

156TH OFFICER BASIC COURSE
THE MILITARY RULES OF EVIDENCE

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MAJ Charles H. Rose III
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Outline of Instruction

I. INTRODUCTION

A. History.

1. 1975 - Enactment of the Federal Rules of Evidence.
2. 1 September 1980 - Effective date of the Military Rules of Evidence.
3. Authority: 10 U.S.C. § 836 (Article 36(a) UCMJ): “The pretrial, trial and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, . . . , may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.”

B. Some Generalizations.

1. Philosophy - more evidence to go to the finder-of-fact.
2. The rules are designed to work together.
3. Significant overlap between the federal and military rules. (See comparison table at end of outline).

II. APPLICATION

A. Mil. R. Evid. 101. Scope. The Military Rules of Evidence are applicable in courts-martial, including summary courts-martial, to the extent and with the exceptions stated in Mil. R. Evid. 1101.

B. Mil. R. Evid. 1101. Applicability of Rules.

1. The Military Rules of Evidence apply generally to all courts-martial, including summary courts-martial; to proceedings pursuant to Article 39(a) [read in conjunction with Mil. R. Evid. 104 which states, "[p]reliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, or the availability of a witness shall be determined by the military judge. In making these determinations, the military judge is not bound by the rules of evidence, except those with respect to privileges"]; to limited fact-finding proceedings ordered on review; to proceedings in revision; and to contempt proceedings, except those in which the judge may act summarily.
2. Application of the Rules with respect to extenuation and mitigation evidence *may* be relaxed in sentencing proceedings. R.C.M. 1001(c)(3).
3. The Rules (other than with respect to privileges and Mil. R. Evid. 412) do not apply in Article 32 investigations; vacation of suspension proceedings; search authorization proceedings; pretrial restraint proceedings; and other proceedings authorized under the UCMJ and MCM not listed in 1101 [this includes Article 15s].

III. MILITARY SPECIFIC RULES

A. Rule 1102. Amendments. Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments unless the President takes action to the contrary.

B. SECTION III - Exclusionary Rules

1. These rules have no equivalent in the Federal Rules. Fed. R. Evid. 301 concerns presumptions in civil actions, and Fed. R. Evid. 302 deals with the applicability of state law in civil proceedings.

2. Section III of the Military Rules represent a partial codification of the law relating to self-incrimination, confessions and admissions, search and seizure, and eyewitness identification. The Joint Service Committee (JSC) believed it imperative to codify the law in these areas because the large number of lay persons with important roles in the military legal system sometimes have to perform their legal duties without the benefit of attorneys or law libraries. These rules provide a uniform system for all the services. They also allow for change through case law.

C. Mil. R. Evid. 707. Polygraph Examinations.

1. The Past: From 1923 to 1987, the “Frye” test excluded polygraph evidence because it was not generally accepted within the scientific community. In 1987, the “Frye” test was overruled as the standard for admissibility for scientific evidence. *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987). From 1987-1991, polygraph evidence was not per se prohibited for use in courts-martial.

2. The Rule: In 1991, the President promulgated Mil. R. Evid. 707 as a per se ban on all polygraph evidence in courts-martial - this included the results of an examination, the opinion of an examiner, any reference to an offer to take, the failure to take or the taking of a polygraph examination.
 - a. In 1996, CAAF held that the categorical ban on polygraph evidence is an impermissible infringement on the accused's 6th Amendment right to present a defense provided the accused testifies and had his credibility placed at issue, *United States v. Williams*, 43 M.J. 348 (1995). *United States v. Scheffer*, 44 M.J. 442 (1996), *cert. granted*, 117 S. Ct. 1817 (1997) (argued 3 November 1997).
 - b. The Supreme Court Speaks. In *United States v. Scheffer*, 118 S. Ct. 1261 (1998) the Supreme Court overruled CAAF. In an 8 to 1 opinion the Court said that a per se exclusion on polygraph evidence does not unconstitutionally abridge the right of an accused to present a defense.
 - c. *United States v. Light*, 48 M.J. 187 (1998). Accused was convicted of larceny for stealing government equipment. During the course of the investigation he was given a polygraph by CID, which he failed. The polygraph failure was one factor that a Texas Justice of the Peace used to grant a search warrant of his civilian quarters. Can polygraph results be considered in deciding probable cause? CAAF noted the tension between MRE 104 and MRE 707 but avoided the issue. The court said this is an area that the President may want to clarify.

- d. *United States v. Tanksley*, 54 M.J. 169 (2000), Buried on page seven of a nine-page statement to NIS agents, the accused stated that he refused to take a polygraph examination. The government offered the entire statement and the information about his refusal to take a polygraph was not redacted. The defense did not object. The CAAF ruled that any passing reference to a polygraph examination did not materially prejudice the accused.
- e. *United States v. Clark*. 53 M.J. 280 (2000), Accused plead guilty to larceny and false swearing. In this judge alone case the stip included information that the accused failed a polygraph test. The CAAF ruled that it was plain error for the M.J. to admit this evidence, however, the error did not materially prejudice his rights and the court granted no relief.

IV. SECTION IV – RELEVANCY AND IT’S LIMITS.

A. Character Evidence - The General Principle.

- 1. Competing Concerns: proper and improper inferences concerning character that arise from pertinent traits or unrelated prior bad acts versus information pertinent to the determination of guilt.
- 2. “Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant’s evil character to establish a probability of his guilt. . . . The State may not show the defendant’s prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.”
Michelson v. United States, 335 U.S. 469, 475 (1948).

B. Character Evidence to Establish Propensity From Which Conduct Can be Inferred.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) Character evidence generally. Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) Character of the accused. Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide or assault case to rebut evidence that the victim was an aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Mil. R. Evid. 607, 608, and 609.

1. Character of the Accused.

a. The accused may offer a character witness to testify concerning a pertinent character trait which makes it unlikely that he committed the charged offense. *United States v. Gagan*, 43 M.J. 200 (1995). "Pertinent" in Rule 404(a) means the same thing as "relevant" as that term is defined in Rule 401 - some nexus between the offense charged and trait offered is required.

b. This formula could be applied in the following scenarios:

<u>Offense</u>	<u>Pertinent Character Trait</u>
Larceny	Trustworthiness or Honesty
Drunkenness	Sobriety
False Swearing	Truth and veracity
Assault	Peacefulness
Homosexuality	Heterosexuality

- c. The accused's general good military character is a pertinent character trait if there is any nexus, **however strained or slight**, between the circumstances surrounding the crime and the military. The defense, in most cases, and certainly in every "military" offense prosecution, will probably consider offering a "good soldier defense" by presenting evidence of the accused's good military character. *United States v. Wilson*, 28 M.J. 48 (C.M.A. 1989). Consider the impact of *United States v. Foster*, 40 M.J. 140 (CMA 1994) (service discrediting behavior or conduct prejudicial to good order inherent in all enumerated offenses) on the nexus requirement. Is the nexus requirement automatically satisfied now in every case so that a military judge should never be able to preclude the defense from introducing evidence of GMC?
 - d. The issue of the accused's character is also the proper subject of character evidence in rebuttal by the prosecution. For example, the trial counsel can call his own witness to give an opinion regarding a character trait of the accused or relate the accused's reputation within the community in response to the defense's introduction of reputation and opinion testimony.
2. **Character of the Victim:** The accused may offer (and the Government may rebut) character evidence concerning a pertinent trait of the victim's character that makes it likely that the victim acted in a certain way on a specified occasion. *United States v. Rodriquez*, 28 M.J. 1016 (A.F.C.M.R. 1989). Note that Mil. R. Evid. 412 may prevent the accused from introducing evidence of the victim's past sexual behavior or sexual predisposition.
- a. The rule also contains a limited exception permitting the Government to introduce evidence of the victim's character trait for peacefulness to rebut evidence that the victim was the aggressor in a homicide or assault case. *United States v. Pearson*, 13 M.J. 922 (N.M.C.M.R. 1992).

- b. Type of proof. *United States v. Keiser*, 57 F.3d 847 (9th Cir.), *cert. denied*, 116 S. Ct. 676 (1995). An accused's personal knowledge of the victim's propensity to violence is not a prerequisite to admissibility. The court also notes it is proper to exclude specific acts evidence of the victim's character, offered by the accused to prove he was acting in response to attack by the victim. While he can show the alleged victim was an angry and violent person, as a victim's character is not an essential element of a self-defense claim, proof is limited to reputation and opinion testimony under Rule 405.

3. Character as a Test for Veracity.

Rule 608. Evidence of character, conduct, and bias of witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instance of conduct. Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in Mil. R. Evid. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.

- a. Character evidence in support of a witness's credibility is admissible **only after** the witness's character for truthfulness is attacked.
- b. The rule generally bars evidence of specific instances of conduct of a witness for purposes of attacking or supporting credibility except:
 - (1) evidence of a prior conviction; or
 - (2) inquiry into acts on cross examination of a principal witness or witness giving reputation or opinion testimony.

C. Methods of Proving Character.

Rule 405

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of an offense or defense, proof may also be made of specific instances of the person's conduct.

(c) Affidavits. The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduce affidavits or other written statements under this subdivision, the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other written statement, it would otherwise be admissible under these rules.

(d) Definitions. "Reputation" means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. "Community" in the armed forces includes a post, camp, ship, station, or other military organization regardless of size.

1. Rule 405(a). Reputation and Opinion Testimony.

a. Basis of Knowledge and Scope of Testimony.

(1) Witness's testimony is limited to: (a) offering his opinion concerning the person's character and (b) relating the person's reputation in the pertinent community - not the specific reasons why.

(2) For purposes of reputation testimony, "community" is broadly defined. *United States v. Reveles*, 41 M.J. 388 (1995) (patrons at officer's club bar can be an appropriate "community").

b. Permissible Scope of Rebuttal.

(1) The witness giving the reputation or opinion testimony is subject to cross-examination concerning relevant specific instances of conduct.

- (a) Counsel must first have a good faith basis for believing the conduct occurred before cross-examining the witness about it. *United States v. Pruitt*, 46 M.J. 148 (1997).
- (b) Counsel is bound by the witness's answer - extrinsic proof of the conduct is not allowed. *United States v. Robertson*, 39 M.J. 211 (C.M.A.1994).
- (c) When cross-examining on specific instances of conduct, the focus should be on the underlying conduct and not the governmental action taken in response. For example, in cross-examining a defense character witness, the trial counsel's questions should focus on the conduct which led to an article 15 and not the fact of the article 15 itself. *Robertson*, 39 M.J. at 214-15.
- (d) A trial counsel can test the soundness of defense good character testimony through inquiry into specific acts of conduct occurring outside the time period upon which the witness bases his opinion. However, he can not cross-examine with hypotheticals concerning the charged offense. *United States v. Brewer*, 43 M.J. 43 (1995).

(e) *But see, United States v. Graham*, 50 M.J. 56 (1999). Accused charged with wrongful use of marijuana under 112a. Accused offered a good soldier defense and an innocent ingestion defense. He took the stand and testified that he never knowingly used marijuana and he was flabbergasted when he found out that he had come up hot. CAAF held it was error for trial counsel to ask the accused about a urinalysis where the accused tested positive 4 years earlier. Government used this evidence to rebut innocent ingestion/good soldier defense. CAAF said the evidence was irrelevant under MRE 401 and unduly prejudicial under MRE 403. This case contradicts an earlier holding in *United States v. Trimper*, 28 M.J. 460 (CMA 1989).

c. The issue of a witness's character is also the proper subject of character evidence in rebuttal by the prosecution. For example, the trial counsel can call his own witness to give an opinion regarding a character trait of the witness or relate the witness's reputation within the community in response to the defense's introduction of reputation and opinion testimony.

2. Rule 405(b). Where character is "an essential element of the offense or defense," proof may be made by means of opinion or reputation evidence or specific instances of a person's conduct. Such evidence escapes the general proscription against character evidence because it is not offered to prove conformity, but because of the significance of the trait in relation to the crime. Except for evidence of the accused's predisposition to sell drugs in an entrapment defense or the character of the victim in a criminal defamation action under article 134, character will rarely be an element of a crime, claim or defense in courts-martial practice. *See, e.g., United States v. Schelkle*, 47 M.J. 110 (1997) (character not essential element of good soldier defense). *See also United States v. Keiser*, 57 F.3d 847 (9th Cir.), *cert. denied*, 116 S. Ct. 676 (1995) (character not essential element of self-defense case).

3. Use of Affidavits. Mil. R. Evid. 405 (c) has no federal rules counterpart and is made necessary by the worldwide disposition of the armed forces and the difficulty of securing witnesses, particularly in connection with brief statements concerning character. Rule 405(c) is based on prior military practice and permits the defense to use affidavits or other documentary evidence to establish the accused's character

D. Other acts evidence offered for purposes other than propensity.

Rule 404(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

1. The First Sentence:
 - a. The rule's first sentence has two components:
 - (1) "...to prove the character of a person..." refers to proof that the accused is inclined to wrongdoing in general or tends to commit a particular type of wrongdoing.
 - (2) "...in order to show that he acted in conformity therewith" means that the Government is trying to use character as a link in the chain leading to the ultimate inference of conduct in conformity with character.

- b. Evidence of misconduct in this circumstances is not excluded on relevancy grounds, but rather because it may weigh too heavily with the panel. Exclusion of the prosecution's character evidence rests on the grounds that the jury may convict a "bad man" who deserves to be punished not because he is guilty of the crime charged, but because of prior or subsequent misdeeds; the jury will infer that because the accused committed certain other crimes or acts, he probably committed the crime charged.

2. The Second Sentence:

- a. If the evidence is not offered to prove that a person acted in conformity with that person's character on a particular occasion, it may be admissible. Theories of admissibility include "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

(1) The list in Mil. R. Evid. 404(b) is not exhaustive: The "sole test" for admissibility is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime and therefore to suggest that the factfinder infer that he is guilty, as charged, because he is predisposed to commit similar offenses. It is unnecessary that relevant evidence fit snugly into a pigeon hole provided by Mil. R. Evid. 404(b). *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989).

(2) Mil. R. Evid. 404(b) is an "inclusive rule" which permits admission of extrinsic evidence unless the sole purpose is to show criminal disposition.

- (a) If the proponent can articulate a non-character theory of logical relevance for the uncharged misconduct evidence, the military judge will have discretion to admit or exclude the evidence.

- (i) *United States v. Arevalo*, 43 M.J. 719 (A.F. Ct. Crim. App. 1995) (statement that accused said he would “do anything if the charges were dropped” reflected a consciousness of guilt and admissible as other acts evidence).

- (ii) *United States v. Henry*, 53 M.J. 108 (2000), Accused convicted of rape and adultery with his 15-year-old stepdaughter. The victim told the police that the accused made her watch pornographic movies with him. The accused house was searched but no movies were found. However, two or three pornographic magazines were found that contained order forms for videos. At trial the government admitted this evidence over defense objection under 404(b). The CAAF held that the military judge did not abuse his discretion because the magazines were relevant to show intent and possible grooming on the part of the accused.

- (iii) *U.S. v. Davis*, 47 M.J. 707 (N.M.Ct.Crim.App. 1997). Judge did not abuse his discretion in allowing government to introduced evidence of sexual abuse that occurred outside the statute of limitations to show plan and establish force and lack of consent.

(iv) *U.S. v. Mance*, 47 M.J. 742 (N.M.Ct.Crim.App. 1997). In order to prove reasonable apprehension of immediate bodily harm by the victim, the government introduced evidence of a previous incident where the accused pointed a loaded weapon at a person. The victim was present at that prior incident. The court held that this evidence is admissible for the limited purpose of showing victim's apprehension.

(v) *United States v. Phillips*, 52 M.J. 268 (2000). Accused charged with BAQ fraud and entering into a sham marriage in order to collect BAQ payments. Court held that evidence of the accused homosexual relationship was admissible under 404(b) to show motive and intent.

(b) Logical relevance is the touchstone of the admissibility of uncharged misconduct evidence.

b. Can the defense force the government to stipulate as a way to prevent the admission of uncharged misconduct? In *U.S. v. Crowder*, 141 F.3d 1202 (D.C. Cir. 1998), the court held that the defense could not force the government to stipulate to uncharged misconduct in an effort to preclude the government from introducing evidence under Rule 404(b). The willingness of the defense to stipulate is one factor the judge should consider when conducting a 403 admissibility determination.

- c. What About Post-Offense Misconduct? In *United States v. Latney*, 108 F.3d 1446 (D.C. Cir. 1997), evidence of the accused’s crack-related activities occurring after the charged offense was admissible to show intent and knowledge as to earlier offenses. Two recent CAAF cases seem to indicate that the government cannot question about post-offense misconduct. See *United States v. Matthews*, 53 M.J. 465 (2000), *United States v. Wright*, 53 M.J. 476 (2000).

3. Counsel Analysis.

- a. Identify the “other act” and show who did it. This is a question of conditional relevance, and governed by Mil. R. Evid. 104(b). The judge is required only to consider the evidence offered and decide whether the panel reasonably could find that the “similar act” was committed by the accused.
 - (1) In determining whether the Government has introduced enough evidence, the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence.
 - (2) The court simply examines all the evidence in the case and decides whether the jury reasonably could find the conditional fact. See *Huddleston v. United States*, 485 U.S. 681 (1988) (preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not required by Fed. R. Evid. 104(a)); *United States v. Castillo*, 29 M.J. 145, 151 (C.M.A. 1989).
- b. What is the specific purpose for which the evidence is offered, other than to show a predisposition to crime?

- (1) What inferences and conclusions can be drawn from the evidence? The proponent, usually the trial counsel, must be able to articulate a theory why the evidence is relevant to a material fact other than to show the accused's criminal propensity or predisposition.
 - (2) If the inference intended includes one's character as a necessary link, the past bad act evidence is excluded.
- c. Mil. R. Evid. 403 balancing test: Has the party seeking exclusion (usually the defense) shown that unfair prejudicial effect **substantially** outweighs the probative value of the uncharged misconduct?
- d. Perceived "Problems" with Admission of 404(b) Evidence
- (1) Government's Difficulty in Articulating "Other Purpose."
 - (2) Judges Excluding Probative Evidence as Unduly Prejudicial.
 - (3) Judges Postponing Admission Until Close of Defense Case.
 - (4) Limiting Instruction Prohibits Consideration of the Evidence for Its True [intended] Value.

E. Rules of Evidence 413 and 414.

Rule [413][414]. Evidence of Similar Crimes in [Sexual Assault][Child Molestation Cases]

(a) In a criminal case in which the defendant is accused of an offense of [sexual assault][child molestation], evidence of the defendant's commission of another offense or offenses of [sexual assault][child molestation] is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the government intends to offer evidence under this rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least five days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) [definitions of "offenses of sexual assault" and "child molestation"].

1. Rules are premised on the distinctive nature of sexual offenses and, therefore, their enhanced probative value;
2. need to admit all possible evidence because there are few witnesses to sexual assaults;
3. need to rebut consent defense in rape cases;
4. need to corroborate children's testimony in child molestation cases;
5. fact that victims often to not come forward until they hear another person has been assaulted;
6. danger to public if rapist or child molester remains at large.
7. Unresolved issues?
 - a. Application of Rule 403.

Frank v. County of Hudson, 924 F.Supp. 620 (D.N.J. 1996) (evidence proffered under the new rules must still be legally relevant under FRE 403); *see also United States v. Guardia*, 955 F.Supp 115 (D.N.M. 1997) (413 evidence excluded as unduly prejudicial), *United States v. Green* 51 M.J. 835 (Army Ct. Crim. App. 1999) (Army court held this was reversible error for the judge not to apply 403 to evidence admitted under MRE 413).

b. Time Limit. *United States v. Meacham*, 115F.3d 1488 (10th Cir. 1997) (no time limit on past offenses - rules anticipate liberal admission).

c. Constitutionality of Propensity Evidence.

(1) *United States v. Castillo*, 140 F.3d 874 (10th Cir. 1998). 10th Circuit Court of Appeals held that FRE 414 does not violate the Due Process Clause. The court said that the FRE 403 balancing determination adequately satisfies due process concerns.

(2) *United States v. Larson*, 112 F.3d 600 (2d Cir. 1997) (analyzing prior acts evidence occurring 20 years before trial under both 404(b) and 414, court held that testimony, *offered for purposes other than to show criminal propensity*, was within scope of both Rules and probative of intent to engage in criminal sexual conduct with minor).

(3) *United States v. Wright*, 53 M.J. 476 (2000). MRE 413 does not violate the Due Process or Equal Protection Clauses of the Constitution. *See also, United States v. Henley*, 53 M.J. 488 (2000), *United States v. McDonald*, 53 M.J. 593 (N.M. Ct. Crim. App 2000).

V. SECTION VI - WITNESS IMPEACHMENT.

A. Mil. R. Evid. 608. Evidence of Character, Conduct, and Bias of Witness.

Rule 608. Evidence of character, conduct, and bias of witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instance of conduct. Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in Mil. R. Evid. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.

1. Rule 608(a) and (b) are taken from the Federal Rules without significant change.
2. Rule 608(c), permitting impeachment by bias, is not found within the Federal Rules of Evidence. The rule allows the introduction of extrinsic evidence to show bias.

B. Opinion, Reputation and Prior Bad Act Impeachment. Mil. R. Evid. 608(a) allows either party to attack or support a witness with opinion or reputation evidence. The method of proof is the same as for other character evidence under Mil R. Evid. 405(a). There are two important limitations.

1. First, the only relevant character trait is the witness's character for truthfulness or untruthfulness.
2. Second, a witness's character for truthfulness is admissible only after the witness's truthful character has been attacked.
 - a. Bolstering of the accused's truthful character is not allowed. This evidence is only admissible if the accused testifies or his truthful character makes it less likely that he committed the offense (i.e. False Swearing).

- b. Bolstering of a witness's truthful character is not allowed. The witness's truthfulness must first be attacked by a slashing cross-examination, by opinion/reputation evidence of untruthfulness, or otherwise. *United States v. Everage*, 19 M.J. 189 (C.M.A. 1985).
3. Specific Instances of Conduct Mil. R. Evid. 608(b). Specific instances of a witness's conduct for the purpose of attacking or supporting the witness's credibility cannot be proved by extrinsic evidence.
- a. A party can cross-examine the witness on the stand about specific instances of misconduct that are probative of the witness's character for truthfulness. However, the questioner is bound by the answer.
 - b. A party can also cross-examine a character witness with specific instances of conduct regarding the person the witness is testifying about. The specific instances must relate to truthfulness or untruthfulness. The purpose of the cross-examination is to test the knowledge and unreliability of the character witness. The questioner is bound by the witness's answer.
 - c. Witness cannot act as human lie detectors. *United States v. Jenkins*, 54 M.J. 12 (2000). Accused convicted of numerous specifications of larceny and forgery. During the trial the accused testified. On cross-examination, the trial counsel asked the accused 21 separate times if other government witnesses were lying. The court held that these questions were improper because no witness can testify about the ultimate credibility of another witnesses' testimony. The court, however, held that the error was harmless.

C. Impeachment with a Prior Conviction. (Mil R. Evid. 609).

(a) General Rule. For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to rule 403, if the crime was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for the conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advanced written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

1. This method of impeachment can be done by cross-examination, or with extrinsic evidence, or both. Thus, it is an exception to Mil. R. Evid. 608(b). The key to the analysis is what type of crime the witness was convicted of.
 - a. Crimen falsi convictions are crimes such as perjury, false statement, fraud, or embezzlement, which involve deceitfulness or untruthfulness bearing on the witness's propensity to testify truthfully. For crimen falsi crimes, the maximum punishment is irrelevant and the military judge must admit proof of the conviction.
 - b. Non crimen falsi crimes involve convictions for offenses punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law of the prosecuting jurisdiction. The key is the maximum punishment the witness faced, not the actual punishment the witness received.
 - (1) Balancing test for witnesses: Admissibility of non crimen falsi convictions of witnesses is governed by Mil. R. Evid. 403. The military judge can exclude this evidence if the probative value is substantially outweighed by unfair prejudice.

- (2) Balancing test for the accused witness:
Admissibility of non *crimen falsi* convictions of the accused is more restrictive than Mil. R. Evid. 403. Convictions are only admissible if the military judge determines the probative value outweighs the prejudicial effect. See *United States v. Ross*, 44 M.J. 534 (A.F. Ct. Crim. App. 1996).
- (3) If defense removes the sting, they waive the issue on appeal. *Ohler v. United States*, 20 S. Ct. 1851 (2000). See also, *United States v. Cobia*, 53 M.J. 305 (2000).

2. Time Limit. Conviction generally inadmissible if more than 10 years old, later of release from confinement or date of conviction.

D. Motivational Impeachment.

Rule 608. Evidence of character, conduct, and bias of witness

(c) Evidence of bias. Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

1. Ulterior motives never collateral and may be proven extrinsically. There is no requirement to have the witness deny the ulterior motive as a prerequisite to proving the ulterior motive extrinsically.
 - a. In *United States v. Gray*, 40 M.J. 77 (C.M.A. 1994), the accused was charged with indecent acts upon a nine-year-old child. The military judge excluded evidence that the Texas Department of Human Services investigated the victim's parents in response to complaints of child and spousal abuse. This was relevant bias evidence to show the father was the initial target of the investigation and the parents had their daughter accuse the defendant of indecent acts to shift attention from their own abusive and dysfunctional family situation.

- b. In *United States v. Bins*, 43 M.J. 79 (1996), the CAAF held that the military judge abused his discretion in excluding evidence that the victim received a cash settlement from the accused to withdraw “civil” charges in a concurrent foreign proceeding as well as evidence the victim, although not entitled, received substantial financial support from the U.S. government in per diem, housing assistance and mental health counseling. This provided a motive to make and maintain a claim against the accused to continue receiving money.

- c. In *U.S. v. Alis*, 47 M.J. 817 (A.F.Ct.Crim.App. 1998), the accused was charged with fraternization while he was the SJA. The defense sought to impeach a government sentencing witness (who served as the SJA after the accused was relieved) by showing the witness had been relieved for giving bad legal advice. The defense argued that the witness had a motive to embellish his testimony in order to put himself in a better light. The military judge granted government’s motion in limine to exclude the evidence. The court said the judge did not abuse his discretion, because the bias argument was weak, especially since the witness testified similarly before the incident leading to his relief occurred.

E. Impeachment with Prior Statements

Rule 613. Prior statements of witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to him at the time, but on request the same shall be shown or disclosed to opposing counsel.

1. Evidence that a witness made a statement on a previous occasion that is inconsistent with his present testimony is "probably the most effective and most frequently employed" attack on witness credibility.
2. A prior inconsistent statement may cast doubt on the general credibility of the declarant. This evidence is only considered for the purposes of credibility, not to establish the truth of the prior statement's contents. Thus, a limiting instruction is appropriate.
3. A witness may be impeached with competent evidence to show that he or she made a previous statement, oral or written, inconsistent with his in-court testimony. The evidence may be:
 - a. Intrinsic: controlled by 613(a), involving interrogation of the witness concerning the prior statement, or
 - b. Extrinsic: controlled by 613(b), involving extrinsic proof (testimony or documents) of the inconsistent statement.

Rule 801. Definitions

(d)(1) A statement is not hearsay if...[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

4. Impeachment is not the only possible use of a prior inconsistent statement. Pursuant to Mil. R. Evid. 801(d)(1)(A), such statements are admissible substantively as an exemption to the rule against hearsay when four requirements are met:
 - a. The declarant testifies at trial;

- b. The statement is inconsistent with the declarant's in-court testimony;
 - c. The declarant made the prior statement under oath subject to the penalty of perjury; and
 - d. The statement was made at a trial, hearing, or other proceeding, or in a deposition.
5. Interplay between Mil. R. Evid. 613 and 801(d). There is a danger that an impeachment only prior inconsistent statement will be considered on the merits. The Government may not use a prior inconsistent statement under the guise of impeachment for the primary purpose of placing before the panel substantive evidence which is not otherwise admissible. *United States v. Pollard*, 38 M.J. 41 (C.M.A. 1993).

CONCLUSION

THE FEDERAL RULES OF EVIDENCE V. THE MILITARY RULES OF EVIDENCE

A Comparison Table

The following table is designed to give the reader a general idea of the relationship between the Federal Rules of Evidence and the corresponding Military Rules of Evidence

Although not a substitute for a side-by-side comparison of the rules, this table should be useful in an initial analysis and determination of the persuasive value of the federal court cases interpreting the Federal Rules of Evidence.

The term “identical” denotes that the respective federal rule was adopted as a military rule without change; “similar” denotes that the language of the federal rule was unchanged to some extent (most often to conform to military terminology such as “military judge” for the “court,” “members” for “jury” and “accused” for “defendant”) but the intent of the Federal Rule was retained; and “standard” refers to provisions of the Federal Rules proposed by the Supreme Court but not accepted by Congress.

<i>FEDERAL RULE</i>	<i>MILITARY RULE</i>
ARTICLE I GENERAL PROVISIONS	SECTION I GENERAL PROVISIONS
101 <i>Scope.</i>	101 Similar to FRE 101; adds sub (b) as to permissible secondary sources, (c) definition of “military judge.”
102 <i>Purpose and Construction.</i>	102 Identical to FRE 102.
103 <i>Rulings on Evidence.</i>	103 Substantially similar to FRE 103; adds sec on constitutional error at end of (a)(2) and

makes minor modifications.

104
Preliminary Questions.

104
Similar to FRE 104; specifically includes continuance requests and witness availability as preliminary questions.

105
Limited Admissibility.

105
Similar to FRE 105.

106
Remainder of or Related Writings or Recorded Statements.

106
Identical to FRE 106.

Standard 107.
Summing Up and Comment by Judge.

Not included in MRE.

**ARTICLE II
JUDICIAL NOTICE**

**SECTION II
JUDICIAL NOTICE**

201
Judicial Notice of Adjudicative Facts.

201
Substantially similar to FRE 201; subsection (b) modified to reflect worldwide nature of armed forces; and subsection (c) adds requirement that MJ inform parties in open court when notice taken without request.

no comparable rule

201A
Judicial Notice of Law; subsection (b) substantially similar to Fed.R.Crim.P. 26.1.

**ARTICLE III
PRESUMPTIONS IN CIVIL ACTIONS AND
PROCEEDINGS**

301

*Presumptions in General in Civil Actions
and Proceedings*

302

*Applicability of State Law in Civil Actions
and Proceedings.*

Standard 303

Presumptions in Criminal Cases.

no comparable rule

**SECTION III
EXCLUSIONARY RULES AND RELATED
MATTERS CONCERNING SELF-
INCRIMINATION, SEARCH AND SEIZURE,
AND EYEWITNESS IDENTIFICATION**

no comparable rule

no comparable rule

no comparable standard

301

*Privilege Concerning Compulsory Self-
Incrimination.*

302

*Privilege Concerning Mental Examination
of an Accused.*

303

Degrading Questions.

304

Confessions and Admissions.

305

Warnings About Rights.

306

Statements by One of Several Accused.

no comparable rule	311 <i>Evidence Obtained From Unlawful Searches and Seizures.</i>
no comparable rule	312 <i>Bodily Views and Intrusions.</i>
no comparable rule	313 <i>Inspections and Inventories in the Armed Forces.</i>
no comparable rule	314 <i>Searches Not Requiring Probable Cause.</i>
no comparable rule	315 <i>Probable Cause Searches.</i>
no comparable rule	316 <i>Seizures.</i>
no comparable rule	317 <i>Interception of Wire and Oral Communications.</i>
no comparable rule	321 <i>Eyewitness Identification.</i>

**ARTICLE IV
RELEVANCY AND ITS LIMITS**

**SECTION IV
RELEVANCY AND ITS LIMITS**

401
Definition of “Relevant Evidence.”

401
Identical to FRE 401.

402
*Relevant Evidence Generally Admissible;
Irrelevant Evidence Inadmissible.*

402
Substantially similar to FRE 402; adds reference to UCMJ, MRE, and the MCM; reflects different application of U.S. Constitution to members of the Armed Forces.

403
*Exclusion of Relevant Evidence on
Grounds of Prejudice, Confusion or Waste
of Time.*

403
Identical to FRE 403.

404
Character Evidence Not Admissible.

404
Similar to FRE 404; subsection (a)(2) adds “or assault” after “homicide” and deletes “first” before “aggressor;” allowing proof of victim aggressiveness in all crimes against persons.

405
Methods of Proving Character.

405
Substantially similar to FRE 405; adds subsections (c), use of affidavits, and (d) definitions of “reputation” and “community,” to account for unique nature of military setting.

406
Habit; Routine Practice.

406
Identical to FRE 406.

407
Subsequent Remedial Measures.

407
Identical to FRE 407.

408 <i>Compromise and Offer(s) to Compromise.</i>	408 Identical to FRE 408.
409 <i>Payment of Medical and Similar Expense.</i>	409 Identical to FRE 409.
410 <i>Inadmissibility of Pleas, Plea Discussions, and Related Statements.</i>	410 Similar to FRE 410; adds to parties authorized to bargain on behalf of govt in subsection (a)(4) and adds subsection (b) to account for administrative dispositions.
411 <i>Liability Insurance.</i>	411 Identical to FRE 411.
412 <i>Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition.</i>	412 Identical to FRE 412.
413 <i>Evidence of Similar Crimes in Sexual Assault Cases.</i>	413 Identical to FRE 413.
414 <i>Evidence of Similar Crimes in Child Molestation Cases</i>	414 Identical to FRE 414.
415 <i>Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation</i>	415 no comparable rule.

**ARTICLE V
PRIVILEGES**

**SECTION V
PRIVILEGES**

501
General Rule

501
Adopts those privileges recognized in
common law, with some limitations.

Standard 502
Required Reports Privileged by Statute.

no comparable rule

Standard 503
Lawyer-Client Privilege.

Combines standard 503, modified for
military use, and 1969 MCM provisions.

Standard 504
Psychotherapist-Patient Privilege.

Proposed 513
Similar to Standard 504. Evidentiary
privilege would protect from compelled
disclosure communications between
patients and psychotherapists made during
the course of diagnosis or treatment.

Standard 505
Husband-Wife Privilege.

504
Based on 1969 MCM and Standard 505.

Standard 506
Communications to Clergymen.

503
Similar to Standard 506, modified for
military use.

Standard 507
Political Vote.

508
Substantially similar to Standard 507.

Standard 508
Trade Secrets.

no comparable rule

Standard 509
Secrets of State and Other Official Information.

Comparable rules: 505, *Classified Information*, and 506, *Government Information Other than Classified Information*.

Standard 510
Identity of Informer.

507
Identity of Informant; subsection (a) similar to 1969 MCM provisions and subsection (b) similar to Standard 510(b) w/ minor language changes; subsection (c)(1-3) based on 1969 MCM and Standard 507; adds subsection (d).

Standard 511
Waiver of Privilege by Voluntary Disclosure.

510
Subsection (a) similar to Standard 511, adds “under such circumstances that it would be inappropriate to allow the claim of privilege;” adds subsection (b), based on 1969 MCM.

Standard 512
Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege.

511
Subsection (a) similar to Standard 512; adds subsection (b), concerning telephonic transmissions.

Standard 513
Comment Upon or Inference from Claim of Privilege; Instruction.

512
Substantially similar to Standard 513; (a)(2) authorizes inference in the “interests of justice.”

no comparable rule

509
Deliberations of Courts and Juries. Similar to 1969 MCM provisions, modified to conform to MRE 606(b).

**ARTICLE VI
WITNESSES**

**SECTION VI
WITNESSES**

601
General Rule of Competency.

602
Lack of Personal Knowledge.

603
Oath or Affirmation.

604
Interpreters.

605
Competency of Judge as Witness.

606
Competency of Juror as Witness.

607
Who May Impeach.

608
*Evidence of Character and Conduct of
Witness.*

601
Identical to first sentence of FRE 601.
Deletes second sentence dealing with civil
actions and proceedings.

602
Identical to FRE 602.

603
Identical to FRE 603.

604
Identical to FRE 604.

605
Substantially similar to FRE 605, modified
for military practice; adds subsection (b),
matters related to case docketing.

606.
Substantially similar to FRE 606, modified
for military practice.

607
Identical to FRE 607.

608
Substantially similar to FRE 608, minor
modifications for military practice; adds
subsection (c), impeachment by evidence
of bias, motive, influence.

<p>609 <i>Impeachment by Evidence of Conviction of Crime.</i></p>	<p>609 Substantially similar to FRE 609, modified for military practice; adds subsection (f), definition of “conviction.”</p>
<p>610 <i>Religious Beliefs or Opinions.</i></p>	<p>610 Identical to FRE 610, except for grammatical change.</p>
<p>611 <i>Mode and Order of Interrogation and Presentation.</i></p>	<p>611 Substantially similar to FRE 611, modified for military practice.</p>
<p>612 <i>Writing Used to Refresh Memory.</i></p>	<p>612 Substantially similar to FRE 612, modified for military practice.</p>
<p>613 <i>Prior Statements of Witnesses.</i></p>	<p>613 Identical to FRE 613.</p>
<p>614 <i>Calling and Interrogation of Witnesses by Court.</i></p>	<p>614 Similar to FRE 614, modified to account for military practice of court members calling and questioning witnesses.</p>
<p>615 <i>Exclusion of Witnesses.</i></p>	<p>615 Substantially similar to FRE 615, modified for military practice.</p>

**ARTICLE VII
OPINIONS AND EXPERT TESTIMONY**

**SECTION VII
OPINIONS AND EXPERT TESTIMONY**

<p>701 <i>Opinion Testimony by Lay Witnesses.</i></p>	<p>701 Identical to FRE 701.</p>
<p>702 <i>Testimony by Experts.</i></p>	<p>702 Identical to FRE 702.</p>

703
Bases of Opinion Testimony by Experts.

703
Identical to FRE 703.

704
Opinion on Ultimate Issue.

704
Identical to FRE 704, except subsection (b), excluding ultimate issue evidence in connection with defendant's sanity, deleted from Military Rules.

705
Disclosure of Facts or Data Underlying Expert Opinion.

705
Substantially similar to FRE 705, modified for military practice.

706
Court Appointed Experts.

706
Subsection (a) is a redraft of FRE 706(a), in order to be consistent with Article 46, UCMJ (equal access to witnesses) and employment and compensation provisions of RCM 703.

no comparable rule

707
Polygraph Examinations.

ARTICLE VIII
HEARSAY

SECTION VIII
HEARSAY

801
Definitions.

801
Identical to FRE 801.

802
Hearsay Rule.

802
Substantially similar to FRE 802, except recognition of Supreme Court's power to promulgate hearsay provisions deleted.

803
Hearsay Exceptions; Availability of Declarant Immaterial.
803(1)
Present Sense Impression.

803
see below
803(1)
Identical to FRE 803(1).

803(2)
Excited Utterance.

803(2)
Identical to FRE 803(2).

803(3)
Then Existing Mental, Emotional or Physical Condition.

803(3)
Identical to FRE 803(3).

803(4)
Statements for Purpose of Medical Diagnosis or Treatment.

803(4)
Identical to FRE 803(4).

803(5)
Recorded Recollections.

803(5)
Identical to FRE 803(5).

803(6)
Records of Regularly Conducted Activity.

803(6)
Substantially similar to FRE 803(6), with modification to include "armed forces" within definition of "business" and inclusion of nonexclusive listing of types of documents admissible under this rule.

803(7)
*Absence of Entry in Records of Regularly
Conducted Activity.*

803(7)
*Absence of Entry in Records Kept In
Accordance With the Provisions of
Paragraph (6).* Except for rule name,
identical to FRE 803(7).

803(8)
Public Records and Reports.

803(8)
First sentence identical to FRE 803(8).
Second sentence includes exhaustive listing
of types of documents admissible under
this rule.

803(9)
Records of Vital Statistics.

803(9)
Identical to FRE 803(9).

803(10)
Absence of Public Record or Entry.

803(10)
Identical to FRE 803(10).

803(11)
Records of Religious Organizations.

803(11)
Identical to FRE 803(11).

803(12)
*Marriage, Baptismal and Similar
Certificates.*

803(12)
Identical to FRE 803(12).

803(13)
Family Records.

803(13)
Identical to FRE 803(13).

803(14)
*Records of Documents Affecting an Interest
in Property.*

803(14)
Identical to FRE 803(14).

803(15)
*Statements in Documents Affecting an
Interest in Property.*

803(15)
Identical to FRE 803(15).

803(16) <i>Statements in Ancient Documents.</i>	803(16) Identical to FRE 803(16).
803(17) <i>Market Reports, Commercial Publications.</i>	803(17) Substantially similar to FRE 803(17); adds government price lists.
803(18) <i>Learned Treatises</i>	803(18) Identical to FRE 803(18).
803(19) <i>Reputation Concerning Personal or Family History.</i>	803(19) Identical to FRE 803(19).
803(20) <i>Reputation Concerning Boundaries or General History.</i>	803(20) Identical to FRE 803(20).
803(21) <i>Reputation as to Character.</i>	803(21) Identical to FRE 803(21).
803(22) <i>Judgment of Previous Conviction.</i>	803(22) Similar to FRE 803(22), modified to recognize convictions punishable by death or punitive discharge.
803(23) <i>Judgment as to Personal, Family or General History, or Boundaries.</i>	803(23) Identical to FRE 803(23).
803(24) <i>Other Exceptions.</i>	803(24) Identical to FRE 803(24).

804
*Hearsay Exceptions, Declarant
Unavailable.*

804
see below

804(a)
Definition of Unavailability.

804(a)
Similar to FRE 804(a), modified to
conform to military practice; adds
subsection (6).

804(b)(1)
Former Testimony

804(b)(1)
Similar to FRE 804(b)(1), adapted to
military use, specifically acknowledging
verbatim article 32 investigations.

804(b)(2)
*Statement Under Belief of Impending
Death.*

804(b)(2)
Similar to FRE 804(b)(2); deletes reference
to “civil action or proceeding” and adds
“for any offense resulting in the death of
the alleged victim.”

804(b)(3)
Statement Against Interest.

804(b)(3)
Identical to FRE 804(b)(3).

804(b)(4)
Statement of Personal or Family History.

804(b)(4)
Identical to FRE 804(b)(4).

804(b)(5)
Other Exceptions.

804(b)(5)
Identical to FRE 804(b)(5).

805
Hearsay Within Hearsay.

805
Identical to FRE 805.

806
Attacking and Supporting Credibility of Declarant.

806
Identical to FRE 806.

807
Residual Hearsay. Proposed rule combining 803(24) and 804(b)(5).

807
Identical (180 days after effective date).

**ARTICLE IX
AUTHENTICATION AND IDENTIFICATION**

**SECTION IX
AUTHENTICATION AND IDENTIFICATION**

901
Requirement of Authentication.

901
Identical to FRE 901.

902
Self-Authentication.

902
Substantially similar to FRE 902; subsections (4) and (10) refer to “applicable regulations;” adds subsection (4a) - U.S. documents with custodian authenticating certificates.

903
Subscribing Witness’ Testimony Unnecessary.

903
Identical to FRE 903.

**ARTICLE X
CONTENTS OF WRITINGS, RECORDINGS,
AND PHOTOGRAPHS**

**SECTION X
CONTENTS OF WRITINGS, RECORDINGS,
AND PHOTOGRAPHS**

1001
Definitions.

1001
Identical to FRE 1001.

1002
Requirement of Original.

1002
Substantially similar to FRE 1002; refers to MCM.

1003
Admissibility of Duplicates.

1003
Identical to FRE 1003.

1004
Admissibility of Other Evidence of Contents.

1004
Identical to FRE 1004.

1005
Public Records.

1005
Substantially similar to FRE 1005; adds “or attested to.”

1006
Summaries.

1006
Identical to FRE 1006 with “military judge” substituted for “court.”

1007
Testimony or Written Admission of Party.

1007
Identical to FRE 1007.

1008
Functions of Court and Jury.

1008
Identical to FRE 1008, with “military judge” and “members” substituted for “court” and “jury.”

ARTICLE XI
MISCELLANEOUS RULES

SECTION XI
MISCELLANEOUS RULES

1101
Applicability of Rules.

1101
Similar to FRE 1101, adapted to military practice and procedure, adding section on applicability of rules to sentencing.

1102
Amendments.

1102
Mandates that changes to Federal Rules automatically become part of Military Rules 180 days after effective date of Federal Rules changes unless action to the contrary taken by the President.

1103
Title.

1103
Similar to FRE 1003, adapting title to military practice.