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MEMO

AN APPROACH TO REPRESENTING AN ACCUSED SERVICEMEMBER AT AN ARTICLE 32, UCMJ, INVESTIGATION

By Louis Font

The following is an approach to Article 32, Uniform Code of Military Justice (UCMJ), investigations and is based upon my experience as an independent, civilian counsel in military cases¹.

Article 32 (Title 10, U.S. Code, Section 832) provides that before a military criminal case can proceed to trial before a general court-martial (the military's major felony trial) there must first be an Article 32, UCMJ, investigation. Article 32, passed by Congress in the early 1950s, provides that the investigation must be "thorough" and "impartial". The accused is entitled to be present during this investigation.

An Article 32 investigation is usually open to the public. When a case is in the press, military public affairs officials like to tell the public that the Article 32 proceeding is like a civilian grand jury. There are, however, many differences between an Article 32 investigation and a civilian grand jury. One difference is that a grand jury is a group of citizens who decide whether or not to indict and the decision is binding upon the government. However, an Article 32, UCMJ, investigation is held before one person, called the Investigating Officer or "IO", and the recommendation made by the IO is not binding upon his superiors. The Investigating Officer can recommend, for instance, that a charge be dismissed, or even that the entire case be thrown out, but a commanding general is free to disagree and move forward with a general court-martial anyway.

Even though the result of the Article 32, UCMJ, investigation is not binding upon the commanding general, the fact that the proceeding is an *investigation* is extremely significant. I have been counsel in cases in which the command would rather refer a case to a special court-martial (one year limitation on prison time), or dispose of a case in some other manner, rather than conduct an Article 32 investigation. In cases in which the Article 32 investigation may have great potential for exposing unlawful command

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influence or other command malfeasance, a criminal case may even completely collapse before the Article 32 investigation or during the proceeding.

1. Filing an appearance.

Because the military system of justice is so different from the judicial system in the civilian world, a civilian attorney may not even know how to file an appearance.

An appearance by civilian counsel may be submitted by sending it to the prosecution or to the Investigating Officer of the Article 32 investigation.

There is no "court" where civilian counsel can file an appearance, because when a case is scheduled for an Article 32 investigation, the case has not yet been referred to a trial. In the military judicial system each trial is a separate creation of a convening authority. Furthermore, in the military judicial system there is no clerk's office at the trial level.

When a case is scheduled for an Article 32 investigation, the posture of the case is that the Special Court-Martial Convening Authority, probably a Colonel in an Army, Air Force, or Marine Corps case, or likely a Captain in a Navy or Coast Guard case, has appointed an Investigating Officer. The Investigating Officer is ordered to conduct an investigation concerning the criminal charge(s) that have been served upon the client. The theory is that upon review of the Investigating Officer's recommendation made after the investigation is complete, the Special Court-Martial Convening Authority will make a recommendation on the case concerning disposition, and forward his recommendation and the Article 32 investigation and any objections by the defense to the Investigating Officer's report, to the General Court-Martial Convening Authority (GCMCA), likely a commanding general or admiral. The GCMCA then decides whether to order (convene) a trial by general court-martial.

If the GCMCA decides that he or she will convene a general court-martial, the GCMCA issues a "convening order" which creates the trial. The GCMCA personally selects the court members (jurors) and the names of the court members are listed on the convening order.

In practice, the vast majority of cases scheduled for an Article 32 investigation are referred to trial by general court-martial. I usually assume that the case will go to a general court and start planning accordingly.

I suggest that a civilian attorney send the following notice of appearance, either on office letterhead or by email to the Trial Counsel (the prosecutor), referring to the officials by their titles, which saves the civilian counsel from having to track down who is who in the chain of command:

To the General Court-Martial Convening Authority, Staff Judge Advocate, Special Court-Martial Convening Authority, Investigating Officer, and Trial Counsel in United States v. _____:

Please be advised that I have been retained to represent (rank and name) as civilian defense counsel (lead counsel) at the Article 32 investigation in the above-referenced case.

My qualifications are as follows: I am a member of the bar of the state of _____. I am admitted to practice before the highest level court of that state.

Sincerely,

Xxxxx Xxxxx
Civilian Defense Counsel

This appearance can be sent with a note asking that the prosecutor forward the appearance to all the persons listed on the appearance. An appearance can also be sent to the Investigating Officer directly. These days, this can be done by email or as an attachment to an email.

2. The role of civilian defense counsel.

Once the civilian attorney files an appearance, the civilian counsel should discuss his or her role with the detailed military defense counsel. The detailed military defense counsel is an attorney who has been assigned to defend the accused. But for the appearance of civilian counsel, the detailed military counsel would be acting as lead counsel. I make certain that the military defense attorney knows that I intend to act as lead counsel. That is one reason to let everyone know in the notice of appearance that civilian counsel intends to act as lead counsel.

I usually explain to military defense counsel that he or she has no “express” or “implied authority” to reveal defense information to the prosecution and that the military defense counsel does not have the authority to make decisions for the defense. Sometimes I say that I will make all decisions. That keeps things clear. I learned this the hard way years ago when a military defense counsel was approached by the prosecution shortly before a general court-martial case in which I was lead counsel. The prosecution asked that a witness be released and the detailed defense counsel said yes without consulting me. That decision by military defense counsel was binding on the defense. It had not been easy to have this witness compelled to testify at trial, and I was disappointed on the eve of trial to learn that the defense would have to obtain a stipulation of expected testimony (which requires the prosecution’s agreement) rather than having the witness testify in person in front of the military jury. I have tried to avoid such problems by making the military defense counsel aware from the outset that in such a situation he or she would be required to say that I must be contacted and will make the decision.

Be aware that the military prosecutor and the military defense counsel may be friends or may have gotten into the habit of an information exchange that may be inimical to your

case. Military defense counsel often have a broad view of “implied authority” to reveal facts and strategy.

The military lawyer detailed to the defense can be the defense’s best ally, and can be very helpful. However, in my view, many military defense lawyers have not been taught correctly. I have found that many military defense lawyers do not look for reasonable doubt but instead look for reasons to plead guilty. One reason that military defense counsel are susceptible to such a view of a criminal case – even before an investigation takes place -- is because of the emphasis in the military on “acceptance of responsibility”, “response to correction” and “honor”. These concepts can easily be distorted in the military criminal context. For instance, a military defense counsel may say to a client: “You just told me you committed the crime; the honorable thing to do is to plead guilty.” “If you accept responsibility, that will mean a great deal to the commander.” Such an approach is inimical to the view usually found in the civilian criminal defense community, in which emphasis is placed on the presumption of innocence, the government’s burden of proof, the reasonable doubt standard, and the view that almost all cases have a winning defense or can be set up for a reversal on appeal.

I’ve had clients come to me over the years telling me that one of the first things the military defense lawyer said is “You’re going to jail.” I’ve been involved as lead counsel in such situations that later resulted in acquittal or in a disposition other than trial.

I have never advised my client to fire a military defense counsel. I think it is very bad form to come before a military court without a military lawyer at the defense table. Also, the accused has the right to request “individual military counsel”, and if the request is granted, the military counsel requested becomes the military counsel on the case. I have sometimes advised the accused to request as individual military counsel a lawyer that I have previously worked with and respect.

I have also had military defense counsel assigned to the case who worked hard and contributed much to the accused and to me.

To be fair, many military counsel have stories of civilian defense counsel who did little, if any, work on a case, told the military defense lawyer to do everything, and then somehow blew the case at trial. The military defense lawyer may tell such stories to your client. I have found that the best antidote to such stories is for the civilian attorney to do his or her job professionally and well.

3. Investigation prior to the Article 32, UCMJ, Investigation.

If at all possible, conduct your own investigation instead of just relying upon the Article 32 investigation. Get started on your investigation immediately upon being retained as civilian defense counsel.

If a client is not in pretrial confinement, I’ll ask the client to spend a day or more with me as I investigate the case. If my client drives me around the base or post it can save a great

deal of time. I can obtain my client's medical records, mental health records, military police records, and other records in this manner (with my client readily at hand to sign releases), and interview witnesses as pointed out by my client. I investigate the facts of the case, including seeking any evidence of "good military character", which, all by itself, can raise reasonable doubt in a military criminal case. By actually doing an investigation on the ground, the civilian attorney can learn more about the case than anyone else in the courtroom and build rapport with the client.

4. Activity Prior to the Article 32, UCMJ, Investigation.

Typically, the Investigating Officer provides a letter to the accused which gives notice of the date and time for the investigation and states the witnesses that the Investigating Officer intends to call. The accused is invited to submit the names of any additional witnesses to the Investigating Officer. If defense counsel has already started the defense investigation the defense is in a better position to be able to list witnesses and provide any justification for witness attendance that the Investigating Officer may require. Also, it may be necessary for counsel to request a different date for the Investigation. The letter to the accused may give as little as three days notice and the Investigating Officer may have been told to complete the investigation within a short period of time, such as ten days.

Prior to the Article 32 investigation, civilian counsel should submit a written request for a verbatim record to the Special Court-Martial Convening Authority and the Trial Counsel or have the military defense counsel do so.

5. Preparation for the Article 32, UCMJ, Investigation.

There is a published script for the Investigating Officer to use at the Article 32 investigation. Civilian counsel should be able to get a copy from military defense counsel by email. This will give the civilian lawyer a feel for the proceeding and a list of exactly what the client's rights are as told to the client by the IO at the beginning of the investigation.

Reviewing the script of what the Investigating Officer says to the client and defense counsel at the beginning of the investigation is important. It could be that the script differs from the IOs actions and writing prior to the hearing. The Investigating Officer may say, for instance, prior to the hearing that if names of witnesses are not provided by the defense a few days before the hearing the witnesses will not be called to testify at the investigation. But the Article 32 script makes clear that the accused has the right to request witnesses during the hearing itself. In other words, according to the script the investigation is really an investigation, rather than a perfunctory hearing or an investigation in name only. If in questioning a witness at the hearing the names of other witnesses are revealed, you may want to request the presence of the other witnesses at the hearing for questioning.

I suggest that civilian counsel study the case law, Manual for Courts-Martial (Rule for

Courts-Martial 405), and Article 32, UCMJ, concentrating on language that says an Article 32 investigation must be “thorough” and “impartial” and that a purpose of the investigation is defense discovery. Defense counsel will likely need citations to authority and language when, during the investigation, defense counsel requests that additional witnesses be brought forward to testify or requests that documents be provided as part of the investigation. The prosecution is likely to argue at the proceeding that the Article 32 investigation is for the purpose of establishing probable cause to proceed to general court-martial and to review the form of the charges. Be aware that the prosecution and sometimes the Investigating Officer try to limit the witnesses presented at the Article 32 investigation.

In preparation for the Article 32 investigation I suggest that civilian defense counsel read the Military Judge’s Benchbook concerning each of the charges on the charge sheet. The Benchbook is available online. It’s about a thousand pages but only a few pages will pertain to any particular charge on your client’s charge sheet (DD Form 458). The Benchbook tells the reader what the military judge’s instructions to the jury would be in a contested case before members (jurors). The defense should try at the Article 32 investigation to develop evidence that negates an element of the offense for each charge, and/or is evidence of a lesser included offense. This evidence may prove to be very important at trial, especially if you can tape record the Article 32 proceedings or otherwise obtain a verbatim record to use at trial. Civilian defense counsel should plan to have at the hearing a set of carefully planned questions or areas of inquiry to pose to each prosecution witness. The defense may want to broaden the inquiry because this is an investigation rather than a trial. It could be important to ask such questions as “Who has talked to you about testifying today?” “Have you attended any meetings of any sort in which the accused’s name came up?” “What was said?” “When was the last time you attended any lecture or briefing pertaining to military justice?” “Who held this meeting?” “What was discussed?” “Have you talked to any high-ranking persons about the accused?” “What has been my client’s duty performance?” The defense counsel may be able to find out something that could prove to be very useful for pretrial motions or for trial.

Unlawful Command Influence. It is important that civilian defense counsel brush up on unlawful command influence law. This is very important and I can't stress this enough. The defense lawyer must quickly become an expert in this area of military law so that the attorney can keep his or her eyes and ears open for any suggestion of unlawful command influence.

Unlawful command influence is referred to in the military case law as the "mortal enemy of military justice." Unlawful command influence can hit the defense from any direction - influence on witnesses, on the Investigating Officer, upon the chain of command, even concerning whether tape recorders are allowed at the Article 32 investigation. (Years ago I encountered a written policy at an Army post saying that no tape recorders were allowed at any Article 32 proceeding. That became one of the first issues to investigate at the Article 32 proceeding.)

A civilian counsel should investigate whether there are any "rules of thumb" or policies that impact upon the disposition of the case. Military law is premised upon individualized determinations in cases, but sometimes the military lawyers and the command start treating all similar cases under certain rules, which is likely illegal. I have found such policies concerning AWOL and desertion cases and in other subject areas as well.

Also, the defense should determine whether the General Court-Martial Convening Authority has issued any directives or memos or made any statements about the charges, the events giving rise to the charges, or the accused. If the defense has any inkling that there may be unlawful command influence I suggest that civilian defense counsel request witnesses about these serious matters for questioning at the Article 32 investigation. Civilian counsel would point out that unlawful command influence strikes to the heart of military justice and should be investigated immediately, under oath, and with a verbatim record. I've had cases disappear - I mean just plain stop and go away - after requesting a witness - such as the Staff Judge Advocate, the general's lawyer - to testify at the Article 32 investigation.

6. The defense's goals at the Article 32, UCMJ, Investigation.

When a case is scheduled for an Article 32 investigation the chances are overwhelming that the case will be referred to trial by general court-martial. It is rare that such is not the case. This is true even if there is a favorable recommendation from the Investigating Officer concerning the disposition of the charge(s). This has implications for how defense counsel handle the Article 32 investigation. I have encountered cases in which the military defense lawyer limited the questioning of witnesses, all in the hope of getting a favorable recommendation from the Investigating Officer. I do not follow such an approach, unless I know that a witness may divulge information giving rise to an offense not reflected on the charge sheet. Given that the Investigating Officer's recommendation is not binding upon commanders, I usually see the Article 32 investigation as a discovery vehicle and use the proceeding to obtain as much information about the government's case as possible in anticipation of a general court-martial.

Civilian counsel should try to pin down each prosecution witness to a story. In my view, it is better to learn the details at the investigation, rather than at trial.

It may be a goal of the defense to gain a favorable recommendation for dismissal of one or more charges or an alternative disposition of the case but such a goal may be unattainable. This is because, as stated above, the General Court-Martial Convening Authority can refer any and all charges to trial by general court-martial regardless of the recommendation of the Article 32 Investigating Officer.

A primary goal of the Article 32 investigation should also be to investigate, expose, and explore any unlawful command influence.

7. The Article 32, UCMJ, Proceeding.

An Article 32, UCMJ, investigation may be held practically anywhere on the base or post. It is sometimes held in a courtroom, but may take place around a conference table somewhere at the accused's unit. I usually don't mind if the hearing is held at a conference room and everyone is seated and the situation is less formal than in a courtroom, because I see the proceeding as an investigatory tool and part of what I am doing is tantamount to taking depositions of the prosecution's witnesses. I've also found that when the Article 32 is held at the unit, it may be easier to bring in other witnesses to testify who are nearby or for the IO, defense counsel, and prosecutor to walk down the corridor and obtain documents requested by the defense during the hearing.

The Air Force usually appoints an Air Force attorney to act as Investigating Officer. The Army and Navy usually appoint line officers, and not military attorneys, to be the investigator.

Bring a tape recorder. I suggest that civilian counsel bring a tape recorder to record the proceedings since there is a good chance the request for a verbatim transcript will be denied. The defense may want to incur the expense of a civilian, court-certified stenographer. Having such a transcript can be very important at trial.

Investigate as thoroughly as allowed.

Client's unsworn statement made through counsel. At an Article 32 investigation the client has the right to testify, and the defense can put on evidence or no evidence at all. It would be a very rare instance, in my view, for the defense to provide any evidence on the merits. What I usually do is submit to the Investigating Officer a copy of awards, decorations, and other favorable information from my client's military personnel records. The civilian lawyer can ask the military defense counsel to gather these materials if civilian counsel has not already obtained a copy of the client's military personnel records.

The client has the right to make an "unsworn statement". Under military law an unsworn statement is one that the prosecution is not allowed to cross-examine, but may rebut with other evidence. An unsworn statement can be presented through counsel rather than from the lips of the accused. The approach I usually take at an Article 32 investigation is to give an unsworn statement of the accused, through counsel. For instance, something along the following lines may be appropriate: "The accused, through counsel, makes the following unsworn statement: The accused asserts that he is not guilty of the offenses charged, and requests that you, as the Investigating Officer, recommend that all charges and specifications be dismissed." Such a short unsworn statement, through counsel, gets information across to the Investigating Officer, yet is practically worthless for the prosecution to use at trial against the accused.

8. Defense Objections.

The civilian defense lawyer should take care to preserve objections to the Article 32 investigation. At the hearing a defense lawyer should object as appropriate. I object to the denial of witnesses and other serious matters.

Be aware that it may be best to object to the prosecution leading its witnesses during questioning. Otherwise, I rarely object to questions by the prosecution at an Article 32, UCMJ, investigation because I want to learn as much as I can about the prosecution's case. Be aware that when a witness has provided a written statement to military law enforcement prior to the Article 32, the prosecutor may ask the witness to adopt their statement and ask no other questions. As defense counsel, it may be best to question that prosecution witness about each and every line in their written statement and ask other questions as well.

Be aware that military defense counsel may be of the opinion that it is better to limit the information received at the Article 32, UCMJ, investigation, all with a view toward obtaining a favorable recommendation from the Investigating Officer. The military defense counsel, for instance, may believe that it would be best to hear from one prosecution witness rather than three, for the purpose of limiting information received by the IO in the hope of getting a favorable recommendation from the IO (such as the IO never hearing evidence of one element of an offense). I usually view such a strategy as misguided; this is because the IO's recommendation is not binding, the prosecution and the general's lawyer know about other witnesses testimony and evidence, and the general is free to proceed to general court-martial despite the recommendation of the IO.

I have been to military bases where military defense counsel are so worn down by having participated in only perfunctory Article 32s, that the initial attitude about an Article 32, UCMJ, investigation in the case at hand is: "We'll never get anything out of the Article 32; it's just a waste of time." Such an attitude begins to take shape when no civilian lawyers are involved in trials at the post or base; the command always denies requests for verbatim transcripts no matter how important a verbatim record may be; the IO views the hearing as a proceeding only to establish probable cause rather than to conduct a "thorough" investigation as required by statute; military defense counsel join with the prosecution and the IO in limiting the scope of the investigation; and cases repeatedly go forward to a general court-martial no matter what the recommendation of the IO.

After the hearing the Investigating Officer submits a report and a copy is provided to the defense. The defense has only a short period -- five days -- to submit written objections to the report. It is important to file objections to the report or objections are deemed waived. The objections are important because the objections provide the basis for a pre-trial motion for a new Article 32 investigation or for other appropriate relief.

If witnesses have been denied, or if unlawful command influence has been exposed or covered-up, these are matters that should be part of the defense's objections to the Investigating Officer's report.

9. Conclusion.

The fact that Article 32, UCMJ, provides for an *investigation* prior to trial is a powerful concept. Properly conducted, the Article 32, UCMJ, hearing is truly an investigation that is thorough and impartial, as required by law.

The Article 32, UCMJ, investigation may reveal flaws in the prosecution's case that may be helpful in negotiating an alternative disposition. At trial, the information obtained at the Article 32, UCMJ, investigation may prove to be significant.

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