RCM 1004(b)(1) and (c). Following *Ring v. Arizona*, 536 U.S. 584 (2003), aggravated factors may need to be charged and investigated. *The smart Government choice is to both charge and investigate the aggravating factors.*

XV. PREPARATION OF THE PRETRIAL ADVICE

A. SJA Need Not Personally Prepare the Advice, *But-*

1. The SJA is personally responsible for it.
2. Disqualification of the SJA to Prepare Post-trial Recommendation.
 - a) Mere preparation of the pretrial advice is not enough to disqualify the SJA. However, under RCM 1106(b), the SJA may be disqualified from

preparing the post-trial recommendation when the sufficiency or correctness of the earlier action (the pretrial advice) is placed in issue.

b) *United States v. Lynch*, 39 M.J. 223 (C.M.A. 1994). Accused questioned the pretrial advice in a motion prior to trial. “[W]here a legitimate factual controversy exists between the SJA and DC, the SJA must disqualify himself from participating in the post-trial recommendation.”

c) *United States v. Engle*, 1 M.J. 387 (C.M.A. 1976). At trial DC moved for a new advice on the ground that the advice in question contained a material misstatement of the evidence and omitted matters that could have affected convening authority’s referral decision. SJA should have recused himself.

d) Inappropriate comments by the SJA in the pretrial advice may disqualify the SJA from preparing the SJA Post-trial Recommendation. *United States v. Plumb*, 47 M.J. 771 (A.F. Ct. Crim. App. 1997). In the pretrial advice, the SJA referred to the accused, an Air Force OSI CPT, as a “shark in the waters, [who] goes after the weak and leaves the strong alone.” The Air Force court said that such a comment was “so contrary to the integrity and fairness of the military justice system that it has no place in a pretrial advice.” The comment (in conjunction with other errors) resulted in the findings and sentence being set aside.

3. The SJA must make an independent and informed appraisal of the charges; *SJA must personally sign the pretrial advice*. It may not be signed “For the SJA.” *United States v. Hayes*, 24 M.J. 786 (A.C.M.R. 1987).
4. The trial counsel may *draft* the pretrial advice for the SJA’s consideration. *See United States v. Smith*, 33 M.J. 527 (A.F.C.M.R. 1991), *aff’d*, 35 M.J. 138 (C.M.A. 1992).

B. Enclosures with the Pretrial Advice.

1. Charge sheet.
2. Forwarding letters and endorsements.
3. Report of (Article 32) investigation, DD Form 457.

- C. Distribution of the Advice. A copy of the pretrial advice must be provided to the defense if the charges are referred to a GCM. RCM 406(c).

XVI. DEFECTS IN THE PRETRIAL ADVICE

A. **WAIVED IF NOT RAISED.** Objections are waived if not raised prior to entry of plea or if the accused pleads guilty. RCM 905(b) and (e); *see generally* RCM 910(j); *see also United States v. Packer*, 8 M.J. 785 (N.C.M.R. 1980); *United States v. Blakney*, 2 M.J. 1135 (C.G.C.M.R. 1976); *United States v. Henry*, 50 C.M.R. 685 (A.F.C.M.R. 1975).

B. **NON-JURISDICTIONAL.** Defects are not jurisdictional and must be raised by motion for appropriate relief at trial. RCM 905(b)(1) Discussion.

C. STANDARDS FOR RELIEF.

1. *At trial.* Information which is so incomplete as to be misleading may result in a defective advice, necessitating appropriate relief. RCM 406(b) discussion; *see also* RCM 905(b)(1) and 906(b)(3).

2. *Appellate review.* Is the advice so “incomplete, ill-considered, or misleading” as to a material matter that the convening authority might have made an erroneous referral? *United States v. Kemp*, 7 M.J. 760 (A.C.M.R. 1979).

D. FAILURE TO PROVIDE PRETRIAL ADVICE.

1. Failure to provide a written pretrial advice to the convening authority is error which will be tested for prejudice. *United States v. Murray*, 25 M.J. 445 (C.M.A. 1988).

2. *United States v. Green*, 44 M.J. 631 (1996). Accused failed to raise absence of written pretrial advice at trial for wrongful appropriation of motor vehicle, larceny, and obtaining services by false pretenses. Waiver rule applied.

3. *United States v. Cook*, No. 200100254 (N-M. Ct. Crim. App. Feb. 28, 2005) (unpub.) (holding an accused must suffer actual prejudice to reverse a case for the government’s failure to refer without Article 34 advice).

E. Where convening authority refers charge and specification despite fact that staff judge advocate’s legal conclusions do not support referral, the proper remedy is to dismiss the charges rather than ordering an amendment to the pretrial advice. *United States v. Harrison*, 23 M.J. 907 (N.M.C.M.R. 1987). If Staff Judge Advocate neglects to state a conclusion as to jurisdiction, probable cause, or that the specification states an offense, the proper remedy is to return the case for a new pretrial advice. *Id.*

F. The absence of an Article 34 Pretrial Advice does not render a record nonverbatim within the meaning of RCM 1003(b)(2)(B) and 1003(b)(3), and Article 54, UCMJ. *United States v. Blaine*, 50 M.J. 854 (N-M. Ct. Crim. App. 1999).

XVII. CONCLUSION

XVIII. APPENDIX – ARTICLE 32 & ARTICLE 34 SUMMARY

MAJOR POINT

SUMMARY

<p>PRESERVATION AND ADMISSION OF 32 TESTIMONY</p>	<ul style="list-style-type: none"> ○ Article 32 testimony may be admissible as substantive evidence at courts-martial (once the foundational elements for each provision are satisfied): <ul style="list-style-type: none"> • M.R.E. 801(d)(1) (prior inconsistent statement); • M.R.E. 804(b)(1) (former testimony); • M.R.E. 803 (24) and 804(b)(5) (residual hearsay).
<p>PARTICIPANTS</p>	<ul style="list-style-type: none"> ○ The appointing authority (AA) must be neutral and detached. An AA who is merely a statutory “accuser” has more options than an AA with an other than official interest in the case. <i>See United States v. Wojciechowski</i>, 19 M.J. 577 (N.M.C.M.R. 1984); <i>McKinney v. Jarvis</i>, 46 M.J. 870 (A. Ct. Crim. App. 1997); <i>see also United States v. Dinges</i>, 49 M.J. 232 (1998). The investigating officer must be “neutral and detached,” and must avoid <i>ex parte</i> contact. The IO is bound by the ethical standards applicable to judges. IO actions that violate the above, upon appropriate motion, must be tested for prejudice to the accused.
<p>PRODUCTION OF WITNESSES</p>	<ul style="list-style-type: none"> ○ RCM 405(g)(1)(A) controls whether the Gov’t must secure the physical presence of witnesses. A witness is reasonably available if within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witnesses’ appearance. Relief from an IO’s misapplication of the balancing test is granted only upon a showing of undue prejudice to the accused. Alternative means of obtaining the testimony (i.e. telephonic direct and cross examination) may negate prejudice. <i>United States v. Marrie</i>, 43 M.J. 35 (1995); <i>United States v. Burfitt</i>, 43 M.J. 815 (A.F. Ct. Crim. App. 1996).
<p>PROCEDURE FOR CONDUCTING THE INVESTIGATION</p>	<ul style="list-style-type: none"> ○ Speedy Trial Considerations: RCM 707 appears to vest authority to exclude article 32 delays from the speedy trial clock only in the AA. An IO does not have inherent authority to do the same, but it appears that the AA can delegate this authority to an IO. <i>United States v. Thompson</i>, 46 M.J. 472 (1997). ○ M.R.E. application: Only the rules on privileges, Rape Shield, and self-incrimination apply at the Article 32 investigation. RCM 405(i). ○ Standard for Closure: Whether there is cause that outweighs the value of openness. The cause must be an overriding interest articulated in the findings. This determination must be made on a case-by-case, witness-by-witness basis. <i>See generally ABC, Inc. v. Powell</i>, 47 M.J. 363 (1997); RCM 405(h)(3).

<p>TREATMENT OF DEFECTS AND REMEDY</p>	<ul style="list-style-type: none"> ○ Objections to the investigation must be made “promptly upon discovery” or are waived, absent good cause. RCM 405(h)(2) and 405(k). ○ Objections to the report must be made “timely” (that is, within five days of service of the report on the accused) or are waived, absent good cause. RCM 405(j)(4) and 405(k). ○ Objections not made prior to entry of plea are waived, absent good cause. (Defects are nonjurisdictional). Objections are made by motion for appropriate relief. RCM 905(b), 905(e) and 906(b)(3). ○ If objection is to failure to produce a witness, accused may need to request deposition of witness in order to preserve objection. <i>United States v. Chuculate</i>, 5 M.J. 143 (C.M.A. 1978). ○ The burden of proof that the Government has not substantially complied with the provisions of Article 32, to the prejudice of the accused, is on the accused by a preponderance of the evidence. RCM 405(a), Discussion; RCMs 905(c)(1) and 905(c)(2). ○ The remedy to correct a defect is normally a continuance to correct the defect. RCM 906(b)(3), Discussion.
<p>THE ARTICLE 34 PRETRIAL ADVICE</p>	<ul style="list-style-type: none"> ○ The SJA or Acting SJA must sign the article 34 advice, which concludes that: <ul style="list-style-type: none"> • each specification alleges an offense, • the allegations are warranted by the evidence in the Art 32 report, and • there is jurisdiction over the accused and the charged offense. A negative conclusion on one of the above prohibits forwarding a charge to a GCM (they are binding on the CA). The SJA also makes a recommendation on disposition, which is NOT binding on the CA. ○ Defects in the Article 34 advice must be raised by motion for appropriate relief. Defects are nonjurisdictional and waived if not raised prior to plea or if the accused pleads guilty. RCM 406(b), Discussion; 905(b)(1) and 905(e). ○ The standard at trial is whether information which is so incomplete as to be misleading, that the convening authority may have made a different decision on referral. RCM 406(b), Discussion; <i>United States v. Kemp</i>, 7 M.J. 769 (A.C.M.R. 1979). ○ Remedy for referral over SJA advice is dismissal. <i>United States v. Harrison</i>, 23 M.J. 907 (N.M.C.M.R. 1987)