

# Walking on Unfamiliar Ground: A Primer for Defense Counsel Representing Clients in an Inspector General Investigation

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## Introduction

In the course of a two-year assignment as a trial defense counsel (TDC), most defense attorneys are likely to represent numerous Soldiers at courts-martial and administrative separation proceedings. Likewise, most TDCs routinely assist Soldiers who are the subject of commander's inquiries<sup>2</sup> and investigations under *Army Regulation* (AR) 15-6.<sup>3</sup> The formal and informal training TDCs receive, focuses on these aspects of their practice. Because of this emphasis and the volume of cases, most TDCs develop a good working knowledge of criminal investigations, AR 15-6 investigations, and commander's inquiries. There is another type of investigation, however, that most defense counsel may only see once or twice over the course of a two-year assignment—Army Inspector General (IG) investigations.

Inspector general investigations come with their own set of rules and procedures.<sup>4</sup> Like other investigations, they can adversely impact the Soldier under investigation. Many aspects of an IG investigation are similar to the other investigations that TDCs work with on a regular basis. There are, however, several unique aspects of an IG investigation.<sup>5</sup> This article explains the IG investigation process and provides a primer that will assist defense attorneys to understand their role in protecting the interests of a client under investigation. The article will discuss investigations conducted at both the installation and command level as well as investigations conducted by the Department of the Army Inspector General (DAIG). The paper will first examine the rules of the IG investigative process. Next, it will consider the process. The article will also provide suggestions and highlight particular areas for TDCs to consider. The article concludes with some observations about the due process issues at stake.

## Background

Before discussing IG investigations as they relate to a particular client, it is important to understand the IG's regulatory role and the IG's responsibilities in the context of an investigation or investigative inquiry.<sup>6</sup> Most judge advocates (JA) are familiar with many of the local IG office's day-to-day functions. One of the IG's most important functions is to conduct inspections.<sup>7</sup> These inspections are intended to help leaders assess their organization's ability to accomplish its wartime and peacetime missions.<sup>8</sup> Another function is the IG's responsibility to provide assistance to Soldiers, family members, civilian employees, and retirees in resolving problems.<sup>9</sup> These functions are not the focus of this article.

The function with which most JAs are less familiar is the IG's investigative responsibility. The Secretary of the Army (SA), the Under Secretary of the Army (USofA), the Chief of Staff of the Army (CSA), the Vice Chief of Staff of the Army (VCSA), the Inspector General (TIG), and commanders can direct that the IG conduct investigations or investigative inquiries.<sup>10</sup> The stated purpose of investigations is to "provide the directing authority a sound basis for decisions and actions.

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<sup>1</sup> Before assignment as Executive Officer, United States Army Claims Service, the author served as the Regional Defense Counsel for Region I, United States Army Trial Defense Service. In that assignment, the author represented several senior officers who were named as subjects and suspects of Department of the Army Inspector General (DAIG) investigations.

<sup>2</sup> U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 5-8 (13 May 2002).

<sup>3</sup> U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996) [hereinafter AR 15-6].

<sup>4</sup> U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES (29 Mar. 2002) [hereinafter AR 20-1].

<sup>5</sup> For example, the rules differ based on the rank and status of the client. *See id.* para. 8-3(i) (setting out special procedures for investigating senior officers).

<sup>6</sup> Lieutenant Colonel Craig Meridith, *The Inspector General System*, ARMY LAW., July/Aug. 2003 (providing a complete overview of the IG system).

<sup>7</sup> AR 20-1, *supra* note 4, paras. 1-4 a(11)(c) and 1-4b(4).

<sup>8</sup> *Id.* para. 6-1a.

<sup>9</sup> *Id.* para. 1-4a(10)(a). These problems can range from pay issues, to retirement benefits or other areas where the complainant is experiencing problems with the Army system.

<sup>10</sup> *Id.* para. 1-4b(5)(a) and para. 1-4a(12).

Inspector general investigations normally address allegations of wrongdoing by an individual and are authorized by written directive.”<sup>11</sup> The purpose of investigative inquiries is “to gather information needed to address allegations of impropriety against an individual that can accomplish the same objectives of an IG investigation.”<sup>12</sup> It is clear from these provisions that the IG uses investigations and investigative inquiries to look into allegations of individual misconduct.

### *Type of Investigation*

Generally, investigations conducted by the command IG at the direction of a local commander are investigative inquiries. Investigative inquiries are less formal than investigations.<sup>13</sup> Investigative inquiries typically involve witness statements and a review of documents. Witness statements are not required to be sworn or recorded verbatim.<sup>14</sup> At the conclusion of the inquiry, a report of investigative inquiry (ROII) must be completed, and a legal review is required for any substantiated allegation.<sup>15</sup> The directing authority must approve the ROII, and the subject or suspect of the investigation must be notified in writing of any substantiated allegation.<sup>16</sup>

Investigations involve a more formal procedure and are typically conducted at the DAIG level. An investigation is a formal fact finding process. The investigation will include a formal directive from the directing authority and a notice to the subject or suspect and to the appropriate commander that an investigation is being conducted.<sup>17</sup> Sworn witness statements and verbatim transcripts of interviews; a report of investigation (ROI); a formal legal review of the ROI; and notification to the subject or suspect, the respective commander, and the complainant of the results of the investigation, are all requirements of a formal investigation.<sup>18</sup>

### *Inspector General Action Request*

Investigations and investigative inquiries are most often triggered by someone making an Inspector General Action Request (IGAR). An IGAR is “[a] complaint, allegation, or request for information or help presented or referred to an IG. An IGAR may be submitted in person, over the telephone, through written communication, by electronic communications, or through the DOD Hotline referral.”<sup>19</sup> A complaint is “[a]n expression of dissatisfaction or discontent with a process or system . . . .”<sup>20</sup> A complainant is “[a]ny person or organization submitting an IGAR. The person can be a [S]olider, family member, member of another Service, Government employee, or member of the general public. The organization can be any public or private entity.”<sup>21</sup> Finally, an allegation is “a statement or assertion of wrongdoing by an individual . . . .”<sup>22</sup> Taken together, these definitions show that any person or any organization can bring information of suspected wrongdoing or misconduct by a military individual in virtually any form, including anonymous tips, and that information may trigger an investigation or investigative inquiry.

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<sup>11</sup> *Id.* para. 8-1b(1).

<sup>12</sup> *Id.* para. 8-1b(2).

<sup>13</sup> *Id.* para. 8-4c.

<sup>14</sup> *Id.* para. 8-4c(2).

<sup>15</sup> *Id.* para. 8-4c(3).

<sup>16</sup> *Id.* paras. 8-4c(1)-(5) and 8-4d. Note that the regulation also states that subjects and suspects have the right to address unfavorable information against them. *Id.* para. 8-4d. That right, however, is not clear and the cross-reference to para. 4-10 says nothing about the right to address unfavorable information. *See id.* para. 4-10.

<sup>17</sup> *Id.* para. 8-4 b(1)-(7).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* Glossary, sec. II, terms, “Inspector General Action Request.”

<sup>20</sup> *Id.* Glossary, sec. II, terms, “Complaint.”

<sup>21</sup> *Id.* Glossary, sec. II, terms, “Complainant.”

<sup>22</sup> *Id.* Glossary, sec. II, terms, “Allegation.”

### *Who Conducts the Investigation?*

The IG can conduct its investigative functions in a number of ways. At the local level, the commander can direct the command IG to conduct an investigative inquiry.<sup>23</sup> Because the IG system is not a stovepipe organization, the local command IG works for and reports to the local commander.<sup>24</sup> The DAIG includes the combined offices of the Office of the Inspector General (OTIG) and the U.S. Army Inspector General Agency.<sup>25</sup> At the direction of the SA, USofA, CSA, VCSA, or TIG, the Investigations Division of the DAIG can also conduct investigations and investigative inquiries.<sup>26</sup>

Often, the local command's IG will conduct the investigation or investigative inquiry. Depending on the rank of the client under investigation, however, the DAIG may also be involved. For investigations involving allegations against a master sergeant (MSG), sergeant major (SGM), command sergeant major (CSM), or any officer in the grade of major through colonel, the command IG is required to forward an action request to the DAIG within two working days of receipt of the allegation.<sup>27</sup> While the command IG may still be responsible for the investigation, the Assistance Division of the DAIG will provide oversight.

Allegations against general officers, brigadier general selectees, and members of the senior executive service (SES) must be reported directly to TIG within two days of receipt of the allegations.<sup>28</sup> The Investigations Division of the DAIG conducts all investigations or investigative inquiries involving these officials.<sup>29</sup>

### *The Investigator's Role*

Regardless of whether the investigation is an investigative inquiry or a more formal investigation, IG investigators view their role as that of an independent fact finder who has no stake in the ultimate disposition of the case.<sup>30</sup> The analogy that many investigators like to use is that they are like the umpire at a baseball game.<sup>31</sup> Their responsibility is simply to call balls and strikes, find the facts, and not be concerned with the final score. There is some regulatory support for this analogy. The regulation makes clear that results of investigations will not be used as a basis for adverse actions against the individuals being investigated.<sup>32</sup> There is, however, an exception to this rule. The regulation permits using the investigation as a basis for adverse actions against the subject or suspect with the approval of the SA, USofA, CSA, VCSA, or TIG.<sup>33</sup>

### *Scope of Investigations*

The IG does not have unlimited jurisdiction to conduct investigations. Inspector generals should not normally investigate when: “[t]he alleged impropriety is of a nature that, if substantiated, would likely constitute criminal misconduct”;<sup>34</sup> “[s]ubstantiation of allegations appears certain at the outset of the IG analysis of the [Inspector General

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<sup>23</sup> *Id.* para. 8-3d.

<sup>24</sup> *Id.* para. 1-6d.

<sup>25</sup> *Id.* para. 1-8c.

<sup>26</sup> *Id.* para. 1-4a(11)(c).

<sup>27</sup> *Id.* para. 1-4b(5)(b).

<sup>28</sup> *Id.* para. 1-4(5)(c).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* para. 8-2a(5).

<sup>31</sup> This assertion is based on the author's recent professional experiences as the Regional Defense Counsel for Region I, United States Army Trial Defense Service, from 10 June 2002 to 15 July 2004 [hereinafter Professional Experiences].

<sup>32</sup> AR 20-1, *supra* note 4, para. 3-3a.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* para. 8-3b(1). The regulation further states:

While many allegations of acts or omissions can theoretically be seen as criminal insofar as they could be phrased as a dereliction of duty, violation of a regulation, or conduct unbecoming an officer, this does not necessarily preclude an investigation or inquiry by an

Action Request], and it appears certain adverse actions against individuals will occur”;<sup>35</sup> “[t]he Army has established means of redress”;<sup>36</sup> “[t]he chain of command decides to address the issues and allegations”;<sup>37</sup> “[t]he allegations involve professional misconduct by an Army lawyer, military or civilian”;<sup>38</sup> or “[t]he allegations involve mismanagement by a member of the Judge Advocate Legal Service serving in a supervisory capacity.”<sup>39</sup> If an individual is being investigated by the IG, it is likely to involve relatively minor misconduct. The command may also be uncertain of what the individual did and can use the IG investigation to develop facts, which they can then use to launch a different type of investigation.

If the client is a senior official—general officer, a brigadier general select, or a senior civilian employee—the DAIG has greater involvement. It is Army policy to forward “any and all allegations of impropriety or misconduct” (including criminal allegations) against senior officers to the DAIG.<sup>40</sup> If, in an ongoing collateral investigation, senior officials become the suspects or subjects of an allegation, the command must “halt the inquiry or investigation as it regards any specific allegations against a senior official and report any and all such allegations directly to DAIG’s Investigations Division for determination of further action.”<sup>41</sup> If a collateral investigation, such as a criminal investigation, was initiated, that collateral investigation is to “halt the inquiry or investigation as it regards any specific allegations against a senior official and report any and all such allegations directly to DAIG’s Investigations Division for determination of further action.”<sup>42</sup> The IG “will not conduct any fact-finding into the nature of the allegations unless authorized by TIG, DTIG, or Chief, Investigations Division, DAIG.”<sup>43</sup> For senior officers, the DAIG investigation is likely to be the primary investigative tool.

### *Status of the Client*

Regardless of the type and scope of the investigation, the client’s status will fall into one of three categories: witness, subject, or suspect. Witnesses are not the subject of the investigation. They are someone “who saw, heard, knows, or has something relevant to the issues being investigated and who is not a subject or a suspect.”<sup>44</sup> A subject is someone being investigated for non-criminal allegations such as violations of non-punitive regulations.<sup>45</sup> A suspect is in the most serious category and “is a person against whom criminal allegations have been made.”<sup>46</sup> Although it does not appear in the regulation, it is also the DAIG’s policy to treat all senior officers being investigated as suspects.<sup>47</sup>

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IG. The directing authority may still direct the IG to conduct an investigation or inquiry. Coordination or consultation with the appropriate legal advisor will be conducted in such cases as this and with USACID officials if appropriate.

*Id.* para. 8-3b(1).

<sup>35</sup> *Id.* para. 8-3b(2).

<sup>36</sup> *Id.* para. 8-3b(3).

<sup>37</sup> *Id.* para. 8-3b(4).

<sup>38</sup> *Id.* para. 8-3b(5).

<sup>39</sup> *Id.* para. 8-3b(6).

<sup>40</sup> *Id.* para. 8-3i(2).

<sup>41</sup> *Id.* para. 8-3i(1).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* para. 8-3i(2).

<sup>44</sup> *Id.* para. 8-5a.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Interview with Lieutenant Colonel Craig Meredith, former Deputy Legal Advisor, United States Army Inspector General Agency, in Alexandria, Va. (Feb. 21, 2003).

## Sources & Confidentiality

The IG will undertake extensive measures to protect the identity of witnesses and, especially, complainants.<sup>48</sup> The IG will not disclose the name of the complainant to anyone without the complainant's consent.<sup>49</sup> The regulation also establishes a privilege for IG records.<sup>50</sup> The IG applies the Freedom of Information Act (FOIA)<sup>51</sup> exemptions broadly in order to limit disclosure of information.<sup>52</sup> The IG will not allow witnesses, subjects, or suspects to independently record their testimony given to the IG investigator.<sup>53</sup> The IG regulation also provides that the IG will ask all witnesses, subjects, and suspects not to disclose their testimony with anyone other than the IG without the IG's permission.<sup>54</sup>

## Standards and Burden of Proof

It is important to know what standards the IG uses and the burden of proof required in order to substantiate an allegation. The violations investigated fit into three categories: non-punitive violations of regulatory guidance, punitive violations of law, and violations of established policies, SOPs, or standards.<sup>55</sup> The investigative standards come from the issues being investigated and are analogous to the elements of the offense. For example, if a client is being investigated for allegations of adultery, the standards or elements are based on a punitive violation of the law and come from Article 134, UCMJ.<sup>56</sup> If, on the other hand, the client is being investigated for improperly receiving a gift from a foreign source, the standards may come from the Joint Ethics Regulations<sup>57</sup> or a departmental policy. Inspector generals are also directed to word allegations in such a way that a substantiated allegation represents an impropriety.<sup>58</sup> The regulation states that “[p]reponderance of credible evidence is the standard of proof IGs use to substantiate or not substantiate allegations. Preponderance is defined as ‘superiority of weight.’”<sup>59</sup>

## Conducting the Investigation

The IG will gather evidence, talk to witnesses and conduct the leg work of the investigation similar to how other investigations are conducted. One unique aspect of IG investigations, particularly those conducted by the DAIG, is that they

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<sup>48</sup> See generally AR 20-1, *supra* note 4, para. 1-12.

<sup>49</sup> *Id.* para. 1-12a(1).

<sup>50</sup> *Id.* para 3-1b. This paragraph states that “[i]nspector general records are privileged documents and contain sensitive information and advice.” *Id.* While there is no specific privilege for unclassified IG records in the Military Rules of Evidence (MRE), MRE 507 can protect the identity of an informant. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 507 (2002) [hereinafter MCM]. It is possible that this privilege could be asserted in a court-martial to protect the identity of an informant. The MRE privilege is not so broad, however, as to protect all IG documents and records. When the IG report is being used as a basis for adverse administrative actions, the IG protects these records under exemptions in the FOIA.

<sup>51</sup> 5 U.S.C. § 552 (2000).

<sup>52</sup> AR 20-1, *supra* note 4, para. 3-2 b. This paragraph states the following:

[w]hen IG records are released outside IG channels, they will be marked, “This document contains information EXEMPT FROM MANDATORY DISCLOSURE under the FOIA. Exemption(s) (number(s)) apply.” The following exemptions may apply to IG records: (1) Inspection reports – Exemption 5. (2) Reports of Investigation – Exemptions 5,6, and 7. (3) Reports of Investigative Inquiry – Exemptions 5,6, and 7. (4) Inspector General Action Requests – Exemptions 5, 6, and 7.

*Id.* See also *id.* para. 3-7e (stating that discovery requests for IG records by a defense counsel in a judicial proceeding will be reviewed and the IG will redact what they deem as nonrelevant information and information exempted under the FOIA before releasing the records. Only after the presiding judge does an in camera review and signs a protective order, will the IG release complete unredacted copies of IG records to a defense counsel).

<sup>53</sup> *Id.* para. 8-4h.

<sup>54</sup> *Id.* para. 8-4i.

<sup>55</sup> *Id.* para. 4-4 d.

<sup>56</sup> UCMJ art. 134 (2002).

<sup>57</sup> U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION (JER) (30 Aug. 1993).

<sup>58</sup> AR 20-1, *supra* note 4, para. 8-2 a(3).

<sup>59</sup> *Id.*

proceed slowly. More specific details about the actual conduct of the investigation are discussed in the subsequent sections of the article.

### *Concluding the Investigation*

After the evidence is gathered, the IG will write up the report of investigation or investigative inquiry. The report will most often consist of an executive summary and the main body of the investigation. For every allegation investigated there will be a consideration of the relevant evidence, testimony, and statements; an analysis; and a conclusion stating whether the allegation was substantiated or unsubstantiated.

Once the report is complete, it enters the review process. In the case of a DAIG, there will be a legal review before the report leaves the IG office. In all reports of investigation and investigative inquiries where there has been a substantiated allegation, a legal review by the supporting JA is required.<sup>60</sup>

After many weeks or months, the report will be complete. In the case of a DAIG investigation, TIG and the VCSA will review the report as part of the final review process if the VCSA was the appointing authority. For investigations conducted at the local level, the local inspector general and the commander who directed the investigation will normally approve or disapprove the report. The subject will then be notified, usually in writing, of the results of the investigation.

### **The Process/The Client/The Defense Counsel**

With this general understanding of the rules and structure of the IG investigative system, the article will now focus on how the process may work for an individual client and how the defense counsel can get involved to best protect their client's interests. The general structure is the same, regardless of the rank of the client. There will be some variations, which this section will discuss, if the client is a senior officer.

### *The Step by Step Process*

The regulation sets forth seven steps to an IG Investigation. The IG must "obtain a written directive from the directing authority . . ."<sup>61</sup> The IG must "[v]erbally notify appropriate commanders or supervisors and the subjects or suspects of the investigation and inform them of the nature of the allegations."<sup>62</sup> The IG will "[d]evelop an investigative plan."<sup>63</sup> The IG will "[g]ather evidence and take sworn and recorded testimony."<sup>64</sup> After collecting the evidence, the IG will "[e]valuate the evidence and write the report of investigation."<sup>65</sup> The IG will "[o]btain a written legal review of the report of investigation from the supporting judge advocate."<sup>66</sup> Finally, the IG will "notify the appropriate commanders or supervisors, complainant (only allegations directly pertaining to the complainant), and subjects or suspects of the approved results of the investigation in writing . . ."<sup>67</sup> Investigative inquiries are less formal than investigations, but are conducted in a similar manner as investigations.<sup>68</sup> While there is a logical flow to these steps, there is no regulatory requirement to follow them in sequential order, and some steps may proceed simultaneously. For example, the IG could begin formulating the investigative plan before contacting the subject(s) or suspect(s) of the allegations. Likewise, after a legal review, there may be a need for the IG to interview or re-interview certain witnesses or collect additional evidence.

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<sup>60</sup> *Id.* para. 8-7c(1)(a).

<sup>61</sup> *Id.* para. 8-4b(1).

<sup>62</sup> *Id.* para. 8-4b(2).

<sup>63</sup> *Id.* para. 8-4(3).

<sup>64</sup> *Id.* para. 8-4(4).

<sup>65</sup> *Id.* para. 8-4(5).

<sup>66</sup> *Id.* para. 8-4(6).

<sup>67</sup> *Id.* para. 8-4b(7).

<sup>68</sup> *Id.* para. 8-4(c).

## *The Beginning*

The process begins after the IG receives an IGAR. At this stage, the client may not be aware that an IGAR has been made. The client is generally made aware of the investigation or investigative inquiry after being informed by their chain of command or the IG of the investigation and the allegations. In the case of senior officers, the Deputy IG or TIG will likely contact the officer and tell him that an investigative inquiry or a formal investigation has been initiated. The client will be told, in general terms, the allegations being investigated, but the IG will not share any detailed information. Notification of investigations conducted by the command's IG may vary, but the end result will be the same—the client will know in very general terms that the IG is investigating him.

Once an investigative inquiry or investigation is opened, the client, particularly a senior client may suffer significant adverse impacts, even if the allegations are never substantiated. Senior officers will essentially be flagged during this process.<sup>69</sup> As a result, the client will not be able to: apply for retirement without DA approval; take a new command; or, be promoted, if on a promotion list.<sup>70</sup> Senior officers in the grade of O-9 and O-10 will not be able to apply for time in grade waivers while the investigation is pending. This is often a source of extreme frustration for the client, especially if the investigation goes on for several months or even years.

After the client is notified that an investigation is opened, he may make his first attempts to contact a trial defense attorney. It is rare that the client will seek assistance from trial defense counsel before this stage, and often the client will wait until much later in the process. If the client contacts a defense attorney at this stage, it is important to advise the client not to act on his frustrations. For example, the client may want to find out who submitted the IGAR and talk with that person in hopes of resolving the issue. The client should be advised against this. One issue the IG takes an intense interest in is protecting a complainant against reprisal actions.<sup>71</sup> Even if the client's intent in finding and contacting a complainant is motivated by a genuine desire to resolve an issue, the complainant and the IG may not see it that way. If the IG perceives the client as attempting to take a reprisal action against the complainant, additional allegations will likely be added and investigated.

In the case of DAIG investigative inquiries and formal investigations, the investigators will not typically contact the client for an interview immediately. Instead, the investigators will conduct a background inquiry to gather facts about the allegation.<sup>72</sup> The IG will interview witnesses and gather documentary or other evidence.<sup>73</sup> Only after the IG spends considerable time and effort gathering relevant information on the case, will they approach the subject or suspect for an interview.<sup>74</sup>

## *Defense Counsel Involvement*

Typically, one will not contact a defense counsel until after receiving notification that an investigation or investigative inquiry is being conducted or after being contacted by the IG for an interview. In most cases, the defense counsel gets involved well after the process is underway and after the IG has collected a significant amount of evidence.

Once the client is aware that the investigative inquiry or investigation is being conducted and contacts the defense attorney for advice, it is very important to advise the client not to do anything to assert himself in the investigative process. For example, the client may have the best of intentions for contacting witnesses and gathering information; however, it is important for the defense counsel to conduct evidence gathering and contact witnesses because the IG could interpret the client's action as an attempt to influence the investigation. It can be particularly difficult to convince senior officers to sit on

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<sup>69</sup> The IG regulation does not state that individuals will be flagged or otherwise adversely impacted while the investigation is ongoing. That is the practical reality, however, in the case of senior officers. The Secretary of the Army generally delegates the authority to adjudicate non-criminal investigations of general officers to the VCSA. From the beginning of the investigation, the VCSA will be aware of the subject of the allegations, and usually serves as the appointing authority for IG investigations against general officers. Because of the potential consequences that a substantiated allegation may have on the general officer and on the Army, the leadership is usually unwilling to give further assignments or take any favorable action until the investigation is complete. Professional Experiences, *supra*, note 31.

<sup>70</sup> Theoretically, an investigation cannot proceed indefinitely against an officer on an approved promotion list. Promotion cannot be delayed more than six months without SA approval, and in no case can a promotion be delayed more than eighteen months. See 10 U.S.C. § 624 (2000).

<sup>71</sup> See AR 20-1, *supra* note 4, para. 8-9c.

<sup>72</sup> *Id.* para. 8-4(b)

<sup>73</sup> *Id.* para. 8-4b(4).

<sup>74</sup> *Id.* para. 8-4b(5).

their hands while the IG is investigating, but it is important to prevent the client from doing anything the IG could interpret unfavorably.

After the client contacts a defense attorney, the attorney should immediately contact the IG office conducting the investigation or inquiry. The attorney should talk to the individual conducting the investigation and gather as much information as possible about the scope and nature of the investigation. Typically, the investigator will only provide the defense attorney with the general nature of the allegations and the regulatory, statutory, or other standards the client is alleged to have violated.<sup>75</sup> Press for details, however, focusing on specific issues, such as the time frame of the alleged misconduct, the locations where the misconduct is alleged to have taken place, and the standards that were violated.

The investigator may only provide very general information, such as “between 1998 and 2000 while stationed at Fort Swampy, BG Blank improperly used official military travel.” Clearly, such general information is not very helpful or informative, which may be the IG’s intent. Occasionally, the investigator may be willing to share more specific information and, on even rarer occasions, the investigator may be willing to discuss the allegations in detail with the defense attorney. It is always worth the effort to at least ask.

During the initial contact with the IG, the defense counsel should notify the investigator that the attorney represents the client under investigation and all future contact with the client should be coordinated through the defense counsel. A sample notification and client release is at appendix A.

If the investigator has already contacted the client for an interview, the attorney should get the interview postponed in order to review the information and fully prepare the client. In the case of senior officers, the DAIG is typically willing to delay the interview until the defense counsel has had an opportunity to meet with the client and prepare for the interview. On occasion, an investigator may press for an immediate interview. The defense attorney should remind the investigator that the client has a right to be represented at the interview and the opportunity to comment on any unfavorable information during the interview process.<sup>76</sup> Failing to give the client the opportunity to prepare for the interview would deny the client these important rights. In most cases, that should be enough to convince the investigator to delay the interview. Since the investigator will have done extensive investigation prior to the interview, it is critical not to let the client be rushed into the interview before he is fully prepared.

#### *Client Meeting*

The defense counsel must also meet with the client. Meeting with a client under IG investigation will be similar in many respects to the initial meetings a defense counsel has with any client. The client should come prepared to discuss the allegations in as much detail as possible. The defense counsel will not have the benefit of a charge sheet or other similar documentation describing the allegations. Therefore, it is important to press the client for as many details as possible about the matters being investigated.

Encourage the client to bring any documents, records, vouchers or other physical evidence that are in his possession and related to the allegations. As in other cases, the client is often the best source of initial evidence. Senior clients may have very detailed records of activities, which may be very helpful. It is also important for the client to provide names and contact information of persons who may have relevant information.

At the meeting, the defense counsel should answer the client’s questions about the IG process and explain the potential consequences of an IG investigation. Walk the client through these consequences at the initial meeting and throughout the investigation process. In the case of senior clients, approval is routinely granted to use investigations as the basis for adverse actions. Investigators at the DAIG are aware that their investigation will likely serve as the basis for disciplinary action against a senior official if the allegations are substantiated. Accordingly, these investigations can become prosecutorial in their tone and nature. The investigators often spend significant time building a case against the client before an interview. At the interview, the investigators may then confront the client with adverse information that they have collected and then gauge his response. The defense attorney should explain this to the client during the first meeting so the client can be better informed when making critical decisions about his case.

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<sup>75</sup> While this information may be the same information the IG provided to the client at the initial notification, it is important that the defense counsel gather this information directly from the IG. Often times, the client will have been caught off guard when the TIG, DTIG, or other IG official provided him the initial notification and he will be vague as to what specifically the IG is investigating.

<sup>76</sup> AR 20-1, *supra* note 4, para. 8-6.

## *Investigative Work*

After the initial meeting with the client, the defense attorney will need to investigate the case. The IG regulation states that investigators will not disclose names of witnesses to defense counsels and that defense counsels must find witnesses “through their own procedures.”<sup>77</sup> The IG’s unwillingness to provide any information about the investigation to a defense counsel is one of the most frustrating aspects of these investigations. Unlike a criminal investigation, a commander’s inquiry, or other investigations conducted under AR 15-6, the defense has no legal authority to view the entire investigative file. Also, before the investigation is complete, the client has no legal authority to view any of the investigative files.

Information from the client often provides the only basis the defense may have for beginning a review of the facts. It is then up to the defense counsel to contact witnesses, obtain evidence, and review information. There is no short cut for this kind of legwork, and it is essential in order to develop a good understanding of the case.

There may often be roadblocks throughout this process. The most common roadblock is a witness’s unwillingness to talk with the defense counsel because of the witness’s belief that he cannot discuss the matter with anyone other than the IG investigator. The IG routinely asks witnesses not to discuss the matters under investigation with anyone unless they get permission from the IG.<sup>78</sup> The IG, however, has no legal authority to prevent witnesses from talking to defense counsel about the investigation. The regulation states, “[i]nspectors general will not withhold permission for defense counsel to interview witnesses about matters under investigation.”<sup>79</sup> On most occasions, the IG will not inform witnesses that they have permission to talk to the defense counsel and sometimes an inspector will not even be aware of the provision regarding defense counsel’s access to witnesses.<sup>80</sup> The impression often left with witnesses is that they cannot discuss the matters under investigation with anyone other than the IG. It is important to have this provision of the regulation accessible so that witnesses understand that it is appropriate for them to talk to the defense counsel.

Interviewing witnesses for an IG investigation is no different than other witness interviews that defense counsel routinely conduct. The skills of listening, asking detailed follow-up questions, and thoroughly preparing will serve the attorney well. The one additional advantage that the defense counsel may have is that witnesses are often willing to provide information that will assist the client once they realize they can talk to the defense counsel. This is often the case with senior clients who have established a good name and strong reputation in their years of service. Use the client’s good name to his advantage. Once the witness understands that the defense attorney is there to help the officer under investigation, he may be more willing to help and may also put the defense in contact with others who may have relevant information.

The IG will likely have interviewed most of the relevant witnesses before the defense gets involved in the case; however, the defense should not assume that all the witnesses have been interviewed or that the IG knows everything. In some cases, the defense attorney may beat the investigator to the witness or uncover witnesses that the IG knows nothing about. If those witnesses have relevant and helpful information, it is important to get a statement and lock the witnesses in on the facts. It may also be advisable to request a sworn statement from the witness.<sup>81</sup> After the IG interviews the client and asks him if there is any additional information or witnesses relevant to the investigation, the client can provide a copy of the sworn statement. Providing the IG with sworn statements supporting the information provided by the client can be very helpful in getting the allegations unsubstantiated.

Contacting witnesses is not the only method for gathering information. Collecting documents may also be important. Here again, the defense may be at a significant disadvantage. There is no legal authority the defense counsel can use to compel individuals or organizations to provide documents while the investigation is ongoing. Often, the client’s good name will persuade individuals to provide copies of relevant documents. Frequently, the best source of documentary evidence is the client and his staffs’ records. The defense counsel can assist the client in getting these documents organized and catalogued and should explain to the client the relevance for each document or piece of evidence.

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<sup>77</sup> *Id.* para. 8-4i.

<sup>78</sup> *See Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* app. E, fig. E-1. This appendix is the interview guide used by investigators during the interview. Under step 11, “Wrap-up,” the guide states, “TO KEEP THIS CASE AS CONFIDENTIAL AS POSSIBLE YOU WILL BE ASKED NOT TO DISCUSS YOUR TESTIMONY WITH ANYONE WITHOUT OUR PERMISSION.” No mention is made that the IG will not withhold permission to talk with the defense counsel of the individual being investigated.

<sup>81</sup> Contrary to IG investigations, in criminal investigations it may not always be advisable for a defense counsel to take sworn statements during witness interviews because the statements may be discoverable and the defense attorney may become a witness at trial.

The defense counsel should be cautious and discrete in conducting the investigation. First, the defense would not want to inadvertently taint the reputation of the client under investigation by disclosing information too freely or with people who do not have a need to know this information. Also, the IG is usually given a very specific charge as to the areas of investigation. If, however, other potential related or unrelated misconduct is discovered, the investigator can obtain authority to investigate those additional matters.<sup>82</sup> Defense counsel must be cautious not to do or say anything which would give the IG reason to broaden the investigation's scope.

Defense attorneys must also research the relevant law, policy, regulations, and standards that the client is alleged to have violated. It is important for the attorney to have a strong understanding of the legal standards at issue. This often requires research into such areas as employment law, contract and procurement law, operational law, finance and travel regulations, joint ethics regulations, and a potential host of other legal standards. There is simply no short cut for this work, and the attorney must be willing to invest the time and effort to become well versed in the relevant subject areas.

### *Developing an Interview Strategy*

After the defense counsel has had an opportunity to talk to the client, interview witnesses, and review documents and other evidence, the counsel should be ready to meet with the client and formulate an interview strategy. The first question to answer is whether the client should participate in the interview. Counsel must assume the IG knows or will obtain all the relevant facts. Defense counsel must also explain to the client that the IG will follow-up on whatever the client tells the investigators. If there is any suspicion that the client attempted to mislead or lie to the investigators, the client's situation will only get worse. The best option, under some circumstances, is to advise the client not to participate in an interview. If the client does not participate, however, he forfeits the opportunity to provide input and it will be difficult for him to later on inject himself into the process. The client should also understand that the decision not to participate in an interview is likely to be viewed negatively by the IG and the decision makers who will ultimately decide what, if any, action to take against the client.

If the defense counsel and the client determine that participating in an interview and providing information to the IG is in the client's best interest, it is important to fully prepare the client for the interview. Senior clients may believe that because of their intelligence and experience in the Army, and because they have nothing to hide, they can handle the interview with little or no preparation. The defense counsel must disabuse the client of that notion. While the client may be very experienced, and very smart, few of them have been in this situation before. They will be on unfamiliar turf and any misstep can have adverse consequences. The defense counsel can relate to past experiences with other clients. In some cases, the defense attorney may even do a mock interview, to help the client understand the importance of preparation. Senior clients are typically going to be very busy, but they must understand that preparing for the interview is a priority.

Often the investigator will tell the client that the interview is his "day in court." The courtroom analogy works well only if the attorney and the client understand that there have been numerous "court sessions" before the interview. The defense will not know what was discussed in those sessions. There will most likely be other sessions after the interview, which the defense is unlikely to know anything about either. During the client's "day in court," the defense counsel and the client must understand that the IG investigator is the prosecutor, judge, and jury. The investigator holds all the evidence, makes the rules, and only allows the defense counsel and the client to see selected portions of the evidence that the investigator wants to show. The defense counsel must prepare the client for this "day in court," and the client must go into the interview with his eyes wide open.

### *Have a Theme*

Just like preparing for any trial, it is important to have a theme or set of themes when preparing for the interview. The theme can guide the client throughout the interview process, and it allows him to return to safe ground and keep the interview focused on a message. For example, assume the client is being investigated for misusing official travel for personal or family use. After the defense counsel's review of the facts, the counsel determines that some of his use of official travel was a close call. The vast majority of the travel, however, was properly reviewed, coordinated, and executed.

In such a case, the theme may be that the client is careful about his use of official travel as evidenced by his past behavior. The client will need to be prepared to explain why there may have been some discrepancies with the travel in question; however, the client should take every opportunity to explain the process he goes through in getting official travel reviewed and approved, and that he is careful to do things the right way. Developing a theme allows the client to convey his

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<sup>82</sup> AR 20-1, *supra* note 4, para. 8-4e.

message, put specific conduct in a broader context, and provide him with a safe harbor to return to during the course of the interview.

### *Details are Important*

One of the most challenging aspects of the DAIG investigative process, particularly with senior clients, is that the issues being investigated are rarely recent. In many cases, the incidents took place several months or even several years ago. Because of the time lag and the client's busy and ever-changing schedule, it is often difficult for the client to recall facts and information in the level of detail that the interviewer will want. This presents a challenge for the defense counsel.

In order to meet that the challenge, the client must become as familiar with the facts as possible through the pre-interview investigation. The defense must get as much detailed information as possible from witnesses. The counsel should always ask if there is documentation, such as e-mails, legal opinions, or other written evidence, to verify whatever information the witness is providing. Documents, e-mails, written legal advice and similar items can be very helpful in refreshing the client's specific recollection.

During pre-interview preparation, other methods can be used to help refresh the client's recollection. For example, create a time line for the client that includes relevant dates and facts or provide the client with a list of key individuals and a synopsis of their involvement in the matters under investigation. Finally, provide the client with any documents or other evidence in an indexed fashion, so that he can quickly refer to and access important information during the interview. The interview is not a court proceeding, and the rules of evidence do not apply.<sup>83</sup> It is completely appropriate for the client to take all documentary evidence and other information into the interview and refer to the information as necessary. Before the interview, defense counsel can also discuss with the client whether the documents should be provided to the IG.

Finally, emphasize to the client that if they cannot recall a specific fact or detail the interviewer is asking about, the best response is likely, "I do not remember." As with any other situation where a client is interviewed, it is never a good idea for the client to guess or speculate.

### *Have Documents Ready*

During the pre-interview meeting with the client, all relevant documents and other evidence should be catalogued, indexed, and ready to use. In most cases, the IG will have already seen everything the defense gathers and brings to the interview. In some situations, however, the client may have key evidence that the IG has not seen. This evidence may be what turns the table in the client's favor.

Even if the IG has already seen and has copies of all the relevant documents, bringing a complete set of documents to the client's interview is important. The client's command of the facts, collection and organization of documentary evidence, and preparation for the interview positively impacts the investigator. The client's preparedness may even change the dynamic of the interview by sending a clear message that the client is well versed and prepared to discuss the issues. It can also serve as a subtle warning to the investigator not to overstate facts and inferences when questioning the client.

Along with documents, it is also important for the client to have a list of witnesses that the IG should interview. At the end of every interview, the IG will ask the client if there are other people that the IG should contact. The client should provide the IG with a witness list containing the witnesses' names and contact information and a brief synopsis of the witnesses' expected testimony. As mentioned above, the client may also want to provide sworn statements if the statements help the client and the IG has not yet interviewed the witnesses. Even if the IG has talked to every witness on the client's list, providing the list to the IG may reinforce the point that the client has done his homework.

### *Give the Client a Product*

At the conclusion of the pre-interview meeting, the defense counsel and the client will have covered a lot of ground. It may be difficult for the client to remember everything. Moreover, senior clients are used to receiving executive summaries

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<sup>83</sup> MCM, *supra* note 50, Mil. R. Evid. 1101(a) and (d) (providing that the MRE are applicable in courts-martial and do not apply to proceedings not listed in the section).

and similar documents from their staff officers, which summarize key points of briefings and meetings. The defense counsel should provide the client with a product that summarizes the things that were discussed. This packet can also include more general advice about how the client should conduct himself during the interview.<sup>84</sup> This general boilerplate advice can be modified for each individual client. The packet should be clearly labeled as attorney-client privileged material and the client should be cautioned on protecting the contents of the packet. The client can look over this information in the days leading up to the interview and use it as a means to refresh his memory. Senior clients in particular are very busy and may only have limited time to prepare for the interview. These written products can help clients focus their attention and energy on preparing for the interview in a short time with a minimum of distractions. The written product provided to the client should be clearly marked as attorney-client communication and the client should be reminded not to share the information with others.

### *Mechanics of the Interview*

One final point to discuss with the client prior to the interview is how the IG will conduct the interview. The process may vary, depending upon which IG office is conducting the interview. The DAIG process is the most formal and can serve as a baseline.

Interviews conducted by the DAIG will always include at least two interviewers. In some cases, the legal advisor may be present for the interview or some portions of the interview. Typically, one investigator will do most of the questioning; however, any member of the IG team may ask questions. The client should be aware that he will face a team of interviewers who may “tag team,” allowing each interviewer to take a break from questioning while the client remains on the hot seat.

If the client is a suspect, an interviewer will read the client his rights and have him sign a rights waiver before beginning the interview. It can be unsettling for the client to have his rights read to him. The defense counsel should prepare the client for this event and be prepared to answer the client’s questions and reassure him when the rights warnings are given.

The defense attorney should also carefully look over the rights warning document to get a clear understanding of the specific allegations against the client. The wording of the allegation must always represent an impropriety.<sup>85</sup> This requirement can make for some very tortured allegations that defy logic. For example, the allegation may read, “BG Blank wrongfully failed to ensure that all safety requirements were adhered to.” An allegation such as this seems to presuppose a failure on the client’s part, the only issue being whether the client’s failure was wrongful. Clarify with the interviewer if the language of the allegation is in any way unclear and force the IG to articulate to the client specifically what impropriety he is alleged to have committed.

Before the actual interview begins, the interviewer will provide a pre-taped briefing. “The pre-tape briefing essentially explains the investigative procedure, the IG investigator’s role, the ground rules for the interview, and other administrative elements of the interview prior to starting.”<sup>86</sup> One of the key ground rules is that while the client can have an attorney present, the attorney cannot participate in the interview.<sup>87</sup> Other ground rules are that the client cannot record the interview; the client cannot see copies of statements given by other witnesses, and the client cannot have a copy of his statement before the investigation is complete.<sup>88</sup> Finally, the interviewer will ask the client if he wants his statement released outside official

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<sup>84</sup> The following is an example of general advice provided to clients by defense counsel:

There are some general guidelines to keep in mind throughout the course of the interview. Answer the questions asked; do not guess or speculate. If you do not know the answer or cannot remember, say so. If you are not sure of an answer, qualify your response with phrases like “to the best of my recollection,” and “I can’t be completely sure, but . . . .” Do not let the interviewer put words in your mouth such as “could it be possible . . . .” Naturally, time causes a loss of detail. If your memory is vague, tell them so, though try to be consistent with any earlier statements you made on the subject. Be polite, but confident. Look the questioner in the eye. Choose your words precisely. Be short and to the point, but if you need to explain a particular answer, by all means do so. Do not be afraid to take frequent breaks. It is important that you remain fresh and focused. Breaks will also provide us an opportunity to discuss any possible issues of concern.

Professional Experiences, *supra* note 31.

<sup>85</sup> See AR 20-1, *supra* note 4, para. 8-2a(3).

<sup>86</sup> *Id.* para. 8-4 and fig. E-1.

<sup>87</sup> Professional Experiences, *supra* note 31.

channels under the FOIA. Discuss this with your client in advance so he is not confused by the question. There is no real advantage to consenting to the release of the client's testimony. There may, however, also be a disadvantage because the complainant may then be able to obtain a copy of the client's interview.

Once the pre-taped briefing is completed, the tape recorder will start rolling and will likely remain rolling for the rest of the interview. The client must understand that even if there are conversations off tape, there are no communications with the IG that are off the record.<sup>89</sup> Tell the client in advance not to let his guard down and to avoid making any gratuitous statements about the matters being investigated after the tape recorders stop. As with any client in any proceeding, stress the importance of listening to the questions carefully and answering what is asked, truthfully and directly.

Once the tape recorder starts, the IG will do a formal read-in.<sup>90</sup> This is a short scripted reading where the IG informs the client of the allegations, who directed the investigation, the investigator's qualifications, and the persons present at the interview. At this time, the interviewer will also ask the client if he consents to the release of his statement outside of official channels.<sup>91</sup>

The next step will be the questioning phase of the interview.<sup>92</sup> This will be the longest phase of the process. Prepare the client for a long day. Even in seemingly simple cases, the interview is likely to take two to three hours. Some interviewers will write out all of their questions and go through every question one at a time. Other interviewers will engage in a fluid questioning technique, letting the discussion move from one topic to another. Regardless of the technique used, the client must understand that every question has a purpose. It would be naive for the client to believe that the investigator comes to the interview with a completely open mind. By this time, the investigator may have spent months or even years on the investigation. He will undoubtedly have preconceived notions and will have definite ideas of where he wants to take the investigation. The client must be prepared for this in advance and use every opportunity to keep the interview focused on themes helpful to the client.

After the questioning, there will be a formal read-out.<sup>93</sup> This is much like the read-in and is a scripted process. During this phase, the client will be asked to provide the names of other people who may have relevant information on the issues being investigated. Finally, the client will be asked again if he consents to the release of his statement outside of official channels. That will conclude the interview. The attorney must prepare the client for each stage so that the client knows what to expect during the interview.

### *The Client's Role*

After thorough preparation of the client and the case, the defense counsel and the client are ready for the interview. In spite of all the work and preparation, the client still may be uncomfortable. Senior clients are not used to being on the receiving end of these interviews. Some clients may find it very hard to be placed in a position where they have to justify their actions to a suspecting audience. There are some things the client can do in the interview to gain a greater degree of comfort and confidence so that the right impression and message are presented.

The client should consider giving an opening statement. This approach may be particularly effective when the defense has a very clear idea of the allegations being investigated. The statement should not be more than a couple of minutes. An opening statement helps give the client more control of the process. It can allow the client to focus the investigators quickly on the key issues, so that time is not wasted on irrelevant issues. An opening statement also gives the client the opportunity to introduce his theme of the case. Finally, an opening statement can demonstrate to the investigators that the client has a strong command of the facts, is engaged in the process, and is not going to be easily tricked or boxed into corners.

The client must then be prepared to answer questions. He will face some easy questions and some hard questions. In either case, the client must be as forthcoming as possible. If the client tries to cut corners or explain behavior in a way that is

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<sup>88</sup> *Id.* para. 8-4h.

<sup>89</sup> *Id.* app. E, fig. E-6.

<sup>90</sup> *Id.* para. 8-4g(2) and fig. E-6.

<sup>91</sup> *Id.*

<sup>92</sup> *See id.* para. 8-4g(3).

<sup>93</sup> *See id.* para. 8-4g(4).

not credible or reasonable, the investigators will notice and may even include this observation in the report. If the defense attorney and the client participate in the interview, participation cannot be half-baked. In most cases the client can and should look forward to the opportunity to finally explain himself. With preparation, he will likely be more successful in looking the investigators in the eye and addressing the issues.

It is also important that the client does not guess on facts or go out on a limb on issues he is unsure of. It is much better for the client to say, "I do not know" or "I cannot recall" than to guess and be wrong. Even if the error is unintentional, the investigator may interpret the misstatement as an attempt by the client to deceive.

Make sure the client uses the investigators' questions to address his issues. The easiest way to ensure this happens is to give the client a list of talking points that he can take into the interview. The defense counsel should also have a copy of the list. Throughout the questioning, counsel can check off the points as the client discusses them with the investigators. Before the questioning leaves a certain topic, the attorney can ensure the client double checks his list to verify that he has discussed all of the relevant and helpful points on that issue.

While it is important for the client to answer the questions directly, the client can and should avoid irrelevant or repetitive questions. Many times, the investigator will ask the same question in a different number of ways in hopes of either getting a different answer or tripping up the client. The client should handle this by telling the investigator that he has already answered that question or set of questions. Usually, the investigators will move on to a different subject. This technique also works well in getting the investigators to move away from irrelevant questions.

### *The Attorney's Role*

The defense counsel's role at the interview can be nebulous. While the regulation allows the defense counsel to be present during the interview,<sup>94</sup> the investigators will point out that the defense counsel has no official standing. The defense attorney is neither allowed to ask questions nor answer questions on behalf of the client.<sup>95</sup> In the IG's eyes, the defense counsel is nothing more than an interested observer.

In reality, a defense attorney's role depends on the investigator's personality. Some investigators will stop the tape any time the attorney tries to talk to prevent the attorney's comments or questions from becoming a part of the investigation. Other investigators will see the attorney and the client as a team and will be receptive to limited amounts of information that the attorney can inject into the process. Regardless of the investigator's personality, the defense counsel has an important role in the interview. Counsel must be vigilant to protect the client's interests.

Throughout the interview and the questioning, the defense attorney should be assessing the investigation's strengths and weaknesses. While the investigators will not reveal everything, the attorney can determine a great deal from the questions, the documents, other evidence presented, and the interview's overall direction and focus. Careful attention to these issues allows the attorney to give the client an honest and more complete assessment of the overall investigation and the possible outcomes.

Another very important task for the defense counsel is to consider all documents the investigators may introduce and review those documents with the client before the client answers questions about them. Even if the attorney and the client have seen the documents before, carefully examine all documents with the client before he begins answering any questions related to a document. If necessary, the attorney can call for a break and discuss any concerns the client may have before he begins answering questions about a document or set of documents.

To the extent that interviewers allow, the attorney can interject thoughts and viewpoints into the interview in order to help the client explain issues. If the client plans to introduce documents, statements, or other evidence during the interview, the attorney can have the evidence lined up and prepared for the client's use. Counsel can then pass the information to the client at the appropriate times so that the client can refer to it and introduce it in the interview. Defense counsel can also take written notes during the interview.

As stated earlier, one of the realities of IG interviews is that they can be very long and physically draining. The attorney needs to keep an eye on the client and assess his fatigue and frustration level. Request breaks as often as necessary to break

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<sup>94</sup> *Id.* para. 8-5b.

<sup>95</sup> *Id.*

the rhythm of the interview, give the client an opportunity to gather his thoughts and prepare a response, allow the client to calm his temper, or give the client a short break. At a minimum, the attorney should call for a break every forty-five minutes to give the client an opportunity to discuss how things are going and prepare for the next phase of the interview.

After the interview is complete and the IG prepares a verbatim transcript of the interview, the attorney and the client have the opportunity to review the transcript.<sup>96</sup> The defense counsel should let the investigators know to contact him once the transcript is complete. The defense counsel and the client can then review the testimony. At that time, counsel can make the necessary notes without distractions.

During the interview, the defense attorney should ensure that all of the relevant and favorable information is part of the recorded interview. Some interviewers may engage in frequent discussions off the record. These discussions often address substantive matters, which may be helpful to the client. The counsel must make sure that these discussions are made part of the record after the tape is turned back on. This will prevent favorable information from being excluded or possibly ignored.

### **After the Interview (The Second Ice Age)**

Once the interview is over, the client typically will want immediate feedback. It is important to provide some initial feedback, but it is not a good idea to enter into a lengthy discussion immediately after the interview. The defense counsel should take a few days to review notes and thoughts about the interview and have the client do the same. After careful reflection, the attorney is much better suited to provide the client an honest and accurate assessment of the interview and overall investigation.

It is helpful to review again the entire process with the client during the follow-up meeting because, now that the client has experienced the process, he is likely to be more attentive, focused, and realistic as to his expectations. Also during the post interview period, the client should quickly collect and provide any documents that the investigator asked for that were not available during the interview.

In some cases, the IG investigation may have been going on for several months before the client is interviewed. Now that the interview is complete, the client will be anxious to get the entire investigation behind him and move forward. While it may be the client's desire and in his interests to conclude the investigation quickly, a quick resolution is not very likely in most cases, particularly with investigations conducted at the DAIG level. The defense counsel has to prepare the client for a lengthy and prolonged conclusion to the investigative process.

In most cases, the investigators will be hesitant to estimate when the report will be complete. In a DAIG investigation, it is likely to be a minimum of two to three months. During this time, the investigator will be writing the report of investigation or investigative inquiry.<sup>97</sup>

Once the report is complete, it enters the review process. The legal review process can take many months, and this long wait with seemingly no action on the case can be a great source of frustration for the attorney and the client.

In the case of DAIG investigations, the legal review is not a transparent process. Because the defense counsel and the client will not yet have access to the full report, the defense will not know what issues are receiving the greatest scrutiny or causing the most concern. It will be very difficult to advocate the client's position at this stage and in most cases, the client should rely upon the information provided in the interview as effectively conveying the client's points.

In some cases, however, it may be advantageous to contact the lawyers conducting the legal review and present the client's message to them. This is likely to meet with varying degrees of success, depending on what information the defense counsel can provide on behalf of the client. The most powerful information would be proof that the IG did not consider evidence favorable to the client. If the defense comes across such information, even after the interview, it is important to use this evidence as a way to continue to advocate the client's position.

Once the report is complete and approved, the client will be notified, usually in writing, of the results of the investigation. The report will either substantiate or unsubstantiate the allegations.<sup>98</sup> After a long period of waiting, this notification will trigger a number of actions by the defense counsel and the client.

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<sup>96</sup> *Id.* para. 8-5h.

<sup>97</sup> *Id.* para. 8-4b(5).

The best outcome is that the allegations are unsubstantiated. If the case is unsubstantiated, that will be the end of the issue. There will be no entry of the client's name in the IG database and that should conclude the representation. If, however, any allegations are substantiated, there are a number of adverse consequences, which may follow. Inspector general databases are reviewed anytime the Army conducts suitability or background screening on individuals selected for promotion or other favorable personnel actions.<sup>99</sup> The following are examples of when information regarding a substantiated allegation may be disclosed within Army channels: general officer nominations, promotions, and reassignments;<sup>100</sup> general officer retirements;<sup>101</sup> vacation of promotion;<sup>102</sup> promotion to colonel,<sup>103</sup> and, removal from the command list.<sup>104</sup>

A substantiated report may also trigger other actions. In the case of senior officers, any adverse administrative actions will usually be taken by the VCSA. For other Soldiers, the command appointing the investigation may want to use the substantiated report as a basis for initiating action against the Soldier. The regulation, however, states, "Inspector General reports will not be used as a basis for adverse actions against individuals, military or civilians, by directing authorities or commanders, except when specifically authorized by SA, US of A, CSA, VCSA, or TIG."<sup>105</sup> The rationale for this prohibition seems to be the IG's desire to keep their reports and internal matters confidential.<sup>106</sup> Because of this prohibition, the defense counsel must remain alert for follow-on investigations or command attempts to take action against a client based upon the IG report without first obtaining authorization.

In the case of senior officers, authorization to use the IG report as a basis for adverse action is routinely granted. It is also unlikely that there will be a follow-on investigation. The types of adverse actions which the VCSA may take based on the IG's substantiated report include: a censure or memorandum of concern or a General Officer Memorandum of Reprimand (GOMOR)—filed locally or in the officer's Official Military Personnel File (OMPF).<sup>107</sup> On very rare occasions, the substantiated report may also serve as a basis for a nonjudicial punishment<sup>108</sup> or a court-martial. If either nonjudicial punishment or trial by courts-martial is contemplated, the case may be sent to a major command for evaluation and possible action.

By far, the most likely outcome of a substantiated IG report on a senior officer will be a censure or GOMOR<sup>109</sup>. If the VCSA issues a GOMOR, it will most likely be filed in the client's OMPF. A GOMOR in a senior officer's OMPF can have a devastating effect on his career. The most obvious impact is a certain end to the officer's upward progression in the Army. A more serious and long-term impact, which may occur after the client submits a retirement request at some point in the future, is the initiation of an Army Grade Determination Review Board (AGDRB) under the provisions of Army Regulation 15-80.<sup>110</sup> The possibility that the client could be retired at a lower rank is one of the most long lasting and severe consequences of a substantiated IG report and a follow-on GOMOR.

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<sup>98</sup> *Id.* para. 8-4j.

<sup>99</sup> Meredith, *supra* note 6, at 24.

<sup>100</sup> U.S. DEP'T OF ARMY, REG. 600-8-29, OFFICER PROMOTIONS para. 1-15b and ch. 8 (30 Nov. 1994) [hereinafter AR 600-8-29].

<sup>101</sup> Memorandum, Secretary of Defense, to Secretaries of the Army, Navy, and Air Force, Under Secretary of Defense (Personnel & Readiness), General Counsel, and Inspector General, subject: Processing Retirement Applications of Officers in the Grades of 0-7 and 0-8 (9 Oct. 1998) (on file with DAIG Legal Counsel). The author has represented general officer clients whose retirement grade has been reduced by the Secretary of the Army based solely on a substantiated DAIG report of investigation.

<sup>102</sup> The President may vacate the promotion of an officer to Brigadier General if that officer has served in the rank for less than 18 months. *See* 10 U.S.C. § 625 (2000).

<sup>103</sup> AR 600-8-29, *supra* note 103, para. 1-15a.

<sup>104</sup> Meredith, *supra* note 6, at 24

<sup>105</sup> AR 20-1, *supra* note 4, para. 3-3a.

<sup>106</sup> *Id.* para. 3-3e (providing that if an IG report is used for disciplinary action, "only the minimum amount of evidence necessary will be used . . . . IG opinions, conclusions, and recommendations are not evidence and will not be used for adverse action.").

<sup>107</sup> The SA delegates to the VCSA the authority to adjudicate all non-criminal investigations and their findings. The VCSA then has the authority to take administrative actions against the client, such as issuing GOMORs. *See* U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986).

<sup>108</sup> UCMJ art. 15 (2002).

<sup>109</sup> Professional Experiences, *supra* note 31.

<sup>110</sup> U.S. DEP'T OF ARMY, REG. 15-80, ARMY GRADE DETERMINATION REVIEW BOARD AND GRADE DETERMINATIONS (12 July 2002) [hereinafter AR 15-80].

Most retirement grade determinations are automatic by operation of law and do not require action by the AGDRB.<sup>111</sup> If, however, there is sufficient unfavorable information in a Soldier's file that demonstrates that the Soldier's service in that rank was unsatisfactory, the AGDRB may recommend to the SA or his designee that the Soldier be retired at a lower rank. One specific act of misconduct may serve as the basis for this determination.<sup>112</sup>

Because of the potential adverse consequences that can result from a substantiated IG report, it is essential that the defense counsel stay engaged in the process even after the interview is over. A client's right to receive a copy of the report under the FOIA is triggered by his notice that the investigation is complete.<sup>113</sup> The regulation states:

Inspector General records will not be made available to individuals or their counsel for use in administrative actions, military justice actions or appeals, unless TIG determines that the individual has a right of access under minimum due process because the IG records are the basis for the action taken against the individual.<sup>114</sup>

Thus, if the IG report will serve as a basis for an adverse action, the client and the client's attorney have a right to the report under the FOIA.

On its face, this procedure appears fair and protective of the client's basic due process rights because of the client's opportunity to review the basis of the adverse information before any action is taken. In reality, however, this right is illusory because the client will only receive portions of the records that are releasable under the FOIA.<sup>115</sup>

Under the FOIA, there are nine categories of exemptions that an agency can assert to prevent disclosure.<sup>116</sup> Not all categories apply to IG reports of investigation; however, there are several categories the IG asserts on a routine basis.<sup>117</sup> One of the most frequent exemptions asserted by the IG is exemption (b)(7)(C).<sup>118</sup> This provision exempts records or information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."<sup>119</sup> The IG will use this exemption to redact the names and other personal information of witnesses who provided statements and other individuals contained in the report.

Another often used exemption is (b)(7)(D).<sup>120</sup> This provision allows the IG to exempt records or information compiled for law enforcement purposes, which; "could reasonably be expected to disclose the identity of a confidential source . . . and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation . . . information furnished by a confidential source."<sup>121</sup> If the IG either explicitly or implicitly offers a promise of confidentiality to a witness,<sup>122</sup> even the statements provided by that witness, which could allow the identity of the witness to be deduced,<sup>123</sup> can be exempted from disclosure.

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<sup>111</sup> *Id.* para. 2-3.

<sup>112</sup> *Id.* para. 2-5c.

<sup>113</sup> If the defense counsel attempts to get information from the IG report before the report is complete, the IG will assert the exemption under 5 USC § 522(b)(7)(A) (2000). The exemption, commonly known as 7A, exempts records or information compiled for law enforcement purposes, which "could reasonably be expected to interfere with enforcement proceedings." *Id.*

<sup>114</sup> AR 20-1, *supra* note 4, para. 3-7e(9).

<sup>115</sup> *Id.* para. 3-7e(9). This article is not intended to provide a complete explanation of the interface between the FOIA and IG investigations. The purpose of the FOIA discussion in this article is to make the practitioner aware that there is a significant interface between the FOIA and IG investigations, and that the use of the FOIA exemptions by the IG will often result in denying the defense counsel and the client important information.

<sup>116</sup> 5 U.S.C. § 552 (2000).

<sup>117</sup> AR 20-1, *supra* note 4, para. 3-2b(2) and (3) (stating that exemptions 5, 6, and 7 may apply to the release of reports of investigation and reports of investigative inquiry).

<sup>118</sup> 5 U.S.C. § 552(b)(7)(C).

<sup>119</sup> *Id.* § 552(b)(7)(C).

<sup>120</sup> *Id.* § 552(b)(7)(D).

<sup>121</sup> *Id.* § 552(b)(7)(D). For the purpose of this clause, criminal law enforcement agencies include agency inspectors general. See *Ortiz v. U.S. Dep't of Health and Human Servs.*, 70 F.3d 729 (2d Cir. 1995).

<sup>122</sup> See, e.g., *Williams v. FBI*, 69 F.3d 1155 (D.C. Cir. 1995); *Jones v. FBI*, 41 F.3d 238, (6th Cir. 1994); *KTVY-TV v. United States*, 919 F.2d 1465 (10th Cir. 1990).

Each witness who gives a statement or testimony during the IG investigation is told by the interviewer that the IG will protect his confidentiality and will not reveal sources of information.<sup>124</sup> The IG also asks witnesses if they agree to allow the IG to release their statement to members of the general public under the FOIA.<sup>125</sup> If the witness elects not to have the statement released, which is often the case, the IG will assert the (b)(7)(D) exemption and the entire statement will be redacted before the record is released. It is not unusual to receive an IG report pursuant to the FOIA with hundreds of blank pages and nothing more than the conclusions of the investigator. This can be extremely frustrating, since neither the attorney nor the client have much indication of what facts or factors the investigator used in reaching a decision to substantiate the allegations. More importantly, the client and the defense counsel do not have access to the evidence that the appointing authority may use in deciding what actions to take against the client. Without knowledge of the underlying facts, it is extremely difficult to rebut the allegations.

Even though the report that the defense receives under the FOIA may not be very helpful or enlightening, it is essential to submit a FOIA request for the client in every case in which the IG has substantiated the allegation, because the report may potentially contain some useful information. A sample FOIA request is attached at Appendix B. If the command is contemplating adverse administrative actions, such as a GOMOR, they typically give the client seven to fourteen days to submit a rebuttal before the commander makes a final decision. Unfortunately, it often takes several weeks or even months to receive a copy of an IG report pursuant to the FOIA. It is, therefore, important to submit a request for the report as soon as the client is notified that the investigation is complete, often before the command may have decided to take adverse action. It is also important to request the command to delay any contemplated action against the client until the defense has received a copy of the report and had an opportunity to respond. In the case of senior officers, the VCSA routinely grants a continuance for up to fourteen days after the defense receives a copy of the report<sup>126</sup>. A copy of a request for continuance is enclosed at Appendix C.

It is important to remember that the defense counsel does not lobby the IG or the investigators regarding disciplinary actions. The IG and the investigators view themselves as independent umpires and they have no say in the consequences that may result from their report. The focus of the defense counsel's advocacy efforts at this point must be the decision maker or more likely, the lawyers who advise the decision maker.

The negotiation tactics and techniques will vary depending on the facts of the case and the needs of the client. In some cases, the counsel may attempt to negotiate the waiver of certain rights, such as the right to have the client's case reviewed by the AGDRB in order to protect the client's privacy and hopefully avoid more serious action. In another case, the defense may have enough information to attack the factual conclusions of the IG report and may be able to introduce evidence that was never considered by the investigators in hopes of convincing the decision maker to reach a different outcome. Regardless of the technique or tactic employed, it is important to stay engaged in the process and assist the client in facing the many potential collateral consequences that may result from a substantiated report.

## Conclusion

Investigations conducted by the IG, either at the local level or at the DA level, come with their own set of rules. Most defense counsel may only come across these investigations once or twice in a two-year tour. The consequences and impacts an IG investigation may have on the client's career can be significant. An understanding of the rules guiding the IG process, and how the defense counsel can help the client through the process and advocate on the client's behalf during the process, will make the defense counsel a better, more effective, and more complete judge advocate. The hope is that this article will serve as a primer to get defense attorneys on the right path.

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<sup>123</sup> See, e.g., *Ibarra-Cortez v. DEA*, 36 Fed. Appx. 598 (9th Cir. 2002); *Judicial Watch, Inc. v. FBI*, 2001 U.S. Dist. LEXIS 25732, at 14 (D.D.C. Apr. 20, 2001).

<sup>124</sup> AR 20-1, *supra* note 4, app. E, fig. E-1, at 1).

<sup>125</sup> *Id.* at 2.

<sup>126</sup> Professional Experiences, *supra* note 31.

**Appendix A**

**UNITED STATES ARMY TRIAL DEFENSE SERVICE  
ATTN: ANME-JAT, 2257 HUBER RD  
FORT GEORGE G. MEADE, MARYLAND 20755-5030**



**REPLY TO  
ATTENTION OF:**

ANME-JAT (27-1)

Date

MEMORANDUM FOR Department of the Army, Office of The Inspector General, 1700 Army Pentagon, Washington, DC 20310-1700

SUBJECT: Release of Information

I, Lieutenant General I. M. Blank, authorize my attorney, CPT Good Attorney, USA Trial Defense Service, to request and receive information pertaining to me, and to otherwise act on my behalf, pertaining to information requested under the Freedom of Information Act, Privacy Act, Army Regulation 25-55, and any and all other applicable directives and regulations governing the release of information. I also authorize CPT Attorney to discuss matters pertaining to me with applicable DOD personnel and authorize those personnel to discuss information pertaining to me with CPT Attorney.

I.M. Blank  
Lieutenant General, USA

**Appendix B**

**UNITED STATES ARMY TRIAL DEFENSE SERVICE  
ATTN: ANME-JAT, 2257 HUBER RD  
FORT GEORGE G. MEADE, MARYLAND 20755-5030**



**REPLY TO  
ATTENTION OF:**

ANME-JAT (27-1)

Date

MEMORANDUM FOR Department of the Army, Office of The Inspector General, ATTN: Records Release Office (Ms. Reed), 1700 Army Pentagon, Washington, DC 20310-1700

SUBJECT: Freedom of Information Act (FOIA) Request – MG Blank

1. Pursuant to the FOIA as implemented in Army Regulation AR 25-55, Department of Defense (DOD) Regulations 5400.7-R and 5400.11-R, and DOD Directive 5400.7, I request on behalf of MG I.M. Blank a complete copy of the DAIG Report of Inquiry (ROI)/investigation, including exhibits, which inquired into allegations made against MG Blank regarding travel and leave/pass violations.
2. This information is required so that MG Blank may respond to a possible adverse action against him, which may be based on the DAIG ROI.
3. MG Blank is willing to pay any reasonable search or copying fees that you may legally charge. He asks, however, that you waive any fees. Such waiver will be consistent with the FOIA and Privacy Act and I understand that your office customarily waives fees from requesters in circumstances such as these.
4. A copy of MG Blank's authorization for me to seek this information on his behalf is enclosed.
5. Please contact me if you require additional information, (phone #).

Encl:  
as

GOOD ATTORNEY  
CPT, JA  
Defense Counsel

Appendix C

UNITED STATES ARMY TRIAL DEFENSE SERVICE  
ATTN: ANME-JAT, 2257 HUBER RD  
FORT GEORGE G. MEADE, MARYLAND 20755-5030



REPLY TO  
ATTENTION OF:

ANME-JAT (27-1)

Date

MEMORANDUM FOR Office of the Judge Advocate General, ATTN: DAJA-AL, 2200 Army Pentagon, Washington, DC 20310-2200

SUBJECT: Request for Extension

1. On 22 October 2003, GEN Doom signed a Memorandum of Reprimand directed to my client, Major General I.M. Blank. The memorandum gives MG Blank 14 days from receipt of that memorandum to submit any matters for consideration before a final filing decision is made. On behalf of MG Blank I request an extension of the time to submit matters.
2. We received notice on 25 August 2003 that The Inspector General substantiated three allegations against MG Blank. On that same day I requested a copy of the Inspector General Report of Investigation (ROI) pursuant to the Freedom of Information Act. I have not yet received any information pursuant to that request. We request a continuance of the deadline to submit matters until we receive a response from the Inspector General, so that MG Blank has an opportunity to review the evidence that serves as a basis for the memorandum of reprimand.
3. Please feel free to contact me if you have any questions at (phone #).

GOOD ATTORNEY  
CPT, JA  
Defense Counsel