

# Investigation Manual

## CHAPTER 7 - EVIDENCE

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## CHAPTER 7 - EVIDENCE

0701 **DEFINITION:** Evidence consists of information and objects which are used to prove or disprove facts. The IG investigator gathers evidence in order to determine the facts in the case. Although the investigative report may not directly address the evidence behind every fact stated in the report, the quality of that evidence will eventually determine the degree to which the facts will be accepted

by others, especially in administrative or judicial proceedings. Rules of evidence exist to ensure evidence is reliable, and experienced investigators should be familiar with and apply the more important rules and the concepts behind them. Return to [Chapter Table of Contents](#).

**0702 TYPES:** Evidence includes information obtained from people, documents, and physical objects. Information from human witnesses may be testimonial (oral descriptions of statements, acts, and events) or demonstrative. It may constitute first hand knowledge of witnesses, or recitation of what they have learned from others (hearsay). Documents may be obtained by the investigator merely to prove their existence (there was a contract), or to establish the substance of their contents (the contract was signed by a specific person, or it included a specific provision). Similarly, physical objects may be used to demonstrate their existence or identity (the serial number on the notebook computer found in a private residence establishes it is government owned property), or to demonstrate a particular characteristic or quality of the object that is subject to tampering without careful control (chain of custody) of its handling (data tending to prove a violation of the Procurement Integrity Act, stored in the computer at the time it was found in the residence, has not been altered since the computer was seized at the residence). Return to [Chapter Table of Contents](#).

**0703 QUALITIES OF EVIDENCE USED IN INVESTIGATIONS:** The investigator should consider the following qualities of evidence in determining its value to the investigation:

Relevance - In obtaining and evaluating evidence, consider its relevance by asking whether it tends to make a fact that is of consequence to the inquiry more probable than it would be without that evidence. If not, then the evidence is not relevant, and its reception, consideration, or incorporation into the investigative report is not appropriate. The question of relevancy often arises in the consideration of circumstantial evidence, discussed in [paragraph 0704](#).

Materiality - The explanation of relevancy given in the preceding paragraph is similar to the current definition of relevancy in the Federal Rules of Evidence, and encompasses the traditional concepts of both relevancy and materiality. Understanding the difference, however, is useful in analyzing a case. Evidence is **relevant** if it tends to make a fact more probable. A fact is **material** if it tends to prove or disprove an allegation. For example, the fact that contractor A's proposal was given to competing contractor B by John, a member of the source selection board, is material to proving an allegation that John violated the Procurement Integrity Act. The fact that Ann, another member of the board, also had a copy of the proposal, is not likely to be material to the allegation against John (unless it can be used to suggest Ann, not John, was the source of the leak). Evidence in the form of a statement by Mike that he saw John take the proposal out of the file cabinet and hand it to Carol, an employee of contractor B, is relevant to establishing the fact that John really did give the proposal to contractor B. Mike's observation that Carol was wearing a blue

dress that day is not evidence that tends to make more likely the fact that John gave her the proposal (unless it is used to establish the person really was Carol) and, therefore, that evidence is not relevant.

Competence - In obtaining and evaluating information, consider whether the circumstances by which it was obtained support a belief in its veracity. For example, statements by a witness with a history of lying, or impaired perception, or with a strong bias or prejudice, are likely to be of limited value in establishing facts. Similarly, a confession or statement containing information contrary to one's interest or benefit obtained by coercion will not be as reliable as one obtained fairly and freely.

Authenticity - In obtaining and evaluating information, consider its authenticity - is it what it purports to be? Is the signature on the document really that of the person whose name it conveys? Did the technician who analyzed an object alleged to be defective really look at the object at issue? Issues of authenticity are generally resolved by the quality (or lack) of chain of custody proof. The authenticity of testimony is also bolstered by being given under oath. Personnel tasked to perform IG investigations are empowered to administer oaths and take sworn testimony. See [Chapter 3](#).

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**0704 CATEGORIES OF EVIDENCE PERTINENT TO INVESTIGATIONS:** The investigator must deal with several categories of evidence and understand the distinctions between them. The most important include direct versus circumstantial evidence, and fact versus opinion evidence.

Direct evidence - Evidence, in whatever form, may tend to prove or disprove a fact either directly or indirectly (circumstantially). A fact is proved by direct evidence when the witness has actual, or direct, knowledge of the fact to be proved, and does not need to rely on facts the witness did not actually observe, but only inferred from other facts known to the witness. A witness who says, "I know that Joe shot Jim in the barracks because I was there with them, I saw Joe point and fire the gun at Jim, and I saw Jim fall right after Joe fired the shot," has presented direct evidence to prove the fact that Joe shot Jim in the barracks.

Circumstantial evidence - When direct evidence cannot be obtained to establish a fact, the existence of that fact may sometimes be established because reasonable persons are willing to draw inferences from other facts. Circumstantial evidence is direct evidence of one or more facts from which other facts may be inferred, or established indirectly, because there is a logical relationship between them. A witness who says, "I know Joe shot Jim in the barracks because while I was standing outside I heard a shot, saw Joe run out holding a gun, and when I ran into the barracks I saw Jim lying on the deck," has presented circumstantial evidence to prove the fact that Joe shot Jim in the barracks. The evidence is circumstantial because the witness did not actually observe Joe shoot Jim, but inferred that fact from other facts the witness did

observe directly. In the absence of other contrary facts, it is logical to infer that the person who ran out of the barracks with a gun in his hand shot the person inside the barracks who has a gunshot wound. Of course, all of these examples assume that the witness knew what Joe and Jim look like.

Importance of distinction - It is important to appreciate the difference between direct and circumstantial evidence because circumstantial evidence leaves room for an alternate explanation of what really happened that the investigator may need to explore. In the previous example, there may have been a third person in the barracks who shot Jim, and who ran out another door before the witness entered. Or, the witness may not have known Joe by sight, but, after describing the person running out of the barracks to a third person, had been told "that could have been Joe." Witnesses may think they know something directly, and present it in that manner, when in fact they are really drawing inferences from indirect, or circumstantial evidence. When a witness says "I know fact A occurred" it is important for the investigator to establish the actual basis for that assertion. In far too many cases, careful examination by the investigator will disclose the witness does not really know fact "A" occurred, but only that facts "B" and "C" did. Test a witness's statements by probing follow-up questions, such as, "why do you think that?" and, "how do you know that?" Don't reject evidence because it proves to be circumstantial, but be aware that such evidence should be more critically evaluated and, when possible, corroborated with additional evidence.

Fact versus opinion - Opinions are generally conclusions premised on facts and the interpretation of those facts. For example, to say that Joe was shouting at Jim, was calling him names, and was red in the face, constitutes a recitation of facts. To merely state that Joe was angry at Jim constitutes a statement of opinion that is based on the facts observed. The opinion may be accurate, but the trier of fact cannot be certain without knowing the facts underlying it. Indeed, in some cases observation of physical details may not always be sufficient to form a valid opinion. Jim may have been helping Joe practice a role in a play that required Joe to show anger.

Limitation on use of opinion evidence - In court proceedings and many administrative actions, opinion testimony by laymen (people who are not "experts") is generally not admissible. When obtaining and evaluating evidence, this distinction should be recognized. It is always necessary to ask for the facts that underlie an opinion. However, ordinary people form opinions about certain events as a result of their everyday experiences, and may be permitted to give their "opinions" as to those events. The most common example is permitting a lay witness to testify as to the speed of a moving vehicle. Remember that people become "experts" by experience as well as education and training. Many government employees can be considered experts in their line of work.

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**0705 RULES OF EVIDENCE IMPORTANT TO INVESTIGATIONS:** The administrative and judicial proceedings which may result from an IG investigation

are generally governed by the Federal Rules of Evidence, either directly (because their application is mandatory in a federal district court) or indirectly (because administrative boards often look to them for general guidance). Investigators should be familiar with the more important of these rules in order to evaluate whether the evidence they develop in support of the facts may be used in such proceedings. Investigators must deal with several categories of evidence to which the rules apply, as discussed in the following paragraphs. Return to [Chapter Table of Contents](#).

**0706 HEARSAY EVIDENCE:** The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." They go on to explain that evidence constitutes hearsay only if three conditions are present:

1. the evidence is an assertive statement or act;
2. the statement or act was made or committed out of court; and
3. the evidence is being used to prove the truth of the assertion.

Unless all three conditions are satisfied, the evidence is not hearsay.

Hearsay evidence is seldom admitted in a court proceeding unless it falls within one of the hearsay exceptions. This is because the declarant is not available for the type of examination, by the opposing party or the court, that would establish whether the statement may be relied upon. Hearsay evidence is generally admissible in administrative proceedings, although the trier of fact may give less weight to it than non-hearsay evidence.

Note that what a person says to an investigator based on personal, direct knowledge may not be "hearsay" to the investigator, who can probe the witness for problems with perception, memory, bias, etc., but the written record of the interview (or the investigator's oral recitation of it) is hearsay if someone attempts to introduce it in court or an administrative hearing to prove the truth of the statements the witness made to the investigator. An IG investigator may base findings of fact and conclusions on evidence that would be hearsay in a judicial or administrative proceeding, but the investigative notes should clearly reflect the witness' willingness to appear in such proceedings. An IG investigator also may base findings and conclusions on evidence that is hearsay to the investigator, but should be cautious in the use of this evidence, recognizing that the investigator did not have an opportunity to test its reliability by interviewing the original source.

An assertive statement or act is one that is offered to make a positive statement, or declaration, of the existence of some fact. For example, the statement of a witness that the traffic light was red when the defendant drove through the intersection and hit the plaintiff's car usually would be offered to prove the assertion that the light was red, an important element in plaintiff's case. In that case, the witness should make the statement in court, where the witness can be examined for error (in perception, memory, or the ability to

recount the event) or bias. The attempt to introduce such evidence through the oral statement of another person present in court or a written document, even when signed and notarized by the witness, constitutes hearsay evidence. Sometimes, the out of court statement (or act) of a person is not offered for its underlying truth (for example, to prove that the light was red). In that case it is not hearsay. This is often done where one is attempting to show the state of mind of the person making the statement (the person thought the light was red), or where the mere making of the statement, not its truth, is the fact to be established. Allen, a government employee who offers to influence the award of a contract in return for a gift, violates 18 USC 201 even if Allen does not have the power, or the intention, to make good on his promise. Joan, a supervisor who threatens adverse action if a subordinate makes a protected disclosure to Congress, violates the whistleblower protection provisions of the Civil Service Reform Act of 1978 merely by making the threat, whether or not she intends to carry it out. The in court witness who says he heard Joan make the statement is not presenting hearsay evidence because the fact to be proved is that Joan made the statement (for whatever reason), and the witness making that assertion is in court where his perception, memory, bias, etc. may be examined.

Information contained in documents, as well as oral statements, can constitute hearsay if offered to prove the truth of that information.

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**0707 STATEMENTS AGAINST INTEREST:** It is generally agreed that when people make admissions, or other statements they know are likely to be detrimental to their interests, they are less likely to be lying than when they protest their innocence. Similarly, it is commonly believed that when innocent people are accused of wrongdoing, they will deny it. Although there is some disagreement as to whether an out of court admission is hearsay, the Federal Rules say it is not. Thus, Carrie may testify in court that Joe told her he was the one who shot Jim, and this evidence may be used to prove the fact that Joe made the statement, to show Joe's state of mind at the time, and to prove the truth of the assertion itself. Similarly, Joe's silence when Carrie accuses him of shooting Jim may also be introduced through Carrie to prove that Joe shot Jim, as could Joe's response that Carrie was right. However, where circumstances indicate a person does not have a reasonable opportunity to deny the accusation, or has the right to remain silent (for example, when under arrest), silence should not be construed as an admission. To establish the subject's acceptance of another person's accusation by silence, the investigator should attempt to obtain facts that would show the following:

The statement was made in the subject's presence and was in the form of an accusation against the subject;

The subject heard and understood the accusation;

The circumstances were such that an innocent person would deny the

accusation; and

The subject remained silent, or gave an evasive or equivocal response.

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**0708 BUSINESS RECORDS:** When a document is offered to prove the truth of the statements in it, it is hearsay. But bringing in all the witnesses necessary to prove the statements in a document can be unduly burdensome. Most business organizations, including the government, have an interest in maintaining accurate records of the normal business they conduct regularly.

When certain indicators of reliability are present in connection with the creation of a business record, the "business record exception" to the hearsay rule may be invoked. In those cases, courts recognize that the business record may be more accurate than the memories of the people who originally created it. To establish whether a record was created in the ordinary course of business, the investigator should attempt to determine:

1. Whether the document was prepared by a person with a business relationship with the organization (usually an employee, but other people who have business with the organization may also qualify);
2. Whether the person who provided the information recorded in the document had a duty to report the information;
3. Whether that person had personal knowledge of the facts or events recorded in the document;
4. Whether the document was prepared at a time reasonably close to the occurrence of the events;
5. Whether it is a routine practice of the organization to prepare documents of this nature;
6. Whether the information recorded in the document is the type of information the organization would ordinarily record in the regular course of its business; and
7. Whether the information is essentially factual in nature.

Note that the person who provides the document to the investigator (or who introduces it in court) need not have personal knowledge of the information recorded in the document, and, in fact, usually does not have such information. Having established the reliability of a business record by asking the questions presented in the preceding paragraph, the investigator still needs to determine the authenticity of the particular document being provided. To do this, it is usually sufficient to establish proper custody of the document between the time it was created and the time it is presented to the investigator. The investigator would want to know:

1. Whether the person providing the document has personal knowledge of the organization's filing system;

2. The name (or description) of the file from which the person removed the document;
3. Whether the witness recognizes the document as one that should be contained in the file where it was located; and
4. In some cases, the investigator may want to know who has access to the files, whether there is any reasonable possibility of tampering with the files, and the process through which a document goes from initial receipt to storage in the file.

Note that the business records discussion outlined in the preceding paragraphs also applies to official government documents. In addition, some documents are required to be maintained pursuant to laws or regulations, such as the Federal Acquisition Regulations. Also, the Federal Records Act makes almost every record regularly maintained by the DoN an official document. In those cases, the investigator may ask for a "certified copy" of the document from an official custodian. This practice is especially useful when the document is obtained from a government organization outside of the DoD. The certification should include a signature and/or seal, along with a statement to the effect that: *I, [name], certify that I am the [title], and that the attached document is a true and accurate copy of an original, official record in my custody.*

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**0709 USING DOCUMENTS TO REFRESH MEMORY:** Documents are an effective tool for prompting the memory of witnesses, especially reluctant ones. There are two evidentiary theories relating to this practice that the investigator should understand.

Refreshing Present Recollection - The first theory assumes that the witness, after reviewing the document, has an independent recollection of the events recorded in it, such as a meeting the witness attended. Reviewing the document merely served to "refresh" the witness' present recollection of what happened at the meeting. Under this theory, the real evidence is the witness' statements to the investigator (or testimony in court), not the contents of the document. Since the document is not the evidence, there is no hearsay problem with using the document this way. Indeed, any object or sound that would help the witness recall what happened at the meeting may be used for this purpose. When using a document to refresh the witness' present recollection of a meeting, the investigator would establish the following during the interview:

1. The witness indicates an inability to recall what happened at the meeting;
2. The witness recalls (or is shown) a document that may state what happened during the meeting;
3. The witness reviews the document;

4. The witness states she now can recall what happened at the meeting; and
5. The witness tells the investigator what happened at the meeting (to test whether the witness really has an independent recollection, the investigator may want to take the document away from the witness while the witness relates what occurred during the meeting).

Note - in this situation, the document does not have to be an accurate accounting of what occurred during the meeting, since the witness is telling the investigator what happened. However, it is still a good practice to get the witness to state whether the document is accurate, and, if not, to indicate what information is erroneous.

Past Recollection Recorded - Assume that, during the course of an interview, the investigator shows the witness minutes of a meeting the witness attended, yet the witness still claims to be unable to remember what happened during the meeting. By asking the witness a series of questions, the investigator may still be able to force the witness to concede the document accurately reflects what took place. This evidentiary theory is called "past recollection recorded." In this case, the document is the real evidence, and the witness is being used to establish the reliability of the document in order to get around the problem that the document is hearsay if used to assert what happened at the meeting. To employ this technique, the investigator would establish that:

1. At one time in the past, the witness had personal knowledge of what happened during the meeting (usually by participating in it);
2. The witness prepared a document recording what happened during the meeting (or reviewed a document prepared by someone else) within a reasonable period of time after the meeting (close enough to the date of the meeting that the witness could accurately recall what happened);
3. The witness is willing to state that at the time the document was prepared (or reviewed) it accurately reflected what took place during the meeting; and
4. After reviewing the document during the interview, the witness is still unable to independently recall what happened during the meeting.

Note - Since in this case, the document, not the witness, is asserting what happened during the meeting, it is clearly hearsay, both as to the investigator and as to a court. Its use is permitted because the witness is vouching that at one time he or she knew the document was accurate. The investigator can force reluctant witnesses to concede the accuracy of a document they prepared by asking why they prepared the document, whether they considered it important to be accurate at that time, whether they generally try to prepare accurate documents, why they would prepare a document that was not accurate, etc., so that the witness must choose between conceding the accuracy of the document or admitting to negligence, if not outright falsification of what may be an official government document. Similarly, if the witness

reviewed the document, he or she can be led to admit that any inaccuracy they may have noted would have been corrected when it was reviewed.

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**0710 BEST EVIDENCE RULE:** This old rule once required the production of the original of a document in order to prove its contents. Modern day mechanical reproduction devices (photocopiers such as the "Xerox machine") have largely done away with its application in the courtroom. Nonetheless, photocopy equipment may not produce a true copy of a document if the writing on the original is too light, or of a certain color that does not reproduce well. In general, therefore, a photographic copy is accepted in legal proceedings unless the opposing party can articulate a specific reason why it may not be accurate. In such cases, it may become necessary to produce the original, or a certified copy from the custodian of the document. Thus investigators should document their files to indicate where the originals of important documents may be obtained. Investigators should also note that the best evidence rule applies only to "writings" such as printed or typed documents, tape recordings, computer tapes, photographs, video tapes, and the like. It does not apply to testimonial evidence. Although the subject's admission that he accepted a gift from a contractor may be more persuasive than the same testimony from a witness (and in that sense may constitute the best evidence to prove the fact) the best evidence rule applies only to writings, and may not be used to preclude use of the witness to prove the fact. Note also that simply because a writing may record what happened at a particular event such as a meeting, it does not preclude a participant in the meeting from testifying as to what took place during the meeting based on the witness' present recollection, with or without reference to the document. Return to [Chapter Table of Contents](#).

**0711 CHAIN OF CUSTODY:** Chain of custody issues relate to proving the authenticity of objects. Lets assume that when Joe ran out of the barracks after a shot was fired, he stumbled and dropped the pistol in his hand. The witness then walked over and picked it up. When the police officer arrived, the witness gave her the pistol. After Jim arrived at the hospital, the doctor removed a bullet from his shoulder. Establishing that the pistol Joe dropped fired the bullet removed from Jim's shoulder will go a long way toward proving Joe shot Jim. There are two issues involved.

The first issue, relating to the pistol, is relatively simple, because it has certain unique, readily identifiable characteristics. It is sufficient for the police officer to note the serial number (if any) and place a unique mark on the pistol (preferably in the presence of the witness). Later, the witness can testify that he knows it is the pistol Joe dropped because of its unique mark he saw the police officer place on it (the police officer could testify that the witness gave her the pistol, but it would still be necessary to call the witness to establish Joe dropped it). Investigators who must account for objects of this nature should be prepared

to establish the following points:

1. The object has a unique characteristic;
2. the witness observed the characteristic on a previous occasion;
3. the witness looks at the object and identifies it as the one seen earlier;  
and
4. the witness points out the unique characteristic that leads him to  
conclude the object is the one seen earlier.

The second issue, proving that the bullet taken from Jim's shoulder was fired from the pistol Joe dropped, is more complex. The movement of the bullet taken from Jim's shoulder must be tracked from the time it is removed until the point at which it is compared to another bullet fired from the pistol Joe dropped. The chain of custody is broken if, at any point along the way, there is the possibility that another bullet could have been substituted for it, or the characteristics of the bullet altered (the classic example of this type of problem arises in the case of drug arrests). To establish the bullet was not substituted or altered, each step in the movement of the two bullets to be compared must be traced in such manner as to establish that:

1. The witness originally received the object at a certain time and place;
2. The witness safeguarded the object while in his or her possession in order to prevent substitution or tampering;
3. The witness eventually disposed of the object in some manner (usually by turning it over to the next person in the chain, or by performing the test that establishes the characteristic to be proven (that the bullet was fired from the pistol in question, that the substance is an illegal drug, etc.);
4. As best the witness can tell, the object he or she is now looking at (assuming it was not destroyed during testing) is the object the witness previously handled; and
5. As best the witness can tell, the object is in the same condition as when the witness originally received it (unless testing the object would alter its condition).

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**0712 PHOTOGRAPHIC EVIDENCE:** When photography was a relatively new technique for the presentation of evidence, it was common for courts to require the person who took the photo to testify. The photographer had to be prepared to describe the photographic equipment, the film used, the type of lens, and the settings on the camera. Cross examination frequently centered on establishing the photograph presented a distorted depiction of the scene. The modern view of photographic evidence is that anyone familiar with the scene or object depicted in the photograph may be used to introduce and verify the accuracy of the photo.

Nevertheless, considering the remarkable capability to "doctor" photographs and video film that exists today, the investigator should always be alert for the possibility of tampering. Usually it is sufficient for the investigator to establish that:

The witness is familiar with the object or scene depicted in the photo;  
The witness can explain the basis for his or her familiarity with the object or scene (where the object or scene has changed over time, as, for example, during construction of a building, the witness should indicate the basis for familiarity at the time the photo was taken);  
The witness recognizes the object or scene in the photograph; and  
The witness says that the photograph is an accurate (fair, true, good, etc.) depiction of the object or scene at the pertinent time.

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0713 **PRIVILEGES:** Certain types and sources of information have restrictions imposed by law on their solicitation and use.

Self-incrimination - Solicitation of information can raise a witness' Constitutional right against compulsory self-incrimination. The Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." Its application extends to investigations that may furnish leads on which a criminal prosecution could be based. Thus, questions asked in the context of an IG investigation must be considered in light of the right against self-incrimination.

1. The law generally requires that suspects in custody be advised of their right to remain silent or refuse to respond to questions that may require incriminating answers. Article 31 of the UCMJ (10 USC 831) also requires that suspects be advised of their rights even when they are not in custody. See [Paragraphs 0320](#) through 0328 for a discussion of the interplay between the use of warnings and grants of immunity to protect rights and further the purposes of the investigation.
2. Investigators must remember that courts interpret "custody" as any set of circumstances which deprive people of their freedom in any significant way. IG investigators do not place witnesses in custody in the same way police do, but, depending on the circumstances, a court could find an interviewee's freedom had been deprived by orders to report to be interviewed, orders to cooperate, and so forth. Therefore, investigators who seek to use a civilian suspect's statements (or their fruits) for criminal prosecution, should not rely on their belief that the interview will be non-custodial, and should provide the Miranda warning. See [paragraph 0321](#).

Attorney-client - Communications made by a person to his attorney for the

purpose of obtaining legal advice or representation are privileged. The privilege belongs to the client: he can stop the attorney from divulging the information conveyed by the client. An exception exists where the communication was made in connection with the future commission of a crime. The client may not always be an individual. Information provided by members of an organization, such as employees of a corporation, to the organization's attorney may come within the privilege: the organization in such cases is the client, and it may legitimately seek to bar disclosure of information conveyed by its members. In the government context, consultation with a military defense counsel or legal assistance attorney, done for the purpose of obtaining legal advice, and with an expectation of confidentiality, will come within the privilege. However, an organization's JAGC or OGC attorney cannot provide personal legal counsel for an individual member of that organization. Thus, information provided under such circumstances does not come within the attorney-client privilege. While the privilege belongs to the client, an attorney, if asked questions regarding statements made by his client, will refuse to answer, claiming that the statements were made in reliance on the confidentiality afforded by the privilege. If your investigative plan envisions interviewing an attorney, consult beforehand with a JAGC or OGC attorney to determine if your proposed inquiries are likely to trigger an invocation of the privilege, to get guidance on what areas of inquiry are not within the privilege, and to consider whether alternative means exist to obtain the desired information.

Spousal - There are two spousal privileges. The first allows one spouse, during the existence of the marriage, to refuse to testify against the other spouse. The second applies to confidential communications made during the marriage. It applies even after the marriage is ended, and is asserted by the spouse who made the confidential communication. These privileges should not bar solicitation of information in an IG inquiry or investigation. However, subsequent use of such information in a more formal proceeding may be barred.

Doctor-Patient - There is no generally recognized or common law doctor-patient privilege, but some jurisdictions have created the privilege by statute. Neither the Federal Rules of Evidence nor the Military Rules of Evidence recognize this privilege.

Communications to Clergy - To be recognized as confidential, communications to a clergyman must be made as a formal act of religion or as a matter of conscience. The communicant owns the privilege.

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0714 **Sources:** Certain potential sources of evidence require special mention.

Tax returns - Inquiries stemming from allegations of financial irregularities may conclude that tax return information would add to the store of useful knowledge. But Section 6103 of the Internal Revenue Code greatly restricts the disclosure of tax returns and return information. A disclosure can be predicated on a need for investigation of a non-tax federal crime. It requires a showing that: a specific

federal crime has been committed; that the return or other information may be relevant to a matter relating to the commission of the crime; that the return or other information is sought exclusively for use in a federal criminal investigation or proceeding concerning the crime; and the information sought cannot reasonably be obtained from another source (26 U.S.C. 6103(i)(1)(A) and (B)). Given these predicates, this provision is of little use in an IG inquiry or investigation; generally, if the facts suggest the commission of a crime, the matter will be handled by means other than an IG inquiry.

Financial institutions - IG inquiries or investigations may also raise a need for information maintained by financial institutions. Access to such information (e.g. bank account records) is restricted by the Right to Financial Privacy Act (RFPA), 12 USC 3401 et. seq. Basically, such information can only be disclosed by the financial institution to the government if the customer has consented to disclosure, or in response to an administrative summons or subpoena (including a DoD IG subpoena, discussed in paragraph 0319); a judicial subpoena; a search warrant; or other formal written request. SECNAVINST 5500.13 establishes procedures for compliance with RFPA.

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**0715 DECLARATIONS VERSUS AFFIDAVITS:** When taking sworn statements, investigators should consider putting them in the form of a declaration rather than an affidavit. Technically, an affidavit must be notarized, and although investigators have the authority to administer oaths, not all of them are authorized to act as a notary. A declaration executed pursuant to 28 USC 1746 is acceptable in court without being notarized.

28 USC 1746 states:

Unsworn declarations under penalty of perjury: Wherever, under any law of the United States, or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form ...

For the purposes of an IG investigation, the following is suggested as the form to follow at the start of the declaration:

*Pursuant to 28 USC 1746, I [name], declare as follows:*

The following language is suggested for the form of the closing of the declaration:

*I declare under penalty of perjury that the foregoing is true and correct.*

*Executed on [date]. [Signature]*

Federal court decisions interpreting 28 USC 1746 routinely hold that those who make false statements in a declaration that contains the language "under penalty of perjury" may be charged with perjury under 18 USC 1621, just as if the statement were made under oath, and that declarations may be used in lieu of sworn statements or affidavits to support or oppose motions for summary judgment.

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