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JAG INSTRUCTION 5800.7E CHANGE TRANSMITTAL 2

From: Judge Advocate General

Subj: MANUAL OF THE JUDGE ADVOCATE GENERAL

Ref: (a) JAGINST 5219.1F, Publication of the Manual of the Judge Advocate General (JAGMAN)

Encl: (1) Summary of Changes
(2) Revised Chapter II

1. Purpose. To transmit Change 2 to the Manual of the Judge Advocate General (JAGMAN) in accordance with reference (a).

2. Information. Enclosure (1) contains a summary of the pertinent JAGMAN changes.

3. Action. Insert new pages contained within enclosure (2) and remove superseded pages.

4. Availability. The JAGMAN is part of the Department of the Navy (DON) directives system and is available on the DON directives website at http://doni.daps.dla.mil. The JAGMAN may also be accessed and downloaded from Navy Knowledge Online (https://wwwa.nko.navy.mil) at the Judge Advocate General's Corps community portal, and on the official Judge Advocate General's Corps website at http://www.jag.navy.mil.

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JAGINST 5800.7E CHANGE TRANSMITTAL 2

SUMMARY OF JAG MANUAL CHANGES

1. The entire chapter has been reorganized to incorporate general provisions applicable to all types of administrative investigations under Part C and specific provisions for the three types of investigations under Part D.

2. Administrative changes, including updating references, contact information, routing information, and office titles, are made throughout the chapter.

3. Section 0201c(8). Adds quality assurance reviews required by BUMEDINST 6010.13 (series).

4. Section 0201d. Includes liaison with the Naval Safety Center for safety investigations; adds new language to liaison with the Naval Safety Center or Naval Criminal Investigative Service regarding pending investigations.

5. Section 0202a. Adds cognizant judge advocates and the local Region Legal Service Office Command Services Department as additional sources for assistance.

6. Section 0204c(1). Adds discussion regarding "dual-purpose" investigations.

7. Section 0206c. Adds new language regarding witnesses, judge advocate assistance, time limitation to conduct the investigation, and designation of parties in courts of inquiry; adds reference to the Health Insurance Portability and Accountability Act (HIPAA).

8. Section 0207b(3). Adds video or audio recordings and photographs to the list of examples of documentary evidence.

9. Section 0207b(4). Adds video recordings.

10. Section 0207c(2). Adds consultation with law enforcement personnel for witnesses in custody. Adds further coordination with judge advocate if defense counsel has been retained.

11. Section 0207e. Former section 0215 (Privacy Act) re-designated as 0207e and is now titled "Personally Identifiable Information and the Privacy Act." Appendix A-2-a contains definition of PII.

12. Section 0209e. New subsection providing additional guidance for command investigation reports.

13. Section 0209h. Adds reference to the Health Insurance Portability and Accountability Act (HIPAA).

14. Section 0210a. Adds discussion regarding "dual-purpose" investigations.

15. Section 0210d(1) and 0210e(2). Clarifies that audio or video recorded statements from witnesses will not be obtained for litigation-report investigations.

16. Section 0210e. New subsection providing additional guidance regarding litigation-report investigations.

17. Section 0213a. Adds new language to include benefits in addition to the Survivor Benefit Plan (SBP) such as Dependency and Indemnity Compensation (DIC) and Dependents' Educational Assistance.

18. Section 0213c. New subsection regarding survivor benefits.

19. Section 0214. Discussion regarding the standard of proof for Line of Duty(LOD)/Misconduct determinations is now contained in Part E.

20. Section 0219b. Revises section to add to the presumption of impairment the blood or breath alcohol content limit under the law of the State in which the conduct occurred.

21. Section 0222b. Adds new language that preliminary inquiry reports are not normally included within the health or dental record.

22. Section 0222c. Adds reference to sample LOD health or dental record entries which is now included in line of duty checklist at A-2-k.

23. Section 0222d(1)(a). Adds abuse of prescription drugs.

24. Section 0222d(1)(b). Adds the blood or breath alcohol content limit under the law of the State in which the conduct occurred.

25. Section 0223a(2). Adds new language to clarify "member's representative" for purposes of routing adverse LOD/misconduct determination findings for members deemed to be mentally incompetent to understand the nature of the action.

26. Section 0223a(3). Adds timelines for taking action on and routing of LOD/misconduct reports to the General Court-Martial Convening Authority.

27. Section 223c(3). Clarifies forfeiture of pay provision for members who are absent from duty due to injury or disease caused by intemperate use of alcohol, illegal or prescription drugs.

28. Former section 0232 (checklist for LOD/misconduct determinations) is deleted and is now contained in the appendix (Appendix A-2-k). Former section 0252d required facts and opinions for investigations involving reservist personnel is deleted and is now contained in the LOD/misconduct checklist at Appendix A-2-k.

29. Sections 0225b and 0225c. Incorporates new Department of Defense (DoD) policy requiring notification to the Military Service Casualty Headquarters office and family members of any investigation into the cause or circumstances surrounding the death of a military member or DoD civilian employee who becomes a fatality while accompanying military personnel in the field or as a result of military-related actions.

30. Section 0226. Clarifies that LOD determination is independent of any investigation or internal report requirement; adds new language within introductory paragraph not to conduct litigation-report investigations in death cases and to consult with the Office of the Judge Advocate General (Code 15) for matters involving fatalities of civilians where potential claims are likely.

31. Section 0226c. Clarifies that limited investigations and/or internal reports are considered investigations for records retention purposes.

32. Former Part G (Investigations of Specific Types of Incidents) is deleted and is now contained as part of the appendix.

33. Appendix A-2-a. Updates definition of Class A Mishaps consistent with OPNAVINST 3750 (series).

34. Appendix A-2-a. Updates definition of Personally Identifiable Information (PII), consistent with DoD Directive 5400.11.

35. Appendix A-2-n. Revises and updates checklist for Aviation Mishaps; revises paragraph b(6) regarding submission of requests for the preservation of aircraft wreckage to be forwarded to the controlling command or individual (e.g., Naval Safety Center, squadron, mishap investigation board senior member) consistent with OPNAVINST 3750.6 (series).

36. Appendix A-2-o. Revises and updates checklist for Accidents Aboard Ships or Submarines.

37. Appendix A-2-q. Adds reporting requirements for ship collisions in accordance with OPNAVINST 5102.1 (series).

38. Appendix A-2-r. Adds reporting requirements for accidental flooding of a ship in accordance with OPNAVINST 5102.1 (series).

39. Appendix A-2-s. Adds reporting requirements of fires occurring afloat (except small trash fires in which no personnel are injured and the material property damage is limited to trash) in accordance with OPNAVINST 5102.1 (series).

40. Appendix A-2-t. Adds reporting requirements of explosions in accordance with OPNAVINST 5102.1 (series).

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CHAPTER II

ADMINISTRATIVE INVESTIGATIONS

PART A -- OVERVIEW

0201 SCOPE

a. General. This chapter sets forth principles governing the convening, conduct, review, and storage of administrative investigations conducted in or by the Department of the Navy (DON) under the authority of this Manual. The term "commander" generally refers to both commanding officers and officers in charge, but in the case of a major incident, see section 0203. The commander who directs an investigation, other than a preliminary inquiry, is referred to as the convening authority (CA).

b. Relation to UCMJ investigations. If the only basis for an investigation is disciplinary action, a preliminary inquiry under Rule for Courts-Martial (R.C.M.) 303, Manual for Courts-Martial (MCM), or a pretrial investigation under R.C.M. 405, MCM, and Article 32, UCMJ, should be conducted without a separate investigation under this Manual.

c. Relation to other investigations. In addition to the investigations governed by this Manual, investigations may be required by other regulations. These investigations have different purposes and both may be appropriate. Examples of investigations required by other regulations:

(1) situation reports prescribed by Articles 0831 and 0851, U.S. Navy Regulations (1990), OPNAVINST 3100.6 (series), or other situation reports prescribed by bureau manuals or departmental regulations;

(2) investigations conducted by an inspector general under SECNAVINST 5430.57 (series);

(3) investigations of aviation mishaps under OPNAVINST 3750.6 (series);

(4) reports concerning security violations prescribed by SECNAV M-5510.36;

(5) safety and mishap investigation reports required by OPNAVINST 5102.1 (series) or by MCO P5102.1 (series);

(6) investigations conducted by the Naval Criminal Investigative Service (NCIS) under SECNAVINST 5430.107 (series);

(7) investigations of allegations against senior DON officials conducted pursuant to SECNAVINST 5800.12 (series); and

(8) quality assurance reviews required by BUMEDINST 6010.13 (series).

d. Coordination with other investigations. To avoid potential conflicts among investigations, commanders must remain cognizant of the progress made by other investigative bodies. Before conducting a preliminary inquiry or convening an investigation under this chapter, the commander shall liaison with the Naval Criminal Investigative Service (NCIS) or the Naval Safety Center (NSC), as appropriate, regarding any pending law enforcement (military, federal, or state) or safety investigation.

(1) If a law enforcement investigation is pending, the commander should determine whether the law enforcement investigation will serve to appropriately document the matter without further investigation under this chapter. If the commander determines that a preliminary inquiry or investigation needs to be conducted in addition to the law enforcement investigation, the commander shall coordinate any preliminary inquiry or investigation with the cognizant law enforcement agency through NCIS. If NCIS declines, direct liaison may be made.

(2) If a safety investigation is pending, the commander shall ensure that any preliminary inquiry or investigation convened does not interfere with the safety investigation. If, in the course of conducting an investigation under this chapter, misconduct by naval personnel is discovered, the commander shall immediately notify the senior member of any on-going safety investigation.

(3) Refer to the Region Commander, his designee, or, in the case of the Marine Corps, to the general court-martial convening authority (GCMCA), via the chain-of-command, any conflicts between the law enforcement agency or NSC and the commander that cannot be resolved locally.

0202 ASSISTANCE

a. Commanders are encouraged to seek guidance from the cognizant judge advocate (see Appendix A-2-a for definition) or, if that judge advocate is not immediately available, the Command Services Department of the local Region Legal Service Office (RLSO) prior to convening an investigation. In addition, guidance for all types of investigations, except litigation-reports, may be obtained from the Office of the Judge Advocate General (OJAG), Administrative Law Division (Code 13) at DSN 224-7415 or 703-614-7415, or the Research and Civil Law Division (Code JAR), Headquarters, Marine Corps (HQMC) at 703-614-2510 or DSN 224-2510. Guidance on interpretation and application of policy for litigation-reports may be obtained from OJAG, Claims and Tort Litigation Division (Code 15) at DSN 325-4600 or 202-685-4600, or, in the case of Admiralty investigations, from OJAG, Admiralty and Maritime Law Division (Code 11) at DSN 325-5040 or 202-685-5040.

b. In order to help the investigating officer and the CA prepare an accurate and complete report, the Appendix to this chapter includes guidance on specific types of incidents.

PART B -- PRELIMINARY CONSIDERATIONS

0203 PRELIMINARY INQUIRY

a. Purpose. A preliminary inquiry serves as an analytical tool to help a commander determine whether an investigation is warranted and, if so, how it should be conducted. A preliminary inquiry is not intended to develop extensive findings of fact. Commanders should consult with a judge advocate when determining whether additional investigation is necessary.

b. Responsibility

(1) Generally, a commander is responsible for initiating preliminary inquiries into incidents occurring within, or involving personnel of, the command. The reporting command of a member who is injured or dies during permanent-change-of-station transfer shall ensure that appropriate inquiries are conducted.

(2) In the event of a major incident, however, the GCMCA over the command involved, if a flag or general officer, or the first flag or general officer in the chain-of-command, or any superior flag or general officer in the chain-of-command, will immediately take cognizance over the case as the "commander." See subsection f(2) below.

c. Method. A commander may conduct a preliminary inquiry personally or through designees. While the preliminary inquiry may be accomplished in any manner considered sufficient by the commander, normally it will be directed in writing by an appointing order and the outcome documented in writing (see Appendix A-2-c). Evidence gathered during a preliminary inquiry shall be preserved and submitted to the investigating officer in the event the commander later initiates an investigation.

d. Preliminary inquiries into incidents involving potential claims or litigation. An incident may occur in which there is a potential for claims or litigation against the DON or U.S for damage to personal property, personal injury or death, or for claims on behalf of the DON as an affirmative claim for damage to DON property. Although in most cases, a litigation-report investigation will be required, absent a preliminary inquiry, the commander will not know whether the matter is more appropriately the subject of a command investigation, litigation-report investigation, or court or board of inquiry. In such situations, a preliminary inquiry under the direction and supervision of a judge advocate should be conducted, using an appointing order and including language as described in section 0210, paragraph (c).

e. Time limitations. Generally, the preliminary inquiry should be completed within three calendar days of the commander learning of the incident in question. The commander may grant extensions as necessary on a case-by-case basis and with the limited nature of the preliminary inquiry in mind. A preliminary inquiry into a major incident will usually take longer (see subsection f below).

f. Major incidents

(1) Investigation of major incidents (see Appendix A-2-a for definition) is sometimes complicated by premature appointment of a court of inquiry. Failure to first ascertain the sequence of incident events and identify essential witnesses can unnecessarily prolong and complicate subsequent proceedings.

(2) A commander will normally find it valuable to immediately appoint an officer to conduct a preliminary inquiry. Such officer should promptly begin to locate and preserve evidence and identify and interview witnesses. A commander may direct such officer to submit oral reports, which would permit the commander to make a timely decision as to how to proceed with the investigation.

0204 COMMAND OPTIONS

a. General. A preliminary inquiry is concluded when the commander who initiated the inquiry has sufficient information to exercise one of the options listed below. Although the natural instinct of a commander is to seek out and document facts quickly, doing so without judge advocate involvement may not only be counterproductive but may actually work against the interests of the commander, the command, and DON. Subject to the factors set forth below, determining which option to exercise is, in the first instance, a matter of command discretion. Superiors in the chain-of-command may, however, direct a commander to reconsider or to take a different course.

b. Options

(1) take no further action (see subsection d below);

(2) make appropriate medical or dental record Line of Duty (LOD) determination (see section 0222);

(3) conduct a command investigation (see section 0209);

(4) convene a litigation-report investigation to be conducted under the direction and supervision of a judge advocate (see section 0210). The merits of the claim are irrelevant in determining whether to initiate a litigation-report; or

(5) in cases involving a major incident, convene a court or board of inquiry. If not authorized to do so, then the commander may request, via the chain-of-command, an officer with such authority to convene the court or board (see section 0211).

c. Factors to consider

(1) Purpose of the investigation. Generally, the primary manner in which the investigation will be used will determine which option should be exercised. If, for example, an investigation will be used primarily to defend against a civil lawsuit or to pursue an affirmative claim against a third party for damage to government property, then a litigation-report

investigation or an Admiralty Letter Report should be conducted to ensure that the DON's legal interests are protected (see Chapter XII of this Manual for discussion on admiralty investigations). However, the fact that a potential claim exists is not the only consideration in determining the nature of the investigation. When the incident being investigated involves large scale property damage, loss of life, or raises issues concerning the management of Naval activities, there may be sound policy reasons, such as openness and transparency of process or results, that warrant the convening of a command investigation or court or board of inquiry. In such cases, a separate litigation-report investigation need not be convened, but a "dual-purpose" investigation may be convened that includes the information necessary for claims adjudication (see Appendix A-2-1). The type of investigation convened must take into account that a command investigation or court of inquiry, once begun, may not be protected from subsequent release to the public and use in litigation. If a "dual-purpose" investigation is contemplated, the commander or the cognizant judge advocate should consult with Code 15 before making a decision on the type of investigation to be conducted.

(2) Powers of the investigation. In choosing an option, a commander should consider the power that an investigative body will require. For example, if a hearing is required to either resolve significant issues of fact or the commander believes that the individual whose conduct or performance of duty is called into question and their interest should be protected by being designated a party, a court or board of inquiry should be convened. If subpoena power will be required, a court of inquiry is the only option.

(3) Resource and time concerns

(a) Generally, the more formal the investigation, the more resources and time required. Nonetheless, conducting a command investigation when a court or board of inquiry is warranted is not advisable, since the less formal format will often fail to adequately address the issues.

(b) Under circumstances where a court-martial might arise from the incident, a court of inquiry may prove to be efficient because it may be a valid substitute for the Article 32, UCMJ, investigation.

d. Commander's action

(1) No further action. Not every incident or event warrants an investigation. A commander who concludes that further investigation would serve no useful purpose may decide not to conduct one, unless superior authority directs otherwise or unless an investigation is required under this Chapter. This option is appropriate if there are no potential claims for or against the U.S. or the DON, and the preliminary inquiry reveals that the event is likely to be of little interest to anyone outside the immediate command or that the event will be adequately investigated under some other procedure (e.g., a mishap investigation or NCIS investigation; see section 0201). In such cases, a commander should nonetheless endorse the preliminary inquiry as an internal "memorandum for the record" or "To: File." See Appendix A-2-c for a sample format.

(2) Reporting the decision. Ordinarily, when a commander determines which of the options discussed in subsection b above will be exercised, a report of that decision will be made to his immediate superior in command. Superior commanders may modify this reporting requirement by limiting the categories of incidents that should or should not be reported. However, if a commander concludes that an incident initially considered major does not fit within the definition of that term, see Appendix A-2-a, or concludes that a court of inquiry is not warranted, the commander shall, prior to convening another type of investigation, report such conclusion and the reasons therefore to the next superior officer in the chain-of-command.

e. Review. A superior in the chain-of-command may direct a subordinate to reconsider a decision or to exercise a specific option under subsection b.

PART C - ADMINISTRATIVE INVESTIGATIONS

0205 COMMAND RESPONSIBILITIES

a. Generally, a commander is responsible for initiating investigations into incidents occurring within, or involving personnel of, the command.

b. If a commander believes that the investigation of an incident is impractical or inappropriate for the command to investigate, another command may be requested to conduct the investigation. When circumstances such as pending deployments, geographical separation, or military exigencies prevent the command from conducting or completing a thorough investigation, requests for assistance may be directed to superiors in the chain-of-command. Requests should contain all available information, such as time, place, and nature of the incident; full names, grades, and leave status of members; names and addresses of all known witnesses; and copies of all relevant statements, written evidence, or reports.

c. Whenever more than one command is involved in an incident requiring investigation, a single investigation should be conducted. Such an investigation may be convened by the commander of any of the activities concerned, and all the activities shall cooperate in the investigation. If difficulty arises in determining the appropriate CA, then the matter shall be referred to the Region Commander or common superior. If the conduct or performance of duty of one of the officers in command may be subject to inquiry, then the Region Commander or common superior shall convene the investigation.

d. Whenever an incident or event involves only members of the other Military Departments, the nearest command of the member's parent service shall be notified and requested to contact the cognizant authority. If requested to do so by the other Military Department, then an investigation shall be convened and the report forwarded per the direction of the parent service. No further action need be taken within DON.

e. Incidents involving Marine Corps personnel

(1) When an investigation of a training or operational incident causing serious injury or death (other than a major incident or aviation accident) is required, the senior commander in the chain-of-command of the organization involved will consider convening the investigation and appointing the investigating officer at that level. No member of the organization suffering the incident, nor any member of the staff of a range or other training facility involved in the incident, shall be appointed to conduct the investigation without the concurrence of the next senior commander.

(2) If Marine Corps personnel are involved in a non-major incident requiring an investigation while in an area geographically removed from the parent command, the commanding officer shall request investigative assistance from a GCMCA Marine commander in the immediate area where the incident occurred or, in the absence of such an officer, from the Commanding General, Marine Forces Reserve.

f. Incidents involving Reservists. The Region Commander or designated subordinate commander in whose geographic area of responsibility the incident occurred has the responsibility to ensure that investigations are conducted into incidents involving Naval reservists. The Commanding General, 4th Marine Division, the Commanding General, 4th Marine Logistics Group, and the Commanding General, 4th Marine Aircraft Wing, are responsible for ensuring that investigations are conducted into incidents involving reservists within their commands.

g. Costs. The costs of travel, per diem, consulting fees, or other related expenses of conducting or participating in an administrative investigation conducted under the authority of this Manual will be charged to the operation and maintenance budget of the CA (see Chapter I of this Manual regarding fees of civilian witnesses).

0206 CONVENING ORDERS

a. General. When circumstances warrant, a CA may utilize a verbal order or naval message to initially direct an investigating officer to initiate an investigation. In such circumstances, the CA must memorialize the convening order in writing. Written convening orders issued from the CA to the investigating officer must be signed and appended to the investigative report. See Appendices A-2-d and A-2-f for sample convening orders.

b. Designation. Convening orders must designate the investigating officer(s) or members of the board of inquiry or court of inquiry, as applicable.

(1) Member and investigating officer qualifications. Personnel detailed to conduct an investigation shall be individuals who, in the opinion of the CA, are best qualified by reason of their age, education, training, experience, length of service, and temperament. Most command or litigation-report investigations will be conducted by a commissioned officer, but a warrant officer, senior enlisted person, or civilian employee may also be used when the CA considers it appropriate. If necessary, more than one

Investigating Officer may be appointed. Whenever practical, an investigating officer should be senior in rank to any individual whose conduct is subject to inquiry. See Appendix A-2-n for statutory membership qualifications in conducting Class A aviation mishap JAGMAN investigations.

(2) Assistance and technical support. A CA may appoint any assistance deemed necessary, including reporters, interpreters, experts, and other assistance. See section 0211 regarding appointment of advisors to boards and courts of inquiry.

c. Elements of a convening order. A convening order:

(1) should recite the specific purposes of the investigation and contain explicit instructions about its scope;

(2) should require findings of fact that fully explain all the circumstances surrounding the event, i.e., who, what, where, when, how, why;

(3) should identify potential witnesses and sources of information, and otherwise provide such direction as the CA determines necessary or proper, including specifying the format in which the report will be submitted. Normally, a letter report supported by enclosures will be specified.

(4) may assign certain issues, witnesses, or specific matters to individual members of the investigation if more than one investigating officer is appointed, and hold later meetings to review the information collected for completeness;

(5) may, unless a litigation-report investigation is being convened, require opinions and recommendations;

(6) should direct the investigating officer to seek the assistance of a judge advocate;

(7) shall contain directions for complying with the Privacy Act, the Health Insurance Portability and Accountability Act (HIPAA), Article 31, UCMJ, section 0201 (coordinating with law enforcement authorities), and section 0212 (concerning statements about origin of disease or injury), as necessary;

(8) shall direct, in applicable cases, per section 0201, investigators to coordinate the JAGMAN investigation with NCIS/Security personnel who may be conducting criminal investigations, requiring the report of any conflict to the CA for resolution;

(9) shall specify when the investigative report is due, normally within 30 calendar days; and

(10) may not designate parties unless the investigation being convened is a Court of Inquiry.

d. Amendments

(1) A CA may amend a convening order at any time to change membership, limit or increase the scope of the inquiry, or provide additional instructions. During the investigation, if it appears to the fact-finders, or to the supervising judge advocate in the case of a litigation-report investigation, that the CA might consider it advisable to enlarge, restrict, or modify the scope of the inquiry or to change in any material respect an instruction provided in the convening order, a report shall be made to the CA. The CA may take any action on this report deemed appropriate.

(2) As necessary, the CA may grant extensions of a reasonable amount of time as the CA deems appropriate. Requests and authorizations for extensions need not be in writing but must be memorialized in the preliminary statement and/or endorsement, as applicable.

0207 STANDARDS OF PROOF AND EVIDENCE

a. Standards of proof

(1) General. An administrative investigation need not be conducted in accordance with the formal rules of evidence applicable to courts-martial. It should use the most effective methods for collecting, analyzing, and recording all relevant information and should include in its investigative report any relevant matter that a reasonable person would consider to be believable or authentic.

(2) Preponderance of evidence. Except for facts of which a court may take judicial notice (see M.R.E. 201 and 201a, MCM) an administrative investigation shall arrive at findings of fact only if supported by a preponderance of the evidence, i.e., more likely than not. For line of duty determinations, see Part E.

(3) Inferences. An investigation may not speculate on the causes of an incident. Reasonable inferences drawn from evidentiary enclosures or personal observations, however, are permissible. For example, an investigation may determine, through competent evidence, the likely chain of events relative to the subject of investigation. However, it is generally improper to theorize about the thought processes of an individual that resulted in certain courses of conduct.

b. Evidence

(1) Safekeeping. To the extent consistent with mission requirements, the investigating officer and the CA will ensure that all evidence is properly preserved and safeguarded until the investigation is complete and all relevant actions have been taken.

(a) Failure to properly safeguard and account for evidence may result in its inadmissibility in subsequent legal proceedings and therefore prejudice the interests of the Government.

(b) Original items with evidentiary value must be retained or adequate steps taken to ensure their safe storage. Operational commands are encouraged to make satisfactory storage arrangements with supporting elements ashore in this regard. The CA's forwarding endorsement must indicate where the evidence is maintained, what arrangements have been made for its safekeeping, and report the name and telephone number of the responsible official. In addition, chain-of-custody documents must be preserved together with the evidence to which they relate. Consult a judge advocate for assistance. See OPNAVINST 5580.1 (series) for further information; OPNAV Form 5527/11 is the "Evidence/Property Custody Receipt" form and includes space for chain-of-custody documentation.

(2) Physical Evidence

(a) Whenever the condition, location, or other characteristic of an item of tangible evidence has probative value, include the item or a photograph, description, chart, map, or suitable reproduction in the investigative report. If an investigator or board member observes an item and gains relevant sense impressions (e.g., noise, texture, smells, or any other impression not adequately portrayed by a photograph, chart, map, or other representation), the impressions should be recorded and included as an enclosure to the report.

(b) Perishable or unstable items of evidence, such as tire tracks, should be promptly photographed or otherwise preserved, preferably by trained personnel. Evidence should not be handled by untrained personnel, unless absolutely necessary to preserve its integrity.

(3) Documentary evidence. Examples of documentary evidence include records, logs, documents, letters, diaries, video or audio recordings, reports, photographs and statements. Documents should indicate their source and specify any special restrictions on their disclosure to third parties. Originals or authenticated copies should be obtained when possible. Completion and forwarding of investigations will not be delayed to await final reports, originals, or similar documents unless their inclusion is absolutely essential to the completion of the investigative report. Instead, the investigating officer should note the unavailability of such items in the report.

(4) Photographs or Videos

(a) When photographs or video recordings are included as part of the investigation, the following information should be included on the reverse side of the photograph, or label of the video recording: the hour and date they were taken; a brief description of the location or area photographed or recorded; the full name and rank or rate of the photographer or videographer; and full names and addresses of persons present when the photographs or video were taken.

(b) In addition, the investigation report should provide details surrounding the taking of the photographs or video (e.g., type of camera, distance from object, etc.).

(c) Discretion should be exercised in enclosing graphic photographs or video recordings. When including such materials, place them in a separate envelope marked: "CAUTION, CONTAINS GRAPHIC MATERIAL. VIEWER DISCRETION ADVISED."

c. Witnesses and warnings

(1) Witnesses not suspected of misconduct or improper performance of duty. Ordinarily, witnesses should provide statements in informal interviews. Military witnesses may be required, however, to swear or affirm that their statement is truthful or to provide recorded testimony under oath. Probing questions as to "who," "what," "where," "when," "how," and "why" should be pursued. The investigator may assist a witness prepare his or her statement to avoid irrelevant material or omission of important facts. When an investigator takes an oral statement, it should be reduced to writing and signed by the witness or certified by the investigator to be an accurate summary or verbatim transcript. Care should be taken to ensure that any statement is phrased in the actual language of the witness.

(2) Witnesses suspected of misconduct, or improper performance of duty. Ordinarily, an investigation should collect relevant information from all other sources before interviewing persons suspected of an offense, misconduct, or improper performance of duty. Also, prior liaison with the appropriate judge advocate is advised to ensure investigators have coordinated with law enforcement officials and to ensure investigators will not impede any criminal investigations into the same incident (see section 0201). Before the interview, military personnel suspected of a criminal offense must be advised of Article 31, UCMJ, warnings; see Chapter I of this Manual. Department of Defense (DoD) Civilian personnel offices should be consulted about applicable collective bargaining requirements before interviewing DoD civilian employees suspected of misconduct. Law enforcement personnel must be consulted if the witness is in custody. If defense counsel has been retained, further coordination may be required through the judge advocate.

(3) Cautioning witnesses. To reduce the possibility that disclosure of witness statements or interviews may influence the statements of future witnesses, an investigating officer may direct witnesses subject to Naval authority not to discuss their statements. Witnesses not subject to Naval authority may be requested not to discuss their statements.

d. Witness statements from other investigations

(1) Safety investigations. Statements gathered in the course of safety investigations may not be used by the administrative board Investigating Officer nor be included in administrative investigation reports, nor shall any witness who provided a statement to a safety investigation board under a promise of confidentiality be questioned regarding the information provided to that safety investigation board. The investigating officer may, however, interview those same witnesses and either obtain statements or use those interviews to prepare a summary of interview. See Appendices A-2-n and A-2-o for further discussion.

(2) NCIS investigations. Witness statements contained as enclosures to NCIS investigations may be included in administrative investigation

reports. See section 0208g(2) for further discussion on NCIS investigations as enclosures.

e. Personally Identifiable Information and the Privacy Act. Steps should be taken to ensure that personally identifiable information (see Appendix A-2-a for the definition of "Personally Identifiable Information") is protected from inappropriate release. Only the minimum amount of personal information necessary to investigate the matter concerned should be included in the investigative report (for guidance regarding protected personal information and the Privacy Act see SECNAVINST 5211.5(series)). The following procedures apply to administrative investigations conducted under this Manual:

(1) Advice required. Requests for information about what a Government officer, employee, or member did, observed, or thought while performing official duties does not require a Privacy Act statement. However, when an individual is requested to supply personal information about himself in a statement to be maintained in a system of records retrievable by the individual's name or personal identifier, the individual shall be provided a Privacy Act statement containing the particular information prescribed in SECNAVINST 5211.5 (series). The requirement for a Privacy Act statement is separate from other applicable warnings or advisement (see Appendix A-2-h).

(2) Social Security numbers. A Privacy Act statement must be used if a member or employee is asked to voluntarily provide his Social Security number for an investigation. If Social Security numbers are obtained from other sources (e.g., service records), the individual need not be provided a Privacy Act statement. If Social Security numbers are obtained from other sources, this should be noted in the preliminary statement of the investigation. Social Security numbers should not be included unless they are necessary to identify precisely the individuals in question, such as in cases involving serious injury or death.

(3) Records of disclosure. Appendix A-2-i is recommended for use in recording and accounting for disclosures of information about identifiable individuals from records that are collected, used, or maintained under the authority of this Manual.

0208 INVESTIGATION REPORT FORMAT

a. General. Investigative reports shall be submitted in the format prescribed by the CA or, in the case of a litigation-report investigation, by the cognizant judge advocate. Normally, the CA will direct the report be provided in a letter format. Appendices A-2-e and A-2-g are sample investigative reports.

b. Classification. Since investigative reports may be circulated widely, classified information should be omitted unless inclusion is absolutely essential. If unclassified information is important to the report's accuracy but is contained in a classified document, then the unclassified information should, if possible, be extracted from the classified document and included in the investigative report. When classified matter must be included, the report shall be classified at the highest level of any classified matter contained therein. Encrypted versions of messages shall not be included or attached to

investigative reports where the content or substance of such message is divulged elsewhere in the report. See SECNAV M-5510.36.

c. Preliminary statement

(1) A preliminary statement informs convening and reviewing authorities that all relevant evidence was collected or is forthcoming and that the investigating officer met each of the CA's directives. After setting forth the nature of the investigation, the preliminary statement details difficulties encountered, extensions requested and granted, limited participation by any member or advisor, and any other information necessary for a complete understanding of the case. The itinerary of an investigator or board in obtaining information is not required.

(2) A preliminary statement does not eliminate the necessity for findings of fact. For example, notwithstanding statements in both the subject line and the preliminary statement that the investigation involves a certain incident, the findings of fact must fully describe the time and place of the incident, what government equipment was involved, identify the personnel involved, and provide other relevant information.

d. Findings of fact. Findings of fact must be as specific as possible as to times, places, persons, and events. Each finding of fact must identify one fact only, and be supported by and cite to at least one enclosure to the report.

e. Opinions. Opinions are reasonable evaluations, inferences, or conclusions based on the facts. Each opinion must cite the finding(s) of fact upon which it is based.

f. Recommendations. Recommendations depend on the nature of the facts found and opinions expressed. Recommendations shall not be offered unless requested, and may be limited to certain subject areas.

g. Enclosures

(1) General. The first enclosure is the signed, written appointing order or signed, written confirmation of an oral or message appointing order. Subsequent enclosures should contain all evidence developed by the investigation. Each statement, affidavit, transcript or summary of testimony, photograph, map, chart, document, or other exhibit should be a separate enclosure. Enclosures should be listed in the order in which they are cited in the body of the investigation.

(2) NCIS investigations. NCIS investigations consist of the report of investigation (ROI), the narrative summary portion, and enclosures. ROI's shall not be included in administrative investigation reports. Unless a local NCIS office indicates to the contrary, clearance is not required for inclusion of enclosures to the ROI in an administrative investigative report. Neither polygraph reports nor their results may be included in the investigative report; however, the fact that a polygraph examination occurred and the location of the file maintained by the investigative agency administering the polygraph examination may be noted. Comments regarding an individual's refusal to undergo a polygraph examination shall not be

included in any administrative investigative reports. If necessary for a full understanding of the incident, the location of the ROI should be cross-referenced in the administrative investigative report.

h. Signatures

(1) The investigating officer or senior member, or in the senior member's absence, the next senior member, respectively, must sign the investigative report. Dissents may be written and, if written, must be attached to the report.

(2) Signatures of board members or of the investigating officer(s) on an investigative report shall be sufficient to authenticate all enclosures.

PART D -- THREE TYPES OF ADMINISTRATIVE INVESTIGATIONS

0209 TYPE ONE: COMMAND INVESTIGATIONS

a. Purpose. A command investigation functions as a tool to gather, analyze, and record relevant information about an incident or event of primary interest to the command. Most investigations will be of this nature. Command investigations may, for example, be used to inquire into:

(1) significant property loss or destruction (minor property losses in most cases will be adequately documented through other means);

(2) aviation mishaps, groundings, floodings, fires, and collisions not determined to be major incidents; see Appendix for guidance on investigating specific types of incidents;

(3 incidents in which a member of the naval service, as a result of possible misconduct, incurs a disease or injury that may result in a permanent disability or a physical inability to perform duty for a period exceeding 24 hours (distinguished from a period of hospitalization for evaluation or observation); see Part E; and

(4) deaths of military personnel apparently caused by suicide or under other unusual circumstances, or deaths of civilian personnel accompanying military personnel in the field or killed as a result of military-related activities; see part F for special considerations in death cases.

b. Limitations. This type of investigation **should not** be used to inquire into incidents that have resulted or are likely to result in claims or civil litigation against the DON for damage to personal property or personal injury caused by Navy personnel acting within the scope of employment, or on behalf of the DON as an affirmative claim for damage caused to DON property by non-DON personnel.

c. Convening order. See section 0206.

d. Investigatory approach

(1) The investigating officer will comply with the guidance in section 0207 in conducting the investigation. Because a command investigation does not involve hearings, evidence will be collected through personal interviews and statements, telephone inquiries, or written correspondence.

(2) A command investigation, if deemed necessary, may contain sworn statements. In such cases, the investigating officer should consult with the cognizant judge advocate. A person on active duty appointed to perform investigative functions for a command investigation is empowered to administer the following oaths in the performance of duties:

(a) For interpreters: "Do you swear or affirm that you will faithfully perform the duties of interpreter for this proceeding (so help you God)?"; and

(b) For witnesses: "Do you swear or affirm that the statement provided is truthful (so help you God)?"

e. Command Investigation report

(1) The report shall be prepared in accordance with the convening order and the guidance set forth in both section 0207 and this section (see also Appendix A-2-e).

(2) Unless directed by proper authority, an investigator shall not prefer charges or notify an accused of recommended charges. For recommendations pertaining to the issuance of punitive and nonpunitive letters, see subsection f(2) below.

f. CA action. Upon receiving a command investigation report from the investigating officer, the CA shall review the report or have the report reviewed. The CA has 30 calendar days from receipt to act on the report, except in death cases where section 0225 requires CA review in 20 calendar days. If the report is incomplete, the CA shall return it to the investigating officer for further investigation. Once satisfied the report is complete, the CA shall either:

(1) determine that the investigation is of no interest to anyone outside the command, and, unless otherwise directed by superior authority, may treat it as an internal report (see subsection g below for retention guidance), or

(2) endorse the report in writing. In the endorsement, the CA will:

(a) approve, disapprove, modify, or add to the findings of fact, opinions, and recommendations. The CA may also comment on recommendations that the CA cannot implement at his or her level.

(b) state opinions and make recommendations as appropriate.

(c) indicate what corrective action, if any, is warranted and a timeline for implementation.

(d) comment on whether punitive or nonpunitive action is warranted. Whenever punitive or nonpunitive action is contemplated or taken as the result of the incident under inquiry, the action shall be noted in the endorsement of the convening or reviewing authority. For example, the endorsement could read: "Punitive action is not warranted; however, appropriate corrective measures were taken in the case of ENS Smith." Punitive letters, or copies of recommended drafts thereof, shall be included in the investigative report as enclosures. Nonpunitive letters, or recommended drafts, are private in nature and shall not be specifically mentioned in endorsements or included as enclosures in the investigative report. Drafts shall be separately forwarded to the appropriate commander for issuance.

(e) state where any original evidence is preserved and provide the name and telephone number of the responsible official.

(3) The CA shall retain a copy of the report and forward the original, through the chain-of-command, including the Region Commander when appropriate, to the GCMCA over the CA. The CA shall maintain copies of all command investigations for a minimum of 2 years.

(a) One complete copy of the investigation shall be forwarded with the original for each intermediate reviewing authority. The GCMCA may direct subordinate commands to use specific forwarding requirements for investigations into certain categories or types of incidents. The CA shall also provide copies of the report to other commands that may have an interest, such as the Naval Safety Center. If one command conducted an investigation upon the request of another, then a copy of the report should be sent to the requesting command.

(b) If an investigation involves a claim under Article 139, UCMJ, see Chapter IV of this Manual.

(c) For cases involving injury or death of Naval personnel or material damage to ship, submarine, or other Government property not involving claims, the CA shall forward an advance copy of the record or report of investigation as soon as practical to: Commander, Naval Safety Center, Naval Air Station, Norfolk, VA 23511-5796. Reviewing authorities shall also forward advance copies of their endorsements as above. In cases of aviation mishaps, CAs and reviewing authorities will only forward advance copies of investigation reports to the Commander, Naval Safety Center upon his or her request.

(c) See section 0232 for special routing requirements in death cases.

g. Review

(1) A GCMCA superior to the CA must review every command investigation. Thus, if the first reviewer is not a GCMCA, the investigation will require additional review. Superior commanders may, by regulation or on an *ad hoc* basis, provide direction concerning review and forwarding of investigations consistent with this chapter. The subject matter will dictate

the routing of the report for additional review. All investigations are considered final when the last reviewing authority determines that further endorsement is not necessary.

(2) As a general rule, intermediate reviewing authorities should complete their review and forward the investigation within 30 calendar days. In death cases, endorsers shall complete this review within 20 calendar days; see section 0225.

(3) Investigations that involve loss, compromise, or possible compromise of classified information shall be routed per SECNAV M-5510.36.

(4) Copies of the investigation should be made available to all superior commanders who have a direct official interest in the recorded facts. Region Commanders or designated subordinate commanders have a direct official interest in incidents that affect their command responsibility or occur in their geographic area.

(5) Commands receiving copies of investigative reports may provide all comments and recommendations. However, these comments do not become part of the investigative report unless a reviewing authority expressly incorporates them.

(6) Command investigations are not forwarded to Office of the Judge Advocate General (OJAG), except in the case of a "dual-purpose" investigation. In such cases, a copy will be provided to the Office of the Judge Advocate General (Code 15), Tort Claims Unit, 9620 Maryland Avenue, Suite 100, Norfolk, VA 23511-2989.

(7) Generally, copies of investigations are not be forwarded to the Chief of Naval Operations or to the Commandant of the Marine Corps. However, copies of investigations into the following types of incidents shall be forwarded to the following codes:

(a) incidents that may result in extensive media exposure (N09C or CMC(JA));

(b) training incidents causing death or serious injury (N7 or CMC(JA));

(c) operational incidents causing death or serious injury (N3/5 or CMC(JA));

(d) incidents involving significant fraud, waste, abuse, or significant shortages of public property or funds (N09G or CMC(JA));

(e) incidents involving lost, missing, damaged, or destroyed property of significant value (N09G or CMC (JA));

(f) incidents involving officer misconduct (N1 or CMC(JAM));

(g) incidents that are required to be reported to Headquarters by other directives or regulations, as appropriate;

(h) incidents or investigations that may require action by CNO or CMC, as appropriate; and

(i) cases involving significant postal losses or offenses (N4 or CMC (MHP-50)).

(8) Investigations shall be retained by the CA, GCMCA, or by the last commander to whom they are routed for a period of 2 years from the time that they are received. After 2 years, a complete copy of command investigations shall be sent to Office of the Judge Advocate General (Code 15), Tort Claims Unit, 9620 Maryland Avenue, Suite 100, Norfolk, VA 23511-2989 for storage. If the CA or GCMCA receives a request for an investigative report after it has been sent, that command shall submit a request for the investigation to the Tort Claims Unit (TCU). The TCU will return the investigation to the requesting command as the originator of the report and the responsive party to the request for action. Once the command has responded to the inquiry, the command shall return the investigation to the TCU for storage. See section 0207 on storing and protecting original evidence.

h. Release of Command Investigations. Release of investigation reports outside DON is governed by SECNAVINST 5720.42 (series), FOIA Program, and SECNAVINST 5211.5 (series), Privacy Act Program, and HIPPA. Also see Chapter V of this Manual.

(1) As a general rule, no investigative report, evidence, or documents compiled by investigating officials may be released until the report is final.

(2) The Chief of Naval Operations (N09N) is the release authority for investigations involving actual or possible loss or compromise of classified information.

(3) For command investigations, other than those dealing with possible compromise of classified information, the GCMCA to whom the report is forwarded is ultimately the release authority.

0210 TYPE TWO: LITIGATION-REPORT INVESTIGATIONS

a. Purpose. A litigation-report investigation is used to investigate an incident or event that is likely to result in claims or civil litigation against the DON for damage to personal property, personal injury or death caused by Navy personnel, or on behalf of the DON as an affirmative claim for damage caused to DON property by non-DON personnel. The primary purpose of a litigation-report is to document facts and gather evidence to protect the legal interests of the DON and the U.S.

(1) Claims often arise, however, from major incidents (as defined in appendix A-2-a), which are investigated by courts of inquiry, or from other incidents documented by command investigations. In such cases, the CA need not convene multiple investigations to inquire into a single incident. Rather, a commander may direct a "dual-purpose" investigation to investigate the circumstances surrounding the incident and include the information necessary. Investigations will be conducted in accordance with the guidelines

for command investigations, but shall also address the specific claims considerations contained in this section and Appendix A-2-g. See also Appendix A-2-1 for additional discussion on "dual-purpose" investigations. Combining a claims investigation with an inquiry or investigation ordered for other reasons is discretionary; however, litigation-report investigations shall be used when documentation of the facts in anticipation of a claim is the primary purpose of the investigation.

(2) The CA must contact a judge advocate or OJAG Code 15 before convening either a litigation-report or "dual-purpose" investigation to determine the appropriate type of investigation to be conducted. See JAGINST 5890.1 (series) for more information on claims and/or Chapter XII, section 1205, concerning admiralty incident investigations when litigation is anticipated.

(3) Litigation-report investigations must be conducted under the direction and supervision of a judge advocate, and must be protected from disclosure to anyone who does not have an official need to know. When investigations are conducted in anticipation of litigation, but are not conducted under the direction and supervision of a judge advocate or are handled carelessly, they cannot be protected from disclosure. It is imperative, therefore, commands conduct litigation-report investigations in accordance with this section.

(4) Litigation-report investigations **will not** be conducted in any incident where either an active duty death has occurred or when a civilian has died when accompanying military personnel in the field or as a result of military-related actions.

(5) Litigation-report investigations **will not** be used to investigate major incidents (as defined in appendix A-2-a), **may not** have designated parties, and **will not** involve hearings.

b. Responsibilities

(1) After consulting a judge advocate, a commander is responsible for initiating litigation-report investigations into incidents involving the command or its personnel. The cognizant judge advocate, however, is responsible for overseeing and directing the investigative process.

(2) The cognizant judge advocate may request the assistance of the CA or ask the CA to request help from superiors in the CA's chain-of-command when circumstances such as pending deployments, geographic separation, or military exigencies prevent or hinder the completion of a thorough investigation. Such requests should contain all relevant information and indicate that the investigation is being conducted in contemplation of litigation, and should be processed accordingly.

(3) Whenever more than one command is involved in an incident requiring a litigation-report investigation, a single investigation under the supervision of a single judge advocate should be conducted. All concerned activities shall cooperate in the investigation. If difficulty arises in determining the appropriate CA, then the matter shall be referred for resolution to the common superior having a judge advocate on staff.

c. Convening order. In addition to the guidance contained in section 0206, the convening order:

(1) shall identify the cognizant judge advocate under whose direction and supervision the investigation is to be conducted. The convening order shall direct the investigating officer to report to that judge advocate before beginning to collect evidence, and to comply with the judge advocate's direction and supervision thereafter;

(2) will not direct the inclusion of opinions or recommendations. Opinions and recommendations will only be included if directed by the cognizant judge advocate;

(3) shall state specifically: "This investigation is being convened and your report is being prepared in contemplation of litigation and for the express purpose of assisting attorneys representing the interests of the United States in this matter;"

(4) shall caution the investigating officer that the investigation's conduct and results may be discussed only with personnel having an official need to know;

(5) may identify potential witnesses and other sources of information;

(6) will not assign experts, reporters, interpreters, etc. Experts, reporters, interpreters, etc., will only be used if directed by the cognizant judge advocate;

(7) will direct a completion date, normally within 30 calendar days. The Convening Authority may grant extensions as necessary. Requests and authorizations for extensions need not be in writing but must be memorialized in the preliminary statement and/or endorsement, as applicable;

(8) A sample convening order is in Appendix A-2-f.

d. Investigatory approach. The investigating officer will comply with the guidance in section 0207 in conducting the investigation. In addition, during the course of gathering information, the investigating officer shall comply with the following:

(1) Litigation-report investigations will not include audio or video recorded statements from witnesses.

(2) Witnesses will be asked probing questions but they will not, except as noted below, be asked to make a written statement or to sign a statement that the investigator has prepared nor will audio or video recorded statements be obtained. Such statements are subject to discovery and release to opposing parties in civil litigation even if provided to an attorney. Rather, the investigator should summarize the results of the interview, using care to be as accurate and complete as possible, and authenticate the summary with the investigator's own signature. If, however, a witness with interests clearly adverse to the Government's, i.e., a claimant or opposing party to litigation, is willing to provide a signed statement, the investigator, after

consultation with the cognizant judge advocate, should obtain a signed and sworn statement.

(3) During the course of a litigation-report investigation, the investigating officer shall be guided by the cognizant judge advocate and shall consult frequently with that judge advocate as the investigation progresses. When it is necessary to obtain evidence such as expert analyses, outside consultant reports, and so forth, the judge advocate should sign the necessary requests.

(4) The investigating officer shall present the preliminary report to the cognizant judge advocate for review. The litigation-report investigation may include opinions and recommendations in the underlying report so long as they are directed and approved by the cognizant judge advocate. At a minimum, the report should include the judge advocate's opinion regarding the scope of employment of any government employee that may be the alleged cause of a claim or litigation.

e. Litigation-Report investigation

(1) The report shall be prepared in accordance with the convening order and the guidance set forth in sections 0207 and 0208. A sample litigation-report investigation is at Appendix A-2-g.

(2) The report **shall not** contain statements signed by witnesses or video or audio recordings of witness statements unless the statement is from a claimant or opposing party to litigation.

(3) Photographs

(a) When photographs are included as part of the investigation, the following information should be included on the reverse side: the hour and date they were taken; a brief description of the location or area photographed; the full name and rank or rate of the photographer; and full names and addresses of persons present when the photographs were taken.

(b) In addition, the photographer should be asked to provide details surrounding the taking of the photographs such as type of camera, distance from object, etc. Similar information should be on a label affixed to any videotape included in the investigation.

(c) If digital photography is used, the following additional requirements must be met. Safeguard the source of the media that shows the original directory with dates, file size and file names automatically generated by the digital camera, and retain both the source media (original directory with dates, file size and file names automatically generated by the digital camera) and image in a secure area. In addition, evidentiary considerations require the following information be included with respect to the digital images included in the litigation-report: document the name of the person who took the digital image, the type of digital camera used to create the image and the type of medium used to store the image (i.e., internal or removable storage); the type of computer to open the stored digital image and software used to convert the image to a photograph (including software edition); the name of the person who operated the computer that transformed

the image to a digital photograph; and the date and time the digital image was converted into a digital photograph and the type of printer used (make, model).

(4) If original evidence is contained in a litigation-report investigation, neither the investigating officer nor any reviewing authority shall alter or mark the original evidence.

(5) When the report is compiled, it shall be marked on every page: "FOR OFFICIAL USE ONLY: LITIGATION/ATTORNEY WORK PRODUCT." The report must be signed by both the investigating officer and the cognizant judge advocate, or in the case that they cannot agree on a particular portion of the report, the judge advocate alone shall sign the report. The investigating officer may, but is not required to, separately document the basis for any disagreement.

f. CA action

(1) Upon receiving a litigation-report investigation, the CA shall review the report or have it reviewed, and either endorse the report in writing within 30 calendar days or return it to the supervising judge advocate for further inquiry.

(a) The CA shall not normally approve or disapprove the findings of fact. If the CA is dissatisfied with the findings, the CA may return the report to the cognizant judge advocate for additional information.

(b) The CA may comment may be provided on those aspects of the report that bear on the administration or management of the command. The CA should, for example, indicate what corrective action, if any, is warranted and a timeline for implementation.

(c) The CA shall state in the endorsement where the original evidence is preserved and provide the name and telephone number of the responsible official.

(d) The CA's endorsement, on every page, shall be marked: "FOR OFFICIAL USE ONLY: LITIGATION/ATTORNEY WORK PRODUCT."

(2) The CA shall retain a copy of the report and forward the original plus one copy to the Office of the Judge Advocate General (Code 15), Tort Claims Unit, 9620 Maryland Avenue, Suite 100, Norfolk, VA 23511-2989, via the staff judge advocate of the GCMCA in the chain-of-command. The copy must be kept in a file marked "FOR OFFICIAL USE ONLY: LITIGATION/ATTORNEY WORK PRODUCT" and be safeguarded against improper disclosure. The CA will provide superiors in the chain-of-command, and other commands that have a direct official need to know the results of the investigation, with a copy of the report but shall not otherwise disseminate the report without consulting a judge advocate.

(a) Copies of litigation-report investigations, other than "Health Care Incidents," in which the adequacy of medical care is reasonably at issue and that involve significant potential claims, permanent disability, or death shall be provided to the Chief, Bureau of Medicine and Surgery.

(b) If an investigation involves a claims matter or redress of injuries to property under Article 139, UCMJ, see Chapter IV of this Manual.

g. Review

(1) Superiors in the chain-of-command who receive a copy of a litigation-report investigation may, but are not required to, comment on the report. They should, however, take such action as may be warranted. They will not normally approve or disapprove the findings of fact. Comments shall be marked "FOR OFFICIAL USE ONLY: LITIGATION/ATTORNEY WORK PRODUCT" and copies must be kept in files marked "FOR OFFICIAL USE ONLY: LITIGATION/ATTORNEY WORK PRODUCT" and safeguarded against improper disclosure. Copies may be provided to other commands that have an official need to know the results of the investigation, but the report shall not be otherwise disseminated without consulting a judge advocate.

(2) Staff judge advocates through which litigation-report investigations are routed shall review the report for accuracy and thoroughness, coordinate any further investigation with the cognizant judge advocate or OJAG (Code 15), and forward the report not later than 30 calendar days after it is received. The report need not be forwarded to OJAG (Code 15), TCU, via formal endorsement.

h. Release of Litigation-Report investigations. For all litigation-report investigations, OJAG (Code 15) is the release authority. For Admiralty Letter Reports, OJAG (Code 11) is the release authority. Convening and reviewing commands are not authorized to release litigation-report investigations or their contents; see Chapter V of this Manual.

0211 TYPE THREE: COURTS AND BOARDS OF INQUIRY

a. Overview. Courts and boards of inquiry use a hearing procedure and should be reserved for the investigation of major incidents, as defined in Appendix A-2-a, or serious or significant events. Specific guidance on conducting courts and boards of inquiry is set forth in JAGINST 5830.1 (series). If there is a conflict with that instruction, this Manual controls.

b. Court of Inquiry characteristics

(1) Convened by a GCMCA, or a person designated by the Secretary of the Navy (see Article 135, UCMJ).

(2) Convened by written appointing order, which should direct that all testimony be taken under oath and all open proceedings, except counsel's argument, recorded verbatim.

(3) Consists of at least three commissioned officers as members and has appointed legal counsel for the court. It may also include advisors appointed to assist the members and non-voting members. See subsection d below for additional information on advisors and non-voting members.

(4) Uses a hearing procedure.

(5) Designates as parties persons subject to the UCMJ whose conduct is subject to inquiry. See Appendix A-2-b.

(6) Designates as parties persons subject to the UCMJ or employed by the DoD and who have a direct interest in the subject under inquiry and request to be so designated. See Appendix A-2-b.

(7) Has the power to order military personnel to appear, testify, and produce evidence, and the power to subpoena civilian witnesses to appear, testify, and produce evidence. Article 47, UCMJ, provides for prosecution of civilian witnesses in U.S. district court for failing to appear, testify, or produce evidence.

c. Board of Inquiry characteristics

(1) Convened by a GCMCA.

(2) Convened by written appointing order, which should direct that all testimony be taken under oath and all open proceedings, except counsel's argument, recorded verbatim.

(3) Consists of one or more commissioned officers as members and has appointed legal counsel for the board. It may also include advisors appointed to assist the members. See subsection d below for additional information on advisors and non-voting members.

(4) Uses a hearing procedure.

(5) May designate as parties persons whose conduct is subject to inquiry or who have a direct interest in the subject of the inquiry. The CA may also authorize the board to designate parties during the proceedings. See Appendix A-2-b.

(6) Does not possess power to subpoena civilian witnesses unless convened under article 135, UCMJ, and Chapter IV, but can order Naval personnel to appear, testify, and produce evidence.

d. Advisors and non-voting members

(1) The CA may appoint to a court or board of inquiry full-time Federal personnel, military or civilian, to participate in the proceedings and advise the members. The CA may select such advisors because of their background, training, or experience. Advisors may be present at all board or court sessions, are subject to challenge to the same extent as members, and may suggest courses of inquiry or recommend such other action to the board or court as they consider appropriate. Moreover, persons with technical knowledge may be appointed for either full participation or the limited purpose of utilizing their special expertise. If appointed for a limited purpose, they need not participate in any aspect of the inquiry that does not concern their expertise. The investigative report must clarify any limited participation by advisors.

(2) The CA may appoint one or more non-voting members, whose level of participation in the proceedings will be as determined by the CA or the senior member of the court when so authorized by the CA. An example of when it may be appropriate to appoint a non-voting member is when a court is convened to investigate an incident in which a friendly nation or ally has a significant interest and the CA determines that it will serve the interests of the U.S. to invite a representative from the friendly nation or ally to participate, in a non-voting capacity.

e. Responsibilities

(1) The GCMCA over the command most involved in a major or serious incident, if a flag or general officer, or the first flag or general officer in the chain-of-command, or any superior flag officer in the chain-of-command, will immediately take cognizance over the case as the CA.

(2) Whenever more than one command is involved in a major or serious incident requiring formal investigation, a single investigation shall be conducted. The common superior commander shall convene the investigation in such cases, unless that officer's conduct or performance of duty may be subject to inquiry, in which case the next superior in the chain-of-command shall convene the investigation.

f. Convening order. See JAGINST 5830.1 (series) for the requirements for convening orders for courts and boards of inquiry.

g. Method. See JAGINST 5830.1 (series) for information on how courts and boards of inquiry are conducted.

h. Participation by non-parties. Other than the official members, counsel, advisors, non-voting members, and administrative support personnel, only parties may, as a general rule, participate in the proceedings of a court or board of inquiry. The CA, or the president in the case of a court of inquiry, may, however, permit the participation of an individual or organization that has an interest in the subject under inquiry. For example, the Federal Aviation Administration may be permitted to participate in an investigation inquiring into the circumstances surrounding an aircraft crash. Appropriate limits on the degree of participation should be specified in advance.

i. Time limitations. The CA shall prescribe when the report is due according to the complexity and gravity of the incident under investigation. The CA may grant extensions in writing. Requests and authorizations for extensions must be included in the report as enclosures.

j. Action

(1) Upon receiving a report from a court or board of inquiry, the CA shall review it or cause it to be reviewed, and either endorse the report in writing or return it for further investigation. In the endorsement, the CA:

(a) may approve, disapprove, modify, or add to the findings of fact, opinions, and recommendations;

(b) shall indicate what corrective action, if any, is warranted and has been or will be taken;

(c) may comment on whether punitive or nonpunitive action is warranted. Whenever punitive or nonpunitive action is contemplated or taken as the result of the incident under inquiry, the action shall be noted in the endorsement of the convening or reviewing authority. For example, the endorsement could read: "Punitive action is not warranted; however, appropriate corrective measures were taken in the case of ENS Smith." Punitive letters, or copies of recommended drafts thereof, shall be included in the investigative report as enclosures. Nonpunitive letters, or recommended drafts, are private in nature and shall not be specifically mentioned in endorsements or included as enclosures in the investigative report. Drafts shall be separately forwarded to the appropriate commander for issuance.

(d) shall state where the original evidence is preserved and provide the name and telephone number of the responsible official; see section 0214 for further information on the safekeeping of evidence.

(2) The CA, if not an Echelon II Commander, shall retain a copy of the report and forward the original, via all superior commanders who have a direct official interest in the recorded facts, to the appropriate Echelon II Commander or as otherwise directed. The subject matter and facts found will dictate the routing of the report for review. Reports involving Marine Corps matters shall be forwarded to the Commandant of the Marine Corps. The CA shall provide a copy to other commands that may have an interest in the report, such as the Naval Safety Center. See section 0218 for additional information on routing copies.

(3) If a court or board of inquiry is to be used as a pretrial investigation under Article 32(c), UCMJ, and the original report of investigation is desired in connection with trial by general court-martial, it may be retained for such purpose. A complete certified copy shall be forwarded to the Echelon II Commander via appropriate authorities.

(4) The CA's action on the report should be completed within 30 calendar days of receiving the report.

k. Review. Superiors who receive a report from a court or board of inquiry shall have it reviewed, and shall forward it to the cognizant Echelon II Commander, via the chain-of-command. In their endorsements, intermediate reviewing authorities shall comment on the report and state their concurrence or disagreement with the findings of fact, opinions, and recommendations. They shall also state what action, if any, is considered warranted or has been taken. Reports, as a general rule, should be forwarded within 30 calendar days of receipt.

l. Advance copies of investigations

(1) In all cases where it is appropriate to forward an advance copy of an investigation, the advance copy shall be forwarded by the CA and shall include that officer's endorsement.

(2) All advance copies of Marine Corps investigations shall be forwarded to the Commandant of the Marine Corps after endorsement by the CA.

m. Release. For courts and boards of inquiry, the cognizant Echelon II Commander is the release authority.

PART E -- LINE OF DUTY/MISCONDUCT

0212 WHEN LINE OF DUTY/MISCONDUCT DETERMINATIONS ARE REQUIRED

a. General. If a member incurs a disease or injury that may result in a permanent disability or that results in the member's physical inability to perform duty for a period exceeding 24 hours, as distinguished from a period of hospitalization for evaluation or observation, a determination as to whether the disease or injury was incurred in the line of duty or as the result of misconduct is very important. An injury or disease suffered by a member of the Naval service will, however, be presumed to have been incurred in the line of duty and not as a result of misconduct, unless contrary findings supported by clear and convincing evidence are made.

b. Death cases. A line of duty determination is required whenever an active duty service member of the Naval service dies, in order to make decisions concerning eligibility and annuity calculations under the Uniformed Services Survivor Benefit Program; see Part F, section 0228 of this Manual. In many cases, the death of a reservist will also require a line of duty determination. See section 0224 for additional information on reservist personnel.

c. Warning required. Any person in the Armed Forces, prior to being asked to sign any statement relating to the origin, incidence, or aggravation of any disease or injury suffered, shall be advised of the right not to sign such a statement; see 10 U.S.C. § 1219. The spirit of this section will be violated if a person, in the course of an investigation, obtains the member's oral statements and reduces them to writing, unless the above advice was given first. Compliance with this section must be documented. See Appendix A-2-j for a sample.

0213 WHY LINE OF DUTY/MISCONDUCT DETERMINATIONS ARE REQUIRED

a. General. Line of duty/misconduct determinations are extremely important since they control several personnel actions. Receipt of certain survivor benefits such as the Survivor Benefit Plan (SBP), Dependency and Indemnity Compensation (DIC), and Dependents' Educational Assistance, are contingent on whether the service member died while in the line of duty. Equally important, the receipt of disability retirement or and severance pay hinge on this same determination.

b. Disability retirement and severance pay. To be eligible to receive certain retirement and severance pay benefits, members of the Naval service on active duty who sustain injuries resulting in permanent disability must have received those injuries in the line of duty and not due to their own

misconduct. 10 U.S.C. §§ 1201, 1203, 1204, 1206, and 1207 require a determination that "the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence." Although the degree and permanent nature of the disability will be determined pursuant to SECNAVINST 1850.4 (series), the determination regarding line of duty/misconduct will be made by the line commander in accordance with the provisions of this chapter. The line of duty/misconduct determination made pursuant to this chapter will normally be binding on the Physical Evaluation Board, subject to limitations set forth in SECNAVINST 1850.4 (series).

c. Survivor benefits. Dependents of service members who died in the line of duty are generally eligible to receive certain survivor benefits such as the Survivor Benefit Plan under 10 U.S.C. §§ 1447-1460 (see section 0228 for additional information on the SBP), Dependency Indemnity Compensation under 38 U.S.C. §§ 1301-1323 and Dependent's Educational Assistance under Chapter 35 of Title 38 of the U.S. Code.

0214 STANDARDS OF PROOF FOR LINE OF DUTY/MISCONDUCT DETERMINATIONS

As discussed in section 0207, administrative investigations normally will arrive at findings of fact only if supported by a preponderance of the evidence, i.e., more likely than not. However, in LOD/Misconduct investigations, certain findings require a higher standard, that of clear and convincing. Clear and convincing means that the truth of the facts asserted is highly probable. To be clear and convincing, evidence must leave no serious or substantial doubt as to the correctness of the conclusion in the mind of objective persons, after considering all the facts. It is a higher degree than a preponderance of the evidence standard, but it does not require proof beyond a reasonable doubt as in criminal cases (see also paragraph 3 of Appendix A-2-a). Findings of fact relating to the following issues must be established by clear and convincing evidence:

a. to rebut the presumption that an injury, disease, or death has been incurred in the line of duty;

b. to rebut the presumption of mental responsibility when the question of a member's mental responsibility has been raised by the facts or by the nature of the incident;

c. to rebut the presumption that an unauthorized absence period of less than 24 hours did not materially interfere with the performance of the member's military duties in line of duty/misconduct cases; or

d. to find that the acts of a deceased service member may have caused harm or loss of life, including the member's own, through intentional acts.

0215 WHAT CONSTITUTES LINE OF DUTY

a. General. For purposes of this Chapter, only the award of disability, retirement and severance pay are bound by separate standards regarding injuries incurred during a period of unauthorized absence; see subsection d(2) below. Injury or disease incurred by Naval personnel while in active service,

and death incurred by Naval personnel on active duty, will be considered to have been incurred "in line of duty" except when incurred under one or more of the following circumstances:

(1) as a result of the member's own misconduct as determined under the regulations contained in this chapter;

(2) while avoiding duty by deserting;

(3) while absent without leave and such absence materially interfered with the performance of required military duties; see subsection d below;

(4) while confined under a sentence of court-martial that included an unremitted dishonorable discharge; or

(5) while confined under a sentence of a civil court following a conviction of an offense that is defined as a felony by the law of the jurisdiction where convicted.

b. Active service defined. "Active service" as used in this section includes full-time duty in the Naval service, extended active duty, active duty for training, leave or liberty from any of the foregoing, and inactive duty training. Inactive duty training is duty prescribed for reservists by the Secretary of the Navy and special additional duties authorized for reserves, performed voluntarily in connection with prescribed training or maintenance activities at their units; see SECNAVINST 1770.3 (series).

c. Active duty defined for death cases. Active duty for purposes of line of duty determinations in death cases is defined in 10 U.S.C. § 101(d)(1). It includes active duty for training, even for periods less than 30 days, and inactive duty for training. The term inactive duty training is defined in 37 U.S.C. § 206.

d. Unauthorized absence

(1) Whether absence without leave materially interferes with the performance of required military duties necessarily depends upon the facts of each situation, applying a standard of reality and common sense. No definite rule can be formulated as to what constitutes "material interference." Generally speaking, absence in excess of 24 hours constitutes a material interference unless evidence to the contrary exists. Similarly, an absence of shorter duration will not be considered a material interference unless there is clear and convincing evidence to establish the contrary. A statement of the individual's commanding officer, division officer, or other responsible official, and any other available evidence to indicate whether the absence constituted a material interference with the performance of required military duties, should be included in the record whenever appropriate.

(2) Per 10 U.S.C. § 1207, a member is ineligible for physical disability retirement or physical disability severance benefits from the Armed Forces if the disability was incurred during a period of unauthorized absence, regardless of the length of such absence and regardless of whether such absence constituted a material interference with the performance of required

military duties. Therefore, any injury incurred during a period of unauthorized absence requiring a line of duty/misconduct determination pursuant to the provisions of section 0212, must be the subject of a command investigation.

0216 WHAT CONSTITUTES MISCONDUCT

a. Generally. An injury or disease is the result of a member's misconduct if it is either intentionally incurred or is the result of willful neglect that demonstrates a reckless disregard for the foreseeable and likely consequences of the conduct involved. It is more than just inappropriate behavior. For death cases, see sections 0218 and 0228. Simple or ordinary negligence, or carelessness, standing alone, does not constitute misconduct. The fact that the conduct violates law, regulation, or order, or is engaged in while intoxicated, though relevant, does not alone constitute a basis for a misconduct determination.

b. Presumption. An injury, disease, or death suffered by a member of the Naval service is presumed to have been incurred in the line of duty and not to be the result of misconduct. Clear and convincing evidence, see section 0214, is required to overcome this presumption.

c. Examples. If an individual deliberately shoots off a toe to avoid duty, the injury is due to misconduct since it was intentionally incurred. If an individual shoots off a toe while playing Russian roulette, the injury is due to misconduct since such conduct demonstrates a reckless disregard for the foreseeable and likely consequences. If an individual shoots off a toe while holstering a pistol with the safety off, the injury is not due to misconduct; rather, it is the result of the negligent failure to observe a safety precaution.

0217 RELATIONSHIP BETWEEN MISCONDUCT AND LINE OF DUTY

a. General. For purposes of these regulations, "misconduct" can never be "in line of duty." Hence, a finding or determination that an injury was incurred as a result of the member's own misconduct must be accompanied by a finding or determination that the member's injury was incurred "not in line of duty." It is permissible, however, to find that an injury was incurred "not as a result of misconduct" and "not in line of duty." As an example, a member who is absent without authority may be injured by a felonious assault or struck by a vehicle driven by a drunken driver. Obviously, the injury was incurred through no fault of the member, but if the unauthorized absence interfered with the performance of the member's required military duties, a finding of "not in line of duty" must result.

b. Possible findings. The only possible combinations of findings are:

(1) "In line of duty" and "not due to the member's own misconduct;"

(2) "Not in line of duty" and "not due to the member's own misconduct;" and

(3) "Not in line of duty" and "due to the member's own misconduct."

0218 MENTAL RESPONSIBILITY

a. General rule. A member may not be held responsible for particular actions and their foreseeable consequences if, as the result of mental defect or disease, the member was unable to comprehend the nature of such acts or was unable to control such actions.

b. Presumption. In the absence of evidence to the contrary, all members are presumed to be mentally responsible for their acts. If a question of the mental responsibility of a member is raised by the facts or by the nature of the incident, this presumption ceases and the investigation must clearly and convincingly establish the member's mental responsibility before an adverse determination can be made.

c. Suicide attempts or suicides. In view of the strong human instinct for self-preservation, suicide and a bona fide suicide attempt, as distinguished from a suicidal gesture, creates a strong inference of lack of mental responsibility. Self-inflicted injury, not prompted by a serious suicidal intent, is at most a suicidal gesture, and such injury, unless lack of mental responsibility is otherwise shown, is deemed to be incurred as the result of the member's own misconduct; see section 0228.

0219 INTOXICATION AND DRUG ABUSE

a. Intoxication. In order for voluntary intoxication alone to be the basis for a misconduct determination, clear and convincing evidence must show that the member was intoxicated sufficiently to impair the rational and full exercise of his mental or physical faculties at the time of the injury and that the impairment was the proximate cause of the injury. Intoxication or impairment may be produced by alcohol, a drug, or inhalation of fumes, gas, or vapor.

b. Presumption

(1) Any member that operates or physically controls any vehicle, aircraft or vessel while drunk; or, when the alcohol concentration in the person's blood or breath is equal to or exceeds the lesser of .10 percent or the blood or breath alcohol content limit under the law of the state in which the conduct occurred, is presumed to be sufficiently intoxicated to impair the rational and full exercise of his mental or physical faculties. This presumption is rebuttable but, if not rebutted, is of sufficient strength to provide clear and convincing evidence of the member's impairment. The presumption alone, however, does not establish anything about the proximate cause of the injury.

(2) For example, if a sailor is injured while driving with a voluntarily induced blood-alcohol content that is equal to or exceeds the lesser of .10 percent by volume or the blood or breath alcohol content limit under the law of the State in which the conduct occurred, then it may be presumed that the sailor was impaired due to intoxication to the extent that

he could not fully exercise his mental or physical faculties at the time of the wreck. To find misconduct, however, it still must be shown that the resulting impairment was the proximate cause of the injury. Thus, if the accident were caused solely by the wrongdoing of another driver, then the sailor's impairment was not the proximate cause of the injury.

(3) Intoxication, as described above, may also be found when there is no blood-alcohol content measurement available or when it measures less than .10 percent by volume or the blood or breath alcohol content limit under the law of the State in which the conduct occurred. In such cases, all relevant information concerning the member's condition at the time of the injury or incident should be considered.

c. Alcohol and drug-induced disease. Inability to perform duty resulting from disease directly attributable to a specific, prior, proximate, and related intemperate use of alcohol or habit-forming drugs is the result of misconduct, see 37 U.S.C. § 802. Time spent in evaluating habituation without specific inability to perform duty shall not be charged as time lost due to misconduct.

0220 REFUSAL OF MEDICAL AND DENTAL TREATMENT

If a member unreasonably refuses to submit to medical, surgical, or dental treatment, any disability that proximately results from such refusal shall be deemed to have been incurred as a result of the member's own misconduct; see chapter 18, Manual of the Medical Department.

0221 RELATIONSHIP TO DISCIPLINARY ACTION

An adverse line of duty/misconduct determination is not a punitive measure. If warranted, commanders may take independent disciplinary action. Similarly, a favorable line of duty/misconduct determination does not preclude separate disciplinary action for the underlying act or circumstance which caused or led to the injury. Line of duty and misconduct determinations are not binding at subsequent disciplinary or administrative separation proceedings.

0222 HOW LINE OF DUTY/MISCONDUCT DETERMINATIONS ARE RECORDED

a. General. As noted above, injuries or disease suffered by Naval personnel are presumed to have been incurred in the line of duty and not as a result of a member's misconduct.

(1) Each injury or disease requiring line of duty/misconduct determinations, see section 0212, must be the subject of a preliminary inquiry; see section 0228 for LOD determinations in death cases. If, however, following a preliminary inquiry, the conditions set forth in subparagraph c below are met, then the member's command need not convene an investigation and need not report the line of duty/misconduct determinations separately. Thus, if appropriate entries in the member's health or dental records are made, and the command does not convene an investigation, then the presumption that the

member's injuries or disease were incurred in the line of duty and were not a result of the member's misconduct will not be rebutted.

(2) See Appendix A-2-k for a checklist of matters that should be included, as applicable, in any report of an investigation convened to inquire into and make recommendations concerning misconduct and line of duty under the provisions of this chapter.

b. Reporting. If the command completing the preliminary inquiry is not a GCMCA, the command will report the circumstances surrounding the injury and results of the preliminary inquiry to its GCMCA using the Personnel Casualty Report system; see MILPERSMAN 1770-030. Unless the GCMCA directs otherwise, the command will provide a copy of the preliminary inquiry report to the appropriate medical department for review in making a health or dental record entry described in subparagraph c (normally the preliminary inquiry report will not be included within the health or dental record). The GCMCA may review the preliminary inquiry and order an investigation.

c. Entry in health or dental record. An investigation need not be convened and a report need not be forwarded concerning misconduct and line of duty when, in the opinion of the medical officer or senior representative of a medical department, with the concurrence of the member's commanding officer, the injury or disease was incurred "in line of duty" and "not as a result of the member's own misconduct" and appropriate entries to this effect have been made in the member's health or dental record. See Appendix A-2-k for sample line of duty health or dental record entries.

d. Command Investigations. A command must convene an investigation and make findings concerning misconduct and line of duty when:

(1) the injury was incurred under circumstances which suggest a finding of "misconduct" might result. These circumstances include, but are not limited to, all cases in which a qualifying injury was incurred:

(a) while the member was using illegal drugs or abusing prescription drugs;

(b) while the member's blood alcohol content was equal to or exceeded the lesser of .10 percent by volume or the blood or breath alcohol content limit under the law of the State in which the conduct occurred. This does not preclude the convening of an investigation if the blood-alcohol percentage measured less than .10 percent by volume or the blood or breath alcohol content limit under the law of the State in which the conduct occurred, if the circumstances so indicate; or

(c) as a result of a bona fide suicide attempt.

(2) the injury was incurred under circumstances that suggest a finding of "not in line of duty" might result;

(3) there is a reasonable chance of permanent disability and the commander considers the convening of an investigation essential to ensure an adequate official record is made concerning the circumstances surrounding the incident; or

(4) the injured member is in the Naval Reserve or the Marine Corps Reserve and the commander considers an investigation essential to ensure an adequate official record is made concerning the circumstances surrounding the incident. See SECNAVINST 1770.3 (series) for additional information on Reserve Component Incapacitation Benefits and their relationship to line of duty/misconduct findings.

0223 ACTION BY REVIEWING AUTHORITIES

a. Action by convening authority. Unless the report is returned for further inquiry into the circumstances behind the disease or injury, see Part F of this Chapter for death cases, the CA will make a line of duty/misconduct determination by taking one of the following actions:

(1) If the CA concludes that an injury or disease was incurred in line of duty and not due to the member's own misconduct or that clear and convincing evidence is not available to rebut the presumption of in line of duty/not due to misconduct, this conclusion shall be expressed in the action on the record of proceedings. This action may be taken regardless of whether it differs from or concurs with an opinion expressed by the investigating officer.

(2) If, upon review of the report, the CA or higher, believes that the injury or disease of the member was incurred not in line of duty and/or due to the member's own misconduct, then prior to taking action that authority must afford the member, or the member's representative if the member is mentally incompetent to understand the nature of the action, notice of the preliminary determination and an opportunity, not exceeding 10 calendar days, to submit any desired information for the CA's consideration. Additional time may be granted by the CA for good cause. For purposes of this subsection, "member's representative" includes a court-appointed conservator (or equivalent) or a duly-appointed attorney-in-fact. In the absence of such a representative, notice may be sent to the member's primary next-of-kin as designated on the NAVPERS 1070/602 ("Page 2"). In the event of a conflict between a durable power of attorney and a court-appointed conservator or equivalent, the CA must reconcile which takes precedence under the relevant state law.

(a) The member will be advised that he does not have to make any statement relating to the origin, incidence, or aggravation of any injury or disease. If any information is obtained from the member, a statement attesting that the above warning was given must be attached; see section 0212 and Appendix A-2-j.

(b) If the member is also suspected or accused of any offense under the UCMJ, then the member should also be advised in accordance with Article 31, UCMJ, and of rights to counsel. Suspect's Rights Acknowledgement/Statement forms should be used for such advice; see Chapter I of this Manual.

(c) Upon request, the member may be permitted to review the investigative report but not to copy it. After the report is final, the member may have a right under the Privacy Act to a copy of the report; see Chapter V of this Manual for further information.

(d) If the member elects to provide any information, it shall be considered by the CA and attached to the record.

(e) If the member elects not to provide any information, or fails to respond within 10 calendar days, that election or failure shall be noted in the CA's endorsement.

(3) Unless the CA is a GCMCA, the report shall be forwarded via the chain-of-command to a GCMCA with an assigned judge advocate.

(a) The CA has 30 calendar days to take action on the report. The endorsement should be prepared as directed in section 0209.

(b) In cases involving death or injury of members, the original shall be forwarded with sufficient copies so that the ultimate addressee receives the original and two copies.

b. Action by general court-martial convening authority

(1) The GCMCA may take any action on the report that could have been taken by the CA. With respect to conclusions concerning misconduct and line of duty, the GCMCA shall indicate approval, disapproval, or modification of such conclusions unless the record is returned for further inquiry. A copy of this action shall be forwarded to the commander of the member concerned, so that appropriate entries may be made in the member's service and medical records, see below. Reviewing authorities subsequent to the GCMCA, if any, need neither comment nor record approval or disapproval of the prior actions concerning line of duty and misconduct.

(2) The investigation should not normally be forwarded to the Judge Advocate General.

(3) Copies of the report shall be provided to:

(a) the Naval Safety Center when the report reveals systemic safety problems;

(b) OJAG (Code 15), TCU, if potential claims against the Government or OJAG (Code 15) MCRU if potential affirmative claims by the Government may be involved. This is of special concern where medical care has been furnished and the Government may be entitled to recover third party medical claims; and

(c) other commands having a direct official interest in the matter.

(4) The GCMCA shall keep the original investigation for 2 years.

c. Follow-up actions. As noted above, after the GCMCA reviews and approves the line of duty/misconduct findings, the commander of the concerned member must cause appropriate service and health record entries to be made to include the GCMCA action. A copy of the GCMCA action will be made an enclosure to all line of duty/misconduct health record entries resulting from

command investigations. In this regard, the following information is provided:

(1) Extension of enlistment. When an enlisted service member is unable to perform duties for more than one day because of intemperate use of drugs or alcohol or because of disease or injury resulting from the member's misconduct, his or her enlistment shall be extended to account for the lost time. See 10 U.S.C. § 972.

(2) Longevity and retirement multiplier. An enlisted member who is unable to perform duties for more than one day because of intemperate use of drugs or alcohol or because of disease or injury resulting from misconduct is not entitled to include such periods in computing "creditable service" for purposes of longevity pay or retirement pay. See DoD Financial Management Regulation (DoD FMR), DOD 7000.14-R, Volume 7A, Military Pay Policy and Procedures - Active Duty and Reserve Pay.

(3) Forfeiture of pay. A member of the Naval service on active duty who is absent from regular duties for a continuous period of more than one day because of disease that is directly caused by and immediately follows intemperate use of alcohol, illegal or prescription drugs is not entitled to pay for the period of that absence. If pay is forfeited for more than one month, however, the member is entitled to $5.00 for personal expenses for each month that his pay is forfeited. Pay is not forfeited for absence from duty caused by injuries or diseases that are not directly caused by and immediately following intemperate use of alcohol, illegal or prescription drugs. See DoD FMR, DoD 7000.14-R, Volume 7A, Chapter 1, Basic Pay.

(4) Disability retirement and severance pay. As noted in section 0213, to be eligible for disability retirement or severance pay, a member's injuries must meet the requirements established by applicable statutes. One of these requirements is that the injury/disability not be the result of the member's "intentional misconduct or willful neglect" nor have been "incurred during a period of unauthorized absence." The Physical Evaluation Board in awarding any disability payment in accordance with SECNAVINST 1850.4 (series) is bound by line of duty/misconduct determinations made pursuant to this chapter.

(5) Benefits administered by the Department of Veterans Affairs. In determining whether a veteran or the veteran's survivors or dependents are eligible for certain benefits, the Department of Veterans Affairs makes its own determination with respect to misconduct and line of duty. As a practical matter, these determinations often rest upon the facts that have been officially recorded and are on file within the DON. Statutes governing these benefits generally require that disabling injury or death be "service connected," which means the disability was incurred or aggravated, or, that the death resulted from a disability incurred or aggravated "in line of duty." See 38 U.S.C. § 101. The statutory criteria for making such determinations are contained in 38 U.S.C. § 105.

0224 SPECIAL CONSIDERATIONS IN RESERVE COMPONENT CASES

a. Interim Line of Duty determination. Pursuant to DoDI 1242.2 (series), CA's must issue "interim" line of duty determinations within seven days of being notified that a reservist not on the active duty list has an incapacitating injury or illness incurred or aggravated while on active duty, including leave and liberty therefrom, active duty for training, inactive duty training, or travel to or from such duty. This interim determination is intended to ensure that the reservist's incapacitation pay can be started without delay. If the final line of duty/misconduct determination is adverse to the member, immediate action must be taken to stop incapacitation benefits; see SECNAVINST 1770.3 (series) for further information.

b. Statutory authority. 10 U.S.C. § 1074a governs entitlement to medical and dental care administered for reserve component members who incurred or aggravated an injury, illness, or disease while performing active duty or annual training for a period of 30 days or less, or inactive-duty training, or while traveling directly to or from such duty.

c. Annual training. The period of annual training extends from the time of reporting to the time of release, and, if the orders to active duty for training provide for travel, the time of travel to and from the duty station not in excess of the allowable constructive travel time as prescribed DoD FMR, DoD 7000.14-R, Volume 9, Travel Policy and Procedures.

d. Investigation. Incidents involving injury or death of reservists occurring during a period of annual training or inactive duty training (drill), as defined above, or that occur while traveling directly to or from places where members are performing or have performed such duty, or any case involving a question of whether a disease or injury was incurred during a period of annual training, inactive duty training (drill), or travel, as defined above, should be investigated. See Appendix A-2-k for a checklist of matters that should be included, as applicable, in any report of an investigation convened to inquire into and make recommendations concerning line of duty for reservists.

PART F -- SPECIAL CONSIDERATIONS IN DEATH CASES

0225 GENERAL

a. Special considerations. The circumstances surrounding the death of Naval personnel or DON civilian employees accompanying military personnel in the field or killed as a result of military-related actions, may be recorded in a variety of ways, such as autopsy reports, battlefield reports, and medical reports. Investigations conducted pursuant to this Manual may also focus on such deaths and may incorporate other official reports as enclosures, subject to the guidance contained in this Chapter. Since reports pertaining to deaths of military members are by law generally releasable to family members, special considerations prevail in the investigation of death cases.

b. Casualty Office notification. When an investigation into the cause or circumstances surrounding the death of a military member or DoD civilian

employee who becomes a fatality while accompanying military personnel in the field or as a result of military-related actions is initiated, the appropriate Military Service Casualty Headquarters Office shall be notified immediately. At a minimum, the Casualty Office shall be provided written confirmation containing the following information:

(1) The name of the DoD organization conducting the investigation;

(2) The type of investigation being conducted;

(3) The existence of any reports by the investigating organization that have been or will be issued as a result of the investigation;

(4) A point of contact within the investigating organization that can provide information on the status of the completion of any investigative reports;

(5) The procedures for family members to obtain a copy of the completed report(s) to the extent such reports may be furnished consistent with sections 552 and 552a of title 5, United States Code, and to obtain assistance in obtaining a copy of the completed report(s); and

(6) The procedures for family members to obtain answers to their questions on the complete investigation from a fully qualified representative.

(7) Investigating agencies will provide an update to the appropriate Military Service Casualty Headquarters office at a 30-day frequency until the investigation is completed.

(8) The contact numbers for providing the Military Service Casualty Headquarters with the required information concerning death investigations are: Navy Casualty Office at 800-368-3202 and Marine Corps Casualty Office at 800-847-1597.

c. Family Member Notification. In accordance with DoDI 1300.18 and applicable service regulations family members shall be informed in a timely manner of the initiation of an investigation into the death of a Service member. The same policy and all related responsibilities and requirements shall be extended to the family members of DoD civilians who have died while accompanying military personnel in the field or as a result of military-related actions.

d. NCIS notification. NCIS must be notified of any death occurring on a Navy vessel or Navy/Marine Corps aircraft or installation, except when the cause of death is medically attributable to disease or natural causes.

e. Time limitations. The period for completing the administrative investigation report/record into a death shall not normally exceed 20 calendar days from the date of the death, or its discovery. For good cause, however, the CA may extend the period. Requests and authorizations for extensions must be coordinated with the next reviewing authority. The CA and subsequent reviewers have 20 calendar days to review and endorse the investigation. Noncompliance with these time requirements must be explained in the endorsement of the deviating command and commented upon by subsequent

endorsers. See MILPERSMAN 1770-060 for the requirement to submit Status Investigation Reports.

f. Release of death investigations

(1) Policy for release to next of kin. As a normal rule, death investigations reports/records shall not be released to the public until they are final. In the interest of providing the decedent's next of kin with timely information, however, it is DON policy that service member deaths and civilians who died while accompanying military personnel in the field or as a result of military-related activity, upon completion of the review by the first flag officer in the chain of command, the reviewer shall release an advance copy of the investigation, upon a request, to the next of kin. The release of an advance copy to requesting next of kin shall be made unless release would violate law (e.g., investigation classified) or the endorser can articulate how release would harm the command's mission or interfere with an ongoing criminal investigation, or why release should not be made for good cause. If an endorser does not wish to release an investigation to requesting next of kin, this decision shall be coordinated with OJAG (Code 13), at 703-604-8200/DSN 664-8200.

(2) Delivery to next of kin. In providing death investigations to the next of kin, consideration should be given to the potential impact of the report. Section 0232 directs that graphic photographs are to be separately wrapped and labeled. Similar procedures should be employed for autopsy reports and other written materials containing graphic details of injury, wounds, mutilation, etc. In order to assist those who may still be grieving to understand the meaning and significance of the report of investigation, releasing authorities should ensure, when reasonable, hand delivery of the report by someone who can discuss it with the family. Normally, the Casualty Assistance Calls Officer(s) would make the delivery, but there may be reasons (technical subject-matter, personal friendships, etc.) for another individual to be assigned this task.

0226 WHEN INVESTIGATIONS OF DEATH CASES ARE REQUIRED

A preliminary inquiry, see section 0203, shall, as in any other circumstance potentially warranting an investigation, be conducted into the death of a member of the Naval service or into the death of a civilian aboard a place under Naval control. The requirement to conduct a preliminary inquiry or an investigation is independent of the line of duty determination requirement. See section 0228 and Part E. At the conclusion of the preliminary inquiry, the commander must determine which of the options listed in section 0204 will be exercised, and report that decision to the next superior in the chain-of-command. Normally, a command investigation, or a limited investigation (see subparagraph c below), will be appropriate to inquire into a death of a service member. A court or board of inquiry is appropriate in some cases, as discussed below. Litigation-report investigations will never be conducted in any incident where an active duty death has occurred or where civilian personnel have died while accompanying military personnel in the field or as a result of military-related activities. In cases involving the death of other civilians, whether a DON employee or not, potential claims are likely and commands should consult with OJAG (Code 15). In deciding on the type and

necessity of investigation, the commander shall consider the following:

a. No investigation required. An investigation under this Manual will normally not be conducted if the preliminary inquiry shows that the death of a service member:

(1) was the result of a previously known medical condition and the adequacy of military medical care is not reasonably in issue; or

(2) was the result of enemy action, except for "friendly-fire" incidents described in subsection b(4) below.

b. Investigation required. An investigation under this Manual shall be conducted if the preliminary inquiry shows:

(1) the case involves civilian or other non-Naval personnel found dead aboard an activity under military control, where the death was apparently caused by suicide or other unusual circumstances;

(2) the circumstances surrounding the death place the adequacy of military medical care reasonably at issue;

(3) the case involves the death of a military member and a probable nexus exists to Naval service, except where the death is as a result of enemy action; or

(4) it is unclear if enemy action caused the death, such as in possible "friendly-fire" incidents.

c. Limited investigation required. If the preliminary inquiry shows that the death of a service member occurred at a location in the U.S. but not under military control, while the member was off-duty, and the circumstances of the death had no discernable nexus to the Naval service, the command shall obtain the results of the investigation of the incident by civilian authorities and maintain the results as an internal report. The command shall document, in writing, the reasons for making the determination to conduct a limited investigation, attaching the enumerated reasons to the internal report. Completion of these actions shall follow the time constraints noted for the processing of command investigations and will constitute final action on the report. Limited investigations or internal reports are considered investigations for records retention purposes.

0227 STANDARD OF PROOF

To find that the acts of a deceased service member may have caused harm or loss of life, including the member's own, through intentional acts, findings of fact relating to those issues must be established by clear and convincing evidence; see Appendix A-2-a for a definition of that term.

0228 AUTOPSIES

a. General. When the death of a member of the uniformed services on active duty, or active duty for training, occurs under any of the circumstances set forth in chapter 17, Manual of the Medical Department, and when an autopsy is authorized by the member's commander, and in other cases in which authorization from proper authority has been obtained, the preliminary inquiry officer shall provide the medical officer designated to conduct the autopsy with a preliminary report of the circumstances surrounding the death. In those cases in which authorization for autopsy has been granted by other than the member's commanding officer, the medical officer shall be responsible for advising command authority that such authorization has been granted in order to facilitate the preliminary investigation and report thereof to the medical officer conducting the autopsy. Upon completion of the autopsy, the medical officer conducting the autopsy shall provide the preliminary inquiry officer, or investigating officer, a copy of the preliminary autopsy findings as to the cause of death and, when completed, a copy of the final protocol. The medical officer conducting the autopsy should be provided with a copy of the final investigative report, if an investigation is convened. DoDD 5154.25 and NAVMED P5065 refer to issues of authorization of autopsies.

b. Unavailability of documents. Notwithstanding the guidance above, completion of a death investigation and its forwarding will not be delayed to await final autopsy reports, death certificates, or similar documents unless their inclusion is absolutely essential to the completion of the investigative report. The unavailability of such documents should be noted and the investigation completed and forwarded. Documents subsequently obtained shall be forwarded by separate correspondence via the review chain, with appropriate reference to the report of investigation/forwarding endorsement.

0229 DETERMINATIONS CONCERNING LINE OF DUTY/MISCONDUCT IN DEATH CASES

a. Modifications to Survivor Benefit Plan programs

(1) Section 642, National Defense Authorization Act (NDAA) of Fiscal Year 2002 (NDAA 2002), Public Law 107-107, modified the SBP program in two important ways: First, SBP benefits are payable to a qualified survivor when an active duty service member dies in the line of duty, regardless of whether the service member was retirement eligible at the time of death. Second, there is an increase in the calculation of the SBP annuity payable to a qualified survivor, if the active duty service member dies in the line of duty.

(2) Section 644, NDAA for Fiscal Year 2004 (NDAA 2004), Public Law 108-136, expanded the benefits and coverage of the SBP program to include benefits for surviving spouses of reserve component members not eligible for retirement who die from an injury or illness incurred or aggravated in the line of duty during inactive training.

b. Calculations of SBP annuities. SBP annuities are calculated as a percentage of the SBP base amount. Normally, the annuity is 55 percent of the SBP base amount. When an active duty death is determined to be in the line of duty, the SBP base amount is equal to retired pay as if the service

member retired with total (100 percent) disability, which in turn is equal to 75 percent of the member's base pay (final or high-36 pay). Thus, for an active duty death determined to be in the line of duty, the calculation of the SBP annuity payable to a qualified survivor normally will be 55 percent of 75 percent of the deceased service member's final or high-36 pay.

c. SBP modifications in line of duty determinations. Section 642, NDAA 2002 only affects the SBP eligibility determination or annuity calculation in cases determined to be in the line of duty. For cases determined to be not in the line of duty, SBP eligibility and annuity calculations remain in effect under the rules that existed prior to Public Law 107-107. If the service member was not retirement eligible at the time of death, then SBP is inapplicable. If the service member was retirement eligible at the time of death, a SBP annuity will be paid to a qualified survivor, but will not be computed on the basis of a nominal total disability retirement. Rather, the SBP base amount will be computed on the retirement for service rules that would have applied if the service member had retired at time of death.

d. Process. Line of duty determinations are now required in all active duty death cases and are made as follows:

(1) Each active duty death shall be subject to, at a minimum, a preliminary inquiry in accordance with section 0203 of this Manual. The preliminary inquiry shall be conducted by the command to which the deceased member was attached, or the gaining command for service members who die in transit. The command conducting the preliminary inquiry, or higher authority, shall decide whether the preliminary inquiry is sufficient to base a line of duty determination or whether there is need for an investigation. In many death cases, a preliminary inquiry, consisting of a basic letter report attached to a medical record entry or accident report, will be sufficient to base a line of duty determination.

(2) If the command completing the preliminary inquiry or investigation is not a GCMCA with an assigned judge advocate, the command will forward the inquiry/investigation to the first GCMCA in its chain of command with an assigned judge advocate. The command will include a written recommendation concerning the line of duty determination.

(3) The GCMCA with an assigned judge advocate is the cognizant official for making the formal line of duty determination, subject to a limited review process described below. The GCMCA shall make the line of duty determination in accordance with the guidance in sections 0215-0220 of this Manual. All line of duty determinations in death cases shall be made in writing by the GCMCA and forwarded to Commander, Navy Personnel Command, (PERS-62), 5720 Integrity Drive, Millington, TN 38055-6220 or Headquarters, U.S. Marine Corps, Manpower and Reserve Affairs (MMSR-6), 3280 Russell Road, Quantico, VA 22134-5103.

(4) Adverse determinations. Before making a determination that an active duty death was not in the line of duty, the GCMCA or his judge advocate shall afford a known potential SBP beneficiary the opportunity to review the report of investigation and provide relevant information to the GCMCA. A "known potential SBP beneficiary" is the person who would otherwise be the recognized qualified survivor if a favorable determination

were made. The respective Navy and Marine Corps program managers will provide assistance for Navy and Marine Corps commands in identifying potential SBP beneficiaries. Ordinarily, the known potential SBP beneficiary shall be provided 30 calendar days from receipt of the report of investigation to provide information to the GCMCA. In an adverse determination case in which there is no known potential SBP beneficiary, the GCMCA shall make the line of duty determination following a review of the investigation by the assigned judge advocate.

(5) For adverse determination cases, the GCMCA shall forward a complete copy of the investigation to PERS-62 or MMSR-6, where it will be reviewed by CNP or DC(M&RA). CNP or DC(M&RA) shall review the LOD determination and underlying investigation. The determination of the GCMCA shall be sustained unless CNP or DC(M&RA) determine that a substantial error occurred that could materially affect the determination. In such cases, CNP or DC(M&RA) can make a different determination or return the case to the GCMCA for further investigation. The review and determination of the CNP or DC(M&RA) shall be administratively final.

0230 MAJOR INCIDENTS AND OTHER CASES INVOLVING DEATH WHERE A COURT OF INQUIRY MAY BE APPROPRIATE

a. Death cases within the definition of major incident. For death cases that fall within the definition of major incident in Appendix A-2-a, a court or board of inquiry should be convened. Additionally, and notwithstanding that a death case may not qualify as a major incident, a CA may conclude that a board or court of inquiry is the appropriate forum for conducting the investigation.

b. Deceased service member contributing cause to incident. If, at any time during the course of a court or board of inquiry, it appears that the intentional acts of a deceased service member were a contributing cause to the incident, the CA will be notified by legal counsel assigned to the court. The CA will then notify OJAG (Code 13) or, as appropriate, (Code JAR) HQMC, of the preliminary finding of contributing cause by the deceased member. OJAG (Code 13) or (Code JAR) HQMC will advise the CA what additional measures, if any, are necessary to ensure a fair hearing regarding the deceased member's actions.

0231 INDEPENDENT REVIEW

a. General. To enhance the investigation process, prior to taking action on an investigative report that calls into question the propriety of a deceased individual's conduct, including all apparent suicide cases, the CA may cause the report to be reviewed by an individual not previously connected with the investigation process and outside the CA's immediate chain-of-command.

b. Qualifications of reviewer. The individual selected pursuant to this section to review the preliminary report should, to the extent feasible, possess such training, experience, and background that he can critically analyze the salient circumstances surrounding the death as documented in the

report. For example, if a pilot's death occurred as the result of an aircraft accident, then the individual selected should be a pilot. In all cases, the individual selected should have no official or personal interest in the outcome of the investigation.

c. Duties of reviewer. The individual selected to review the investigative report shall not act as the deceased's representative, but should critically analyze the investigative report from the perspective of the deceased, tempered by the reviewer's own experience, training, and education. If, after conducting the review, the reviewer believes comment on the thoroughness of the investigation or the accuracy of its findings is warranted, then such comments shall be provided in writing to the CA. The review shall be completed within 10 calendar days of delivery of the report to the reviewer.

d. Action. The CA shall consider the reviewer's comments and take such action as the CA deems appropriate. The reviewer's comments, if any, shall be appended to the investigative report.

0232 SPECIAL ROUTING

a. Advance copy of death investigations. Since most death cases are of interest to headquarters activities, an advance copy of all death investigations, other than those where only a preliminary inquiry or limited investigation is required, shall be provided to the cognizant Echelon II Commander after the first endorsement. The original report shall note the forwarding of the advance copy, and each subsequent endorser shall provide an advance copy of his endorsement to the Echelon II Commander.

b. Reports available to family of deceased service members. Pursuant to 10 U.S.C. § 113 note (Pub. L. 102-484, Div. A, Title X §1072, 23 Oct 92; 106 Stat. 2508), fatality reports and records pertaining to any member of the Armed Forces who dies in the line of duty shall, generally, be made available to family members of the service member. For this reason, discretion must be exercised in enclosing graphic photographs since doing so has significant potential for shocking the sensitivities of relatives and others to whom the investigation may be released. Such materials should be enclosed separately in an envelope marked: "CAUTION, CONTAINS GRAPHIC PHOTOGRAPHS. VIEWER DISCRETION ADISED."

DEFINITIONS

1. Administrative Investigation. Administrative investigations collect and record information. Their reports are advisory. Their opinions, when expressed, do not constitute final determinations or legal judgments, and their recommendations, when made, are not binding upon convening or reviewing authorities.

2. Class A Mishap. A Class A mishap is one in which the total cost of damage to property or aircraft or unmanned aerial vehicle (UAV) exceeds $1,000,000, or a naval aircraft is destroyed or missing, or any fatality or permanent total disability results from the direct involvement of naval aircraft or UAV. Loss of a UAV is not a Class A unless the cost is $1,000,000 or greater.

3. Clear and Convincing Evidence. A degree of proof beyond a preponderance but less than the near certainty of beyond a reasonable doubt. It means that the truth of the facts asserted is highly probable. To be clear and convincing, evidence must leave no serious or substantial doubt as to the correctness of the conclusion in the mind of objective persons after considering all the facts.

4. Cognizant Judge Advocate. The judge advocate (see definition below) who, by regulation or practice, is responsible for providing legal advice to the concerned convening or reviewing authority. This often will be a station, staff, fleet, or force judge advocate, but may also include the command services or claims officer at the servicing Region Legal Service Office.

5. Command Investigation. An administrative investigation conducted into an incident of primary interest to command authorities. It need not be forwarded to OJAG.

6. Intoxication. A state of impairment of the mental or physical faculties that prevents their rational and full exercise. Whether the impairment is caused by ingesting liquor or drugs, or by inhaling fumes or vapors, is immaterial.

7. Judge Advocate. As used in this chapter, the term ordinarily refers to a military lawyer, but may include civilian attorneys under the professional supervision of either the Navy Judge Advocate General or the Navy General Counsel.

8. Litigation-Report Investigation. An administrative investigation conducted under the direction and supervision of a judge advocate in anticipation of litigation or claims. All litigation-report investigations must be forwarded to OJAG (Code 15), TCU.

9. Major Incident. An extraordinary incident occurring during the course of official duties resulting in multiple deaths, substantial property loss, or substantial harm to the environment, where the circumstances suggest a significant departure from the expected level of professionalism, leadership, judgment, communication, state of material readiness, or other relevant

standard. Substantial property loss or other harm is that which greatly exceeds what is normally encountered in the course of day-to-day operations. These cases are often accompanied by national public and press interest and significant congressional attention. They may also have the potential of undermining public confidence in the Naval service. That the case is a major incident may be apparent when it is first reported or as additional facts become known.

10. Mishap Unit. The unit of the Armed Forces, at the squadron or battalion level or equivalent, to which was assigned the flight crew of the Naval aircraft that was involved in the accident that is the subject of the investigation.

11. Person. For the purposes of this chapter, a person is an individual, not an organization or corporation.

12. Personally Identifiable Information. In the context of Privacy Act requirements, personal information is information about an individual that links, relates, or is unique to, or describes him or her, e.g., a Social Security Number; age; military rank; civilian grade; marital status; race; salary; home/office phone numbers; other demographic, biometric, personnel, medical, and financial information, etc. Such information is also known as personally identifiable information (i.e., information which can be used to distinguish or trace an individual's identity, such as their name, Social Security Number, date and place of birth, mother's maiden name, and biometric records, including any other personal information which is linked or linkable to a specified individual.

13. Preponderance of Evidence. A preponderance is created when the greater weight of evidence, or evidence that is more credible and convincing to the mind, is offered in support of, rather than in opposition to, any given fact. Weight of evidence in favor of establishing a particular fact is not to be determined by the sheer number of witnesses or volume of evidentiary matter presented on either side, but by that evidence that best accords with reason and probability.

14. Proximate Cause. That which, in a natural and continuous sequence, unbroken by any significant intervening factor, causes an event, and without which the result would not have occurred. For example, if a sailor voluntarily becomes intoxicated and then wilfully exceeds the speed limit by 30 mph, loses control of his vehicle, crashes into a tree and, as a result, suffers severe injury, then his voluntary intoxication may be said to be the proximate cause of his injury. Conversely, if another sailor voluntarily becomes intoxicated, begins to drive home, is struck by another vehicle which failed to yield the right of way at an intersection and, as a result, suffers severe injury, then her voluntary intoxication cannot be said to be the proximate cause of her injury.

15. System of Records. In the context of the Privacy Act, a system of records is a group of records under the control of the DON from which information is retrieved by an individual's name or some identifying number or symbol.

PARTIES - DEFINITIONS AND RIGHTS

1. Party. A "party" is an individual who has properly been so designated in connection with a court of inquiry or a board of inquiry required to conduct a hearing whose conduct is either the subject of the inquiry or has a direct interest in the inquiry. No individual has a right to demand a court of inquiry.

2. Subject to Inquiry. A person's conduct or performance of duty is "subject to inquiry" when the person is involved in the incident or event under investigation in such a way that disciplinary action may follow, the person's rights or privileges may be adversely affected, or the person's reputation or professional standing may be jeopardized.

3. Direct Interest. A person has a "direct interest" in the subject of inquiry:

a. When the findings, opinions, or recommendations of the fact-finding body may, in view of the person's relation to the incident or circumstances under investigation, reflect questionable or unsatisfactory conduct or performance of duty; or

b. When the findings, opinions, or recommendations may relate to a matter over which the person has a duty or right to exercise official control.

4. Rights. A person duly designated a party before a fact-finding body shall be advised of and accorded the following rights:

a. To be given due notice of such designation.

b. To be present during the proceedings, but not when the investigation is cleared for deliberations.

c. To be represented by counsel.

d. To examine and to object to the introduction of physical and documentary evidence and written statements.

e. To object to the testimony of witnesses and to cross-examine adverse witnesses.

f. To introduce evidence.

g. To testify as a witness.

h. To refuse to incriminate oneself; and, if accused or suspected of an offense, to be informed of the nature of the accusation and advised of the right not to make any statement regarding the offense of which accused or suspected and that any statement made may be used as evidence in a trial by court-martial.

i. To make a voluntary statement, oral or written, to be included in the record of proceedings.

j. To make an argument at the conclusion of presentation of evidence.

k. To be properly advised concerning the Privacy Act.

l. To challenge members.

SAMPLE DOCUMENTATION OF PRELIMINARY INQUIRY

(Date)

From: (Name and rank of individual conducting preliminary inquiry)
To: (Title of authority ordering preliminary inquiry)

Subj: PRELIMINARY INQUIRY INTO (DESCRIPTION OF INCIDENT)

Ref: (a) JAGMAN, Section 0203

Encl: (1) Appointing order (*If any*)
(2) *Any other evidence used by the reviewing official, such as statements, documents, records, pictures, etc.*

1. This reports completion of the preliminary inquiry conducted in accordance with reference (a) into (description of incident).

2. Personnel contacted: (List individuals with name, rank, title, unit, and telephone number).

3. Materials reviewed: (List documents, objects, materials, and tangibles reviewed and, if of probable evidentiary value, where stored together with name of responsible individual and that person's phone number).

4. Summary of findings: (The inquiring official should provide a brief summary of their findings to the commander. While the summary need not extend beyond one paragraph, it should be as long as required to provide the commander with a reasonably good picture of what occurred and should support the recommendations provided below. In addition, it should document what is not known about the event in question).

5. Recommendation: (The inquiring official should provide a recommendation on subsequent command action: consult a judge advocate; no further investigation warranted; command investigation; litigation-report investigation; board of inquiry; or court of inquiry. If the inquiring official: concludes that any injuries may result in a finding of "not in the line of duty" or "misconduct," then it must be accompanied by a recommendation to convene a formal investigation; or, recommends disciplinary action, then such a recommendation should be followed by a recommendation to conduct a formal investigation or a Preliminary Inquiry pursuant to Rule for Courts-Martial 303.

_____
Name, rank, unit, telephone

FIRST ENDORSEMENT

_____Concur with recommendation

_____Other:_____

_____

_____
Name, rank, unit, telephone

(Note: Attachments may be added to the report as desired.)

SAMPLE COMMAND INVESTIGATION CONVENING ORDER

5800
Ser
[Date]

From: Commanding Officer, Headquarters Battalion, Marine Corps Base, Camp Pendleton, CA
To: Capt _____, USMC

Subj: COMMAND INVESTIGATION OF THE FIRE THAT OCCURRED AT _____ ON __ AUGUST 20__

Ref: (a) JAGMAN, Chapter II

1. This appoints you, per reference (a), to inquire into the facts and circumstances surrounding the fire that occurred at _____ on __ August 20__.

2. Investigate the cause of the fire, resulting injuries and damages, and any fault, neglect, or responsibility therefore, and recommend appropriate administrative or disciplinary action. Report your findings of fact, opinions, and recommendations in letter form by __ September 20__, unless an extension of time is granted. If you have not previously done so, read Chapter II of reference (a) in its entirety before beginning your investigation.

3. You may seek legal advice from _____ during the course of your investigation.

4. By copy of this appointing order, Commanding Officer, Headquarters Company, is directed to furnish necessary clerical assistance.

_____
Colonel, U.S. Marine Corps

Copy to:
CG, MCB CamPen, CA
CO, HQCo, HQBn, MCB, CamPen, CA

SAMPLE COMMAND INVESTIGATION REPORT

5800
[Date]

From: Capt _____, USMC
To: Commanding Officer, Headquarters Battalion, Marine Corps Base, Camp Pendleton, CA

Subj: SAME AS SUBJECT ON CONVENING ORDER

Encl: (1) Appointing order and modifications thereto (if any were issued)
(2) Summary (or verbatim) of sworn (or unsworn) testimony of _____ (a witness)
(3) Summary (or verbatim) of sworn (or unsworn) testimony of_____ (a witness)
(4) Statement of_____, signed by witness
(5) Description of _____ (evidence found at scene of the accident)
(6) Photograph of _____ depicting_____

Note: Testimony of each witness, observations of the investigator, photographs, diagrams, and suitable reproductions of tangible evidence should be listed and attached as enclosures to the investigative report. The location of all original evidence, such as logs, charts, tangible items, and so forth, and the name and phone number of the official responsible for its safekeeping must be stated in the report, either on each enclosure or in the preliminary statement.

Preliminary Statement

1. Paragraph 1 of an investigative report must contain information in the form of a "preliminary statement." Contents may require continuation in one or more additional paragraphs. In general, see section 0208(c) for required contents. Where applicable, an investigating officer should indicate the name and organization of any judge advocate consulted. Extensions of time to complete the report should be noted here. Also state in appropriate cases that the matter was first referred to NCIS and NCIS expressed no objection to proceeding with the investigation.

Findings of Fact

1. _____. [Encls ( ), ( )]

2. _____. [Encls ( ), ( )]

3. _____. [Encl ( )]

Note: Findings of fact constitute an investigating officer's description of details of events based on evidence. Findings must be as specific as possible about time, places, and persons involved. Each fact may be made a separate finding. An investigating officer may determine the most effective presentation for a particular case. Each fact must be supported by

testimony of a witness, statement of the investigating officer, documentary evidence, or tangible (real) evidence attached to the investigative report as an enclosure. Each finding of fact should reference each enclosure that supports it.

Opinions

1. _____. [FF ( )]

2. _____. [FF ( ), ( )]

3. _____. [FF ( )]

Note: An opinion is a reasonable evaluation, reference, or conclusion based on facts found. Each opinion must be supported by findings of fact. Determination of line of duty and misconduct is properly stated as an opinion.

Recommendations

1. _____.

2. _____.

3. _____.

Note: If an investigating officer recommends trial by court-martial, a charge sheet drafted by the investigating officer may be prepared and submitted to the convening authority with the investigative report. See R.C.M. 307, MCM. **The charge sheet should not be signed; i.e., charges should not be preferred since preferral starts the "speedy trial clock" running. Before preferring charges, the local legal service office or staff judge advocate should be consulted.** Unless specifically directed by proper authority, an investigating officer must not notify an accused of charges. Notification is the responsibility of the commanding officer of an accused. See R.C.M. 308 and 707, MCM. If a punitive letter of reprimand or admonition is recommended, a draft of the recommended letter must be prepared and forwarded with the investigative report. Proposed nonpunitive letters of caution must <u>not</u> be forwarded with the report; see section 0209f.

_____
(INVESTIGATING OFFICER)

SAMPLE LITIGATION-REPORT INVESTIGATION APPOINTING ORDER

5800
Ser
[Date]

From: Commanding Officer, Naval Submarine Base New London
To: LT _____, USN

Subj: LITIGATION-REPORT INVESTIGATION OF THE FIRE THAT OCCURRED AT QUARTERS XYZ, NAVSUBBASE NLON, ON ___ AUGUST 20__

Ref: (a) JAGMAN, Chapter II

1. Per reference (a), you are hereby appointed to investigate the circumstances surrounding the fire that occurred at Quarters XYZ, Naval Submarine Base New London on __August 20__, and to prepare the related litigation-report. During the investigation, you will be under the direction and supervision of LCDR _____, JAGC, USN. Consult LCDR _____ before beginning your inquiry or collecting any evidence. If you have not already done so, you should also read Chapter II of reference (a) in its entirety before consulting LCDR _____.

2. This investigation is being convened and your report is being prepared in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter. As such it is privileged and should be discussed only with personnel who have an official need to know of its progress or results. If you have any doubt about the propriety of discussing the investigation with any particular individual, then you should seek guidance from LCDR _____ before doing so.

3. Investigate all facts and circumstances surrounding the fire, including the cause of the fire, resulting injuries and damages, and any fault, neglect, or responsibility therefore. Report your findings to LCDR _____ by __ September 20__, unless an extension of time is granted. Do not express any opinions or recommendations unless LCDR _____ directs you to do so. Label your report **"FOR OFFICIAL USE ONLY: ATTORNEY WORKPRODUCT,"** and take appropriate measures to safeguard it.

_____

Copy to:
COMSUBGRU TWO

SAMPLE LITIGATION-REPORT INVESTIGATION

FOR OFFICIAL USE ONLY: ATTORNEY WORKPRODUCT

5800
Ser
[Date]

From: LCDR_____, JAGC, USN
LT _____, USN

To: Commanding Officer, Naval Submarine Base New London

Subj: SAME AS SUBJECT ON CONVENING ORDER

Encl: (1) Appointing order and modifications thereto (if any were issued)
(2) Summary of statement of [witness] (Do not include signed statements)
(3) Summary of statement of [witness]
(4) Description of _____ (evidence found at scene of fire)
(5) Photograph of _____ depicting _____

Note: Summarized statement of each witness, observations of the investigator, photographs, diagrams, and suitable reproductions of tangible evidence should be listed and attached as enclosures to the investigative report. The location of all original evidence, such as logs, charts, tangible items, and so forth, and the name and phone number of the official responsible for its safekeeping must be stated in the report, either on each enclosure or in the preliminary statement.

Preliminary Statement

1. Paragraph 1 of a litigation-report must contain information in the form a "preliminary statement." Contents may require continuation in one or more additional paragraphs. In general, see section 0208(c) for required contents. The name and organization of the supervisory judge advocate should be listed and the following language must be included: "This investigation is being conducted and this report is being prepared in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter."

Findings of Fact

1. _____. [Encls ( ), ( )]

2. _____. [Encls ( ), ( )]

3. _____. [Encl ( )]

Note: Findings of fact constitute an investigating officer's description of details of events based on evidence. Findings must be as specific as possible about time, places, and persons involved. Each fact may be made a separate

finding. An investigating officer may determine the most effective presentation for a particular case. Each fact must be supported by the statement of a witness, statement of the investigating officer, documentary evidence, or tangible (real) evidence attached to the investigative report as an enclosure. Each finding of fact should reference each enclosure that supports it.

Opinions and Recommendations are not made by the investigating officer unless directed by the supervisory judge advocate. Before the report is submitted to the convening authority, however, the supervisory judge advocate should normally add appropriate opinions and recommendations and may request the assistance of the investigating officer in drafting them. Each opinion must be supported by findings of fact, and each recommendation must be supported by an opinion.

_____
(INVESTIGATING OFFICER)

_____
(SUPERVISORY JUDGE ADVOCATE)

SAMPLE PRIVACY ACT STATEMENT FORMAT - JAGMAN INVESTIGATION

1. **AUTHORITY:** 44 U.S.C. § 3101; 5 U.S.C. § 301. Specify, if possible, other statutory authority listed below that is peculiarly applicable to the matter under investigation.

Authorities applicable to various investigations:

a. Requirement that enlisted members make up time lost due to misconduct or abuse of drugs or alcohol. 10 U.S.C. § 972.

b. Retirement or separation for physical disability. 10 U.S.C. §§ 1201-1221.

c. Manual for Courts-Martial.

d. Uniform Code of Military Justice. 10 U.S.C. §§ 815, 832, 869, 873, 935, 936, and 938-940.

e. Military Claims Act. 10 U.S.C. § 2733.

f. Foreign Claims Act. 10 U.S.C. §§ 2734, 2734a, 2734b.

g. Emergency payment of claims. 10 U.S.C. § 2736.

h. Non-Scope claims. 10 U.S.C. § 2737.

i. Duties of Secretary of the Navy. 10 U.S.C. § 5013.

j. Duties of the Office Chief of Naval Operations. 10 U.S.C. §§ 5031-5033, 5035-5036.

k. Duties of the Bureaus and Offices of the Department of the Navy and duties of the Judge Advocate General. 10 U.S.C. §§ 5021-5024, 5131-5133, 5135, 5137-38, 5141-5142a, 5148-5150.

l. Duties of the Commandant of the Marine Corps. 10 U.S.C. § 5043.

m. Reservists' disability and death benefits. 10 U.S.C. § 1074.

n. Requirement of exemplary conduct. 10 U.S.C. § 5947.

o. Promotion of accident and occupational safety by Secretary of the Navy. 10 U.S.C. § 7205.

p. Admiralty claims. 10 U.S.C. § 7622-7623.

q. Federal Tort Claims Act. 28 U.S.C. §§ 1346, 2671-2680.

r. Financial liability of accountable officers. 31 U.S.C. §§ 3521, 3527, 3531.

s. Military Personnel and Civilian Employees' Claims Act of 1964. 31 U.S.C. §§ 240-243.

t. Federal Claim Collection Acts. 31 U.S.C. §§ 3521, 3526, 3529, 3701-3702, 3717-3718.

u. Forfeiture of pay for time lost due to incapacitation caused by alcohol or drug use. 37 U.S.C. § 802.

v. Eligibility for certain veterans' benefits. 38 U.S.C. § 105.

w. Postal claims. 39 U.S.C. §§ 406, 2601.

x. Medical Care Recovery Act. 42 U.S.C. §§ 2651-2653.

y. Public Vessels Act. 46 U.S.C. §§ 781-790.

z. Suits in Admiralty Act. 46 U.S.C. §§ 741-752.

aa. Admiralty Extension Act. 46 U.S.C. § 740.

bb. Transportation Safety Act. 49 U.S.C. § 1901.

2. **PRINCIPAL PURPOSE(S)**: The information which will be solicited is intended principally for the following purpose(s):

[Specify each purpose listed below for which the record of the particular investigation could reasonably be used:]

a. Determinations on the status of personnel regarding entitlements to pay during disability, disability benefits, severance pay, retirement pay, increases of pay for longevity, survivor's benefits, involuntary extensions of enlistments, dates of expiration of active obligated service, and accrual of annual leave.

b. Determinations on disciplinary or punitive action.

c. Determinations on liability of personnel for losses of, or damage to, public funds or property.

d. Evaluation of petitions, grievances, and complaints.

e. Adjudication, pursuit, or defense of claims for or against the Government or among private parties.

f. Other determinations, as required, in the course of naval administration.

g. Public information releases.

h. Evaluation of procedures, operations, material, and designs by the Navy and contractors, with a view to improving the efficiency and safety of the Department of the Navy.

3. **ROUTINE USES:** In addition to being used within the Departments of the Navy and Defense for the purpose(s) indicated above, records of investigations are routinely furnished, as appropriate, to the Department of Veterans Affairs for use in determinations concerning entitlement to veterans' and survivors' benefits; to Servicemembers' Group Life Insurance administrators for determinations concerning payment of life insurance proceeds; to the U.S. General Accounting Office for purposes of determinations concerning relief of accountable personnel from liability for losses of public funds and related fiscal matters; and to the Department of Justice for use in litigation involving the Government. Additionally, such investigations are sometimes furnished to agencies of the Department of Justice and to State or local law enforcement and court authorities for use in connection with civilian criminal and civil court proceedings. The records of investigations are provided to agents and authorized representatives of persons involved in the incident, for use in legal or administrative matters. The records are provided to contractors for use in connection with settlement, adjudication, or defense of claims by or against the Government, and for use in design and evaluation of products, services, and systems. The records are also furnished to agencies of the Federal, State, or local law enforcement authorities, court authorities, administrative authorities, and regulatory authorities, for use in connection with civilian and military criminal, civil, administrative, and regulatory proceedings and actions.

4. **MANDATORY/VOLUNTARY DISCLOSURE - CONSEQUENCES OF REFUSING TO DISCLOSE:**

a. Where disclosure is voluntary, as usually is the case, use one of the following statements, or a combination of the following statements, as applicable:

(1) Where an individual is a subject of an investigation for purpose 2a or 2b, above: "Disclosure is voluntary. You are advised that you are initially presumed to be entitled to have the [personnel determinations] [disciplinary determinations] in paragraph 2, above, resolved in your favor, but the final determination will be based on all the evidence in the investigative record. If you do not provide the requested information, you will be entitled to a favorable determination if the record does not contain sufficient evidence to overcome the presumption in your favor. If the completed record does contain sufficient evidence to overcome the presumption in your favor, however, your election not to provide the requested information possibly could prevent the investigation from obtaining evidence, which may be needed to support a favorable determination."

(2) Where an individual is a subject of an investigation for purpose 2c, above: "Disclosure is voluntary, and if you do not provide the requested information, any determination as to whether you should be held liable for repayment of the Government's loss would be based on the other evidence in the investigative record."

(3) Where the individual is a claimant or potential claimant in an investigation for purpose 2e, above: "Disclosure is voluntary, but refusal to disclose the requested information could prevent the investigation from

obtaining sufficient information to substantiate any claim which you have made or may make against the Government as a result of the incident under investigation."

(4) Where the individual was treated at Government expense for injuries caused by third parties in connection with a matter being investigated for purpose 2e, above: "Disclosure is voluntary, but refusal to disclose the requested information could result in a requirement for you to assign to the Government your medical care claims against third parties in connection with the incident, or authorize withholding of the records of your treatment in a Naval medical facilities."

(5) In any other case: "Disclosure is voluntary, and if you do not provide the requested information, any determinations or evaluations made as a result of the investigation will be made on the basis of the evidence that is contained in the investigative record."

b. In the unusual situation where a specific statute, regulation, or lawful order of competent authority requires an individual to disclose particular information for the Government's benefit in furtherance of a Government interest, policy, or objective, the following statement should be used: "Disclosure of (specify the particular relevant information required) is mandatory under (cite the statute, regulation, or order), and refusal to disclose that information will subject you to possible disciplinary or criminal proceedings. Disclosure of any other information requested is voluntary, (and there will be no adverse effects if you elect not to disclose it) (but election not to disclose the information could ... ."

SAMPLE PRIVACY ACT RECORD OF DISCLOSURE

THE ATTACHED RECORD CONTAINS PERSONAL INFORMATION CONCERNING AN INDIVIDUAL. USE AND DISCLOSURE THEREOF IS GOVERNED BY SECNAVINST 5211.5 (SERIES). UNAUTHORIZED DISCLOSURE OF PERSONAL INFORMATION FROM THIS RECORD COULD SUBJECT THE DISCLOSER TO CRIMINAL PENALTIES.

INSTRUCTIONS: This sheet is to remain affixed as a permanent part of the record described below. An appropriate entry must be made below each time the record or any information from the record is viewed by, or furnished to, any person or agency, including the subject of the record, except: (1) disclosures to DoD personnel having a need to know in the performance of their official duties and (2) disclosure of items listed in subparagraph 7a(2) of SECNAVINST 5211.5 (series).

_____

TITLE AND DESCRIPTION OF RECORD

_____

NAME AND ADDRESS OF PERSON OR AGENCY TO WHOM DISCLOSED (AND SIGNATURE IF DISCLOSURE IS MADE IN PERSON)

_____

DATE PURPOSE OF DISCLOSURE

_____

_____

_____

_____

IMPORTANT - READ AND COMPLY WITH THIS PAGE

SAMPLE WARNING ADVISEMENT ABOUT STATEMENTS REGARDING ORIGIN OF DISEASE OR INJURY

COMPLIANCE WITH SECTION 0212 OF THE JAGMAN

I, _____, have been advised that:

-questions have arisen concerning whether or not my injury/disease, sustained or discovered on _____ 20_____, was incurred in the line of duty or as a result of my own misconduct;

-in the event such injury/disease is determined to have been incurred not in the line of duty or as a result of my own misconduct, I will be required to serve for an additional period beyond my present enlistment to make up for the duty time lost;

-lost duty time will not count as creditable service for pay entitlement purposes;

-I may be required to forfeit some pay where absence from duty in excess of one day immediately follows intemperate use of liquor or habit-forming drugs;

-if I am permanently disabled and that disability is determined to have been the result of misconduct or was incurred not in the line of duty, I may be barred from receiving disability pay or allowances, as well as veterans' benefits;

-I may <u>not</u> be required to give a statement relating to the origin, incidence, or aggravation of any disease/injury that I may have.

I do/do not desire to submit a statement.

_____ _____

Date Signature

_____

Witness Signature

_____

Witness Name/Rate/Grade/Unit/Telephone Number

LINE OF DUTY/MISCONDUCT INVESTIGATIONS

The following is a list of matters that should be included, as applicable, in any report of an investigation convened to inquire into and make recommendations concerning misconduct and line of duty under the provisions of this chapter.

a. Identifying information. The complete name, grade or title, service or occupation, and station or residence of all persons, military and civilian, killed or injured incident to the event under investigation; see section 0215 for advice required to be given by the Privacy Act if social security numbers are requested.

b. Facts. All facts leading up to and connected with an injury, disease, or death.

c. Records. Military or civilian police accident reports, pertinent hospitalization or clinical records, death certificates, autopsy reports, records of coroners' inquests or medical examiners' reports, and pathological, histological, and toxicological studies. If originals cannot be included, then the report shall state where the originals are located and the name and telephone number of the official responsible for their safekeeping.

d. Site of incident. Complete information concerning the site and terrain where the incident in question occurred as well as photographs, videotapes, maps, charts, diagrams, or other exhibits that may be helpful to a complete understanding of the incident. When photographs are included as part of the investigation, the following information should be included on the reverse side: the hour and date they were taken; a brief description of the location or area photographed; the full name and rank or rate of the photographer; and full names and addresses of persons present when the photographs were taken. If available, the photographer should be asked to provide details surrounding the taking of the photographs such as type of camera, distance from object, and so forth. Similar information should be on a label affixed to any videotape included in the investigation.

e. Duty status. Include all pertinent facts with respect to the duty, leave, liberty, or unauthorized absence status of an individual at the time of the incident.

f. Reservists. When the person involved is a member of a Reserve component of the Navy or Marine Corps, complete information as to the member's status in relation to extended active duty, active duty for training, or inactive duty training, or travel to and from such duty, at the time of the incident must be stated. An investigation involving Reserve personnel should include:

(1) hour the reservist began travel directly to or from duty or training;

(2) hour the reservist was scheduled to arrive for, or at which he ceased performing, that duty or training;

(3) method of travel used;

(4) actual itinerary and authorized itinerary;

(5) authorized mode of travel and authorized travel time;

(6) manner in which travel was performed; and

(7) place, time, and circumstances of injury or death.

g. Injuries. Complete information as to the nature and extent of all injuries to Naval personnel and the place and extent of any hospitalization resulting therefrom. Include costs when civilian facilities are used. Also include the amount of "lost" time.

h. Impairment. Refer to section 0219 regarding applicable presumption. When relevant, evidence regarding the state of intoxication and the extent of impairment of the physical or mental faculties of any person involved and connected with the incident. Evidence as to the individual's general appearance and behavior, rationality of speech, coordination of muscular effort, and all other facts, observations, and opinions of others bearing on the question of actual impairment shall be obtained and recorded. Efforts shall be made to determine the quantity and nature of the intoxicating agent used and the period of time over which used by the person. Results of any blood, breath, urine, or tissue tests for the intoxicating agent should also be obtained and submitted as exhibits.

i. Mental competence. When material, evidence regarding the mental competence or impairment of the deceased or injured person. In all cases of suicide or attempted suicide, evidence bearing on the mental condition of the deceased or injured person shall be obtained. This will include all available evidence as to social background, actions, and moods immediately prior to the suicide or the suicide attempt, any troubles that might have motivated the incident, and any relevant medical or counseling information.

j. Privacy Act. Document that each enclosure containing personal information solicited from an individual for inclusion in a record system retrievable by name or personal identifier complies with the Privacy Act; see section 0207.

k. Warnings about injury or disease. Document that statements solicited from an injured member respecting the incidence or aggravation of his disease or injury are in compliance with section 0212.

SAMPLE LINE OF DUTY HEALTH OR DENTAL RECORD ENTRY

The following are sample medical or dental record entries regarding line of duty/misconduct determinations:

Example 1: Member fell off ladder while securing line during sea and anchor evolution on (*specify date*) aboard (*specify vessel*). Member sustained injuries to left rotator cuff.

RECORD ENTRY: Member fell off ladder during sea and anchor evolution on (*specify date*) aboard (*specify vessel*). Member sustained the following injuries: (*document injuries*). Injuries were incurred in the line of duty and not as a result of the member's own misconduct.

_____ _____

Medical/Dental Official

Commanding Officer/Command Representative

Concur _____ Non-Concur _____

Example 2: Member was playing volleyball while in a liberty status in Hawaii (homeport) on (*specify date*). Member sustained injuries to left rotator cuff.

RECORD ENTRY: Member was playing volleyball while in a liberty status on (*specify date*) at (*specify location*). Member sustained the following injuries: (*document injuries*). Injuries were incurred in the line of duty and not as a result of the member's own misconduct.

_____ _____

Medical/Dental Official

Commanding Officer/Command Representative

Concur _____ Non-Concur _____

DUAL PURPOSE INVESTIGATIONS

a. Generally, when conducting an investigation to determine the facts and circumstances surrounding an incident that will be used primarily to defend against a civil lawsuit or to pursue an affirmative claim against a third party for damage to government property, a litigation-report investigation or an Admiralty Letter Report will be conducted to ensure that the DON's legal interests are protected (see Chapter XII of this Manual for discussion on admiralty investigations). However, when the incident being investigated involves large scale property damage, loss of life, or raises issues concerning the management of Naval activities, there may be sound policy reasons, such as openness and transparency of process or results, that warrant the convening of a command investigation or court or board of inquiry. In such cases, a "dual-purpose" investigation may be convened that includes the information necessary for claims adjudication.

b. If a "dual-purpose" investigation is contemplated, the commander or the cognizant judge advocate should consult with Code 15 (or Code 11 for admiralty incidents) before making a decision on the type of investigation to be conducted.

c. The dual-purpose investigation will be conducted in accordance with the procedures for the type of administrative investigation selected by the Convening Authority (see section 0203). For example, if a command investigation is convened, the procedures in section 0209 will apply. The investigating officer should review the guidance contained in this appendix concerning specific types of incidents, as well as the guidance on claims contained in Appendix A-2-m.

d. The administrative investigation will be reviewed and endorsed in accordance with the guidelines for that particular investigation. However, a copy of the report and CA's endorsement shall be forwarded to Office of the Judge Advocate General (Code 15), Tort Claims Unit, 9620 Maryland Avenue, Suite 100, Norfolk, VA 23511-2989, as soon as practicable, with endorsements to follow when completed.

CLAIMS FOR OR AGAINST THE GOVERNMENT

Investigations into incidents which may result in claims must answer the following fundamental questions:

a. The identity of those involved, including name, rank/grade, unit, age, address (home and work), telephone number, occupation, and how they were involved, e.g., deceased as a result of the incident, in which case, identifying information for the next-of-kin or legal representative must be provided, as well, injured party, owner of property damaged, military member whose acts or omissions are alleged to have caused the harm, or witness. The findings of fact should provide information on how those involved may be located. Moreover, every attempt should be made to obtain a permanent address that will be accurate for at least 5 years after the accident. Indicate for each individual their status as military (indicate Regular or Reserve, on active duty, TAD, leave, liberty, and so forth at the time of the incident, after consulting sections 0205 and 0224 with regard to Reserves) or civilian (indicate whether they are a Federal employee or are a personal services contractor employed by an independent contractor). If maintenance or training is involved, identify the individual responsible for the maintenance or training at issue;

b. Date, time, and place of incident, including a full description of location, terrain, weather, light conditions, obstructions, and photographs of the site;

c. Nature of the claim, e.g., wrongful death, personal injuries, property damage;

d. A factual description of what happened, how the parties were injured, what equipment was being used, who was operating the equipment, who was supervising or should have been supervising, whether equipment failed or was operated incorrectly, if equipment failure, the maintenance history of the equipment, if the injury occurred on Government property, the condition of the property, who was responsible for the property's upkeep, the authority for the injured party to be present on Government property;

e. The nature and extent of personal injuries, if any:

f. Amount of property damage, including photographs before and after, if possible, and estimates or bills of repair and receipts, whether any pre-existing damage existed, original purchase price, date of purchase, salvage value of property, if any;

g. Extent of damage to Government property, estimates or bills of repair and receipts, original purchase price, date of purchase, and salvage value of property, if any. If no damage, so state;

h. Whether the claimant has insurance for this type of damage or injury, the insurance company, policy number, policy provisions relevant to this claim or incident, extent of coverage, limits on liability, whether a claim has been or will be made against the insurance carrier, the status of any such claim;

i. Names and addresses of other owners, if claimant is not the sole owner of the property;

j. Existence of any police or other investigative report, name and address of investigating officer and unit, custodian of original investigation, provide a copy of any police report as an enclosure;

k. Whether civilian or military criminal charges were filed, the jurisdiction in which they were filed, and the status or final disposition of those charges;

l. An opinion regarding the cause(s) of the incident. If the facts are insufficient to form an opinion regarding the cause(s), indicate those factors which significantly contributed to the incident; if not a litigation-report investigation, consult with the cognizant judge advocate before inclusion;

m. An opinion whether a claim is likely to be filed, the amount likely to be claimed, and the names and addresses of any potential claimants and their legal representatives, if any; and

n. Whether a claim should be filed by the Government for personal injuries to its employees or property damage.

AVIATION MISHAPS

The following contains specific guidance when conducting an administrative investigation into aviation mishaps.

a. General. Aviation mishaps are investigated by one or more investigative bodies under various instructions and legal requirements.

(1) Safety investigation reports. For the sole purpose of safety and mishap prevention, the Chief of Naval Operations has issued special instructions for the conduct, analysis, and review of investigations of aviation mishaps in OPNAVINST 3750.6 (series). These investigations are known as "aviation mishap safety investigations" and are conducted by aviation mishap boards. The results of those investigations are documented in Safety Investigation Reports (SIRs).

(2) JAGMAN investigations. When an aviation mishap results in death or serious injury, extensive damage to Government property, or the possibility of a claim exists for or against the Government, an administrative investigation shall be ordered to determine the cause and responsibility for the mishap, nature and extent of any injuries, description of all damage to property, and any attendant circumstances. In most cases, a claim for or against the Government is likely. If the incident results in personal injury, death or property damage to a third party, and there are no active duty deaths involved, a litigation-report investigation should be conducted. In all investigations concerning potential claims for or against the Government, a copy of the investigation shall be forwarded to the Office of the Judge Advocate General (Code 15), Tort Claims Unit, 9620 Maryland Avenue, Suite 100, Norfolk, VA 23511-2989, upon completion of the CA's endorsement. Damage or injury to non-Federal property or personnel, caused by aircraft that originated from U.S. vessels is likely to involve Admiralty law aspects; consult JAGMAN Chapter XII and OJAG (Code 11). These JAGMAN investigations are in addition to, and separate from, the aviation mishap safety investigations conducted under the authority of OPNAVINST 3750.6 (series).

(3) Combat losses or damage. A JAGMAN investigation is not required for aircraft losses incident to direct enemy action (DEA). DEA occurs when one or more of the following three conditions exists: (1) damage or loss of an aircraft, or injury on the ground, or in the air, by enemy action, fire, or sabotage; (2) damage or loss of an aircraft, or injury due to evasive action taken to avoid enemy fire; (3) an aircraft fails to return from a combat mission and there is no evidence that an operational (non DEA) mishap occurred. DEA events may occur outside of an officially designated combat zone. Notwithstanding, a JAGMAN investigation is required when an aviation mishap occurs in the course of a combat operation but not under hostile circumstances, such as an aircraft crash while taking off, or returning to, an airfield or aircraft carrier. JAGMAN investigations are not precluded when deemed appropriate by operational or administrative commanders. CAs may convene investigations to gather, evaluate, or verify the facts of a combat engagement when enemy action has resulted in the loss or damage to Naval aircraft, or to determine whether combat losses were sustained by unintentional damage to friendly forces.

(4) Unintentional damage to friendly forces. "Unintentional damage to friendly forces," "friendly fire," "blue on blue," and "harm to friendly forces" are terms used to describe a circumstance in which members of a U.S. or friendly military force are mistakenly killed or wounded, or equipment is damaged by U.S. or allied forces actively engaged with an enemy or a presumed enemy. An aviation mishap safety investigation shall be conducted when a Navy or Marine Corps aircraft is involved in unintentional damage to friendly forces.

(5) This subsection relates to JAGMAN investigations only and does not affect any other reporting requirement, such as casualty and damage reports required under Article 0831, U.S. Navy Regulations (1990).

b. Relationship between JAGMAN investigations and aviation mishap safety investigations

(1) A JAGMAN investigation of an aviation mishap is a collateral investigation, as referred to in the joint directive issued under OPNAVINST 3750.16 (series), which implements section 702 of the Federal Aviation Act of 1958, 49 U.S.C. § 1442. OPNAVINST 3750.16 (series) provides specific direction concerning coordination of investigations of aviation mishaps between military authorities and the National Transportation Safety Board (NTSB) and the Federal Aviation Administration (FAA). Due to the separate purposes and procedures of JAGMAN investigations, military mishap investigations, and FAA or NTSB investigations, there are specific limitations and restrictions regarding the integration of these investigations, use of evidence obtained, including witness statements, and the use and disclosure of the respective reports. OPNAVINST 3750.16 (series), OPNAVINST 3750.6 (series) and MCO 5100.29 (series) provide detailed guidance regarding the restrictions on the use of these investigations and the permissible extent of integration between JAGMAN investigations and aviation mishap safety investigations. The relationship between the JAGMAN investigation and aviation mishap safety investigations should be thoroughly understood by all persons involved with investigating any aircraft accident or mishap.

(2) Statements gathered in the course of aviation mishap safety investigations may be privileged. This means that when the source of that information was given a promise of confidentiality, that statement, made before the aviation mishap board, cannot be used for any purpose other than mishap prevention. OPNAVINST 3750.6 (series) also extends the concept of privilege to those conducting the aircraft mishap safety investigation. This means that the opinions, analyses, and conclusions of the aviation mishap board, the privileged portions of the safety investigation report, and any subsequent endorsements cannot be used for purposes other than mishap prevention. In conducting the JAGMAN investigation, care shall be exercised to respect the privileged character of the aviation mishap safety investigation. No witness shall be questioned regarding information provided to the aviation mishap board under a promise of confidentiality.

(3) Although membership on an aviation mishap board does not bar an individual from being a witness for a JAGMAN investigation of the same incident, such dual participation is undesirable and should be avoided due to

the possibility of undermining the concept of privilege crucial to the conduct of safety investigations.

(4) Investigating officers of the aviation mishap safety investigation and JAGMAN investigation shall have access to all real evidence and have separate opportunities to question and obtain statements from all witnesses. JAGMAN investigating officers shall not sit in on interviews conducted by the aviation mishap board.

(5) If a possibility exists that witnesses will testify before both investigative bodies, the JAGMAN investigating officers shall explain to such witnesses the reasons for the apparent duplication of effort. This is particularly important with non-military witnesses. The explanation shall cover:

(a) the different objectives of the two investigations;

(b) the reasons why procedures vary;

(c) the need to preserve the privileged nature of the aviation mishap safety investigation; and

(d) the fact that since neither command nor administrative action may alter the privileged character of statements provided to the aviation mishap board, and such statements will not be available to the JAGMAN investigation from any official source.

(6) Requests for preservation of aircraft wreckage following a crash. Any request for the preservation of aircraft wreckage will be forwarded to the controlling command or individual (e.g., Naval Safety Center, squadron, mishap investigation board senior member). Copies of the forwarding letter and the original request with all attachments shall be forwarded separately to OJAG (Code 15).

c. Class A aviation mishap JAGMAN investigations

(1) Designation of Class A Aviation Mishaps. As soon as practical, but in no case more than 60 days after the occurrence of an aviation mishap involving an aircraft or unmanned aerial vehicle of the DON, the authority responsible for convening the investigation under this Manual shall determine whether the mishap is a Class A mishap. See Appendix A-2-a for the definition of "Class A aviation mishap." If the mishap meets the criteria for a Class A aviation mishap, the convening order for the investigation shall contain the following: "This [Command Investigation] [Litigation-Report Investigation] [Board of Inquiry] [Court of Inquiry] is convened to investigate the circumstances surrounding a Class A aviation mishap in compliance with 10 U.S.C. § 2255."

(2) Member Qualifications for Class A Aviation Mishap JAGMAN Investigations. Federal law establishes specific qualifications for members conducting Class A aviation mishap investigations. These qualifications apply to any Class A aviation mishap investigation under sections 0209, 0210, or 0211 of this Manual, convened on or after March 24, 1997; 10 U.S.C. § 2255.

(a) Multiple Member Investigations. A multiple member Class A aviation mishap JAGMAN investigation shall have:

1. a majority of its members selected from units other than the mishap unit or a unit subordinate to the mishap unit, as defined in Appendix A-2-a; and

2. at least one member who is a member of the armed forces or an officer or employee of the DoD who possesses knowledge and expertise relevant to aviation mishap investigations, for example, a graduate of a Naval Aviation Safety Officer or Command course, or previous service on an aviation mishap safety or aviation mishap JAGMAN investigation, or previous assignment as a squadron Aviation Safety Officer.

(b) Single Member Investigations. A single member Class A aviation mishap JAGMAN investigation shall be:

1. selected from a unit other than the mishap unit or a unit subordinate to the mishap unit, as defined in Appendix A-2-a; and

2. directed to consult with a member of the armed forces or an officer or employee of the DoD who possesses knowledge and expertise relevant to aviation mishap investigations, for example, a graduate of a Naval Aviation Safety Officer or Command course, or previous service on an aviation mishap safety or aviation mishap JAGMAN investigation, or previous assignment as a squadron Aviation Safety Officer.

(c) Exceptions to Statutory Qualifications

1. Waiver Criteria. The Secretary of the Navy may waive the statutory qualifications if the Secretary determines:

a. It is not practicable to meet the requirement because of

(1) the remote location of the aviation mishap;

(2) an urgent need to promptly begin investigating; or

(3) a lack of available personnel outside of the mishap unit who have adequate knowledge and expertise regarding the type of aircraft involved in the mishap; and

b. The objectivity and independence of the aviation mishap investigation will not be compromised.

2. Procedure for Obtaining a Waiver. Requests for a waiver shall be addressed to the Secretary of the Navy, via the chain of command, and contain a detailed explanation of the particular criteria listed in subsection (a) justifying the need for a waiver.

3. Congressional Notification. The Secretary of the Navy must notify Congress of a waiver granted under this section and the reasons.

d. Required facts and opinions. The scope of the investigation function

varies with the nature and circumstances of the particular incident. The report of the investigation should include, but not be limited to, data relevant to the purpose of the investigation on the following matters:

(1) Identity of the pilot(s), co-pilot(s)/naval flight officer(s) (NFO), air crew and any passengers, including the background, history, training, and experience of the pilot, co-pilot/NFO and air crew and their familiarity with the type of aircraft involved.

(2) The military or civilian status of all personnel aboard, e.g., Regular, Reserve, or retired; active duty, inactive duty, inactive duty training; Temporary Additional Duty (TAD), Temporary Duty (TDY), leave, liberty; and so forth.

(3) Type, model, series and bureau number of the aircraft involved.

(4) Identification of the squadron, detachment, or unit authorizing the flight and the official who authorized the flight.

(5) If a privately-owned or rented aircraft was involved, identify the owner, authorization for the flight, existence of private insurance, and extent of coverage.

(6) The identity of all individuals who were killed, injured, or who suffered property damage as a result of the mishap, including name, age, address (home and work), telephone number, occupation, and a complete description of how their injuries occurred; see Part F for special considerations in death cases.

(7) Sociological, psychological, and human factors related to the accident, including potential stress factors, fatigue, use of medication, or intoxication.

(8) Type, duration, and purpose of the flight, briefing of the pilot, and other pertinent information regarding the particular flight, including the use of night vision goggles or other mission-specific factors relevant to aircraft or air crew equipment or performance.

(9) Weather conditions throughout the flight.

(10) Preflight history of the aircraft, compliance or noncompliance with pertinent technical directives, including flight hours since the last overhaul, discrepancies noted on recent "A sheets" (OPNAV Form 3760/2, OPNAVINST 3710.7 (series)), VIDS/MAF forms (OPNAV 4790/60, COMNAVAIRINST 4790.2A), and flight hours since the last intermediate check.

(11) Description of flight path and maneuvers of the aircraft during flight, including manner of descent and impact.

(12) Positions of external control surfaces, landing gear, canopy, and other relevant parts of the aircraft, during the flight.

(13) Presence, condition, and use of safety, communication, escape,

and survival equipment.

(14) Post-mishap assessment of the aircraft and detailed description of all damage to the aircraft, including wreckage diagrams, disassembly and inspection reports, wreckage photographs, and data on engine, fuselage, and control surfaces.

(15) Assessment of the scene of the mishap including its precise location, a description of the terrain, and a complete listing and cost of damaged or destroyed Government and non-Government property.

(16) Description of rescue operations employed, their effectiveness, and any difficulties encountered.

(17) Instructions in effect at the time of the accident concerning procedures relating to the particular flight, including applicable local and regional flight rules governing the flight and copies of air charts in effect and in use.

(18) Performance data on the aircraft in question under prevailing wind, weather, and temperature.

(19) In the case of deaths caused by the mishap, the precise medical cause of death, substantiated by medical records, autopsy, and death certificate.

(20) Cause, nature, and extent of any injuries suffered as a result of the mishap as substantiated by medical records, including line of duty/misconduct determinations for injuries to Naval personnel, if required.

(21) Involvement of other aircraft, if any.

(22) Roles of supervisory, support, and controlling personnel.

(23) When the evidence concerning the mishap is sufficient to do so, an opinion or opinions as to the cause or causes of the mishap.

(24) When the evidence is not sufficient to form an opinion or opinions as to the cause or causes of the mishap, a description of those factors, if any, which, in the opinion of the investigator(s), substantially contributed to the mishap.

e. Release. In the case of aviation mishaps investigated under the provisions of this Manual, only the Secretary of the Navy may release unclassified tapes, scientific reports, and other factual information pertinent to an aircraft accident investigation before the release of the final accident report, per 10 U.S.C. § 2254. Requests for the release of evidence, including unclassified tapes, scientific reports, and other factual information, in aircraft investigations shall be forwarded expeditiously via the chain-of-command and OJAG (Code 15) to the Secretary of the Navy.

ACCIDENTS ABOARD SHIPS OR SUBMARINES (GENERAL)

The following contains general guidance when conducting an administrative investigation into accidents aboard ships or submarines. See subsequent sections for specific types of incidents.

a. General

(1) Command investigations are normally sufficient to document most shipboard accidents that require more than a preliminary inquiry. Major incidents involving greater losses of life, personal injuries, or property damage will normally be investigated by a court of inquiry. Accidents aboard ships, particularly those involving damage caused by other ships, watercraft, or cargo handling equipment, or injuries to dock workers, shipyard employees, longshoremen, or ship's visitors are likely to involve Admiralty Law aspects and should be the subject of a Admiralty Letter Report. Consult Chapter XII of this Manual and OJAG (Code 11), the cognizant judge advocate, or local RLSO.

(2) Mishap investigation reports. For the sole purpose of safety and mishap prevention, the Chief of Naval Operations has issued special instructions in OPNAVINST 5102.1 (series) for the conduct, analysis, and review of investigations of mishaps involving diving and those that occur aboard ships or submarines. These investigations are conducted by safety investigation boards (SIBs) appointed for that purpose and the results are documented in safety investigation reports (SIREPs).

(3) JAGMAN investigations. When an afloat mishap results in death or serious injury, extensive damage to Government property, or the possibility exists that a claim may be filed by or against the Government, a JAGMAN investigation shall be appointed to investigate and determine the cause and responsibility for the mishap, nature and extent of any injuries, description of all damage to property, and any and all attendant circumstances. These JAGMAN investigations are in addition to, and separate from, the SIBs appointed under the provisions of OPNAVINST 5102.1 (series).

(4) Combat losses or damage. A JAGMAN investigation is not required for damages to property or injuries to personnel that are incident to direct enemy action. Damage to property or injuries to personnel are incident to enemy action when the mishap results from hostile action or an unknown cause in a hostile area. Nonetheless, a JAGMAN investigation is required when the damage or injury occurs in the course of combat operations which are not subject to hostile circumstances, e.g., a collision at sea which occurs when the vessels involved are not engaged in action with enemy forces. Commanders may, in their discretion, convene JAGMAN investigations to gather, evaluate, or verify the facts of a combat engagement when enemy action has resulted in the loss or damage to naval ships or submarines, or to determine whether combat losses were sustained by "friendly fire." This subsection relates only to JAGMAN investigations and does not affect any other reporting requirements, such as reports required under article 0831, U.S. Navy Regulations (1990).

b. Relationship between JAGMAN investigations and safety investigations

(1) The JAGMAN investigation of an afloat mishap is a collateral investigation and is conducted separately and independently from the afloat safety investigation. Due to the separate purposes and procedures of each of these investigations, there are specific limitations and restrictions regarding the integration of JAGMAN investigations with other safety investigations, use of the evidence gathered, including witness statements, by these other investigations, and use and disclosure of those reports. OPNAVINST 5102.1 (series) provides detailed guidance regarding restrictions on the use of these investigations and the permissible extent of integration between the JAGMAN investigation and safety investigations. The relationship between a JAGMAN investigation and a safety investigation should be thoroughly understood by all persons involved in investigating any afloat mishap.

(2) Statements gathered in the course of an afloat safety investigation may be protected from release by the safety privilege, meaning that when the source of that information has been given a promise of confidentiality, that statement, made before the SIB cannot be used for any purpose other than mishap prevention. OPNAVINST 5102.1 (series) also extends the concept of privilege to those individuals appointed to conduct the afloat safety investigation, meaning that their opinions, analyses, and conclusions cannot be used for purposes other than mishap prevention (e.g., identifying hazards and mishap causes). In conducting a JAGMAN investigation, care shall be exercised to respect the privileged character of the afloat safety investigation. No witness shall be questioned as to participation in an afloat safety investigation. Although safety investigations do not include witness statements from the JAGMAN investigation, the SIB can summarize the witness statements for inclusion with their report.

(3) Although membership on an afloat SIB does not bar an individual from being a witness for a JAGMAN investigation of the same incident, participation of mishap board members as witnesses for the JAGMAN investigation should be avoided due to the possibility of undermining the promise of confidentiality crucial to the conduct of safety investigations.

(4) Members of a SIB and JAGMAN investigating officers shall have access to all real evidence and have separate opportunities to question and obtain statements from all witnesses. JAGMAN investigating officers shall not sit in on interviews conducted by the SIB. Safety investigation reports and witness statements to safety investigators shall not be included in any JAGMAN investigations.

(5) If a possibility exists that a witness or witnesses will provide information to the SIB and to the JAGMAN investigating officers, the JAGMAN investigating officers shall explain to such witnesses why the apparent duplication of effort is necessary. The explanation shall cover:

(a) the different objectives of the two investigations;

(b) the reasons why the procedures for each investigation vary;

(c) the necessity for respecting and preserving the privileged character of the safety investigating board SIB; and

(d) the fact that statements obtained by the SIB will not be available to the JAGMAN investigating officers from any official source because neither command nor administrative action may alter the privileged character of the statements provided to the SIB.

STRANDING OF A SHIP OF THE NAVY

The following contains specific guidance when conducting an administrative investigation into the stranding of a ship.

a. General. An investigation involving the stranding of a ship shall include all pertinent logs, charts, orders, regulations, condition of the sea and weather, rate and direction of the tidal stream, time of the tide, and other factors involving natural elements. Additionally, any mechanical or electronic deficiency or failure in the ship pertinent to the stranding shall be investigated and reported. The investigation shall ascertain the cause and responsibility for the stranding and resulting damage. The stranding of a Navy ship, unless only insignificant damage results, is usually a major incident. A court of inquiry will normally be convened unless the preliminary inquiry indicates that a command investigation will be sufficient to establish the facts. These incidents may also involve aspects of admiralty law; consult Chapter XII of this Manual and OJAG (Code 11), the cognizant judge advocate, or local RLSO.

b. Determination of ship's position. The investigation shall determine whether the proper chart provided by DON was used, whether the position of the ship at the last favorable opportunity to avoid the casualty was accurately determined and, if not, when it was last accurately ascertained. To enable the investigative body to fix the true position of the ship at the time of her grounding, an officer not attached to the ship involved may be directed to ascertain the position of the ship from the data available.

c. Navigation in pilot waters. If land was sighted and the distance estimated before the ship struck, steps taken during the time land was in sight to correct the ship's course and speed will be reported. The extent to which applicable instructions, e.g., those contained in Coast Pilot or Sailing Directions, were observed should be noted.

d. Other reports. Strandings are also reported under the separate procedures in Chapter 3 of OPNAVINST 5102.1 (series).

COLLISION AND ALLISION INCIDENTS

The following contains specific guidance when conducting an administrative investigation into a ship collision or allision.

a. General. All vessel collisions and allisions, a vessel and fixed object, are admiralty incidents. Consult Chapter XII of this Manual and OJAG (Code 11) for required investigations and guidance.

b. Other reports. Collisions and allisions are also reported under the separate provisions in Chapter 3 of OPNAVINST 5102.1 (series).

ACCIDENTAL OR INTENTIONAL FLOODING OF A SHIP

The following contains specific guidance when conducting an administrative investigation into the accidental or intentional flooding of a ship.

a. General. If the investigated mishap is a flooding, the first determination to be made is whether the flooding is significant enough to document. Generally, flooding is considered significant when one or more of the followings conditions exist: damage is caused to major/vital equipment; origin of the flooding is suspicious; flooding delays deployment, causes significant change in operating schedule, or degrades mission capability; Naval personnel were responsible for the flooding; defective naval design, specifications, or installation may have caused the flooding; or unsound operating doctrine or procedures caused or contributed to the flooding. Command investigations are normally used to document flooding.

b. Required facts and opinions. The following information shall be included in the report of investigation into flooding:

(1) Date, time, and location of the flooding by compartment name or number;

(2) Source and type of flooding, e.g., salt or fresh water, oil, JP-5;

(3) How the flooding was detected;

(4) Type of de-watering equipment that was used and its effectiveness;

(5) Draft forward and aft and list of ship, before and after damage. Drafts may have to be estimated from drafts recorded on departure from last port and on arrival in port after damage;

(6) General distribution and amount of variable weights, particularly fuel and water, before damage;

(7) Compartments flooded and the rate of flooding for each one, including time when:

(a) flooding started;

(b) flooding detected;

(c) time General Quarters sounded, or duty emergency repair party was called away;

(d) flooding was stopped or brought under control; and

(e) de-watering was completed;

(8) Description of the physical effects of the flooding and the extent of damage to hull, machinery, equipment, electronics, supplies, cargo, etc., including photographs, or diagrams to document the range and extent of damage;

(9) Date of last inspection of the involved spaces with any noted discrepancies;

(10) Ship's location at sea or in port;

(11) Ship's condition of readiness;

(12) Effect on the ship's ability to carry out its mission;

(13) Summary of the steps taken to control damage and to correct the list, trim, or depth;

(14) Performance of installations such as flood control, automatic door, and hatch closures;

(15) Estimated dollar amount of damage or repairs required, including damage to personal property which may result in a claim against the Government;

(16) Opinion on the probable cause of the flooding, including the cause of progressive flooding of other compartments, e.g., material condition of readiness violated, failure of structure, deficiency of structure; and

(17) Opinion on whether the occurrence of a similar type of flooding is possible on another ship.

c. Other reports. Accidental flooding of a ship is also reported under the separate provisions in Chapter 3 of OPNAVINST 5102.1 (series).

FIRES

The following contains specific guidance when conducting an administrative investigation into a fire.

a. General. If the investigated mishap is a fire of unknown origin affecting DON personnel or property under Navy/Marine Corps control, any investigation shall be coordinated with NCIS; see sections 0201(d) and 0225(c). The next, determination to be made is whether the fire is significant enough to document. Generally, a fire is considered significant when one or more of the following conditions exist: damage is caused to major/vital equipment; origin of the fire is suspicious; fire delays deployments, causes significant change in operating schedule, or degradation of mission capability; Naval personnel were responsible for the fire; defective naval design, specifications, or installation may have caused the fire; or unsound operating doctrine or procedures caused or contributed to the fire. Command investigations are normally used to document fires, unless the damage to property or loss of life involved rises to the level of a major incident. Fires in government quarters provided in kind by the government should normally be investigated by a litigation-report investigation since claims are usually involved.

b. Required facts and opinions. The following information shall be included in the report of investigation of fires:

(1) Date, time, and location of the fire, use compartment name or number if applicable;

(2) Class of fire;

(3) Method by which fire was detected;

(4) Time when:

(a) fire started (detected);

(b) fire was reported;

(c) General Quarters sounded, or fire party was called away;

(d) fire located;

(e) fire-fighting started;

(f) reflash watch was set;

(g) boundaries were set; and

(h) fire was extinguished.

(5) Type of fire-fighting organization that was used, e.g., duty section fire party, Condition One fire and repair party, base firefighters, civilian fire department;

(6) Number of personnel who responded to the fire, their level of fire-fighting and damage control training;

(7) Effectiveness of fire/repair locker organization, maintenance of organization charts, and leadership;

(8) Effectiveness of installed damage control systems and equipment;

(9) Type of extinguishing agent used and its effectiveness;

(10) Availability and operability of extinguishing equipment;

(11) System of communications that was used and any difficulties in communication;

(12) Description of the physical effects of the fire; radii of losses and damage with respect to fire, smoke, and water; extent of the spread of the fire, including maps, photographs, or diagrams to document the range and extent of the damage;

(13) Date of last inspection of the involved spaces with any noted discrepancies;

(14) Ship's location at sea or in port;

(15) Ship's condition of readiness;

(16) Effect of the fire on the ship's ability to carry out its mission;

(17) Estimated dollar amount of damage or repairs required, including damage to personal property which may result in a claim against the Government;

(18) Identity of personnel that were injured or killed, with full description of injuries, medical records, autopsy reports, as required; see Part F for special considerations in death cases;

(19) Opinion on the cause of fire and the factors that contributed to the spread of the fire; and

(20) Opinion on whether the occurrence of a similar type of fire is possible on another ship.

c. Other reports. All fires occurring afloat (except small trash fires in which no personnel are injured and the material property damage is limited to trash) are also reported under the separate provisions in Chapter 3 of OPNAVINST 5102.1 (series).

EXPLOSIONS

The following contains specific guidance when conducting an administrative investigation into explosions.

a. Required facts and opinions. Criminal law enforcement investigations are required for any fire or explosion of unknown origin affecting DON property or property under Navy/Marine Corps control. Any such investigation shall be coordinated with NCIS; see section 0201. An investigation involving an explosion should document the type of explosion, the cause of the explosion, the extent and nature of personnel injuries, the nature and extent of loss or damage to property, the estimated dollar amount of the loss or damage of the property, the estimated cost of medical treatment of non-military personnel injured by the explosion, the person(s) (if any) responsible for the explosion, and all other pertinent facts and circumstances. Command investigations are normally used to document nonlethal explosions, or where property damage is minor. If the explosion caused great loss of life or property damage associated with a major incident, a court of inquiry will normally be used.

(1) The following information shall be included in the report:

(a) Date, time, and location of the explosion, use compartment name or number if applicable;

(b) Type of explosion;

(c) Kind and quantity of the materials, gases, etc. that were involved;

(d) Measurable time intervals, if any, between explosions;

(e) Existence of barricades and protective gear and the effect of the explosion on them;

(f) Existence of any natural obstructions such as a hill, forest, or other object intervening between the site of the explosion and the areas affected;

(g) Description of any loss or damage to Government and private property and estimated dollar amount needed to replace or repair the loss or damage;

(h) Range and extent of damage as indicated by maps or photographs showing the following:

1. Radius of complete destruction;

2. Radius of structural damage beyond economical repair;

3. Radius of repairable structural damage;

4. Radius of general glass breakage;

5. Distances that significant missiles were projected, including kind and weight;

6. Distance between locations, if explosions occurred at more than one location; and

7. Distance between ships and other vessels or structures affected and distances to nearby ships or structures not affected.

(i) Approximate shape and dimensions of crater, if any, including depth and kind;

(j) Weather and atmospheric conditions and their effect on shock waves;

(k) Personnel involved and the extent of their involvement, their qualifications in terms of the Personnel Qualification Standards (PQS) System or other required safety qualifications, the level of training of the personnel involved, and whether the level of training met required standards;

(l) Identity of personnel injured or killed, with full description of injuries supported by medical records and autopsy reports, as required; see Part F for special considerations in death cases;

(m) Description of the safety precautions or operating procedures that were in effect at the time of the explosion and whether they were observed or violated; and

(n) Opinions on the probable cause(s) of the explosion.

(2) An environmental assessment of the damage caused by the explosion may be necessary, particularly if there is evidence of chemical contamination of the surrounding area; consult the cognizant judge advocate or local RLSO.

b. Other reports. All explosive mishaps as defined within OPNAVINST 5102.1 (series), whether occurring ashore or afloat, are reported under the separate procedures established in OPNAVINST 5102.1 (series).

MOTOR VEHICLE ACCIDENTS

The following contains specific guidance when conducting an administrative investigation into motor vehicle accidents.

a. General. All but the most minor of accidents involving Government vehicles and personally-owned vehicles must be investigated. Accidents involving $5,000 or less of property damage or minor personal injuries can, however, be adequately documented by completion of Standard Form 91 (Police Accident Form) alone. A litigation-report investigation should be conducted in more serious accidents that result in personal injury, death or property damage to a third party, and there are no active duty deaths involved (see section 0210). Chapter 6 of OPNAVINST 5102.1 (series) provides reporting procedures under the Navy's Mishap Investigation and Reporting System which may require an additional investigation.

b. Basic investigating requirements. When conducting an investigation into a motor vehicle accident, physically observe the damage to property and survey the accident scene whenever practical. Include photographs, if possible. Document injuries and damage by attaching the best available evidence. A copy of any investigation concerning potential claims for or against the Government must be forwarded to OJAG (Code 15), TCU, upon completion of the CA's endorsement.

c. Required facts and opinions. The following facts shall be included in all command investigations and litigation-reports. The following opinions will be included in command investigations but will only be included in litigation-reports if directed by the supervising judge advocate:

(1) Vehicle(s) completely identified, including vehicle identification number, license plate number, model, year, and color.

(2) Identity of driver(s) and owner(s), including name, age, addresses (home and work), and telephone numbers. For military members, indicate their military status at the time of the accident, e.g., active duty, TAD, leave, liberty, etc., their grade/rank, and the name, address, location and Unit Identification Code (UIC) of their unit. If an individual died or is incapacitated as a result of the accident, provide similar identifying information for the next-of-kin or legal representative. See sections 0205, 224 and Appendix A-2-k regarding special findings of fact required when an accident involves reservists coming to or from periods of active duty or training. If a Government vehicle was involved, identify the unit to which the vehicle was assigned, the individual at that unit who authorized use of the vehicle, and its authorized purpose.

(3) Time of the accident, light and weather conditions, and their effect on driving conditions.

(4) The location of the accident, e.g., highway number, direction of travel, milepost number, street name, intersection, road and terrain factors, including road characteristics, obstructions to the driver's vision, traffic signals, and signs.

(5) Estimated speed of vehicle(s) involved as evidenced by witnesses, skid marks, condition of roads, and damages to the vehicles or other property.

(6) Actions of other vehicles involved in the accident, including any part played by them in creating the conditions that resulted in the accident.

(7) Traffic conditions at the scene and their effect on the accident.

(8) Traffic laws and regulations in force pertinent to the accident, including traffic safety devices, signs, and markings, e.g., school zone, no passing zone, railroad crossing, reduced speed limit, and any requirement to use safety devices installed in the vehicles, e.g., seat belts, child carriers. A copy of the statute, ordinance, or regulation should be made an enclosure. Consult the cognizant judge advocate or local Region Legal Service Office (RLSO).

(9) Mechanical condition of the vehicles. If a mechanical defect or condition, e.g., faulty or worn brakes/tires, is determined to have contributed to the accident, include the relevant maintenance history of the vehicle.

(10) Physical condition of the driver, or drivers, including intoxication, fatigue, use of medications or drugs, or other medical condition. The factual portion of the report should include such matters as the number of hours of sleep prior to the accident, the number of hours worked, the amount of alcohol consumed, results of any blood alcohol or other test for intoxication, any medications or drugs taken prior to the accident and the time elapsed between their last use and the accident, and any unusual stress or abnormal condition that might have affected the driver's alertness. The opinion section should address any reasonable inferences that may be drawn from these facts relevant to the cause of the accident.

(11) Driving experience of the driver or drivers, both generally and in the type of vehicles being driven, including the state which licensed the driver(s) and any previous loss of driving privileges and driving-related convictions, e.g., reckless driving, drunk driving, driving without insurance.

(12) Safety devices installed and whether they were being used at the time of the accident.

(13) Conduct of passenger(s). Opinions may include reasonable inferences on the effect of any passenger's conduct on the driver(s).

(14) Facts and opinions relevant to knowledge by any passenger of any impairment of the driver at the time the passenger entered or had a reasonable opportunity to leave the vehicle.

(15) Damage to vehicles fully described, including photos if available, and repair costs.

(16) Damage to other property, including photos if available, and repair costs.

(17) Nature and extent of personal injuries and medical costs. If death resulted from the accident, indicate the cause of death and include a copy of the death certificate and any autopsy reports as enclosures, if possible.

(18) Name, age, address, and telephone number of any witnesses to the accident, a description of their location in relation to the accident scene, their ability to observe from that location, and what they saw.

(19) The name, address, and telephone number of any law enforcement official who investigated the accident. A copy of any law enforcement or police report made concerning the accident should be included as an enclosure and the custodian of the original report should be indicated.

(20) Any civilian or military criminal charges brought as a result of the accident and the ultimate resolution of those charges. Do not delay the report of investigation solely to document the outcome of criminal charges. The CA should forward that information to subsequent endorsers and to the copy-to addressees as it becomes available.

(21) If a private vehicle is involved in the accident, the name, address, policy number, and telephone number of any insurer of the vehicle, including the amount and type of insurance carried and those categories of drivers who are covered by the policy.

(22) An opinion regarding the probable cause of the accident.

(23) An opinion regarding the contributory or comparative negligence of any party, if any. Consult with OJAG (Code 15), TCU, or the cognizant judge advocate for guidance pertaining to the relevant standard and its application.

(24) If not included in the facts relevant to military or criminal charges filed, an opinion concerning any laws, articles of the UCMJ, or regulations violated.

(25) Whether or not the vehicles are economically repairable, and if not, their salvage value.

(26) Whether or not the driver, in case of Government vehicle, was acting within the scope of employment.

d. Recommendations

(1) Whether or not disciplinary action should be taken against any of the parties involved. If disciplinary action has been taken, indicate the result, documented by enclosure. Nonpunitive letters of caution are private in nature and the issuance of such letters should not be addressed in the investigation, nor should copies of such letters be made enclosures to the investigation. If disciplinary action is recommended, but has not been initiated, include as an enclosure a charge sheet with draft specifications. Draft specifications should not be preferred, however, since doing so starts

the "speedy trial clock." Consult with the cognizant judge advocate or RLSO.

(2) If Government property has been damaged, a recommendation as to the disposition of the property as follows:

(a) Repaired and returned to service.

(b) Dropped from the records.

(3) Whether the Government should initiate a claim to recover losses suffered by the Government due to damage to property or injuries to personnel, if any.

(4) Pertinent recommendations on matters of safety procedures.

LOSS OR EXCESS OF GOVERNMENT FUNDS OR PROPERTY

The following contains specific guidance when conducting an administrative investigation into the loss or excess of government funds or property.

a. General. Article 0814, U.S. Navy Regulations (1990), requires commanding officers to recommend or convene an investigation under the provisions of the JAGMAN into the circumstances of all deficits (losses) or excesses of public funds or property in the custody of persons under their command, unless properly excused by higher authority. A command investigation is usually sufficient for this purpose. The following general provisions are pertinent:

(1) To verify the existence and amount of a deficit or excess, a prompt audit (preliminary inquiry) of funds or property records normally should precede the decision to convene a JAGMAN investigation. Consultation with an appropriate assist team is encouraged prior to convening a JAGMAN investigation.

(2) A JAGMAN investigation may be required even if the custodian of funds or property is not an accountable person, as defined in Department of Defense Financial Management Regulation, DoD 7000.14-R, Volume 5, Disbursing Policy and Procedures.

(3) A JAGMAN investigation may be a prerequisite, under section 0167, to setoff against pay for losses by nonaccountable personnel, and is the primary source of information in determining whether or not relief of liability may be granted to the custodian in cases of lost funds in amounts of $750.00 or more.

(4) Criminal law enforcement investigations are required if there is any indication that the loss or excess was caused by fraud, embezzlement, theft, or other criminal act. Any such investigation should be coordinated with NCIS; see section 0201. Whether or not a criminal investigation is conducted, inventory records must be corrected with a supporting survey, Financial Liability Investigation of Property Loss (DD Form 200). Losses or excesses of Government funds shall be investigated and reported either by JAGMAN investigation or by the procedures established in DoD 7000.14-R, Vol 5.

(5) Commanders or reviewing authorities should consider conducting a preliminary inquiry when recurring losses or excesses indicate carelessness in handling public funds or property, and regular management reviews and reports are not considered adequate to remedy the situation. A JAGMAN investigation may be appropriate even though each loss or excess, by itself, would not normally require one. Navy publications applicable to the type of funds or property involved, e.g., NAVSUP P-486 for provisions afloat, or P-487 for ships' stores, should be consulted for those amounts of losses or excesses that are considered normal for the volume of business conducted, and for those amounts that warrant further investigation.

(6) For losses or excesses of property, not funds, the procedures for Financial Liability Investigation of Property Loss (DD Form 200) meet the requirements for an investigation in most situations. The original report

will be forwarded in accordance with survey regulations, and a duplicate original will be forwarded as set out in subsection h.

(7) When the cause of loss or excess in the funds or property of a financially accountable custodian cannot be determined, negligence on the part of the custodian is normally presumed by the relief authority when considering requests for relief of liability.

(8) Except as provided in Chapter I of this Manual regarding the setoff of indebtedness of a person against pay, there is no authorization to collect the value of lost government property from nonaccountable personnel, even when caused by fault or negligence. Disciplinary action, however, may be taken, if appropriate, based on investigation findings of culpability.

b. Specific guidance

(1) Public funds. JAGMAN investigations are required for all losses or excesses of public funds, except as follows:

(a) When a loss of disbursing funds is voluntarily liquidated by the custodian under applicable provisions;

(b) When the loss or excess is less than $750.00 in a single incident or related series of incidents; or

(c) When routine accounting adjustments to accounts are appropriate to reflect a discrepancy in money on hand.

(2) Public property. A Financial Liability Officer (formerly called a Survey Officer) or Financial Liability Board (formerly a Survey Board) must inquire into, and report on, all losses or excesses of public property, unless an adjustment to accountable records is otherwise authorized by Naval Supply System Command regulations.

(a) JAGMAN investigations are not generally required for those losses or excesses for which a Financial Liability Investigation of Property Loss (survey) is not mandated by Naval Supply Systems Command regulations. This includes such actions as food service "losses without survey," ship's store "non-disproportionate losses or gains," supply stock or other property book material losses or excesses which are below survey thresholds, or when other routine accounting adjustments to property accounts or inventories are appropriate to reflect a discrepancy in the property on hand. Repetitive minor losses, however, which are indicative of negligence may warrant an investigation as discussed in subsection a(5) above. Furthermore, a JAGMAN investigation may be directed by higher authority in the chain of command or by Commander, Naval Supply Systems Command.

(b) To ensure independent investigation, the officer having custody of the property lost or in excess should not be designated the Financial Liability Officer to conduct the survey.

(3) Postal funds or property. Postal funds are not public funds. Investigations into loss or excess of postal funds or property, therefore, are

not required by Article 0814, U.S. Navy Regulations (1990). OPNAVINST 5112.6 (series), however, requires a commanding officer to convene an investigation into any "postal offense" listed in Volume I of the DoD Postal Manual, DoD 4525.6-M. Even where no offense is involved, a commanding officer should consider convening an investigation into any postal loss in which an accountable Naval postal clerk or officer has not made voluntary restitution. Such an investigation may be needed by the Postal Service for action on a request for relief of liability by the accountable individual.

(4) Nonappropriated funds or property. Nonappropriated funds are not public funds. Whether to convene an investigation under this Manual into losses or excesses of nonappropriated funds or nonappropriated fund property is in the discretion of the commanding officer or higher authority. In dealing with losses or excesses of "nonappropriated fund activities," however, it is important to note that some receive partial appropriated fund support. Losses or excesses of appropriated funds and appropriated fund property in the hands of nonappropriated fund activities must be investigated under subsections b(1) and b(2) above.

c. Primary references for processing losses or excesses of Government property. Primary references for processing losses or excesses of Government funds and property include:

(1) Department of Defense Financial Management Regulation, DoD 7000.14-R, Volume 5, Disbursing Policy and Procedures;

(2) Department of Defense Manual, DoD 7200.10-M, Accounting and Reporting for Government Property Lost, Damaged or Destroyed;

(3) Naval Supply Systems Command Manual, Volume II, Supply Ashore;

(4) Naval Supply Systems Command Publication 485, Afloat Supply Procedures;

(5) Naval Supply Systems Command Publication 486, Volume I, Food Service Management - General Messes;

(6) Naval Supply Systems Command Publication 487, Ships Store Afloat; and

(7) Marine Corps Order (MCO) P4400.150 (series), Consumer Level Supply Policy Manual.

d. Type of investigation. At the conclusion of the preliminary inquiry, the commander must determine which of the investigatory options listed in section 0204 to exercise. Where disciplinary action may be a consideration, see section 0202. For losses of property, the commander may use a survey procedure under applicable Navy or Marine Corps regulations in lieu of an administrative investigation under this Manual. Original reports of survey generated by such bodies shall be forwarded as specified in the regulations under which they are convened. A duplicate original shall be forwarded in the same manner as reports of investigation. This provision does not limit a commander's discretion to convene another type of investigation under this

Manual in addition to a survey procedure. Regardless of the type of investigation convened, coordination with concurrent investigators from other DON organizations or other Federal agencies may be required.

e. Loss investigations: special notice to individuals affected. In any investigation into a loss of funds or property in the custody of an accountable individual, or for the purpose of making an administrative determination of accountability Chapter I of this Manual regarding the setoff of indebtedness of a person against pay, the accountable individual(s) shall, in addition to other warnings and advisements required by law or regulation, be advised of the following:

(1) The investigation extends to all facts relating to the loss, its causes, its dollar value, and the kinds and degrees of individual responsibility for the loss.

(2) The findings of the investigation may be a basis for any of the following actions that are applicable to the loss:

(a) Determination of financial liability of the accountable individual for loss of property or funds derived from sale of property by the Commander, Naval Supply Systems Command, Chief, Bureau of Medicine and Surgery, or Deputy Chief of Staff for Installations and Logistics, U.S. Marine Corps, as appropriate, under 31 U.S.C. § 3531;

(b) Determination whether relief of liability will be granted for physical loss or improper payment of disbursing funds or documents, upon request of the accountable individual, by the Secretary of the Navy or the Comptroller General, under 31 U.S.C. § 3527;

(c) Determination by the commander to hold a non-accountable individual liable for the loss under Chapter I of this Manual regarding the setoff of indebtedness of a person against pay.

(3) In loss of funds cases, negligence of the accountable individual may be presumed by the Secretary of the Navy or the Comptroller General if the loss remains unexplained.

(4) The affected individual may present evidence for the consideration of the investigating officer(s). The investigating officers may, however, refuse to accept evidence that is irrelevant, lacking in probative value, unduly voluminous, or whose inclusion would unduly delay the investigation.

(5) An accountable individual may request to liquidate voluntarily a loss of disbursing funds under the applicable provisions of Department of Defense Financial Management Regulation, DoD 7000.14-R, Volume 5, Disbursing Policy and Procedures.

f. Required facts and opinions. Chapter 6, section 0607, Department of Defense Financial Management Regulation, DoD 7000.14-R, Volume 5, Disbursing Policy and Procedures, provides specific procedures, findings and recommendations for investigation of major losses of funds due to physical loss, or illegal, incorrect, or improper payment. Command investigations

appointed under the JAGMAN are used in the case of major losses of funds, defined as those losses of $750.00 or more or any physical loss where there is evidence of fraud within the accounting function, regardless of the dollar amount. JAGMAN investigations are not required in the case of minor losses, defined as losses of less than $750.00 without any evidence of fraud internal to the accounting function. Chapter 6 of DoD 7000.14-R, Volume 5, provides the procedures for investigating and reporting minor losses. In addition to any specific requirements of the appointing order or DoD 7000.14-R, investigations into losses or excesses of public funds or property must include, at a minimum:

(1) What items were lost or found in excess and the exact dollar value of the loss or excess, e.g., property, vouchers, cash, and so forth.

(2) The nature of the loss or excess, inventory gain or loss, cash shortage, or overage, etc. and, in case of loss of funds, whether the loss was a loss of proceeds of sale of Government property, a physical loss of funds, or the result of illegal or improper payment. Losses due to embezzlement or fraudulent acts of subordinate finance personnel, acting alone or in collusion with others, are physical losses, while all other payments on forged checks or vouchers are improper payments.

(3) How the loss or excess is being carried in the command's accounts.

(4) The facts and circumstances surrounding the loss or excess, and an opinion as to the cause of the irregularity or, if the cause cannot be determined, the most likely cause and the reasons it is so considered.

(5) The identity and position of the accountable officer, and the identity and position of any other person who had custody of the funds or property in question.

(6) The general reputation of the accountable individuals for honesty and care in the handling and safeguarding of funds or property entrusted to them.

(7) The experience and training of the accountable individual in the handling of funds or property, as appropriate, and the workload, including collateral duties, of the accountable individual at the time of the irregularity.

(8) A description, with diagrams where appropriate, of the physical working conditions of the accountable individual who incurred the loss or excess, including a description of physical security arrangements and devices, and security containers and persons with access to them, if applicable, and a statement of whether they were being used properly at the time of the irregularity.

(9) A description of the internal control procedures in effect in the division, department, or office where the irregularity occurred, and a statement whether they were being applied properly at the time of the irregularity. If relevant, include information on recent inspections, assist visits, management control reviews, or other evaluations of procedures.

(10) Identification of the regulations pertinent to the handling of the property or funds involved and a statement whether the regulations were followed.

(11) A description of remedial measures taken to prevent recurrence of the irregularity.

(12) An opinion whether the loss or excess was proximately caused by the fault or negligence of any accountable individual or by an act of a non-accountable individual that can be the basis for financial liability under Chapter I of this Manual regarding the setoff of indebtedness of a person against pay.

g. Guidelines for determining fault or negligence

(1) "Fault" means conduct showing bad faith, gross mismanagement, or neglect of care and may be inferred from irregularities resulting from inattention, dereliction, or perversity.

(2) "Negligence" means failure to exercise care that a reasonable, prudent, accountable person would have exercised under the same or similar circumstances. Failure to know and follow regulations for the care and safeguarding of public funds or property normally is considered negligence, as is failure to follow normal and customary disbursing, collection, or safeguarding procedures or standards without sufficient reason.

(3) "Proximate cause" means the irregularity was the direct and foreseeable consequence of an act or omission, or that the act or omission created the conditions for occurrence of the irregularity. A proximate cause is a cause without which the irregularity would not have occurred.

(4) Burden of proof. There is no burden of proof on the Government to show fault or negligence on the part of an accountable individual. The individual is automatically accountable for the loss and has the burden of establishing that he was not at fault or negligent in order to avoid financial liability. Normally, however, investigators and reviewing authorities should not presume fault or negligence from the mere fact that an irregularity occurred, except that negligence may be presumed when a loss of public funds is entirely unexplained.

h. Distribution. Reports of investigation under this section should be forwarded as described in section 209. In addition, reports should be provided as follows:

(1) For investigations of losses or excesses of disbursing funds or documents, a copy, as finally reviewed and acted upon pursuant to section 0209, shall be forwarded to Director, Defense Finance and Accounting Service, Cleveland Center, Code FFA, 1240 E. 90th Street, Cleveland, OH 44199.

(2) For investigations of losses or excesses of Government property or proceeds from the sale of Government property, the report shall be forwarded to the Commander, Naval Supply Systems Command, the Chief, Bureau of Medicine and Surgery, or the Commandant of the Marine Corps (Code JA), as appropriate.

(3) For investigations involving fraud of public funds, waste, inefficiency, and related improprieties, the report shall be forwarded to the Office of the Navy Inspector General.

SONIC BOOMS, JET NOISE, AND ARTILLERY NOISE

The following contains specific guidance when conducting an investigation into sonic booms, jet noise and artillery noise. Because these incidents will almost always result in claims against the Navy, a litigation-report investigation should be conducted.

a. The nearest Navy or Marine Corps aviation activity receiving notice that a sonic boom occurred within the U.S., regardless of whether damage was reported, is responsible for an inquiry to determine whether a military aircraft caused the disturbance. The inquiry shall include queries to all Navy, Marine Corps, Air Force, Air National Guard, and other military facilities in the area where supersonic aircraft operate. All traffic, transient as well as local, shall be checked. Incidents of noise damage resulting from ship-based aircraft or shipboard weapons systems are admiralty incidents. Consult Chapter XII and OJAG (Code 11).

b. The principal types of damage caused by a sonic boom are glass and plaster damage. Less frequently, claims are received for damage allegedly caused to brick walls, driveways, concrete foundations, and other major structural elements. Studies have shown that it is almost impossible for a sonic boom to generate over-pressures of sufficient intensity to cause such structural damage regardless of the aircraft's altitude. Whenever questionable items of damage are claimed, the services of a construction engineer or other professionally qualified person should be employed as investigator or as consultant to the investigator. The following information shall be included in any investigative report regarding sonic booms, jet noise, or artillery noise:

(1) detailed description of alleged damage;

(2) photographs of the allegedly damaged building or structure and of the specific area of damage; see section 0214c(4);

(3) detailed description of the building or structure involved, including significant details of construction, size of rooms, age, and general state of repair;

(4) detailed examination and description of any alleged plaster damage;

(5) existence or absence of glass damage in the allegedly damaged building or structure and whether any other glass damage resulting from the incident was reported and verified;

(6) whether windows and doors were open or shut at the time of the boom;

(7) whether any loose objects, such as dishes, glassware, or trinkets inside the building or structure were moved as the result of the boom;

(8) existence or absence of similar damage to other buildings in the immediate neighborhood;

(9) type of surrounding community development, type of construction, and density of buildings or structures in the immediate area, etc.;

(10) occurrence or absence of seismic disturbances registered in the locality at the time involved;

(11) other potential sources of damage, such as heavy truck or rail traffic, explosions or earthquakes, and their distance and direction in relation to claimant's building or structure;

(12) any unusual weather or climatic conditions that may have affected the building or structure;

(13) complete physical description of the aircraft alleged to have caused the damage, including markings, whether jet or propeller driven, and any other distinctive characteristics;

(14) full description of the approximate altitude, maneuvers, speed, direction of flight, time of day, date, formation, and number of aircraft;

(15) any complaints of noise or sonic booms received by any duty office which coincides with the alleged damage; and

(16) authorization, description of flight, aircraft involved, applicable charts, and air controller transcripts or audiotapes of aircraft in the vicinity of the alleged damage.

HEALTH CARE INCIDENTS

The following contains specific guidance when conducting an investigation into health care incidents.

a. General. Investigations under this section are separate from any quality assurance investigation conducted by the staff of the military treatment facility (MTF). Most health care incidents should be documented by a Command Investigation, or if a claim is anticipated, a Litigation-Report Investigation.

b. Formal investigation required. A formal investigation into a health care incident shall be convened in the following circumstances:

(1) When a claim has been filed against the U.S., its officers, or its employees as a result of a health care incident. Incidents involving Government contractors and their employees should also be investigated, if it is likely that the U.S. may be joined or impleaded as a party to a lawsuit, or where a claim under a contract between the U.S. and the contractor is likely.

(2) In any case involving death, or a potentially compensable event, where the adequacy of health care rendered by Government employees or provided in a MTF is reasonably in issue. Potentially compensable events include:

(a) Unexplained death, including apparent suicide;

(b) Any complication in treatment which results in: corrective procedure; brain damage; motor weakness; sensory nerve injury; total or partial loss of limb; sensor organ loss or impairment; or reproductive organ loss or impairment;

(c) Inadvertent blood transfusion with HIV or hepatitis-virus contaminated blood;

(d) Procedure performed on wrong patient or body part, including extraction of the wrong tooth;

(3) When necessary to make administrative determinations, other than actions involving clinical privileges concerning health care personnel.

(4) When necessary to assist convening and reviewing authorities in making decisions concerning the delivery of health care. In this regard, the impact of the following should be taken into consideration:

(a) Training of health care personnel;

(b) Design or maintenance of material or equipment;

(c) Assignment and qualifications of personnel;

(d) Supervision of trainees; and

(e) Health care delivery policies or the lack thereof.

c. Relationship to medical quality assurance program

(1) See BUMEDINST 6010.13 (series) regarding the medical quality assurance program. Records created as a part of the quality assurance program are privileged documents under 10 U.S.C. § 1102.

(2) Although health care investigations are not conducted as part of the quality assurance program, and therefore are not entitled to the confidentiality and privilege mentioned above, they may be used as input to the quality assurance review process.

(3) Inquiries into the circumstances surrounding a health care incident done exclusively for quality assurance purposes should be clearly labeled as such. Such inquiries are not subject to the requirements of this chapter.

d. Required facts and opinions. An investigation involving health care incidents shall include:

(1) Comprehensive chronology and description of all relevant facts;

(2) Identification of all involved health care providers, including:

(a) credentials (education, training, and experience);

(b) status (trainee or staff; Government employee or contractor);

(c) role (attending, consulting, supervision);

(3) Full identification of the staff physician responsible for the patient's care at the time of the incident;

(4) If maintenance of equipment or training or personnel is involved, identify the individual(s) responsible for the maintenance or training at issue;

(5) Patient information:

(a) name, date of birth, age, sex, address (home and work), phone number, marital status, dependents, occupation;

(b) medical history;

(c) condition immediately prior to incident; and

(d) current condition.

(6) Nature and extent of injuries alleged to have occurred:

(a) additional treatment required;

(b) prognosis;

(c) degree of disability;

(d) loss of chance of recovery; and

(e) names and addresses of subsequent treating physicians or health care providers.

(7) A copy of the claim and any other documents or correspondence which shed light on the claimant's or potential claimant's contentions concerning the matter;

(8) Secure all of the medical records, inpatient, outpatient, and special studies (x-rays, tissue slides, EKG tapes, fetal monitoring strips, etc.);

(a) indicate the date and person who secured those items and the current location and custodian of each.

(9) Complete copy of the medical record and location of the original. Entries must be reviewed to ensure handwriting is legible and, if illegible, typed transcripts should be attached to the investigation;

(10) All special studies must be retrospectively reviewed to assess whether the original interpretations were accurate:

(a) retrospective reviews must be structured as "blind" reviews, e.g., the reviewer should not be aware of the previous interpretation; and

(b) a summary containing the name and credentials of the person conducting the retrospective review and that person's findings must be included with the investigation. The summary <u>should not</u> be signed by the reviewer.

(11) Copies of all relevant documents:

(a) MTF staff bylaws;

(b) MTF policies, procedures, and protocols (clinical/surgical, nursing, and ancillary services such as the laboratory or pharmacy, and health care administrative policies) in effect at the time of the incident;

(c) all relevant logbook entries pertaining to the patient maintained by labs/clinics/offices (e.g., emergency room logs reflecting arrival/departure times, ambulance log book/trip sheets/rescue service reports, and centralized appointment registers/printouts or pharmacy history printouts;

(d) all patient information pamphlets, brochures, or sheets which were provided to the patient; and

(e) in cases involving contract providers, a copy of the contract.

(12) In cases involving possible equipment/device failure:

(a) photographs of equipment/devices taken before the equipment/device is moved, used again, altered, tested, or repaired. See section 0207 for photo requirements;

(b) date, location, and names of the persons involved in the evaluation of the equipment/device and the findings thereof. Equipment/devices must be removed from service and secured until examined by appropriate technical representatives. Equipment/devices must not be used, altered, tested, or repaired until properly evaluated; and

(c) copies of maintenance reports and any protocols.

(13) Review of the staffing levels (physician, nursing, corpsman, and ancillary) at the time of the incident:

(a) "Currency" of members to perform their duties at the time of the incident; and

(b) "Orientation" to perform the duties assigned at the time of the incident.

(14) The standard of care for any practices, procedures, policies, protocols, or systems involved in the incident and the basis which establishes that standard of care (provide a copy of relevant medical literature, text, treatises, articles, policy, practices, or procedures):

(a) This refers to clinical/surgical procedures, nursing procedures, ancillary services such as the medical laboratory or pharmacy procedures, and health care administrative policies. The source and date of documents relevant to the standard of care must be provided.

(15) Summaries of expert reviews of the care documented by the Investigation:

(a) identify the reviewer and the reviewer's credentials;

(b) evaluation (e.g., expert opinion) describing the duty that was owed the patient (standard of care);

(c) manner in which the duty was either met or not met;

(d) in instances where the duty was not met, an opinion on whether the act or omission resulted in harm to the patient and, if so, a description of the harm, including an explanation of how the harm may affect the patient in the future; and

(e) where there has been a deviation from the standard of care, an opinion regarding the cause(s) or contributing factors for any deviation from the standard, the name(s) of persons responsible for the deviation, and a description of corrective action, if required, in terms of personnel, equipment, or policy.

(16) Each provider whose actions are at issue must be provided an opportunity to make a statement for inclusion in the investigation. The investigating officer should summarize the results of the interview using care to be as accurate and complete as possible. Summaries of interviews with providers shall not be signed and will be instead be authenticated by the investigating officer's signature.

FIREARM ACCIDENTS

The following contains specific guidance when conducting an investigation into firearm accidents.

a. General. A command investigation shall normally be used to document all relevant circumstances of incidents involving accidental or apparently self-inflicted gunshot wounds.

b. Required facts and opinions. An investigation involving firearm accidents shall include:

(1) Date, time of day, and names and addresses of witnesses present;

(2) Description of physical location of incident and light and weather conditions;

(3) Description of the firearm and its mechanical condition, especially safety mechanisms, and whether the safety mechanisms were used by the firearm handler;

(4) Authorization for possession of the firearm, including how, when, and where it was obtained;

(5) Description of firearm handler's formal training, experience, and familiarity with the firearm's condition, safety procedures, and proper use; and

(6) Discussion of any psychological problems, mental impairment due to drug or alcohol use, and mental responsibility of the firearm handler.

OTHER INCIDENTS

The following contains specific guidance when conducting an investigation into other specific types of incidents.

a. Pollution incidents. When pollution incidents are required to be investigated because of service regulations, other than the JAGMAN, or because of applicable Federal, State, or local laws or regulations, a copy of any report should be submitted directly to OJAG (Code 12) and the geographic environmental coordinator as set out in OPNAVINST 5090.1 (series). Further guidance concerning pollution incidents is contained in Chapter XIII of this Manual. A litigation-report investigation should normally be convened, unless the event amounts to a major incident requiring a court of inquiry. When the pollution originates from a U.S. vessel, also see Chapter XII of this Manual. The following information shall be included in the report of investigation of pollution incidents and spills:

(1) Location and circumstances of the spill, including the weather and conditions at the site (visibility, darkness, presence/phase of the moon), how, when, and by whom the spill was detected;

(2) Description of the activity occurring when the spill occurred, e.g., shifting fuel, taking on fuel, pumping bilges;

(3) Type of material, e.g., fuel, oil, other hazardous material;

(4) Estimated quantity of material spilled and the basis for the estimate;

(5) Source of the spill, e.g., tank, drum, or valve;

(6) Identity of personnel involved including name, rank/grade, unit, address (home and work), age, training and experience for task, and who was (or should have been) providing supervision;

(7) Whether required reports were made, e.g., reports required by OPNAVINST 5090.1 (series), reports to the National Response Center, reports required by State and local law, reports to the Navy operational chain-of-command, and reports under the Emergency Planning and Community Right-To-Know Act (EPCRA);

(8) Whether local SOPA and command instructions were complied with;

(9) Description of cleanup, including membership of the quick response team, training, response time, actions taken, equipment used, effectiveness of equipment and personnel, availability and readiness of equipment and personnel;

(10) Nature and extent of damages to Government and private property;

(11) Personal injuries, if any, including name of injured parties and extent of injuries; see section 0210 regarding claims;

(12) Attach copies of relevant training documents (e.g., Personnel Qualification Standard (PQS) records), deck/watch logs, and engineering logs which support the facts; and

(13) An opinion regarding the cause of the spill, e.g., faulty equipment, container, fitting, or valve, operator error/safety, or operational procedure error.

b. Combined investigations of maritime incidents. For maritime incidents involving two or more NATO countries, commands may conduct a single investigation under NATO Standardization Agreement 1179 (STANAG). This sets forth three alternative investigation procedures: (1) combined board of inquiry; (2) national inquiry, attended by witnesses or observers from other nations; and (3) independent inquiries coordinated by the presidents of those inquiries.

c. Security violations. For specific investigation requirements respecting investigations ordered to inquire into the loss, compromise, or possible compromise of classified information; see SECNAV M-5510.36, Chapter 12. Such reports are sent to CNO (N09N) as ultimate addressee. A command investigation shall normally be used.

d. Postal violations. For specific investigation requirements respecting investigations ordered to inquire into postal losses or offenses, see paragraph 601, Department of the Navy Postal Instructions, OPNAVINST 5112.6 (series). In such cases, command investigations may be convened.

e. Allegations of discrimination or sexual harassment. Investigations of alleged discrimination or sexual harassment, including reporting and review procedures, are governed by OPNAVINST 5354.1 (series). Similar Marine Corps investigations are governed by MCO 5354.1 (series).