



PRACTICE ADVISORY

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Impact of Safety Investigations on Military Justice

Background

Safety Investigations (SI) have stalled or halted the criminal prosecution of military cases. For example, in *United States v. Boatwright*, military judges abated and eventually dismissed the case after the United States refused to waive the privilege associated with the SI. The SecNav has never waived the safety privilege for criminal prosecution.

Purpose

It is imperative that SJAs and litigators understand the implications of SI on judicial action. Close coordination with the cognizant convening authority and the Naval Safety Center (NSC) can potentially stem the acquisition of privileged information by safety investigators or halt the SI as a whole to pursue a criminal investigation.

SJAs need to be aware that a SI is in progress. There is no requirement for the convening of a SI to be reviewed or advised by a judge advocate. In fact, section 5003, para. 3a, OPNAVINST 5102.1D CH-2/MCO P5102.1B Ch 2, of 5 October 2010, states that “The [OJAG] and [SJAs] shall *not* be addressee[s] on any SIREP messages or endorsements nor shall copies be provided to them.” Further, Section 5003, para. 4a states “[d]o not append or include SIREPs in JAG investigations.”

BLUF:

- Have the convening authority (CA) consider stopping the SI if there is any suspicion of criminal - even negligent - misconduct.
- Ensure Safety Investigators notify the CA if they suspect any criminal misconduct.
- Ensure Safety Investigators only provide a promise of confidentiality when necessary and required.
- Consider administrative alternatives to the court-martial process impacted by SI Boards (SIB).
- Never include SI privileged information in a JAGMAN or other investigation.
- Seek waiver of the privilege or alternative remedies in a court-martial.

What is a Safety Investigation and how does it relate to criminal misconduct?

The sole purpose of a SI is to identify the causes of a mishap in order to prevent a similar accident in the future. Mishaps resulting from criminal conduct are outside the purview of the NSC. When safety investigators suspect criminal conduct, they are advised to suspend the SI and secure the site, notify law enforcement and the CA, secure privileged information, and turn over all non-privileged information to other investigative bodies. The appointing authority then confers with the NSC Staff Attorney. Similarly, the appointing authority should direct suspension of the SI if (s)he suspects misconduct and, with the assistance of the SJA, should evaluate whether criminal prosecution is contemplated. A draft appointing letter is enclosed to highlight these areas for the investigator(s).

What is “criminal conduct”?

For layman safety investigators and others involved in SIs, “criminal conduct” is thought of in the realm of intentional criminal intent. But a SI can impact criminal cases that lie in negligence, including negligent dereliction of duty, negligent homicide or involuntary homicide. Some examples of SI information that reflects misconduct include: admissions of accidental and intentional violations of published orders and directives; lack or loss of professional skills; hazardous conduct outside of safe operating procedures; effect of command climate on mishaps or hazards; improper maintenance procedures and practices; physiological impairment; lapse of attention or concentration; and, overly aggressive conduct.

Who gets to provide information under a promise of confidentiality?

Witnesses may be reluctant to provide complete and candid information to investigators. “Individual[s] . . . must be assured they may confide with the investigator for the mutual benefit of fellow service members without incurring personal jeopardy in the process. . . .”

In 2012, the Commandant directed the restoration of the authority for USMC safety investigators to grant promises of confidentiality to witnesses in ground mishaps - when the witness needs such an assurance to overcome a reluctance to reveal complete and candid information. The investigating officer “must judge whether confidentiality is necessary to ensure that witness’ full cooperation”; the promise is to be “given only as needed to ensure forthright cooperation” and not as a blanket promise to all witnesses.¹

What is a promise of confidentiality?

The promise of confidentiality is used to encourage free and open disclosure of safety information during an investigation. Military and federal courts recognize that the information given under the promise of confidentiality is protected from release (See M.R.E 506 below). To ensure that the information provided is used solely for safety purposes, the SIB or command investigator must give the promise of confidentiality to witnesses.

The Court-Martial Process

Production: Rules for Court-Martial (R.C.M.) 701 and 914, Jencks Act, and Brady

- (1) R.C.M. 701(f), “Information not subject to disclosure,” relieves the government of discovering to the defense routine discovery items where they are otherwise protected by a Military Rule of Evidence (M.R.E.).
- (2) R.C.M. 914 requires production of statements of witnesses related to the testimony and in the possession of the party who called the witness – i.e., the government would be required to produce statements from a SI of its own witnesses. R.C.M. 914(e) proposes a remedy for failure to disclose: witness testimony is to be disregarded *or a mistrial declared*.
- (3) Essentially codified in R.C.M. 914, the Jencks Act is a federal law requiring all prosecutors for the United States to produce statements or reports of government witnesses after the witness testifies. There are no exceptions provided for in the statute. There is no case law recognizing any privilege that circumvents the statute.
- (4) *Brady* material. In *Brady v. Maryland*, the Supreme Court found that the prosecution’s withholding of evidence favorable to an accused violated the Due Process Clause of the Constitution. It includes, among others, evidence the defense may use to impeach government witnesses, for example, inconsistent statements.

¹ Message R 041942Z JAN 12 PSN 219404K20 FM CMC SD WASHINGTON DC SUBJ: RESTORATION OF THE AUTHORITY FOR USMC SAFETY INVESTIGATORS TO GRANT PROMISES OF CONFIDENTIALITY TO WITNESSES WHEN INVESTIGATING GROUND MISHAPS

(5) M.R.E. 506. This Rule protects from disclosure, government information that would be detrimental to the public interest—which includes SIs. However, the Rule itself exempts privileged items whose disclosure is required by a federal statute, e.g. Jencks Act, 18 U.S.C. § 3500. Nevertheless, regardless of the exemption, military judges frequently order *in camera* review.² The SecNav (via designee at the NSC) generally waives the privilege for the limited purpose of *in camera* review.

- a. Standard for 506 disclosure. The party making the request must demonstrate a specific need for information containing evidence that is relevant to the guilt or innocence or to punishment of the accused, and is otherwise admissible in the court-martial proceeding.
- b. Where the United States seeks relief from discovery under a 506 claim of privilege, the military judge must first determine that such government information would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution’s case, or to sentencing.³
- c. The court must authorize the United States alternatives where the alternative would provide the accused with substantially the same ability to make a defense as would the specific government information.
- d. If alternatives are inadequate and disclosure is warranted, and where the United States fails to comply with the court’s order, the military judge *must* issue any order that the interests of justice require, ranging from striking or precluding all or part of the testimony of a witness to dismissing the charges, with or without prejudice.

What part of the SIB are privileged under M.R.E. 506?

- Information voluntarily provided under a promise of confidentiality or information which would not have been discovered otherwise, but for information voluntarily provided under a promise of confidentiality.
- Deliberative analyses of findings, conclusions, and recommendations of the SIB or command investigator.
- Calculations and deductions the SIB or investigator makes that would reveal the board’s deliberative process.
- Report endorsements also are part of the deliberative process and are similarly privileged.

Can the privilege be waived?

The privilege for SI is held by the SecNav. The current general policy is to continue to assert the privilege after *in camera* review. If the SecNav believes waiver of the privilege is warranted, the SecNav may consider the information “for limited use in the trial subject to appropriate protective measures and after first consulting with the DoD General Counsel and DUSD (I&E).” However, outside of *in camera* review, the SecNav has never waived the safety privilege for a criminal prosecution.

Points of Contact: Military justice policy questions may be directed to LtCol Iain Pedden (JMJ Branch Head) at iain.pedden@usmc.mil/(703) 693-9005 or Maj Wayne Shew (JMJ) at wayne.shew@usmc.mil/(703) 693-9299.

² Besides witness statements that would be excepted from the privilege under the Jencks Act, judges may look for *Brady* information in other aspects of the testing, findings, analysis portions of the privileged safety investigation.

³ M.R.E. 506(h)(1)(B) Standards for Discovery or Access by the Accused. Anecdotally, regardless of the plain exemption to privilege of documents required by the Jencks Act, military judges are using this language as a basis for nondisclosure. When faced with an objection under R.C.M. 914, judges refer to M.R.E. 506 and this language.