

Collateral Investigations

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This article is intended to assist practitioners involved in the Army's collateral investigation process. The article should be used in conjunction with Army Regulation (AR) 15-6 and Department of the Army (DA) Pamphlet 385-40 for Army accident investigations. This article should be used as a guide but does not supersede any regulations, official pamphlets, or local standing operating procedures (SOP).

Contents of this article are intended for both aviation and non-aviation (ground) accidents. Unless otherwise stated, information pertains to either type of accident. Where necessary, differences have been delineated.

Introduction to Collateral Investigations

When an Army accident occurs, commanders often will need to initiate multiple investigations to completely research and document the events surrounding the accident. The potential investigations include the safety investigation, financial liability investigation for property loss (FLIPL), line of duty (LOD) investigation, criminal investigation, and collateral investigation. The safety investigation is conducted solely for accident prevention purposes.¹ The purposes of the FLIPL, LOD, and criminal investigations are well-known. The collateral investigation's purpose, however, is not always as clear. The regulatory purpose of the collateral investigation is to make a record of the facts for use in litigation, claims, and other administrative and disciplinary actions.² If thorough in scope, the collateral investigation report can have far-reaching implications for the Army at large.

Collateral investigations are conducted independently and apart from the accident investigation. They are initiated and conducted by local commands as required by *Department of Defense Instruction (DODI) 6055.7*³ and *AR 385-40*⁴ and are governed by the procedures in *AR 15-6*⁵ and *AR 27-20*.⁶ Although *AR 385-40* suggests that most collateral investigations will follow the procedures of *AR 27-20*,⁷ historically most collateral investigating officers have relied on the procedures in *AR 15-6*. When determining which regulation will govern, practitioners should consider whether or not the accident constitutes a potentially compensable event (PCE) within the meaning of *AR 27-20*.⁸ If there is no PCE, *AR 15-6* should be used. If a PCE is involved and adverse administrative action is likely, the command may elect to conduct an investigation under both *AR 15-6* and *AR 27-20*. Collateral investigations require timely access to all appropriate information. This article was written to provide basic information specific to initiating and conducting a technically intensive investigation into such matters as why a complex piece of military machinery malfunctioned or was misused or why the operators made errors that led to a severe injury, fatality, or destruction of equipment.

Army Regulation 385-40 and *DA Pamphlet 385-40*⁹ provide excellent guidance for the conduct of safety investigations. Additionally, the Combat Readiness Center published a *Centralized Accident Investigators Handbook (CAI Handbook)*, which provides practical insight into the application of those publications.¹⁰ Since the process used by safety investigators requires the methodical gathering and reviewing of evidence, the safety investigation process could also be beneficial to collateral investigators. In an effort to improve the collateral process, portions of the *CAI Handbook* are summarized here, with amendments necessary to cover the scope and purpose of the collateral investigation.

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¹ *Id.* para. 1-7 a & b.

² U.S. DEP'T OF ARMY, REG. 385-40, ACCIDENT REPORTING AND RECORDS para. 1-7 (1 Nov. 1994) [hereinafter *AR 385-40*].

³ U.S. DEP'T OF DEFENSE INSTR. 6055.7, ACCIDENT INVESTIGATION, REPORTING, AND RECORD KEEPING (3 Oct. 2000).

⁴ *AR 385-40*, *supra* note 1, para. 1-8c.

⁵ U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996) [hereinafter *AR 15-6*].

⁶ U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS (1 Aug. 2003) [hereinafter *AR 27-20*].

⁷ *AR 385-40*, *supra* note 1, para. 1-8d (stating "[t]he investigation will usually use the procedures in *AR 27-20* because most will involve potential claims. If that regulation is not applicable, the procedures in *AR 15-6* for informal investigations will be followed.").

⁸ *AR 27-20*, *supra* note 6, paras. 2-2, 13-1.

⁹ U.S. DEP'T OF ARMY, PAM. 385-40, ACCIDENT REPORTING AND RECORDS (1 Nov. 1994) [hereinafter *DA PAM. 385-40*].

¹⁰ U.S. DEP'T OF ARMY, CENTRALIZED ACCIDENT INVESTIGATION (CAI) HANDBOOK (Sept. 2002), available at <https://crc.army.mil/tools/applications/ground/caihandbook.pdf> [hereinafter *CAI HANDBOOK*].

Why the Army Needs Better Collateral Investigations

Over the course of the past decade, public interest in military operations, including accidents, has increased. With the added public interest, members of Congress have increased their demands for in-depth information on the cause of many Army accidents. Occasionally, because of the external pressure to provide information, the Department of Defense's (DOD) policy for handling safety and legal investigations separately has been compromised.¹¹ Generally, this happens in only the most high-profile accidents.

Two examples stand out. The first example involved the mid-air collision of two Blackhawk helicopters, which resulted in the death of six Soldiers, injury to five others, and destruction of both aircraft. In that accident, the aircraft were flying a night mission in forecasted deteriorating weather conditions. The mission plan was changed to adjust the direction of flight and landing order due to wind conditions and requirements of the ground commander. The safety investigation and the collateral investigation reports initially differed as to whether the accident was the result of weather or poor pilot decisions given the forecasted conditions. The appointing authority rejected the collateral investigating officer's (IO) findings and twice returned the report for the IO to rewrite his findings. Based on the IO's third set of findings, the battalion commander, who was in charge of the mission, was relieved. An Inspector General's investigation was initiated based on the appearance that the appointing authority used the safety investigation to redirect the collateral IO to a finding that adversely affected the battalion commander. Such a cross-leveling of findings and analysis would be a violation of DOD and Army guidance.¹²

Another problematic investigation involved a fixed-wing accident with twenty-one resulting fatalities. Again, the safety and collateral boards' findings differed as to whether or not adverse weather caused the accident, or the pilots' failure to properly plan for the forecasted weather was the cause of the catastrophe. The appointing authority in that accident requested the collateral IO to reevaluate the evidence and adjust his findings and asked the Safety Center to have experienced investigators review the collateral IO's finding to see if they were supported by credible evidence. Although DOD's regulatory guidance does not prohibit safety investigators from receiving findings from collateral investigations, the motivation behind the appointing authority's request seemed to be a desire to deconflict the findings of the two reports. Such an effort is in direct opposition to the guidance in *AR 385-40*, paragraph 1-8a, which states that the collateral investigation is to be conducted "independently and apart from other types of accident investigations."¹³

By attempting to reconcile the findings of the two investigations, the appointing authorities delayed the acceptance of the collateral reports and, thus, delayed the release of causal information to the public and to Congress. These accidents occurred prior to the publication of *AR 600-34*,¹⁴ which requires a strict timeline for completion of the collateral investigation report so that the report can be used to brief the servicemember's next of kin after a fatal training accident.

In both of these examples, the appointing authorities were disturbed by the disparate findings of the two boards. The rationale for the safety boards' findings were well understood and supported by the published guidance. Since the collateral investigation guidance is limited, however, the collateral IOs failed to comprehend the role of the weather in the planning process and solely applied the impact of the conditions at the time of the accident. Had the collateral IOs received training or had a better understanding of the depth to which they should have probed during the investigation, they likely would have uncovered the underlying events that allowed the poor weather to have a negative effect on the missions.

Providing sound collateral investigations is "essential for the protection of the privileges afforded to accident investigation reports, as they ensure there is an alternative source of evidence for use in legal and administrative proceedings."¹⁵ Maintaining the judicially created privilege for safety reports is an essential part of DOD's accident prevention programs and, thus, an essential part of national security. This article attempts to provide guidance to future collateral IOs to avoid similar issues.

¹¹ Under *AR 385-40*, para. 1-8b, safety personnel (the Combat Readiness Center) "will not conduct, review, evaluate, assist with, or maintain on file the collateral investigation." *AR 385-40*, *supra* note 1, para. 1-8b.

¹² See DOD INSTR. 6055.7, *supra* note 3, paras. E.4.4.1, E.4.4.2, & E.4.5.3.1; *AR 385-40*, *supra* note 1, paras. 1-8a, 1-10, and 1-11f(3).

¹³ *AR 385-40*, *supra* note 1, para. 1-8(a).

¹⁴ U.S. DEP'T OF ARMY, REG. 600-34, FATAL TRAINING/OPERATIONAL ACCIDENT PRESENTATIONS TO THE NEXT OF KIN (2 Jan. 2003).

¹⁵ *AR 385-40*, *supra* note 1, para. 1-8a.

When Must a Collateral Investigation be Conducted?

A collateral investigation is required for Class A accidents¹⁶ or when directed by the supporting staff judge advocate.¹⁷ In addition to those required by the regulation, a commander may conduct a collateral investigation into the circumstances of any other accident if his personnel, equipment, or operations were involved.

The Collateral Investigation Board

One of the command's first challenges when conducting a collateral investigation is assembling the investigation board. While many commands may use only one investigator, accidents are often complex and require experts from various fields. Board members are normally provided by the Installation Commander where the accident occurred, but to avoid conflicts of interest, some members may be required to travel from other locations. Board member selection, notification, and travel may require several days. Whatever the circumstances, the board president and recorder must develop a plan to gain control of board members and advisors immediately upon arrival.

Appointing the Board

Army Regulation 15-6, paragraph 2-1, delineates who has authority to appoint an investigative board. The majority of accidents will require a general court-martial convening authority to appoint the board.¹⁸ The collateral board president must be a commissioned officer, warrant officer, or DA civilian employee permanently assigned to a position graded as a General Schedule, Level 13 (GS-13) or above.¹⁹ For most *AR 15-6* investigations, all voting members of the board must meet those same requirements. *Army Regulation 15-6*, however, provides an exception that applies to most accident investigations. The exception permits "persons with special technical knowledge [to] be appointed as voting members."²⁰ If the investigation involves a designated respondent,²¹ however, the person with special technical knowledge can serve only as an advisory member without a vote.²²

With one exception, the investigating officer or voting member(s) of a board must be senior to any person²³ whose conduct or duty performance may be investigated or against whom adverse findings or recommendations may be made.²⁴ In addition to grade requirements, there are additional requirements for a safety investigation that can be applied to a collateral

¹⁶ A Class A accident is an accident involving one or more fatalities, injury resulting in permanent total disability, or more than \$1 million in property damage. *Id.* para. 2-2.

¹⁷ *Id.* para. 1-8a. Paragraph 1-8c requires a collateral investigation for all Class A accidents (an accident involving one or more fatalities or more than \$1 million in property damage) when directed by the command's staff judge advocate (SJA) or legal counsel in accordance with the claims regulation (*AR 27-20*) for those accidents where there is a potential claim or litigation for or against the government or a government contractor, and for accidents with a high degree of public interest or anticipated disciplinary or adverse administrative action.

¹⁸ *AR 15-6*, *supra* note 5, para. 2-1a.3 (requiring that a general court-martial convening authority appoint the board, regardless of procedures used, "for incidents resulting in property damage of \$1,000,000 or more, the loss or destruction of an Army aircraft or missile, an injury and/or illness resulting in, or likely to result in, permanent total disability, or the death of one or more persons").

¹⁹ "Investigating officers and board members shall be those persons who, in the opinion of the appointing authority, are best qualified for the duty by reason of their education, training, experience, length of service and temperament." *Id.* para. 2-1c.

²⁰ *Id.* para. 5-1e.

²¹ *Id.* para. 1-7. "In formal investigations, the appointing authority may designate one or more persons as respondents in the investigation. Such a designation has significant procedural implications." *Id.* para. 5-4a.

A respondent may be designated when the appointing authority desires to provide a hearing for a person with a direct interest in the proceedings. The mere fact that an adverse finding may be made or adverse action recommended against a person, however, does not mean that he or she should be designated a respondent. The appointing authority decides whether to designate a person as a respondent except where designation of a respondent is — (1) Directed by authorities senior to the appointing authority; or (2) Required by other regulations or directives or where procedural protections available only to a respondent under [AR 15-6] are mandated by other regulations or directives.

Id.

²² *Id.* para. 2-1c(2).

²³ *Id.* paras. 2-1c(3)(b), 2-1c(3)(c) (outlining scenarios for handling the possibility that the board members will discover that the completion of the investigation requires them to review the performance of duty of a person senior to him). To avoid having to appoint new members late in the process, select senior personnel early.

²⁴ *Id.* para. 2-1c(3).

investigation to help the investigation run smoothly. Safety investigators must be from units or organizations other than the accountable organization, and they must be familiar with the type of operation involved in the accident.²⁵ In addition, safety investigators may not have an interest in the accident that may bias the outcome of the investigation.²⁶ Although AR 15-6 does not require it, collateral investigators should be chosen using the same restrictions.

Recommended Board Members and Qualifications

Each accident presents different needs, but frequently the board will need assistance from one or more of the following people:

- a. Equipment/Task Subject Matter Expert (SME). An officer or senior noncommissioned officer (NCO) who is currently serving in a capacity that requires conducting or overseeing the type of mission or task that was being performed when the accident occurred.
- b. Vehicle/Equipment Maintenance Personnel. An officer, warrant officer, senior NCO, or a DoD civilian, who is currently serving in a capacity that requires performance (or oversight) of the maintenance of the type of vehicle or equipment involved in the accident.
- c. Instructor Pilot (IP). An individual holding the necessary and current qualifications and serving as an instructor pilot or a standardization instructor pilot. If the accident occurred during instrument meteorological conditions (IMC) or inadvertent IMC flight, the IP should also be a qualified and current instrument flight examiner (IFE).
- d. Maintenance Test Pilot (MTP). A qualified and current maintenance test pilot or maintenance flight examiner (MFE) of the type of aircraft involved in the accident.
- e. Technical Inspector (TI). A warrant officer, NCO, or DOD civilian who is serving in a TI position with direct oversight of maintenance of the type of aircraft or equipment involved in the accident.
- f. Medical Officer. A doctor or physician assistant who is currently serving in that capacity. In aviation accidents involving personal injuries, problems with personal protective equipment, egress from the aircraft, MEDEVAC (medical evacuation), rescue or survival, a flight surgeon is required

Immediate Actions After Board Appointment

Before going to the accident scene, the collateral investigation board should consider whether or not the accident involved composite or other hazardous materials and ensure the appropriate precautions are taken prior to and while visiting the site.

Accidents involving composite materials that fragment or burn upon impact may pose a significant health threat to investigators. The primary threats are inhalation and dermal exposure to fragmented materials. The aircraft and vehicles that contain a potentially damaging quantity of composite materials include, but are not limited to: UH-1, AH-1, AH-64, CH-47D, OH-58D, RAH-66, UH-60, V-22, HMMWV, M-1 Abrams, M-2/M-3 Bradley, M-9 ACE, M-109 Howitzer, and M-113 APC.²⁷

If the board suspects they have a health or safety threat from the accident site, they should seek assistance from the installation safety team to learn how to protect themselves.²⁸

²⁵ AR 385-40, *supra* note 1, para. 4-2c(1)).

²⁶ *Id.* para. 4-2a(1)).

²⁷ CAI HANDBOOK, *supra* note 10, at S-3a.

²⁸ See, e.g., U.S. DEP'T OF ARMY, REG. 11-34, THE ARMY RESPIRATORY PROTECTION PROGRAM (15 Feb. 1990); U.S. DEP'T OF ARMY, REG. 385-10, THE ARMY SAFETY PROGRAM (29 Feb. 2000); U.S. DEP'T OF DEFENSE, INSTR. 6055.1, DOD OCCUPATIONAL SAFETY AND HEALTH PROGRAM (19 Aug. 1999); see also Respiratory Protection, 29 C.F.R. § 1910.134 (2005); Bloodborne Pathogens, 29 C.F.R. § 1910.1030 (2005).

The next step for the board is to visit the accident site.²⁹ When feasible, the board should visit the site at the same time of day as when the accident occurred and under the same or similar conditions. Doing so will give the investigators a more accurate picture of the existing environmental conditions at the time of the accident (e.g., glare, traffic, and road conditions). Upon arrival at the accident site, members of the board should make a controlled access point (ensuring the site, including ground scarring or marking, is not disturbed) to get a mental picture of the physical layout.

The safety board has priority over the accident scene.³⁰ Often, the safety board will deploy from the Combat Readiness Center at Fort Rucker and, thus, not arrive for several days. In such a case, the collateral board must gain control of the accident site and record any perishable evidence. On-site unit safety personnel will usually attempt to preserve the site to the greatest degree possible; however, well-intentioned, but uninformed senior officers and other interested personnel often feel the need to personally inspect the scene and may inadvertently destroy evidence in the process.

Installation Support Responsibilities

Once the board has completed its initial survey of the accident site, it should focus on gathering equipment necessary to more thoroughly review the accident site. Every unit should have a pre-accident plan that delineates post-accident responsibilities.³¹ Aviation units are *required* to have such a plan.³² The plan should assign personnel to implement accident site security measures and to immediately begin to secure data after completing emergency response actions. Collateral boards should review the plan to identify which installation personnel may have already gathered necessary information and items and collateral investigation legal advisors should obtain a copy of the pre-accident plan to assist them in guiding the board's composition.

Points of contact for assistance to the collateral board should be identified. The types of support will differ depending on the type of accident. The collateral investigator can informally consult with anyone with special expertise.³³ Those experts, however, do not need to be appointed as board members.³⁴

Recommended Equipment and Facilities

Commands should properly equip collateral investigators to complete their task. In addition to traditional office supplies, boards may need more specialized equipment, depending on the type or nature of the accident.³⁵ Commands should also provide the collateral board a quiet meeting room with sufficient tables and chairs and at least two telephone lines.

The Basics of Conducting a Collateral Investigation

Once the collateral board has the personnel and equipment necessary to complete its task, the real work will begin. It is important for board members to remember that the purpose of a collateral investigation is to "obtain and preserve all

²⁹ In the event of an accident on a public roadway where the scene has been cleared away, investigators should maximize local resources such as state, local, or military police reports and site diagrams.

³⁰ AR 385-40, *supra* note 1, para. 1-8.

³¹ U.S. DEP'T OF ARMY, PAM. 385-1, SMALL UNIT OFFICER/NCO GUIDE para. 5-2 & app. B (20 Nov. 2001).

³² U.S. DEP'T OF ARMY, REG. 385-95, ARMY AVIATION ACCIDENT PREVENTION para. 2-3 (10 Dec. 1999).

³³ Typically, the board will need the following aides: (1) Engineer. Surveying and mapping the debris pattern, preparing the required sketches, etc. (2) Local Training Support Center (TSC) representatives. Photo, audio, video, and graphic art assistance. (3) Public Affairs Officer (PAO). Handling press representatives and public information releases. (4) Hospital commander. Treatment and examination of personnel, identification of fatalities, provision of facilities and support for conducting autopsies, lab support, and other medical support as necessary, (e.g., the preparation and shipment of body fluid samples and specimens to the Armed Forces Institute of Pathology (AFIP) for analysis). (5) Provost Marshal. Providing guards, traffic control, and site security. (6) Weather officer. Obtaining complete weather information, to include graphic snapshots, if available, for the time and location of the accident. (7) Maintenance support facility commander. Recovery of wreckage, disassembly, and removal of components, and preparation for shipment of items selected for teardown analysis. Also, preparation of estimated cost of damage (ECOD) to assist in establishing pecuniary liability. (8) Transportation officer. Assistance with transportation to and from the accident site and expeditious shipment of components selected for teardown analysis.

³⁴ AR 15-6, *supra* note 5, para. 4-1.

³⁵ Examples of the types of supplies and equipment a collateral board may need include the following: (1) two easels with pads of paper; (2) laptop computer; (3) digital camera; (4) 35mm camera and film; (5) cellular phone; (6) global positioning system; (7) micro-cassette tape recorder and tapes; (8) magnetic compass; (9) inclinometer; (10) laser rangefinder; (11) tape measurer (steel, 100"); (12) multi-tool similar to a Gerber or Leatherman; (13) hearing and eye protection; (14) flashlight; (15) Tyvek-like protective suit and high-efficiency respirator; (16) composite materials and blood borne pathogen safety kit (when composite materials are present or suspected); (17) batteries; (18) marking flags; and (19) paint pens.

available evidence for use in litigation, claims, disciplinary action, or adverse administrative actions.”³⁶ Many collateral investigations stop once the board determines what happened in an accident and recommend action against the driver or the pilot. While it is often easy to determine what happened in an accident—for example, the driver went too fast around a turn or a pilot flew too close to the trees—a thorough investigation should go beyond what happened and address why the driver was driving too fast or why the pilot flew too close to the trees.

The investigative procedure used during collateral investigations should be the “3W” approach: What happened, Why it happened, and What to do about it.³⁷ The “3W” approach reveals adverse interactions between man, machine, and environment that caused or contributed to the accident.³⁸

(1) *What happened.* Identify key factors (human, materiel, environmental) that caused or contributed to the accident. In the case of injuries, explain how the injuries occurred.

(2) *Why it happened.* Identify the system inadequacy(ies) that permitted the error to occur, the materiel to fail, or the environment to become a factor in the accident. After determining the root causes or system inadequacies, the board should examine each cause or inadequacy and determine if the source was in the Doctrine, Organization, Training, Material, Leadership, Personnel, and Facilities (DOTMLPF) capabilities or processes (e.g., the unit was set up for failure because of Army-level decisions. If root causes or system inadequacies can be attributed to DOTMLPF, the board should consider Army-level recommendations targeting the DOTMLPF domain. For example, a training failure is identified at the unit-level; however, the source of that training failure may be at the Army level.³⁹ Identifying and resolving root causes or system inadequacies are the keys to preventing future accidents.⁴⁰

(3) *What to do about it.* Identify the recommended actions and the proponent activity or lowest level of command most responsible for taking action to correct the root causes or system inadequacies (both at the unit and, if applicable, Army levels). It is important to provide the local commander with recommendations to address his local situation, but it is equally important to provide the Army Chief of Staff with recommendations to address Army-wide hazards. Unlike the safety board, the collateral board can and, where appropriate, should recommend adverse administrative or punitive action be taken against individuals who failed to perform or negligently performed their duties.⁴¹ Rarely have collateral reports gone beyond the equipment operator, but when decision-makers at higher levels make decisions that adversely impact the safety of our Soldiers, they, too, should be held accountable for their decisions.

Conclusion

The collateral investigation is essential to holding Soldiers and civilians accountable for actions or inactions that lead to the death or injury of Soldiers. This article only covers the basics of initiating a collateral investigation. *Department of the Army Pamphlet 385-40* is an invaluable resource to learn more about how to plan and execute the data collection portion of the investigation, what to look for at the accident scene, and how to interview witnesses. It further explains how to evaluate the environmental and materiel information. Readers should also consult the *CAI Handbook*, which expands on the pamphlet’s discussion of the data analysis process and includes tips on dealing with the media, Criminal Investigation Division, and next of kin. If you have any questions about the contents of this article, please contact the Combat Readiness Center legal department.

³⁶ AR 385-40, *supra* note 1, para. 1-8.a.

³⁷ DA PAM. 385-40, *supra* note 9, para. 1-5 & fig. 1-1

³⁸ *Id.* para.1-5.

³⁹ For example, the unit’s back-to-back deployments did not allow sufficient time for training.

⁴⁰ Although one may argue that preventing future accidents is the purpose of the safety investigation rather than the collateral investigation, both can and should serve a vital role in accident reduction.

⁴¹ See DA PAM. 385-40, *supra* note 9, para. 2-8g(4) (prohibiting recommendations for punitive or administrative actions in safety board findings). See AR 15-6, *supra* note 5, para. 3-10 (providing guidance on collateral board findings).