



THE
**ADVOCACY
TRAINER**

A Manual for Supervisors

Criminal Law Department
The Judge Advocate General's School
United States Army
Charlottesville, Virginia

1999



THE ADVOCACY TRAINER

A Manual for Supervisors

TABLE OF CONTENTS

FOREWORD

TAB A INTRODUCTION

TAB B LEARN THE SKILL

- Module 1: **Direct Examination - The Fundamentals**
- *Form of the Question, Inflection, Body Language*
- Module 2: **Cross Examination - The Fundamentals**
- *Form of the Question*

TAB C APPLY THE SKILL

- Module 1: **Voir Dire**
- Module 2: **Opening Statements**
- Module 3: **Closing Arguments**
- Module 3a: **Rebuttal Arguments**
- Module 4: **Examination of Lay Witnesses - Direct and Cross**
- *Assault Victim*
 - *PX Representative*
- Module 5: **Expert Witnesses**
- *Qualifying the Witness: Drug Expert*
- Module 6: **Assembly of Sentencing Case**
- Module 7: **Sentencing Proceedings**
- *Company Commander - Direct Examination*
- Module 8: **Objections - The Fundamentals**
- *Videotape*
- Module 9: **Demonstrations**
- Module 10: **Sentencing Proceedings**
- *The Accused - Direct Examination*
- Module 11: **Motion Practice**
- *Article 10, UCMJ*
 - *Motion to suppress evidence*

TAB D DEVELOP THE SKILL: IMPEACHMENT

- Module 1: **Bias, Prejudice and Motive**
- Module 2: **Prior Untruthful Acts**
- Module 3: **Prior Conviction**
- Module 4: **Prior Inconsistent Statements**
- Module 5: **Visual Observation**

TAB E **DEVELOP THE SKILL: FOUNDATIONS**

Module 1:	Diagrams
Module 2:	Refreshing Memory and Past Recollection Recorded
Module 3:	Bad Checks
Module 4:	Business and Military Records
Module 5:	Photographs
Module 6:	Habit Evidence
Module 7:	Voice Identifications
Module 8:	Identification of the Accused
Module 9:	Confessions
Module 10:	BAC Tests
Module 11:	Videotapes
Module 12:	X-rays
Module 13:	Fax and E-mail Documents
Module 14:	Fingerprints
Module 15:	Reputation/Opinion Evidence
Module 16:	Fungible and Non-Fungible Evidence

TAB F **HEARSAY**

Module 1:	Present Sense Impression
Module 2:	Excited Utterance
Module 3:	Statements for Purposes of Medical Diagnosis or Treatment
Module 4:	Residual Hearsay

Foreword

Forward the phones, pick up this book, and march with your counsel to the courtroom...or to a GP small, or to any other location where two or more aspiring advocates can practice the skills critical to excellence in court.

“Our top priority is training,” according to FM 25-100, and “[w]e train the way we intend to fight.” This is as true for judge advocates as for mortarmen or combat engineers. In an era in which we are trying fewer but more complex courts-martial than before, we must train better, smarter, and more creatively. This book provides you a wealth of opportunity to close up shop and go train on virtually any aspect of criminal trial advocacy.

Nothing is more important than military justice, whether effectively and fairly prosecuting cases or ardently and ethically defending fellow soldiers. The training in this book is performance-oriented, designed to develop and hone the central skills of trial advocacy for counsel of all skill and experience levels.

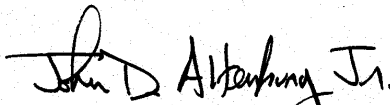
Challenge your counsel. Training, especially advocacy training, can be challenging *and* fun, but it must be challenging. Do not lower the bar. Our young counsel have great capacity; you owe them the opportunity to develop and stretch that capacity. They need not hit a home run in the first at bat, but don't be content to develop only singles hitters when the advocates have the potential to do more.

The Army tells us that “[t]raining must be carefully planned, aggressively executed, and thoroughly assessed.” This book spares you the first part. You still need to prepare, but you need not create the training. The exercises in this edition, and those to follow in 1998, enable you to pull out a training module, prepare and review the references, and head to the courtroom. Don't concern yourself with your own experience or comfort level; you were selected for your job because you have the ability not only to perform but also to train and lead.

Don't forget to continue challenging your more experienced counsel. We owe them developmental and sustainment training. In the process of sustaining their skills, they set an example – as advocates and soldiers – for less experienced advocates.

It is not incidental that we are called judge *advocates*. Your commitment to training is critical to our ability to maintain one of the best-trained courtroom forces in the world. Our advocacy performance is directly related to the morale and discipline of the best-trained, most combat-ready army in the world. This book is the product of the creative efforts of the Criminal Law Department, TJAGSA. Take advantage of it and use it. All you require is time, and your supervisors are sure to give you that.

Now go out and train!



John D. Altenburg, Jr.
Major General, U.S. Army
The Assistant Judge Advocate General



NOTE TO THE TRAINER

Nothing beats the concentration of preparing for and trying a case. There are, however, many ways to get ready to try those cases better. The materials in **THE ADVOCACY TRAINER** make it easier for you to train your counsel. They enable you to identify a skill on which you want to train counsel, select the module, follow the preparation instructions, and conduct the training.

Before your first session, read the Introduction, which suggests several methods for conducting the training. Then pick a module, set a date, and do some training!

THE ADVOCACY TRAINER provides *a*, not *the* exclusive method of training counsel. Although nothing takes the place of rehearsing counsel before trial, this book enables you to train counsel beyond the issues that arise in particular cases. Innovate while using **THE ADVOCACY TRAINER**. For example, while counsel can be used to play witness roles, consider inviting other participants, especially other professionals (law enforcement and medical personnel) who are likely to testify in court themselves; this can make your training more realistic and give these participants valuable courtroom preparation. In addition, you should treat each record of trial as a potential training package: review, tab, and copy portions that can be used to create situational training exercises.

Use the scenarios in this book as they are written, or adapt them to the needs of your counsel. The materials are sufficiently flexible that you can adjust the demands, duration, and intensity of the training. And you can use them over and over. The modules can also be used to sustain the skills of more experienced counsel, as all counsel can always get sharper. In addition, of course, the participation of experienced counsel sets an example on two important levels: (1) how to perform better in court, and (2) the value of training to the already proficient.

THE ADVOCACY TRAINER represents the combined efforts of many judge advocates, not only the TJAGSA Criminal Law Department, its primary authors and editors, but also senior judge advocates and several members of the 45th Graduate Course. *It is not a static package.* Let us know what works and what doesn't. Also, let us know your needs. With your input, future supplements will be geared to the training needs of you and your counsel. Send your suggestions to Chief, Criminal Law Department, The Judge Advocate General's School, ATTN: **THE ADVOCACY TRAINER**, 600 Massie Road, Charlottesville, Virginia 22903. Phone: (804) 972-6340. Electronic mail: advtrngm@otjag.army.mil

Authors

LTC Lawrence J. Morris
LTC James K. Lovejoy
LTC Stephen Henley
MAJ Charles N. Pede
MAJ Norman F.J. Allen III
MAJ Gregory B. Coe
MAJ John P. Einwechter
MAJ Edye U. Moran
Maj Martin H. Sitler, USMC
MAJ Victor M. Hansen
MAJ Michael J. Hargis
MAJ Walter M. Hudson
CPT Erik Christiansen

45th Graduate Course Contributors

LCDR Brenda Armstrong, USN
MAJ Bryan Broyles
MAJ Geoffrey Corn
MAJ Michael Klein
MAJ Kurt Mieth
LCDR Thomas Miro, USN
MAJ John Saunders

46th Graduate Course Contributors

LtCol Kenneth Martin, USMC
LtCol Robert Sokoloski, USMC
LCDR Lara Jowers, USN
MAJ Michael Henry

47th Graduate Course Contributors

MAJ Michael Seidel
Major Gary Barthel, USMC
Major Robert Miller, USMC
Major John Schum, USMC
LCDR Andrea Prince, USN

Production

Mrs. Ellen C. Beauchamp
Mr. Dennis Mills
Mr. Byrd Eastham
Mr. James Davey

Contributing Editors

LTC Donald G. Curry, Jr.
LTC Patrick Lisowski
COL Denise Vowell
COL Fredric I. Lederer

Tab A

Introduction



The Advocacy Trainer

THE ADVOCACY TRAINER

A Manual for Supervisors

INTRODUCTION

The flowers of advocacy are hothouse plants
Winston Churchill



I. CONCEPT.

- A. These materials provide supervisors of trial and defense counsel with an informal and entertaining means of training subordinates and assessing their fundamental trial advocacy skills. In the spirit of “hip pocket training,” this book provides Chiefs of Justice and Senior Defense Counsel with a tool to enhance training conducted on a short or no-notice basis. The objective of this training is to maximize time spent practicing the skills necessary for effective advocacy, and to minimize the time counsel spend role playing or memorizing hypothetical fact patterns.
- B. Additionally, by providing supervisors with necessary materials, the manual enables supervisors to devote their energies to teaching counsel and assessing subordinates’ performances, rather than developing advocacy training from scratch.



II. STRUCTURE.

- A. ***The Training Module.*** The training module for each advocacy skill is generally the same. Each module contains the following:
 - 1. **Supervisor’s Guide.** This guide provides an overview of the advocacy skill and provides specific instructions for conducting the advocacy skill drills.

2. **Counsel Handout.** Each training module contains a Counsel Handout that you should photocopy and distribute prior to each training session. The handout includes: a brief introduction that explains the purpose of the training, instructions for any necessary preparation by counsel, the keys to success for the advocacy skill highlighted, and a reference list for counsel's independent study.
3. **Evidence.** Each training module contains the Evidence (if needed) for counsel use during the training. Items such as sworn statements or physical evidence (checks or other business records) are included if required by the skill drill.
4. **Sample Solution.** Each training module contains Sample Solutions that you can use in conjunction with the critique that you conduct after each training session.

B. ***Your Training Plan.*** The training modules may be used in two ways.

1. Training Plan 1: Start with TAB B, Module 1, and each week, every two weeks, or every month, train with the next tab in order. You need only provide the **TIME** and **LOCATION**. Time required: Flexible. Many drills can be done effectively in 15 minutes. The same drills can be enhanced in a one hour training session. The ***key*** is setting the time aside.
2. Training Plan 2: Given counsel weaknesses and your personal preferences, simply choose a module from anywhere in the text and conduct training. Ideally, the skills build on one another. One module is not, however, a prerequisite for another. The sequence of your training is a function of your priorities and identified strengths and weaknesses.

III.



RESOURCES.

- A. All materials necessary to conduct training are included. You must only reproduce sufficient copies of the Counsel Handout and Evidence for your subordinates. Counsel should always bring their Manual for Courts-Martial, Benchbook, and an evidentiary foundations text to the training. A television and VCR are needed when videotapes are part of the training materials.

- B. Although supervisors are encouraged to incorporate other materials relevant to the training, this is not required for successful training. To the extent possible, your subordinates should only be the examining counsel. You, or one of your legal specialists, should play the roles of witness or judge. *The most important resource you will need is your most precious resource, **time**.*



IV.

BUT I DON'T KNOW HOW TO TRAIN!

- A. Most judge advocates question whether they're qualified to train, and even if qualified, are uncertain how to do it **well**. The critique methodology provided below (based on the National Institute of Trial Advocacy model) is a complete recipe for providing excellent training and critiques to your counsel. And it gets easier and better the more you do it!
- B. Construct and deliver your critiques using the following model.



HEADNOTE. Tell them **WHAT** the skill is you are going to address and **WHY** it is important. Not just, “should lead on cross,” but “we are going to discuss leading on cross-examination. It is important because it keeps you in control of the exam and keeps the witness from straying into material that is not central to your theory of the case.”



PLAY BACK the advocate's words. You need not keep a verbatim log (your attention should remain on the speaker when performing) but you should be able to quote, as accurately as possible, the speaker's words. This reinforces that you do not have just a vague point – “you didn't lead much” – but that you can point to exact language that was ineffectual or objectionable. When you can quote the speaker's language, that person is much less likely to be defensive, will realize the close attention you paid to the performance, and will be more likely to heed your advice.



PRESCRIPTION. What to do next time. Avoid “what I would have done” language, as any resentful lawyer is likely to tell you to go ahead and do it (which you will do shortly). Tell them, however, what approach you suggest for next time. “Instead of repeating ‘the evidence will show’ in your opening statement, say it once early, then stick to telling the story, as this will avoid an objection while also enabling you to keep the tightest grip on the panel's attention as you paint a word picture.”



MODEL AND RATIONALE. This is where you earn your pay. After criticizing the advocate, show how it should be done. This need not be theatrical or elaborate (though it can be both in the right circumstances), but only has to be a solid example of how to perform the criticized portion of the case correctly. This has two main purposes: (a) the student will remember your showing him how to perform much more than a fairly abstract critique of what he did wrong, and (b) it cements your credibility as instructor, if you can help the student navigate through a better way of performing the criticized task.

- C. This methodology is not meant to be complicated or confining. It is meant to give you a logical construct for helping another lawyer perform better. Following this general structure will help you think harder about which points to critique, *why* they are important, and what specific advice you can give about how to perform next time.



- D. **Time.** When conducting the drills, have a plan for when to critique and how long the critique will be. Of course a host of variables, including how long you have to train and the number of counsel, affect this. Letting counsel perform most or all of the drill, makes the drill as close to real life as possible: in court, counsel get no reinforcement until after trial when a verdict is delivered or supervisors and judges conduct critiques. On the other hand, the value of a drill is that it is not real life and you can stop performance – especially performance that is well off the mark – and have counsel start over, or perform an aspect of the evaluated skill again. If counsel are routinely stopped too frequently, the disadvantage is that they might become intimidated (afraid to take a risk because of impending interruption) or complacent (relying on the supervisor to insert frequent mid-course corrections, thereby sweating insufficiently to get any conditioning value from the drill). Waiting until after the drill makes it most like real life, but may leave you with too many points to make and diminish the absorption value for counsel.

- E. **Videotape.** Consider using videotapes in your training. You need not do this all of the time (need to build in time to set up machines, review the tapes), but taping has several virtues:



CREDIBILITY. Even when you use the “playback” method of quoting counsel’s words back to them, nothing is as effective as seeing and hearing those words uttered. Your credibility is stronger when your critique is validated by counsel’s seeing and hearing what you just told them they said.

☞ **STYLE.** Your critiques generally should focus on substance as opposed to the peculiar but often minor stylistic quirks all of us have. It is often a “cheap” or easy critique to focus on a distracting mannerism (hands in the pockets, too many “ums”) instead of the more difficult and substantive legal critiques (failure to lead, disorganized argument, and here’s how to fix it). Occasionally, however, you should ensure that counsel receive critiques on their style – pace and cadence of speech, mannerisms and the like. Videotapes help you accomplish this, and enable you to focus most of your critiques on substance.

☞ **SELF-DIAGNOSIS.** Give your counsel the credit they have earned as attorneys. Much of the time they will recognize their errors upon viewing them.

☞ **PRIVATE REVIEW.** Counsel can take the tapes home or to their offices to review privately (reinforces the self-diagnosis). Also, you can review them 1-on-1 with counsel, sparing them possible embarrassment, especially on style matters, in front of peers.

☞ **TIME CRUNCHES.** If you have a short time in which to conduct training, you do not have to sacrifice drill time if you tape the exercises for later (but close in time) review.

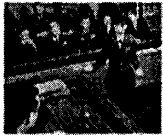
F. *Typical Critique Points.*

- **Form** of the question
- **Length** of the question }
- **Compound** question } *One fact per question*
- **Facts vs. Conclusions** }
- **Language**
- **Listening**
- **Organization**
- **Theme/purpose**
- **Objections:** making and response
- **Awareness of fact-finder:** documents, questioning techniques, tone, position
- **Excessive** use of notes
- **Style:** critiques during video review

V.



NOW YOU ARE READY TO TRAIN!



Tab B

Learn the Skill



The Advocacy Trainer

Tab B
Module 1

Learn the Skill

Direct Examination

The Fundamentals



The Advocacy Trainer

DIRECT EXAMINATION - THE FUNDAMENTALS

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** The advocate's role during direct examination is to help the witness **tell the story** using carefully framed **single-fact, non-leading** questions. The calculated and judicious use of inflection and body language to emphasize key factual points is central to the advocate's mission on direct examination. This module is designed primarily to **develop**, and then incrementally improve, and fine-tune the direct examination skills of both experienced and inexperienced trial attorneys through simple drills. The emphasis is on **form**, not **substance**. Once the form (methodology) is mastered, it can be applied to any substance (your specific case).
- B. **Training Overview.** This training requires at least two participants: one supervisor and one counsel. The training is divided into various drills of short (15 minutes) or long (1 hour) duration, depending on the time available to you. They are specifically designed to be used anywhere, with little or no preparation. Resources: time.



II. THE LAW.

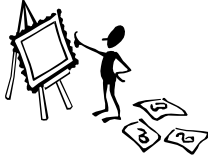
- A. **The order of your case in chief.** MRE 611.



“The Military Judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.” MRE 611(a).



“Leading questions should not be used on direct examination of a witness. Leading questions are permitted on cross-examination.” MRE 611(c).



III.

THE ART.

- A. *The Canvas:* A direct examination must focus attention on the **witness**, not the lawyer. Given the rules of evidence, counsel must be able to ask **single-fact** (not compound), **non-leading** questions. Once mastered, counsel must further refine their skills through such techniques as “looping,” or reflective questioning. Looping permits counsel at various points in the testimony to reinforce and accentuate significant testimony.



Form of the Question. **Single-fact, non-leading questions.** The direct examination must present a clear, coherent statement of the witness’s personal knowledge. The keys to success are preparation and simplicity. You must prepare yourself and the witness. You must also develop the habit of using **short, simple questions in plain English** to elicit testimony. This will enhance the clarity, brevity and pace of the presentation. Above all, avoid sounding like a lawyer. Further, superior knowledge of the facts often leads an anxious advocate to ask compound questions in an effort to let the fact finder in on all of the “good stuff” right away. Unfortunately, the Rules of Evidence mandate that an advocate ask only **single-fact, non-leading** questions during a direct examination. Thus, on direct examination, the advocate must be able to elicit all relevant facts to the court-martial in a simple, step-by-step manner.



Listening. It is difficult to listen to what you think you already know. Counsel must, however never assume that the answer to the question they ask in court will be the same as the answer they received during the interview process. You must listen with **both eyes and ears**. There is no surer way to look foolish in court than to unwittingly ask a question that the witness already answered or to fail to follow up on an unanticipated answer. Additionally, counsel can be sure that if they do not seem interested in the witness’s answer, because they are busy studying their notes or next question, the fact finder will also lack interest in what the witness has to say. By not focusing on the next question until the witness gives a complete answer to the question just asked, the advocate will avoid this common pitfall. The increased eye contact will reassure a hesitant witness and engage the fact finder as well. Moreover, this simple technique will allow the advocate to maintain a steady pace.



Inflection, Volume and Rate of Speech. Whether on direct or cross-examination, counsel must realize the communicative power of inflection. Monotone bores. Improper inflection confuses. Too loud or too fast distracts and confuses. Inflection can also determine whether the statement is an affirmative declaration (leading) or a question (non-leading). Finally, inflection indicates counsel's interest, respect or contempt for the witness or his answer.

- Consider the impact of inflection on the meaning of the following statement.

I *never* said I'd give you money.

I never said I'd give you *money*.

- The first version denies ever making the statement. The second version acknowledges a statement was made but that the promised "gift" was something other than money. Clearly, inflection changes the meaning of a given set of words.
- Verbal habits. Many counsel develop bad verbal habits in direct examination, such as saying "and," "uh," and "ok" after each answer or before each new question. Eradicate these distracters. Many who fall into these habits don't have problems with them in normal conversation.



Body Language and Movement. Counsel's movement in a courtroom should be accomplished with calculation and for effect. Counsel should not move around the courtroom for the sake of movement, or because one "feels better." Similarly, counsel should not spend time focusing on the floor or ceiling. Counsel **must engage** the panel or military judge with their eyes. Energy which should be going into counsel's face, voice, hands and arms is often lost through the feet in unproductive and distracting pacing. Military bearing is especially critical in a court-martial. The examiner must convey control and confidence in his body language. Position in the courtroom when conducting an examination is also important. Generally, counsel should stand at a place that helps the witness look toward the panel and avoids having the panel look at the counsel (e.g., at the far end of the panel). If this is used as a default rule, then movement can be used for emphasis and other exceptional purposes.



Building Blocks. Every direct examination requires **logical organization**. Counsel and the witness know the facts but the panel does not. Effective advocates ask questions in a logical progression, thereby presenting information for the fact finder in an orderly manner. Effective advocates also use “headline” and “transition” questions to help this logical flow. These techniques identify the **principal topic** to be discussed early in an examination and **reorient** the witness and panel to new topics. Most importantly, these techniques assist the witness *and the panel* in following the organization of the testimony.

Headline example:

Q: Were you stabbed in the stomach on 18 March?

A: Yes.

Q: Please tell the panel where the attack took place? When? Describe what happened.

Transition example:

Q: Let's focus now on the description of the person who attacked you. How tall was the attacker?



Looping. Looping is the practice of incorporating the witness's last answer into the body of counsel's next question. Looping is a legitimate means of transitioning to the next question. If artfully done, looping is also an easy way for counsel to repeat and thereby emphasize important testimony. **Listening** is a critical predicate skill to artful and effective looping. It is both impossible and *objectionable* to loop unless counsel properly and accurately assimilate the words used by the witness in the preceding answer. For example,

What did the accused do with the bat?

He swung it at me.

As he swung the bat, what did you do?

I held my arms up to stop the bat.

When he swung the bat and you held up your arms, what happened next?

The bat hit my right forearm.

When he swung the bat and it hit your arm, what happened next?

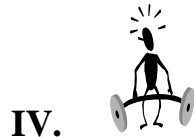
It hurt like hell and I heard my arm crack.

After the bat hit your arm and you heard the bone crack, what happened next?

I fell to the ground.

After you heard the bone crack and you fell to the ground,
what did the accused do next?

- B. *Construction of the Direct Exam.* This module focuses exclusively on the **ability** to ask a direct examination question in the **proper form**. It does not address the critically important task of how best to **organize** a direct exam. This skill is discussed at more length in Tab C, Module 4, Examination of Lay Witnesses.



THE SKILL DRILLS.

- A. *Goal: Train counsel to use the following skills.*

1. Single-fact, non-leading questions (form of the question).
2. Inflection, body language, movement and looping.

- B. *Conduct the drills.*

1. *Preparation:* You must practice these drills on your own (in front of the mirror, spouse, or in the car) or with another counsel with whom you feel comfortable before you stand up in front of your counsel.
2. *Role Play:* Counsel must really “loosen up” to obtain the full benefit from these drills.
3. *Execution:* **Get out of your office, away from the phones!** Go to the courtroom. Supervisor should demonstrate what he expects from counsel. After a demonstration, the supervisor then selects counsel to do the entire drill or has counsel collectively perform the drill, randomly selecting counsel to perform a part of the exercise.

C. ***Drill 1: Inflection.***

Have counsel stand in front of the group. Choose a short phrase, one listed below or one you make up. Have the counsel repeat the sentence and each time, have the student emphasize a different word. Each time counsel repeats the statement, the inflection is placed on a different word. Very quickly counsel will see how the meaning of the sentence changes. Discuss with counsel how it is not the inflection alone but related conduct - e.g., pace of the speech and facial expression - that make the inflection even more powerful.


- *This is a really stupid idea.*
- *I never said I'd give you money.*
- *Show me the money.*
- *I feel your pain.*
- *You tried a great case.*
- *What did you see?*
- *After the accused staggered across the street, where did he go?*
- *You never saw him leave the bank?*

D. ***Drill 2: Body Language and Movement.*** One technique to assist counsel in controlling movement is to have them begin a direct, cross, opening or closing from a past or upcoming court-martial. Again, substance is not critical, so force counsel to get up and not worry so much about accuracy or details. In fact, tell them to embellish the facts if necessary. When counsel begin to move around the courtroom for no specific purpose, have another counsel grab their feet from behind and hold their heels stationary. Alternatively, place two pieces of paper on the floor and require counsel to remain on the paper. This forces counsel's energy into the face, voice, and arms. Watch how counsel become much more expressive.

E. ***Drill 3: Form of the Question.*** (Level 1)

1. **Single-Fact, Non-leading:** Each counsel conducts a direct examination of another counsel about an object or event of their choosing. His task is to use open-ended, nonleading questions to develop the facts. The supervisor should write on the board or provide a handout with the classic list of questions for direct examination: **who, what, where, when, why, and how.**

2. The supervisor should first demonstrate what he expects counsel to do. Sample topics include what counsel had for breakfast, lunch or dinner, past weekend activities, their uniform, a favorite pen or pencil, the contents of a briefcase or the briefcase itself. The possibilities are endless.


 *This initial direct drill can be accomplished by counsel sitting around a table. Its teaching value is enhanced if counsel are made to stand in front of others and required to examine a witness in a witness chair.*


Ex.: **Did** you eat breakfast?
Where did you eat breakfast?
What time did you eat?
Did you eat alone?
What did you eat?
How was the food?
What did you have to drink?
Why did you choose Shoney's to eat?
How much did you spend?
What time did you leave?

OR

Do you own a car? Continue as above.

Describe your clothing. Continue as above.

 *Ensure that each counsel conducts a simple direct examination. Have other counsel, including yourself, object and rule if counsel's question is leading, compound, or otherwise improper.*

 *Counsel should do this more than once. After each is finished, run each counsel through on a different subject. This will further emphasize the ability to break an event into its component pieces. This is an absolutely critical skill in conducting an effective direct examination and the persuasive retelling of a story. **Thereafter, use the drill from time to time as an icebreaker or warm-up drill before future exercises.***

F. **Drill 4: Listening and Looping.** (Level 2)

1. Most counsel are familiar with the technique generally referred to as “looping.” Looping involves incorporating part of the answer to one question into the next question. Thus,

What color is your car?

Red.

What is the model of your **red** car?

It’s a Porsche 911.

Where did you drive your **red Porsche 911**?

Or, another example:

What did the accused do when you asked to buy cocaine?

He reached into his pocket and pulled out a baggy.

After you **asked for the cocaine** and he **pulled out the baggy**, what happened next?

He said the baggy would cost me \$100.00.

When he **pulled out the baggy** and said it **would cost \$100.00**, what did you do?

I gave him the money.

After he said it **would cost \$100.00** and you **gave him the money**, what happened next?

He gave me the baggy of cocaine.

After you **gave him the money** and he **gave you the cocaine**, what then happened?

I pulled out my badge and cuffed him!



*In this example, counsel included in the follow-up question a portion of the witness’s previous answer, highlighted in bold. In effect, it repeats and reinforces the testimony. Each time a new piece is added the oldest part of the answer is dropped. Like any trial technique, this technique can be annoying if used throughout a direct examination. Therefore, it should be used with **calculation** and **discrimination** to emphasize certain critical points in the testimony.*

2. Have counsel repeat Drill 3 and practice looping the answers, no matter how irrelevant the information. Every question must loop part of the previous answer.

G. *Drill 4: Building Blocks (Inflection, Form and Looping).*

1. **Putting it all together:** For this **advanced** drill, the supervisor plays the witness and judge. Counsel should be seated in front of you. You will give them minimal facts (below) to begin their questioning. Each counsel will ask one **non-leading, single-fact question**. Emphasize the use of **looping** the previous answer into the next question.
2. You will point to counsel who is to ask the next question. The question must **build** on the previous question, that is, develop the facts in a **logical** order. This places a healthy burden on **listening** skills. As the judge, if counsel ask a leading, compound, or otherwise objectionable question, or backslide to an area already covered, simply say “sustained” and move to a new counsel. The exercise should be kept moving. Give counsel time to formulate questions but don’t linger. Just point to another counsel or establish eye contact. This keeps the drill moving and enforces eye contact with the witness, an essential component of direct examination. Choose counsel randomly. **Do not establish a pattern** of selection. This ratchets up the pressure and comes close to simulating the courtroom experience.

OPTION A

FACTS Given to Counsel: *I am standing on the front steps of the 1st Brigade Headquarters Building with a folder in my hands. It is 1200 hours.*

FACTS for Supervisor: *I am carrying a classified file to the Brigade Commander with whom I have an appointment at 1230. It is a bright, sunny day. I am by myself but others are standing nearby. A man approaches in (civilian/military clothes, your preference) with a knife in his hand. He lunges at me and stabs my right arm. I do not know the man. He is 6'2" tall, Caucasian, mustache, scar on right cheek. He says, "You prying bastard!" After I fall to the ground he takes the folder and runs away. I crawl into the Brigade Headquarters and am helped by those standing around. The file contained an investigation into the improper release of classified information by staff members in the S-2 Shop. Two staffers had been identified for disciplinary action.*

- ◇ *Counsel should explore your job, purpose at the school, contents of file, approach of man, identification of man and knife.*

OPTION B

FACTS Given to Counsel: *I am standing at an ATM and I hear footsteps behind me.*

FACTS for Supervisor: *I hear footsteps behind me and before I can turn around I am grabbed from behind. The person wraps her right arm around my neck. I see a wisp of long blond hair for an instant as I struggle for air. The voice of a female demands my ATM access number. I give it. I am then backed up and taken around a corner. I notice Nike sneakers and see a reflection in the ATM glass. The person is a female wearing jeans and red shirt. I see her raise her arm and notice a long blunt object in her hand and then I see blackness. I am 5'10" tall, weigh 170 pounds. When grabbed from behind I remained upright - the person was apparently as tall or taller than me. I later discovered \$500.00 missing from my account, and my wallet was also taken.*

- ◇ *Counsel should explore physical descriptions, clothing, statements, weapons and money taken.*

OPTION C

FACTS Given to Counsel: *I am driving in my car and have just stopped at an intersection.*

FACTS for Supervisor: *I am assaulted in my car. I am driving in my blue Ford Taurus with my son in the back seat. It is 1800 hours and I just picked my boy up from daycare. I stop at a traffic light at First and Main Streets. A brown van pulls up beside me. Two men immediately jump out, put a gun to my head and order me out of the car. I open the door and they drag me out. They then drag my son out and throw him at my feet crying. Both men get into the car and drive away.*

- ◇ *Counsel should explore the description of the van, the men, the weapon used, or anything said.*



- H. ***Summarize the main teaching points.*** Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **Single-fact, nonleading, open-ended questions are critical to success on direct examination.**
- ✓ **You must listen to and maintain eye contact with your witness.**
- ✓ **Practice the use of inflection and body language to call attention to certain testimony.**



V.

REFERENCES.

- A. Thomas A. Mauet, *Trial Techniques* 73-138 (4th ed. 1996).
- B. James W. McElhaney, *McElhaney's Trial Notebook* 337-364 (3d ed. 1994).
- C. Steven Lubet, *Modern Trial Advocacy* 15-49 (NITA 1993).

ENCLOSURE
Counsel Handout

DIRECT EXAMINATION - THE FUNDAMENTALS

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. Introduction. The next trial advocacy training session, scheduled on _____, from _____ to _____ hours, will focus on the skill of direct examination. The training will be conducted in two parts. First, I will lead a discussion about the various skills necessary for an effective direct examination. After a short break, we will reconvene for the second part of the training, during which we will conduct a series of short advocacy drills intended to reinforce the skills and techniques addressed in the first part of the training.
- B. Preparation. Counsel must bring their Military Judge's Benchbook, Manual for Courts-Martial, and an evidentiary foundations text to this, and every future, trial advocacy training session. Counsel must also review and be prepared to discuss the facts of one of their current cases. Finally, counsel will review, and be prepared to discuss, the direct examination skills listed in part II.



II. KEYS TO SUCCESS.

- A. Voice Control and Nonverbal Factors. Consider how the following affect your direct examination:
1. Voice Control
 - a. Inflection
 - b. Tone
 - c. Volume

d. Rate of Speech

e. Verbal Habits

2. Nonverbal Factors

a. Posture



b. Mannerisms



c. Arm and Hand Gestures



d. Movement



e. Location in Courtroom



B. Form of the Question. What are the rules of evidence governing the form of a question on direct examination?

C. Listening. So simple yet so hard . . . why?



D. Building Blocks. Building Blocks = Logical Organization of Direct Examination. What template will you use to standardize your direct exams?



- E. Looping. By incorporating the witness's last answer into the body of the next question, counsel can reiterate the testimony of the accused and repeat key segments over and over again.



III.

REFERENCES FOR FURTHER STUDY.

- A. Thomas A. Mauet, *Trial Techniques* 73-138 (4th ed. 1996).
- B. James W. McElhaney, *McElhaney's Trial Notebook* 337-364 (3d ed. 1994).
- C. Steven Lubet, *Modern Trial Advocacy* 15-49 (NITA 1993).

Tab B
Module 2

Learn the Skill
Cross-Examination
The Fundamentals



The Advocacy Trainer

CROSS-EXAMINATION - THE FUNDAMENTALS

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** The key to effective cross-examination is precise, single-fact *leading questions*. Your role as an advocate during cross-examination is to attack weaknesses in opposing counsel's case and reinforce your theory of the case. These drills are designed to teach, reinforce and enhance counsel's ability to effectively cross-examine. Background is provided for the supervisor and is followed by drills designed to achieve the basic skills. As in the first module, the emphasis is on **form**, not **substance**. Once the form (methodology) is mastered it can be applied to any substance (your specific case).
- B. **Training Overview.** This training requires at least two participants: one supervisor and one counsel. The training is divided into various drills of short (15 minutes) or long (1 hour) duration depending on the time available to you. They are specifically designed to be used anywhere, with little or no preparation. Resources: time.



II. THE LAW.

- A. **The order of your case in chief.** MRE 611.



“The Military Judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.” MRE 611(a).



“Leading questions should not be used on direct examination of a witness. Leading questions are permitted on cross-examination.” MRE 611(c).

III.



THE ART.


- A. **The Canvas:** The goal of cross-examination is to attack and exploit weaknesses and to reinforce strengths. Unlike direct examination, you do not want witnesses explaining answers or responding with narratives. Counsel must maintain control of the witness. This goal is best accomplished through the use of **single-fact, leading questions** which force witnesses to answer “yes” or “no” to a series of propositions posed by counsel.
- B. **Focus:** The following drills focus on the **fundamental skill of single-fact, leading questions**. This is a foundational skill for all trial lawyers. Regardless of experience, it is a skill which counsel must constantly sharpen.



Caveat: This module focuses on single-fact, leading questions. Although such questions need not be “cross” in tenor, they must be single-fact and leading. Unquestionably, there are many “forms” of cross-examination. For example, “friendly” cross tends toward open-ended questions. Without experience this can lead to disaster. **ONLY** when counsel become more experienced should counsel venture away from **single-fact, leading questions**. As a supervisor, you must gauge your counsel’s experience level and capabilities.

- C. **Strategy:**




Should Counsel Cross-Examine the Witness?  The threshold inquiry counsel must make for every witness is whether to cross-examine.

- Counsel must ask whether the witness can support his theory of the case, or hurt his opponent’s case. If the answer to both inquiries is no, don’t cross-examine. This might be the case for a chain of custody witness whose testimony on direct neither hurts counsel’s case nor particularly helps his opponent’s case. The witness is merely fulfilling a technical requirement of proof and so there is no need to waste the court’s time with cross-examination.
- Another reason to forego cross-examination is that the witness is not important to the fact-finder. Is it necessary to cross the confinement facility NCO who supervised the accused for three weeks while he was

in pretrial confinement and testifies on sentencing that the accused is an American hero? Argument will suffice to put that witness's testimony in proper perspective. Counsel must develop a sense of when such cross might serve a collateral purpose -- e.g., give a preview of a closing argument to a new panel -- even when it yields no concessions from the witness.

- Counsel might also forego cross-examination because there is no reasonable expectation of getting favorable testimony from the witness. For example, counsel often are unlikely to gain much by crossing the accused's mother on sentencing.
- Finally, counsel must weigh the potential benefit of cross-examination against the potential that the witness will be able to rehabilitate himself during the cross, or on redirect.



Identify the Purpose of Each Cross-examination.  Counsel **must plan**, based on interviews, witness *statements*, and last minute revelations made on direct examination, what he hopes to achieve through cross-examination.

- Counsel may seek testimony on cross that corroborates information provided by one of his witnesses. Even with a hostile witness, counsel can fill gaps in his case by getting the witness to corroborate details.
- Counsel may seek to discredit the **testimony** given on direct or seek to discredit the witness as a **person**. Inexperienced counsel must understand that testimony can be attacked without attacking the witness as a person. It is usually ill-advised to attack the 80 year-old kindly eyewitness. This does not endear you to the panel. Simply pointing out the weaknesses in the witness's testimony is far more productive. The low key approach might be the best tactic if counsel's objective is merely to poke holes in the direct testimony, based on the witness's faulty perception, poor memory, or inartful recitation of facts on direct. However, when counsel needs to discredit the witness as a person, a more hard-edged, destructive cross-examination is required. This is quite common when an accused or an alibi witness testifies. These individuals often have a "dog in the fight" and it is up to counsel to expose this agenda or bias.
- Counsel may seek to **impeach** the witness, or his testimony through cross-examination. Bias, prior untruthful acts, convictions and

inconsistent statements constitute fertile grounds for impeachment on cross-examination.



D. **Tactics:**



The skill drills in this module **do not** focus on counsel's grasp of a particular set of facts or the ability to prove or disprove an essential element. Instead, counsel must perfect the **form** of the question. Counsel **must** be able to ask a leading question in **any** given setting. Once counsel learn the basic skill, they can then use it in any setting, and with far greater impact and less anxiety.



Leading questions are not really questions at all. They are declarative statements. They are affirmative propositions **disguised as questions**. They are "put to" the witness who must, because of the phrasing, either adopt the statement or reject it with minimal or no opportunity or expectation of explanation.



"To Tag or Not to Tag": Two "styles" of phraseology are used. The first is a leading question with a "tag." "You own a baseball bat, don't you." The "tag" is "don't you?" and takes many forms (e.g., didn't you?, isn't it true?, etc.). The other style is to drop the tag entirely. A leading question can still be asked with identical language but there is now a premium on **inflection**. Thus, "you own a baseball bat." To be leading, the inflection must **fall** on "bat." See **Drill 1** for more detail.



Because leading questions are not truly inquisitive in tenor or spirit, voice and inflection make the critical difference. This is especially true with non-tag, leading questions. Thus, the question, "you own a baseball bat" can be leading or non-leading. If the inflection drops when saying "bat," it is leading. As discussed above, the falling inflection of the questioner does not reflect doubt or true inquisitiveness. If, however, your inflection rises on the "bat," it demonstrates the questioner is uncertain or at least inviting an explanation.



A good cross-examination question, therefore, is one that marries proper form with tailored inflection. This skill only comes with practice.

IV.



PRACTICE POINTERS.

Although each cross-examination will vary depending on the information sought from the witness, there are fundamentals of an effective cross-examination that counsel should follow.

- ***“Cross-examination is a commando raid, not the invasion of Europe!” [Irving Younger]*** Limit the number of points sought from each witness. Too much information from one witness tends to obscure the truly important facts from the testimony. If counsel know important information can be obtained from follow-on witnesses, limit the points to be made by each individual.
- ***Primacy and Recency.*** Make strongest points at the beginning and end of cross-examination.
- ***Avoid the Ultimate Question!*** Counsel often ruin a successful cross-exam because they think the witness is on the ropes and will admit the critical, ultimate fact in issue. AVOID this temptation and save the *inference* for argument. Most witnesses will not play into your hands and “confess” on the stand. Save it for argument. Don’t be greedy!
- ***No expansive narratives.*** Questions should be short, single-fact, and leading. Counsel should lead the witness to a desired response and not allow the witness to give expansive narratives. There is seldom a place for “How” or “Why” or “Tell the court” lines of questioning.
- ***Mix it up!*** Judiciously use tags to direct the questioning. Prefacing every question with “Isn’t it true?” or ending every question with “wouldn’t you agree?” can be very distracting. When used sparingly, however, tags do help to maintain control of the witness and the direction of the cross-examination.
- ***Playing with fire.*** Do not ask questions to which you do not know the answer.
- ***Toolbox of control techniques.*** Develop canned responses to control hostile witnesses, such as, “perhaps you didn’t hear my question,” “so the answer is yes,” “maybe you could answer my question this time,” “my question was ...” and so on. Seeking the judge’s assistance should always be a last resort.

V.



SKILL DRILLS.

- A. *Goal: Train counsel to ask* single-fact, leading questions.
- B. *Conduct the drills.*
1. *Preparation:* You **must** practice these drills on your own (in front of the mirror, spouse, or in the car) or with a peer before you stand up in front of your counsel.
 2. *Role Play:* Counsel must really “loosen up” to obtain the full benefit from these drills.
 3. *Execution:* **Get out of your office, away from the phones!** Go to the courtroom. Supervisor should demonstrate what he expects from counsel. After a demonstration, the supervisor then selects counsel to do the entire drill or has counsel collectively perform the drill, randomly selecting counsel to perform a part of the exercise.
- C. *Drill 1: Inflection.* “The Falling Inflection”
1. The supervisor explains how inflection dictates whether a query is leading or nonleading. As an example, if a witness is asked “you own a bat?” and the inflection (not volume) rises on the word “bat,” the witness perceives the questioner is uncertain of the answer and is honestly inquisitive. This invites an explanation from the witness. In cross, counsel don’t want explanations. The inflection must fall on “bat.” The witness will then hear a **proposition**. The falling inflection turns the tenor of the question into a declarative statement with which the witness will either agree or disagree. The falling inflection does not invite an explanation. With the falling inflection there is no “doubt” discernible in the questioner’s voice.
 2. Mastering the falling inflection is sometimes made easier by starting first with “tags,” i.e., “don’t you?,” “didn’t you?,” “haven’t you?” Thus, “You hit Smith with a crowbar, didn’t you?” Counsel should first say this statement with the inflection rising on the “didn’t you?” Then counsel make the statement with the inflection falling on the “didn’t you.” If the inflection rises, regardless of the accusatory, declarative choice of words, it is not leading. The inflection must fall to be leading.

3. Work around the room and have counsel ask the following questions with a **falling** (leading) inflection. (See counsel handout for Drill 1). Hearing the “**fall**” is an important part of perfecting the ability to use the falling inflection.
 - You drive a red car, don’t you?
 - You never counseled the accused, did you?
 - You’ve read the SOP?
 - You had four margaritas at the bar?
 - You took the ATM card from your roommate’s wall-locker, didn’t you?
 - You tried to flush your system before the urinalysis, isn’t that right?

D. *Drill 2: Form of the Question.*

1. There are numerous cross-examination drills which help to improve counsel’s ability to ask a proper single-fact leading question. This drill is similar to **direct examination drill 3 (level 1)**.
2. Just as counsel conducted direct examination on objects or events, the same information learned on direct now becomes the subject of cross. Thus, if we conduct a direct exam on breakfast, we can now “cross” armed with the necessary information. Thus,
 - You ate breakfast?
 - You ate at 0800 hours?
 - You ate breakfast at Shoney’s?
 - And you had pancakes didn’t you?
 - In fact, you ate alone, didn’t you?
 - And you spent \$5.00?

◇ *Each counsel should be required to perform in this fashion.*
3. One technique is to have the same counsel conduct the direct exam and then immediately conduct the cross-examination with the information learned on direct. This technique has a number of benefits. It contrasts the ability to ask the questions in the proper form with the proper inflection. It also places a premium on the ability to listen to the answers. This drill is also constructive between two counsel. One counsel conducts the direct exam of you, and then another counsel, selected at random, is told to conduct a cross immediately after direct is concluded.

E. **Drill 3: Cross-Examination of an Inanimate Object.** (Level 1)

“Future surgeons practice on cadavers. Future dentists practice carving chalk. Trial lawyers can take a lesson from these practices.” [unknown]

1. Pair counsel off and have them sit in chairs facing one another. Give one counsel an object, for example, a staple remover, Magic Marker, 3-hole punch, wrist watch, or coin. The person holding the object will now speak as the object and answer only single-fact, leading questions. Counsel conducting the cross-examination must break the object down mentally and describe it through questions.
2. This drill forces counsel to state questions as propositions and to think from **general** to **specific**. The drill also demonstrates the power of descriptive questions such that counsel never need to ask the ultimate question.

Thus, a bar of soap would look something like this:

You are an inanimate object?
You are a three-dimensional figure?
You are rectangular in shape?
You are approximately four inches long?
You are approximately two and a half inches wide?
You are approximately one and a half inches deep?
You are white in color?
Your edges are rounded?
The word “Ivory” is pressed into you?

*Note that the **ultimate question**, “You’re a bar of soap?” is NOT asked. Save it for argument. Don’t be greedy.*

F. **Drill 3: Inanimate Object.** (Level 2)

Counsel can benefit from this drill outside the office setting as well. In fact, this drill is easily performed alone while one is, for example, mowing the lawn, taking a shower, driving to work or sitting in a staff call. Simply pick an object, e.g., the lawnmower, the shower head, the car radio or the boss’s shoe, and conduct a cross-examination.

G. **Drill 3: Inanimate Object.** (Level 3)

Select a counsel to conduct the inanimate object drill described above. This time, however, have remaining counsel put their heads down or close their eyes so they don't know the object in question. As the examination develops, the listening counsel will raise their hands, but not open their eyes, when they think they know the object being described. This technique conveys to counsel the importance of descriptively breaking down an object and reconstructing it with leading questions. To paint a recognizable picture, it must go from general to specific.

H. **Drill 4: The Eliminator.**

1. Another variation on this theme is to place counsel in competition with one another by selecting a subject on which to cross-examine you. You must rule on improper questions. If counsel ask non-leading or otherwise objectionable questions, they are removed from the competition. The following scenarios may be used with this approach:

OPTION A

FACTS Given to Counsel: *I am an accused on the witness stand. I was apprehended on the front steps of a house with a screwdriver in my hand. The window next to the front door is broken. I live 20 miles from this house*

FACTS for Supervisor: *I came to the house by car from my own home located 20 miles away. I brought the screwdriver with me along with a hammer, which was in the car. When I drove to the house I intended to break in. I broke the window next to the door and unlocked the door. I spent over an hour in the home and was only apprehended on my way out. No one was home except the dog, which I killed. It was my ex-wife's dog. My ex-wife's house. I just lost it in the divorce. I was going to set fire to the house but lost my nerve. So I just busted things up. Except my daughter's room. It's my house and my things inside. I hate the woman!*

- ◇ *Counsel should be able to develop many avenues of inquiry with these facts: intent to burgle and burn, actions in the house, relationship to house, divorce, etc.*
- ◇ *Counsel may complain that they're asking questions to which they don't know the answer or for which they have no good faith basis. That's OK in this drill. The point of the drill is to focus on **form only**. The **method** of not knowing the facts is deliberate and intended to cause counsel to react on their feet, be creative, and have fun.*

OPTION B

FACTS Given to Counsel: *The accused is charged with murder by stabbing Jones in a bar fight. The witness on the stand claims the accused was with him the night of the stabbing.*

FACTS for the Supervisor: *I have known the accused for 10 years and he is my best friend. He was with me the night of the stabbing. We were in my apartment watching movies. We watched "Last Man Standing." We were drinking beer together. Yes, we went to a bar together. I carry a switchblade. It's a tough town. I knew the victim. I talked with the victim. We argued. Maybe I stabbed him, maybe I didn't.*

2. The drills discussed thus far are repetitive drills, that is, they can and should be done each time you meet with counsel. They can also be done with little or no preparation. And they are an excellent way of keeping counsel's interrogation skills fresh and finely honed.



- I. ***Summarize the main teaching points.*** Following the drills, conduct a discussion of lessons learned and summarize the main points:

- ✓ **Single-fact, leading questions are critical to success on cross-examination.**
- ✓ **You must listen to and maintain eye contact with your witness.**
- ✓ **Practice the use of inflection to call attention to certain testimony.**



VI.



REFERENCES.

- A. Steven Lubet, *Modern Trial Advocacy* (NITA 1993).
- B. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).
- C. James W. McElhaney, *McElhaney's Trial Notebook* (3d ed. 1994).
- D. James W. McElhaney, *McElhaney's Litigation* (1995).
- E. Leonard Packel and Dolores B. Spina, *Trial Advocacy: A Systematic Approach* (ALI-ABA 1984)
- F. Louis E. Schwartz, *Proof, Persuasion, and Cross-Examination: A Winning New Approach in the Courtroom* (1973).
- G. Herbert J. Stern, *Trying Cases to Win - Cross-Examination* (1993).
- H. Michael E. Tigar, *Examining Witnesses* (1993).

ENCLOSURE
Counsel Handout

CROSS-EXAMINATION - THE FUNDAMENTALS

COUNSEL HANDOUT




I. TRAINING OVERVIEW.

- A. Introduction. The next advocacy training session is on _____, from _____ to _____ hours. We will focus on the skill of cross-examination. The training will be conducted in two parts. First, I will lead a discussion about the various skills necessary for an effective cross-examination. After a short break, we will reconvene for the second part of the training, during which we will conduct a series of short advocacy drills intended to reinforce the skills and techniques addressed in the first part of the training.
- B. Preparation. Bring your Military Judge's Benchbook, Manual for Courts-Martial, and an evidentiary foundations text to this and every future trial advocacy training session. You must also review and be prepared to discuss the facts of one of your current cases. Finally, review and be prepared to discuss the cross-examination skills listed below.




II. KEYS TO SUCCESS.

- A. Threshold Inquiry: Do I Need to Cross-Examine the Witness at All? 
1. Can the witness support your theory of the case, or hurt your opponent's case? If the answer to both inquiries is no, leave the witness alone.
 2. Is the witness important to the fact-finder? Even if you can make a point by cross-examining the witness, is the point worth making?
 3. Is there a reasonable expectation of getting favorable testimony from the witness? Are you going to cross the accused's mother? How about a rape victim's husband?


4. What is the cost of cross-examination? Will the witness rehabilitate himself? Will your opponent kill you on redirect?

B. What is the Purpose of Each Cross-Examination You Conduct?

1. Corroborate other testimony.
2. Impeach other testimony. Faulty perception? Memory? Prior inconsistent testimony?
3. Impeach the Witness.  Bias? Prior Bad Acts? Reputation? Convictions?

C. Mechanics of Effective Cross-Examination.



1. Limit the number of points sought from each witness.
2. Think primacy and recency, i.e., making your strongest points at the beginning and end of your examination.
3. Questions should be short, single-fact, and leading.
4. “You would agree” that tags should be used judiciously, “isn’t that true?”
5.  Avoid questions to which you do not know the answer.
6. Refrain from asking one too many questions. Get **facts** from the witness, do not seek conclusions.
7. Develop strategies to control hostile witnesses. Seeking the judge’s assistance should be a last resort.



III.

REFERENCES FOR FURTHER STUDY.

- A. Steven Lubet, *Modern Trial Advocacy* (NITA 1993).
- B. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).
- C. James W. McElhaney, *McElhaney's Trial Notebook* (3d ed. 1994).
- D. James W. McElhaney, *McElhaney's Litigation* (1995).
- E. Leonard Packel and Dolores B. Spina, *Trial Advocacy: A Systematic Approach* (ALI-ABA 1984).
- F. Louis E. Schwartz, *Proof, Persuasion, and Cross-Examination: A Winning New Approach in the Courtroom* (1973).
- G. Herbert J. Stern, *Trying Cases to Win - Cross-Examination* (1993).
- H. Michael E. Tigar, *Examining Witnesses* (1993).

Drill 1: Inflection. "The Falling Inflection"

- You drive a red car, don't you?
- You never counseled the accused, did you?
- You've read the SOP?
- You had four margaritas at the bar?
- You took the ATM card from your roommate's wall-locker, didn't you?
- You tried to flush your system before the urinalysis, isn't that right?



Tab C

Apply the Skill



The Advocacy Trainer

Tab C

Module 1

Apply the Skill

Voir Dire



The Advocacy Trainer

VOIR DIRE

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** The goal of this section is to develop counsel's confidence and ability to prepare and execute general and individual voir dire through careful preparation, relevant questions, and judicious assertion of challenges.
- B. **Training Overview.** This training has six separate drills. The training requires two to five participants. The training is divided into four steps: (1) a short period of instruction; (2) counsel preparation; (3) practical exercises and critique; and (4) a review of the sample solutions. There is one fact scenario which counsel can use to develop voir dire questions. Alternatively, counsel can use pending cases for additional fact scenarios. It should take no more than two hours to instruct, prepare and perform each drill.



II. THE LAW.



"Before trial the trial counsel may, and shall upon request of the defense counsel, submit to each member a written questionnaire requesting certain basic information [and] additional information may be requested with the approval of the military judge." R.C.M. 912(a)(1).



"The use of questionnaires before trial may expedite voir dire and permit more informed exercise of challenges." Discussion R.C.M. 912(a)(1).



"In addition to member questionnaires, a copy of any written materials considered by the convening authority in selecting members will be provided to any party upon request." R.C.M. 912(a)(2).



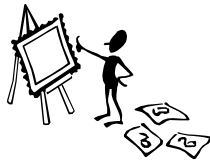
"Before voir dire of members, any party may move to stay the proceedings on the ground that members were improperly selected." R.C.M. 912(b)(1).

☞ “The military judge may permit the parties to conduct the examination of members or may personally conduct the examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of another member when the military judge so directs.” R.C.M. 912(d).

☞ “The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges.” R.C.M. 912(d), Discussion.

☞ “Any party may present evidence relating to whether grounds for challenge exist against a member.” R.C.M. 912(e).

☞ “Each party may challenge one member peremptorily.” R.C.M. 912(g).



III.

THE ART.

A. ***The Canvas.*** There are three primary goals of voir dire. First, ascertain any prejudice, bias, or experiences that would prevent a panel member from being fair and impartial. For example, a potential panel member who had been the victim of the same or similar crime. Second, educate the panel on the theory of your case. This includes educating the panel on any legal principles that are important to your case. Third, establish rapport with the panel. Voir dire is the first interaction with the panel and opportunity to impress them with your command of the case. The principles discussed below will assist in developing a good voir dire presentation.

B. ***The Strategy.***

☞ **Be Prepared.** R.C.M. 912(a)(1) allows panel members to complete questionnaires before trial. R.C.M. 912(a)(2) allows both parties to review all written matter considered by the convening authority to select panel members. These documents contain valuable information on prospective panel members.

- Always review questionnaires, ORBs, and the 2A/2-1s of prospective panel members. These documents will prompt narrowly tailored

questions, give counsel a better picture of the panel, and prevent counsel from asking repetitive questions.

- Sit in on other trials to observe counsel and members in the voir dire process.
- If a standing panel is used, ask counsel who have tried cases before the same panel about the panel members.
- Determine the areas you need to explore. Write out your questions and rehearse. Ask yourself, what is the purpose of the question? Is the question clear and easy to understand?
- Practice by asking someone who doesn't know the case to listen to your questions.



Prepare a Case Specific Questionnaire. The use of tailored questionnaires may expedite voir dire and assist counsel in developing challenges for cause.

- Draft a case specific questionnaire early in your case.
- Use open-ended questions in the questionnaire.
- Review questionnaires that have been used by other counsel.
- Negotiate potentially objectionable questions with opposing counsel.
- Seek the military judge's approval to use the questionnaire.
- Prepare a motion to litigate for the questionnaire that you want.
- Questionnaires provide members an opportunity to answer questions without embarrassment in court.
- Tactically, questionnaires allow counsel to pose questions without the member knowing which party is seeking the information.



Know the Law. The stated purpose of voir dire under R.C.M. 912(d) is to obtain information for the intelligent exercise of challenges.

- Counsel must be familiar with the 14 bases for disqualification under R.C.M. 912(f). They are:
 - Member does not meet the qualifications of Article 25(a), (b), or (c).

- Member not properly detailed
- Member is an accuser to any offense charged
- Member will be a witness
- Member has acted as counsel for any party as to any offense charged
- Member has been an investigating officer to any of the offenses
- Member has acted as the convening authority or legal advisor on the case
- Member will act as the reviewing authority or legal advisor on the case
- Member has forwarded any of the charges with a personal recommendation as to disposition
- Member sat on the original case if this is a re-hearing , new, or other trial of the case
- Member is junior to the accused, unless it couldn't be avoided
- Member is in arrest or confinement
- Member has formed or expressed a definite opinion on the guilt or innocence of the accused as to any charged offense
- Member should not sit in order to keep the court-martial free from substantial doubt as to legality, fairness, and impartiality.

Examples include: member has a direct personal interest in the result of the trial; is closely related to the accused, a counsel, or a witness; has participated as a member or counsel in the trial of a closely related case; has a decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offenses charged.

- Counsel must fully develop any perceived bias to form a factual basis for later challenges.
 - Put a member's nonverbal actions and expressions on the record. (e.g. "Major X looked down and was shaking his head from side to side").

- Counsel should try to rehabilitate panel members and, if possible, object to any challenges for cause.
- Remember that the military judge should liberally grant challenges for cause.
- Exercise of a peremptory challenge requires special attention when used against a member you unsuccessfully challenged for cause. The “But For” rule under R.C.M. 912(f)(4) requires you to tell the military judge, "but for your denial of my challenge for cause against member X, I would have used my peremptory challenge against member Y." If you do not exercise a peremptory challenge against member X, and state that you would have used it on another member, you waive any objection to the denied causal challenge.



Know Batson Requirements. Counsel may not exercise their peremptory challenge in a discriminatory manner (based on race or gender). The prohibitions apply to both parties. Further, the accused and the challenged panel member do not need to be of the same racial group. For example, the trial counsel must articulate a gender-neutral reason to peremptorily challenge the only female member from the panel.

- Before exercising a peremptory challenge on a minority member, counsel must articulate race or gender neutral reasons that are unambiguous and supported by the record.
- Be prepared to articulate as many race neutral reasons as possible in order to protect the record.
- Opposing counsel must force the challenging party to specify a race or gender neutral reason for the challenge in order to preserve the issue.



Know your Judge. The nature and scope of voir dire is within the discretion of the military judge. R.C.M. 912(d).

- The judge will likely ask several preliminary questions similar to the questions set out in the Military Judge's Bench Book (pages 41-54). Listen to the member's responses to these questions. Don't repeat those questions. However, if you need to explore these areas, ask additional questions.
- Some judges may require counsel to submit proposed questions in writing. If so, have questions and a rationale for the questions ready.
- No two judges conduct voir dire the same way. It is important to find out what kind of questions the judge typically allows. Controversial

questions should be cleared with the judge beforehand, i.e., questions concerning burdens of proof, defenses, or elements of an offense.



Know the Case. Counsel must know their case thoroughly before they can educate panel members on their theory. This includes the strengths and weaknesses of both sides.

- Counsel should select the most critical portions of the case on which to question panel members. For example, if the trial counsel plans to prove the case using testimony from an accomplice, question the panel to ensure that each member can convict the accused based on accomplice testimony. Likewise, in a self-defense case the defense counsel must ensure that panel members agree that there are situations where people are justified in using force.
- Weave the theory and theme of the case into the questions.
- Highlight the weaknesses of the opponent's case.



General Questioning Techniques. Voir dire is your first opportunity to make a good impression on the members. How you conduct yourself can either enhance or diminish your credibility.

- Know your questions. Avoid looking down at your notes. Make eye contact with the members while asking questions.
- Listen to and observe the verbal and non-verbal responses of panel members. Watch for changes in facial expressions, body movements, avoidance of eye contact, hesitancy to respond, and other indications that a member is uncomfortable or insincere in his or her response. Make a note of these so that you can use them to support a challenge for cause.
- Ask panel members to signify their responses in an unequivocal manner. For example, "Raise your hand if you agree that . . ."
- Direct your questions to every panel member, not just the president.
- Ask questions in a conversational tone.
- Use simple language; avoid legalese.
- Don't ask repetitive or unnecessary questions. Every question must be directly tied to one or more of the purposes of voir dire.

- Don't taint the entire panel with follow-up questions. For example, if a member says he has knowledge of the case or knows a witness, do not ask what he has heard or what he thinks of a witness. Ask follow-up questions in individual voir dire.
- Don't ask trick questions. Such questions only serve to alienate members and cause them to distrust you.
- Educate members on the law by relating questions to the judge's instructions. For example, "If the Military Judge instructs you that the defense of accident is a complete defense to the charge, raise your hand if you can follow that instruction?"
- Don't misquote or misstate the law. If you do, you will lose credibility. Consider having the judge provide an instruction during voir dire in an area that you want to explore.



Open-Ended v. Leading Questions. It depends on the purpose of the question whether open-ended or leading questions are appropriate. For example, trial counsel may ask leading questions regarding sentencing philosophies to preempt defense counsel's open-ended questions on the same subject.

- Use leading questions to educate the panel on legal and factual concepts. (e.g. LTC X, wouldn't you agree that an accused has a right to remain silent?).
- Ask open-ended questions to expose potential bias. Open-ended questions let members answer questions using their own vocabulary and manner of expression. This gives counsel a better insight into the member's opinions. (e.g. Major Y, what thoughts enter your mind when you learn that a suspect exercised his right to remain silent when questioned about a particular crime?").



Keep Track of Answers and Follow-up. Counsel must have a method for accurately recording responses, particularly during group voir dire.

- The best method is to draw up a matrix and have co-counsel carefully record all responses from both parties and the military judge. Use some type of shorthand and key so that you can quickly record answers and decipher what you are writing.
- If there is no co-counsel, a matrix and seating chart is vital. Consider asking a co-worker to sit in the gallery and take notes for you.
- Record not just what the member said, but how he or she said it.

- Carefully record responses that may be the basis for a causal challenge.



Areas of Focus for Trial Counsel. Trial counsel should be particularly aware of the following areas:

- Unusual or complicated theories such as conspiracy, attempt, accessory after the fact, principal, etc.
- Immunized witnesses, confidential informants, and accomplice testimony.
- Circumstantial evidence and other scientific evidence such as urinalysis results, BAC results, DNA evidence, etc.
- Credibility of child witnesses or victims of date rape.
- Unsympathetic victims.
- Police misconduct and command shortcomings.
- "Victimless" crimes.
- Vicarious liability.



Areas of Focus for Defense Counsel. Defense counsel should be particularly aware of the following areas:

- Experience of the members or their family members with the offenses charged.
- Explanation of relevant defenses such as self defense, entrapment, alibi, etc.
- Witnesses testifying under immunity.
- Whether the accused will testify.
- Individual attitudes toward CID, alcohol, drugs, DNA, child witnesses, or other key aspects of the case.



Developing a Challenge for Cause. In developing a challenge for cause, counsel should be intimately familiar with the grounds for a challenge for cause and the members' responses to the questionnaires. In addition, counsel need to be aware of the following techniques in setting up a challenge for cause.

- Never use questions that are accusatory, reproaching or cause embarrassment.

- Counsel should always begin looking for potential challenges for cause by reviewing the member questionnaires and then probe a little deeper with the use of non-leading and open-ended questions in general voir dire.
- During general voir dire counsel should avoid going into detail with a member on an issue that might ripen into a challenge for cause so that the other members are not tainted by the member's response.
- If a member's response in general voir dire clearly establishes a ground for a challenge for cause, then counsel should ask the other members if they agree with the member's response. If other members agree, then the number of members that could be challenged for cause has increased. These members should be queried further on individual voir dire.
- In individual voir dire, counsel should shift to the use of leading and close-ended questions.
- One potential source of challenges that counsel should pursue is whether any members have had any previous contact with counsel, witnesses, or the accused. Based upon these prior contacts, the member may have either favorable or unfavorable opinions that can affect their ability to be fair and neutral.
- Another potential source for a challenge for cause is the possibility that the members have heard something about the facts of the case. Just because a member may have heard something about the case does not disqualify the member per se. Instead, counsel need to focus on whether the member can set aside what they heard and make their decision solely on the evidence presented in court. In this regard, counsel needs to get the member to state on the record "how" they would be able to set aside what they heard earlier.
- Where a member, or a family member or friend has been accused or convicted of a crime, or was the victim of a crime, counsel need to inquire into this area in individual voir dire. Again, counsel should not merely accept the member's assurances that they can set aside these facts and faithfully execute their duty as a member. Counsel should seek to have the member explain "how" he would do so. If a challenge for cause is denied in this area, counsel should generally exercise a peremptory challenge.

- Counsel should attempt to discover if any member has been influenced by the acts or words of the officer convening the court. Counsel needs to inquire whether the convening authority, or any other senior military authority, has commented on the case to a member personally or in their presence. If comments have been made, counsel needs to establish what was said and the situation in which it was said.

IV.



THE SKILL DRILLS.

A. **Goal: Train counsel to use the following skills.**

1. Prepare case-specific questionnaires.
2. Prepare case-specific voir dire questions.
3. Conduct a group and individual voir dire session with the specific purpose of establishing a basis for a challenge for cause.
4. State grounds for appropriate challenges for cause and then any peremptory challenges, if desired.

B. **Conduct the drills.**

1. *Preparation:* There are six drills. This training module requires two to five participants, depending on the specific drill used. A fact scenario involving conspiracy and rape serves as the vehicle for the training. You can use pending cases for additional fact scenarios. The training is divided into four steps: (1) a period of instruction; (2) counsel preparation time; (3) a practical exercise and critique; and (4) a review of the sample solution. It takes approximately two hours to complete each drill. Decide which skill drills to conduct based upon time, resources, and experience level. One approach is to proceed in order from skill drill # 1 through skill drill #6.

a. **Drill #1:** This drill requires at least three people: the supervisor and two counsel.

- 1) Step 1. Prepare a 15-minute period of instruction on the elements of preparing a tailored questionnaire and how to use it in conducting voir dire.

- 2) Step 2. At the end of the instruction, give counsel the enclosed fact scenario and assign them roles as either trial or defense counsel. Counsel will then spend 30 minutes drafting a tailored member questionnaire based on the facts of the scenario.
 - 3) Step 3. Supervisor will play the role of the military judge and listen to counsel's arguments for and against the use of the tailored questionnaire.
 - 4) Step 4. Critique and go over the sample questionnaire.
- b. **Drill #2:** This skill drill requires at least three people: the supervisor, one counsel, and a panel member. This drill can be used as an extension of the first drill. If not, conduct steps 1 and 2 above. If possible, select non-lawyers as mock panel members. Have the members complete the questionnaire and then distribute the responses to counsel. Then have counsel conduct voir dire on members of the mock panel based upon the members' responses on the tailored questionnaire. During this drill, counsel will test the veracity of a member's responses on the questionnaire. For example, if a member refuses to answer specific questions on the questionnaire, counsel must explore why. Counsel will then be critiqued by the members and the supervisor and will go over sample lines of questioning.
- 1) Step 1: Using the Supervisor's Guide for this training, present a 15 minute period of instruction on the elements of preparing and conducting voir dire.
 - 2) Step 2: At the end of the instruction, give counsel the enclosed conspiracy/rape fact scenario. Assign counsel the role of either trial counsel or defense counsel. Counsel will prepare general voir dire questions based on the fact scenario. Specific areas of focus are accomplice testimony, conspiracy, grants of immunity, and inconsistent statements of potential witnesses. Give counsel 30-45 minutes to prepare.
 - 3) Step 3: Once preparation is complete, have counsel ask questions of the panel members. Conduct this portion of the training in a location free from interruptions. Critique counsel's performance. The questioning should last about 20 minutes.

- 4) Step 4: After the exercise, distribute the appropriate sample solution to counsel. Review and discuss the solutions with counsel. The review should last 15-30 minutes.
- c. **Drill #3:** This drill will require at least two people: the supervisor and one counsel.
- 1) Step 1. Prepare a 15-minute period of instruction on the elements of preparing a challenge for cause.
 - 2) Step 2. At the end of the instruction, give counsel the enclosed fact scenario and tailored questionnaires. Counsel will then make a list of potential areas ripe for developing challenges for cause.
 - 3) Step 3. The supervisor will assume the role of a member and have counsel attempt to establish a challenge for cause.
 - 4) Step 4. At the end of this drill, the supervisor will critique counsel and provide them with a sample answer.
- d. **Drill #4:** This drill is a variation of the previous skill drill. Rather than just questioning the supervisor, get several non-lawyers to listen to counsel's questions to see if they understand what information counsel are seeking. Follow the steps outlined in skill drills #2 and #3. If you have already conducted the basic instruction, there is no need to repeat these steps. Consider doing this skill drill as a follow-up to the prior exercises. The supervisor may want to give counsel more time to polish questions they developed in the first exercise.
- e. **Drill #5:** This drill requires five people: the supervisor, the counsel, and three mock panel members (preferably non-lawyers of different ranks). This drill requires counsel to develop general voir dire questions. This drill also gives counsel the opportunity to craft follow-up questions and practice presentation techniques.
- 1) Step 1: Using the Supervisor's Guide for this training, present a 20-30 minute period of instruction on the elements of preparing and conducting voir dire. Focus particularly on questioning techniques. There is no need to repeat this step if you conducted this training in the previous drills.
 - 2) Step 2: At the end of the instruction, give counsel the enclosed conspiracy/rape fact scenario, court member packets, and seating chart enclosed. Assign counsel the

role of either trial counsel or defense counsel. Counsel will prepare voir dire questions based on the fact scenario and the court member packets. Give counsel as much time as necessary to prepare. One approach is to conduct Step 1 the first week and then give counsel a week to prepare questions. Prior to the training select soldiers (preferably non-lawyers) to serve as mock panel members. Give each panel member one of the enclosed member packets containing personnel records, the court member questionnaire, and biography of that member. Advise mock panel members not to discuss the information contained in the packet prior to the training exercise.

- 3) Step 3: Once preparation is complete, have counsel conduct group voir dire of the mock panel. Conduct this portion of the training in the courtroom or other location free of interruptions. Critique counsel's performance. Get input from mock panel members to see if they liked counsel's style and understood the questions.
- 4) Step 4: After the exercise, distribute the voir dire checklist to counsel as a sample solution. Review and discuss possible solutions with counsel. The review should last 30-45 minutes.

f. **Drill #6:** This drill can be an extension of Drill #5. After the first two steps in Drill #5, divide counsel up into trial counsel and defense counsel. Then have counsel prepare voir dire of at least three members with the goal of getting one or more of them challenged for cause. The supervisor can play the role of military judge. At the end of this drill, counsel should be critiqued by the members, supervisor, and counsel and provided with sample solutions. The evaluation should focus on specific challenges for cause.

C. ***Critique Points.***

1. **Drill #1:** This drill requires counsel to develop a case specific questionnaire. Consider the following points in your critique:
 - Did counsel draft a questionnaire using open-ended questions?
 - Did the questionnaire reflect an understanding of the facts and issues in the case?

- Did the questionnaire contain specific questions that would elicit information that might support a challenge for cause?
 - Did counsel negotiate potentially objectionable questions with opposing counsel?
 - Were counsel able to articulate the applicable law and policy reasons in support of using a case specific questionnaire.
2. ***Drills # 2-4:*** These drills require counsel to develop case specific voir dire questions drawn from a fact scenario. Consider the following points in your critique:
- Was the counsel's theme apparent in the questions?
 - Did questions center on the critical issues of the case?
 - Were questions straightforward and easy to follow?
 - Did questions educate members on the law?
 - Did questions prepare members for potential strengths and weaknesses of the case?
 - Were open-ended questions used where appropriate?
 - Were leading questions used where appropriate?
3. ***Drills # 5 and 6:*** These drills move beyond developing case-specific questions. These drills require counsel to develop and conduct a complete voir dire. In addition to the critique points listed above, consider the following:
- Did counsel review court member packets in developing questions?
 - Did counsel make good eye contact?
 - Did counsel vary the questions and ask questions of all members?
 - Did counsel observe and accurately record members verbal and non-verbal responses?
 - Did questioning flow in a logical order that was easy to follow?
 - Did follow-up questions fully develop relevant issues?
 - Were questions in each area thorough?

- Did counsel effectively use close-ended questions in setting up a challenge for cause?



V.

REFERENCES.

- A. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).
- B. Thomas A. Mauet and Warren Wolfson, *Materials in Trial Advocacy* (3d ed. 1994).
- C. Michael Marcus, *Trial Preparation for Prosecutors* (1989).
- D. Cathy E. Bennett and Robert B. Hirschorn, *Bennett's Guide to Jury Selection and Trial Dynamics* (1995).

ENCLOSURES

Counsel Handouts

Panel Member Packets (For Counsel and Mock Panel Members)

Panel Member Bios (For Mock Panel Members Only)

Sample Solutions

Sample Voir Dire Question Checklist

VOIR DIRE

COUNSEL HANDOUT FOR SKILL DRILLS 1-4



I. TRAINING OVERVIEW.

- A. **Introduction.** We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on the preparation and execution of voir dire.
- B. **Overview.** The purpose of this exercise is to enhance voir dire development and presentation skills. Counsel will play trial counsel and defense counsel. Counsel will develop case specific voir dire questions based on the fact scenario set out below.
- C. **Preparation.** Draft voir dire questions in the following areas: accomplice testimony, immunized testimony, conspiracy, and inconsistent statements of witnesses. Be prepared to present your questions as you would to a panel. Bring your MCM to the training. Review basic techniques of voir dire and objections. Review RCM 912. After the exercise, you will receive a sample solution and critique.



II. KEYS TO SUCCESS.

A. Facts.

PFC Williams and PFC Smith had known each other since basic training. They met SPC Jones two weeks ago. On Thursday afternoon, the accused, SPC Jones, PFC Smith, and PFC Williams sat in the motorpool discussing what they were going to do Friday night. While talking, SPC Jones pulled some pills out of his pocket and showed the other two soldiers. SPC Jones told the two soldiers that the pills would make a woman feel good and willing to do anything that they wanted her to do. The three soldiers agreed to go out on Friday night and slip the drugs into a woman's drink and take her to a hotel to have sexual intercourse with her.

That evening all three soldiers went to a local hotel and reserved a room for Friday evening. The hotel clerk thought it was odd that three men came in and asked for a room in the most private area of the hotel.

On Friday evening, the three soldiers went to a local bar and looked for their victim. After an hour the soldiers found a woman sitting at the bar by herself. The soldiers agreed that SPC Jones would strike up a conversation with the woman and distract her while PFC Smith slipped the pills into her drink. PFC Williams acted as the lookout while PFC Smith put the pills into her drink.

After 15 minutes, the woman appeared completely intoxicated and was hanging all over the three soldiers. The bartender noticed the woman hanging all over the three soldiers and told her he would call her a cab. SPC Jones told him that they would take her home. The soldiers took the woman to their car and drove to the motel. PFC Williams drove the car. They parked in a dark secluded area of the hotel's parking lot and talked about who would have sex with the girl first. PFC Williams got scared and stated that he didn't want to have sexual intercourse with her and that he would stay in the car. The hotel clerk who gave them the room on Thursday night saw the car pull into the parking lot.

SPC Jones and PFC Smith took the woman into the motel room. The two soldiers agreed that SPC Jones would have sexual intercourse first. The woman was so affected by the pills she didn't know what was going on. PFC Smith claims that he left the room while SPC Jones was having sexual intercourse and did not return.

Late that evening, a policeman found the woman passed out on a park bench and took her to the police station. The next morning, the woman woke up and discovered that she did not have her undergarments on and told the police that she believed she was raped. The woman was only able to remember the bar, where the hotel was located, and that someone had sexual intercourse with her. After a few hours, the police located the hotel and soon found the woman's undergarments. The hotel clerk gave a statement to the police about the three soldiers who paid for the room.

The police lab found fiber evidence from SPC Jones' and PFC Smith's clothing on the victim's clothes. In addition, SPC Jones' and PFC Smith's fingerprints and hair were found in the room. No semen or DNA evidence was found. There was also evidence of a "date rape drug" in the victim's blood. The police went to the bar and spoke with the bartender. The bartender remembered the three soldiers who were hitting on the intoxicated woman and provided a detailed description of all three.

The police brought PFC Williams to the police station and interviewed him. PFC Williams gave a written statement saying he didn't know anything about the woman and wasn't at the bar that night. Two days later, after confronted with the bartender's and hotel clerk's statements, PFC Williams gave another statement to the police admitting to the conspiracy and taking the woman to the hotel, but not to the rape. PFC Williams also told the police that he saw PFC Smith leave the hotel room soon after they took the girl into the room.

The police also questioned PFC Smith. In his first statement, PFC Smith denied the conspiracy and claimed that the woman consented to the sexual intercourse with SPC Jones. PFC Smith also claimed that he left the room after the woman consented to have sexual intercourse with SPC Jones. A week later, the police brought PFC Smith in for another statement. After PFC Smith discovered that PFC Williams told the police about the conspiracy

he made a second statement admitting to the conspiracy and bringing the woman into the room and then leaving. SPC Jones did not make a statement.

Shortly after the incident, the base and local papers published articles regarding the incident. Specifically, the articles reported the facts related to the rape, identified all three suspects and printed a summary of their statements, to include how PFC Williams and PFC Smith changed their stories.

All three soldiers are charged with violations of Article 81, Conspiracy to commit rape and kidnapping; Article 134, Kidnapping; and Article 120, Rape. PFC Williams and PFC Smith have agreed to testify against SPC Jones and plead guilty to conspiracy to commit rape. In exchange, the Convening Authority has agreed to give them testimonial immunity, and to limit their punishment to no more than 3 years confinement.

B. **Tasks.**

1. ***Trial Counsel.*** Draft voir dire questions to educate members on the law of conspiracy. Questions should also prepare members for the strengths and weaknesses of your case. Finally, use questions to ascertain any hesitancy of members to convict an accused based on the testimony of immunized accomplices.
2. ***Defense Counsel.*** You represent SPC Jones. Draft voir dire questions to educate members on the danger of accepting the testimony of immunized accomplices. Questions should show the weaknesses of the government's case and reduce the impact of any weaknesses in the defense case. Questions should also remind the members of the high standard of proof in a criminal case.

III.



REFERENCES.

- A. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).
- B. Thomas A. Mauet and Warren Wolfson, *Materials in Trial Advocacy* (3d ed. 1994).
- C. Michael Marcus, *Trial Preparation for Prosecutors* (1989).
- D. Cathy E. Bennett and Robert B. Hirschorn, *Bennett's Guide to Jury Selection and Trial Dynamics* (1995).

VOIR DIRE

COUNSEL HANDOUT FOR SKILL DRILLS 5 & 6



I. TRAINING OVERVIEW.

- A. **Introduction.** We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on the preparation and execution of voir dire.
- B. **Overview.** The purpose of this exercise is to practice voir dire development and presentation skills. Counsel will play the role of either trial counsel or defense counsel. Counsel will develop voir dire questions based on the fact scenario set out below and the enclosed panel member packets.
- C. **Preparation.** Draft voir dire questions focusing on the following areas: reasonable doubt/burden of proof, panel members knowledge of the case and/or parties, past experience of panel members with similar cases, potential bias of panel members, credibility determinations, and any rating chain issues among panel members. Also draft voir dire questions focused on the strengths and weaknesses of your case. Be prepared to conduct both group and individual voir dire of mock panel members. Review basic techniques of voir dire and objections. Review RCM 912. After the exercise, you will receive a sample solution and critique.



II. KEYS TO SUCCESS.

- A. **Facts.**

PFC Williams and PFC Smith had known each other since basic training. They met SPC Jones two weeks ago. On Thursday afternoon, the accused, SPC Jones, PFC Smith, and PFC Williams sat in the motorpool discussing what they were going to do Friday night. While talking, SPC Jones pulled some pills out of his pocket and showed the other two soldiers. SPC Jones told the two soldiers that the pills would make a woman feel good and willing to do anything that they wanted her to do. The three soldiers agreed to go out on Friday night and slip the drugs into a woman's drink and take her to a hotel to have sexual intercourse with her.

That evening all three soldiers went to a local hotel and reserved a room for Friday evening. The hotel clerk thought it was odd that three men came in and asked for a room in the most private area of the hotel.

On Friday evening, the three soldiers went to a local bar and looked for their victim. After an hour the soldiers found a woman sitting at the bar by herself. The soldiers agreed that SPC Jones would strike up a conversation with the woman and distract her while PFC Smith slipped the pills into her drink. PFC Williams acted as the lookout while PFC Smith put the pills into her drink.

After 15 minutes, the woman appeared completely intoxicated and was hanging all over the three soldiers. The bartender noticed the woman hanging all over the three soldiers and told her he would call her a cab. SPC Jones told him that they would take her home. The soldiers took the woman to their car and drove to the motel. PFC Williams drove the car. They parked in a dark secluded area of the hotel's parking lot and talked about who would have sex with the girl first. PFC Williams got scared and stated that he didn't want to have sexual intercourse with her and that he would stay in the car. The hotel clerk who gave them the room on Thursday night saw the car pull into the parking lot.

SPC Jones and PFC Smith took the woman into the motel room. The two soldiers agreed that SPC Jones would have sexual intercourse first. The woman was so affected by the pills she didn't know what was going on. PFC Smith claims that he left the room while SPC Jones was having sexual intercourse and did not return.

Late that evening, a policeman found the woman passed out on a park bench and took her to the police station. The next morning, the woman woke up and discovered that she did not have her undergarments on and told the police that she believed she was raped. The woman was only able to remember the bar, where the hotel was located, and that someone had sexual intercourse with her. After a few hours, the police located the hotel and soon found the woman's undergarments. The hotel clerk gave a statement to the police about the three soldiers who paid for the room.

The police lab found fiber evidence from SPC Jones' and PFC Smith's clothing on the victim's clothes. In addition, SPC Jones' and PFC Smith's fingerprints and hair were found in the room. No semen or DNA evidence was found. There was also evidence of a "date rape drug" in the victim's blood. The police went to the bar and spoke with the bartender. The bartender remembered the three soldiers who were hitting on the intoxicated woman and provided a detailed description of all three.

The police brought PFC Williams to the police station and interviewed him. PFC Williams gave a written statement saying he didn't know anything about the woman and wasn't at the bar that night. Two days later, after confronted with the bartender's and hotel clerk's statements, PFC Williams gave another statement to the police admitting to the conspiracy and taking the woman to the hotel, but not to the rape. PFC Williams also told the police that he saw PFC Smith leave the hotel room soon after they took the girl into the room.

The police also questioned PFC Smith. In his first statement, PFC Smith denied the conspiracy and claimed that the woman consented to the sexual intercourse with SPC Jones. PFC Smith also claimed that he left the room after the woman consented to have sexual intercourse with SPC Jones. A week later, the police brought PFC Smith in for another statement. After PFC Smith discovered that PFC Williams told the police about the conspiracy he made a second statement admitting to the conspiracy and bringing the woman into the room and then leaving. SPC Jones did not make a statement.

Shortly after the incident, the base and local papers published articles regarding the incident. Specifically, the articles reported the facts related to the rape, identified all three suspects and printed a summary of their statements, to include how PFC Williams and PFC Smith changed their stories.

All three soldiers are charged with violations of Article 81, Conspiracy to commit rape and kidnapping; Article 134, Kidnapping; and Article 120, Rape. PFC Williams and PFC Smith have agreed to testify against SPC Jones and plead guilty to conspiracy to commit rape. In exchange, the Convening Authority has agreed to give them testimonial immunity, and to limit their punishment to no more than 3 years confinement.

B. *Tasks.*

1. *Trial Counsel.*

- Draft voir dire questions that will give you a basis to exercise challenges for cause and peremptory challenges.
- Use follow-up questions to rehabilitate panel members if possible.
- Questions should also educate members on issues unique to your case.

2. *Defense Counsel.*

- Draft voir dire questions that will give you a basis to exercise challenges for cause and peremptory challenges.
- Use follow-up questions to rehabilitate panel members if possible.
- Questions should also educate members on your theme and/or weaknesses in the government's case.

III.



REFERENCES.

- A. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).
- B. Thomas A. Mauet and Warren Wolfson, *Materials in Trial Advocacy* (3d ed. 1994).
- C. Michael Marcus, *Trial Preparation for Prosecutors* (1989).
- D. Cathy E. Bennett and Robert B. Hirschorn, *Bennett's Guide to Jury Selection and Trial Dynamics* (1995).

STANDARD MEMBER'S QUESTIONNAIRE
(To be completed by each member)

Name: _____

Rank: _____ Date of Rank: _____

Date of Birth: _____

Sex: _____

Race: _____

Marital Status: _____

Dependents:	Sex	Age
	_____	_____
	_____	_____
	_____	_____
	_____	_____

Home of Record: _____

Civilian Education:			
School	Years of Education	Major	Degree

Military Education:			
School	Years of Education	Major	Degree

Current Unit: _____

Past duty assignments: _____

Awards and decorations: _____

Have you ever acted as an accuser, counsel, investigating officer, convening authority, legal officer or staff judge advocate for a convening authority, or forwarded charges with a recommendation as to disposition. _____ Yes _____ No. If yes, please explain.

Signature: _____

Date: _____

VOIR DIRE

SAMPLE MEMBER BIOGRAPHIES

Brigade Commander Bio

Please study the enclosed court member questionnaire to be familiar with your character. Information that you should disclose if questioned includes the following:

- Three unknown assailants mugged your niece last year while she was away at college. The perpetrators have never been caught.
- You have previous experience as a panel member 5 years ago. The case was a drug case involving urinalysis evidence. The panel convicted the accused in that case. Do not disclose how you voted.
- You have a BS in chemistry and still read scientific journals occasionally.
- You know the first sergeant also sitting on the panel. He served as your driver 12 years ago when you were a company commander.
- You have also read about the offense in the base and local newspapers, but it was so long ago you do not remember the specifics. Nevertheless, you believe you can set any prior publicity aside, follow the judges instructions and be fair and neutral.

Be willing to adapt and improvise to counsel questions.

VOIR DIRE

SAMPLE MEMBER BIOGRAPHIES

Company Commander Bio

Please study the enclosed court member questionnaire to be familiar with your character. Information that you should disclose if questioned includes the following:

- You read a blotter report on this incident several months ago but are unfamiliar with any of the details.
- One of your best friends and former Academy classmates is the accused's company commander. You remember him telling you that he preferred charges on some "dirt bags" a few months ago, but you don't know any other details.
- You are the rater of the first sergeant who is also sitting on the panel. You have a good working relationship and a mutual respect for each other's professionalism.
- You also read about the offense in the base and local newspapers and formed an opinion that these "dirt bags" were guilty and should be put to sleep.

Be willing to adapt and improvise to counsel questions.

VOIR DIRE
SAMPLE MEMBER BIOGRAPHIES

1SG Bio

Please study the enclosed court member questionnaire to be familiar with your character. Information that you should disclose if questioned includes the following:

- You go to the same church as the accused. You remember seeing him there a couple of times but you have no real contact with him since you only go on Christmas and Easter.
- The company commander who is sitting on the panel rates you. You have a good working relationship and a mutual respect for each other's professionalism.
- In your first enlistment 18 years ago you were an MP. You were a traffic policeman and were not involved in any major cases or investigations.
- You have an NCOER due from the commander next month.
- You do not recall reading anything in the base or local papers regarding this offense.

Be willing to adapt and improvise to counsel questions.

PERSONAL DATA SHEET

NAME: Robert W. Jarvis

RANK: 1SG (E-8)

A. DATE OF BIRTH: 1954

B. SEX: (M) F

C. RACE: cau

D. FAMILY MEMBERS:

<u>NAMES</u>	<u>AGES</u>	<u>RELATIONSHIP</u>
<u>Barbara</u>	<u>38</u>	<u>Wife</u>

E. HOME OF RECORD: Youngstown, OH

F. EDUCATION:

1. Civilian:	<u>Name of School</u>	<u>Years</u>	<u>Area of Study</u>	<u>Degree</u>
	<u>Central Tx. College</u>	<u>1993</u>	<u>Business</u>	<u>Associates</u>

2. Military:	<u>Course</u>	<u>Year Completed</u>
	<u>MP AIT</u>	<u>1980</u>
	<u>NBC</u>	<u>1986</u>
	<u>BNOC</u>	<u>1987</u>
	<u>ANOC</u>	<u>1992</u>

G. UNIT OF ASSIGNMENT: 1SG, A Co.

H. PAST DUTY ASSIGNMENTS: 125, Supt Bn.

<u>Post</u>	<u>Duty Position</u>	<u>Unit</u>	<u>Years</u>
<u>Ft. Lewis</u>	<u>Traffic MP</u>	<u>97th ID</u>	<u>1980</u>
<u>KOREA</u>	<u>NBC NCO</u>	<u>8th ID</u>	<u>1986</u>
<u>Ft. Polk</u>	<u>Platoon SGT.</u>	<u>2 AD</u>	<u>1991</u>

I. AWARDS AND DECORATIONS: EIB, Airborne, MSM, AHM x3, OSR, N

J. DATE OF RANK: 30 Aug. 1995

PERSONAL DATA SHEET

NAME: William C. Nelson

RANK: COL, HR

A. DATE OF BIRTH: 2 Jan. 1946

B. SEX: (M) F

C. RACE: CAU

D. FAMILY MEMBERS:

<u>NAMES</u>	<u>AGES</u>	<u>RELATIONSHIP</u>
Bill	16	Son
Jennifer	13	Daughter
Wendy	10	Daughter

E. HOME OF RECORD: Topeka, KS

F. EDUCATION:

1. Civilian:	<u>Name of School</u>	<u>Years</u>	<u>Area of Study</u>	<u>Degree</u>
	University of Kansas	1974	Chemistry	B.S.
	University of Oregon	1986	Statistics	M.A.

2. Military:	<u>Course</u>	<u>Year Completed</u>
	AO BC	1977
	AO AC	1986
	C + GSC	1990
	War College	1995

G. UNIT OF ASSIGNMENT: HHC 3rd Bde, 1AD (Commander)

H. PAST DUTY ASSIGNMENTS:

<u>Post</u>	<u>Duty Position</u>	<u>Unit</u>	<u>Years</u>
Fort Knox Ky	Bn. Commander	195 th Bde	1994
Fort Riley, ks	Bn. S-3/XO	2137 Ar	1992
Germany	Troop Commander	1AD	1986

I. AWARDS AND DECORATIONS: MSM (2), ARCOM (4), AAM (3), NDSM, OSR

J. DATE OF RANK: 16 June 1997

PERSONAL DATA SHEET

NAME: Stewart L. White

RANK: CPT, OD

A. DATE OF BIRTH: 14 Dec. 1965

B. SEX: (M) F

C. RACE: Black

D. FAMILY MEMBERS:

<u>NAMES</u>	<u>AGES</u>	<u>RELATIONSHIP</u>
Joni	30	wife
Ryan	7	Son
John	4	Son

E. HOME OF RECORD: Austin, TX

F. EDUCATION:

1. Civilian:	<u>Name of School</u>	<u>Years</u>	<u>Area of Study</u>	<u>Degree</u>
	USMA	1991	History	B. A.

2. Military:	<u>Course</u>	<u>Year Completed</u>
	O.D. Basic	1991
	O.D. Advanced	1995
	Airborne	1989

G. UNIT OF ASSIGNMENT: A Co., 125th Support Bn.
(Commander)

H. PAST DUTY ASSIGNMENTS:

<u>Post</u>	<u>Duty Position</u>	<u>Unit</u>	<u>Years</u>
Ft. Hood	Platoon leader / XO	1 st CHU	1992
Ft. Stewart	S-1	24 th ID	1996

I. AWARDS AND DECORATIONS: ARLUM (2), AFM, VDSM

J. DATE OF RANK: 1994 (1 April)

VOIR DIRE

SAMPLE SOLUTION FOR SKILL DRILL #1

MEMBER'S QUESTIONNAIRE

TO PROSPECTIVE JURORS

This questionnaire is designed to obtain information from you with respect to your qualifications to sit as a member in this case. By the use of the questionnaire, the process of member selection will be substantially shortened. Please answer the following questions as completely and truthfully as possible. The information contained within the questionnaire will become part of the court's permanent record, but it will not be distributed to anyone except the attorneys in the case and the military judge. During the questioning by the military judge and the attorneys, you will be given an opportunity to explain or expand any answers, if necessary.

Because this questionnaire is part of the jury selection process, the questions must be answered by you under penalty of perjury and you should fill out this questionnaire by yourself without consulting any other person.

If you wish to make further comments regarding any of your answers, please use the Explanation Sheet at the back of your questionnaire to do so.

If you do not understand a question, please write "I do not understand" and the question will be explained to you in court. Please realize there are no right or wrong answers--just honest ones. You are under oath and must answer truthfully.

1. Name: _____

2. Birthdate: _____

3. Are you: _____ married _____ living with someone _____ divorced
_____ separated _____ widowed _____ single

(a) Are any other persons currently residing in your home? _____

(b) What is their relationship to you? _____

(c) What is their job or occupation? _____

4. What is your current duty assignment?

(a) Where do you work? _____

(b) What is your job title? _____

(c) How long have you had this job? _____

(d) In your job, do you have authority in supervising others? _____ Yes _____ No

(e) Please describe your job responsibilities: _____

(f) What kind of jobs have you held in the past? _____

5. If married or sharing a household with someone (other than a child),
is he/she: _____ currently employed _____ student _____ retired
_____ unemployed _____ homemaker

**IF YOUR SPOUSE, OR INDIVIDUAL YOU ARE RESIDING WITH IS NOT
CURRENTLY EMPLOYED, ANSWER THESE QUESTIONS FOR HIS/HER LAST JOB.**

(a) Where did he/she work? _____

(b) What was his/her job title? _____

(c) How long did he/she have that job? _____

(d) In his/her job, did he/she have authority in hiring, firing, or supervising others?
_____ Yes _____ No

(e) Please describe his/her job responsibilities:

(f) If unemployed, what is his/her source of income? _____

(g) What jobs has he/she held in the past? _____

6. What was the last grade you completed in school? _____

7. If you attended college, vocational, or technical school what was your:

(a) Major subject? _____

(b) Name and location of school? _____

(c) What degrees, if any do you hold? _____

(d) What do you consider your most important or meaningful informal learning experience?

8. If your spouse or the person with whom you share your household attended college, vocational, or technical school, what was his/her:

(a) Major subject? _____

(b) Name and location of school? _____

(c) What degrees, if any, does he/she hold? _____

9. Since leaving school, have you attended classes, trade schools, correspondence courses, seminars, or workshops (include service schools)? _____ Yes _____ No. If yes, briefly describe: _____

10. Is any member of your family currently serving in any branch of the armed forces of the United States of America? (Including the military reserves or ROTC.)

_____ Yes _____ No.

11. Has any member of your family ever been in any branch of the armed forces?

_____ Yes _____ No

12. Have you, any member of your family, or any of your friends ever received a security clearance? _____ Yes _____ No

Ever been denied a security clearance? _____ Yes _____ No

13. What is your religious affiliation, if any? _____

How often do you attend services?

(a) more than once a week (d) occasionally

(b) every week (e) rarely

(c) frequently (f) never

Have you ever had a different religious affiliation?

_____ Yes _____ No

If yes, what religion? _____

14. What activities, if any, other than attendance, are you involved in with your church, temple, or religious organization? _____

15. Are you presently or have you ever been a member of any societies, unions, professional associations, civic clubs, fraternities, sororities, or other organizations or groups?

_____ Yes _____ No If yes, which ones?

(a) Have you served as an officer for any group or organization?

(b) If yes, what group(s) or organization(s) and what position(s)?

16. What are your hobbies, favorite recreations, pastimes, and spare time activities?

17. Do you have children or other dependents living in your home?

_____ Yes _____ No

18. Do (did) your children attend a public or private school? _____

19. Please provide us with the following information on your children, step-children, and/or grandchildren;

NAME	AGE	EDUCATION	OCCUPATION
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

20. Please provide the following information on your parents (step-parents), brothers (step-brothers), and sisters (step-sisters):

NAME	AGE	EDUCATION	OCCUPATION
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

21. Are you (or were you) employed by, or connected with, a law enforcement agency? (This includes police, sheriff, FBI, CIA, IRS, U.S. Marshal, Highway Patrol, Drug Enforcement Administration, State Attorney, State Prisons or County Jails, Attorney General, Family Services, United States Attorney, Immigration and Naturalization Service, Probation Office, or any other agency). _____ Yes _____ No

If yes, what agencies?

22. Do you have any friends or relatives who are (or were) employed by, or connected with, a law enforcement agency? (This includes police, sheriff, FBI, CIA, IRS, Highway Patrol, Drug Enforcement Administration, State Attorney, State Prisons or County Jails, Attorney General, Family Services, United States Attorney, Immigration and Naturalization Service, Probation Office, or any other agency). _____ Yes _____ No

If yes, what agencies?

23. Have you, any family member, or friends ever been a member of an auxiliary or police reserve unit such as an auxiliary deputy sheriff or constable? _____ Yes _____ No

24. Have you, any family member, or friends ever served as a military policeman?
_____ Yes _____ No

25. Have you, any family member, or friends ever applied for a job in law enforcement?
_____ Yes _____ No

26. Have you, any family member, or friends ever worked as a secretary, clerk, filing assistant, dispatcher, or back-up employee of any law enforcement agency?
_____ Yes _____ No

27. Have you, any family member, or friends ever worked in a courthouse or been a court watcher? _____ Yes _____ No

28. Have you, any family member, or friends ever worked in a prison, jail, or detention center of any sort? _____ Yes _____ No

29. Have you, any family member, or friends ever worked in a security or detective service?
_____ Yes _____ No

30. Have you, any family member, or friends ever worked with or worked for any State Attorney's Office, United States Attorney's Office, Attorney General's Office, or any other city, county, state, or federal attorney's office? _____ Yes _____ No
If yes, please explain:

31. Have you, any family member, or friends ever used the services of any state or District Attorney's Office or U.S. Attorney's Office? _____ Yes _____ No
If yes, please explain:

32. Have you ever attended any course, seminar, lecture, or demonstration connected with any law enforcement agency? _____ Yes _____ No

(a) Do you belong to, or associate with, any groups that have crime prevention or law enforcement as a goal? _____ Yes _____ No If yes, which groups?

33. Have you, any family member, or friends ever volunteered your services to any law enforcement agency? _____ Yes _____ No

34. Do you know any lawyers, district attorneys, or judges? _____ Yes _____ No

(a) Who? _____

(b) Have you ever hired a lawyer for any reason?
_____ Yes _____ No

(c) What was the reason(s) for hiring a lawyer?

(d) Have you ever had a bad experience with a lawyer? _____ Yes _____ No
Please explain: _____

(e) How do you know a judge? _____

(f) How do you know a prosecutor? _____

(g) How do you know a lawyer? _____

35. Have you ever received any training in law? _____ Yes _____ No

36. Have you or anyone you know ever worked in any law office or agency that dealt with the law? _____ Yes _____ No

If yes, describe: _____

37. Have you, any family members, or friends ever filed a police report?

_____ Yes _____ No

If yes, please explain: _____

38. Have you, any family member, or friends ever called the police?

_____ Yes _____ No

If yes, please explain: _____

39. Have you, any family member, or friends ever been interviewed by the police or any other law enforcement agency? _____ Yes _____ No

If yes, why were you/they interviewed? _____

40. Have you, any family member, or friends ever had a pleasant experience involving law enforcement? _____ Yes _____ No

If yes, please explain: _____

41. Have you ever had an unpleasant experience involving law enforcement?

_____ Yes _____ No

If yes, please explain: _____

42. What criminal cases have you followed in the media? _____

(a) Why did you follow the case(s)? _____

43. Have you, any family member, or friends ever been the victim of physical or domestic violence? _____ Yes _____ No If yes, please tell us about that:

44. Have you, any family member, or friends ever been a victim of any crime?

_____ Yes _____ No

If yes, where, when, and what type of crime?

45. If you, a family member, or friend have been a victim of any crime, was anyone charged with the offense? _____ Yes _____ No

If yes, was that person prosecuted in court and what was the result?

46. Have you, any family member, or friends ever been a witness in a criminal case?

_____ Yes _____ No

If yes, what was the nature of the case? _____

47. Have you, any family member, or friends ever been a witness in a civil case or any other legal hearing? _____ Yes _____ No

48. Have you, any family member, or friends ever sued someone or wanted to sue someone?
_____ Yes _____ No

If yes, please describe: _____

49. Has anyone ever sued you or a family member? _____ Yes _____ No

If yes, please describe: _____

What was the nature of the case? _____

50. Have you, any family member, or friends ever been charged, arrested, indicted, or convicted of any criminal offense? _____ Yes _____ No If yes, please explain: _

51. Have you ever served as a juror before? _____ Yes _____ No

If yes, how many times? _____

(a) For each time you have served, please list the type of case and dates: _____

(b) If yes, how did you feel about that (those) experience(s)? _____

(c) Were you ever the foreman or forewoman of the jury? _____ Yes _____ No

(d) Could you reach a verdict? _____ If not, describe: _____

(e) What did you like or dislike about your prior jury service? _____

52. Regarding your jury service: (circle the letter(s), which apply to you)

(a) I can tell pretty easily when a person is telling a lie.

(b) When I make up my mind I rarely change it.

(c) I am easily influenced by the opinion of others.

(d) I always follow my own ideas rather than do what others expect of me.

(e) Please describe what the experience was like for you personally: _____

53. Have you ever served on a Grand Jury? _____ Yes _____ No

If yes, please give dates and details: _____

54. Have you ever appeared before a Grand Jury? _____ Yes _____ No

55. Have you ever been to court before? _____ Yes _____ No

If yes, under what circumstances? _____

56. Have you or anyone you know ever testified in court? _____ Yes _____ No

If yes, please describe: _____

57. In your opinion, what are the three (3) most important problems with the law today?

No. 1: _____

No. 2: _____

No. 3: _____

58. What is the main problem in our society today?

59. Have you or any member of your family ever belonged to, or contributed money or time to, any neighborhood watch, crime stoppers, victims for victims, mothers against drunk drivers, students against drunk drivers, or other related programs?

_____ Yes _____ No

If yes, which group(s)? _____

60. Would you characterize yourself as a leader or follower? _____

61. If you were in a group of people that you did not know very well, would you be labeled as a leader or follower? _____

62. Have you ever studied psychiatry, psychology, sociology, or any related subjects?

_____ Yes _____ No

If yes, please describe: _____

63. Have you, any family member, or friends ever studied or read about psychology, sociology, or psychiatry? _____ Yes _____ No

If yes, please describe: _____

64. Have you, any family member, or friends ever studied or read about medicine, chemistry, biology, engineering, pharmacology, toxicology, or any related subjects?

_____ Yes _____ No

If yes, please explain: _____

65. Do you think some people exaggerate their problems in order to gain the sympathy of others? _____ Yes _____ No

Please explain: _____

66. Have you, any family member, or friends ever worked or volunteered your services at any rape crisis center, alcohol or drug rehabilitation program, suicide prevention center, battered women and children center, crisis hot line, or any related group?

_____ Yes _____ No

If yes, please describe: _____

67. Have you, any family member, or friends ever used any of the above services?
_____ Yes _____ No
If yes, please explain: _____

68. Have you, any family member, or friends ever had an unwanted sexual contact?
_____ Yes _____ No
If yes, please explain: (DO NOT GIVE NAMES):

69. How do you feel about the use of alcohol in our society? _____

70. Do you personally know anyone whom you believe has a drinking problem or is addicted to medication? _____ Yes _____ No
If yes, please explain: (DO NOT GIVE NAMES):

71. In your opinion, what is the number one problem in America today?

72. In your opinion, what is the principal cause of crime in America?

73. Have you ever witnessed any violence (other than on TV)? _____ Yes _____ No
Please explain: _____

74. Have you personally felt fearful of being victimized by violent crime or been fearful those members of your family would be victimized? _____ Yes _____ No
If yes, describe those fears: _____

75. What steps do you think people who are frightened about crime should take to protect themselves? _____

76. What steps have you taken to protect yourself? _____

77. What in your opinion should or could be done about the crime problem? _____

78. What is the first thing that comes to your mind when you think of:

(a) Defense Attorneys: _____

(b) Prosecutors: _____

79. Is there anything else we should know about you? _____

80. Is there anything you would like to discuss privately with the court?

_____ Yes _____ No

If yes, please explain: _____

Signature _____

Date _____

VOIR DIRE

SAMPLE SOLUTION FOR DRILLS 2-4

TRIAL COUNSEL

[Note: After the members respond to each question asked, counsel must accurately state for the record their responses, e.g., “affirmative response by all the members.” The following sample solution is not a comprehensive list of all the questions counsel may want to ask during voir dire. Rather, it offers an example of questions relating to the legal issues raised in the fact scenario.]

CONSPIRACY ISSUES

- Q Members, I would like to focus on conspiracy. The military judge will instruct you that a conspiracy is a two-part crime. First, there must be an agreement to commit a crime; and second, there must be some activity to carry out this agreement. Do you all agree that in its simplest form a conspiracy involves an agreement between at least two people to commit a criminal act?*
- Q Let’s focus on the first part—the agreement. The military judge will instruct you that the agreement in a conspiracy does not have to be in any particular form. Do you all agree that the agreement could be oral?*
- Q Do you all agree that the agreement could be based upon actions?*
- Q Do you all agree that the agreement could simply be a meeting of the minds without any words?*
- Q Do you all understand that while the agreement continues, the accused or a co-conspirator must do something in order to accomplish the criminal act intended?*
- Q For example, two people agree to rob a liquor store, and one of them goes out and buys a gun to use in the robbery. Do you all agree that at this point, even before the actual robbery takes place, the two may be guilty of conspiracy?*
- Q The military judge will further instruct you that a conspiracy is a crime separate from the underlying offense. In the robbery example, if the two people actually did go through with the planned robbery, they may be guilty of both conspiracy and robbery. Does everyone understand this principle of law?*
- Q Please look at the flyer before you. Charged are the offenses of rape, kidnapping, conspiracy to commit rape, and conspiracy to commit kidnapping. Do you all agree that rape and conspiracy to commit rape are two separate offenses?*
- Q Do you all agree that kidnapping and conspiracy to commit kidnapping are two separate offenses?*

- Q In this case, if you find, beyond a reasonable doubt, that the accused is guilty of conspiracy to commit rape, can you convict him of that offense separate from the rape offense?*
- Q In this case, if you find, beyond a reasonable doubt, that the accused is guilty of conspiracy to commit kidnapping can you convict him of that offense separate from the kidnapping offense?*
- Q Do you all understand the difference between a carefully planned crime and a crime of impulse?*
- Q If you find the accused guilty of the conspiracy charges, will you consider that fact in reaching an appropriate sentence?*

ACCOMPLICE TESTIMONY ISSUES

- Q Do you agree that the government has no control of who witnesses a crime?*
- Q Do you agree that the government must use the witnesses who have the most information in order to get to the truth?*
- Q In a conspiracy case, would you agree that often the only evidence of the conspiracy is likely to come from co-conspirators?*
- Q COL X, do agree that when individuals plan a crime they are likely to do it in secret?*
- Q Would any of you not believe the testimony of an accomplice simply because he was also involved in the crime?*
- Q Would you all agree then that an accomplice could be a truthful witness?*
- Q If the government presents evidence that supports the accomplices' testimony, will that make you more likely to believe it?*
- Q In this case, the government will present the testimony of two accomplices, PFC Williams and PFC Smith. If you find their testimony credible, could you consider their testimony in reaching a verdict in this case?*
- Q Do you all agree that when an accomplice testifies, he may not only implicate the accused, but he may also incriminate himself?*
- Q Major A, would you agree that we all have a constitutional right against self-incrimination—that is, the right to remain silent when questioned about criminal activity?*

- Q In order to protect the accomplices' constitutional rights against self-incrimination, the government can provide some protection. A type of protection the government can provide is called testimonial immunity. Has anyone heard of this term before?*
- Q Do you understand that the government can't use a witness's immunized testimony against him?*
- Q Does everyone understand that the witness with immunity may still face prosecution for his role in the crimes based on other evidence?*
- Q Does everyone understand that if the immunized witness lies on the stand, he can also be prosecuted for perjury?*
- Q Would any of you not believe the testimony of a witness simply because the government gave him immunity?*
- Q In this case, the government gave immunity to PFC Williams and PFC Smith. If you find their testimony credible, could you rely on it in reaching a verdict in this case?*

PRIOR INCONSISTENT STATEMENT ISSUES

- Q CPT C, I noticed from your questionnaire that you have two children, ages 4 and 7, is that correct?*
- Q Have you ever disciplined your children?*
- Q When you've confronted your children with something they did wrong, say getting into the chocolate chip cookies, do they always immediately confess to their wrongdoing?*
- Q On some occasions have they initially denied they did anything wrong and only confessed after being confronted with overwhelming evidence, such as the chocolate on their hands and face?*
- Q Does everyone agree that this is human nature?*
- Q Would you all agree that sometimes adults also deny wrongdoing when first confronted?*
- Q Would you all agree that some people only admit to their wrongs after being confronted with strong evidence?*
- Q Would you all agree that this does not automatically make the final confession untruthful?*
- Q Would you all agree that in fact the confession might be truthful because the person realizes that he can not lie his way out of trouble any longer?*

VOIR DIRE

SAMPLE SOLUTION FOR DRILLS 2-4

DEFENSE COUNSEL

[Note: after the members respond to each question asked, counsel must accurately state for the record their responses, e.g., “affirmative response by all the members.” The following sample solution is not a comprehensive list of all the questions counsel may want to ask during voir dire. Rather, it offers an example of questions relating to the legal issues raised in the fact scenario.]

IMMUNITY ISSUES

- Q Do you all believe that everyone who swears to tell the truth actually tells the truth?*
- Q I expect that some witnesses will testify about PFC Williams' and PFC Smith's poor character for truth and veracity. Will you agree to take this testimony into consideration in determining whether or not to believe these witnesses? (Consider asking the military judge to give preliminary instruction on witness credibility at this point).*
- Q ISG Y, do you agree that a witness charged with the same crimes as the accused, may have a motive to lie in order to protect himself?*
- Q For example, do you agree that a witness may feel that if he testifies in a manner that is favorable to the government, then the government may give him leniency in his case?*
- Q CPT C, do you agree that a witness who has a plea agreement with the government may also have a motive to lie?*
- Q Wouldn't you all agree that in order to get the benefit of a plea agreement, a witness must testify the way the government wants him to?*
- Q MAJ A, do you agree that a witness who has a deal with the government has a strong incentive to testify the way the government wants in order to keep the deal?*
- Q Do all members agree with MAJ A?*
- Q Do you all agree that witnesses who are best friends are likely to protect each other so they won't get in trouble?*
- Q In evaluating a witness's testimony, would you consider all of these and any other potential motives to lie?*
- Q COL X, who is less believable, a person that has one motive to lie or a person that has four motives to lie?*

Q MAJ A, what is your opinion?

Q How about you, CPT C?

ACCOMPLICE ISSUES

Q Do you agree that the mere presence at the scene of a crime does not establish guilt?

Q Do you agree that the government has the burden to prove each and every element of every offense?

Q The military judge is going to instruct you that when someone withdraws from a crime, that is, decides not to participate in a crime and makes it known to others, he is not liable for any offenses committed after he withdraws from the crime?

Q Do any of you disagree with this principle of law?

Q If the military judge instructs you that the testimony of an accomplice, another person who is a party to the crime, is of questionable integrity and is to be considered with great caution, will you consider this instruction in evaluating the accomplice's testimony?

Q COL X, why do you think an accomplice's testimony might be of questionable integrity?

Q Do all the members agree with COL X?

Q Do all members agree that an accomplice's greatest motive to lie about another individual's involvement in the crime might be to save himself, or minimize his own involvement?

Q How many of you believe that an accomplice's testimony could be less reliable than a witness who was not involved in the crime?

Q Do you all agree that it is not the number of witnesses that the government calls to testify, but the quality of their testimony that is important in deciding what the truth is?

Q Will you consider any self-serving motives a witness might have that would effect the reliability and truthfulness of his story?

PRIOR INCONSISTENT STATEMENT ISSUES

- Q If there were conflicting testimony in this case by the prosecution's witnesses, would you take this into consideration on the question of reasonable doubt?*
- Q What would you think about the reliability of a co-accused's testimony if he gave two completely different statements to the police?*
- Q Would you take extra care in evaluating his statements and testimony?*
- Q Would you all agree that co-accused, who attempt to minimize their own involvement by lying to the police, could also be lying to you?*
- Q How many of you would be less inclined to believe the co-accused if he gave two completely different statements to the police?*

VOIR DIRE

SAMPLE SOLUTION FOR SKILL DRILLS 5-6

SAMPLE USE OF CLOSED ENDED QUESTIONS FOR A CHALLENGE FOR CAUSE

- Q Captain X isn't it true you believe SPC Jones is guilty of something or else she wouldn't be here?*
- Q In fact, at this moment you believe she is guilty, don't you?*
- Q You would agree with me that once you form an opinion about something, it's difficult, if not impossible, to set that opinion aside, isn't it?*
- Q Even though you agree that the law says a person is presumed innocent until proven guilty, based on the publicity in this case you've already formed some feeling or opinion that SPC Jones is probably guilty, isn't that so?*
- Q Wouldn't you also agree with me that there isn't anything that the trial counsel or the military judge can say that would change your mind?*
- Q Wouldn't you also agree with me that the opinion you formed about the guilt or innocence of SPC Jones would affect your deliberations as a member in this case?*
- Q Wouldn't you also agree that although you could be a good juror in any other case, but for the pretrial publicity in this case, you might not be as fair as you would like to be in this particular case?*

SAMPLE VOIR DIRE CHECKLIST

Counsel should consider the following areas in deciding what questions to ask prospective panel members in any case. The military judge will likely ask some of these questions but follow-up may be necessary. The checklist and sample questions are not an exhaustive list and must be tailored to the facts of an individual case. (* Indicates questions for individual voir dire).

I. LAW:

A. *General:*

1. After having read the flyer, is there anything about this case that would prevent you from being fair and impartial?
2. Can you set aside sympathy, bias, and prejudice in reaching a just verdict?
3. Will you wait until you receive all the evidence and the military judge's instructions before making up your mind?
4. Will you follow the law as the judge instructs you, even if you disagree?

B. *Reasonable Doubt and Burden of Proof:*

1. Defense Counsel:
 - a. Do you all understand and agree that my client stands before you today innocent of any charges?
 - b. If you had to vote on my client's guilt or innocence right now, how would you vote?
 - c. Member X can you apply the presumption of innocence in this case?
 - d. Can every member apply the presumption of innocence in this case?
 - e. Do you all agree that before you can convict my client you must find him guilty of every element of the offense beyond a reasonable doubt?
 - f. Member X, do you think the government has a fair burden?
 - g. Member Y, can you promise to hold the government to this burden?

- h. After hearing all the evidence in this case, if there is a reasonable doubt as to the guilt of my client, are you willing to vote for a finding of Not Guilty?
2. Trial Counsel:
- a. Would you all agree that proof beyond a reasonable doubt does not mean proof beyond any doubt?
 - b. Do you understand that the burden of proof is the same whether this is a rape case or an AWOL case?
 - c. Member X, if the defense were to suggest an explanation of innocence that you found incredible, do you understand the government is not required to disprove this theory?

II. CASE ON TRIAL:

A. *Knowledge of the Parties:*

- 1. Do any of you know the Judge?
- 2. Do any of you know the trial counsel?
- 3. Do any of you know the defense counsel?
- 4. Do any of you know the accused in this case?
- 5. *Describe the nature of your relationship.
- 6. *Have you ever received legal advice from the trial counsel in the past?
- 7. *Have you always followed the trial counsel's recommendations?
- 8. *Because of this past relationship, would you be more receptive to the trial counsel's evidence or arguments?

B. *Knowledge of the Witnesses:*

- 1. Does anyone know witness X?
- 2. *How do you know her?
- 3. *Are you more likely to believe his or her testimony because of past dealings?

C. *Knowledge of the Case:*

1. Have any of you read or heard anything about this case prior to today?
2. *Member X, what have you heard or read?
3. *Do you consider these news reports, blotter reports, police reports, an accurate statement of the facts?
4. *Have you formed an opinion based upon the information you have received?
5. *Do you agree that you must decide the accused's guilt or innocence based solely on the facts that are presented in this trial?

III. EXPERIENCE OF PANEL MEMBERS:

A. *Prior Court Duty:*

1. Have any members sat on a court-martial before?
2. How many times?
3. How long ago?
4. Do you recall what the case was about?
5. Do you recall what the defense was?
6. Did the accused testify in that case? (Defense Question)
7. Did it bother you that the accused elected not to testify? (Defense Question)
8. What was the outcome of the case?
9. Can you separate these past experiences and judge this accused based solely on the evidence presented?

B. *Victim of Crime:*

1. Have any of you or a close family member or friend been the victim of a crime similar to the crime charged here?
2. *Please explain the experience.
3. *Was this a traumatic experience?
4. *Was the perpetrator caught?

5. *Does it bother you that the perpetrator has never been brought to justice?
6. *Did you participate in or view the trial?
7. *What did you think about the prosecutor?
8. *What did you think about the defense counsel?
9. *Were you satisfied with the job law enforcement did?
10. *Were you satisfied with the outcome of the case?
11. *How will that experience affect your ability to sit on this case?

C. ***Experience with Law Enforcement:***

1. Have any of you or members of your family served in a law enforcement capacity?
2. *Did the family member/friend ever discuss his/her work with you?
3. *Did you ever hear him/her discuss cases involving rape, robbery, etc.?
4. *Have any of you had close dealings with law enforcement in the past?
5. *Were you satisfied with this experience?
6. *Will you give special consideration to law enforcement witnesses simply because of their status?

D. ***Crime Committed While Commander/Supervisor:***

1. Has a soldier working with/for you ever been court-martialed?
2. Please describe.
3. What level of court-martial?
4. What were the crimes charged?
5. Did you recommend court-martial?
6. What level?
7. What was the outcome of the case?
8. Were you satisfied? Why or why not?
9. Did you testify for or against the soldier?

10. Was this testimony during findings or at sentencing?

IV. BIAS:

A. *Alcohol Bias:*

1. Please raise your hand if you drink alcohol.
2. How do you feel about someone who drinks alcohol?
3. Are you less likely to believe the accused/victim/witness simply because he drinks alcohol or was drinking on the day in question?
4. How would you evaluate the victim/witness/accused testimony if you found out that he had been drinking on the night of the incident?

B. *Drug Bias:*

1. Do you know anyone with a drug problem?
2. Are you less likely to believe the accused/victim/witness because he uses drugs or used drugs on the day in question?
3. Do you have a drug problem in your unit?
4. How often do you test for drugs in your unit?
5. How do you feel about the Army urinalysis program?
6. Is it reliable?
7. Are you aware of any cases involving a false positive?
8. Are you aware of any urinalysis tests where there were problems with the chain of custody?

C. *Status of Witness.* Do you think the testimony of a police officer, commander, expert is more/less credible simply because of their status?

D. *Bias Against the Accused:* (Defense Counsel Questions)

1. What would you think about the accused if he doesn't testify?
2. Would you assume that he has something to hide if he doesn't testify?
3. Is a soldier who has a good/bad service history more/less likely to have committed the offenses charged?

4. If an accused pleads guilty to one charge, is he more likely to have committed the other charged offenses?

5. Can you tell a criminal just by looking at him?

E. ***Bias for the Accused:***

1. Do any of you go to the same church/club as the accused?

2. Will that affect your ability to sit on this case?

3. Are you more/less likely to give the accused favorable consideration because you go to the same church or share the same faith?

V. **CREDIBILITY:**

A. ***Victim/Witness Testimony Presentation:***

1. Have any of you ever made a speech to a group of strangers?

2. Have you ever had to discuss personal issues/problems in front of a group of strangers?

3. How did it make you feel?

4. Do you all agree that it can be a very uncomfortable experience?

5. Can you consider the nervousness and embarrassment of the victim/witness in judging their credibility?

6. Can you appreciate that a person may be nervous and be telling the truth?

B. ***Witness Motive/Bias:***

1. Do you believe that a witness/victim may have one or several motives to lie?

2. Would you consider a witness's personal interest in the case in evaluating the witness's credibility?

3. Do you believe that children are more/less likely to lie than adults?

4. What do you think of a victim who only reports a crime after a motive to lie arises?

C. ***Eyewitness:***

1. Defense Questions:
 - a. Do you agree that lighting/distance/opportunity to view/fright/etc. can affect a witness's ability to accurately see and report an incident?
 - b. Do you think you would be better able to describe someone of your own race?
2. Trial Counsel Questions:
 - a. Do you think it is possible for a witness to give an accurate description even in a fast moving situation?
 - b. Would you all agree that different people can see the same incident differently?
 - c. Would you expect the victim of a rape/assault to always give a detailed description of the suspect?
 - d. Can you still believe a witness who can only give a partial description of the suspect/incident?

VI. SUPERIOR/SUBORDINATE RELATIONSHIPS:

A. Defense Counsel Questions:

1. How long has he/she worked for you?
2. * Do you respect your superior/subordinate's opinion?
3. * Have you received an OER/NCOER from him/her?
4. * Are you due an OER/NCOER from him/her?
5. * When?
6. * How often do you see each other?
7. * Do you socialize with him/her?
8. * Do you discuss leadership/command/punishment philosophy?
9. * Have you ever sought their advice on a disciplinary issue?
10. *Please explain.

B. *Trial Counsel Questions:*

1. Does your superior expect you to speak freely with him/her?
2. *What is the most significant disagreement you have ever had with him/her?
3. *How did you resolve it?
4. *Does he/she allow for honest discussion and disagreement?
5. *Are you reluctant to speak your mind to him/her?
6. *Would you feel any pressure to adopt his opinions simply because he/she is your superior?
7. *What do you expect of subordinates if they disagree with you?
8. *Do you seek honest feedback from your subordinates?
9. *What do you do if you disagree with his/her ideas/opinions?
10. *If your subordinate were to disagree with you over any issue in this case, would you have a problem with that?

VII. SENTENCING QUESTIONS:

A. *Defense Questions:*

1. If you find the accused guilty of a serious crime, could you consider sentencing the accused to no punishment?
2. If the accused is found guilty, do you understand that you must consider his personal and military record in determining an appropriate sentence?
3. Would you consider the fact that the victim suffered no permanent physical injuries in determining an appropriate sentence?
4. Will you consider the interests of the accused and his family in determining an appropriate sentence?
5. Do you think that rehabilitation is an important function of punishment?

B. *Trial Counsel Questions:*

1. Will you consider any aggravating evidence including the impact on the victim in determining an appropriate sentence?

2. Do you agree that there is no such thing as a victimless crime?
3. Do you understand harm to society/military community/Army when someone does X (i.e. writes a bad check)?
4. Do you think retribution and deterrence are important aspects of punishment?

Tab C
Module 2

Apply the Skill
Opening Statements



The Advocacy Trainer

OPENING STATEMENTS

SUPERVISOR'S GUIDE



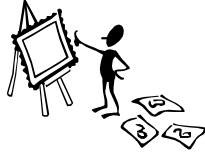
I. SKILL OVERVIEW.

- A. *Goal.* Develop counsel's ability to prepare and deliver an opening statement.
- B. *Training Overview.* This module requires two people: you and one of your counsel. When you have more than one counsel, have them sit in a panel area, so your counsel must address members while also in the presence of the military judge. Direct your counsel to prepare the statement ahead of time (when you give notice of the training), so that the training session consists solely of counsel's statement, your critique and then, perhaps, redelivery of the statement or parts of the statement, incorporating your direction. It is an excellent exercise for videotape.



II. THE LAW.

- A. "Each party may make one opening statement to the court-martial before presentation of evidence has begun. The defense may elect to make its statement after the prosecution has rested, before the presentation of evidence for the defense. The military judge may, as a matter of discretion, permit the parties to address the court-martial at other times." RCM 913(b).
- B. This is an area in which there is little law and in which objections are rarely sustained unless they involve arguing, or mischaracterizing or overstating what the evidence will show.



III.

THE ART.

- A. ***Theory, theme, themela.*** Help counsel understand these critical concepts, as they often find them dense.
- **Theory** is an adaptation of a set of facts to legal issues in the case, the meshing of facts with the law to prove guilt or acquit.
 - **Theme** illustrates the most personal and specific aspects of the case (e.g., accused is a timebomb or a predator, accused is a victim of misidentification, vindictive charge of rape), the aspects that provide the moral force, the who and why that bring your case to life.
 - **Themela** is the still more personalized application of a broad theme to this case (e.g., accused harbored a grudge that resulted in his exploding in this instance; accused is a misunderstood, sensitive soul whose actions reflect an unbalanced but good faith desire to right wrongs). Themela marries logic and the elements to emotion or human nature. Counsel should be able to express the theme in a sentence or so, and it should permeate the statement.
- B. ***Remember housekeeping.*** If nothing else, an opening should be, in the tired analogy, a road map that tells panels (for whom briefing is a universal experience) what's coming and who's going to deliver. After trial counsel's (TC) opening the members should not only be prepared to vote for you, but they should know who they're going to see and roughly in what sequence. After the defense opening, the panel does not necessarily have to be ready to acquit, but it should be skeptical of aspects of the government case and have a sense of any major defense witnesses, if appropriate, or a fuller sense of the weaknesses of government evidence.
- C. ***No arguing.*** Little is gained by appearing to "stretch the envelope" to the limits of argument, as a well-delivered opening is itself persuasive. Use the "witness test" to determine when an opening starts to morph into an argument. Counsel should consider whether they have a witness who will testify to the "facts" counsel present in the opening. If not, it is argument. Look for extended narratives about witnesses's credibility; that is argument.

- D. ***Start strong and end strong.*** This is classic “primacy and recency;” people remember best what they hear first and last. Opening statements are not spontaneous. Though they should not be read, they must be well planned and *appear* to be extemporaneous. You want to think hard about the first words out of your mouth; the same is true for your closing lines. As Churchill said, “the flowers of rhetoric are hothouse plants,” i.e., the best advocacy is well-planned but has the appearance and force of spontaneity.
- E. ***Humanize the victim or accused.*** Part of this is terminology, but it should be more than calling the accused by name if defense counsel, or “the accused” if the government (in fact using full rank is sometimes effective for a TC when emphasizing forfeiture of respect). Counsel should paint pictures of victims or accused soldiers by placing them in scenarios or filling in human details that bring them to life; members will remember these facts and it will help counsel get past the temptation to look at the case as (merely) a contest between lawyers.
- F. ***TC anticipate DC?*** Trial counsel may want to anticipate *major* points that they feel the defense is virtually certain to make in its opening or its case. Be careful here, however, as you cannot be certain the defense will say or do anything, you may open yourself to cheap objections and short speeches and corrective instructions (defense does not have to present anything, etc.), and you may say better what the defense would not have said as well. In addition, anticipation of such defense spin (other than through compensating for your weaknesses, addressed above) may appear weak, and may give the defense the chance to build on your perceived acknowledgment of the strength of its case.
- G. ***Language.*** Panel members will summon mental images of people, places, facts, objects and locations from the words counsel use. Choose them advisedly, with precision and with understanding of their connotations. Consider the difference between “billiards parlor” and “pool hall.” Related: ensure counsel use military terminology correctly, not only official nomenclature, but “junior [not “lower”] enlisted” and “weapon,” not “gun.” Gripping language need not be flamboyant, so counsel should not strain to be poets. It is also important to avoid inside lingo, especially lawyer-speak or cop-speak (e.g., “exited the blue in color vehicle,” as opposed to “got out of the blue car”).



IV. PRACTICE POINTERS.

Discuss the following points with counsel.

- **Get started.** Avoid “this is a case about...” and other clichés, or use them with a novel twist. Sentence one of the opening statement should scream off the page and have something to do with *this* case, *this* crime, *this* accused or *this* victim. At some point you will want to introduce yourself and the major players, but not right away and not as the central component of the opening.
- **Enthusiasm.** Does not necessarily mean cheerleading or table pounding. It does mean caring – or seeming to care – strongly about the case and the position counsel are advocating. Enthusiasm is reflected in a number of ways, most obviously in inflection and word choice, but also a soldier’s command of the courtroom, a trial counsel’s organized presentation of a case, and a defense counsel’s unapologetic advocacy for a fellow soldier.
- **Do not over-promise.** *Really* only discuss what the evidence will show. There is no swifter way to lose credibility – and to play into the hands of an alert opponent – than to promise something in an opening and not deliver, inviting your opponent to flog you with it during his closing.
- **Wield exhibits.** If they’re worth showing to the panel, they’re worth showing as early and as often as possible; people learn best through multiple senses. Use exhibits in openings. If they are controversial or counsel are unsure of the judge, seek to either get them admitted in advance or to get permission to use them – but in the latter instance, be aware that counsel bear a substantial risk if they display evidence that they cannot later get admitted.
- **No personal opinions.** “I’m Kyle and I’ll be your waiter tonight, the special is...” Excise the word “I” from courtroom vocabulary. Sounds presumptuous, sanctimonious, too familiar, all things we do not want to be.
- **No inside baseball.** Don’t talk about the function of an opening statement, how it is not evidence, etc. It sounds defensive, panels don’t care, it invites them to ignore you, and the judge tells them anyway. This is not to say that you should not mention legal concepts to a panel. When a case turns on a significant legal point (e.g., knowing use of marijuana, consent in a rape case, divestiture in a disrespect case), expect a panel to understand your well-planned, lucid explanation of the law.

- ***Highlight your strengths.*** The other side will hammer at your weaknesses; when you have a particularly strong part to your case (e.g., extremely sympathetic victim, registered source with checkered past), you can hardly over-sell it. But...
- ***Compensate for your weaknesses.*** You should volunteer and account for significant weaknesses. Not every weakness. Some appear to be more important to you, and some will slip past your opponent. Counsel need to address the obvious weaknesses in the case – perhaps compromises made by your victim, lab errors, admissions by your client or “bad witnesses” impeachable under MREs 609, 404(b), 405(a), 608, 613 or 801(b) –but should do so with a plan. It does show your candor and suggests a sense of balance, but you should couple the admission with a compensating fact that diminishes the damage and gives the panel an “out” or better context in which to place the weakness.
- ***When to wait.*** Generally, the defense will want to present its statement right away, on the theory that minds are made up early. The defense may want to consider postponing its statement until the beginning of its case when it is not going to contest the facts but present an affirmative defense; in such a circumstance it would have raised the defense in cross of government witnesses, and can use the opening statement as an early window into the closing argument.
- ***Delivery and Technique.*** Again, counsel should not read, though opening statements should be prepared and rehearsed. Eye contact with the panel and the appearance that counsel is talking *to them* is paramount. Counsel normally should deliver the statement from a lectern or podium, but should move enough to emphasize certain points and engage the panel. Trial counsel can point to the accused at this stage, making it clear that there is an adversarial relationship in the courtroom and that the government aims to convict; the defense can begin the humanizing of the accused by physically referring to the accused, preparing for the panel’s scrutiny of him.



V.



SKILL DRILLS

- A. **Goal.** Train counsel to deliver a powerful opening statement.
- B. **Conduct the drills.**
1. **Preparation.** Give notice of time and date of training with guidance to prepare an opening statement from an upcoming or previous case. Or provide them some facts or a short case file and direct them to prepare an opening statement.
 2. **Execution.**
 - a. Choose an aspect, or several aspects, of an opening statement and tell counsel to prepare their opening, or segment of opening statement, with special emphasis on the skills required. You can still have them deliver an entire opening, but narrow your critique to an aspect below, advising counsel that you simply are not evaluating for other aspects at this time. Have them prepare an opening for a future case, but you can also have them give an opening for a case already tried or for simple facts you create. For example, deliver an opening (or segment) that focuses on:
 - Theme: all parts of the statement relate to a central theme.
 - Organization: why certain parts of the statement appear in the sequences they do; transitions.
 - Primacy and recency (start and end strong).
 - Humanizing the accused or victims.
 - Language: precise and appropriate language (avoid jargon, use military and technical terms correctly), use strong impact words, avoid verbosity and legalese.
 - Foregoing expression of opinion, while presenting a compelling view of the case.
 - Use of exhibits.
 - Defuse weaknesses.
 - Incorporating anticipated instructions.
 - Delivery mechanics (use videotape).

- b. Set a time limit, perhaps 8-10 minutes for a full opening, less if you are only evaluating a portion of the statement.
- c. There is no “school solution” to this exercise, because counsel should give opening statements on concluded or upcoming cases. Stop them during their statements as they deliver information that is objectionable, unclear, or misleading. Concentrate on the aspect of opening statements that is the focus of this drill and on which you gave counsel notice to prepare. This also enables you to conduct many opening statement drills, because aspects of the same statement can be given more than one time, until the teaching value is exhausted. You may, for example, want to concentrate on arguing. Some counsel think it clever or helpful to walk right up to the line separating statement from argument, and even to tiptoe (if not leap) over it, daring the opponent to object or the judge to interject. Arguing in an opening, besides being a violation of the rules, rarely does much to advance your cause. A *statement* can still be (should be) gripping; it cannot, however, overtly ask the panel to make judgments by arguing the links between the evidence, witness motives and the like, to the party’s theory of the case. Force counsel to drop argumentative phrases and statements and to focus on presenting facts in a way that advances a theme.
- d. **“Skull Session”: Starting and stopping.** Pull an opening from a record of trial. Photocopy it and have counsel draw a line at the point at which the statement *starts* to have anything to do with the case at hand. Frequently counsel “wheel spin” through a paragraph or two or three in which they issue generalities about what an opening statement is, who has what burden, who they are, etc. Now look at the first sentence that relates to this case or client. Start with that and make it as punchy and engaging as possible. Discourage them from generic opening lines; such blandishments quickly bore a panel that often then misses the real start to the statement when you start to state your case.
- e. **End strong, too.** Draw a line at the end of opening statements when counsel diverge from the case at hand and go into closing generalities about the burden, keeping an open mind, paying attention to all of the evidence, listening to the judge, paying attention to cross, etc. Look at the last line during which counsel actually talked about the case. Now make that punchier and more dramatic. Then stop.



C.

Summarize the Main Teaching Points.

- ✓ **Tie all statements to a central theme.**
- ✓ **Avoid too much time on preliminary matters.**
- ✓ **Present facts in an active, assertive manner.**
- ✓ **Pay particular attention to opening and closing lines.**
- ✓ **Don't argue.**
- ✓ **Avoid excess reliance on notes.**
- ✓ **Avoid distracting mannerisms.**



VI.

REFERENCES.

- A. Thomas A. Mauet, *Trial Techniques* chapt. 3 (4th ed. 1996).
- B. Trial Counsel Assistance Program Memo #54 (Advocacy Supplement) (June 1990).
- C. Michael Marcus, *Trial Preparation for Prosecutors* chapt. 19 (1989).
- D. Steven Lubet, *Modern Trial Advocacy* (1993).

OPENING STATEMENTS

COUNSEL HANDOUT



I.

TRAINING OVERVIEW.

A. **Introduction.** The next trial advocacy training session, scheduled on _____, from _____ to _____ hours, will focus on opening statements. The training will be conducted in two parts. First, I will lead a discussion about the various techniques necessary for an effective opening statement. After a short break, we will reconvene for the second part of the training, during which counsel will deliver an opening statement, or part of an opening statement.

B. **Preparation.** Counsel must bring their Manual for Courts-Martial to this trial advocacy training session. Counsel must also be prepared to deliver an opening statement from an upcoming case, a prior case, or from a fictitious scenario I provide. Finally, counsel will review, and be prepared to discuss, the opening statement skills listed in part II.



II.

KEYS TO SUCCESS.

A. Theory and theme.

B. Remember - an opening statement is a roadmap.

C. No arguing.





D. Start strong and end strong.

1. Start with a punch - no generic opening lines.
2. End forcefully - no closing generalities.

E. Humanize the victim or accused.

F. Highlight your strengths - compensate for your weaknesses with a plan.

G. Language.

1. Use **strong** impact words.
2. Avoid verbosity and legalese.
3. Use precise language.



III.

REFERENCES FOR FURTHER STUDY.

- A. Thomas A. Mauet, *Trial Techniques* chapt. 3 (4th ed. 1996).
- B. Trial Counsel Assistance Program Memo #54 (Advocacy Supplement) (June 1990).
- C. Michael Marcus, *Trial Preparation for Prosecutors* chapt. 19 (1989).
- D. Steven Lubet, *Modern Trial Advocacy* (1993).

Tab C

Module 3

Apply the Skill

Closing Arguments



The Advocacy Trainer

CLOSING ARGUMENTS

SUPERVISOR'S GUIDE



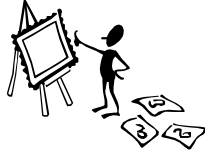
I. SKILL OVERVIEW.

- A. **Goal.** Develop counsel's ability to prepare and deliver a powerful closing argument.
- B. **Training Overview.** This module requires two people: you and one of your counsel. When you have more than one counsel, have them sit in a panel area, so your counsel must argue to members while also in the presence of the military judge. Direct your counsel to prepare the argument ahead of time (when you give notice of the training), so that your training session consists solely of counsel's argument, your critique and then, perhaps, redelivery of the argument or parts of the argument, incorporating your direction. This module does not address sentencing advocacy.



II. THE LAW.

- A. **Argument by counsel on findings.** "In general. After the closing of evidence, trial counsel shall be permitted to open the argument. The defense counsel shall be permitted to reply. Trial counsel shall then be permitted to reply in rebuttal." RCM 919(b).
- B. **Contents of Argument.** "Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party's theory of the case." RCM 919(b).
- C. There is little law in this area, and objections are rarely sustained unless they involve arguing facts not in evidence, grievously mischaracterizing the evidence, or extremely inflammatory arguments or images.



III.

THE ART.

- A. ***Theory, theme, themela.*** Help counsel understand these critical concepts, as they often find them theoretical and dense.
- **Theory** is how the facts mesh with the law to produce a legally defensible verdict.
 - **Theme** is the most personal and specific aspects of the case (e.g., accused is a timebomb or a predator, accused is a victim of misidentification, vindictive charge of rape, etc.), the aspects of the case that provide the moral force, the who and why that bring your case to life. Why the verdict is morally desirable – making members comfortable with the choice you are advocating.
 - **Themela** is the still more personalized application of a broad theme to this case (e.g., accused harbored a grudge that resulted in his exploding in this instance; accused is a misunderstood, sensitive soul whose actions reflect an unbalanced but good faith desire to right wrongs). Themela marries logic and the elements to emotion or human nature. Counsel should be able to express their theme in a sentence or so, and it should permeate the argument.
- B. ***Start strong and end strong.*** This is classic primacy and recency; people remember what they hear first and last. You want to think hard about the first words out of your mouth as well as your closing lines; an ideal statement should *appear* spontaneous, but shouldn't actually be.
- C. ***Humanize the victim or accused.*** Part of this is terminology, but it should be more than calling the accused by name, if defense counsel or “the accused” if the government (in fact using full rank is sometimes effective for a TC when emphasizing loss of respect). Counsel should paint pictures of victims or accused soldiers by placing them in scenarios or filling in human details that bring them to life; members will remember these facts and it will help counsel get past the temptation to look at the case as (merely) a contest between lawyers.

- D. ***Argue!*** The only purpose in getting out of your chair is to persuade the jury *to do something*: acquit or convict. Every sentence in the argument, every word choice, every decision of what evidence to highlight, ignore, or explain away, every decision of what to talk about in what sequence should move the panel or judge toward that end. Mauet writes that “argument is not a summation,” that is, it’s not so much the time to “tell them what you told them” as it is to hammer home relentlessly *how* what you showed them (or opponent failed to show) supports your theory of the case.
- E. How do you know you’re arguing? Encourage counsel to:
- Draw and argue conclusions and inferences. The evidence supports any number of interpretations, from the solid and plausible, to the fanciful. Argue yours.
 - Comment on witness demeanor. Don’t underestimate the extent to which judgments about credibility are based on effect, how a witness looks and sounds. Pounce on this. (Footnote to counsel: illustrates an inherent limitation of stipulations of testimony.)
 - Apply law (including instructions) to the facts. It’s not appellate argument but neither is it a plebiscite. Assume that panels try to analyze the case in light of the law; make it easier for them.
 - Refute the opponent’s case. Most critical for the defense in its lone closing argument. Skilled trial counsel will often give a “minimalist” closing argument and save their strongest arguments for rebuttal, the one argument of the day to which the defense does not get to reply.
- F. ***Burdens.*** The government must not in any sense state or imply that the defense has the burden to do anything (i.e., put on a defense or testify) or improperly call attention to the defense’s exercise of its rights (e.g., right not to talk to commanders or law enforcement). All the more reason to steer clear of the law (normally, with obvious exceptions of sophisticated affirmative defenses and some judge alone trials) and address the facts on which the panel will be focused. Government should gladly accept the burden as a matter of course.

IV.



PRACTICE POINTERS.

Discuss the following points with counsel.

- ***Trust the panel.*** Don't rehash the evidence ("Agent Charles told you..."). Avoid clichés, or use them with a novel twist. The first word of counsel's argument should directly and powerfully relate to why the accused should be convicted or acquitted.
- ***Enthusiasm.*** Does not necessarily mean cheerleading or table pounding. It does mean caring – or seeming to care – strongly about the case and the position you are advocating. Reflected a number of ways, most obviously in inflection and word choice, but also a soldier's command of the courtroom, a trial counsel's organized presentation of a case, and a defense counsel's unapologetic advocacy for a fellow soldier.
- ***Hold the opening against them.*** Take notes during your opponent's opening and remind the panel, in your closing, of promises made in the opening that your opponent did not keep.
- ***Write it first?*** Some authors suggest that counsel should begin preparation of their cases by writing their closing arguments. Consider the practice. The closing is the total packaging of the case theme – facts of this case integrated with law, persuasively argued so that a panel or judge makes the decision advocated by counsel. Assembly of the rest of the case – who to call, in what order, what to ask them, what cross to plan – hinges on the theme that will be *presented* in the opening statement but *argued* in the closing.
- ***Wield exhibits.*** If they're worth admitting into evidence, they're worth reinforcing at every opportunity, because people learn best through multiple senses.
- ***No personal opinions.*** "I think the accused..." Of course *you* think: you're the prosecutor or the defense counsel. You need not even (and should not) say "the defense believes" or "it is the government position." Sometimes this is spillover from the opening statement, after which counsel may become too cautious about arguing. Assertions in a closing need no preface or attribution; it is total advocacy, counsel's plea for a verdict based on counsel's version of the evidence (his theme).

- ***No inside baseball.*** Don't talk about the function of a closing argument, how it is not evidence, etc. It sounds defensive, panels don't care, it invites them to ignore you, and the judge tells them anyway. This is not to say that you should not mention legal concepts to a panel. When a case turns on a significant legal point (e.g., knowing use of marijuana, consent in a rape case, divestiture in a disrespect case), expect a panel to understand your well-planned, lucid explanation of the law. The government *does* get to go first and last, and passing reference is OK so long as it does not risk the appearance of sniveling.
- ***Highlight your strengths.*** The other side will hammer at your weaknesses; when you have a particularly strong part to your case (extremely sympathetic victim, registered source with checkered past), you can hardly over-sell it. But...
- ***Compensate for your weaknesses.*** You should account for significant weaknesses. Not every weakness. Some appear more important to you and some will slip by your opponent. The obvious weaknesses to your case – perhaps compromises made by your victim, lab errors, admissions by your client – need to be addressed by you, but do so with a plan. It does show your candor and suggests a sense of balance but you should couple the admission with a compensating fact that diminishes the damage and gives the panel an “out” or better context in which to place the weakness.
- ***Incorporate instructions.*** Counsel should know all or virtually all of the instructions the judge will use. There is no need to preface them with “the judge will instruct you” because (a) he might not, and may choose this opportunity to point that out, and (b) better that you steal the language of the instruction, so that when the judge utters it, he appears to be affirming your wisdom.
- ***Inferences and matters not in evidence.*** Counsel have liberal rein to argue inferences from the evidence. Counsel must be careful, however, only to rely on evidence properly admitted. The extra burden on defense counsel is to abide by the ethical rule that forbids calling the attention of the panel to the absence of evidence when in fact that evidence was suppressed.
- ***Waive closing?*** Don't even think about it. No doubt there is the rare case – a paper AWOL case to a judge alone – in which it is conceivable, but waiver often reflects undue confidence and can be interpreted negatively. Defense waiver of closing argument will be scrutinized with an eye toward ineffective assistance of counsel. Government waiver does not ensure the chance to argue in rebuttal: if the defense also waives, the government will not be permitted a rebuttal because there is no defense argument to rebut.

V.



SKILL DRILLS.

- A. **Goal:** Train counsel to deliver a persuasive closing argument.
- B. **Conduct the drills.**
1. **Preparation.** Give notice of time and date of training with guidance to prepare a closing argument from a previous or upcoming case. Or provide them some facts or a short case file and direct them to prepare a closing argument.
 2. **Execution.**
 - a. Choose an aspect, or several aspects, of a closing argument and tell counsel to prepare their closing, or segment of closing argument, with special emphasis on the skills required. You can still have them deliver an entire closing, but narrow your critique to an aspect below, advising counsel that you simply are not evaluating for other aspects at this time. Have them prepare a closing for a future case, but you can also have them give a closing for a case already tried or for simple facts you make up. For example, deliver a closing (or segment) that focuses on:
 - Theme: all parts of the statement relate to a central theme.
 - Organization: why certain parts of the statement appear in the sequences they do; transitions.
 - Primacy and recency (start and end strong).
 - Humanizing the accused or victims.
 - Language: precise and appropriate language (avoid jargon, use military and technical terms correctly), use strong impact words, avoid verbosity.
 - Use of exhibits.
 - Defuse weaknesses.
 - Incorporating anticipated instructions.
 - Delivery mechanics.
 - Arguing.
 - Refutation.

- b. There is no “school solution” to this exercise, because counsel should give closing arguments on concluded or upcoming trials, unless you provide scenarios to them. Stop them during their statements as they deliver information that is objectionable, unclear or misleading, but concentrate on the aspect of closing arguments that is the focus of this drill and on which you gave counsel notice to prepare. This also enables you to conduct many closing argument drills, because aspects of the same argument can be given more than one time until the teaching value is exhausted.

- c. **Play the opponent.** For defense counsel, give them a sense of what the government argued (better still, deliver the argument yourself), then have the defense deliver the closing *immediately* (as in court), incorporating rebuttal of the government’s argument into their prepared closing. For trial counsel, give them a sense of how the defense would respond to their closing (again, best example is to deliver that closing yourself) and then require your counsel to *immediately* deliver a rebuttal.

- d. **“Skull Session”: Starting and stopping.** Pull a closing from a record of trial. Photocopy it and have counsel draw a line at the point at which the argument **starts** to have anything to do with the case at hand. Frequently counsel “wheel spin” through a paragraph or two or three in which they issue generalities about what a closing argument is, who has what burden, etc. Now look at the first sentence that relates to this case or client. Start with that and make it as punchy and engaging as possible. When counsel begin their arguments, discourage them from generic beginnings; such blandishments quickly bore a panel that often then misses the real start to the argument when you start to argue your case.

- e. **End strong as well.** Draw a line at the end of closing arguments when counsel diverge from the case at hand and go into closing generalities about the burden, listening **to** the judge, etc. Look at the last line during which counsel actually talked about the case. Now make that punchier and more dramatic. Then stop.

C.



Summarize the Main Teaching Points.

- ✓ **Argue.**
- ✓ **Argue a coherent theme.**
- ✓ **Start and end strong.**
- ✓ **Use powerful, persuasive language.**
- ✓ **Forceful but credible theory (acknowledge important weaknesses).**
- ✓ **Refute *significant* portions of opponent's case.**

VI.



REFERENCES.

- A. Thomas A. Mauet, *Trial Techniques* chapt. 8 (4th ed. 1996).
- B. Trial Counsel Assistance Program Memo #55 (Advocacy Supplement) (July 1990).
- C. Thomas A. Mauet and Warren Wolfson, *Materials in Trial Advocacy* (3d ed. 1994).
- D. Michael Marcus, *Trial Preparation for Prosecutors* chapt. 19 (1989).

CLOSING ARGUMENTS

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. **Introduction.** The next trial advocacy training session, scheduled on _____, from _____ to _____ hours, will focus on closing arguments. The training will be conducted in two parts. First, I will lead a discussion about the various techniques necessary for a powerful closing argument. After a short break, we will reconvene for the second part of the training, during which counsel will deliver a closing argument, or part of a closing argument.
- B. **Preparation.** Counsel must bring their Manual for Courts-Martial to this trial advocacy training session. Counsel must also be prepared to deliver a closing argument from an upcoming case, a prior case, or from a fictitious scenario I provide. Finally, counsel will review, and be prepared to discuss, the closing argument skills listed in part II.



II. KEYS TO SUCCESS.

- A. Theory and theme.
- B. Start strong and end strong.
1. Start with a punch - counsel's first words should directly and powerfully relate to why the accused should be convicted or acquitted.
 2. End forcefully - no closing generalities.



C. Argue!



1. Comment on witness demeanor.
2. Do not rehash the evidence - argue inferences from the evidence.
3. Incorporate instructions.



D. Humanize the victim or accused.

E. Language.

1. Use **strong** impact words.
2. Avoid verbosity and legalese.
3. Use precise language.



III.

REFERENCES FOR FURTHER STUDY.

- A. Thomas A. Mauet, *Trial Techniques* chapt. 8 (4th ed. 1996).
- B. Trial Counsel Assistance Program Memo #55 (Advocacy Supplement) (July 1990).
- C. Thomas A. Mauet and Warren Wolfson, *Materials in Trial Advocacy* (3d ed. 1994).
- D. Michael Marcus, *Trial Preparation for Prosecutors* chapt. 1 (1989).

REBUTTAL ARGUMENTS

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

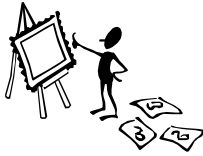
- A. **Goal.** Develop counsel's ability to prepare and deliver a focused, powerful, and effective rebuttal argument. The rebuttal argument, when done correctly, is devastating. It must be focused, lethal, and reiterate those key government issues that will carry the day for the prosecution. When done well, it is a powerful advantage for the government. When done poorly, it can confuse the members even more. Counsel often overlook this portion of trial advocacy. Do not allow your counsel to take it for granted. Focus them on the value of rebuttal argument now, and watch them use it to their advantage in court.
- B. **Training Overview.** This module requires two people: you and one of your counsel. Direct your counsel to prepare a possible rebuttal argument based upon the arguments prepared by your counsel for the closing arguments training module (see Tab C, Module 3). Begin training by presenting one of the offered defense closing arguments, or one that you have prepared on your own, based upon the closing argument fact pattern. When you have more than one counsel, use the second counsel to deliver the defense closing argument and have the remaining counsel sit in a panel area. Having one of your other counsel deliver the defense closing argument allows you to critique your counsel as they prepare for rebuttal while their opponent is delivering their argument. This will allow you to focus on the non-verbal aspects of advocacy that are equally important. Once the defense argument has been delivered, tell the government counsel that he must present his rebuttal argument now. Observe, critique, and then allow redelivery of the rebuttal argument incorporating your critique.



II. THE LAW.

- A. **Rule for Court-Martial (RCM) 919(a).** "In general. After the closing of evidence, trial counsel shall be permitted to open the argument. The defense counsel shall be permitted to reply. Trial counsel shall then be permitted to reply in rebuttal."

- B. **RCM 919(b).** "... The rebuttal argument of trial counsel is generally limited to matters argued by the defense. If trial counsel is permitted to introduce new matter in closing argument, the defense should be allowed to reply in rebuttal. However, this will not preclude trial counsel from presenting a final argument."



III.

THE ART.

- A. **Introduction.** The rebuttal argument allows the government to regain the momentum, reestablish the focus on the key issues in the case, and refute the defense's arguments. The rebuttal must diffuse the defense arguments and forcefully reassert the government's theory of guilt. A purely reactive point-by-point response to defense arguments is ineffective. Counsel deliver weak rebuttal arguments when they do not adequately prepare and organize their argument.
- B. **Prepare the Rebuttal as an Integral Part of Your Closing Argument.** Case preparation should begin with an outline of the closing argument. An outline of the rebuttal argument is an integral part of your closing argument's outline. Never forget that the government gets to argue first and last. Counsel will only fully exploit the benefits of primacy and recency when they plan to do so from the outset of the case. The first closing and the rebuttal must work together to maximize the persuasiveness of the government's case. The rebuttal's primary mission is to refocus the members on the government's theory of guilt and explain why the defense's arguments fail. It is a restoration project, not a new building. The themes and structure of the two arguments must be carefully coordinated to contribute to the same persuasive goal.
- C. **Common mistakes.** Counsel usually make one of the following mistakes when fashioning and delivering a rebuttal argument.

- *Attempting to analyze and neutralize fully defense arguments in the first closing.* While it is tempting to address defense arguments, too much attention on the defense case will distort the focus of your closing. You should focus on your affirmative burden, and only occasionally warn the members about the defense arguments to come. Organize your rebuttal argument according to your warnings. Your warnings must be tied to your analysis of the case and the key evidence upon which the issues will turn. Save your full counter-argument for rebuttal, and only use it if the defense addresses the issue. If the defense does not raise the issue, leave it alone, or draw the panel's attention to the defense's failure to address the government's evidence of guilt.
- *Sandbagging the defense by saving everything for rebuttal.* This tactic surrenders the advantage of primacy and may also run afoul of the scope limitations on rebuttal argument. Rebuttal is generally limited to matters that are raised by the defense argument. If the defense counsel ignores the issues you are saving for rebuttal, the trial counsel may be precluded from addressing them during rebuttal. Sandbagging surrenders primacy and allows the defense to shape the government's final argument.

D. ***Control the Agenda.*** The first closing must establish the key issues in the case. The rebuttal argument should begin by reminding the panel of the key issues they must resolve to determine the verdict. You must organize your rebuttal around these key issues if you want your argument to be effective. Resist the temptation to engage in a point-by-point response to the defense argument. That vice allows the defense to control the agenda and turns your rebuttal argument into an uncoordinated attack. A better method is to identify the three main issues in the case and to construct an outline for rebuttal based on each of these issues. Anticipate and war-game the defense arguments on the key issues. If you are prepared, you can listen and refine your rebuttal argument during the defense argument. If the defense fails to address one (or more) of the issues you selected for rebuttal, explain to the panel why their failure is so important. After analyzing the key issues in the case, trial counsel can prepare an outline for the rebuttal argument before trial. Use the following template to set the agenda:

- *Introduction.* The trial counsel must regain the momentum for the prosecution during the opening seconds of the rebuttal argument. Identify the crucial shortcoming in the defense argument or turn the defense theme against them. Counsel should develop an arsenal of responses for standard defense themes and use them to fashion a one-line introduction.

- *Restate the government theme.* A strong first closing puts you in the best position for rebuttal. Having already made your case, you can confidently begin the rebuttal argument by restating your theme and reviewing the most compelling evidence of guilt. This restores the proper focus on what you perceive as the real issue(s) in the case and sets up the outline for rebuttal.

- *Key Point Rebuttal.* Having set the stage by restoring focus on the crucial issues, you are ready to proceed with the negative aspect of the rebuttal: refuting selected arguments of the defense. Use the following three-step process to address each key point that you selected for rebuttal.
 - Restate the defense argument. You cannot effectively refute an argument without clearly restating it. Restate it accurately; any attempt to mischaracterize the defense argument will undermine your credibility with the panel and will draw an objection from an attentive defense counsel.

 - Refute the defense argument. This is the heart of negative rebuttal. Refutation takes a variety of forms, but it all boils down to this: you can refute a fact (whether it was proven or not) or you can refute the inferences drawn from the facts (what the facts mean). No matter which tactic you use you must always appeal to common sense and explain why your theory is correct. The quality of this part of the argument will dramatically increase if counsel anticipate and analyze avenues of rebuttal during case preparation. Thinking-through rebuttal before trial will also cause the trial counsel to identify and find rebuttal evidence the government can present during their rebuttal case.

 - Recap your theory of the case. After you refute each argument, explain how that affects the big picture and why your theory is the only reasonable explanation.

- *Final Appeal for a Verdict.* This is the final word before instructions. Use it to make your final appeal to the fact-finder. Appeal for justice, restate your theme, and summarize the reasons that compel a verdict of guilty. This portion of the argument should be committed to memory.



IV.

PRACTICE POINTERS.

- A. **Objections.** Objections are rarely sustained unless they involve arguing outside the scope of defense's closing argument, arguing facts not in evidence, grievously mischaracterization of the evidence, commenting on the accused's right to remain silent, or extremely inflammatory arguments or images.
- B. **Presence in the courtroom.** Often the most important witness for your side is you. Your actions, control of the courtroom, and presence can make a difference. Take control of the space available to you during rebuttal argument. One excellent technique is to walk out to a position approximately six to eight feet in front of the panel. Plant yourself firmly on both feet, face the panel and then allow the silence to draw their eyes to you. Make eye contact! Only begin your rebuttal argument when you are sure you have all of their attention.
- C. **Focus, focus, focus.**
- **Key issues from your argument.** This is *your* rebuttal. Decide what is important and what is not. Remind the panel of the strength of your case and highlight the weaknesses of your opponent's. Do not allow your opponent's arguments to sidetrack you. The worst mistake you can make is to address, point by point, the defense's argument. If you take each point of their argument seriously enough to address it, the panel will take each point seriously.
 - **Turn defense's argument back to your theory.** Every piece of your rebuttal should remind the panel of the strength of your argument. If you are going to address a defense argument directly, do it constructively. Expose the weakness of the argument; tell the members to discard it, and then remind them of what is left—your position.
 - **No shotgun approach.** When organizing your rebuttal argument, select only important issues. Compare the issues you select with the government's theme. If an issue does not impact on the government's theme, leave it alone. Remind them of what is important. Tell them why it is important. Expose the weaknesses in your opponent's argument(s) on the key issues. Return to your theme.

- **Thinking on your feet.** Rebuttal is the opportunity for counsel to impress the panel with their ability to destroy the defense’s argument quickly and concisely. Use the evidence. The defense counsel will ask the members to draw inferences from the evidence that are consistent with the defense theme. Ask yourself, “how do the inferences square with other evidence in the case?” Destroy inferences by showing that, although consistent with two pieces of evidence, the inferences are inconsistent with five other pieces. Destroy the inferences and the defense argument will be unpersuasive.
- D. **Organization.** Image is important. Remember, you are a “witness” for your case. So is your table. Members expect military officers to be organized and to have important information at their fingertips. Being organized is impressive. Being organized is devastating when coupled with a strong rebuttal argument. Do not allow your area or your papers to impact negatively on your case. Organize, organize and then organize again. Information management gives an advocate an advantage.
- E. **Primacy and Recency.** The same practice tips that apply to closing argument apply to rebuttal. Primacy/recency is a fundamental principle of all arguments. The members are more likely to remember the first and last thing you say during rebuttal. To illustrate the point, pull an argument from a record of trial. Photocopy it and have counsel draw a line at the point at which the argument **starts** to have anything to do with the case at hand. Frequently counsel “wheel spin” through a paragraph or two or three in which they issue generalities about what a closing argument is, who has what burden, etc. Now look at the first sentence that relates to this case or client. Everything before this sentence is a generic beginning. Discourage counsel from generic beginnings. Analyze the end of the argument and see if there is a generic ending. Emphasize that counsel should address the most critical issues first and last.
- F. **Passion.** If you do not speak with passion and conviction, the members will question whether you believe in your case. Show concern about the victim. Show outrage towards serious crimes. Earnest idealism goes much farther in the courtroom than jaded cynicism. Let the panel know you care about the case and believe in it. Passion does not necessarily mean cheerleading or table pounding. Passion is reflected in a number of ways: your voice inflection, word choice, command of the courtroom, and organization. If the members believe that you believe in your theory, the panel is more likely to accept it.

- G. ***Time management.*** Less is more. The panel has heard the evidence. They are familiar with the military. Do not insult their intelligence by holding them captive explaining the obvious to them. Lead them to the right conclusion. Don't drag them to it and then rub their faces in it for an extended period of time. You don't accomplish anything, and you may lose some of the respect they normally accord a professional.
- H. ***Compare the opening to the closing and point out problems.*** Take notes during defense counsel's opening statement. Your opponent will reveal his or her theory in the opening statement. Compare the defense's theory to what you anticipated. Start formulating responses to arguments you did not anticipate.
- I. ***Show exhibits.*** If evidence is worth admitting, it is worth using to reinforce your theory. People learn best when the presentation reaches multiple senses. Not only should the members hear your evidence, they should see it. Use exhibits to reinforce your arguments during rebuttal.
- J. ***Argue.*** Assertions in a rebuttal argument need no preface or attribution. ("The evidence showed ...") Rebuttal is pure argument, total advocacy. Assert your points in the strongest and most persuasive way.
- K. ***Incorporate instructions.*** Counsel should know all or virtually all of the instructions the judge will give. Use them if they help your argument. Before using instructions in your argument, make sure the judge plans to give those instructions.
- L. ***Waive rebuttal?*** Never. Don't even think about it. There may be a rare case – a paper AWOL case to a judge alone – where waiving rebuttal might make sense, but usually waiver reflects a lack of confidence. If nothing else, take advantage of these opportunities to practice. You have the chance to have the last word, use it.

V.



SKILL DRILLS.

- A. **Goal:** Train counsel to deliver a persuasive rebuttal argument.
- B. **Conduct the drills.**
1. **Preparation.** Give notice of time and date of training with guidance to prepare a rebuttal argument from a previous or upcoming case. Discuss the practice pointers with counsel and illustrate the ways they can occur. Look at old records of trial for examples of missed opportunities.
 2. **Execution.** Conduct this type of training in the courtroom. These exercises should be performed with counsel on their feet in front of a panel for maximum effectiveness.
 - a. Choose an aspect, or several aspects, of a defense closing argument. Use a case out the AT, an old record of trial, or a case that is pending in your office.
 - b. Tell counsel to prepare a rebuttal argument and to use the practice pointers above.
 - c. Play the opponent. Give your trial counsel a sense of how the defense would respond to their closing (the best way is to deliver that closing yourself) and then require your counsel to *immediately* deliver a rebuttal.
 - d. Have counsel give a rebuttal argument.
 - e. Critique. Use the NITA method (see Tab A) and focus your critique on:
 - *Theme:* Does the rebuttal defeat the defense argument and restate the government's case?
 - *Organization:* How did counsel structure their rebuttal. Did they start and end strong? (primacy and recency)
 - *Use of exhibits.*
 - *Identify and attack defense weaknesses.*

- *Delivery mechanics.*
- *Arguing.*
- *Focus, focus, focus.*
- *Passion.*
- *Time management.*

f. Your counsel should learn that you can not form an effective rebuttal without a complete and thorough knowledge of the case. Be careful to keep your training session from devolving into a brainstorming session for the case itself. Keep the counsel focused.

C. ***Summarize the Main Teaching Points.***

✓ **Prepare the Rebuttal as an Integral Part of Your Closing Argument.**

✓ **Common mistakes.**

- Attempting to analyze and neutralize fully the defense arguments in the first closing.
- Sandbagging.

✓ **Control the Agenda.**

- *Introduction.*
- *Restate the key issues of the government's case.*
- *Key Point Rebuttal.*
 - Restate the defense argument.
 - Refute the defense argument.
 - Recap your theory of the case.

- *Final Appeal for a Verdict.*



VI.

REFERENCES.

- A. THOMAS A. MAUET, TRIAL TECHNIQUES ch. 8 (4th ed. 1996).
- B. THOMAS A. MAUET & WARREN WOLFSON, MATERIALS IN TRIAL ADVOCACY (3d ed. 1994).
- C. MICHAEL MARCUS, TRIAL PREPARATION FOR PROSECUTORS ch. 19 (1989).
- D. Faculty, Criminal Law Department, The Judge Advocate General's School, U.S. Army, *The Art of Trial Advocacy – Preparation of Effective Rebuttal Arguments*, ARMY LAW., Aug. 1998, at 47.

ENCLOSURE:

Counsel Handout

REBUTTAL ARGUMENTS

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. **Introduction.** The next trial advocacy training session, scheduled on _____, from _____ to _____ hours, will focus on rebuttal arguments. The training will be conducted in two parts. First, I will lead a discussion about the various techniques necessary for a powerful rebuttal argument. After a short break, we will reconvene for the second part of the training, during which another counsel or I will deliver a defense closing argument, and trial counsel will immediately make a rebuttal argument.
- B. **Preparation.** Counsel must bring their Manual for Courts-Martial to this trial advocacy training session. Counsel must also be prepared to deliver a rebuttal argument from an upcoming case, a prior case, or from a fictitious scenario I provide. Finally, counsel will review, and be prepared to discuss, the rebuttal argument skills listed in part II.



II. KEYS TO SUCCESS.

- ✓ **Theory and theme.** Prepare the Rebuttal as an Integral Part of Your Closing Argument.
- ✓ **Start strong and end strong.**
 - Start with a punch - counsel's first words should directly and powerfully relate to why the defense argument does not work.
 - End forcefully - no closing generalities.
- ✓ **Avoid common mistakes.**

- Attempting to analyze and neutralize fully the defense arguments in the first closing.
- Sandbagging.

✓ *Control the Agenda.*

- Introduction.
- Restate the government position.
- Key Point Rebuttal.

✓ *Argue!*

- Comment on witness demeanor.
- Presence in the courtroom.
- Hit the key issues from your closing argument.
- Turn defense's argument back to your theory.
- Avoid the shotgun approach.
- Think on your feet.
- Organize and anticipate.
- Primacy and Recency.
- Passion.
- Time management.
- Enthusiasm.

- Compare the defense opening to the closing and point out problems.
- Show exhibits.
- No personal opinions.
- Incorporate instructions.
- Waive rebuttal? Never!

✓ *Language.*

- Use strong impact words.
- Avoid verbosity and legalese.
- Use precise language.

✓ *Make a Final Appeal for a Verdict.*



III.

REFERENCES FOR FURTHER STUDY.

- A. THOMAS A. MAUET, TRIAL TECHNIQUES ch. 8 (4th ed. 1996).
- B. THOMAS A. MAUET & WARREN WOLFSON, MATERIALS IN TRIAL ADVOCACY (3d ed. 1994).
- C. MICHAEL MARCUS, TRIAL PREPARATION FOR PROSECUTORS ch. 19 (1989).
- D. Faculty, Criminal Law Department, The Judge Advocate General's School, U.S. Army, *The Art of Trial Advocacy – Preparation of Effective Rebuttal Arguments*, ARMY LAW., Aug. 1998, at 47.

Tab C

Module 4

Apply the Skill

Examination of Lay Witnesses

Direct and Cross



The Advocacy Trainer

EXAMINATION OF LAY WITNESSES - DIRECT AND CROSS

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise develops counsel's ability to structure and conduct direct and cross-examination of lay witnesses. The principles used in developing an effective direct examination or cross-examination are uniform, and apply to most lay witnesses. Counsel should employ these principles when examining lay witnesses involved in different scenarios. You should provide instruction on the important concepts of preparing and conducting a direct and cross-examination, and then guide counsel through the practical exercise. Apply the skills presented in the Fundamentals of Direct Examination (Tab B, Module 1) and Fundamentals of Cross Examination (Tab B, Module 2) training modules to this training module.
- B. **Training Overview.** This training requires at least three participants: one supervisor and two counsel. The training is divided into four steps: (1) a short period of instruction; (2) counsel preparation time; (3) a practical exercise and critique; and (4) a review of the sample solution. It takes two hours to complete the training. Two scenarios serve as vehicles for the training: a bad check case and an assault case. Each scenario identifies a lay witness to be examined by counsel. The supervisor may select one or both scenarios when conducting the skill drill.





II. THE LAW.


- A. **Mode and order of interrogation and presentation of testimony.** MRE 611; RCM 913(c).




“The military judge shall exercise reasonable control over the mode and order of interrogating witnesses . . . so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” MRE 611(a).

-  “Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.” MRE 611(b).

-  “Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination.” MRE 611(c).

-  “The testimony of witnesses shall be taken orally in open session, unless otherwise provided in this Manual.” RCM 913(c)(2).


-  “Each witness must testify under oath. After a witness is sworn, the witness should be identified for the record (full name, rank, and unit, if military, or full name and address, if civilian). The party calling the witness conducts direct examination of the witness, followed by cross-examination of the witness by the opposing party. Redirect and re-cross-examination are conducted as necessary, followed by any questioning by the military judge and members.” RCM 913(c)(2) discussion.


III.





THE ART.


- A. ***The Canvas: Direct Examination of a Lay Witness.*** The goal of direct examination is to elicit in a clear and logical progression, the observations and activities of the witness so that the trier of fact can understand, believe, and remember the testimony. Crafting and conducting a successful direct examination is a creative art. This art can be mastered through experience and the application of basic principles. This training module focuses on application of the basic principles of a direct examination. The principles discussed below provide the structure on which to build a sound direct examination.


-  **Focus on the theory.** Cover only those facts which advance the theory of your case and support your planned closing argument. The witness’s testimony should establish or corroborate essential facts, refute or contradict facts offered by your opponent, or sponsor demonstrative evidence that makes your case more effective or persuasive. Select and develop the objective(s) for the witness, ensuring that the facts elicited promote your theory of the case.

 **Organize logically.** Determine the key points of the direct examination that support your theory. Organize those points in a logical order. Often this results in a chronological presentation of the events. Always introduce the witness first. Let the members know who the witness is, why he is testifying, and why the witness should be believed, i.e., personalize the witness and connect him to the case. Then, elicit testimony which establishes the selected key points.

 **Have a plan.** Each witness should have a theme, and the theme for each witness should fit in your theme. For example, as the prosecutor in an assault case your theme may be: *the accused in this case is a walking time-bomb*. The theme for the first witness you call may be: *the fuse is lit*. The questions you develop, therefore, should elicit information that describes how the accused started to get angry. One approach is to write the theme for the witness on the top of your paper (or a yellow “post-it” at the top of your computer screen) when drafting the examination -- discard the marginal material and only use the material that promotes your theme.

 **Keep it simple.** Inexperienced counsel often elicit unimportant information and spend too little time extracting the critical information. Answer the WHO, WHAT, WHEN, WHERE, WHY, and HOW. Asking unnecessary questions bores and distracts the court members. Remember: brevity is one of the best forms of persuasion.

 **Use non-leading, open-ended questions.** Single-fact, non-leading questions will enhance clarity, brevity and pace of the presentation. The question should be crafted so that it elicits the desired answer. You may want the witness to respond with a short precise answer, or a longer explanation or description. Whatever the length of the intended response, do not suggest the answer when asking the question. This diminishes the impact of having the witness give the answer himself. The goal should be to let the witness tell the story. See Tab B, Fundamentals of Direct Examination, for a detailed discussion about the form of direct examination questions.

 **Use orientation and transition questions.** Orientation questions let the members know what to expect. For example, when questioning a police officer about responding to a burglary scene, an orientation question may be: “I’m going to ask you questions first about the crime scene. When did you get there?” Transition questions let the members know when the questioning on one topic is finished and the testimony on the next topic is to begin. For example, using the same scenario as above, a transitional question may be: “Officer Smith, now let’s talk about the crime scene examination you conducted.” Both types of questions enhance the flow of the examination.

Consequently, if the testimony is easy to follow, then the trier of fact will understand and remember the testimony.



Use pace to emphasize important testimony. Pace involves controlling the speed of the examination. Speed up when eliciting background information and slow down when discussing important action. Have the witness describe the significant action in slow motion, relating as much detail as possible. Only by slowing down the action will the members be able to fully understand what happened.



Volunteer weaknesses. As a general proposition, you should volunteer *significant* weaknesses during the direct examination. This takes the sting out of the weakness by voluntarily disclosing it before cross-examination. When volunteering a weakness, apply the principles of primacy and recency and bury it in the middle of the direct examination. If possible and credible, follow up with compensatory questions that might mitigate or explain the weakness. Do not volunteer all weaknesses; direct examination should be positive.




Use exhibits to highlight facts. One of the best ways to make direct examination stimulating is to emphasize important points visually. This can be done with visual aids (overhead projector, blackboards, or computerized graphics) or with demonstrative and real evidence. Usually, the best time to introduce exhibits is after the witness has completed his or her testimony. The method serves two purposes: (1) it does not interrupt or detract from the oral testimony; and (2) it effectively repeats and emphasizes the important facts. After all, repetition is one of the keys to advocacy! See Foundations, Tab E, Modules 1-8, for detailed discussions about the use/admissibility of real and demonstrative evidence.





Listen to the answers. Although you shouldn't be the focus of the examination, you nevertheless must appear attentive. How can you expect the members to listen if you look bored. Moreover, the witness will be looking at you. If you look interested, the witness will feel his or her testimony is important (which it should be). Finally, you must remain alert to respond to the unexpected answers that inevitably appear.





Proper position. During direct examination, the members' focus must be on the witness. Your positioning in the courtroom, therefore, should not distract from this focus. Stand near the members, but do not interfere with their line of sight to the witness. This forces the witness to look at the members, and it also ensures that the members can hear the witness. If possible, use a podium or lectern. In addition to presenting a professional appearance, you have a convenient place for your notes.


- B.  ***The Canvas: Cross-Examination of a Lay Witness.*** Like direct examination, cross-examination is a creative art. When used effectively, cross-examination can be one of the most important weapons in an attorney's arsenal. The key aspect of any great cross-examination is control over the witness -- getting the witness to answer the questions the way you want. Control is achieved through careful planning and preparation. The tenets below provide sound analytical principles for crafting and executing a cross-examination of a lay witness.


 **Identify clear approach points consistent with witness theme.** Establish a theme or argument for the witness. When you get up to examine the witness you should have in your mind the “end state” you want to achieve with the witness, e.g., bias, a liar, couldn't see, etc. All of your questions should drive toward that end state. Identify specific approach points that support the theme. Craft leading, single-fact questions that advance each approach point. For example, when cross-examining an assault victim in which identity of the attacker is at issue, the defense counsel's theme may be that the victim could not see his attacker. The approach points to support this theme may be as follows: (1) the lighting conditions were poor; (2) the victim was fatigued; (3) the victim was stressed; (4) short opportunity to observe; (5) the attacker was moving quickly. Each approach point should be assigned leading questions that fully develop the facts to support the point.


 **Start strong; finish strong.** Use the concept of primacy and recency when organizing cross-examination. The points made at the beginning and end of your cross-examination are the ones the fact-finder will remember best.


 **Know the answer.** The witness will seize every opportunity to hurt you. By knowing the probable answer to the question asked, you maintain control of the witness and the subject matter, and also deny the witness an opening to hurt you. Cross-examination is not the time to discover information.


 **Don't repeat the direct examination.** It is assumed that on direct examination, opposing counsel will ask questions favorable to his or her position. If you repeat this testimony on cross-examination then you reinforce your opponent's favorable testimony. You should only elicit information that supports your position. In certain situations, this may include certain selected portions of the direct examination that are consistent with your theory of the case.


 **Use short, single-fact, leading questions.** Asking short, leading, single-fact questions will enhance both control of the witness and member comprehension. This principle is the golden rule of cross-examination. The goal should be to craft your questions so that the witness's response will be one word: "yes" or "no." Reference to cross-examinations documented in recent records of trial may help illustrate this principle. See also Tab B, Module 2, Cross-Examination, The Fundamentals.

 **Don't ask the ultimate question.** Ask only enough questions on cross-examination to establish the points you intend to make during the closing argument. This means that you do not ask the last question that explicitly drives home your point. When asked the ultimate question a witness tends to explain the answer or give a response contrary to the point you want to make. A technique to use during closing argument is to rhetorically ask the trier of fact the ultimate question and answer it the way you want it answered.

 **Use simple language.** The use of simple language minimizes witness confusion. The witness understands the question and is less likely to argue with you over "definitions." More importantly, the court-martial members are able to understand the testimony. By using plain language, you will gain credibility with the members.

 **No quarreling.** Do not argue with the witness. Not only is arguing objectionable, but it is also offensive. The members are quick to identify with the witness and hold it against you. You must do everything possible to enhance your personal integrity with the members. There are situations, however, where a confrontational approach may be warranted. If you want to highlight unfavorable qualities about the witness's demeanor (liar, arrogant, hostile) then it may be appropriate to use a more aggressive cross-examination style. In such instances, counsel should be aware that there is no going back. If the cross fails, you lose credibility.

 **Control the witness: don't let the witness explain.** Questions should be phrased in a way that gives the witness the least opportunity to argue or give vague answers. Further, if you allow the witness to explain, then you have ceded control of the examination to the witness. Only in situations where you know that the explanation is favorable to your position should you permit the witness to explain. In such instances, you can further your personal advocacy objectives without sacrificing the quality of the cross-examination.

 **Proper Position.** Keep in mind that the local rules of court may dictate your position in the courtroom. When conducting cross-examination you should position yourself in **such** a manner so you appear confident, dominant, and in

control. Stay in the members' line of sight. Standing directly before the members focuses their attention on you, concentrating them on your questions. Stand close to the witness but vary your distance so that you reserve the intimidating effect of maximum closeness for key points from the most important witnesses. Standing close to the witness commands more attention from the witness. It also forces the witness to look at you and not at the members. Avoid standing too close, however as it may appear that you are attempting to unfairly intimidate or browbeat the witness. Remember: counsel should generally treat a witness with respect.



IV.

SKILL DRILLS.

A. ***Goal: Train counsel to employ the following skills.***

1. Conduct a direct examination of a lay witness.
2. Conduct a cross-examination of a lay witness.

B. ***Conduct the drills.***

1. ***Preparation:*** This training module requires at least three participants: a supervisor and two counsel. The training is divided into 4 steps: (1) a short period of instruction; (2) counsel preparation time; (3) a practical exercise and critique; and (4) a review of the sample solution. It takes two hours to complete the training module. Two fact scenarios serve as vehicles for the training: a bad check case and an assault case. Each scenario identifies a lay witness to be examined by counsel. The supervisor may select one or both scenarios when conducting the skill drill. Use the Counsel Handout to announce the training. Consider asking a cashier from the local exchange to serve as the witness for the training.
 - a. ***Step 1:*** Using the Supervisor's Guide for this training, present a 30 minute period of instruction to counsel on the elements of preparing and conducting direct and cross-examination of lay witnesses.

- b. *Step 2:* At the end of the instruction, give counsel one of the two scenarios enclosed (the bad check case or the assault case). Assign each counsel the role of either trial or defense counsel. Trial counsel will prepare a direct examination of the lay witness for the case selected, and the defense counsel will prepare a cross-examination. Give counsel about 30 minutes to prepare.
 - c. *Step 3:* Once preparation is complete, conduct the practical exercise. If possible, conduct this training in a courtroom with all necessary props. The trial counsel conducts the direct examination, immediately followed by the defense counsel's cross-examination. After completion of one direct examination and one cross-examination, critique counsel's performance. The practical exercise should last about 45 minutes.
 - d. *Step 4:* After the practical exercise, distribute the appropriate sample solution to counsel. You should review and discuss the solution at this session, summarizing the main points of preparing and conducting direct and cross-examination of lay witnesses. This final portion of the training should last about 15 minutes, but do not rush or omit it, as it is here that you reinforce the teaching points and answer counsel's questions.
2. *Role Play:* The supervisor plays the roles of the lay witness, military judge, and evaluator. Designate counsel to play the roles of trial counsel and defense counsel. Remaining participants sit in the panel box and make appropriate objections. In your discretion, you may wish to appoint a counsel as the military judge.

C. ***Scenario #1: Bad Check Case.***

1. *Lay Witness: The Exchange Cashier.*
2. *Direct Examination.* Evaluate counsel's use of the principles of direct examination. Other suggested evaluative points specific to conducting direct examination of an exchange cashier are:
 - a. Whether counsel elicited facts which prove the elements of the offense, i.e., that the accused cashed the check at the PX on the date alleged for the procurement of a thing of value.

- b. Whether counsel used the check as an exhibit to enhance the testimony of the witness.
- 3. *Cross-Examination.* Evaluate counsel's use of the principles of cross-examination.

D. **Scenario #2: Assault Case.**

1. *Lay Witness: Assault Victim.*
2. *Direct Examination.* Evaluate the use of the principles of direct examination. Other suggested evaluative points specific to conducting a direct examination of an assault victim are:
 - a. Whether counsel humanized the victim.
 - b. Whether counsel used “looping” to emphasize/repeat key aspects of the assault.
 - c. Whether counsel slowed down the action (the assault).
 - d. Whether counsel used the crime scene diagram or a demonstration to enhance the testimony of the victim.
3. *Cross-Examination.* Evaluate the use of the principles of cross-examination.



V.

REFERENCES.

- A. Thomas A. Mauet, *Trial Techniques* 73-138, 215-272 (4th ed. 1996).
- B. James W. McElhaney, *McElhaney's Trial Notebook* 337-465 (3d ed. 1994).
- C. Leonard Packel and Dolores B. Spina, *Trial Advocacy: A Systematic Approach* 17-40, 75-94 (ALI-ABA 1984).
- D. D. Rumsey, editor, *The Master Advocate's Handbook* 73-118 (National Institute for Trial Advocacy 1986).
- E. Irving Younger, *A Letter in Which Cicero Lays Down the Ten Commandments of Cross-Examination*, 3 *Litigation* at 18 (Winter 1977).

ENCLOSURES

Counsel Handout

Scenario for Bad Check Case

Sample Solution for Direct/Cross Examination of Bank Representative

Scenario for Assault Case

Sample Solution for Direct/Cross Examination of Assault Victim

EXAMINATION OF LAY WITNESSES - DIRECT AND CROSS

COUNSEL HANDOUT

I. TRAINING OVERVIEW.

- A. *Introduction.* We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on preparing and conducting direct and cross-examination of lay witnesses.
- B. *Preparation.* Bring your MCM to the training. Review the basic principles of direct examination, cross-examination, and objections.

II. KEYS TO SUCCESS.

- A. Know the Basic Principles of Direct Examination.
1. *Focus on the theory/theme.*
 2. *Organize logically.*
 3. *Keep it simple.*
 4. *Use non-leading; open-ended questions.*
 5. *Use orientation and transition questions.*
 6. *Use pace to emphasize important testimony.*
 7. *Volunteer weaknesses.*
 8. *Use exhibits to highlight facts.*
 9. *Listen to the answers.*
 10. *Proper position.*

B. Know the Basic Principles of Cross-Examination.

1. *Identify clear approach points consistent with witness theme.*
2. *Start strong; finish strong.*
3. *Know the answer.*
4. *Don't repeat the direct examination.*
5. *Use short, single-fact, leading questions.*
6. *Use simple language.*
7. *No quarreling.*
8. *Control the witness; don't let the witness explain.*
9. *Don't ask the ultimate question.*
10. *Proper Position.*

III.



REFERENCES FOR FURTHER STUDY.

- A. Thomas A. Mauet, *Trial Techniques* 73-138, 215-272 (4th ed. 1996).
- B. James W. McElhaney, *McElhaney's Trial Notebook* 337-465 (3d ed. 1994).
- C. Leonard Packel and Dolores B. Spina, *Trial Advocacy: A Systematic Approach* 17-40, 75-94 (ALI-ABA 1984).
- D. D. Rumsey, editor, *The Master Advocate's Handbook* 73-118 (National Institute for Trial Advocacy 1986).
- E. Irving Younger, *A Letter in Which Cicero Lays Down the Ten Commandments of Cross-Examination*, 3 *Litigation* at 18 (Winter 1977).

EXAMINATION OF LAY WITNESSES - DIRECT AND CROSS

SCENARIO #1: BAD CHECK CASE

Direct/Cross Examination of Exchange Representative

I. OVERVIEW.

The purpose of this drill is to enhance direct and cross-examination skills. Counsel will conduct a mock direct and cross examination of Mrs. Jane Smith, a Post Exchange (PX) cashier, based on the scenario provided. Pay special attention to organizing the examination, form of the questions, and verbal/non-verbal communication techniques. An exhibit of a bad check is attached. After the exercise, a sample solution will be provided.

II. FACTS.

The accused's name is LT Milo L. **Minderbender**, USA. He is assigned to Company A, 178th Infantry, Fort Knight. LT Minderbender has a checking account with NationsBank; he also has a cocaine habit. During the end of January, 199__, LT Minderbender depleted his checking account to support his cocaine use. On 24 January, 199__, LT Minderbender cashed a check (check # 2910) for \$250.00 at the Fort Knight PX. The maximum amount that can be cashed per customer is \$400.00 per day. He wrote the check prior to arriving at the PX. The check was undated. When he cashed the check, LT Minderbender presented his Armed Forces identification card as identification to Mrs. Jane **Smith**, a PX cashier. Mrs. Smith reviewed the check for completeness and verified the signature on the check. Mrs. Smith wrote the ID# on the check. She then accepted the check, counted out \$250.00 (twice) and gave it to the accused. Mrs. Smith stamped the back of the check, indicating the check was presented to the Fort Knight PX for cash. Later that day, Mrs. Smith gave the check to her supervisor, Mrs. Taylor, for deposit. Mrs. Smith has worked as a cashier for 15 years. Although she cannot remember the accused cashing the check, she can verify the process she uses to cash checks.

The PX sent LT Minderbender notice that his check was returned for insufficient funds. LT Minderbender did not redeem the dishonored check. The check is undated.

III. TASK.

- A. Conduct a direct examination of Mrs. Smith, the PX cashier, to establish that the accused, LT Minderbender, intentionally wrote and uttered a bad check to obtain cash. You know from the opening statements that the defense will proffer a mistake of fact/lack of intent theory and challenge the PX check cashing procedures; or

- B. Conduct a cross-examination of Mrs. Smith, the PX cashier, in support of a mistake of fact/lack of intent theory.

ENCLOSURE
Bad Check

BAD CHECK

LT MILO L. MINDERBENDER 221-54-9876 MID# 555 22910
22 HELLER DR. (804) 867-5308 20-22/1942
SCAGWAY, USA 99603

PAY TO THE ORDER OF Milo L. Minderbender \$ 250.00
Two hundred fifty and 00/100 DOLLARS

NationsBank 75 Years of Military Banking
NationsBank of Texas, N.A.
Fort Sam Houston Banking Center Pl.
PO Box 8000 San Antonio Tx 78225

FOR Cash Milo L. Minderbender
| : 123456543 1955 - 221 - | - 122 - | - 00 | | :

RETURNED FOR INSUFFICIENT FUNDS

ENCLOSE HERE

Fort Knight USA

Check for postage and stamp with signature for no fees, and
never accept payment on back of a returned check.

EXAMINATION OF LAY WITNESSES - DIRECT AND CROSS

SAMPLE SOLUTION

SCENARIO #1: BAD CHECK CASE

Direct/Cross Examination of Exchange Representative

I. SAMPLE DIRECT EXAMINATION.

INTRODUCTION

- Q. Are you Mrs. Jane Smith?
- Q. Where do you work, Mrs. Smith?
- Q. How long have you worked at the PX?
- Q. What is your job title?
- Q. What are your duties?
- Q. Have you received training to qualify you in your duties? Please describe.

CHECK CASHING PROCEDURES

- Q. Mrs. Smith, I am going to ask you questions about PX check cashing procedures. Are you familiar with those procedures?
- Q. How is it that you are familiar with the procedures?
- Q. When presented a check for cash, what information do you look for on the check?
- Q. Does the cashier make marks on the check?
- Q. What marks are made?
- Q. Why are these marks made?
- Q. Are you required, as part of your job, to make these annotations on the check?

IDENTIFICATION

- Q. Is it required that the person presenting the check show some form of identification?
- Q. Why must identification be presented?

- Q. What happens if the person does not present an identification card?
- Q. In your 15 years of experience as a cashier, have you ever cashed a check without some form of identification being presented?

CASH OR THING OF VALUE

- Q. Once proper identification is presented with the check, what does the cashier provide in return?
- Q. Is it indicated on the check whether the cashier provides cash or merchandise?
- Q. How is this annotation made?
- Q. Why is this annotation made?
- Q. How is cash presented to the customer?
- Q. Why is the cash counted twice before giving it to the customer?
- Q. Once the customer leaves, what do you do with the check?

QUESTIONED BAD CHECK

Note: Refer to Tab CC, Foundation Drills: Bad Check, for a detailed discussion on foundational requirements for a check.

- Q. Mrs. Smith, I am handing you PE-___ for ID (hand the witness the attached bad check). Do you recognize this?
- Q. What is PE-___ for ID?
- Q. How do you recognize this check?
- Q. Are there any markings on the check indicating it was cashed at the PX?
- Q. Who made those markings?
- Q. How do you know you made those markings?
- Q. When were those markings made?
- Q. Were you required to make those markings as part of your job? (Offer PE-__ for ID as evidence)
- Q. Looking at the front of the check, what does the mark: "MID# 55512" indicate?
- Q. How did you get that number?

- Q. Whose initials are next to that number?
- Q. Why did you place your initials there?
- Q. Did the signature on the ID card match the signature on the check?
- Q. And whose signature is on the check?
- Q. You also indicated you placed the mark on the back of the check. How did you do that?
- Q. When was this mark made?
- Q. What does this mark indicate?
- Q. How much cash did you give the customer?
- Q. After you provided the customer \$250.00, what did you do with PE-__?

Thank you, Mrs. Smith. I have no further questions.

II. SAMPLE CROSS-EXAMINATION.

CANNOT IDENTIFY THE ACCUSED

- Q. Good Afternoon Mrs. Smith. You indicated that you have worked as a cashier for 15 years; on average, during those 15 years you worked five days a week, didn't you?
- Q. Eight hours a day?
- Q. During those eight hours, you see a lot of soldiers, correct?
- Q. On any given day, you wait on over 25 customers.
- Q. About half of those customers cash checks, isn't that true?
- Q. So then, you cash about 15 checks a day, correct?
- Q. And the amount of the checks is usually different.
- Q. That means that in a week, you cash about 75 checks.
- Q. There is no way you can remember all the people who cash checks, is there?
- Q. Or the amount of the check.
- Q. Sometimes you can remember a particular customer cashing a check, correct?
- Q. Because of unusual clothing.

- Q. Or because of the way he or she acts.
- Q. In other words, if a person was acting shifty or strange, you would probably remember them, correct?
- Q. You do not remember LT Minderbender, do you?
- Q. Specifically, you do not remember LT Minderbender cashing a check for \$250.00 on 24 January 199__, do you?

STATE OF MIND

- Q. The maximum amount of money a person can cash a check for is \$400.00, correct?
- Q. Right outside your window is a sign that states this, correct?
- Q. It is a big sign.
- Q. With big words.
- Q. It is easy to read, correct?
- Q. So, if LT Minderbender wanted to, he could have written the check for \$400.00.
- Q. And if the check was properly completed and he showed the appropriate identification, you would have cashed it.

MISTAKE WITH PROCEDURES

- Q. Mrs. Smith, I want to talk to you now about the PX check cashing process. You are familiar with this process, correct?
- Q. You have been cashing checks at the PX for over 15 years, isn't that true?
- Q. It is important that you follow the proper procedures when cashing a check, right?
- Q. Every time a customer cashes a check, you follow the same procedures, don't you?
- Q. The first step in the process is verifying the accuracy of the check, correct?
- Q. During this step, you ensure the check is filled out properly.
- Q. You make sure the amount is complete, don't you?
- Q. And that the amount is written accurately.
- Q. You make sure the check is accurately dated, correct?
- Q. You also see if the customer signed the check, don't you?

- Q. You compare his signature to that on an ID card?
- Q. All this information must be accurate, correct?
- Q. If it is not, then you will not accept the check, will you?
- Q. This is an important step in the check cashing process, isn't it?
- Q. In fact, your duties as a cashier require you to check for the accuracy of this information, don't they?
- Q. Your initials on the check indicate that you checked this information, correct?
- Q. And that the check is complete and accurate.
- Q. Mrs. Smith, I am handing you PE-__ (the check). Please look at the front of the check. You initialed the check, correct?
- Q. So you found this check to be complete.
- Q. Mrs. Smith, what date was this check written?
- Q. You cannot tell, can you?
- Q. Because there is no date on the check, is there?

Thank you. No further questions.



III. REFERENCES FOR FURTHER STUDY.

- A. Major Henry R. Richmond, *Bad Check Cases: A Primer for Trial and Defense Counsel*, ARMY LAW., Jan. 1990, at 3.
- B. Trial Counsel Assistance Program (TCAP) Memo # 84, Trial Advocacy Supplement: Bad Check Cases, March 1993.

EXAMINATION OF LAY WITNESSES - DIRECT AND CROSS

SCENARIO #2: ASSAULT CASE

Direct/Cross Examination of Assault Victim

I. OVERVIEW.

The purpose of this drill is to enhance direct and cross-examination skills. Counsel will conduct a mock direct and cross examination of Private Smith, an assault victim, based on the scenario provided. Emphasize the organization of the examination, form of the questions, and verbal/non-verbal communication techniques. A diagram of the crime scene is attached. Upon completion of the exercise, a sample solution will be provided.

II. FACTS.

The victim's name is John A. **Smith**, a 19 year-old Private. The accused's name is Private **Jones**. Both are assigned to Company A, 178th Infantry. Both live on the same floor in Barracks number 1234. The accused lives in room 101. Smith lives in room 110. On Friday, 1 February 199__, between 1800 and 2100, soldiers in the barracks, including Smith, were drinking and listening to music. Smith drank about eight beers and appeared drunk. The accused was in his room watching television. At approximately 2100, Smith went to the accused's room and knocked on the door. The accused opened the door, and Smith came in. Smith was loud and obnoxious, and the accused, realizing Smith had been drinking, asked him to leave. Smith refused. The accused asked him two or three additional times, but Smith insisted on staying and watching television. According to Smith, the following transpired:

The accused told him that he would throw him out if he did not leave. Smith again refused to leave, asking the accused why he did not want to let him stay in the room. The accused then picked something up, stood up, and came at him. The accused struck Smith on the head with something sharp. Smith fell to the floor. Smith got up and opened the door, but was struck again on the back of the head, and fell on the floor in the hall. That is all he remembers.

The accused stated the following:

Smith came to the room, was drunk and obnoxious. After a few minutes, he asked Smith to leave, but Smith refused, saying he wanted to stay and watch television. Smith told the accused that if he tried to make him leave he would "kick his ass." Smith then stood up, and at that point, Smith started walking towards the accused. The accused picked up a crescent

wrench from his desk. Smith kept coming, so he hit Smith on the head with the wrench. Smith fell to the floor. The accused then opened the door and told him again to get out. Smith started to stand up. Fearing Smith would attack, Jones hit Smith again on the back of the head. Smith fell again. The accused pushed Smith out into the hall and closed the door.

Smith was found in the hall by several other soldiers who heard yelling. He was bleeding, and had several deep cuts on his head. He was taken to the emergency room, where his wounds were stitched and treated. He had one large cut on the front of his head, and another on the back of his head. His BAC was .14 one hour after the incident.

III. TASK.

- A. Conduct a direct examination of Smith to establish the offense of aggravated assault against Jones. You know from the defense opening that Jones's attorney will proffer a self-defense theory; or

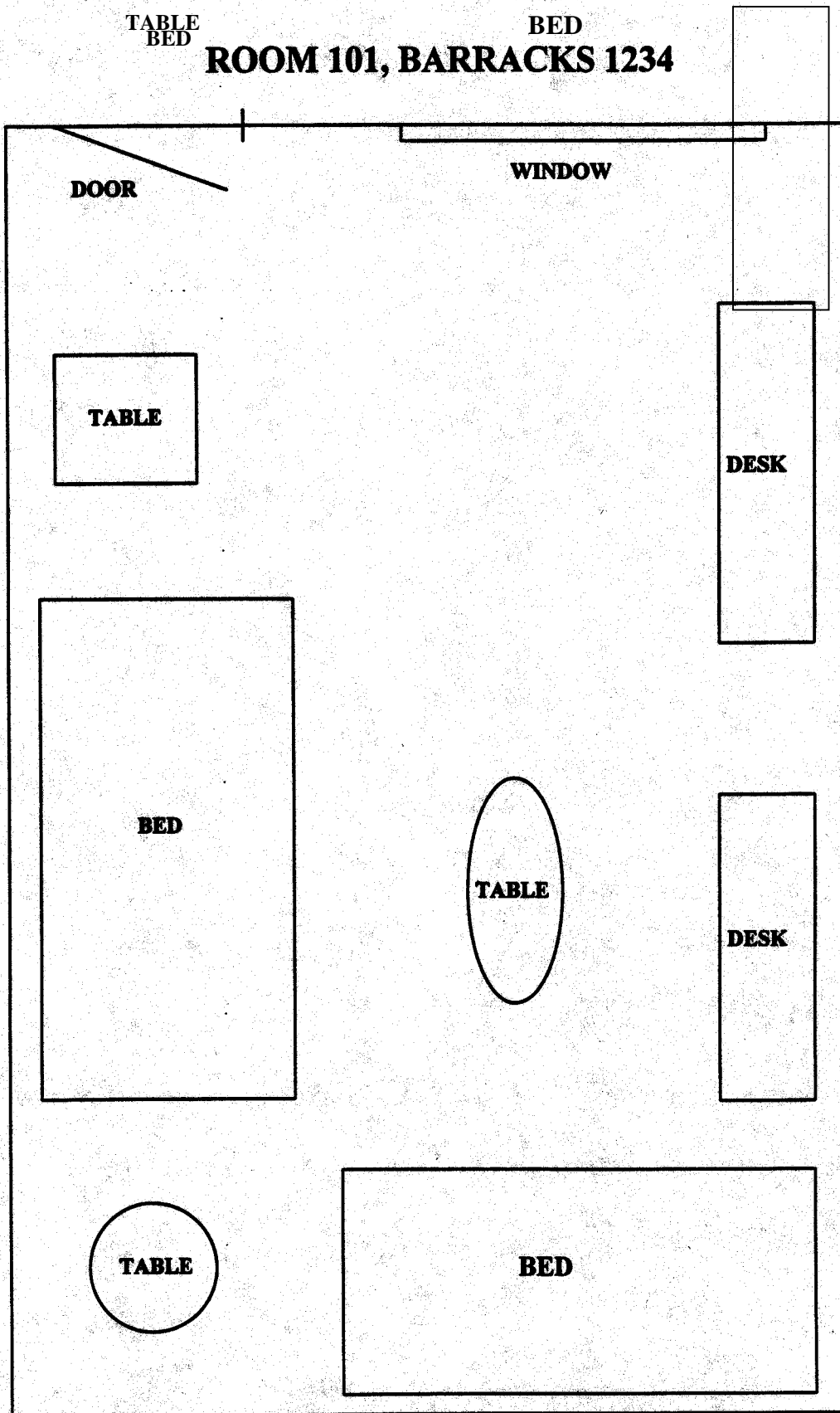
- B. Conduct a cross-examination of Smith in support of a self-defense theory on behalf of Jones.

ENCLOSURE
Crime Scene Diagram

TABLE
BED

BED

ROOM 101, BARRACKS 1234



EXAMINATION OF LAY WITNESSES - DIRECT AND CROSS

SAMPLE SOLUTION

SCENARIO #2: ASSAULT CASE

Direct/Cross Examination of Exchange Representative

I. SAMPLE DIRECT EXAMINATION QUESTIONS.

INTRODUCE THE WITNESS

- Q. Are you Private Smith, assigned to Company A, 178th Infantry?
- Q. How old are you?
- Q. How long have you been in the Army?
- Q. What is your military specialty?
- Q. How long have you been assigned to Company A?
- Q. Where do you live?
- Q. How long have you lived there?

SET THE SCENE

- Q. Private Smith, I'm going to ask you questions about the evening of 1 February 199__.
Where were you after work on that day?
- Q. What were you doing?
- Q. Were you drinking alcohol that evening?
- Q. How many beers did you drink that evening?
- Q. Were you drunk?
- Q. Did you visit the accused that evening?
- Q. Where did you visit him?
- Q. What time was it when you visited him in his room?

DESCRIBE THE ASSAULT

- Q. What happened when you went to his room?
- Q. What was the accused doing?
- Q. Was he standing or sitting?
- Q. What was he sitting on?
- Q. What was he wearing?
- Q. What did the accused say?
- Q. Did you leave when the accused asked? Why not?
- Q. Did he change his mind?
- Q. What did you tell him?
- Q. What happened when you didn't leave the accused's room?
- Q. What did the accused do when he got up?
- Q. Describe the object he picked up (color, size).
- Q. How was the accused holding the sharp object?
- Q. How did he appear?
- Q. What did the accused do after he picked up the object?
- Q. How did the accused move toward you?
- Q. As he aggressively moved toward you, what did you do?
- Q. What happened next?
- Q. How did he hit you?
- Q. Was the object he used hard or soft?
- Q. Where did he hit you?
- Q. How hard did he hit you?
- Q. Describe how it felt when the accused hit you.
- Q. Did you try to block his blow?

- Q. After he hit you, what did you do?
- Q. Did you try to stand up?
- Q. As you were standing up, what happened?
- Q. Where did the accused hit you the second time?
- Q. What did he hit you with?
- Q. How hard did he hit you?
- Q. Were you able to protect yourself from the blow? Why not?
- Q. Did the accused say anything? What?
- Q. What did you do after the accused hit you the second time?
- Q. At any time during this incident did you hit the accused?
- Q. At any time during this incident did you push the accused?
- Q. At any time during this incident did you raise your hand to strike the accused?

DEMONSTRATE THE INCIDENT

- Q. [Ask permission from the military judge to have the witness leave the witness box and conduct a demonstration of the assault.] Private Smith, please stand up and step out from the witness box. With me standing where you were in the room, show the court what the accused did after he stood up. [Counsel should describe the demonstration for the record and return the witness to the witness box.]

CRIME SCENE DIAGRAM

Note: Refer to Tab E, Module 1, Foundations, Diagram, for a detailed discussion on foundational requirements for a diagram.

- Q. Private Smith, please direct your attention to the diagram on the easel to your left, which has been marked as PE ____ for ID. Do you recognize this diagram?
- Q. What is it?
- Q. How do you recognize it?
- Q. Is this diagram a fair and accurate representation of the accused's room, Room 101?

- Q. [Request permission to have the witness approach the diagram.] Private Smith, using the red marker, please place a “S” where you were standing when the accused hit you. [State for the record that the witness did as directed.]
- Q. Now using the same red marker, place a “J” where the accused was standing when he hit you. [State for the record that the witness did as directed. Counsel should offer the diagram into evidence.]

DESCRIBE INJURIES

- Q. What happened after you were hit in the head the second time?
- Q. What happened once you were in the hall?
- Q. What is the last thing you remember?
- Q. After regaining consciousness, what happened?
- Q. Did you have any injuries? Please describe them.
- Q. Did you receive any medical attention?
- Q. How were your injuries treated?

CONCLUSION

- Q. Private Smith, why did you go to Private Jones’s barracks room on the evening of 1 February 199__?
- Q. Did you ever want to fight him?

Thank you, Private Smith. Nothing further, your honor.

II. SAMPLE CROSS-EXAMINATION QUESTIONS.

ABILITY TO RECOLLECT

- Q. Private Smith, before going to Private Jones’s room on the evening of 1 February, you were drinking beer, weren’t you?
- Q. You started drinking beer at 1800 that evening.
- Q. You finished drinking beer at 2100.
- Q. Within this three hour-period, you drank about eight beers, didn’t you?

- Q. During this period, you didn't eat anything, did you?
- Q. You just drank beer and listened to music.
- Q. After drinking eight beers in three hours you felt the effect of the alcohol, didn't you?
- Q. And in fact, your blood alcohol content, one hour after the altercation, was .14.
- Q. You would agree with me that alcohol impairs your ability to remember events.

THE VICTIM IS THE AGGRESSOR

- Q. After drinking those eight beers you went to Private Jones's room.
- Q. You knocked on his door.
- Q. Private Jones opened the door.
- Q. And you walked inside.
- Q. The TV was on.
- Q. It was clear to you that Private Jones had been watching TV.
- Q. Now Private Jones wasn't drinking beer with you, was he?
- Q. In fact, he had not been drinking at all.
- Q. He was having a quiet evening in his room, watching TV.
- Q. Shortly after Private Jones let you in his room, he asked you to leave, didn't he?
- Q. He asked you more than once to leave, correct?
- Q. He repeatedly asked you to leave, isn't that true?
- Q. But you refused to leave.
- Q. Each time he asked you to leave, you refused.
- Q. You wanted to stay in his room, didn't you?
- Q. You did not like Private Jones asking you to leave, did you?
- Q. It upset you, didn't it?
- Q. During this entire time, you were standing, weren't you?
- Q. Initially, Private Jones was sitting.

- Q. Then Private Jones stood up.
- Q. Private Smith, how tall are you?
- Q. That is about four inches taller than Private Jones, isn't it?
- Q. How much do you weigh?
- Q. You would agree that you outweigh Private Jones.
- Q. When Private Jones stood up, you moved toward him, didn't you?
- Q. When you moved toward Private Jones, he didn't have anything in his hand, did he?
- Q. It was only after you moved toward him that Private Jones hit you.

Thank you. No further questions.

Tab C
Module 5

Apply the Skill
Expert Witnesses



The Advocacy Trainer

EXPERT WITNESSES - QUALIFYING A DRUG EXPERT

SUPERVISOR'S GUIDE

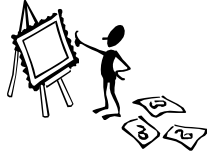
Experto credite (Believe an Expert)
Virgil



I.

SKILL OVERVIEW.

- A. **Goals.** More and more courts-martial involve the use of experts. Certainly, charges of drug use, child abuse, sexual assault, homicide, or economic crime will likely require expert testimony of some kind - be it a psychiatrist, pathologist, handwriting analyst, or chemist. It is therefore of the utmost importance that trial and defense counsel know how to use expert testimony. In many regards, planning for the expert witness is similar to planning for the lay witness. Both require counsel to first ask: "what can this witness actually do to establish or corroborate an element of my case or contradict an element of the opposition?" Once this relevancy hurdle is met, there are specialized rules of evidence dealing with the introduction of expert testimony. This exercise focuses on those areas unique to packaging an expert's direct examination.
- B. **Training Overview.**
1. Legal principles regulating expert testimony can be divided into three main areas: (1) whether the expert will be allowed to testify; (2) the content of that testimony; and (3) the scope of cross-examination of the expert witness. This module covers an aspect of the first, i.e., how to qualify an expert. Establishing the basis of the opinion, the content of the expert's testimony, and the scope of cross-examination are not covered in this module.
 2. This training requires at least three participants: one supervisor and two counsel. The training is divided into four steps: (1) an instruction period; (2) counsel preparation time; (3) a practical exercise and critique; and (4) a sample solution review. It takes one hour to complete this training module.





II.


THE ART.




- A. ***Establishing the Expertise of a Witness.*** The guidelines are stated simply, but are not so simple to apply. To testify as an expert, a witness must be qualified by reason of knowledge, skill, experience, training, or education in a field of specialized knowledge.¹ To qualify a witness as an expert, you must call that witness to the stand and elicit testimony about his or her credentials, unless opposing counsel stipulates to the witness's qualifications and the military judge requires you to stipulate.² A qualifications checklist can include the following:³

 Business or Occupation. What -- how long -- description of field -- company or organization -- capacity -- how long -- where located -- prior positions -- description of positions.

 Education. undergraduate school -- degree -- when graduated. post-graduate school -- degree -- when graduated -- area of study.

 Training. Formal courses -- what -- when -- trained under recognized expert -- who -- when -- how long.

 Licenses. What -- when reviewed -- specialty certification -- exams required -- when -- requirements.

 Professional Associations. What -- positions held.

¹ See MRE 702.

² Counsel should rarely stipulate to their expert's qualifications. It is much more effective to have the panel members hear the impressive credentials of your witness instead of a cold, dispassionate, and unemotional instruction from the military judge that "the witness is qualified as an expert in the field of forensic odontology." If your military judge encourages you to stipulate, an alternative is to have a copy of the witness's resume admitted as an exhibit for the panel to read during deliberations or to ask for the most favorable instruction possible, e.g., "Dr. Swanson is qualified as DoD's leading expert in the field of forensic toxicology."

³ Thomas A. Mauet, *Fundamentals of Trial Techniques* 285-89 (4th ed. 1996).

- ☞ Other Background. Teaching positions -- publications -- lectures -- consulting work.
- ☞ Expert Witness at trials. How many -- which side.
- ☞ Experience in specialty. Types of examinations conducted -- how many. Ever perform a ___ test -- how many? Does that experience include ___? Over these ___ years of practice, how many ___ have you (bought, sold, dealt with, installed, taken, examined, analyzed, etc....)?

B. ***Tendering the Witness.*** After eliciting credentials, counsel should formally tender the witness to the court as an expert in a particular field or specialty.⁴



III.

PRACTICE POINTERS.

- ➔ Many expert witnesses will already have a list of qualification questions in hand. Be sure to ask whether this is the case, and to incorporate packaged foundation questions into your examination. While there is no need to reinvent the wheel each time, remember that this is your case. You are the counsel and the expert is the witness. Not every bullet on the resume is relevant and need not be covered. Be selective.
- ➔ ***Prepare*** your witness to discuss what gives him special expertise in the area at issue, such as any particular work experiences, special training, or publications.
- ➔ ***Mix leading and nonleading questions.*** Use leading questions to cover basic facts quickly. Leading questions also help avoid the impression that the witness is boasting. Because these are preliminary matters, the military judge should overrule any objection that these questions are improperly leading.

⁴ For example, “Your honor, the government offers Doctor Kildare as an expert in the field of orthopedic surgery.” Be specific. Do not, for example, qualify the witness as an expert in “child abuse” or “chemistry” but in the area your case needs help, such as “child abuse accommodation by reporting victims,” or “biochemical drug testing of urine samples.”

IV.



SKILL DRILLS.

Qualifying a Drug Lab Expert. Given a curriculum vitae (CV), counsel lays an adequate foundation to qualify a drug laboratory expert in a case of a soldier charged with wrongful use of marijuana.

A. Instructor explains the drill. Participants assume roles of counsel and witness. Counsel elicits sufficient information to lay a foundation for the expert's testimony using both leading and non-leading questions. Counsel authenticates and offers a CV, responds to an offer to stipulate to the expert's qualifications, and offers the witness to the court as an expert in the field.

B. Instructor reviews the principles and tactics of qualifying an expert.



Elements of the Foundation. MRE 702 provides that a witness may qualify as an expert "by knowledge, skill, experience, training, or education." This broad standard gives the proponent some flexibility in establishing the qualification. Here is a nonexhaustive list of factors typically relied upon:

- witness has acquired degrees from educational institutions;
- witness has other specialized training in the field of expertise;
- witness is licensed or board certified to practice in the field;
- witness has substantial experience in the field;
- witness has taught in the field;
- witness has published in the field;
- witness belongs to professional organizations in the field; and
- witness has previously testified as an expert in the field.



Purpose. Aside from the bare legal requirement to qualify the witness, there are tactical advantages to be gained by a skilled presentation of credentials. Qualifying the witness bolsters his or her credibility before the fact-finder. If the testimony is boring or the witness appears arrogant, however, the impact may be negative.



Responding to the offer to stipulate. Opposing counsel may offer to stipulate to the expert's qualifications for the declared purpose of saving the court's time. Resist attempts to stipulate. The detail is often too important because the witness's testimony is central to your case. There are, however, a variety of factors to consider in deciding whether to stipulate, the centrality of the expert's testimony, judge-alone versus panel, the relative strength of your expert's qualifications, and the effectiveness of your witness.

- Stipulate. In cases with a familiar witness before judge alone, you may agree.
- Conditional stipulation. Agree to stipulate on the condition that opposing counsel agree to the admission of the expert's curriculum vitae into evidence.
- Decline to stipulate. Be sure the panel knows why you refused. "Your honor, the defense appreciates counsel's offer to stipulate to Dr. Frankenstein's impressive credentials. We believe, however, that given the importance of his testimony, the members are entitled to hear them."

C. Conduct the drill and critique!

COUNSEL HANDOUT

CURRICULUM VITAE

Paul Bunyon Klondike
Forensic Toxicology Drug Testing Laboratory
2490 Wilson Street
Fort Meade, Maryland 20775-5375
(301) 677-7085

EDUCATION

1967, G.E.D. Case Western Diploma Mill
1975, B.S. Chemistry, Providence College
1977, M.S. Organic Chemistry, California Institute of Technology
1981, Ph.D. Forensic Chemistry, Puget Sound University

AREAS OF SPECIALIZATION

Microbiology, biochemistry (including intermediary metabolism), immunology, virology, human anatomy and physiology

TEACHING EXPERIENCE

Graduate assistant while attending Nova University. In that capacity, I taught the laboratory portion of the following courses: Biology, Organic Chemistry, Anatomy and Physiology, and Microbiology

ADDITIONAL TRAINING

1996, Capillary Columns and Gas Chromatography, Dr. Emil Jennings, University of Heidelberg
1994, Radioimmunoassay Training Program, Roche Diagnostic Laboratories
1992, Fundamentals in Forensic Toxicology. Pharmacologic Concepts seminar sponsored by the American Academy of Forensic Sciences
1989, Forensic Toxicology Seminar, Armed Forces Institute of Pathology

LABORATORY EXPERIENCE

January 1992 to the present. Fort Meade Forensic Toxicology Drug Testing Laboratory. Supervisory Chemist, Lab Certification Officer/Quality Assurance Officer. Routinely perform internal quality assurance audits on all sections of the laboratory to ensure compliance with strict quality assurance standards. Evaluate and certify scientific and forensic data in the analysis of urine for drugs of abuse. Testify in court proceedings and certify litigation packets.

October 1984 to December 1991. 10th Medical Laboratory, Landstuhl, Germany. Virology section. Responsible for processing, assigning protocol, inoculating, and reading the results of incoming specimens. Toxicology section. Primary gas chromatography operator and primary atomic absorption operator in the toxicology instrument lab. I also developed the use of a Mozart assisted thin layer chromatography system currently used worldwide to prepare specimens for gas chromatography injection.

PUBLICATIONS

Willette & Klondike, *Interpreting Cannabinoid Assay Results, Continuing Education for Syva Customers*, Winter 1986.

Klondike, *Marijuana, the Passive Inhalation Defense, and Marked Degrees of Separation*, AMERICAN JOURNAL OF TOXICOLOGY, April 1994.

SAMPLE SOLUTION

Qualifying the Expert Witness

- Q.** *Sir, are you Dr. Paul Bunyon Klondike, last name spelled K-L-O-N-D-I- K-E. Social security number 365-43-7817?*
- A.** *Yes, I am.*
- Q.** *Are you a civilian employee of the United States Government?*
- A.** *Yes.*
- Q.** *Where are you employed?*
- A.** *I'm currently employed as the supervisory chemist at the Forensic Toxicology Drug Testing Lab, Fort Meade, Maryland.*
- Q.** *What does a supervisory chemist do?*
- A.** *I'm essentially the foreman of a five person section. I'm in contact with the operation of the lab when I'm there, which is most of the time. The only time I'm absent is when I am testifying in court or taking continuing education courses.*
- Q.** *Dr. Klondike, I'm going to ask you about your formal educational background. What did you study as an undergraduate?*
- A.** *Well, it was primarily chemistry, although I also took several humanities courses just to round out my education.*
- DC.** *Your honor, the defense is willing to stipulate to Mr. Klondike's qualifications to testify as an expert in this case.*
- TC.** *The government believes the panel is entitled to hear Dr. Klondike's impressive credentials and does not accept the offer to stipulate.*
- MJ.** *Proceed.*
- Q.** *Dr. Klondike, where is your first degree from?*
- A.** *My first degree is a Bachelor of Science in chemistry from Providence College, Providence, Rhode Island.*
- Q.** *Did you receive any honors?*
- A.** *Yes. I graduated with highest honors, finishing 15th out of 980 students and was the number one science student in my class.*
- Q.** *Do you have any advanced degrees?*
- A.** *Yes, I do. I have a Masters in Science degree in organic chemistry from the California Institute of Technology and a Ph.D. in forensic chemistry from Puget Sound University.*

- Q. Are you a member of any professional societies?**
A. Yes. I'll try to list them in alphabetical order, but that may be a problem. The American Chemical Association, The Forensic Drug Institute, The American Society of Military Surgeons, The Eastcoast Evaluation Society....
- Q. Thank you, doctor. Can you briefly define what the study of chemistry, in general terms, encompasses?**
A. It is essentially the study of substances, their properties, structures and transformations.
- Q. Are there different types of chemistry?**
A. Yes. There is organic chemistry and inorganic chemistry.
- Q. What is included within the field of organic chemistry?**
A. Organic chemistry includes the study of carbon-based compounds.
- Q. Are carbon-based compounds those compounds in which illegal drugs are found?**
A. Yes.
- Q. Is the drug marijuana considered a carbon compound?**
A. Yes, it is.
- Q. You stated the field of chemistry includes the transformation of compounds. How are compounds transformed?**
A. They can be transformed synthetically in the laboratory or they can be transformed biologically in a living organism.
- Q. Would the living organism include the human body?**
A. Yes.
- Q. Have your studies included the different methods by which these compounds are transformed?**
A. Yes.
- Q. Have they included both biological and synthetic transformation?**
A. Yes.
- Q. What is the mission of the Fort Meade Forensic Toxicology Drug Testing Lab?**
A. Currently we are tasked with screening specimens from the Army for certain specified drugs of abuse: marijuana, cocaine, amphetamines, barbiturates, PCP, and opiates, to include morphine and codeine.

- Q. How long has the Forensic Toxicology Drug Lab been involved in testing urine for the presence of drugs?**
A. The program started sometime in 1970.
- Q. How long have you been employed at the Drug Lab?**
A. Since the early part of 1992.
- Q. How long have you been employed in a supervisory capacity?**
A. Since 1994.
- Q. During the time that you have been employed as a supervisory chemist, how many urine specimens have been tested in your laboratory?**
A. I have overseen the analysis of approximately 350,000 specimens.
- Q. Are you familiar with all aspects of the operations of a drug testing laboratory?**
A. Yes, I am.
- Q. Do you understand both the scientific basis for the testing and the practical aspects of how samples are handled?**
A. Of course.
- Q. Have you received any training or certification enabling you to work in the military drug testing laboratory?**
A. Yes. I have attended annual training and certification programs at the Armed Forces Institute of Pathology.
- Q. What articles have you published that deal specifically with identification of marijuana in urine?**
A. I have published numerous articles dealing with use of instrumentation in toxicology. I have further published an evaluation of the radioimmunoassay test as a screening device. I've also published articles involving the extraction, derivitization and identification of the marijuana and cocaine metabolites in urine. And I've written a book having to do with the morbidity, the adverse consequences and the incidence and prevalence of drug use among individuals seeking psychiatric treatment - which, I might add, recently came out on the N.Y. Times Bestseller's List.
- Q. Have you ever testified as an expert chemist in a court-martial?**
A. Yes, I have.
- Q. How many times?**
A. Approximately 75 times since 1992.
- Q. Have you testified for both the government and the defense?**
A. Yes. I've been asked to testify about 55 times for the government and 20 for the defense.

- Q. Of those, how many times did the testimony deal with the analysis of urine for drugs of abuse?**
- A. All 75.**
- Q. Has the military judge, on each of those 75 occasions, accepted you as an expert?**
- A. Yes. I've been asked to give my expert opinion each time.**
- Q. Dr. Klondike, do you feel qualified to testify in this court today on the issue of marijuana toxicology, its effect on human personality, and the physical and psychological impact of accumulated use?**
- A. Yes.**
- Q. Dr. Klondike, I am handing you Prosecution Exhibit 5 for Identification. Do you recognize it?**
- A. Yes. It is a copy of my curriculum vitae.**
- Q. Your honor, the government requests that the Court recognize Dr. Klondike as an expert in the field of the biochemical testing and analysis of urine samples for the presence of illegal drugs.**
- MJ. Does the defense wish to ask any questions of Dr. Klondike at this time concerning his credentials?**
- DC. The defense has no objection to qualifying Mr. Klondike as an expert.**
- MJ. The Court recognizes Dr. Klondike as an expert in the field of biochemical testing and analysis of urine samples for the presence of illegal drugs.**
- TC. Your honor, the government offers Prosecution Exhibit 5 for Identification into evidence as Prosecution Exhibit 5 for consideration by the panel members.**
- DC. Objection, Your honor. The c.v. is hearsay and there is no exception applicable here. Further, the c.v. is cumulative to the information already elicited by the trial counsel during the direct examination of this witness.**
- MJ. Sustained.**

Tab C
Module 6

Apply the Skill
Assembly of Sentencing Case



The Advocacy Trainer

SENTENCING

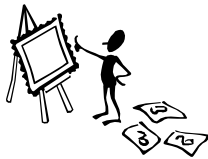
SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goal.** This module develops counsel's ability to present admissible and effective sentencing evidence. With our court-martial practice consisting of more pleas than contests, advocacy in the sentencing phase of trial is vital. All the fundamental techniques of advocacy are required for this process.
- B. **Training overview.** The supervisor can conduct training with one or more counsel. The focus of the Skill Drills is on assembly of a sentencing case and on introduction of three types of evidence: evidence in aggravation (including mission and victim impact evidence), evidence of rehabilitative potential, and defense extenuation and mitigation (family impact) evidence.

Although the supervisor can play the witness with the scenario provided in the Counsel Handout, a "real" witness is recommended, *e.g.*, a local company commander or a clerk from your office to role-play. The training is divided into four steps: instruction period, counsel interview and preparation, practical exercise and critique, and sample solution review. It takes about one hour to complete. Each drill can be completed in 20 minutes.



II. THE ART.

- A. **Case Development.**
1. **Developing a theme.** Every good drama has a theme, and a court-martial is no exception. A case theme provides both purpose and focus for the trial advocate and the fact-finder.

2. ***Assembling the sentencing case.*** Counsel need a methodology to assist them in this task. One of the best tools is a *checklist*. Sample checklists are included in this section; the best checklist, however, is the one that is *used*. Encourage counsel to develop their own checklists.

3. ***Theory and theme.*** Help counsel understand these critical concepts, as counsel often confuse them.

- **Theory** is an adaptation of a set of facts to legal issues in the case; the meshing of facts with the law to convict or acquit. The case theory focuses on the key legal elements, definitions and defenses relevant to the case.
- **Theme** illustrates the most personal and specific aspects of the case (*e.g.*, the accused is a timebomb or predator; the accused is a victim of misidentification; the victim is making a vindictive charge of rape). The theme provides the framework of logic and reason that unifies the entire case for the fact-finder. Counsel should be able to state their case theme in a few words – a *bumper sticker* for the case.

4. ***Why is a theme important?***

- Without a case theme, the significance of testimony, exhibits, and argument can be easily overlooked, forgotten or ignored by the fact finder. Case themes are helpful in structuring trial tactics and strategies.
- Failure to articulate a case theme invites the military judge/members to develop their own case theme. This is always dangerous because their theme may be inconsistent with the position you are advocating (and want them to adopt).

B. ***Development of a Case Theme***

1. ***When should theme development begin?*** A defense counsel should start thinking about possible themes the moment the client walks in the door. Trial counsel should start considering a case theme the moment he starts gathering information about a new case.

2. ***Where do you get ideas?*** Everywhere and anywhere, including movies, novels, magazine articles, television, the Bible, etc. Brainstorm with other counsel during staff meetings, training sessions, or when standing around the water cooler or coffeepot. When selecting a theme, consider your audience. When the audience is familiar with the source material and idea, they will be able to identify and understand the theme.
3. ***Bumper sticker.*** Fit your theme into a bumper sticker. Distill the essential features of your case so you can succinctly deliver an easily grasped theme to the panel.
4. ***Examples:***

Greed for Money, Power, or Status.
"A Thief, is a Thief, is a Thief."
Youthful Ignorance or Immaturity.

C. ***How do you assemble a sentencing case?***

1. Counsel must understand the law with respect to sentencing (see this module below). With this knowledge, counsel can begin accumulating “sentencing” evidence as soon as case preparation begins! The goal is to organize this process in some manner. Use a checklist. (See Counsel Handout).
2. ***Get out of the office and talk with people.*** Both trial and defense counsel must visit the crime scene, interview the chain of command, ask company first sergeants to recommend witnesses to interview. Ask them whether the accused’s particular offense(s) affect the unit mission and why. Interview friends, family, teachers, acquaintances from church and other associates from community activities. Avoid legal terminology during the interviews. Counsel's job is to synthesize and present the information they gather in a coherent and admissible form.
3. ***Listening.*** Practice this important skill during pretrial preparation. During the preparation, counsel's goal is to get witnesses to talk. Counsel must then ***listen*** to what the witnesses tell you; what the witness does not say may be equally as important as what the witness says.

D. ***Sentencing Evidence – Building Blocks to Argument.***

1. ***Instructions.*** The Military Judge's standard sentencing instructions at page 92 or DA Pam 27-9, Military Judge's Benchbook, provide:

“Society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his/her crime(s) and his/her sentence from committing the same or similar offense(s). **The weight given to any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.”**

The Military Judge concludes his instructions at page 104 of DA Pam 27-9 as follows:

“In selecting an appropriate sentence you should select the sentence which will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society.”

2. ***Five Reasons for Sentencing.*** Counsel can weave any or all of these reasons for sentencing throughout their sentencing case and argument.



Rehabilitation. Also called *correction* or *reformation*, under this theory, society punishes the convicted criminal by giving him appropriate treatment in order to rehabilitate him and return him to society.



Retribution. Also known as *punishment*, *revenge* or *retaliation*, this theory inflicts suffering on the wrongdoer as revenge or retaliation against the wrongdoer.



Protection of Society. Also called *restraint*, *incapacitation*, or *isolation*, this notion assumes that society may protect itself from people deemed dangerous because of their criminal conduct by isolating them from society.



Preservation of Good Order and Discipline in the Military.

The focus here is to maintain the confidence in command and obedience to orders that is the key to mission accomplishment.



General Deterrence. Also known as *general prevention*, this theory holds that the sufferings of one criminal for his crime will deter others from committing future crimes, lest they suffer the same unfortunate fate.



Specific Deterrence. Also known as *prevention*, this theory aims to deter the criminal himself from committing further crimes by providing an unpleasant experience he will not want to endure again.

The applicable theory(ies) depends on the facts of each case.

- E. **Sentencing Factors.** Counsel can use the following list of factors (also in Counsel Handout) to help focus on an appropriate theme and to craft a sentencing case and argument. Sentencing factors are limited only by the facts and by counsel's creativity.

I. General



Role of accused in the crime: Leader, accomplice or minor role; sole perpetrator (or, the accused having no apparent disposition to do so was induced by others to participate in the crime).



Place of Offense: Public building, victim's residence, accused's residence, secluded area, on the street, in the barracks, on base overseas, etc.



Victim's status: Officer/SNCO/NCO/Marine/Civilian/Dependent.



Type of victim: Crime against person or property (military or civilian victim; age of victim; foreign national; Government or private property).



Victim's relationship to offender: Stranger, friend, family, subordinate, chain of command or police, etc.



Victim provoked the crime to a substantial degree, or victim contributed substantially to the criminal event.



Damage or Injury: Degree of actual or threatened property damage or personal injury (permanent or temporary).










Unit Impact: Effect on military discipline / readiness / unit effectiveness.













Weapons: Type of weapon and degree of use (such as, in possession only, used to threaten, actual application).

II. Aggravation

-  Abuse of trust or position (accused's access to the victim was due to a position of trust the accused held).
-  Injury to the victim.
-  Weapon(s) involved.
-  Accused / victim relationship (random crime or accused knew the victim).
-  Youth or advanced age (fragility) of victim.
-  Accused committed the offense while pending other charges.
-  Accused has a criminal pattern or character (prior NJP or conviction, particularly where the prior offenses are serious or similar to the current offenses).

III. Mitigating Factors

-  Absence of any prior disciplinary or criminal record of the accused.
-  Accused's extreme youth, or special conditions (health, low IQ, or service related injury).
-  Good military character (service record and favorable opinions of relevant witnesses) and rehabilitative potential.
-  Accused supports dependents.
-  Victim forgiveness (including the chain of command).
-  Cooperation with law enforcement and prosecutors in this and other crimes / confession.
-  Accused's remorse and apology (including the timing thereof).
-  Provocation by the victim / accused's circumstances.
-  Restitution.
-  Accused's conduct between the offense and the trial.

III.



THE LAW.

- A. **General.** R.C.M. 1001 prescribes the rules for the sentencing procedure. R.C.M. 1001(b) lists the categories of evidence the prosecution may present. R.C.M. 1001(c) discusses matters that may be presented by defense. R.C.M. 1001(f) provides the basis for admission of statements made during providence inquiry. R.C.M. 1001(g) prescribes the sentence argument limitations.
- B. **Sentencing Matter Presented by Prosecution.**
1. **R.C.M. 1001(b).** The following is a three step approach for trial counsel to evaluate potential sentencing matter:
 - a. Does the evidence fit one of the five enumerated categories of R.C.M. 1001(b)?
 - b. Is the evidence in an admissible form?
 - c. MRE 403: Is the probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the members or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence?
 2. **R.C.M. 1001(b)(1).** Service data from the charge sheet. Make sure it is correct.
 3. **R.C.M. 1001(b)(2).** Personal data and character of prior service of the accused.
 - a. Always ask, is the document in an admissible form? For example, is Article 15 complete, with certification and from the proper source?
 - b. Is the document relevant?
 - c. MRE 403: Can't use (b)(2) to "backdoor" otherwise inadmissible evidence (*e.g.*, supporting documents to the Article 15 are not admissible).

4. **R.C.M. 1001(b)(3).** Prior convictions.
 - a. Courts-martial convictions. For sentencing purposes, it is a conviction once the sentence is adjudged.
 - b. Civilian - Look to law of the jurisdiction.
 - c. A pending appeal goes to the weight, not the admissibility, of the conviction (except for SCM or SPCM without an MJ). Evidence of the appeal is admissible.

- d. Methods of Proof.
- 1) Personnel Records.
 - 2) Promulgating Orders.
 - 3) Record of Trial (Relevant Portions).
 - 4) Arraignment Calendar.
 - 5) State Agency Records.

5. **R.C.M. 1001(b)(4).** Evidence in aggravation. This evidence must be “**directly relating** to or **resulting from** the offenses of which the accused has been found guilty.” According to the Discussion to R.C.M. 1001(b)(4), this includes:

- **Victim impact:** Evidence of financial, social, psychological, and medical impact on or cost to a victim as a result of the offense committed by the accused.
 - ✓ Phone bills, travel costs, and medical bills incurred because of the offense.
 - ✓ Value of stolen property.
 - ✓ Persistent medical problems (physical or psychological disabilities).
 - ✓ Trauma to the rape victim's family.
 - ✓ Family's frantic search and distress on the night of incident.
 - ✓ Impact of the homicide on the community.
- **Unit impact:** Evidence of significant adverse impact on the mission, **discipline**, or efficiency of the command directly and immediately resulting from the accused's offense.
 - ✓ Co-workers performed extra duty because of accused's AWOL.
 - ✓ Unit required soldiers to perform 24-hour hall guard after larceny offense.
 - ✓ Work reassigned to other units to avoid contact between a sex offender and his victim.
 - ✓ Hostile work environment caused by section leader's conduct with subordinates increases turn-around time for repair shop.
 - ✓ Accused's loss of security clearance required removal from flightline which affected crew integrity.

- ✓ Unit nondeployable / not mission capable because accused was the only member of the unit capable or trained to perform a critical task [e.g., Tagalog linguist, communications specialist, physician's assistant or boom crane operator].



The members of the accused's immediate chain of command (typically the accused's platoon sergeant, first sergeant and company commander) are key components of the government's sentencing case. These soldiers are often in the best position to know the accused and gauge the effect of the misconduct on the unit, and are the best witnesses to speak on these issues.

- Note: MRE 403 is always **applicable**.

6. **R.C.M. 1001(b)(5)**. Evidence of rehabilitative potential.

- a. "Rehabilitative potential" refers to the accused's potential to be restored to a useful and constructive place **in society**, and **not potential for continued military service**.
- b. Evidence of the accused's rehabilitative potential must be introduced through opinion testimony; whether that opinion is admissible and the quality of that opinion depends on the quality of the foundation. Opinion evidence of rehabilitative potential must have a "rational basis" and may not be based principally on the severity of the offense. Further, the scope of the evidence is limited to whether the accused has rehabilitative potential, **and not testimony regarding the appropriateness of a punitive discharge or the particular reasons for the opinion**.
- c. Foundation:
 - Sufficient knowledge of the accused to form a rationally-based opinion;
 - Opinion must be helpful to the sentencing authority;
 - Not based on seriousness of offenses, what's best for the service, or administrative consequences of conviction; and

- Scope is limited to whether accused has rehabilitative potential, as opposed to specific reasons for the opinion or an opinion as to potential for future service.

C. *Sentencing Matters Presented by Defense.*

1. **R.C.M. 1001(c)(1)(A).** Matters in extenuation. This includes the circumstances surrounding the commission of the offense, including reasons that do not constitute a legal justification or excuse.
2. **R.C.M. 1001(c)(1)(B).** Matters in mitigation. Anything that would lessen the punishment or furnish grounds for a recommendation of clemency. This includes:
 - a. Nonjudicial punishment has already been imposed for the pending offense;
 - b. Particular acts of good conduct or bravery; and
 - c. Evidence of the reputation or record of the accused for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.

These categories are very broad. They typically include information such as:

- ✓ Awards, achievements and letters of commendation.
- ✓ Favorable evaluation reports (NCOERs and OERs).
- ✓ Character witnesses from the chain of command (past and present).
- ✓ Accused's upbringing, background and current family situation.
- ✓ Financial impact of reduction / forfeiture / loss of retirement benefits.
- ✓ Remorse, restitution, and cooperation with the government.

3. **Rules Relaxed.** Upon request by defense, the military judge may relax the rules of evidence. This includes the ability of the defense to admit “letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.” If relaxed for defense, then these rules are generally relaxed for the government in rebuttal.



IV.

PRACTICE POINTERS.

- ➔ Trial counsel must plan to admit the accused’s statements made during the providence inquiry as evidence during the government’s sentencing case. If a judge alone trial, the trial counsel should offer the accused’s providence inquiry before calling his first witness. If a panel case, trial counsel either should have a witness prepared to testify, stipulate between counsel what the panel should hear (and have the judge or counsel read it), or play the tapes / have a transcript produced (obviously more difficult), which can then be read to the panel.
- ➔ Government Rehabilitative Potential Witness - Ask whether this witness is really necessary. **Scrupulously avoid questions which directly or indirectly refer to discharge, separation from service, or lack of potential for continued service.** Defense counsel must be on guard for such comments. If your pretrial interview with the witness shows the
- ➔ witness is adamant the accused should be discharged, ask the military judge to caution the witness against such comments, outside the hearing of the panel.
- ➔ Each witness presentation is bolstered by answering three questions for the fact-finder: What does the witness know? How does the witness know it? What is the impact?
- ➔ Anticipate objections and succinctly articulate the basis for admissibility.
 - When introducing R.C.M. 1001(b)(4) evidence, succinctly articulate how the accused’s misconduct has directly affected unit morale, welfare, readiness or discipline. When objecting to such evidence, be prepared to state how the offered evidence does not “directly relate to or [result] from” your client’s conduct.
 - When offering evidence under R.C.M. 1001(b)(2) (as supplemented by AR 27-10, paragraph 5-26), is the evidence of a type that is admissible at trial? Is it “made or maintained in accordance with departmental

regulations?” Is it properly authenticated (*i.e.* was it signed by some unknown person “for” the actual custodian of the record)?



V.

SKILL DRILLS.

A. *Goal: Train counsel to use the following skills.*

1. Develop short case and sentencing themes.
2. Use direct examination to elicit admissible and effective sentencing evidence.
3. Use cross-examination to minimize the impact of sentencing evidence.

B. *Conduct the drills.*

1. Theme Development.
 - a. *Preparation:* Normal case preparation. Counsel should bring pending case with them to discuss. Case theme development is fun. Pay attention to catchy phrases when you are living your life. Read books, go to movies, and talk to the community you serve about what they do.
 - b. *Drill:* Develop Case Themes.
 - c. *Execution:* Get out of your office, away from the phones! Go to the courtroom or a remote location. After the supervisor leads a discussion of the importance of themes, sources of themes and the creation of theme checklists, the supervisor (in roundtable fashion) selects counsel to discuss the facts of a pending case and that counsel’s theme. Lather, rinse, repeat.

2. Sentencing Evidence

- a. *Preparation:* Conduct this training in the courtroom. Counsel use the attached Sentencing Scenario and Counsel Handout for all of the drills. Distribute the Counsel Handout two or three days before training. (Whether you also distribute the Sentencing Scenario with the Counsel Handout depends on the Method of Execution you choose.) The various categories of evidence are developed with separate witnesses. You can conduct one or more drills as time permits.
- b. *Role Play:* The supervisor plays the role of military judge. Have a “real” witness play the role of witness (that volunteer will need to read the solutions below to play the witness). Designate counsel to play the roles of trial and defense counsel. Remaining participants will sit in the panel box and make appropriate objections. If you act as the witness, you may wish to appoint a counsel as military judge.

2. *Execution:* Two approaches:

Method 1: Distribute the Sentencing Scenario with the Counsel Handout several days in advance. Give each counsel the opportunity to interview your volunteer witness prior to the drill. Counsel can better develop their interview skills *and* prepare their direct and cross-exam.

Method 2: Keep the Sentencing Scenario until the day of the exercise. Give counsel five minutes to read the factual summary and prepare their direct and cross-exam. This direct will be “in the dark” and will, therefore, place a premium on their ability to ask nonleading questions.

Note: Whoever plays the different witnesses will need to elaborate and embellish the facts to give counsel a sense of realism. The witness must be consistent with both counsel.

C. ***Drill 1: Victim Impact.***

1. Counsel should elicit information about the physical and psychological injuries, if any, the victim sustained.
2. Sample solution.

Q. Private A. Whiner, I want to direct your attention back to the date of the training incident.

A. Yes, sir.

Q. Were you injured in any way?

A. Yes, sir. I got a broken jaw, lost one tooth and my lip was cut.

Q. All of that from one punch?

A. Yes, sir. I never saw it coming.

Q. Did you see a doctor?

A. Yes, sir. SFC Loyal took me to our Brigade Surgeon right away.

Q. What happened there?

A. The doc took a look, had some pictures taken, and gave me some ice for my lip.

Q. By pictures, do you mean X-rays?

A. Yes, sir. That is how he knew it was broke.

[Can incorporate handling physical evidence, foundations for x-rays, photos of injury]

Q. What did they do for your jaw?

A. Well, the medical people set my jaw and wired my mouth shut.

Q. How did that feel?

A. It didn't feel too good, sir. I had to keep my mouth shut and ate liquid stuff through a straw for two months. Then my jaw was real stiff-like for a long time after that. It is okay now.

Q. Have you been in pain since?

A. The doc says I'll have some pain the rest of my life but right now it's still pretty painful.

Q. How does it feel when you eat?

A. *I don't look forward to eating like I used to. There is a lot of pain when I chew. It should ease up over time but right now it's really painful.*

Q. *What was done about your lost tooth?*

A. *After SFC Loyal broke my tooth off, the dentist people had to take the rest of the tooth out. They gave me a false tooth. I now have a false tooth that I can pop out, like this....*

Q. *Private, how has this incident affected your view of the service?*

A. *I used to think I could just do whatever I wanted, whenever I wanted. I learned a valuable lesson from this incident. I wanted to stay in the Army, but because of this injury I am being discharged.*

Cross-examination:

DC. *Private Whiner, you said you learned a valuable lesson?*

A. *Yes.*

Q. *And that lesson was not to curse someone's mother?*

A. *That's right.*

Q. *You're not receiving a medical discharge, are you?*

A. *No.*

Q. *Isn't it true you are receiving an administrative discharge?*

A. *Yes.*

Q. *That is because you have refused to participate in any training?*

A. *I can't train because of my jaw.*

Q. *The Doctors have said that you are physically fit for training, isn't that correct?*

A. *Yes, but they don't know how my jaw feels. I could re-injure it anytime.*

Q. *You still can eat any food you want?*

A. *Yes.*

Q. *You still can drink whatever you want?*

A. *Yes.*

Q. *So you have recovered from this injury, isn't that right?*

A. *Yes, but I'll never be able to box.*

Q. *You have never boxed before have you?*

A. *No.*

Q. *SFC Loyal is the one who rushed you to the battalion aid station, isn't that right?*

A. *Yes.*



D. ***Drill 2: Unit and Mission Impact.***

1. The purpose of this drill is to force counsel to highlight the effect of the accused's conduct on the command, the unit, and the mission through the company commander.
2. Sample solution.

Q. CPT Apple, please tell the court what your current duty position is.

A. Yes. I am the company commander for Company A, 1st Training Battalion. I have been the company commander for the past 12 months. SFC Loyal was one of my Drill Instructors.

Q. CPT Apple, what are some of your responsibilities as a company commander?

A. I am responsible for everything that my company does and fails to do. This includes taking care of the soldiers in the company and training. We have a training requirement to prepare the young privates in the infantry MOS. Upon successful completion of the training requirements these privates are then transferred to line infantry battalions in the Army.

Q. How does your company train these soldiers?

A. My company personnel do not actually train the soldiers; there is a separate battalion staff for that specific mission. My staff personnel are known as "troop handlers" and act as senior leadership for the soldiers. Personnel, such as SFC Loyal, would ensure that their men are at the required place at the required time for training.

Q. What were SFC Loyal's responsibilities?

A. He was the Senior Drill Instructor/Troop Handler for 1st Platoon. He was responsible for the performance of the entire platoon and their training.

Q. Are you aware that the accused has been convicted of violation of the training S.O.P. and assaulting a private?

A. Yes.

- Q. Are you familiar with the incident that led to these charges today?**
- A. Yes, I am. I reviewed the initial investigation and interviewed all the participants. I have also discussed the matter in excruciating detail with the Battalion Commander and SJA.**
- Q. What impact have the accused's offenses had on your unit?**
- DC. Objection, Your Honor.**
- MJ. Basis?**
- DC. Relevance.**
- MJ. Trial counsel?**
- TC. This evidence is offered under R.C.M. 1001(b)(4). The negative effect which the witness will describe is "directly relating to and resulting from the offenses of which the accused has been found guilty."**
- MJ. Objection overruled. Please proceed, Trial Counsel.**
- Q. I ask the same question CPT Apple, what impact have the accused's offenses had on your unit?**
- A. Well, for one thing, SFC Loyal was my senior troop handler. Since this happened, he has been pulled from duty and transferred to the battalion staff; I certainly couldn't trust him with the soldiers. We didn't have a replacement for him. So I had to place the Company Staff Sergeant in charge which had a direct impact on the logistical support for the company. Other soldiers needed to double-hat their responsibilities to make sure the training continued. We picked up a new company as soon as this company graduated.**
- Q. What effect, if any, did the offenses have on morale of the company?**
- A. The entire company was put under a microscope. Several investigations disrupted training and not to mention all the attention the troop handlers received because of the incident. Every time we tried to train, someone was looking over our shoulders.**

E. ***Drill 3: Rehabilitative Potential.***

1. Using the company commander, make sure counsel know the limitations imposed by R.C.M. 1001(b)(5) on the scope and admissibility of rehabilitative potential testimony.
2. Sample solution.

Q. CPT Apple, how long have you been the accused's company commander?

A. I've been his commander for the last 12 months.

Q. How often would you see him?

A. Prior to his administrative transfer to battalion, I would see him daily.

Q. How would you monitor his performance?

A. I would receive weekly training updates from him; plus, I would interview graduating soldiers from his platoon to determine their level of knowledge as a result of the training. I would also see him training the troops and talk with other DIs.

Q. Are you familiar with his service record?

A. As a company commander I am also familiar with the service record books of each of my soldiers. In addition, I get weekly reports from the first sergeant on his duty performance. So I would say I know him pretty well.

Q. CPT Apple, have you had an adequate opportunity to form an opinion as to the accused's potential for rehabilitation?

A. Yes.

Q. What is that opinion?.

DC. Objection, Your Honor.

MJ. Basis?

DC. Trial Counsel has not established that this witness has a rational basis from which to offer an opinion as to rehabilitative potential as required under R.C.M. 1001(b)(5).

MJ. Trial Counsel, what is your response?

TC. *Your Honor, the company commander is the best witness to testify in this area. He has known the accused for an entire year.*

DC. *May I voir dire the witness, Your Honor, before proceeding further with this objection?*

MJ. *Proceed Defense Counsel.*

DC. *CPT Apple, you have been SFC Loyal's company commander for twelve months?*

A. *Yes.*

DC. *How long have you been a Captain?*

A. *I was promoted last week.*

DC. *What was your previous assignment?*

A. *I was a protocol officer for the Commanding General. Prior to that I was assigned to the Post Training office where I worked in range control.*

DC. *How many soldiers have you supervised prior to being assigned as a company commander?*

A. *Three.*

DC. *Isn't it true that you were assigned the company for only two weeks prior to this training incident?*

A. *Yes.*

DC. *In fact, you only supervised SFC Loyal in his performance of duties for a couple of days until his transfer?*

A. *That's right.*

DC. *Your honor, I renew my original objection.*

MJ. *Sustained.*

F. **Drill 4: Duty Performance.**

1. Defense counsel should elicit evidence of the accused's duty performance through a former supervisor. Defense counsel tries to elicit specific instances of performance which were particularly noteworthy. See R.C.M. 1001(c)(1)(B) (which includes as mitigation evidence "particular acts" of good conduct and the reputation or record in the service). Conduct direct and cross-examinations.
2. Sample solution.

Q. Colonel Steele, how do you know SFC Loyal?

A. We have served together in various units over the past 17 years.

Q. In what capacities have you served with him over those 17 years?

A. I was a company executive officer when he was a young Corporal fire team leader in the same company. Later I became the operations officer for the battalion and he had risen to be a squad leader.

Q. Did you work closely with SFC Loyal?

A. I worked with him closely with our battalion squad competition and later his squad went to take the Division competition.

Q. Did you serve with him in another unit?

A. We served in Grenada and Panama together in the same battalion. Then when I had my infantry battalion and prior to deploying to Saudi Arabia, then Staff Sergeant Loyal, because division was short of officers, was a platoon leader in my best infantry company.

Q. Have you served with him since Desert Storm?

A. No.

Q. Have you kept abreast of his career since Desert Storm?

A. Yes. The service is small and when someone of Loyal's caliber is in an organization, the chain of command is well aware of it. In his case, I was working at assignments branch when his most recent orders were coming up. I was contacted as to whether he would be a good choice for training recruits, and I gave him a thumbs up.

Q. Have you reviewed his service record?
A. Yes. I have reviewed his service record and am very familiar with it. As his company executive officer I recommended him for meritorious promotion to Corporal. Later, as battalion commander I recommended him for the warrant officer program and believed that he was very competitive. Again, I reviewed his record book before coming into court here today.

Q. Have you discussed his performance with other service members?
A. Yes. Some of his former recruits are in my infantry regiment now. They are highly trained and motivated. Two have been meritoriously promoted. I know staff non-commissioned officers at the training battalion think very highly of SFC Loyal. The junior officers are insecure around him because of his experience and proficiency. Career officers don't like him. Warriors ask for him.

Q. Have you formed an opinion about SFC Loyal's performance of duties as a leader of soldiers?
A. Yes I have.

Q. Colonel Steele, what is that opinion?
A. In my opinion, SFC Loyal is an outstanding leader.

Q. Would you want someone of his caliber in combat with you?
A. Yes. I wish all noncommissioned officers were of his caliber.

Cross-examination:

Q. Colonel, you are aware of the findings of this court?
A. Yes, I am, and I respect the findings.

Q. Are you aware that the accused punched a private in the mouth?
A. Yes, I am, and that does not change my opinion.

Q. Were you also aware that this was not the first incident where the accused punched someone?

DC. Objection, Your Honor.

[Note: If members were present, counsel should request an Article 39(a) session to address the objection with the military judge.]

MJ. Basis?

DC. Trial counsel is trying to backdoor information which was suppressed earlier in this trial. Trial counsel can not use this witness to smuggle in inadmissible evidence.

MJ. Trial counsel, what is your response?

TC. Your Honor, this cross examination is for two purposes: First, the questions are to test the basis for the witness's opinion of the accused's performance of duty; second, the government submits that this evidence is admissible in aggravation, albeit, through cross examination of a defense witness, to show a pattern of violent behavior.

MJ. Objection is overruled; the defense has opened the door through this witness.

Q. So you are aware of the time the accused punched an officer in the mouth?

A. Yes, but that was in October of 1983.



G. ***Drill 5: Mitigation/ Financial Status of Accused's Family.***

1. The supervisor will play the spouse. Counsel should emphasize the accused's family status, highlighting unique family problems and financial situation.
2. Sample solution.

Q. Mrs. Loyal, you are the wife of SFC I.M. Loyal?

A. Yes. I am his second wife. His first wife left him while he was deployed to Panama.

Q. How long have you been married to him?

A. We have been married now for 7 wonderful years?

Q. Do you have any children?

A. Yes, we have two beautiful children, both are boys. The oldest is 6 years old and attends kindergarten. Our youngest is 5 and is in preschool.

Q. Does your youngest require any specialized care or attention?

A. Yes, Ike, the youngest, is severely autistic. We are in the service's exceptional family member program and Ike attends the special classes provided on post.

Q. Are these services available off post?

A. No, they are not. We were assigned to this duty station because of the availability of the special education programs and the medical rehabilitation facility. Ike has been doing marvelously with the innovative training.

Q. What do you mean?

A. Well, the teachers here began playing Mozart music during class. It is an experimental program. Ike has responded tremendously and is learning a great deal. The Mozart music helps him categorize sounds... or so they say.

Q. Do you work?

A. Absolutely.

Q. Where?

A. *I work right at home. I do not work outside the home if that is what you mean. I do not get paid in money for my work at home. You can't put a dollar figure on the reward I receive through the love and gratitude of my two boys. And Ivan, my husband, showers me with attention and help all the time. That is my job.*

Q. Is Ivan a good husband?

A. *I couldn't ask for a better man. I know that he is a war hero and all that grunt stuff, but once he gets home and takes that uniform off, he is a teddy bear. I know that I am embarrassing him, but everyone says that he is much different at home. He has always said, "My duty at work is to be hard. My duty at home is to be a loving husband and parent." They are two different roles that he is comfortable in.*

Q. Is he a task master at home?

A. *Absolutely not. He says the most important thing he does in the world is raise his boys. He has never put anything before his family. Except for maybe church, but we believe that church is family, too.*

Q. How are your finances at home?

A. *Well we do get by on his paycheck. We live like most service families living paycheck to paycheck. Thank goodness we live in quarters. We couldn't live in town. Of course, if in town we'd have to pay for the special education that Ike receives, too. We have only one car that is 10 years old and seems to require monthly repair. Ivan does most of that on his own at the hobby shop on base. We don't have much in the way of furniture. We do owe on DPP for household things. It seems like that bill never goes away. A couple of other credit cards.*

Q. Where does most of the paycheck go?

A. *Well, there are those bonds and campaigns that everyone has to "voluntarily" contribute to, and a dependent's allotment that goes to his previous wife. He pays support for his two children of the previous marriage.*

Q. Have you ever tried to stop paying that money?
A. I mentioned it once, because I didn't think it was fair to us. He would not have anything of it. He said that he would not harbor ill will against the two kids because their mother had left him! That was that.

Q. Other than your husband's paycheck, do you have any other source of income?
A. No. If he didn't receive the same pay, I do not know what we would do.

Cross-examination:

Q. Your husband has never lost his temper at home has he?
A. Correct.

Q. He has never hurt either you or your two boys?
A. Correct, everyone keeps telling you that!

Q. Would you agree that he has good control over his emotions?
A. Yes, he is a very strong man with strong character.

Q. Would you agree that he is rational and thinks before he acts?
A. Absolutely.





H. *Summarize the main teaching points.* Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **Create a "bumper sticker" for your case. Themes are simple, short phrases the audience must be able to identify.**
- ✓ **Develop your own checklist for assembly of a sentencing case.**
- ✓ **Know the reasons for sentencing and organize your witnesses to support the reason(s) that apply in your case.**
- ✓ **Use the Sentencing Factors to help focus on the salient features of your case.**
- ✓ **Understand, in detail, R.C.M 1001 and the prong under which you offer each witness or item of evidence.**
- ✓ **The rules of evidence may be relaxed for the defense.**
- ✓ **Trial counsel must always be prepared to offer the accused's providence inquiry, if necessary (e.g., to rebut facts from the accused's unsworn statement).**



VI.

REFERENCES.

- A. Major Lauren K. Hemperley, III, *Looking Beyond the Verdict: An Examination of Prosecution Sentencing Evidence*, 39 A.F. L. REV. 185 (1996).
- B. Major Carol A. DiBattiste, *The Prosecution Sentencing Case*, 27 A.F. L. REV. 203 (1987).
- C. Major Larry A. Gaydos, *A Prosecutorial Guide to Court-Martial Sentencing*, 114 MIL. L. REV. 1 (1986).
- D. Captain Denise K. Vowell, *To Determine An Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 (1986).
- E. Major Jody Russelburg, *Sentencing Arguments: A View From The Bench*, ARMY LAW., Mar 1986, at 50.

Enclosures:
Counsel Handout with Encls

Sample Solutions

SENTENCING

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. We will conduct trial advocacy training in the courtroom on _____, from _____ to _____ hours. **The training will cover sentencing.** The training will require you to develop sentencing themes and to present victim impact evidence introduced through a victim, unit-impact and rehabilitative potential evidence introduced through the company commander, duty performance evidence presented by a former supervisor, and mitigation evidence through a spouse.
- B. Preparation. Review R.C.M. 1001 and bring your copy of the MCM to the training. Review basic techniques of direct examination and fundamentals of cross (Tab B, Modules 1 and 2). Bring a current case file (for case theme discussion) and any checklists of case themes you may have developed. **Add if required:** You will need to interview _____, who will play the parts of the witnesses in the Sentencing Scenario, prior to the day of the exercise.



II. KEYS TO SUCCESS.

- A. Develop short, simple case themes for current cases – brainstorm!
- B. Be able to articulate the rule under which sentencing evidence is being offered.
- C. Know the elements of a foundation to admit rehabilitative potential evidence.
- D. Know the limitations of rehabilitative potential evidence.

- E. Use the attached scenario and sentencing factors to prepare a direct and cross-examination.



III.

REFERENCES FOR FURTHER STUDY.

- A. Major Lauren K. Hemperley, III, *Looking Beyond the Verdict: An Examination of Prosecution Sentencing Evidence*, 39 A.F. L. REV. 185 (1996).
- B. Major Carol A. DiBattiste, *The Prosecution Sentencing Case*, 27 A.F. L. REV. 203 (1987).
- C. Major Larry A. Gaydos, *A Prosecutorial Guide to Court-Martial Sentencing*, 114 MIL. L. REV. 1 (1986).
- D. Captain Denise K. Vowell, *To Determine An Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 (1986).
- E. Major Jody Russelburg, *Sentencing Arguments: A View From The Bench*, ARMY LAW., Mar 1986, at 50.

ENCLOSURES

Sentencing Themes

Sample Sentencing Worksheets

Sentencing Factors

Sentencing Scenario

SENTENCING THEMES

Possible Prosecution Themes

The Predator
Fatal Attraction
Dr. Jekyll and Mr. Hyde
Born to be Wild
The Night Stalker
Psycho
The Days of Wine and Roses
Basic Right v. Basic Wrong
Duty, Honor, Country
Chester the Molester
For Whom the Bell Tolls
Alfred E. Newman
Gomer Pyle, USMC

Free Bird
Three Strikes and You're Out
The Accused is a Liar
Basic Fairness
Equal Justice for All
Deterrence
For Love of Money
The Abuse of Privilege or Position
Dead Men Tell No Lies
Judicial Afternoon Soap Opera
The Cocaine Fairy Defense
The Grinch Who Stole Christmas
Accountability

Possible Defense Themes

Selective Prosecution
The Abuse of Power
The Man With No Brain
A Victim of Circumstance
Misperceptions
Keystone Cops
Three Stooges
This Wouldn't Be a Crime in the
Civilian World
Just a Knucklehead
The Caine Mutiny
A Few Good Men
Rose Colored Glasses
Young Kid Who Didn't Know Better
Alcohol is the Root of All Evil

Demon Rum
Government Overreaching
Chain of Command Failure
Accused's Good Character
Out of Body Experience
Accused is Sick and Needs Help, Not
Jail
Don't Punish the Accused's Family
Justice Tempered By Mercy
Accused is Already Rehabilitated
The Loyal Soldier
One Time Incident
Manipulated by Another
Follower, Not the Leader
People Learn from their Mistakes

SAMPLE SENTENCING PREPARATION WORKSHEET

RCM 1001 (b)(1) SERVICE DATA:

Grade / Rank: _____

Pay: _____

Initial Date Current Service: _____ for a term of _____ years

Pretrial Restraint: _____ at _____.

Dates of Pretrial Restraint: _____ to _____ for a total of _____ days.

RCM 1001(b)(2) PERSONAL DATA/SERVICE RECORD AND PERFORMANCE

RCM 1001(b)(3) EVIDENCE OF PRIOR CONVICTIONS

RCM 1001(b)(4) EVIDENCE IN AGGRAVATION

RCM 1001(b)(5) EVIDENCE OF REHABILITATIVE POTENTIAL

REBUTTAL WITNESSES AND EVIDENCE AND TRUTH/VERACITY WITNESSES

CROSS OF ACCUSED

SAMPLE SENTENCING WITNESS INTERVIEW WORKSHEET

UNITED STATES V. _____

INTERVIEWER _____

TIME/DATE: _____

LOCATION: _____

1. Witness Name: _____ Rank: _____
 Unit: _____ Phone: _____
 Rotation Date: _____ New Unit: _____
 Combat Experience (right shoulder patch): Where? _____
 When? _____

2. How do you know the soldier? _____
 What is your duty position with regard to the soldier? _____
 What type of contact do you have with the soldier? _____
 How long (during what period) did you supervise the soldier? _____
 During the average duty day, how much contact do you have with the soldier
 (how many hours a day)? _____
 Is the soldier working in his or her MOS? Y / N
 Do you have contact with him/her socially? Y / N If yes, how often? _____










3. What is your general opinion of the soldier? _____

	Rating	Worst	Avg	Best
4. How would you rate the soldier's:				
-- duty performance in garrison?		1 2 3 4 5 6 7 8 9 10		
-- duty performance in the field?		1 2 3 4 5 6 7 8 9 10		
-- military bearing?		1 2 3 4 5 6 7 8 9 10		
-- MOS technical competence?		1 2 3 4 5 6 7 8 9 10		
-- general attitude?		1 2 3 4 5 6 7 8 9 10		
Would you want the soldier				
-- with you in the unit now?	Y / N			
-- with you in combat?	Y / N			
Is the soldier dependable?	Y / N	1 2 3 4 5 6 7 8 9 10		
Does s/he show initiative?	Y / N	1 2 3 4 5 6 7 8 9 10		
Does s/he know their job?	Y / N	1 2 3 4 5 6 7 8 9 10		
Is s/he cooperative?	Y / N	1 2 3 4 5 6 7 8 9 10		
Does s/he respect authority?	Y / N	1 2 3 4 5 6 7 8 9 10		








5. Do you believe you know the soldier well enough to form an opinion as to the soldier's character for truthfulness? Y / N.
 In your opinion, is the soldier truthful? Y / N.
 Has the soldier ever lied to you? Y / N.
 Would you believe the soldier if s/he testified under oath? Y / N.
6. Do you believe you know the soldier well enough to form an opinion as to the soldier's character for peacefulness? Y / N.
 In your opinion, is the soldier peaceful? Y / N.
 Have you ever seen the soldier be violent? Y / N.
7. Have you ever recommended him/her for promotion? Y / N If yes, how often? _____
 Would you recommend him/her for promotion? Y / N If no, why? _____
8. "Rehabilitative potential" is a shorthand way of saying that a soldier can learn from his or her mistakes and can become a useful and constructive member of society. Do you believe the soldier has rehabilitative potential? Y / N.
 How much or how little? _____
9. Do you think the soldier is guilty of these offenses? Y / N Don't know.
 Why?

SENTENCING FACTORS











I. General

-  Role of accused in the crime: Leader, accomplice or minor role; sole perpetrator (or, the accused having no apparent disposition to do so was induced by others to participate in the crime).
-  Place of Offense: Public building, victim's residence, accused's residence, secluded area, on the street, in the barracks, on base overseas, etc.
-  Victim's status: Officer/SNCO/NCO/Civilian/Dependent.
-  Type of victim: Crime against person or property (military or civilian victim; age of victim; foreign national; Government or private property).
-  Victim's relationship to offender: Stranger, friend, family, subordinate, chain of command or police, etc.
-  Victim provoked the crime to a substantial degree, or victim contributed substantially to the criminal event.
-  Damage or Injury: Degree of actual or threatened property damage or personal injury (permanent or temporary).
-  Unit Impact: Effect on military discipline / readiness / unit effectiveness.
-  Weapons: Type of weapon and degree of use (such as, in possession only, used to threaten, actual application).

II. Aggravation

-  Abuse of trust or position (accused's access to the victim was due to a position of trust the accused held).
-  Injury to the victim.
-  Weapon(s) involved.
-  Accused / victim relationship (random crime or accused knew the victim).
-  Youth or advanced age (fragility) of victim.
-  Accused committed the offense while pending other charges.
-  Accused has a criminal pattern or character (prior NJP or conviction, particularly where the prior offenses are serious or similar to the current offenses).

III. Mitigating Factors

-  Absence of any prior disciplinary or criminal record of the accused.
-  Accused's extreme youth, or special conditions (health, low IQ, or service related injury).
-  Good military character (service record and favorable opinions of relevant witnesses) and rehabilitative potential.
-  Accused supports dependents.
-  Victim forgiveness (including the chain of command).
-  Cooperation with law enforcement and prosecutors in this and other crimes / confession.
-  Accused's remorse and apology (including the timing thereof).
-  Provocation by the victim / accused's circumstances.
-  Restitution.
-  Accused's conduct between the offense and the trial.



SENTENCING SCENARIO

Sergeant First Class(E-7) I.M. Loyal has just been found guilty of three specifications of forcing a recruit to perform unauthorized incentive physical training in violation of the local training S.O.P., under Article 92, UCMJ, and one specification of simple assault consummated by battery, under Article 128, UCMJ. The offenses grew out of an incident involving three Privates (E-1) that occurred during the famed “gauntlet” exercise: a five day final test of an infantryman’s training at Infantry Training School. On Day #3, Privates I. B. Good, C.M. Weep and A. Whiner, failed a surprise weapon inspection. After three days of continuous rain, these weapons had rusty bolts and would not operate correctly. SFC Loyal took the three for an incentive march where they performed a variety of additional training exercises (all in violation of the training S.O.P.). Recruit A. Whiner, the nephew of a U.S. Senator on the Joint Armed Services Committee, eventually quit the march and confronted I.M. Loyal and proceeded to discuss the parental lineage of the Drill Instructor. SFC I.M. Loyal punched the Recruit once and broke his jaw.

SFC I.M. Loyal is a warrior. He has served in Grenada, Panama and Saudi Arabia. He wears three combat ribbons and one bronze star with combat “V” device. His other personal decorations include three Army Commendation Medals, two Army Achievement Medals, one Recruiting Service Ribbon and the Purple Heart. He has served seventeen years on continuous active duty and his current enlistment expired 6 months ago. He has been flagged pending the outcome of this trial.

SFC Loyal is married and has two children currently living with him. His wife resides on post in government quarters. One child is enrolled in the exceptional family member program due to severe autism. He has two children of a previous marriage who do not reside with him but he makes support payments each month.

SFC I.M. Loyal has a warrior record. During his first enlistment, he received two Article 15s for barroom fighting at the enlisted club. As an NCO he was reduced at a Summary Court-Martial for striking an officer. (He was subsequently awarded a Bronze Star for his conduct in maneuvering his fire team to rescue a downed pilot, even though the pilot – an army officer -- had told him to wait for assistance). He is outspoken about training. He does not believe in “touchy feely” training and demands immediate obedience to his orders. His squads have traditionally placed first in the camp “super squad” competitions. Over the past year, SFC I.M. Loyal has been the senior troop handler for 1st Platoon, Company A, 1st Training Battalion. Defense presented their “outstanding military character” evidence on the merits.

SENTENCING

SAMPLE SOLUTIONS



Sample Solution for Drill 1: Victim Impact.

Q. Private A. Whiner, I want to direct your attention back to the date of the training incident.

A. Yes, sir.

Q. Were you injured in any way?

A. Yes, sir. I got a broken jaw, lost one tooth and my lip was cut.

Q. All of that from one punch?

A. Yes, sir. I never saw it coming.

Q. Did you see a doctor?

A. Yes, sir. SFC Loyal took me to our battalion surgeon right away.

Q. What happened there?

A. The doc took a look, had some pictures taken, and gave me some ice for my lip.

Q. By pictures, do you mean X-rays?

A. Yes, sir. That is how he knew it was broke.

[Can incorporate handling physical evidence, foundations for x-rays, photos of injury]

Q. What did they do for your jaw?

A. Well, the medical people set my jaw and wired my mouth shut.

Q. How did that feel?

A. It didn't feel too good, sir. I had to keep my mouth shut and ate liquid stuff through a straw for two months. Then my jaw was real stiff-like for a long time after that. It is okay now.

Q. Have you been in pain since?

A. The doc says I'll have some pain the rest of my life but right now it's still pretty painful.

Q. How does it feel when you eat?

A. I don't look forward to eating like I used to. There is a lot of pain when I chew. It should ease up over time but right now it's really painful.

Q. What was done about your lost tooth?

A. Yes, sir. SFC Loyal broke my tooth off and the dentist people had to take the rest of the tooth out. They gave me a false tooth. I now have a false tooth that I can pop out, like this....

Q. Private, how has this incident affected your view of the service?

A. I used to think I could just do whatever I wanted, whenever I wanted. I learned a valuable lesson from this incident. I wanted to stay in the Army, but because of this injury I am being discharged.

Cross-examination:

DC. Private Whiner, you said you learned a valuable lesson?

A. Yes.

Q. And that lesson was not to curse someone's mother?

A. That's right.

Q. You're not receiving a medical discharge, are you?

A. No.

Q. Isn't it true you are receiving an administrative discharge?

A. Yes.

Q. That is because you have refused to participate in any training?

A. I can't train because of my jaw.

Q. The Doctors have said that you are physically fit for training, isn't that correct?

A. Yes, but they don't know how my jaw feels. I could re-injure it anytime.

Q. You still can eat any food you want?

A. Yes.

Q. You still can drink whatever you want?

A. Yes.

Q. So you have recovered from this injury, isn't that right?

A. Yes, but I'll never be able to box.

Q. You have never boxed before have you?

A. No.

Q. WSFC Loyal was the one who rushed you to the battalion aid station, isn't that right?
A. Yes.



Sample Solution for Drill 2: Unit and Mission Impact.

- Q. CPT Apple, please tell the court what your current duty position is.**
- A. Yes. I am the company commander for Company A, 1st Training Battalion. I have been the company commander for the past 12 months. SFC Loyal was one of my Drill Instructors.**
- Q. CPT Apple, what are some of your responsibilities as a company commander?**
- A. I am responsible for everything that my company does and fails to do. This includes taking care of the soldiers in the company and training. We have a training requirement to prepare the young privates in the infantry MOS. Upon successful completion of the training requirements these privates are then transferred to line infantry battalions in the Army.**
- Q. How does your company train these soldiers?**
- A. My company personnel do not actually train the soldiers; there is a separate battalion staff for that specific mission. My staff personnel are known as “troop handlers” and act as the senior leadership for the soldiers. Personnel, such as SFC Loyal, would ensure that their men are at the required place at the required time for training.**
- Q. What were SFC Loyal’s responsibilities?**
- A. He was the Senior Drill Instructor/Troop Handler for 1st Platoon. He was responsible for the performance of the entire platoon and their training.**
- Q. Are you aware that the accused has been convicted of violation of the training S.O.P. and assaulting a private?**
- A. Yes.**
- Q. Are you familiar with the incident that led to these charges today?**
- A. Yes, I am. I reviewed the initial investigation and interviewed all the participants. I have also discussed the matter in excruciating detail with the Battalion Commander and SJA.**
- Q. What impact have the accused’s offenses had on your unit?**
- DC. Objection, Your Honor.**
- MJ. Basis?**
- DC. Relevance.**
- MJ. Trial counsel?**

TC. *This evidence is offered under R.C.M. 1001(b)(4). The negative effect which the witness will describe is “directly relating to and resulting from the offenses of which the accused has been found guilty.”*

MJ. *Objection overruled. Please proceed, Trial Counsel.*

Q. *I ask the same question CPT Apple, what impact have the accused’s offenses had on your unit?*

A. *Well, for one thing, SFC Loyal was my senior troop handler. Since this happened, he has been pulled from duty and transferred to the battalion staff; I certainly couldn’t trust him with the soldiers. We didn’t have a replacement for him. So I had to place the Company Staff Sergeant in charge which had a direct impact on the logistical support for the company. Other soldiers needed to double-hat their responsibilities to make sure the training continued. We picked up a new company as soon as this company graduated.*

Q. *What effect, if any, did the offenses have on morale of the company?*

A. *The entire company was put under a microscope. Several investigations disrupted training and not to mention all the attention the troop handlers received because of the incident. Every time we tried to train, someone was looking over our shoulders.*



Sample Solution for Drill 3: Rehabilitative Potential.

Q. CPT Apple, how long have you been the accused's company commander?

A. I've been his commander for the last 12 months.

Q. How often would you see him?

A. Prior to his administrative transfer to battalion, I would see him daily.

Q. How would you monitor his performance?

A. I would receive weekly training updates from him; plus, I would interview graduating soldiers from his platoon to determine their level of knowledge as a result of the training. I would also see him training the troops and talk with other DIs.

Q. Are you familiar with his service record?

A. As a company commander I am also familiar with the service record books of each of my soldiers. In addition, I get weekly reports from the first sergeant on his duty performance. So I would say I know him pretty well.

Q. CPT Apple, do you believe you have had an adequate opportunity to form an opinion as to the accused's potential for rehabilitation?

A. Yes.

Q. What is that opinion?.

DC. Objection, Your Honor.

MJ. Basis?

DC. Trial Counsel has not established that this witness has a rational basis from which to offer an opinion as to rehabilitative potential as required under R.C.M. 1001(b)(5).

MJ. Trial Counsel, what is your response?

TC. Your Honor, the company commander is the best witness to testify in this area. He has known the accused for an entire year.

DC. May I voir dire the witness, Your Honor, before proceeding further with this objection?

MJ. Proceed Defense Counsel.

DC. CPT Apple, you have been SFC Loyal's company commander for twelve months?

A. Yes.

DC. How long have you been a Captain?

A. I was promoted last week.

DC. What was your previous assignment?

A. I was a protocol officer for the Commanding General. Prior to that I was assigned to the Post Training office where I worked in range control.

DC. How many soldiers have you supervised prior to being assigned as a company commander?

A. Three.

DC. Isn't it true that you were assigned the company for only two weeks prior to this training incident?

A. Yes.

DC. In fact, you only supervised SFC Loyal in his performance of duties for a couple of days until his transfer?

A. That's right.

DC. Your honor, I renew my original objection.

MJ. Sustained.



Sample Solution for Drill 4: Duty Performance.

Q. Colonel Steele, how do you know SFC Loyal?

A. *We have served together in various units over the past 17 years.*

Q. In what capacities have you served with him over those 17 years?

A. *I was a company executive officer when the he was a young Corporal fire team leader in the same company. Later I became the operations officer for the battalion and he had risen to be a squad leader.*

Q. Did you work closely with SFC Loyal?

A. *I worked with him closely with our battalion squad competition and later his squad went to take the Division competition.*

Q. Did you serve with him in another unit?

A. *We served in Grenada and Panama together in the same battalion. Then when I had my infantry battalion and prior to deploying to Saudi Arabia, then Staff Sergeant Loyal, because division was short of officers, was a platoon leader in my best infantry company.*

Q. Have you served with him since Desert Storm?

A. *No.*

Q. Have you kept abreast of his career since Desert Storm?

A. *Yes. The service is small and when someone of Loyal's caliber is in an organization, the chain of command is well aware of it. In his case, I was working at assignments branch when his most recent orders were coming up. I was contacted as to whether he would be a good choice for training recruits, and I gave him a thumbs up.*

Q. Have you reviewed his service record?

A. *Yes. I have reviewed his service record and am very familiar with it. As his company executive officer I recommended him for meritorious promotion to Corporal. Later, as battalion commander I recommended him for the warrant officer program and believed that he was very competitive. Again, I reviewed his record book before coming into court here today.*

- Q. Have you discussed his performance with other service members?**
A. Yes. Some of his former recruits are in my infantry regiment now. They are highly trained and motivated. Two have been meritoriously promoted. I know staff non-commissioned officers at the training battalion think very highly of SFC Loyal. The junior officers are insecure around him because of his experience and proficiency. Career officers don't like him. Warriors ask for him.
- Q. Have you formed an opinion about SFC Loyal's performance of duties as a leader of soldiers?**
A. Yes I have.
- Q. Colonel Steele, what is that opinion?**
A. In my opinion, SFC Loyal is an outstanding leader.
- Q. Would you want someone of his caliber in combat with you?**
A. Yes. I wish all noncommissioned officers were of his caliber.

Cross-examination:

- Q. Colonel, you are aware of the findings of this court?**
A. Yes I am, and I respect the findings.
- Q. Are you aware that the accused punched a private in the mouth?**
A. Yes I am and that does not change my opinion.
- Q. Were you also aware that this was not the first incident where the accused punched someone?**

DC. Objection, Your Honor.

[Note: If members were present, counsel should request an Article 39a session to address the objection with the military judge.]

MJ. Basis?

DC. Trial counsel is trying to backdoor information which was suppressed earlier in this trial. Trial counsel can not use this witness to smuggle in inadmissible evidence.

MJ. Trial counsel, what is your response?

TC. Your Honor, this cross examination is for two purposes: First, the questions are to test the basis for the witness's opinion of the accused's performance of duty; second, the government submits that this evidence is admissible in aggravation, albeit, through cross examination of a defense witness, to show a pattern of violent behavior.

MJ. Objection is overruled; the defense has opened the door through this witness.

Q. So you are aware of the time the accused punched an officer in the mouth?

A. Yes, but that was in October of 1983.



Sample Solution for Drill 5: Mitigation/ Financial Status of Accused's Family.

- Q.** *Mrs. Loyal, you are the wife of SFC I.M. Loyal?*
- A.** *Yes. I am his second wife. His first wife left him while he was deployed to Panama.*
- Q.** *How long have you been married to him?*
- A.** *We have been married now for 7 wonderful years?*
- Q.** *Do you have any children?*
- A.** *Yes, we have two beautiful children, both are boys. The oldest is 6 years old and attends kindergarten. Our youngest is 5 and is in preschool.*
- Q.** *Does your youngest require any specialized care or attention?*
- A.** *Yes, Ike, the youngest, is severely autistic. We are in the service's exceptional family member program and Ike attends the special classes provided on post.*
- Q.** *Are these services available off post?*
- A.** *No they are not. We were assigned to this duty station because of the availability of the special education programs and the medical rehabilitation facility. Ike has been doing marvelously with the innovative training.*
- Q.** *What do you mean?*
- A.** *Well, the teachers here began playing Mozart music during class. It is an experimental program. Ike has responded tremendously and is learning a great deal. The Mozart music helps him categorize sounds... or so they say.*
- Q.** *Do you work?*
- A.** *Absolutely.*
- Q.** *Where?*
- A.** *I work right at home. I do not work outside the home if that is what you mean. I do not get paid in money for my work at home. You can't put a dollar figure on the reward I receive through the love and gratitude of my two boys. And Ivan, my husband, showers me with attention and help all the time. That is my job.*
- Q.** *Is Ivan a good husband?*
- A.** *I couldn't ask for a better man. I know that he is a war hero and all that grunt stuff, but once he gets home and takes that uniform off, he is a teddy bear. I know that I am embarrassing him, but everyone says that he is much different at home. He has always said, "My duty at work is to be hard. My duty at home is to be a loving husband and parent." They are two different roles that he is comfortable in.*

Q. Is he a task master at home?

A. Absolutely not. He says the most important thing he does in the world is raise his boys. He has never put anything before his family. Except for maybe church, but we believe that church is family, too.

Q. How are your finances at home?

A. Well we do get by on his paycheck. We live like most service families living paycheck to paycheck. Thank goodness we live in quarters. We couldn't live in town. Of course, if in town we'd have to pay for the special education that Ike receives, too. We have only one car that is 10 years old and seems to require monthly repair. Ivan does most of that on his own at the hobby shop on base. We don't have much in the way of furniture. We do owe on DPP for household things. It seems like that bill never goes away. A couple of other credit cards.

Q. Where does most of the paycheck go?

A. Well, there are those bonds and campaigns that everyone has to "voluntarily" contribute to, and a dependent's allotment that goes to his previous wife. He pays support for his two children of the previous marriage.

Q. Have you ever tried to stop paying that money?

A. I mentioned it once, because I didn't think it was fair to us. He would not have anything of it. He said that he would not harbor ill will against the two kids because their mother had left him! That was that.

Q. Other than your husband's paycheck, do you have any other source of income?

A. No. If he didn't receive the same pay, I do not know what we would do.

Cross-examination: (huh?)

Q. Your husband has never lost his temper at home correct?

A. Correct.

Q. He has never hurt either you or your two boys?

A. Correct, everyone keeps telling you that!

Q. Would you agree that he has good control over his emotions?

A. Yes, he is a very strong man with strong character.

Q. Would you agree that he is rational and thinks before he acts?

A. Absolutely.

Tab C

Module 7

Apply the Skill

Sentencing Proceedings



The Advocacy Trainer

SENTENCING PROCEEDINGS

COMPANY COMMANDER - DIRECT EXAMINATION

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** Between 1989 and 1996, nearly 13,500 general and special courts-martial were prosecuted in the Army with a conviction rate of over 92%. This means the vast majority of trials reach the sentencing phase. While trial counsel all too often take the position that sentencing is a matter for the defense, in reality the Rules for Courts-Martial provide the government with powerful ammunition to present a variety of evidence for consideration by the military judge or panel in crafting an appropriate sentence. Chiefs of justice must ensure that trial counsel do not abdicate their responsibilities in this regard.
- B. The company commander is a key component of the government's sentencing case. The commander is often in the best position to know the accused and gauge the effect of the misconduct on the unit. Trial counsel should remember that, generally, panel members and judges are most concerned with the effect of the accused's crimes on the health and welfare of soldiers, on good order and discipline within the unit, on the ability of the unit to perform its mission, and whether the accused has any potential for rehabilitation. It is usually the commander who can best speak to these issues.¹
- C. **Training overview.** This training module requires at least three participants: one supervisor, one trial counsel, and one company commander; a fourth person could play the defense counsel. The training is divided into four steps: (1) an instruction period; (2) counsel preparation time; (3) a practical exercise and critique; and (4) a sample solution review. It takes one hour to complete.

¹ "There is no more persuasive evidence available to a military tribunal than the testimony of the accused's immediate commanding officer." *United States v. Randolph*, 20 M.J. 850, 852 (A.C.M.R. 1985).

II.



THE LAW.

A. ***Procedure.*** RCM 1001(a)(1)(A) lists five different categories of evidence that the prosecution may present to the fact-finder in determining an appropriate sentence.² RCM 1001(b) discusses each category separately. Effective use of RCM 1001(b) necessarily includes introduction of personal and service data of the accused, evidence of any prior convictions, evidence reflecting aggravating circumstances, and evidence of the accused’s rehabilitative potential. This module focuses on the two broadest categories: mission impact evidence and evidence of rehabilitative potential.

B. ***Evidence in aggravation.*** RCM 1001(b)(4).



A company commander may be an excellent government witness in aggravation because he or she may be able to testify about circumstances “directly relating to or resulting from the offenses of which the accused has been found guilty.” RCM 1001(b)(4) (discussion).



Aggravation evidence may include the impact of the accused’s offenses on the mission, discipline or efficiency of the command. The key to so-called “unit-impact”³ evidence is the ability of trial counsel to link the offense(s) for which the accused has been convicted and their impact on the unit or mission. Mere relevance of the purported aggravating circumstance is insufficient for admission of evidence under this rule. Rather, the effect on unit readiness, morale and discipline must directly stem from the offense.



Some examples of unit impact evidence could include:

- accused’s loss of security clearance required removal from flightline which affected crew integrity;
- co-workers had to perform extra duty because of accused’s AWOL;

² RCM 1001(b)(1)(A) provides that the trial counsel ordinarily presents matter in the following sequence: (i) service data relating to the accused taken from the top of the charge sheet; (ii) personal data of the accused and the character of the accused’s prior service as reflected in the personnel records; (iii) evidence of prior convictions; (iv) evidence of aggravation, and (v) evidence of rehabilitative potential.

³ Major Lauren K. Hemperley, *Looking Beyond the Verdict: An Examination of Prosecution Sentencing Evidence*, 39 A.F. L. REV. 185 (1996).

- after series of barracks larcenies, soldiers were required to perform 24 hour hall guard duty until perpetrator was caught;
- work had to be delegated to other units to avoid contact between a sex offender and his victim;
- because accused was the only member of the unit capable or trained to perform a critical task [e.g., Tagalog linguist, communications specialist, physician's assistant, boom crane operator] unit could not deploy or mission had to be scrubbed;
- accused's hate crimes resulted in order to remove all paraphernalia from walls of barracks rooms, to include innocuous and noninflammatory pennants, posters, pictures and photographs;
- senior enlisted comes up hot on urine test. Because he is well liked and respected in the unit, junior subordinates conclude there must have been some mistake made in collection or testing. Result is loss of confidence in the Army's drug testing program;
- turnaround time for avionics repair in division aviation maintenance section goes from two to seven days due to hostile work environment caused by section leader's fraternization, harassment and pattern of sexual misconduct with subordinates - aircraft redlined; and
- accused intentionally fails to rescue soldier, who later dies, after causing vehicle accident during field training exercises. Conduct causes brigade members to lose trust and confidence in one another to watch each other's backs.

C. ***Evidence of rehabilitative potential.*** RCM 1001(b)(5).



Rather than considered as a matter in aggravation, lack of rehabilitative potential is a separate factor for consideration in determining an appropriate sentence. "Rehabilitative potential" refers to the accused's potential to be restored to a useful and constructive place *in society*, not potential for continued military service.



Evidence of the accused's rehabilitative potential must be introduced through opinion testimony; the quality of that opinion necessarily depends on the quality of the foundation, and that is the focus of this module. Counsel must also know that opinion evidence of rehabilitative potential may not be based solely on the severity of the offense. Further, the scope of the evidence is

limited to whether the accused has rehabilitative potential, and to the magnitude or quality of such potential, and not testimony regarding the appropriateness of a punitive discharge.⁴



Foundation:

- Sufficient knowledge of the accused to formulate a rationally based opinion;
- not based on seriousness of offenses, what's best for the service, or administrative consequences of conviction; and
- scope is limited to whether accused has rehabilitative potential, as opposed to potential for future service.



III. PRACTICE POINTERS.

- ➔ If you determine that rehabilitative potential evidence is essential to make your sentencing case, scrupulously avoid questions referring to discharge, separation from service, lack of potential for continued service.
- ➔ If introducing RCM 1001(b)(4) evidence, be able to articulate just how the accused's misconduct has *directly* affected unit morale, welfare, readiness or discipline.
- ➔ Regardless of the use to which put, there is a common thread running through any presentation involving the commander - What does the commander know? How does the commander know it? What is the impact?

⁴ This limitation may also apply to the defense. As such, trial counsel should object to testimony to the effect that the accused "could rehabilitate himself and continue to serve and contribute to the United States Army." See, e.g., *United States v. Ramos*, 42 M.J. 392, 396 (1995).

IV.



SKILL DRILLS.

A.



Unit and Mission Impact.

1. While this drill has the secondary benefit of practicing interview skills, its primary purpose is to force counsel to elicit information about the effect of the accused's conduct on the command, the unit, and the mission from a real witness, a sitting company commander. Because counsel are approaching the exercise "in the dark," they cannot help but ask open-ended questions, which is the approach a trial counsel's sentencing presentation should follow. In this exercise, you will play the part of the military judge. No student handouts are necessary. Give your counsel the following fact pattern and have them develop a direct examination of the company commander involving unit impact evidence.
2. We recommend you use a real company commander to act as the witness. This will provide trial counsel with the opportunity to improve their interview skills as well as give the commander the chance to feel what it's like to undergo a direct examination. Counsel should ask questions designed to elicit testimony describing the impact of the accused's conduct, which counsel can later refer to during argument.
3. *Scenario.* Corporal John Smith has been convicted of being drunk on duty and barracks larceny. He is the only fuel truck driver for the Division Support Command.



B. Rehabilitative Potential.

1. A primary purpose of this drill is ensure that trial counsel understand the rather significant limitations imposed by the courts and MCM on the scope and admissibility of rehabilitative potential testimony. You should lead a discussion and focus on whether this type of evidence is ever beneficial and, if so, in what forum and under what circumstances. Once you decide the issues have been adequately addressed, you should give counsel the following fact pattern and have them conduct a practice direct examination of the company commander. No student handouts are necessary.
2. *Scenario.* Staff Sergeant Johnson Pepper is the NCOIC of the battalion motor park. He has been convicted of embezzling over \$70,000 worth of supplies over a two year period. Except for this incident, he has an otherwise good record, although he has been counseled a number of times on grooming, physical appearance and organizational skills. His company commander knows Pepper from monthly walk-throughs and reports from the first sergeant.



V.

REFERENCES.

- A. Lauren Hemperley, *Looking Beyond the Verdict: An Examination of Prosecution Sentencing Evidence*, 39 A.F. L. REV. 185 (1996).
- B. Carol DiBattiste, *The Prosecution Sentencing Case*, 27 A.F. L. REV. 203 (1987).
- C. Denise K. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 (1986).
- D. Joseph A. Russelberg, *Sentencing Arguments, A View from the Bench*, ARMY LAW., Mar. 1986 at 50.

ENCLOSURES
Counsel Handout
Sample Solution

SENTENCING PROCEEDINGS
COMPANY COMMANDER - DIRECT EXAMINATION
COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from _____ to _____ hours. The training will focus on unit-impact and rehabilitative potential evidence introduced through the company commander.
- B. Preparation. Bring your MCM to the training. Review basic techniques of direct examination. Review RCM 1001.



II. KEYS TO SUCCESS.

- A. Know the elements of a foundation to admit rehabilitative potential evidence.
- B. Be able to articulate a connection between the accused's offenses and an impact on the unit.



III. REFERENCES FOR FURTHER STUDY.

- A. Lauren Hemperley, *Looking Beyond the Verdict: An Examination of Prosecution Sentencing Evidence*, 39 A.F. L. REV. 185 (1996).
- B. Carol DiBattiste, *The Prosecution Sentencing Case*, 27 A.F. L. REV. 203 (1987).
- C. Denise K. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 (1986).
- D. Joseph A. Russelberg, *Sentencing Arguments, A View from the Bench*, ARMY LAW., Mar. 1986 at 50.

Company Commander - Direct Examination

Sample Solutions



Mission / Unit Impact

- Q.** *CPT Apple, you are the accused's company commander?*
- A.** *Yes, I am, for the last eight months anyway.*
- Q.** *You're aware that the accused has been convicted of being drunk on duty and stealing money and stereo equipment from his fellow soldiers?*
- A.** *Yes.*
- Q.** *CPT Apple, have these offenses had an impact on your unit?*
- A.** *Yes, they've had a significant impact.*
- Q.** *CPT Apple, what impact has the accused's offenses had on your unit?*
- A.** *Well, for one thing, CPL Smith was my only fuel truck driver. Since this happened, he has been pulled from duty; I certainly can't trust him behind the wheel now. So the brigade had to cancel three field training exercises because we couldn't support their fuel needs. I was able to get a loaner from 3d brigade to cover two other missions, but they have their own exercises which have to take priority.*
- Q.** *Why can't you just put in for a new driver?*
- A.** *Well, as I understand it, the replacement detachment won't let me do anything because Smith is still slotted in that position on my TOE. Until he is off my manning roster, I can't submit a request for a personnel fill. I'll tell you one thing, something has to happen soon because these commanders are starting to get concerned over their dropping readiness rates.*
- Q.** *Anything else?*
- A.** *Yes. Before Smith's crimes, the members in my unit all trusted each other so much so that they used to leave their doors unlocked. People would just come and go - camaraderie and morale were sky high. Because Smith stole from his own, now all my soldiers lock the doors when they leave, even when they are just going down the hall to the telephone room. This was not anything I ordered them to do, mind you. This was all on their own initiative. I think it is going to be a long time before we ever achieve the same degree of reliance and trust the unit shared before Smith's convictions.*

Rehabilitative Potential

Q. CPT Jones, you are the accused's company commander?

A. Yes. I've been his commander for the last 22 months.

Q. How well do you know him?

A. I see him monthly when I inspect the motor pool. We've also been on three deployments the last 14 months and we have monthly training exercises. In addition, I get weekly reports from the first sergeant on his duty performance. We also belong to the same church group and both volunteer as third base coaches for the Fort Knight Little League. So I would say I know him as well as anybody.

Q. What are his duties?

A. He is the NCOIC of the battalion motor park. He supervises six mechanics.

Q. CPT Jones, you're aware he has been convicted of larceny and fraud. Did you ever talk to him about these offenses?

A. Yes. I got the impression he wasn't very remorseful and felt he stopped only because he got caught.

DC. Objection, calls for speculation.

MJ. Sustained.

Q. CPT Jones, if I define rehabilitative potential as the ability to learn from one's mistakes and correct one's behavior, do you have an opinion as to this accused's potential to be restored to a useful and constructive place in society?

DC. Objection. RCM 1001(b)(5) provides the panel members with more than an adequate definition of rehabilitative potential, your honor. The trial counsel is trying to circumvent the will of the President and redefine the concept by trying to add new components.

TC. I'll rephrase the question, your honor. CPT Jones, would you agree that an ability to learn from one's mistakes and correct one's behavior is essential in order for a person to be rehabilitated?

A. Yes.

Q. CPT Jones, do you have an opinion as to this accused's rehabilitative potential?

A. Yes.

Q. What is that opinion?

A. In my opinion, the accused has no rehabilitative potential.

Q. Why is that?

DC. Objection, your honor. As I am sure counsel is aware, RCM 1001(b)(5) severely limits the scope of this witness's testimony. This witness is limited to simply offering his opinion regarding my client's rehabilitative potential to be restored to a useful and constructive place in society and not the reason therefore. That is why I questioned the value of his testimony in the first place.

MJ. Objection sustained. Counsel, I believe you are finished with this witness.

TC Thank you, your honor. No further questions.

Tab C
Module 8

Apply the Skill

Objections
The Fundamentals



The Advocacy Trainer

OBJECTIONS

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** One of the key skills for a trial advocate is the ability to make and respond to objections. This module trains counsel to recognize, lodge, and respond to objections through the use of an interactive videotape.
- B. **Training Overview.** The goal of objecting is to prevent the introduction or consideration of inadmissible information. Summarize the law regarding objections, including the commonly used Rules of Evidence and evidentiary foundations. Attached is a counsel handout for this purpose.



II. THE ART.

- A. **Focus.** Making and responding to objections is a key skill for a trial advocate. To fully exercise this skill, you must:



Understand the Military Rules of Evidence and have a system for refreshing your recollection in the heat of the trial. Do counsel have a list of common objections and the corresponding Military Rules of Evidence? This should be part of their trial notebooks. See, e.g., Appendix 1.



Recognize objectionable questions and evidence. Here, you should consider assigning each person to briefly discuss an objection by reviewing the applicable MRE (you could make this assignment before showing the videotape). Note that MRE 611(c) (leading questions); 802 (hearsay); and 402 (relevancy) cover many of the typical objections. See Counsel Handout for Quick Reference Chart.



Evaluate and decide whether you should object. You should consider:


- **Is the evidence going to come in anyway?** If the objection is strictly a lack of proper foundation, will opposing counsel be able to fix the problem?
- **Will an objection make the members look more closely at the evidence?** Will you look like you are hurt by the evidence and thus draw more attention to it?
- **Will an objection make your opponent lose momentum or get flustered?** While it is improper to make an objection solely to disrupt your opponent, it is proper to object whenever you have a colorable basis. Be cautious in this area--tactical objections may work against you--because you may appear overly contentious to the panel, or you may annoy the judge.





Making an objection: Know your judge! Some judges will require you to state the basis and the MRE. Other judges need only hear the word “objection,” and they will start to interrogate opposing counsel. Be aware, especially as defense counsel, that appellate courts will often find waiver of an issue if the objection is not specific which may, at times, require citation to caselaw. Waiver may also be found if the objection is not renewed each time the disputed evidence or testimony is offered.


- Stand up.
- Say: “Objection, your honor, the question is” (leading, improper, argumentative, etc.).
- Grab your objection reference guide in case the judge wants further information.
- Listen to the judge or your opponent and prepare to respond.

B. ***Responding to an objection:***


 Stop talking and listen to the objection. **Do not** immediately concede or offer to rephrase. Be prepared to answer the military judge's concerns.


 Do not be argumentative in front of the panel.

 Answer the military judge, *not* opposing counsel.

 Think about what you just said, and why it may be objectionable. It could be:

- **How the question was phrased** (leading, argumentative, vague, ambiguous, compound).
- **What you were asking the witness** (answered a question that you already asked, gives a conclusion or opinion that is improper, gives a narrative response, discloses privileged information).
- **You have gotten ahead of yourself** (assuming a fact not in evidence, incomplete or improper foundation, bolstering a witness before credibility is attacked).

 If the judge invites a response, state your position. If the problem is a matter of phrasing, or you tried to enter evidence before the foundation was complete, ask for leave to rephrase the question or to complete the foundation.

 If you do not understand the objection, but the point that you were attempting to make was critical, ask the judge for clarification before responding. This practice pointer is contingent on the temperament of your military judge.



III.

PRACTICE POINTERS - RESPONDING TO OBJECTIONS.

- ➔ To the form of the question: if the form is incorrect, offer to rephrase.
- ➔ To a hearsay objection:
 - Not hearsay - MRE 801 (not offered for the truth of the matter; not a statement or a prior statement of the witness; admission of a party opponent); or
 - Falls within an exception - MRE 803-804 - which you will have noted in a margin or footnote on your direct exam script.
- ➔ To a lack of foundation objection: ensure that you are meeting all foundational requirements in the Military Rules of Evidence. The best way to do this is with a foundations guide. Plan step-by-step to lay each segment of the foundation. Insert the elements of the foundation in your trial notebook.



IV.

THE SKILL DRILLS.

- A. ***Videotape Skill Training.*** The single videotape contains three scenarios designed to help counsel raise and respond to objections at trial. Because the videotape is a training tool, each of the three scenarios contains far more objectionable matter than counsel are normally exposed to in a courtroom.
- ☞ The introduction and first scenario (United States v. Beeche) are 20 minutes long. This scenario involves counsel's direct and cross-examination of a key witness in a drug case.
 - ☞ The second scenario (United States v. Smith) is 9 minutes and 30 seconds in duration. It involves examination of a defense character witness in an assault case.
 - ☞ The final scenario (United States v. Green) is 11 minutes, 30 seconds long and involves a cross-examination of the accused in a fraud case.

- B. **Method.** First, the witness testifies without objection from either counsel. The screen fades and the narrator asks, “what objections could be made?” The narrator pauses 10 seconds, and then lists the objections that could have been lodged (these will also appear on the television screen). The narrator explains the bases for the objections. The *same* scene will then replay, with counsel now making the proper objections. The examinations continue, with appropriate pauses throughout for proper objections.



The videotape may be used in two ways:

- As an independent training aide--you need not be present. Each of the three scenarios on the tape is introduced by a narrator. There will be a 10 second pause between scenarios. Stop the tape during this pause while counsel list or state their objections. Then re-start the tape and watch the next segment of questions.
- You may personally train your counsel using the tape as a training aide. This can be done in one of two ways: (a) watch the tape with your counsel and answer any questions counsel have; or, (b) you can pause the tape and interject your own teaching points.



V.

REFERENCES.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* chapt. 4 (1994).
- B. Edward J. Imwinkelried, *Evidentiary Foundations* (2d ed. 1989).
- C. Crim. L. Dep’t, The Judge Advocate General’s School, U.S. Army, (JA 310), *Trial Counsel and Defense Counsel Handbook* (Mar. 1995).

OBJECTIONS

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on making and responding to objections.
- B. Preparation. Review basic techniques of direct examination, cross- examination, and objections.



II. KEYS TO SUCCESS.

- A. Making and responding to objections is one of the key skills for a trial advocate. To fully exercise this skill, you must:



Understand the Military Rules of Evidence and have a system for refreshing your recollection in the heat of the trial.



Recognize objectionable questions and evidence.



Evaluate and decide whether you should object. Considerations:

- Is the evidence going to come in anyway?
- Will an objection make the members look more closely at the evidence?
- Will an objection make your opponent lose momentum or get flustered?



Making an objection: Know your judge! Some judges will require you to state the basis and the MRE. Other judges need only hear the word “objection,” and they will begin to interrogate opposing counsel. Be aware, especially as defense counsel, that appellate courts will often find waiver of an issue if the objection is not specific. Waiver may also be found if the objection is not renewed each time the disputed evidence or testimony is offered.

- Stand up.
- Say: “Objection, your honor, the question is” (leading, improper, argumentative, etc.).
- Grab your objection reference guide in case the judge wants further information.
- Prepare to respond to your opponent’s answer.

B. *Responding to an objection:*



Stop talking and listen to the objection (instruct your witness before trial that when an objection is made, he or she must stop talking).




Think about what you just said, and why it may be objectionable. It could be:


- How the question was phrased.
- What you were asking the witness.
- You have gotten ahead of yourself.




If the judge invites a response, state your position. If the problem is a matter of phrasing, or you tried to enter evidence before the foundation was complete, ask for leave to rephrase the question or to complete the foundation.


 If you do not understand the objection, but the point that you were attempting to make was critical, ask the judge for clarification before responding.

C. *Tactical responses to objections:*

 If the form of the question is incorrect, offer to rephrase.

 If the question calls for *Hearsay*:

- Not hearsay;
- Not offered for the truth of the matter;
- Not a statement;
- A prior statement of the witness;
- Admission of a party opponent, or
- Falls within an exception - MRE 803-804.

 If the objection is to lack of foundation:

- Ensure that you are meeting all foundational requirements in the MRE's. The best way to do this is with a foundations guide. Insert the elements of the foundation in your trial notebook.

III.



REFERENCES FOR FURTHER STUDY.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* chapt. 4 (1994).
- B. Edward J. Imwinkelried, *Evidentiary Foundations* (2d ed. 1989).

- C. Criminal L. Dep't, The Judge Advocate General's School, U.S. Army, (JA 310), *Trial Counsel and Defense Counsel Handbook* (Mar. 1995).

OBJECTION REFERENCE GUIDE

OBJECTIONS TO QUESTIONS

- Ambiguous, confusing or unintelligible - MRE 611(a).
- Argumentative - MRE 611(a).
- Asked and answered - MRE 611(a).
- Assumes a fact not in evidence - MRE 103(c) and 611(a).
- Beyond the scope of direct - MRE 611(b).
- Bolstering - MRE 608(a).
- Calls for improper opinion - MRE 602, 701, 702.
- Calls for narrative - MRE 103(c), 611(a).
- Calls for speculation - MRE 602.
- Compound - MRE 611(a).
- Counsel testifying - MRE 603.
- Cumulative - MRE 102 and 611(a).
- Degrading question - MRE 303.
- Hearsay - MRE 802.
- Improper - (When you are sure the question is improper, but do not have an immediate basis-this will give you time to think.)
- Improper impeachment - MRE 607 - 610.
- Improper use of memorandum - MRE 612.
- Improper use of prior statement - MRE 613.
- Irrelevant - MRE 402.
- Leading - MRE 611(c).
- Misstating the evidence - MRE 103.

OBJECTIONS TO EVIDENCE

- Best evidence rule - (If contents of document are to be proved, rule usually applies.) - MRE 1002.
- Cumulative - MRE 102 and 611(a).
- Expert witness not qualified - MRE 702.
- Hearsay - MRE 801-805.
- Improper bolstering - MRE 608(a).
- Improper characterization - MRE 404-405; 611(a).
- Improper lay opinion - MRE 701.
- Incompetent witness - MRE 104(a); 602-603 and 605-606.
- Irrelevant - MRE 402.
- Narrative response - MRE 103(c) and 611(a).
- Prejudice outweighs probative value - (Argue outside of the members's hearing.) - MRE 403.
- Uncharged misconduct - MRE 404(b).
- Unresponsive - MRE 103(c) and 611(a).
- Witness lacks personal knowledge - MRE 602.

LACK OF FOUNDATION

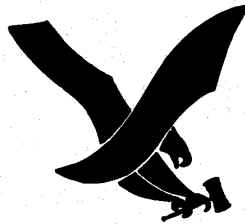
- For expert opinion - MRE 702.
- For exhibit - MRE 104, 401, 801-805.
- Exhibit not properly authenticated - MRE 901(a)-903.

PRIVILEGES

- Clergy - MRE 503.
- Comment on or inference from claim of privilege; instruction - MRE 512.
- Govt. information/classified - MRE 505, 506.
- Husband/Wife - MRE 504.
- Identity of informant - MRE 507.
- Lawyer/client - MRE 502.
- Mental exam of accused - MRE 302.
- Self-incrimination - MRE 301.

Tab C
Module 9

Apply the Skill
Demonstrations



The Advocacy Trainer

DEMONSTRATIONS

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** Increase counsel's direct examination skills by incorporating the proper use of demonstrations. This includes conducting demonstrations with witnesses and using models in the courtroom. Counsel must accurately describe each type of demonstration for the record.
- B. **Training Overview.** This training includes two drills and requires a minimum of four participants; others can assume the role of the panel. The training is divided into four phases: (1) instruction on the law and discussion of practice pointers; (2) preparation by counsel; (3) practical exercise with critique by panel if desired; and (4) a summary of the teaching points and distribution of sample solutions. It should take about one hour to complete this training module.



II. THE LAW.

A. General requirements.




The military judge has broad discretion to control demonstrations. "Preliminary questions concerning the . . . admissibility of evidence . . . shall be determined by the military judge." M.R.E. 104(a).




A demonstration must be relevant. It must have some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." M.R.E. 401.



A demonstration may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M.R.E. 403.

 A demonstration must be for a proper purpose. If the real purpose of a demonstration is to gain an unfair advantage, shock the conscious, or inflame the panel, the demonstration should be excluded. *United States v. White*, 23 M.J. 84 (C.M.A. 1986).

 The demonstrative use of a model or object must be authenticated. “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” M.R.E. 901.

B. Elements of the Foundation: Demonstrations by witnesses.

1. *The demonstration is relevant (useful in explaining testimony).*
2. *The probative value of the demonstration is not substantially outweighed by any prejudicial effect.*

C. Elements of the Foundation: Demonstrations with models. A Foundation must be established for both demonstrative use and admission as an exhibit.

1. *The model is relevant (useful in explaining testimony).*
2. *The probative value of the model is not substantially outweighed by any prejudicial effect.*
3. *The witness is familiar with the item represented at the relevant date and time.*
4. *The model is a fair and accurate representation or created to scale.*



III.

PRACTICE POINTERS.

The art of the in-court demonstration goes beyond exhibition, where the proponent merely displays something before the court. A well-executed demonstration can greatly enhance the impact of direct examination at trial by showing a physical or mechanical process. Demonstrations can be used to show sight, sound, smell, or touch. Furthermore, models can provide an enhanced understanding of spatial orientation, which is not available through two-dimensional diagrams. Models can be used to show the human anatomy, the layout of scenes, or demonstrate the operation of a machine.

- ➔ **Know your judge.** Some military judges may be reluctant to allow certain witness or model demonstrations. Raise the issue early in an R.C.M. 802 session. This will allow time to smooth out any difficulties and provide opposing counsel an opportunity to voice concerns. Make it a habit to ask permission from the military judge before having a witness leave the stand.

- ➔ **Organize effectively.** Logically organize where the demonstration will take place in your direct examination for maximum impact. Ensure the physical facts of the case do not conflict with your demonstration. Reemphasize key components of your theory of the case. The demonstration can be conducted immediately after the relevant testimony or after the entire direct examination is complete.

- ➔ **Prepare your witness.** “Winging it” can lead to disaster. The benefits of a demonstration are lost if the execution is not smooth or the witness is unprepared. Rehearse the demonstration with the witness ahead of time and exercise appropriate witness control during the demonstration.

- ➔ **Anticipate logistics.** Demonstrations can present unique logistical challenges. Plan ahead and use a checklist if necessary.
 - Ensure models are of sufficient quality.
 - Mark and label models as exhibits before your presentation.
 - Measure important distances before the demonstration. Use reference points that can be easily described for the record. Request judicial notice of key distances if necessary.
 - Position the demonstration properly. Ensure all parties, the accused, the military judge, and the panel have an unobstructed view.

- Carefully handle any weapons.
 - Select appropriate assistants. Generally, only actual witnesses or experts should participate in the demonstration.
- **Accurate record description.** A detailed and accurate description of the demonstration must be made. An effective description should allow reviewers of the record of trial to visualize the activity or process shown without confusion. Clear photographs of any models used should be made for the record. Avoid using language such as “let the record reflect.” These legalistic references are unnecessary and may cause the listener to lose interest.
- **Know the language.** Become familiar with key terms (e.g. anatomy, mechanical) that can more accurately describe the demonstration for the record. Familiarize the military judge or panel members with unfamiliar terms before you conduct the demonstration.
- **Control the action.** If you are trying to show fast-moving action, have the witness demonstrate movements twice. Once in slow motion, and once in real-time. Slow motion can help the panel understand positioning and you can describe the action step-by-step. Real-time shows the panel how the event actually occurred.
- **Plan model use.** Decide ahead of time how a model will be used. Is it purely for demonstration, or will it be admitted as an exhibit for the fact-finder to consider during deliberation.
- **Objections and cross-examination.** Counsel conducting the demonstration should anticipate obvious objections and be prepared to respond. Opposing counsel should watch closely and be prepared to object if the demonstration runs afoul of M.R.E. 401, 403, or 901. On cross-examination, counsel may ask the witness to demonstrate a particular act that bolsters the opposing theory of the case.

IV.



SKILL DRILLS.

A. *Goal: Train counsel to employ the following skills.*

1. Use direct examination techniques covered in previous training.
2. Prepare and conduct brief demonstrations with witnesses and models.
3. Lay the proper foundation for demonstrations with witnesses and models.
4. Accurately describe witness and model demonstrations for the record.

B. *Conduct the drills.*

1. *Preparation:* This training module requires at least four participants: (1) a supervisor, who will play the role of military judge, (2) one counsel to perform the drill, (3) one person to play the witness role, and (4) at least one person, preferably more, to assume the role of panel members. The module has two drills: (I) demonstrations with witnesses and (II) demonstrations with models. Common office supplies can be used to complete the demonstrations with models section. Those serving as panel members should be prepared to take notes.
2. *Training Phases:* The training should be conducted in four phases:
 - a. *Phase I: Instruction.* Using the Supervisor's Guide, present a 15-minute period of instruction to include when demonstrations should be used, the applicable law and foundational elements, and practice pointers.
 - b. *Phase II: Counsel Preparation.* Assign counsel and a witness to one of the drills below and provide appropriate scenario handouts. Allow 15 minutes for rehearsal.
 - c. *Phase III: Practical Exercise and Critique.* The counsel and witness perform the demonstration drill. This will be followed by a critique by the supervisor and mock panel members. For the demonstration with witnesses section, a practical critique can be employed. The supervisor should select one or more of the panel members to turn their backs or close their eyes during the demonstration, and then duplicate the position or action described by the counsel for the record.

- d. *Phase IV: Summary.* The supervisor distributes the sample solutions. Review the solutions and summarize main points discussed during the instruction.



V.

DRILL EXECUTION.

A. *Drill #1: Witness Demonstration Exercise.*

1. *Concept.* Counsel conducts a brief direct examination of a witness who sees a victim moving slowly and then discovers the victim on the ground. Counsel incorporates two brief demonstrations into the examination: a demonstration of the movements observed, and a demonstration of the position in which the victim was found. Selected panel members should have their backs turned; note taking is permitted.
2. *Evaluation.* Evaluate how smoothly counsel proceeds into the demonstration phase from direct examination. How well does counsel demonstrate the movement and position for the panel through the witness? How well does counsel describe the movement and position for the record? At the conclusion of the exercise, the supervisor should select one or more of the panel members (who had their backs turned) to demonstrate the movement described and assume the position demonstrated. This provides real feedback to show counsel how well the demonstration was described for the record. Be creative. Consider using other positions as well.

B. *Drill #2: Model Demonstration Exercise.*

1. *Concept.* In a murder case, counsel conducts a brief examination of an expert witness, previously qualified, regarding the path of a bullet through the victim's head. To give the panel a 3-D view of the angle of the bullet's trajectory (a key fact in the case), counsel has the expert demonstrate the trajectory by using a model of a human head and inserting pencils or rods to represent the flight of the projectile. At the conclusion of the demonstration, the exhibit is offered into evidence.

2. *Materials.* This scenario envisions using a Styrofoam head, but for training purposes many substitutes will work. Use a Styrofoam cup, a piece of fruit (orange or apple), or a large ball. Pencils work fine to demonstrate the projectile flight by inserting them into the Styrofoam or fruit. Use tape to secure the end of pencils if using a ball. Some type of marking pen, preferably felt tip, will be needed to mark on the model.
3. *Evaluation.* Evaluate how smoothly counsel proceeds into the demonstration phase from direct examination. Does counsel have the model marked as an exhibit? Does counsel lay a proper foundation? Does the finished exhibit coincide with the testimony? Does the finished exhibit provide a helpful three-dimensional view?

C. **Witness Demonstration Sample.**

Q. Sergeant Rock, where do you reside?

A. In the D Co. barracks, located at 2200 Lee St., Fort Wahoo.

Q. Were you present in your barracks room on the evening of October 31?

A. Yes, I was alone, reading.

Q. Did anything peculiar happen that evening?

A. Yes, at 2230 hours, I heard a strange sound outside my window.

Q. What kind of sound?

A. It sounded like someone was moaning, as if they were hurt.

Q. What happened next?

A. I got up, pulled back the blinds covering my window, and looked out into the parking lot.

Q. What did you see?

A. I saw a soldier who I recognized as Private Rowdy from 2d Platoon, still dressed in his BDU's. He was moving slowly in front of me, from left to right. I could see his right side.

Q. How far away was Private Rowdy when you saw him?

A. I estimate about 12 feet?

Q. How did you arrive at this estimate?

A. I know the distance from my window to the unit parking lot is about 10 feet. There is a narrow strip of grass between the building and the parking lot. He was not far beyond the grass, only a few feet.

Q. Sergeant Rock, I'm standing on a mark on the courtroom floor directly in front of you, but at a distance. Does my distance from you fairly and accurately reflect the distance at which you viewed Private Rowdy?

A. Yes.

Counsel: *The distance from the witness to the mark I am standing on has been previously measured and is 12 feet.*

MJ: *The record will so reflect.*

Q. Sergeant Rock, please describe what you saw?

A. Private Rowdy walked very slowly. He was dragging his left foot. He did not have a boot on his left foot. His right hand was cupped, and pressed against the right side of his neck. I saw blood streaming from under his right hand. His left hand was over his stomach.

Q. Sergeant Rock, would a demonstration help explain the movement you just described?

A. Yes it would.

Q. Your honor, may the witness step down in front of the panel to demonstrate what he saw?

MJ: *The witness may step down.*

Counsel: *Sergeant Rock, I'd like you to assume the role of Private Rowdy and demonstrate to the panel the manner in which you saw him walking. Assume the panel is looking out the window as you did. Please place yourself about 12 feet in front of the panel and walk parallel to the panel box with your right side facing them in the manner you observed Private Rowdy. Please continue moving until I direct you to stop.*

Witness: *[The witness does as instructed, takes his position in front of the panel, and begins the movement].*

Counsel: *[As the witness moves, counsel describes the action for the record]. The witness has removed his left shoe and is walking very slowly in a straight line while dragging his left foot. He is moving parallel to the front of the panel box, approximately 12 feet away, with his right side facing the panel. The witness's right hand is cupped and pressed hard against the right side of his neck. His left hand is open and clutching his abdomen over the navel. The witness may halt.*

MJ: *Thank you counsel.*

Counsel: Sergeant Rock, you may return to the stand.

Q. How long did you observe this movement?

A. Very briefly, about 10 seconds.

Q. What was the lighting like that night?

A. It was dark. No moon, but the parking lot is well lit; I had no problem seeing.

Q. What happened next?

A. I called out, but he only moaned, so I decided to run outside to help. I left the window and ran. I believe it took me about 30 seconds to reach him in the parking lot.

Q. What did you see?

A. When I got to him, he was down. He was on his left side, head facing down, still pressing his right hand against his neck. His left arm was extended and his head rested on his arm. His legs were together, but curled inward towards his chest.

Q. What did you hear?

A. He kept mumbling a name, something like Smith. It was barely audible, but when I knelt down beside him I could hear it.

Q. Sergeant Rock, would a demonstration help illustrate what you saw to the members?

A. Yes it would.

Q. Your honor, may the witness step down in front of the panel to demonstrate the position of the victim he saw?

MJ: The witness may step down.

Counsel: Sergeant Rock, I'd like you to assume the position of Private Rowdy that you just described on direct examination. Please center yourself in front of the panel, and assume the position you observed. Remain in the position until I instruct you to return to the witness stand.

Witness: [The witness does as instructed and assumes the position on the floor in front of the panel].

Counsel: The witness is laying on his left side, approximately ___ft. in front of the panel [any reasonable distance where all members can see], his body is parallel to the front of the panel box. His left ear is

resting on top of his left bicep, his left arm is fully extended and his left hand is in a fist. His right hand is cupped, and pressed tightly against the right side of his neck; his right elbow is on the ground perpendicular with his body; his eyes are gazing at the ground near his right elbow. His legs are together, with the knees curled towards the chest, perpendicular with his body and parallel with his right elbow. The left shoe is missing. Thank you Sergeant Rock, you may return to the witness stand.

D. Model Demonstration Sample.

Q. Dr. Prober, are you familiar with the fatal wounds suffered by Private Rowdy on 21 November?

A. Yes, I have completely reviewed all the medical evidence concerning the deceased.

Q. Dr. Prober, based on all the evidence you have reviewed, where was the entry wound on Private Rowdy?

A. The entry wound was in the left temporal bone, one half inch anterior to the top of the left ear.

Q. And where was the exit wound?

A. The projectile exited the right parietal bone, about two inches above the top of the right ear.

Q. What type of path did the projectile take through Private Rowdy's skull?

A. The projectile went straight through the skull. The projectile entered the left temporal bone and passed completely through the brain to the exit wound in the right parietal bone.

Q. What was the angle of trajectory for the projectile?

A. About a 45 degree angle. If you drew a straight line through the skull from the entry wound to the exit wound, it would represent the axis or flight path of the projectile.

Q. Your honor, may I approach the witness?

MJ: You may.

Q. I am showing you P.E.1/D.E .A for ID, are you familiar with what this model represents? [Already have the document marked, and previously shown to opposing counsel].

A. Yes. It's a model depicting the human head.

Q. Is P.E. 1/D.E. A for ID a fair and accurate representation of the victim's head?

A. Yes.

Q. Would this model help you explain your medical testimony?

A. Yes it would.

Counsel: First, Dr. Prober, could you orient the panel to the major bones of the skull. [Hands marker to witness]. Begin by indicating where the ears would be. [Witness draws ears on the model].

Counsel: Next, with dotted lines, depict the frontal bone, the occipital bone, and the right and left temporal and parietal bones. [Witness does as instructed]. The witness has marked dotted lines, which divide the model into sections. Please label the sections as follows: place an "F" in the frontal bone section; a "O" in the occipital bone section; an "LT" in the left temporal section; an "RT" in the right temporal section; an "LP" in the left parietal section; and an "RP" in the right parietal section. [Witness does as instructed]. The witness has depicted the forehead area of the model with an "F;" the rear section of the model with an "O;" the lower left section of the model with "LT;" the upper left with "LP;" the lower right section with "RT;" and the upper right with "RP."

Counsel: Dr. Prober, using the marker, place an "X" where you testified that the entry wound was and label it as "E1." [Witness does as instructed]. The witness has placed an "X," labeled as "E1" level with the left ear, but one-half inch in front. Please place an "X" where you testified that the exit wound was and label it as "E2." [Witness does as instructed]. The witness has placed an "X" on the right side of the model, about two inches above the top of the right ear.

Counsel: [Hands pencils, or substitute, to witness]. Finally, Dr. Prober, using these pencils, insert them into the entry and exit wounds you have depicted to demonstrate the trajectory of the bullet, and leave them in the exhibit. [Witness inserts pencils as instructed].

Q. Does P.E. 1/D.E. A for ID fairly and accurately reflect your opinion regarding the path of the projectile that passed through Private Rowdy's head?

A. Yes it does.

Counsel: Your honor, I offer P.E.1/D.E. A into evidence as P.E. 1/D.E. A.

MJ: So received.

Counsel: Your honor, I request that the exhibit be published to the members, and that a photograph be taken and included in the record at the appropriate time.

MJ: P.E. 1/D.E. A. shall be published. I order a photograph be taken of the exhibit and entered into the record of trial.

VI.



REFERENCES.

- A. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID, 104, 401, 403, 901; R.C.M. 802 (1998).
- B. Edward J. IMWINKELRIED, *Evidentiary Foundations*, ch. 10 (4th ed 1998).
- C. THOMAS A. Mauet, *Trial Techniques*, ch. 5.3 (4th ed. 1996).
- D. Leonard Packel and Dolores B. Spina, *Trial Advocacy, A Systematic Approach*, ch. 2 (Student ed. 1984).

ENCLOSURES

Counsel Handout

Exercise Handouts

Sample Solutions

DEMONSTRATIONS

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on conducting demonstrations during direct examination. Two types of demonstrations will be covered: demonstrations with witnesses and demonstrations with models.
- B. Preparation. Bring your MCM to the training. Review basic techniques of direct examination, the foundation for witness demonstrations, and the foundation for offering a model into evidence. Review MRE 401; 403; 901.



II. KEYS TO SUCCESS.

- A. Smoothly incorporate a demonstration into your direct examination.
- B. Know the elements of the foundation for a demonstration by a witness.
 - 1. *The demonstration is relevant.*
 - 2. *The probative value of the demonstration is not substantially outweighed by any prejudicial effect.*
- C. Know the elements of the foundation for the demonstrative-use and evidentiary-use of a model.
 - 1. *The model is relevant.*
 - 2. *The probative value of the model is not substantially outweighed by any prejudicial effect.*

3. *The witness is familiar with the item or scene represented by the model at the relevant date and time.*
 4. *The model is a fair and accurate representation or created to scale.*
- D. Accurately describe the demonstration for the record.



III.

REFERENCES FOR FURTHER STUDY.

- A. Manual for Courts-Martial, United States, Mil. R. Evid, 104, 401, 403, 901; R.C.M. 802 (1998).
- B. Edward J. Imwinkelried, *Evidentiary Foundations*, ch. 10 (4th ed 1998).
- C. Thomas A. Mauet, *Trial Techniques*, ch. 5.3 (4th ed. 1996).
- D. Leonard Packel and Dolores B. Spina, *Trial Advocacy, A Systematic Approach*, ch. 2 (Student ed. 1984).

ENCLOSURE Exercise Handouts

WITNESS DEMONSTRATION EXERCISE

SCENARIO HANDOUT

I. OVERVIEW.

The purpose of this drill is to incorporate a witness demonstration into direct examination and accurately describe it for the record. Counsel and the assigned witness will assume the facts below. After reading the scenario, conduct a brief rehearsal.

II. FACTS.

At 2230 hours on 31 October ____, Sergeant Rock, a squad leader in 1st Platoon, D Company, 122d Armor, Fort Wahoo, Va, was alone, reading in his first floor barracks room when he heard a groaning sound outside his window. The D Company barracks are located at 2200 Lee Street on Fort Wahoo. He pulled back the blinds in his room and looked out his window into the parking lot. The company parking lot was only 10 ft. away from his window on the other side of a small strip of grass between the window and the parking lot. The night sky was clear, and the parking lot was well lit.

When he glanced out the window, he saw a soldier he recognized as Private Rowdy, assigned to 2d Platoon, D Company, wearing a battle dress uniform (BDU). Sergeant Rock could see Private Rowdy's right side as he moved very slowly across the parking lot, from SGT Rock's left to his right, directly in front of him. Sergeant Rock estimates that Private Rowdy was about 12 feet away, walking along the parking lot surface. Sergeant Rock noticed that Private Rowdy was dragging his left foot, and his left boot was missing. Rowdy's right hand was cupped and pressed tightly against the right side of his neck; his left hand was open, palm-down, across his stomach. Sergeant Rock saw what appeared to be blood coming from under his right hand and running down the right side of Rowdy's neck. Sergeant Rock watched for about 10 seconds, called out, but heard only more groans in reply.

Next, Sergeant Rock turned away from the window, left his room and rushed outside to help Private Rowdy. When he arrived, 30 seconds later, Private Rowdy was sprawled out on the parking lot surface. He was lying on his left side with his left ear resting on his left bicep. His left arm was fully extended, but his left hand was clenched in a fist. His right hand was still cupped and placed against the right side of his neck with his right elbow resting on the ground perpendicular to his body. His eyes were focused at the ground near his right elbow and he continued to mumble a name in a low tone. At first, the name was inaudible, but when Sergeant Rock knelt beside him, he could hear the name "Smith." His legs were together, but bent in a

curl fashion at a 90-degree angle with his body. Blood was running down the right side of his neck onto the pavement.

III. TASK.

- A. Counsel will conduct a brief direct examination of Sergeant Rock. Counsel will have Sergeant Rock demonstrate the movement he observed and assume the position Private Rowdy was found in for the panel.

- B. Counsel will accurately describe the movement and the body position for the record.

WITNESS DEMONSTRATION EXERCISE

SAMPLE SOLUTION



- Q.** *Sergeant Rock, where do you reside?*
A. *In the D Co. barracks, located at 2200 Lee St., Fort Wahoo.*
- Q.** *Were you present in your barracks room on the evening of October 31?*
A. *Yes, I was alone, reading.*
- Q.** *Did anything peculiar happen that evening?*
A. *Yes, at 2230 hours, I heard a strange sound outside my window.*
- Q.** *What kind of sound?*
A. *It sounded like someone was moaning, as if they were hurt.*
- Q.** *What happened next?*
A. *I got up and pulled back the blinds covering my window and looked out my window into the parking lot.*
- Q.** *What did you see?*
A. *I saw a soldier who I recognized as Private Rowdy from 2d Platoon, still dressed in his BDU's. He was moving slowly in front of me, from left to right. I could see his right side.*
- Q.** *How far away was Private Rowdy when you saw him?*
A. *I estimate about 12 feet?*
- Q.** *How did you arrive at this estimate?*
A. *I know the distance from my window to the unit parking lot is about 10 feet. There is a narrow strip of grass between the building and the parking lot. He was not far beyond the grass, only a few feet.*
- Q.** *Sergeant Rock, I'm standing on a mark on the courtroom floor directly in front of you, but at a distance. Does my distance from you fairly and accurately reflect the distance at which you viewed Private Rowdy?*
A. *Yes.*

Counsel: *The distance from the witness to the mark I am standing on has been previously measured and is 12 feet.*

MJ: *The record will so reflect.*

Q. Sergeant Rock, please describe what you saw?

A. *Private Rowdy walked very slowly. He was dragging his left foot. He did not have a boot on his left foot. His right hand was cupped, and pressed against the right side of his neck. I saw blood streaming from under his right hand. His left hand has over his stomach.*

Q. Sergeant Rock, would a demonstration help explain the movement you just described?

A. *Yes it would.*

Q. Your honor, may the witness step down in front of the panel to demonstrate what he saw?

MJ: *The witness may step down.*

Counsel: *Sergeant Rock, I'd like you to assume the role of Private Rowdy and demonstrate to the panel the manner in which you saw him walking. Assume the panel is looking out the window as you did. Please place yourself about 12 feet in front of the panel and walk parallel to the panel box with your right side facing them in the manner you observed Private Rowdy. Please continue moving until I direct you to stop.*

Witness: *[The witness does as instructed, takes his position in front of the panel, and begins the movement].*

Counsel: *[As the witness moves, counsel describes the action for the record]. The witness has removed his left shoe and is walking very slowly in a straight line while dragging his left foot. He is moving parallel to the front of the panel box, approximately 12 feet away, with his right side facing the panel. The witness's right hand is cupped and pressed hard against the right side of his neck. His left hand is open, and clutching his abdomen over the navel. The witness may halt.*

MJ: *Thank you counsel.*

Counsel: *Sergeant Rock, you may return to the stand.*

Q. How long did you observe this movement?

A. *Very briefly, about 10 seconds.*

Q. What was the lighting like that night?

A. *It was dark. No moon, but the parking lot is well lit; I had no problem seeing.*

Q. What happened next?

A. *I called out, but he only moaned, so I decided to run outside to help. I left the window and ran. I believe it took me about 30 seconds to reach him in the parking lot.*

Q. What did you see?

A. *When I got to him, he was down. He was on his left side, head facing down, still pressing his right hand against his neck. His left arm was extended and his head rested on his arm. His legs were together, but curled inward towards his chest.*

Q. What did you hear?

A. *He kept mumbling a name, something like Smith. It was barely audible, but when I knelt down beside him I could hear it.*

Q. Sergeant Rock, would a demonstration help illustrate what you saw to the members?

A. *Yes it would.*

Q. Your honor, may the witness step down in front of the panel to demonstrate the position of the victim?

MJ: *The witness may step down.*

Counsel: *Sergeant Rock, I'd like you to assume the position of Private Rowdy that you just described on direct examination. Please center yourself in front of the pane and assume the position you observed. Remain in the position until I instruct you to return to the witness stand.*

Witness: *[The witness does as instructed and assumes the position on the floor in front of the panel].*

Counsel: *The witness is laying on his left side, approximately ___ft. in front of the panel [any reasonable distance where all members can see], his body is parallel to the front of the panel box. His left ear is resting on top of his left bicep, his left arm is fully extended and his left hand is in a fist. His right hand is cupped and pressed tightly against the right side of his neck; his right elbow is on the ground perpendicular with his body; his eyes are gazing at the ground near his right elbow. His legs are together with the knees curled towards the chest, perpendicular with his body and parallel with his right elbow. The left shoe is missing. Thank you Sergeant Rock, you may return to the witness stand.*

MODEL DEMONSTRATION EXERCISE

SCENARIO HANDOUT

I. OVERVIEW.

The purpose of this drill is to enhance the direct examination of an expert witness by conducting a demonstration with a model. The demonstration will be accurately described for the record and the model will be offered into evidence. Counsel and the assigned expert witness will assume the facts below. After reading the scenario, conduct a brief rehearsal. A human skull diagram is attached to provide background. You should have the following materials: (1) a styrofoam head or substitute; (2) two pencils or substitute to insert into head; and, (3) a marking pen.

II. FACTS.

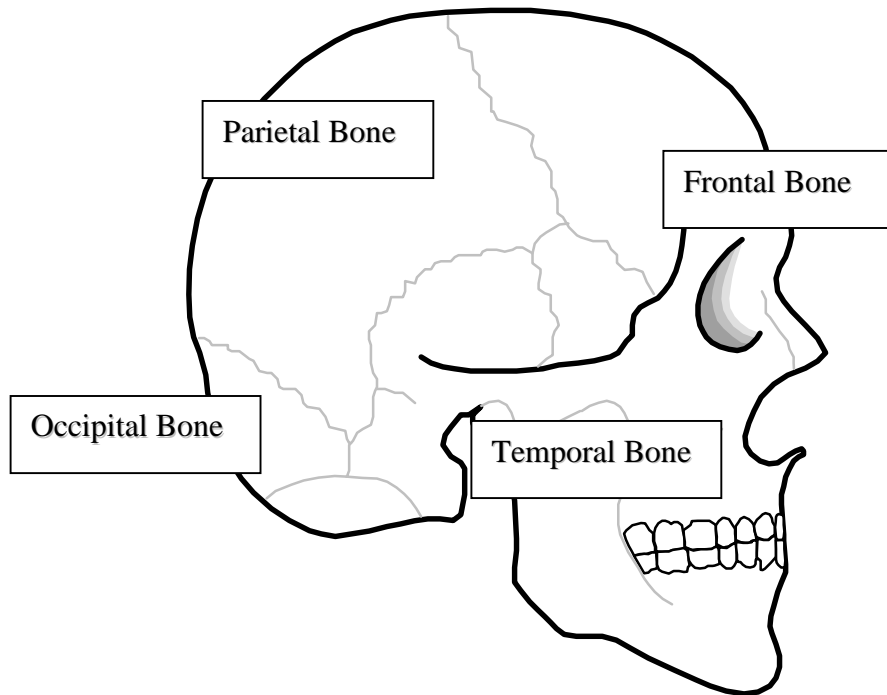
The victim, Private Rowdy, died as the result of a single gunshot wound to the head during an altercation on 21 November, _____. The accused, Specialist Weakling, claims he fired a .380 magnum pistol at Rowdy in self-defense after being knocked to the ground by Rowdy. Dr. Prober, a forensic pathologist, has been retained to examine the case and render an expert opinion on the angle of the bullets trajectory, a key fact in the case. After examining all available medical records, the autopsy, and X-rays, Dr. Prober believes that the entry wound of the projectile was in the left temporal bone, one half inch anterior to the top of the left ear. The projectile exited the right parietal bone two inches directly above the top of the right ear. Furthermore, the projectile had sufficient velocity to pass straight through the skull of the victim. A straight line could be drawn from the point of entry to the exit point. Based on the locations of the wounds and the direct passage of the projectile, Dr. Prober opines that the flight of the bullet was at an approximate 45-degree angle. Assume Dr. Prober is qualified to testify as an expert and has a sufficient basis to formulate an expert opinion.

III. TASK.

- A. Counsel will conduct a brief direct examination of Dr. Prober. Skip expert qualification and basis of opinion questions. At the conclusion of the brief direct examination, conduct a demonstration with the model of the head. Dr. Prober should show the panel the flight path of the projectile by using the marking pen to label the model and the pencils to represent the trajectory of the bullet.
- B. Counsel will accurately describe the demonstration for the record. When the demonstration is complete, counsel will offer the model into evidence.

MODEL DEMONSTRATION EXERCISE

SKULL DIAGRAM



MODEL DEMONSTRATION EXERCISE

SAMPLE SOLUTION



Q. Dr. Prober, are you familiar with the fatal wounds suffered by Private Rowdy on 21 November?

A. Yes, I have completely reviewed all the medical evidence concerning the deceased.

Q. Dr. Prober, based on all the evidence you have reviewed, where was the entry wound on Private Rowdy?

A. The entry wound was in the left temporal bone, one half inch anterior to the top of the left ear.

Q. And where was the exit wound?

A. The projectile exited the right parietal bone, about two inches above the top of the right ear.

Q. What type of path did the projectile take through Private Rowdy's skull?

A. The projectile went straight through the skull. The projectile entered the left temporal bone and passed completely through the brain to the exit wound in the right parietal bone.

Q. What was the angle of trajectory for the projectile?

A. About a 45 degree angle. If you drew a straight line through the skull from the entry wound to the exit wound, it would represent the axis or flight path of the projectile.

Q. Your honor, may I approach the witness?

MJ: You may.

Q. I am showing you P.E.1/D.E .A for ID, are you familiar with what this model represents? [Already have the document marked, and previously shown to opposing counsel].

A. Yes. It's a model depicting the human head.

Q. Is P.E. 1/D.E. A for ID a fair and accurate representation of the victim's head on the relevant date?

A. Yes.

Q. Would this model help you explain your medical testimony?

A. Yes it would.

Counsel: First, Dr. Prober, could you orient the panel to the major bones of the skull. [Hands marker to witness]. Begin by indicating where the ears would be. [Witness draws ears on the model].

Counsel: Next, with dotted lines, depict the frontal bone, the occipital bone, and the right and left temporal and parietal bones. [Witness does as instructed]. The witness has marked dotted lines, which divide the model into sections. Please label the sections as follows: place an "F" in the frontal bone section; an "O" in the occipital bone section; an "LT" in the left temporal section; an "RT" in the right temporal section; an "LP" in the left parietal section; and an "RP" in the right parietal section. [witness does as instructed]. The witness has depicted the forehead area of the model with an "F"; the rear section of the model with an "O"; the lower left section of the model with "LT"; the upper left with "LP"; the lower right section with "RT"; and the upper right with "RP."

Counsel: Dr. Prober, using the marker, place an "X" where you testified that the entry wound was and label it as "E1." [Witness does as instructed]. The witness has placed an "X," labeled as "E1" level with the left ear, but one-half inch in front. Please place an "X" where you testified that the exit wound was and label it as "E2." [Witness does as instructed]. The witness has placed an "X" on the right side of the model, about two inches above the top of the right ear.

Counsel: [Hands pencils, or substitute, to witness]. Finally, Dr. Prober, using these pencils, insert them into the entry and exit wounds you have depicted to demonstrate the trajectory of the bullet, and leave them in the exhibit. [Witness inserts pencils as instructed].

Q. Does P.E. 1/D.E. A for ID fairly and accurately reflect your opinion regarding the path of the projectile that passed through Private Rowdy's head?

A. Yes it does.

Counsel: Your honor, I offer P.E.1/D.E. A into evidence as P.E. 1/D.E. A.

MJ: So received.

Counsel: Your honor, I request that the exhibit be published to the members, and that a photograph be taken and included in the record at the appropriate time.

MJ: P.E. 1/D.E. A. shall be published. I order a photograph be taken of the exhibit and entered into the record of trial.

Tab C
Module 10

Apply the Skill
*Sentencing Proceedings:
The Accused - Direct Examination*



The Advocacy Trainer

**SENTENCING PROCEEDINGS:
DIRECT EXAMINATION OF THE ACCUSED
SUPERVISOR'S GUIDE**



I. SKILL OVERVIEW.

- A. **Goals.** The sentencing phase of the trial is a critical stage in the proceedings for the accused. Whether it follows a guilty plea or a determination of guilt by the trier of fact, it provides the accused with his last opportunity before the sentence is rendered to present evidence aimed at reducing the sentence. Frequently, counsel fail to fully develop extenuation and mitigation evidence during the presentencing stage. This module develops counsel's ability to present effective and admissible evidence through the sworn or unsworn testimony of the accused.
- B. **Training Overview.** The supervisor can conduct training with two or more counsel. The focus of the Skills Drill is the presentation of evidence of extenuation and mitigation through the sworn or unsworn testimony of the accused. The supervisor will play the role of the military judge, while counsel will be selected to play the defense counsel and the accused. You may consider using one of your legal specialists to play the accused since they usually are similar in age and education to the average accused. The training is divided into four stages: 1) instruction period; 2) counsel interview and preparation; 3) practical exercise and critique; and 4) sample solution review. This drill should take about 90 minutes to complete.



II. THE LAW.

- A. R.C.M. 1001 (c)(2)(B). The accused may give sworn oral testimony under this paragraph and shall be subject to cross-examination concerning it by the trial counsel or examination on it by the court-martial, or both.

- B. R.C.M. 1001 (c)(2)(C). The accused may give an unsworn statement during the presentencing phase of the trial. The accused will not be subject to cross-examination by the trial counsel, military judge or members. The unsworn statement can be oral or written, or both. The unsworn statement can be made by the accused or through counsel, or both. The trial counsel can rebut statements of fact in the unsworn statement, but not opinion evidence. Generally, an accused is given latitude to include argument in his unsworn statement (see discussion following R.C.M. 1001(c)(2)(C)).



III.

PRACTICE POINTERS.

- ➔ **Consistency.** Avoid testimony inconsistent with the providence inquiry. During presentencing testimony, the accused may not make a statement that is inconsistent with a prior guilty plea. Contradiction of the accused's guilty plea could result in the loss of a pretrial agreement. If the case is contested on the merits, defense counsel's theme during extenuation and mitigation may differ from the theme in the case in chief. For example, if the defense during the case in chief was alibi on the merits, the theme in sentencing may be that it was the accused's first offense since joining the military. In any case, defense counsel must determine whether the accused will make a sworn or unsworn statement during the sentencing phase of the trial. Select the method most advantageous to the accused. Consider the following factors:
- Sworn Statement:
 - The accused is subject to cross-examination by the trial counsel, military judge, and members. Defense counsel will have little control over the accused's responses. Expect the trial counsel to exploit every negative aspect of the accused's conduct through cross-examination.
 - If the accused is prone to stretch the truth, a lie under oath will justify a request for a mendacity instruction (see p. 73, DA Pam 27-9, Military Judges Benchbook). This permits the prosecution to argue that the accused's lie was both willful and material, and that it reflects his lack of rehabilitative potential.
 - An accused who volunteers to be placed under oath may benefit from answering important questions from the court that otherwise would go unanswered.
 - Testimony under oath may be perceived as more truthful and sincere.

- Unsworn Statement:
 - An unsworn statement deprives the court of a chance to ask specific questions of an accused. Such questions may have been overlooked by counsel, but still be important to the sentencing authority's decision on punishment.
 - An unsworn statement is safe. Defense counsel has the flexibility to prepare and control everything the accused says in court. With an unsworn statement, opposing counsel cannot ambush the accused. Remember that opposing counsel is permitted to rebut statements of fact contained in an unsworn statement.
 - Most accused make unsworn statements at trial. If the facts of the case do not justify sworn testimony by the accused, it is generally better that trial counsel not be given the opportunity to cross-examine.
- ➔ **Responsibility.** Ensure the accused fully accepts responsibility for the crime. The accused should always explain the offense from his or her perspective. However, attempts by the accused to avoid responsibility following a finding of guilt may inflame the members or the military judge. If the accused cannot address the topic without sounding bitter or antagonistic, defense counsel should consider not discussing it in any degree of detail.
- ➔ **Family Background.** Examine the family background of the accused. It is important to humanize the accused to the court. He or she is far more than just a service member who committed a crime. Often the accused has accomplished many fine things and is a member of a good family. Make sure the court is made aware of this side of the story. For example, the accused may come from a solid family with deeply rooted values. Such evidence, and its effect on the accused, may reduce the need for confinement as punishment.
- ➔ **Education.** Examine the educational background of the accused. Sometimes it is a positive thing to educate the trier of fact about the accused's interest in higher learning. This information demonstrates to the court a motivation toward self-improvement and an increased likelihood of rehabilitation.
- ➔ **Culpability.** Explain how the accused became involved in the offense. Beyond explaining the remorse the accused feels for having committed the offense, most often there are facts that the court is unaware of that tend to explain how the accused became involved in the offense, or lessen its seriousness. Even though these should not amount to a defense (remember not to contradict a guilty plea), such facts can soften the impact of the offense and justify a reduced sentence. For example, though your client may have written some bad checks, he wrote them to a grocery store in order to buy food for his children.

- ***Sentence Impact on Others.*** Explain how some aspects of the sentence may have an adverse impact on others. The accused may have family circumstances that make forfeitures or confinement particularly burdensome on others. Make sure the court is aware of their potential impact. For example, the accused may have a wife and children at home who rely on his or her income.
- ***Blameworthiness.*** Explain how the conduct of the accused is less blameworthy. At times, when more than one person is responsible for an offense, it could be helpful for defense counsel to point out that the accused was marginally less responsible, and therefore deserves a lesser punishment. For example, in a conspiracy to burglarize a supply room, it could be helpful to show that the accused never entered the supply room or touched the stolen property, but merely drove the get-away car.
- ***Mitigate Harm.*** Explain how the degree of harm from an offense is mitigated. In a given case the physical harm or property damage may be slight. If so, it could be helpful to ensure the court is aware of that fact. For example, in an assault case, it could be helpful to point out that no weapons were used and that the victim suffered no major injury or pain.
- ***Rehabilitation.*** Explain how the court-martial experience has convinced the accused not to commit similar offenses in the future. The trier of fact will feel less likely to punish severely if they believe the deterrent experience is not necessary. Also, have the accused look at the trier of fact when answering counsel's questions. They will want to be able to evaluate his sincerity and veracity.
- ***Cross-Examination.*** Prepare the accused for cross-examination by the trial counsel and the trier of fact. It is always better to steal the thunder on direct than to have opposing counsel embarrass the accused.
- ***Sincerity.*** It speaks for itself. If the trier of fact does not believe the accused's expressions of remorse, they will send a message with their sentence.
- ***Service Record.*** Defense counsel must be familiar with the accused's service record. The service record contains helpful sentencing evidence that is frequently overlooked. For example, the accused may have received numerous awards, other recognition for superior service, or have a long history of faithful service.
- ***Appearance.*** The accused should appear in a clean and neat uniform for the trial. Make sure the ribbons and badges worn are authorized in the accused's service record. A sloppy appearance sends the message that the accused lacks discipline and enthusiasm and is not worth the rehabilitation effort.

- ***Client Control.*** Defense counsel should use non-leading questions to present the accused's side of the story to the trier of fact. This will require detailed preparation. If the accused is allowed to ramble, salient points could be lost. Both defense counsel and the accused must be aware of the purpose of the testimony and must rehearse its presentation. Also, counsel may request that the Military Rules of Evidence be relaxed if necessary to present presentencing evidence.
- ***Location, Location, Location.*** Counsel should consider different options for the most advantageous location of the accused during testimony. Will the military judge allow the accused to take the stand for an unsworn statement? If so, place him on the stand. Will the military judge allow the accused to enter the well to give his unsworn statement to the members at close range? Depending on the client, closer may be better.
- ***Offering the Accused's Statement.*** If counsel decides to have the accused make an unsworn statement, do not announce to the members that the accused is "making an unsworn statement"--it sounds like it has less veracity. Just say, "the accused desires to make a statement to the court."
- ***Memorable Finale.*** When ending direct examination of the accused, try to end on a strong note. A sincere, tearful apology to the victim, the court, and the unit is always effective.
- ***Retirement Benefits.*** If the accused is retirement eligible or will become retirement eligible during his current enlistment, evidence that a punitive discharge will deny him his retirement benefits, and the magnitude of the loss, is proper mitigation evidence. *See United States v. Becker*, 46 M.J. 141 (1997); *United States v. Sumrall*, 45 M.J. 207 (1996); *United States v. Griffin*, 25 M.J. 423 (C.M.A. 1988).
- ***Disposition of Coactors.*** If coactors received lenient punishment from military or civilian authorities, the accused can include his coactors' punishment in his unsworn statement. *United States v. Grill*, 48 M.J. 131 (1998).
- ***Unsworn Statement without Questions.*** If the accused is articulate, consider having him make the unsworn statement without counsel asking questions. The accused can use notes, if necessary. Allow the accused to have a conversation (at least a monologue) with the sentencing authority.
- ***Use Photographs and Military Certificates.*** Incorporate selected military certificates, coins, photographs from deployments, awards, and other items the accused has received for outstanding performance. Let the accused explain these items to the sentencing authority instead of simply offering them separately. Consider doing the same with family pictures.

➔ **Sentencing Principles.** Remember the five principles of sentencing and fashion your questions accordingly (See DA PAM 27-9 p. 76):

- Rehabilitation of the accused.
- Protect society from the accused.
- Preservation of good order and discipline.
- Deterrence of the accused and others.
- Punishment of the accused.

IV.



SKILLS DRILL.

A. **Goal:** Train counsel to develop the following skills.

1. Counsel presentencing interview of accused.
2. Determine the pros and cons of sworn versus unsworn statement of the accused.
3. Present sworn testimony of the accused through the use of non-leading questions that lays the factual foundation for the sentencing argument.

B. **Conduct the drills.**

1. **Preparation.** Go to the courtroom if possible. You will need at least two counsel for this training. The supervisor will conduct a 15 minute period of instruction on the pros and cons of presentencing sworn and unsworn statements by the accused.
2. **Role Play.** The supervisor will play the judge. One counsel will play the accused and one counsel will play the defense counsel.

3. *Execution.* Following the 15 minute period of instruction, engage counsel in a discussion on the pros and cons of having the accused give sworn or unsworn testimony. Use a pending case, or distribute the scenario fact sheet (enclosure (2)) and the accused background fact sheet (enclosure (3)) to the accused. Next, issue enclosure (2) and the examination checklist (enclosure (4)) to the defense counsel. Allow 30 minutes for the defense counsel to review enclosures (2) and (4) and interview the accused to develop his sentencing questions. The defense counsel should elicit enclosure (3) information from the accused during the interview. Place the accused on the stand and allow the defense counsel to conduct direct examination of the accused. You could assign more than one counsel to prepare questions so all can participate. Have each counsel ask a few questions.

C. *Drill:*

1. The facts. The case involves an E-3 who has pleaded guilty before a military judge to one specification of a violation of Article 112a.
2. Other instructions. Other counsel present should act as trial counsel and object as appropriate. Following the drill, the supervisor and other counsel will critique the defense counsel.
3. See sample solution at enclosure (5).



D. *Summarize the main teaching points.*

- ✓ **Direct examination should elicit evidence that defense counsel intends to use in the sentencing argument. Remember the five principles of sentencing.**
- ✓ **Bring out all possible information that could lessen the punishment of the accused.**
- ✓ **Educate the accused on the pros and cons of sworn and unsworn statements.**
- ✓ **Use open-ended questions during direct examination.**
- ✓ **Prepare for sentencing even if you have a great case on the merits.**

- ✓ **Ensure you humanize the accused to the sentencing authority.**
- ✓ **Educate the sentencing authority about the accused.**
- ✓ **Aim for sincerity.**



V.

REFERENCES.

- A. Thomas A. Mauet, *Trial Techniques*, 73-135 (4th ed. 1996)
- B. LTC Patrick P. Brown, *Trial Judiciary Note: Sentencing Evidence*, *ARMY LAW.*, Mar. 1998, at 29.
- C. David A. Schlueter, *Defense Evidence*, *MILITARY CRIMINAL JUSTICE PRACTICE AND PROCEDURE*, 453-455 (2nd ed. 1987).
- D. *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, R.C.M. 1001 (c)(2)(B) and (C) (1998).
- E. Charles R. Marvin, Jr. & Russell S. Jokinen, *The Presentencing Report: Preparing for the Second Half of the Case*, *ARMY LAW.*, Feb. 1989, at 53.

ENCLOSURES

Counsel Handout

Scenario Fact Sheet

Accused Background Fact Sheet

Examination Checklist

Sample Solution

SENTENCING PROCEEDINGS:
DIRECT EXAMINATION OF THE ACCUSED
COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the court-room on _____, from _____ to _____ hours. The training will cover direct examination of the accused in either a sworn or unsworn statement. The training will require you to interview an “accused” (played by another attorney) and then elect to make a sworn or unsworn statement. Once decided, you will conduct a short examination based upon the information obtained during your interview and from handouts you will receive on the day of training. The purpose of this drill is to enhance your understanding and abilities to solicit meaningful information for use during your presentencing argument.
- B. Preparation. Review R.C.M. 1001 regarding sworn and unsworn statements. Also, review extenuation and mitigation evidence under that same section. You will not need to do any other outside reading.



II. KEYS TO SUCCESS.

- A. Ask thorough questions of the accused's background.
- B. Develop a theme during questioning that will compliment the sentencing argument.
- C. Ask non-leading questions during direct examination.
- D. Prepare your direct examination based upon your sentencing theme and the five principles of sentencing.
- E. Know how to present effectively the accused's testimony in sentencing.

III.



REFERENCES FOR FURTHER STUDY.

- A. Thomas A. Mauet, *Trial Techniques*, 73-135 (4th ed. 1996)
- B. LTC Patrick P. Brown, *Trial Judiciary Note: Sentencing Evidence*, ARMY LAW., Mar. 1998, at 29.
- C. David A. Schlueter, *Defense Evidence*, MILITARY CRIMINAL JUSTICE PRACTICE AND PROCEDURE, 453-455 (2nd ed. 1987).
- D. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001 (c)(2)(B) and (C) (1998).
- E. Charles R. Marvin, Jr. & Russell S. Jokinen, *The Presentencing Report: Preparing for the Second Half of the Case*, ARMY LAW., Feb. 1989, at 53.

SENTENCING PROCEEDINGS:
DIRECT EXAMINATION OF THE ACCUSED
SCENARIO FACT SHEET

On 1 April 1999, E-3 I.M. Stoned was apprehended by the company first sergeant in the A Company latrine while he was snorting crystal methamphetamine. He did not resist apprehension and was escorted to see the company commander. At this encounter, the CO demanded to know where he got the Stuff. He wasn't read his rights as that would just get in the way of ridding the company of drugs. PFC Stoned wiped his nose a bit, looked up in the air, took a deep breath, and said, "I don't remember!" None too pleased, the CO ordered him to CID for interrogation.

Once he arrived at CID, I.M. Stoned realized he was caught cold. After he was introduced to CID Agent Screamer, he decided to make a full confession. Additionally, without any promises or threats, he gave the agent the name of his supplier, as well as all of the other soldiers he knew who were currently using the drug. The only thing I.M. Stoned wants is to stay out of jail and remain in the military. He has many babies at home to feed, and must be there to help his wife. Also, he is the family's sole source of income. Up until this incident, he had loved his job fixing aircraft, and would like to stay in the military.

SENTENCING PROCEEDINGS:
DIRECT EXAMINATION OF THE ACCUSED
ACCUSED'S BACKGROUND FACT SHEET

- Name: PFC (E-3) I.M. Stoned, U.S. Army
- Age: 21 years old, home of record: Charlottesville, Va.
- Unit: A Company, First Air Cavalry
- Years in service: 2; after tax income: \$2,000 per month.
- Marital status: married 4 years
- Children: 5 (triplets and two singles)
- Prior military criminal record: Art. 15 for failure to report to formation on time (15 minutes late).
- Financial status: food stamps/welfare
- Spouse job: none
- Monthly bills: rent: \$500; food: \$350; car: \$ 500; insurance: \$50; baby sitter: \$200; furniture: \$200; ring: \$ 75; credit card: \$100
- Favorite color: teal
- Religion: none
- Outside organizations: Headbanger Music Lovers Ass'n.
- Parents: divorced.
- Prior military waivers: drugs/ federal conviction --burglary
- Used crystal methamphetamine- 20 times in past
- MOS: aircraft mechanic

SENTENCING PROCEEDINGS:
DIRECT EXAMINATION OF THE ACCUSED
EXAMINATION CHECKLIST

I. GENERAL

This handout provides the defense counsel with examples of areas of inquiry relevant to preparation of the accused for direct examination, as well as points to highlight during argument on sentencing. Counsel should review this document in preparation when developing his/her line of questioning.

- ✓ Role of the accused in the crime: leader, accomplice or minor role; sole perpetrator (or, the accused having no apparent disposition to do so was induced by others to participate in the crime).
- ✓ Place of the offense: public building, victim's residence, accused's residence, secluded area, on the street, in the barracks, on base overseas etc.
- ✓ Victim's status: officer/SNCO/NCO/soldier/civilian/dependent.
- ✓ Type of victim: crime against person or property (military or civilian victim; age of victim; foreign national; government or private property)
- ✓ Victim's relationship to the offender: stranger, friend, family, subordinate, chain of command or police, etc.
- ✓ Victim provoked the crime to a substantial degree, or victim contributed substantially to the criminal event.
- ✓ Damage or injury: degree of actual or threatened property damage or personal injury (permanent or temporary).
- ✓ Unit impact: effect on military discipline/readiness/unit effectiveness.
- ✓ Weapons: type of weapon and degree of use (such as, in possession only, used to threaten, actual application).

II. AGGRAVATION

- ✓ Abuse of trust or position.
- ✓ Injury to victim.
- ✓ Weapons involved.
- ✓ Accused/victim relationship—random or known victim.
- ✓ Youth or frailty of victim.
- ✓ Offense committed while accused pending other charges.
- ✓ Accused has criminal pattern or character.

III. MITIGATING FACTORS

- ✓ Absence of any prior disciplinary or criminal record of the accused
- ✓ Accused's extreme youth, or special conditions (health, IQ, service related injury).
- ✓ Good military character (service record and favorable opinions of relevant witnesses) and rehabilitative potential.
- ✓ Accused supports dependents.
- ✓ Cooperation with law enforcement and prosecutors in this and other crimes/confession.
- ✓ Accused's remorse and apology (including timing thereof).
- ✓ Victim forgiveness (including the chain of command).
- ✓ Provocation by the victim or accused's special circumstances.
- ✓ Restitution.
- ✓ Accused's conduct between the time of the offense and the trial.

SENTENCING PROCEEDINGS:
DIRECT EXAMINATION OF THE ACCUSED

SAMPLE SOLUTION



Here is a sample direct-examination of the accused. It can apply during either a sworn or an unsworn statement at the presentencing phase of the court-martial.

Q. For the record, you are PFC Stoned, the accused in this case, correct?

A. Yes, sir.

Q. Where does your family reside?

A. We live in a small apartment in town.

Q. PFC Stoned, please tell the court your family status.

A. Yes sir. I am married and have five children. All of my children are below the age of four. I have been married for four years and am the only source of income for my family.

Q. Does your wife have help with the children?

A. The children go to daycare sometimes. No one else is able to help with the children when I'm not around.

Q. PFC Stoned, what is the total of your military income?

A. Sir, I make about \$2,000 per month with all of my pay as well as some food stamps that we get.

Q. What is the total of your monthly bills?

A. Sir, my bills total about \$1,975 each month. They include: \$500 rent; \$350 food; \$500 car; \$50 insurance; \$200 baby sitter; \$200 furniture; \$75 ring payment; and \$100 credit card.

Q. What effect will forfeitures of pay have on your family?

A. Sir, I wouldn't be able to feed my kids or pay my bills.

Q. How long have you been in the service?

A. About two years, sir.

- Q. Why did you join the Army?**
A. *Sir, I wanted to serve my country like my father did. He fought in WWII at Normandy.*
- Q. How do you feel about military service?**
A. *Sir, I love the Army. I think being an aircraft mechanic is the best thing that ever happened to me.*
- Q. Do you want to stay in the Army?**
A. *Yes sir. I made a mistake, but I know I can learn from this and be a good soldier.*
- Q. You have been in trouble with military authorities on one other occasion in the past, correct?**
A. *Yes sir, I was 15 minutes late for a formation about a year ago. I had slept through my alarm. That was the only time until now.*
- Q. Why did you use drugs, and why on base?**
A. *Sir, the methamphetamine was already on the base. I bought it from my platoon sergeant, Staff Sergeant Cool Dude. I used drugs that day because I was depressed and under a lot of family stress. I knew it was unlawful, but I thought I needed a boost to give me peace.*
- Q. Where did you use the methamphetamine?**
A. *Sir, I used it in the latrine of my company building.*
- Q. Was anyone else present?**
A. *No, sir. Not until the fist sergeant walked in.*
- Q. Would you agree that drugs have no place in a serviceman's life, on or off a base?**
A. *Yes, sir. Drugs can ruin readiness and good order and discipline.*
- Q. After you were apprehended, you were interviewed by CID, correct?**
A. *Yes, sir. When I met agent Screamer, I told him where I got the drugs and the names of other soldiers who use drugs.*
- Q. When you gave him this information, had he made any promises to you?**
A. *No, sir. I just wanted to do the right thing and tell the whole truth. The same reason I pleaded guilty here today. This is my first step in rehabilitation.*
- Q. How do you feel about your misconduct?**
A. *Sir, I feel disappointed in myself. I have let my family and my company down.*

- Q. Do you think the military judge should consider not awarding a bad conduct discharge?**
- A. *Yes, sir. I think this whole event has made me realize my priorities and responsibilities. I have placed my family in jeopardy and I realize now that I was wrong. I don't believe I am capable of doing it ever again. I am ready to accept my punishment, but believe I can serve honorably from this point on.*
- Q. Is there anything else you would like the military judge to consider before he considers an appropriate punishment?**
- A. *Yes, sir. I apologize sincerely for my use of methamphetamine. As is clear from my record, I also used the drug prior to my service. I am 21 years old, and not the brightest person in the world. But, I have learned that I need to take charge of my life for my family's sake. If given the opportunity to learn from this event, I promise to be a better soldier. I promise that my focus from this moment on will be to care for my family and work to be the best soldier possible. I ask that you allow me to remain in the Army today. Let me prove I am worth a second chance.*

MOTION PRACTICE

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** The pretrial motion is the best way to get issues that will affect the way you plan for trial decided in advance. This exercise develops counsel's ability to litigate motions effectively. First, this module develops counsel's ability to recognize important issues that may be grounds for a motion. Second, this module will cover legal and practical considerations of the motion practice. The supervisor should first lead a discussion of the necessity of good motion practice, the law, review the practice pointers, and then conduct the suggested drills.
- B. **Training Overview.** This training requires at least two counsel and the supervisor acting as the military judge during the practical exercise portion. The training is divided into four phases: (1) instruction on the elements of good motion practice, (2) preparation by supervisor and counsel; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions. The fundamentals of motion practice outlined in this module are common to all types of motions. Training should address one motion at a time. Time constraints will preclude addressing all the motion modules at one training session. Although the overall motion practice has common characteristics, each motion module contains different issues presented at trial, as well as specific caselaw concerning the specific grounds addressed.



II. THE LAW.

- A. **Selected portions of Rule for Courts-Martial (R.C.M.) 905.**
- R.C.M. 905(a). *Motions generally.* A motion is an application to the military judge for particular relief. Motions may be oral or, at the discretion of the military judge, written. A motion shall state the grounds upon which it is made and shall set forth the ruling or relief sought. The substance of the motion, not its form or designation, shall control.

- R.C.M. 905(b). Any defense, objection, or request that is capable of determination without the trial of the general issue of guilt may be raised before trial. The following must be raised before a plea is entered:
 - Motions based on defects (other than jurisdictional defects) in the preferral, forwarding, investigation, or referral of charges;
 - Motions based on defects in the charges and specifications (other than failure to show jurisdiction or to state an offense);
 - Motion for discovery under R.C.M. 701 or for production of witnesses or evidence;
 - Motion for severance of charges or accused;
 - Objections to denial of, or request for, an IMC or retention of detailed defense counsel when IMC has been granted;
 - Motions to suppress evidence.

- R.C.M. 905(c). *Burden of Proof*. Questions of fact on interlocutory issues are determined by a preponderance of the evidence, unless otherwise provided by the MCM. In the absence of a rule in the MCM assigning the burden of persuasion, the party making the motion or raising the objection shall bear the burden of persuasion. R.C.M. 801(e)(4). *See also* R.C.M. 801(e)(5).

- R.C.M. 905(d). *Rulings on Motions*. A motion made before pleas are entered shall be determined before pleas are entered unless, if otherwise not prohibited under the MCM, the military judge for good cause orders that determination be deferred until trial of the general issue or after findings, but no such determination shall be deferred if a party's right to review or appeal is adversely affected. Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record.

- R.C.M. 905(f). Additionally, the military judge may reconsider a past ruling on a motion upon a request, or *sua sponte*, at any time prior to the end of trial.

B. *Selected Portions of R.C.M. 906.*

- R.C.M. 906(a). *Motions for appropriate relief.* A motion for appropriate relief is a request for a ruling to cure a defect, which deprives a party of a right or hinders a party from preparing for trial or presenting its case.

- R.C.M. 906(b). The following is a nonexclusive list of grounds for appropriate relief:
 - Continuances

 - Defective Article 32 investigation or pretrial advice

 - Amendment of charges/specifications

 - Severance of duplicitous specifications

 - Bill of particulars

 - Discovery and production of evidence and witnesses

 - Relief from illegal pretrial confinement

 - Severance of multiple accused

 - Severance of offenses

 - Change of place of trial

 - Multiplicity issues

 - Preliminary ruling on admissibility of evidence

 - Mental capacity/responsibility issues

C. *Selected Portions of R.C.M. 907.*

- R.C.M. 907(a). *Motions to dismiss.* A motion to dismiss is a request to terminate further proceedings as to one or more charges and specifications on grounds capable of resolution without trial of the general issue of guilt.

- R.C.M. 907(b). Grounds for dismissal include the following:
 - Nonwaivable grounds. A charge or specification shall be dismissed at any stage of the proceeding if:
 - The court-martial lacks jurisdiction to try the accused for the offense;
or
 - The specification fails to state an offense.

 - Waivable grounds.
 - R.C.M. 707 speedy trial
 - Statute of limitations
 - Double jeopardy
 - Prosecution barred by presidential pardon, immunity, constructive condonation of desertion, or prior punishment under Art. 13 or Art 15 for same minor offense.

 - Permissible grounds. A specification may be dismissed upon timely motion by the accused if there is a defective specification that substantially misled the accused or is multiplicitous.

- D. ***Military Rule of Evidence (MRE) 104(a)***. The military judge shall determine preliminary questions concerning the qualification 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. In making these determinations the military judge is not bound by the rules of evidence, except those with respect to privileges.



III. PRACTICE POINTERS.

- A. ***Understand the procedures involved with motion practice.*** It is imperative that the trial attorney be familiar with the procedure to be utilized in completing his or her preparation for trial. The bulk of motion practice procedure is set forth in R.C.M. 905-907. Additional procedural guidance is provided by local, regional, or service court rules, as well your respective military judge. Also, inextricably intertwined within the procedural rules are the Rules of Professional Responsibility governing Judge Advocate practice.
- B. ***Written motions.*** Written motions are often more persuasive, articulate, and organized than oral motions. Written motions should be the rule rather than the exception. The writing process forces the trial advocate to craft carefully the advocate's rendition of the facts and the law to increase persuasion and the chances of a favorable ruling on the motion.
- C. ***Writing tips.***
- ***Do the research.*** Ensure you read the law and understand the precise issue and how you will address the issue before you begin to write.
 - ***Organize the facts.*** Write out your statement of the facts. Ensure each written motion sets forth all relevant facts in *short, topically-organized and numbered* paragraphs. The evidence must support each factual assertion. Never adopt the opponent's summary of the facts unless the facts are helpful. Tailor the facts toward the conclusion you seek in your legal analysis. Some facts will be more important than others.
 - Carefully present all applicable law, including the law that is contrary to your position.

- Concisely state your argument and your opponent's argument. Clarify the issues. State the applicable standard or rule of law. Ensure you discuss your strongest cases and not simply quote them. Distinguish any contradictory cases.
 - *Apply the law to the facts.* Ensure your argument fits the relevant facts into legal principles.
 - *State the relief sought from the court.* If appropriate, propose to the court alternative solutions. Check with your local court rules for a sample motion submission to ensure the written motions are in the proper format.
- D. **Evidence.** The military judge will expect you to present evidence. Generally, a military judge will not accept an offer of proof as evidence. Remember the military judge is not bound by the rules of evidence in the motion phase. *See* M.R.E. 104(a). Evidence may take the form of testimony, stipulations of fact, depositions, and exhibits. Generally, exhibits introduced are marked as appellate exhibits (AE).
- E. **Be candid with the court.** Candor and honesty are essential to effective advocacy. Never shade the facts. Diffuse ambiguities or unfavorable facts by openly disclosing and confronting them. Do not assume the court will overlook them even if your opponent has. Equally important, the judge advocate that candidly includes apparently contrary, but distinguishable, legal authority will retain more credibility with the court than advocates who fail to do so.
- F. **Timeliness.** Timeliness of motion practice is *critical* to both sides. Some motions are waived if not raised in a timely manner.
- G. **Burden of proof.** Know the burden of proof *before* raising the motion. This is usually the first question a military judge will ask at the motion hearing. Not understanding the burden is embarrassing. Questions of fact on interlocutory issues are determined by a preponderance of the evidence, unless otherwise provided by the MCM. Normally, the party making the motion or raising the objection shall bear the burden of proof. *See* R.C.M. 801(e)(4), (5) and 801(g).

- H. ***Motions in limine.*** Both sides should consider getting advanced rulings on the admissibility of their own evidence if admissibility is in doubt. Consider challenging the admissibility of your opponent's evidence in advance. Knowing whether key pieces of evidence will be admissible will impact on your theory of the case. A *motion in limine* asks the military judge to rule on an evidentiary matter outside the hearing of the members either before trial or during a recess. Check local court rules concerning *motions in limine*; some jurisdictions require advanced notice. Although often associated more with defense motion practice, *motions in limine* are available for both parties.
- I. ***Sequence of events.*** The sequence of events will vary from military judge to military judge.
- Typically, the military judge sets a date for submission of written motions and written responses. This allows the military judge and opposing counsel to understand the issues fully prior to the hearing.
 - Prior to the Article 39(a) session, mark the written motions and responses.
 - During the Article 39(a) session, the military judge will state that the purpose of this particular Article 39(a) session is to litigate motions. The judge will identify the appellate exhibits (AEs). The military judge may then inquire into who has the burden and what the standard of proof is. After identifying the burden, the military judge is ready to hear the motion.
 - Most judges will give both sides an opportunity to state its position before the presentation of evidence. Typically, the moving party has the burden and presents its evidence first. The opposing party then presents its evidence, if any. Rebuttal and surrebuttal evidence, if any, is presented. The advocates then argue their positions to the military judge.
 - The judge deliberates on the motion and ultimately makes a ruling.
 - Stress to counsel that this sequence varies from judge to judge. The military judge is typically more proactive and inquisitive during motion practice. Be prepared for the military judge to attempt to focus counsel on the pertinent issues.

- J. **Argument.** See the argument module (Tab C, Module 3) for a description of how to deliver an argument. Although the argument must be tailored for motion practice, the basic concepts of persuading the military judge to rule in your favor apply. Typically, a good motion argument will initially state your position, move to the facts, present the law, apply the law to the facts and, finally, restate your position on the requested relief. Knowing your judge and the local rules will provide greater insight on the general scheme for the motion argument.

IV. SKILL DRILLS.

- A. **Goals.** To train counsel on the mechanics of a motion hearing and to train counsel to use motion practice effectively.
- B. **Conduct the drill.**
1. **Preparation.** Chose a motion to be used in the training. You can choose a motion that is currently pending in your office, a motion that has been argued in your jurisdiction in the past, or chose a motion at Enclosure 1 or 2.
 2. **Class.** Present a class on the elements of good motion practice. Assign counsel as trial or defense counsel. Give them time to prepare a written motion.
 3. **Conduct a motion hearing.** Play the military judge. Have different counsel represent each side. Each side should prepare a written brief, present evidence, and argue their side of the issue. Other counsel should play the role of witnesses.
 4. **Critique.** Use the NITA method (see Tab A) and focus your critique on the main teaching points.
- C. **Summarize the main teaching points.**
- ✓ **Written motions.** Written motions are more persuasive, articulate, and organized than oral motions.

- ✓ *Evidence.* The military judge will expect counsel to present evidence. Generally, a military judge will not accept an offer of proof as evidence.
- ✓ *Burden of proof.* Know the burden of proof.
- ✓ *Argument.* Typically, a good motion argument will initially state your position, move to the facts, present the law, apply the law to the facts and finally restate your position.
- ✓ *Request specific relief from the court.*

V.  **REFERENCES.**

- A. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 905-907 (2000).
- B. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 104 (2000).
- C. THOMAS A MAUET, TRIAL TECHNIQUES 420-21 (4th ed. 1996).

ENCLOSURE:

Counsel Handout

MOTION PRACTICE

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. **Introduction.** The next trial advocacy training session, scheduled on _____, from _____ to _____ hours, will focus on motion practice. The training will be conducted in three parts. First, I will lead a discussion about the law and techniques necessary for effective motion practice. Second, I will assign you a role in the motion hearing and you will prepare a written brief. Third, we will conduct a motion hearing. The motion will use for this training is _____.
- B. **Preparation.** Counsel must prepare a written brief (use the format used in your jurisdiction) before the training session. Counsel must bring their Manual for Courts-Martial to this trial advocacy training session. Counsel must also be prepared to present evidence and argue the motion. Finally, counsel will review, and be prepared to discuss, the motion practice skills listed in part II.



II. KEYS TO SUCCESS.

- ✓ **Written motions.** Written motions are *always* more persuasive, articulate, and organized than oral motions.
- ✓ **Evidence.** Expect counsel to present evidence. Generally, a military judge will not accept an offer of proof as evidence.
- ✓ **Burden of proof.** Know the burden of proof.
- ✓ **Argument.** Typically, a good motion argument will initially state your position, move to the facts, present the law, apply the law to the facts and finally restate your position.
- ✓ **Request specific relief from the court.**



III. REFERENCES FOR FURTHER STUDY.

- A. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 905-907 (2000).

- B. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 104 (2000).

- C. THOMAS A MAUET, TRIAL TECHNIQUES 420-21 (4th ed. 1996).

MOTION PRACTICE

SCENARIO #1: ARTICLE 10, UCMJ

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise develops counsel's ability to litigate a pretrial motion to dismiss based upon an Article 10, UCMJ violation. Lead a discussion of the law and practice pointers and then conduct the suggested drill.
- B. **Training Overview.** Training should be conducted with at least three individuals. Two counsel and the supervisor as the military judge. If you have additional personnel, you may want to assign them as witnesses. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise; and (4) summary of teaching points and distribution of sample solutions.



II. THE LAW.

- A. **The Manual for Courts-Martial.**
- **R.C.M. 907.** A motion to dismiss is a request to terminate further proceedings as to one of more charges and specifications on grounds capable of resolution without trial of the general issue of guilt.
 - **Article 10, UCMJ.** When any servicemember is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused, and to try him or to dismiss the charges and release him.
- B. **Caselaw.** Counsel are encouraged to review the following cases in preparation for this motion.

- *United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971). Article 10 is more rigorous than the Sixth Amendment right to a speedy trial. The Article 10 standard is not subject to a precise time standard. However, in the absence of a defense request for a speedy trial, there is a presumption of an Article 10 violation 90 days after being placed into pretrial confinement.
- *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993). This case held that the President can modify R.C.M. 707, but the President may not create a less stringent standard than the UCMJ. Therefore, Article 10 may be violated in spite of technical compliance with R.C.M. 707. This case overruled the Burton presumption of an Article 10 violation. This case established the reasonable diligence standard. Article 10 is violated where the government could readily have gone to trial but negligently or spitefully chose not to.
- *United States v. Calloway*, 47 M.J. 782 (N.M.C.C.A. 1998). Even where a delay is approved by a military judge, the government must show reasonable diligence. Detailing of counsel is a significant factor in reasonable diligence analysis.



III. PRACTICE POINTERS.

- A. ***Know the differences between the various speedy trial motions.*** There are four sources of a right to a speedy trial in the military. They are the Fifth and Sixth Amendments to the U.S. Constitution, Article 10, UCMJ, and R.C.M. 707. The military judge will expect counsel to know and understand the different rights.
 - Under the Fifth Amendment the right to a speedy trial is a Due Process issue. The burden is on the accused to show both egregious or intentional tactical delay AND actual prejudice. See *United States v. Reed*, 41 M.J. 449 (1995), cert. denied, 116 S.Ct. 78 (1995).
 - Under the Sixth Amendment right to a speedy trial, preferral of charges or the imposition of pretrial restraint starts the speedy trial clock. See *Barker v. Wingo*, 407 U.S. 514 (1972).

- Under R.C.M. 707, the accused must be arraigned within 120 days of the preferral of charges or imposition of pretrial restraint. R.C.M. 707(c) establishes specific exclusions that may be deducted from the government's accountability when computing the 120-day limit. Under R.C.M. 707, the military judge can dismiss the charge(s) with or without prejudice.
 - Article 10, UCMJ is a statutory right. Article 10 violations will result in dismissal with prejudice. *See also* Article 33, UCMJ.
- B. ***Understand the law.*** Counsel should fully understand Article 10, UCMJ and the cases interpreting Article 10. The trigger to Article 10 is the imposition of pretrial confinement or arrest. Once placed into pretrial confinement, the government shall take immediate steps to inform him of the specific wrongs of which accused, and try him or dismiss the charges and release him.
- C. ***Focus on the "Reasonable Diligence" standard.*** An Article 10 motion can be won or lost on the evidentiary record. Constant motion is not required. The whole picture is more important than an analysis of a single delay. Even where a military judge approves an individual delay, the government must show reasonable diligence. The detailing of counsel is a significant factor in reasonable diligence analysis. What may be reasonable diligence for one offense may not equate to reasonable diligence for another offense.
- D. ***Attach a chronology.*** Timelines are extremely effective in any speedy trial motion. In most jurisdictions, the military judge requires each counsel to submit a timeline, especially since the military judge usually includes a timeline chronology as one of the findings of fact. The chronology should include all significant events that occurred starting with the date the accused is placed into pretrial confinement and ending with the date of arraignment. In between those dates include all events such as the preferral of charges, the magistrate's hearing, various investigative activities, detailing of defense counsel, any speedy trial request, Article 32 investigations, referral, any approved delays, or any other relevant matters.
- E. ***Evidence.*** The military judge will expect evidence to be presented. Generally, an offer of proof will not be considered by the military judge as proof at a motion hearing. However, the military judge is not bound by the rules of evidence in a motion hearing. *See* M.R.E. 104(a). Evidence may take the form of live testimony, stipulations of fact, depositions, and exhibits. Exhibits introduced are marked as appellate exhibits.

- F. **Burden.** Once the defense raises the issue, the government has the burden to prove by a preponderance of the evidence that the government met the “reasonable diligence” standard established in Kossman.
- G. **Delays.** Focus on delays or periods of apparent inaction. A defense counsel can exploit unexplained delays or periods of inactivity. Government counsel needs to show all actions taken on the case during any perceived period of inactivity.

IV.  **SKILL DRILLS.**

- A. **Goal:** To train counsel to litigate a pretrial motion using an alleged Article 10 violation as the training vehicle.
- B. **Conduct the drill.**
 - 1. **Preparation:** Counsel will read and understand Article 10 and related cases prior to training. Additionally, counsel will prepare a written motion advocating their assigned position. Conduct this training in the courtroom. The supervisor may consider providing counsel with previously litigated or current Article 10 issue or utilize the fact scenario below. This training should take approximately two hours to complete, over two separate training days.
 - 2. **Role Play:** The supervisor will play the role of the military judge. Counsel will need to be assigned roles. Other counsel will play the role of witnesses.
 - 3. **Execution:**
 - a. Using the Supervisor’s guide for this training, present a period of instruction to counsel on the fundamentals of motion practice.
 - b. At the end of the instruction, provide counsel with an Article 10 scenario. Supervisors may want to use a previously litigated Article 10 motion, a current Article 10

issue, or the scenerio below. Tell counsel to be prepared to litigate the motion at the following training session.

- c. Defense counsel will draft a written motion to dismiss and serve it on the “court” and opposing counsel. The trial counsel will draft a written response to defense counsel’s motion. The supervisor should consider providing counsel with a previously drafted written defense motion to dismiss and written government response.
- d. Conduct the practical exercise. If possible, conduct this training in a courtroom. The defense counsel raises the motion to dismiss and presents the military judge with the written motion to dismiss (appropriately marked). The trial counsel provides the military judge with its written response and prepares to meet its burden. Counsel must present evidence (a timeline; stipulations of fact; or witnesses). After each counsel has an opportunity to present evidence, counsel will argue the motion.
- e. After the practical exercise, distribute the appropriate solution to counsel. You should review and discuss the solution at this session, summarizing the “fundamentals” of motion practice.

C. *Sample Drill: Litigation of an Article 10, UCMJ motion.*

- 1. Fact situation: On 3 November 20XX, Private Green was pulled over by the Jacksonville, North Carolina Police Department for a routine traffic stop. One police officer requested and received Private Green’s consent to search his automobile, including the trunk. The other police officer ran a check of Private Green’s driver license. The police learned that Private Green is a deserter from the United States Marine Corps. At the same time, the other police officer discovered three “dime” bags of marijuana in the trunk. The police arrested Private Green and turned him over to Naval Criminal Investigative Service (NCIS) on the same evening. The following morning, 4 November 20XX, Private Green was placed into pretrial confinement by order of the Commanding Officer, 2nd Marine Regiment. Private Green was given a urinalysis. That same day, a pretrial confinement (PTC) hearing was conducted; the Magistrate determined that Private Green should remain in PTC.

2. On the same day, the government was served with a request for a speedy trial by the defense counsel assigned to represent Private Green at the PTC hearing. This representation was solely for the purposes of the PTC hearing. On 14 November 20XX, the CO, 2d Marines, as well as NCIS was made aware that the urinalysis came back positive for THC.
3. On 18 November, NCIS provided the CO, 2nd Marines, as well as the Camp LeJeune, North Carolina (CLNC) Military Justice Officer (MJO; the equivalent of the Army's Chief of Military Justice), a Report of Investigation (ROI) detailing all activities that Private Green is eventually charged with. That same day, the MJO briefed the NCIS agent on further investigation requirements. From 18 November through 14 December 20XX, NCIS investigated the charges but did not produce any additional information not already contained in the 18 November report of investigation. The further investigation consisted solely of reinterviewing the two Jacksonville, NC police officers, and a passenger in Private Green's car. On 16 December 20XX, the CO, 2nd Marines submitted a Request for Legal Services (RLS) in the case of Private Green to the CLNC Military Justice Office.
4. On 18 December, the trial counsel (TC) requested and received the laboratory analysis of the urinalysis. On 27 December, the trial counsel received a laboratory analysis of the seized marijuana. On 29 December 20XX, charges were preferred against Private Green. They included: one violation of Article 86 (for a 2-year unauthorized absence), and two violations of Article 112a (one for possession of marijuana, and one for use of marijuana). On 30 December 20XX, the charges and draft Article 32 Appointing Order was forwarded to 2nd Marines.
5. On 6 January 20XX, Private Green was notified of the charges. The CO, 2nd Marines, signed the Article 32 Appointing Order. That same day, the defense section was notified of the preferred charges and Private Green was assigned a detailed defense counsel. On 12 January 20XX, the Article 32 hearing was set for 18 January 20XX. The Article 32 hearing occurred on 18 and 19 January 20XX.
6. On 3 February 20XX, the IO completed his report. On 4 February, the Article 32 Report was delivered to the 2nd Marine Regiment. On 9 February 20XX, the CO, 2nd Marines, signed the forwarding letter recommending a general court-martial. On 11 February 20XX, the Article 34 advice letter was submitted to the Commanding General, 2nd Marine Division. The Commanding

General convened a general court-martial, and the Commanding General referred the charges to a general court-martial. On 21 February 20XX, an Article 39(a) session was held and the accused was arraigned.

D. Summarize the main teaching points.

- ✓ **Written Motions.** Written motions are more persuasive, articulate, and organized than oral motions.
- ✓ **Evidence.** The military judge will expect counsel to present evidence. Generally, a judge will not accept an offer of proof as evidence.
- ✓ **Burden of proof.** Counsel must know who has the burden of proof.
- ✓ **Argument.** A good motion argument will state the advocate's position, state the facts, present the law, apply the law to the facts, and then restate the advocate's position (including a request for specific relief).



V.

REFERENCE.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 905-907 (2000).

ENCLOSURES:

Counsel Handout
Sample Solution

MOTION PRACTICE

SCENARIO #1: ARTICLE 10, UCMJ

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. **Introduction.** We will conduct trial advocacy training in _____ on _____, from ____ to ____ hours. The training will focus on drafting and arguing a motion to dismiss.
- B. **Preparation.** Prior to the training, you should read R.C.M. 905-907 and the attached fact scenario. We will discuss the keys to success in motion practice and then you will be given time to prepare a written brief. At a separate session, you will argue the motion. Bring your MCM to the training.



II. KEYS TO SUCCESS.

- ✓ **Disclosure.**
- ✓ **Timing.**
- ✓ **Know the elements of a motion to suppress.**
- ✓ **Investigate before you write.**
- ✓ **Know who has the burden of proof.**
- ✓ **Present evidence.**

III.  **REFERENCE FOR FURTHER STUDY.**

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 905-907 (2000).

MOTION PRACTICE

SCENARIO #1: ARTICLE 10, UCMJ

SAMPLE SOLUTION



SAMPLE SOLUTION. The practical exercise may follow this format. All counsel should check with local court rules. Your motion hearing may vary.

MJ: It is my understanding that we are here to litigate a motion. Is that correct?

DC and TC: That is correct, sir.

MJ: Defense counsel?

DC: Your honor, the defense moves to dismiss, with prejudice, all charges against Private Green based upon the Government's violation of Article 10 of the Uniform Code of Military Justice. I am providing the Court with what has been marked as Appellate Exhibit I, the defense motion to dismiss.

MJ: And the government's response has been previously marked as Appellate Exhibit II?

TC: Yes, sir. I am providing the Court with the government's response.

MJ: Who has the burden of proof in this case and what is the burden?

DC: Once the issue is raised by the defense, the government has the burden to establish by a preponderance that the government did not violate Article 10. The government has violated Article 10 because [defense counsel states the defense's position].

MJ: Very well, government you may proceed.

TC: [Trial counsel states the government's position] At this time, the government proceeds with presenting evidence to meet its burden. The ideal situation would be for the government and defense to come up with a stipulation of fact concerning the timeline. However, if there is some disagreement over the timeline, each counsel must present a separate timeline. Furthermore, at a minimum, there should be testimony in some form

by the Chief of Justice. Additionally, other stipulations of expected testimony or facts should be provided to the Court at this time by the government in order to meet the burden. Remember during the motion phase, to properly mark and offer documentary evidence as appellate exhibits next in order.

TC: [The TC conducts a direct examination of the Chief of Justice and should elicit facts that show the government's "reasonable diligence" in processing of this case.]

DC: [The DC conducts a cross-examination of the Chief of Justice to elicit facts that the government "dragged its feet" in this case and failed to take "immediate steps" to try the accused.]

MJ: [After TC and DC questions, it is likely that the military judge will have questions of his or her own.]

TC: The government has no further evidence to present.

MJ: Does the defense care to present anything?

DC: [If the defense has any evidence to present, it will do so now. If the accused testifies, ensure you state that the accused is testifying for the limited purpose of the motion in question.]

MJ: [If the defense presents evidence] Government, any rebuttal?

MJ: [If the government presents rebuttal evidence] Surrebuttal?

MJ: Are both sides prepared to argue?

TC: [Government argues.]

DC: [Defense argues.]

MJ: Anything further? If nothing, the court is closed for deliberations

MJ: The court is called to order. (At this point the MJ will announce rulings and make essential findings of fact.)

MOTION PRACTICE

SCENARIO #2: MOTION TO SUPPRESS EVIDENCE

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise will develop counsel's ability to draft and argue a motion to suppress evidence obtained through an unlawful search and seizure.
- B. **Training Overview.** Training can be conducted by the supervisor with one or more counsel and is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions.



II. THE LAW.

- A. **The Fourth Amendment.** "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

- B. **Selected portions of Military Rule of Evidence (MRE) 311.**

- MRE 311(a) General rule. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

- (1) Objection. The accused makes a timely motion to suppress or an objection to the evidence under this rule; and

(2) Adequate Interest: The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

➤ MRE 311(d). Motions to suppress and objections.

(1) Disclosure. Prior to arraignment, the prosecution shall disclose to the defense all evidence seized from the person or property of the accused, or believed to be owned by the accused, that it intends to offer into evidence against the accused at trial.

(2) Motion or objection.

(A) When evidence has been disclosed under subdivision (d)(1), any motion to suppress or objection under this rule shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the motion or objection.

(B) If the prosecution intends to offer evidence seized from the person or property of the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interest of justice.

(C) If evidence is disclosed as derivative evidence under this subdivision prior to arraignment, any motion to suppress or objection under this rule shall be made in accordance with the procedure for challenging evidence under (A). If such evidence has not been so disclosed prior to arraignment, the requirements of (B) apply.

(3) Specificity. The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the search or seizure, the military judge may enter any order required by the interests of justice, including authorization for the defense to make a general motion to suppress or a general objection.

- MRE 311(e)(1) Burden of proof. In general. When an appropriate motion or objection has been made by the defense under subdivision (d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence would have been obtained even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant.
- MRE 311(i) Effect of guilty plea. Except as otherwise expressly provided in R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all issues under the Fourth Amendment to the Constitution of the United States and Mil. R. Evid. 311-317 with respect to the offense whether or not raised prior to plea.



III. PRACTICE POINTERS.

- A. **Disclosure.** The trial counsel must disclose evidence seized from the accused and evidence believed to be owned by the accused that the government intends to offer at trial.
- B. **Timing.** Failure to properly raise the issue before pleas waives the issue, absent good cause. Guilty pleas, except for conditional guilty pleas, waive all evidentiary motions and objections.
- C. **Motion.** Motions to suppress typically involve property seized from the accused, statements made by the accused and pretrial identifications of the accused. The pertinent Military Rules of Evidence (Rules 304, 322, and 321) contain a number of common elements for these motions:
 - State your intent to move to exclude evidence. State with specificity which evidence you seek to exclude.
 - State the reason you believe the proponent will offer evidence at trial.

- State the ground(s) on which the evidence is inadmissible. State the ground(s) with specificity.
 - Present the facts and legal argument in favor of the motion.
- D. ***Burden of Proof.*** Generally, the burden of going forward with a motion is upon the moving party. R.C.M. 905(c)(2). In motions to suppress, the burden of proof is specifically assigned to the prosecution. Generally, the standard of proof is by a preponderance of the evidence. However, the burden for proving the validity of a consent search is clear and convincing evidence (MRE 314(e)(5)), and the burden for proving a proper military purpose once the subterfuge rule has been triggered is clear and convincing evidence (MRE 313(b)).
- E. ***Rulings.*** The military judge should enter his rulings prior to the plea and state essential findings of fact on the record.
- F. ***Present Evidence.*** It is imperative that you investigate and collect evidence, either real or testimonial that will support your position on the motion. This evidence should be set forth clearly in the written motion, should be made available to opposing counsel, and should be available for presentation to the court during oral argument on the motion. You must be prepared to call witnesses or present other evidence on all factual issues.
- G. ***Thorough investigation.*** A thorough investigation is imperative to success on the motion. Uncover all of the circumstances surrounding the search and the seizure from the beginning. No detail is too small.



SKILL DRILLS.

- A. ***Goal:*** Train counsel to employ the following skills:
1. Prepare a Motion to Suppress evidence seized by the government.
 2. Litigate a motion to suppress evidence utilizing advocacy techniques covered in previous training.

B. ***Conduct the drill.***

1. *Preparation.* Counsel will be required to read and understand Military Rule of Evidence 311 and related case law prior to skill drill. The training will be divided into two parts, which may be divided into two sessions.
 - a. The first part of the training consists of conducting a class to teach counsel the essential elements of motion practice. Counsel should be assigned roles and then given time to draft the motion to suppress based upon the facts supplied.
 - a. The second part of the training is arguing the motion. Conduct this training in the courtroom.
2. *Role-Play.* The supervisor will play the role of the military judge. Counsel will need to be designated to play the role of the moving party and respondent. You will need witnesses for the motions hearing. Use other counsel or legal specialists.
3. *Execution.*
 - a. Using the Supervisor's Guide for this training, present instruction to counsel on the differences between a motion to suppress and other motions.
 - b. At the end of the instruction, provide counsel with a search and seizure scenario. Use a previously litigated motion, a pending motion, or the scenario below. Tell counsel to be prepared to litigate the motion at the following training session.
 - c. Defense counsel will draft a written motion to suppress and serve it on the "court" and opposing counsel. The trial counsel will draft a response. The supervisor should consider providing counsel with the format for motions used in his or her jurisdiction.
 - d. Conduct the practical exercise. If possible, use a courtroom. The defense counsel raises the issue with the written motion. Counsel should present evidence, and then argue the motion.

- e. After the practical exercise, distribute the solution to counsel. You should review the solution and summarize the lesson.

C. **Drill:** Litigation of a Motion to Suppress evidence seized as the result of an unlawful search and seizure.

1. Fact scenario (*This fact scenario is intended to bring out two exceptions to the requirements for probable cause and a search authorization. Those two are the emergency exception and the plain view exception.*)
2. On 12 February 20XX, two military policemen, SPC Smith and SGT Jones, responded to a 911 call from the on-post quarters assigned to SFC Bronson. The two MPs heard on the radio that there had been a “domestic disturbance” at SFC Bronson’s quarters and that screams were heard by the neighbors coming from the residence. The neighbors reported that the Bronson’s had two children.
3. Upon arriving at the quarters, the MPs knocked on the front door. When they did not receive any answer, SGT Jones peered through a window beside the front door; he saw a woman lying on the floor. He then opened the unlocked door. The unconscious woman on the floor was Mrs. Bronson. She had been stabbed several times. It was a Saturday and the MPs saw children’s toys lying about the foyer, but no children were in sight.
4. After they called an ambulance, SGT Jones began walking around the house. In the living room he found a bloodstained knife on the carpet, which he seized. He then went upstairs to look around. Walking into the master bedroom, he looked through the dresser drawers and found a handgun and what appeared to be a small bag of cocaine. He left both in place. He then proceeded into the study. He climbed up on top of a chair in the study and noticed a long narrow object that could have been a long pole or bat on top of a bookcase. The object was not visible while standing on the floor. He retrieved the object, which turned out to be a bat with bloodstains on it.
5. After hearing screams from the basement, SGT Jones searched the basement and found two children who were physically abused. Both had bruises on their arms and legs and were hysterical. It was later determined that Mrs. Bronson had been beaten with a blunt object and stabbed with a knife.

6. The government has given notice of its intent to present in evidence at trial the following items:
 - a. A bloodstained knife.
 - b. A handgun (not registered).
 - c. A small bag of cocaine.
 - d. A bloodstained bat.

D. *Summarize the main teaching points.* Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **Understand the disclosure requirement.**
- ✓ **Understand who has the burden of proof.**
- ✓ **Understand the standard of proof.**
- ✓ **Present evidence.**
- ✓ **Argue your position.**

V.



REFERENCES.

- A. DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE*, § 13-4 (5th ed. 1999).
- B. Basham, *Suppression Motions Under the Military Rules of Evidence*, *ARMY LAW.*, May 1980, at 17.

- C. Castle, *Motion Practice under Section III of the Military Rules of Evidence*, 12 THE ADVOCATE 118 (1980).

- D. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (1987).

ENCLOSURES:

Counsel Handout
Sample Solution

MOTION PRACTICE

SCENARIO #2: MOTION TO SUPPRESS EVIDENCE

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. **Introduction.** We will conduct trial advocacy training in _____ on _____, from ____ to ____ hours. The training will focus on drafting and arguing a motion to suppress unlawfully seized evidence.
- B. **Preparation.** Prior to the training, you should read M.R.E. 311 and the attached fact scenario. We will discuss the keys to success in motion practice and then you will be given time to prepare a written brief. At a separate session, you will argue the motion. Bring your MCM to the training.



II. KEYS TO SUCCESS.

- ✓ **Disclosure.**
- ✓ **Timing.**
- ✓ **Know the elements of a motion to suppress.**
- ✓ **Investigate before you write.**
- ✓ **Know who has the burden of proof.**
- ✓ **Present evidence.**

III.  **REFERENCES FOR FURTHER STUDY.**

- A. DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE*, § 13-4 (5th ed. 1999).
- B. Basham, *Suppression Motions Under the Military Rules of Evidence*, *ARMY LAW.*, May 1980, at 17.
- B. Castle, *Motion Practice under Section III of the Military Rules of Evidence*, 12 *THE ADVOCATE* 118 (1980).
- C. WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (1987).

MOTION PRACTICE

SCENARIO #2: MOTION TO SUPPRESS EVIDENCE

SAMPLE SOLUTION



- I. **The disclosure requirement.** The facts indicate that the trial counsel disclosed the evidence they intended to present at trial.

- II. **The burden of proof.** The burden of proof is on the prosecution.

- III. **The standard of proof.** The standard of proof is by a preponderance of the evidence.

- IV. **Present evidence.** The trial counsel should call SGT Jones as a witness. The trial counsel may also want to call SPC Smith and the operator that took the 911 call. The trial counsel may want to introduce the 911 tape, if one exists.

- V. **Argue your position.**
 - A. Emergency Exception.
 1. The initial entry into the house.

The MPs were responding to a “domestic disturbance.” M.R.E. 314(i) states, “in emergency circumstances to save life or for a related purpose, a search may be conducted of persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing physical injury.” In *United States v. Curry*, 48 M.J. 115 (1998), the CAAF upheld a warrantless entry when MPs, after peering through a gap in the curtains in a barracks window, saw a motionless body on the floor. Such a search must be “conducted in good faith and may not be a subterfuge in order to

circumvent an individual's Fourth Amendment protections." See *United States v. Yarborough*, 50 C.M.R. 149 (A.F.C.M.R. 1975).

For the MPs entry into the house to be lawful, they must have search authorization or an exception to the search authorization requirement. After peering into the window, the MPs saw what appeared to be an injured, unconscious person. In this case, their entry can be based on the emergency search exception. SGT Jones should be called as a witness to establish what information was relayed to him over the radio and what he saw when he looked in the window. This will establish the emergency. If the trial counsel presents this evidence, the military judge will rule that the MPs entry was justified from the outset as an "emergency search." The facts here are similar to *Curry*. They will be able to use M.R.E. 314(i) to justify their entry into the house.

2. The search of the house.

How far can the MPs go once they are in the house? In this case, the MPs were told that screams were heard coming from the house. There is no indication that the screams came from a child or adult. The MPs were told that children reside in the house and, this being a Saturday, it is reasonable to expect that the children may still be in the house. The justification for the initial entry, the emergency exception, could be extended to justify the continued search since it is reasonable for the MPs to have surmised that the children could possibly be endangered or injured as well.

B. Plain view doctrine:

1. The knife.

If SGT Jones' search of the house comes under the emergency exception, how far can they go through the house and what can they seize? If the basis for the continuing search is the search for children and/or the assailant, the seizure of the knife is justified under the "plain view doctrine." Property may be seized when (1) the property is in plain view; (2) the person observing the property is lawfully present; and (3) the person observing the property has probable cause to seize it. The bloodstained knife is visible on the carpet; the MP is permitted to be there; and it is immediately apparent that the knife is probably evidence of a crime.

2. The gun and the cocaine.

These items were found when SGT Jones went through the dresser drawers. These items were not in plain view. Going through the dresser drawers is not justified by the emergency situation. Since the search of the drawers was not covered by an exception to the requirement for

probable cause and a search authorization, these items would not be admissible and should be suppressed.

3. The baseball bat.

Proceeding into the study, SGT Jones found a long pole or bat. He climbed on top of a chair to get it. According to *Arizona v. Hicks*, 480 U.S. 321 (1987), the contraband's nature must be immediately apparent to fall under the plain view exception. In *Hicks*, while the police officer was lawfully in the accused's home, he moved a stereo receiver to see a serial number to identify whether it was stolen. He subsequently seized it. The seizure was unlawful because the serial number was not in plain view. Here, since the MP had to climb up on a chair to fully see the bat, the bat's seizure would constitute an unlawful search and seizure. (Note: the result may differ if the bloody tip of the bat had been extending over the edge of the bookcase.)



Tab D

Develop the Skill: Impeachment



The Advocacy Trainer


IMPEACHMENT - THE FUNDAMENTALS

SUPERVISOR'S GUIDE



I. CHAPTER OVERVIEW.

A. **Goals.** The fundamental purpose of impeachment is to discredit the witness as a reliable source of information. This module develops counsel's ability to use four common methods of impeachment. This overview will cover common legal and practical considerations for each of the methods of impeachment addressed in this module:

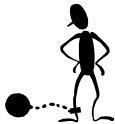
 **Bias, prejudice or motive.** MRE 608(c).

 **Prior untruthful acts.** MRE 608(b).

 **Prior conviction.** MRE 609.

 **Prior inconsistent statement.** MRE 613.

B. **Training Overview.** Each training module in this chapter can be conducted by the instructor with one or more counsel. The training is divided into four phases: (1) preparation by instructor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions. The fundamentals of impeachment outlined in this introduction are common to all methods of impeachment and should be incorporated into the instruction of each module in this chapter.



II. THE LAW.

A. **Relevance.** As soon as a witness testifies, his credibility becomes an issue. Thus, impeachment evidence is always relevant. Counsel must, however, be prepared to articulate how a particular fact or set of facts tend to impeach the credibility of a witness and satisfy the technical requirements of the Military Rules of Evidence (MRE). Also bear in mind that even probative impeachment evidence may be excluded by the military judge based on MRE 403 (i.e., if its probative value is substantially outweighed by its prejudicial effect).

- B. ***Bolstering prohibited.*** The issue of credibility has three facets at trial--bolstering, impeachment, and rehabilitation. If counsel attempts to directly prove the witness's character for truthfulness before he has been impeached, he is said to be bolstering the witness. Bolstering is generally prohibited; however, two exceptions to the general rule against bolstering are permitted in military law: (1) prior identification under MRE 801(d)(1)(C); and (2) the "fresh complaint" doctrine in sexual assault cases. Counsel are also permitted to accredit the witness by eliciting general background information and qualifications as a preliminary step of direct examination.
- C. ***Rehabilitation.*** After a witness has been impeached, the proponent may attempt to rehabilitate his credibility by giving him the opportunity to explain or deny an apparent inconsistency, prior bad act, or conviction, etc.
- D. ***Who May Impeach.*** "The credibility of a witness may be attacked by any party, including the party calling the witness." MRE 607.
- E. ***Collateral Fact Rule.*** For reasons of judicial economy, certain matters offered for impeachment of a witness may not be proven by extrinsic evidence because they raise questions which are too collateral to the issues in the trial, resulting in a "trial within a trial." If a matter is deemed collateral, the court will permit inquiry only on cross-examination. Prior untruthful acts of the witness are generally considered collateral, whereas prior convictions and proof of bias are rarely collateral.
- F. ***Good Faith Basis.*** Some forms of impeachment may be proven by extrinsic evidence, while others only permit inquiry on cross-examination. Regardless of which impeachment technique is used, counsel must have a good faith belief that the impeaching facts are true.

III.



PRACTICE POINTERS.

- ***Clarity and simplicity.*** Effective impeachment depends upon accurate knowledge of the law, good technique, and projection of the right attitude. For impeachment to be effective, the panel must know that it has occurred. Counsel should always strive for clarity and simplicity.

→ ***Impeach only when it benefits your case.*** Impeachment is not an end in itself. Counsel must always analyze whether impeachment of a particular witness helps their case. A clear theory of the case and the opponent's case is critical to this judgment. Additionally, counsel should consider the following key questions:

- Has the witness given me significant factual support?
- Will the method of impeachment destroy the witness's credibility or will it undermine his veracity only on certain points?
- Can I effectively impeach him?
- Will the jury view the impeachment as significant or mere lawyer's tricks?
- Does the witness come across as basically truthful? Will the panel view the impeachment as niggling harassment of a basically truthful witness?

→ ***Adapt your style of impeachment to the witness.*** Approach the witness in a way that will not offend *the* panel's sense of fair play and perception of the witness, or poison your relationship with an otherwise cooperative witness. If the witness has testified in a way that exposes him to impeachment, consider whether clarification or refreshing his recollection will accomplish your purpose. If the witness has hurt your case and you decide to impeach him, you must further consider what tone and style of impeachment will be most effective. If the witness is cocky, partisan, or simply lying, then a hard-hitting, aggressive tone may be appropriate. If the witness seems sincere, then a gentler approach may be warranted.



IV.

REFERENCES.

- A. Manual for Courts-Martial, United States, Mil. R. Evid. 607 - 613 (1996).
- B. Thomas A. Mauet, *Trial Techniques* 238-266 (4th ed. 1996).
- C. James W. McElhaney, *McElhaney's Trial Notebook* 409-431 (3d ed. 1994).
- D. David A. Schlueter et. al., *Military Evidentiary Foundations* 119-164 (1994).

ENCLOSURES

Module 1: Impeachment by Bias, Prejudice & Motive

Module 2: Impeachment by Prior Untruthful Acts

Module 3: Impeachment by Prior Conviction

Module 4: Impeachment by Prior Inconsistent Statements

Tab D

Module 1

**Develop the Skill:
Impeachment**

Bias, Prejudice and Motive



The Advocacy Trainer

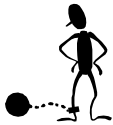
IMPEACHMENT BY BIAS, PREJUDICE & MOTIVE

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise develops counsel's ability to impeach a witness by exposing bias, prejudice, or motive to lie. Lead a discussion of the law and practice pointers and then conduct the suggested drills. Consider using examples of good and bad techniques from records of recent trials throughout the training.
- B. **Training overview.** Training can be conducted by the supervisor with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions. Lay people can be recruited to play the witness roles.



II. THE LAW.

- A. **MRE 608(c):** "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." Such evidence is relevant because it may show that the witness is not an impartial observer or witness of the truth. As long as the impeaching counsel can articulate a theory of why the witness may be predisposed to favor the other side, the evidence will be admissible under 608(c).
- B. **Foundation.** MRE 608(c) does not require any specific foundational elements. Proof of bias, prejudice or motive to lie may be established by direct or circumstantial evidence. To impeach the witness, counsel must persuade the fact-finder that the witness has some reason to perceive or recall events in a skewed manner, or to abandon his oath and become a partisan for one side.

- C. ***Extrinsic Evidence.*** Evidence of bias is not limited to cross-examination of the witness. While the best evidence often may be concessions from the witness himself, supplemental proof may be necessary to give it full impact. Counsel will ordinarily be given wide latitude in proving facts which establish bias. Even if the witness admits his bias, or facts from which bias may be inferred, the judge may permit extrinsic evidence of the same facts, unless such evidence is cumulative. For example, if the witness acknowledges his friendship with the accused, the military judge may still allow other witnesses to drive the fact home with specific examples of acts of friendship.

III.



PRACTICE POINTERS.

- ***You can't use it if you don't have it.*** The key to successful use of bias impeachment is thorough pretrial investigation. Interview every witness, talk to leaders in units, talk to neighbors and social contacts. Ask CID and MPI to assist with this effort, even though it goes beyond element-based evidence gathering. TDS counsel may ask for investigative assistance in these matters.
- ***Develop a standard checklist for bias, prejudice and motive to lie.*** Certain bases for bias, prejudice and ***motive*** to lie recur often and are a good starting place for analysis. For example:
- **Lay witnesses:** family relationships, grudges, prior conflicts, romantic interests, friends, racism, common memberships, superior-subordinate relationships, officer-enlisted views, threats and coercion, peer pressure.
 - **Experts:** defense or prosecution orientation, hourly rate, depth of expertise, academic or real-world experience.
 - **Police:** pressure to obtain convictions, fear of disclosing departure from regulations.
 - **Suspects:** promise of clemency, threat of adverse action, immunity, avoiding suspicion.
 - **Accused:** desire to avoid conviction and punishment.
- ***Don't belabor the obvious.*** Everybody knows that mothers love their sons. It is often better to subtly establish facts from which bias can be inferred, rather than confronting the witness directly. Save the ultimate point for argument. Establish the predicate facts that add up to bias, prejudice or motive to lie, but “do the math” in argument. Don't ask the witness to sum it up for you. Witnesses usually respond with a dramatic reaffirmation of their oath.

IV.



SKILL DRILLS.

A. *Goal: Train counsel to use the following skills.*

1. Use cross-examination techniques covered in previous training.
2. Elicit facts which effectively establish bias, prejudice or motive to misrepresent.

B. *Conduct the Drills.*

1. *Preparation.* Practice these drills on your own or with another counsel before conducting the training.
2. *Role play.* The supervisor will play roles of witness and military judge. Designate counsel to play roles of proponent and opponent. Remaining participants will sit in the panel box. Create a low-threat environment, and admonish counsel to loosen up.
3. *Execution.* Get out of the office and away from the phones! Go to the courtroom. Supervisor should demonstrate what he expects from participating counsel. After a demonstration, select someone to perform the drill.

C. *Drill: Establish bias, prejudice, motive to misrepresent.*

1. The facts: the accused, CPL Savage, is charged with aggravated assault for beating SPC Bronson with a crescent wrench one night in the motor pool. The accused claims self-defense and has testified as such. The accused has also produced a number of witnesses who testify as to his character for truthfulness and peacefulness.
2. The witness: An assistant M60 gunner, SPC LeBlanc, testified on direct that the accused is a truthful and peaceful person. Counsel's thorough pretrial investigation uncovered that the witness and the accused are on the same unit soccer team, which won the post championship last year. The witness is the star goalie, and the accused is his center fullback. There are also rumors that the witness and the accused belong to a local skinhead club.

3. Supervisor's guide: counsel should conduct a short, pointed cross-examination designed to highlight the bias of the witness for his friend, teammate and comrade-in-arms. After briefing the scenario, ask counsel if they have any questions. They should be interested in whether there is a good faith basis for the skinhead information. If they ask, tell them there is no corroboration for the rumors and no credible source for the rumors can be found. Mere rumors "in the air" are generally insufficient to establish a good faith belief for purposes of cross-examination. Given the potentially prejudicial nature of the skinhead information, the military judge and opposing counsel are likely to scrutinize the basis more carefully. Finally, at the close of the exercise, counsel should be required to briefly articulate how the cross-examination will be used in closing argument to the benefit of his or her case.
4. See attached sample solution.



D. *Summarize the main teaching points.* Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **Thoroughly investigate each witness for possible bias, prejudice & motive to lie.**
- ✓ **Develop the facts from which bias may be inferred in sufficient detail to persuade the panel.**
- ✓ **Save the ultimate point for argument.**



V.

REFERENCES.

- A. Thomas A. Mauet, *Trial Techniques* 236-240 (4th ed. 1996).
- B. David A. Schlueter et. al., *Military Evidentiary Foundations* 119-164 (1994).

IMPEACHMENT: BIAS, PREJUDICE & MOTIVE

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. **Introduction.** Trial advocacy training will be conducted in the courtroom on _____, from _____ to _____ hours. The training will focus on impeachment by bias, prejudice, and motive. First, I will lead a discussion of the law of impeachment by bias, prejudice, and motive and associated trial techniques. During the second part of the training we will conduct several drills designed to reinforce the skills discussed in the first part of the training.
- B. **Preparation.** Bring your copy of the MCM to training. Review basic techniques of cross-examination and making and meeting objections.



II. KEYS TO SUCCESS.

- A. Review MRE 608(c).
- B. Review basics of cross-examination.



III. REFERENCES FOR FURTHER STUDY.

- A. Thomas A. Mauet, *Trial Techniques* 236-40 (4th ed. 1996).
- B. David A. Schlueter et. al., *Military Evidentiary Foundations* 119-64 (1994).

IMPEACHMENT BY BIAS, PREJUDICE & MOTIVE

SAMPLE SOLUTION



- Q. SPC LeBlanc, you are assigned to the same infantry platoon as the accused?*
A. Yes.
- Q. You are both in the weapons squad, right?*
A. Yes.
- Q. What is your current duty position in the weapons squad?*
A. Assistant gunner on the "pig"--that's the M60 machine-gun, sir.
- Q. You are the assistant gunner. Who is the gunner?*
A. CPL Savage.
- Q. How long have you been the accused's assistant gunner?*
A. About one year.
- Q. And you have served in the weapons squad together for a total of 18 months?*
A. Yes, sir.
- Q. What are the assistant gunner's primary duties?*
A. Well, sir, I am responsible for assisting the gunner with the maintenance, deployment, and ammunition for the M60. When we move tactically we take turns carrying the pig.
- Q. You work with the gunner on a daily basis?*
A. Yes.
- Q. When you are in the field, you are with the gunner at all times?*
A. Pretty much, sir.
- Q. So, for example, when you are in the defense, you dig in together?*
A. Yes.
- Q. When you lay an ambush, you and CPL Savage are side-by-side in your fighting position, sometimes for hours?*
A. Yeah.

- Q. You and CPL Savage are a good M60 team.**
A. We've kicked some ass, sir.
- Q. You are one of the best in the battalion, aren't you?**
A. I think so.
- Q. You and CPL Savage spend time together during non-duty hours?**
A. Sure, all the time.
- Q. You go to movies together?**
A. Sometimes.
- Q. You go to ball games together?**
A. We've been to a few.
- Q. You are both on the unit soccer team?**
A. Yes, sir.
- Q. Your team won the Ft. Braxton championship last year, didn't they?**
A. Yes.
- Q. You guys practice year round, don't you?**
A. Yes.
- Q. In fact you are the team's star goalie?**
A. Yes.
- Q. And the accused is your center fullback?**
A. He's the best.
- Q. The goalie relies on his fullbacks, doesn't he?**
A. Absolutely.
- Q. That team depends on you guys for defense, isn't that true?**
A. They couldn't have won without us.
- Q. You and CPL Savage have been through a lot together, haven't you?**
A. Yes, sir.
- Q. You get along well with CPL Savage, don't you?**
A. What do you mean?
- Q. You are good friends?**
A. Yes.

Q. He's your best friend, isn't he?

A. I guess so.

Q. And you certainly don't want him to go to jail, do you?

A. No.

Q. You don't believe he should be court-martialed, do you?

A. No.

Q. You weren't in the motor pool the night that CPL Savage hit SPC Bronson with the wrench?

A. No.

Q. All you know about the incident has come from your friend, CPL Savage, right?

A. I guess so.

Tab D

Module 2

**Develop the Skill:
Impeachment**

Prior Untruthful Acts



The Advocacy Trainer

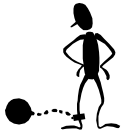
IMPEACHMENT BY PRIOR UNTRUTHFUL ACTS

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise develops counsel's ability to impeach a witness by cross-examination regarding specific acts probative of untruthfulness. This form of impeachment is sometimes called impeachment by "prior bad acts." Lead a discussion of the law and practice pointers and then conduct the suggested drills. Consider using examples of good and bad techniques from recent records of trial.
- B. **Training Overview.** Training can be conducted by the instructor with one or more counsel and is divided into four phases: (1) preparation by instructor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions. Consider using lay people to play witnesses.



II. THE LAW.

- A. **Specific instances of conduct probative of untruthfulness.** MRE 608(b) permits counsel to impeach a witness by cross-examining him concerning certain prior bad acts. Only those prior acts which are probative of the witness's character for truthfulness may be used to impeach under this rule.
- B. **Extrinsic evidence not allowed.** Impeachment by prior untruthful acts is limited to cross-examination. If the witness denies or minimizes the deceptive nature of the act, extrinsic evidence may not be used to refute his answer, or, to establish the untruthful act. You are stuck with the witness's answer.
- C. **Requires good faith basis.** Although extrinsic evidence is not admissible to prove the prior untruthful act, counsel may be required to disclose the basis for believing that the act occurred. The inability to articulate a good faith basis for an inquiry under MRE 608(b) may result in a mistrial or other judicial sanction.

- D. ***Subject to MRE 403 balancing.*** The military judge may forbid inquiry into prior untruthful acts if unduly prejudicial or based on other MRE 403 reasons such as undue delay or misleading the members. This issue commonly arises when counsel attempt to impeach the accused by prior untruthful acts under MRE 608(b).
- E. ***May not refer to nonjudicial punishment or other adverse action.*** It is potential error to refer to Article 15 punishment or summary court-martial that may have resulted from an untruthful act. Inquiry must be limited to the underlying misconduct. The proper question, therefore, is not, “didn’t you receive an Article 15 for lying to your squad leader?”, but rather, “Isn’t it true that you have lied to your squad leader before?” A criminal conviction for a prior untruthful act may only be referred to if the technical requirements of MRE 609 are satisfied. Article 15s and most summary courts-martial do not satisfy the requirements of MRE 609.



III.

PRACTICE POINTERS.

- ➔ ***Investigate each witness thoroughly.*** Prior untruthful acts, by definition, happened in the past. Sometimes you must dig deep to find good material. Counseling files and prior Article 15s are good starting points. Supervisors will usually have an opinion regarding the witness’s truthfulness or untruthfulness. Explore the basis for these opinions.
- ➔ ***Form your questions carefully.*** There are several ways to approach the prior untruthful act. If you know the witness will admit the prior act, it may be possible to impeach with a few direct, dramatic questions. More commonly, you will need to pursue a more oblique approach, which commits the witness to specific facts surrounding the prior incident before confronting him with the specific untruthful act. If you demonstrate to the witness your knowledge of the prior act through detailed, leading questions, he will be reluctant to deny your account. It is especially difficult for the witness if your questions refer to witnesses who could corroborate your allegations. The witness doesn’t understand that you are barred from presenting extrinsic proof of the prior untruthful act. The subtle handling of documents during cross-examination may also lead the witness to believe that you possess documentary proof of the prior act.

- ***Don't give up too soon.*** You are not permitted to present extrinsic evidence of the prior bad act. You will be stuck with the witness's denial. You may, however, test the witness's commitment to his denial to some extent. An initial denial may need clarification to ensure that you are referring to the same event as the witness. If you persist after a denial, you may draw an "asked and answered" objection from opposing counsel. Be prepared to explain to the judge that you are simply attempting to refresh the witness as to the surrounding facts or clarifying the incident to which you are referring.

- ***Look hard at discovery rules.*** Information useful for impeachment does not always need to be disclosed to the opposing party. Special care is warranted, however, when using prior bad acts to impeach the accused. It is generally a good idea to alert the military judge and opposing counsel of your intent to impeach the accused with such information. This gives the opposing counsel an opportunity to object to such impeachment prior to cross-examination. The military judge will appreciate the opportunity to weigh the matter in advance. For tactical reasons you may wish to delay such notice until after the accused has testified. In that case simply ask the judge for an Art. 39(a) hearing prior to cross-examination. This is a greater concern in a panel case than in a judge-alone trial.

- ***Timing of the impeachment.*** As with other forms of impeachment, you must ensure that your impeachment is consistent with your plan for the witness. Consider eliciting favorable information from the witness before casting doubt on his veracity. It is often better to raise impeachment after the witness has offered testimony which conflicts with your theory of the case. Thus, the cross-examination could begin by having the witness affirm favorable testimony; then proceed to attack his unfavorable testimony; then impeach the witness to show that he does not always tell the truth. Remember that some witnesses help you more than hurt you and you may be better off foregoing impeachment opportunities.



IV.



SKILL DRILLS.

A. ***Goal: Train counsel to employ the following skills.***

1. Use cross-examination techniques covered in previous training.
2. Impeach the witness by cross-examining regarding prior untruthful acts.

B. ***Conduct the Drills.***

1. *Preparation.* Practice these drills on your own or with another counsel before conducting the training.
2. *Role play.* The supervisor will play roles of witness and military judge. Designate counsel to play roles of proponent and opponent. Remaining participants will sit in the panel box. Create a low-threat environment; admonish counsel to loosen up.
3. *Execution.* Get out of the office and away from the phones! Go to the courtroom. Supervisor should demonstrate what he expects from participating counsel. After a demonstration, select someone to perform the drill.

C. ***Drill 1: Impeach a witness based on information in counseling file.***

1. The facts: The witness is SPC Lars N. Eboy, HHC, 1st COSCOM, Ft. Braxton, NC. He is a witness in a barracks larceny case. He testified for the government or the defense, whichever you prefer. Through dogged investigation, you have found the enclosed General Counseling Form (DA Form 4986) in the witness's unit file.
2. Counsel will be given a copy of the attached counseling form and directed to cross-examine the witness regarding the incident described in the document. Counsel will be designated to object. Counsel should not attempt to admit the counseling form into evidence.

3. Sample solution.

Q. SPC Eboy, you took an oath today to tell the truth, correct?

A. Yes, sir.

Q. You want this court to believe your testimony today?

A. They should.

Q. Do you agree that it is important for a soldier to tell the truth even when he is not under oath in the courtroom?

A. Yes.

Q. You agree that a soldier should always be truthful with his chain of command?

A. Yes.

Q. But you have not always told the truth when speaking with your squad leader, have you?

A. No, sir, I lied one time.

Q. Are you referring to the incident on 10 Jan 19XX when you lied about stomach pains in order to get out of PT?

A. Yes.

Q. On that occasion, isn't it true that you lied about stomach problems in order to get a sick slip and get out of PT?

A. Yes.

Q. After getting the sick slip, you did not go to sick call, but instead you went to the snack bar and ate donuts, right?

A. Basically.

Q. Basically? Isn't that exactly what happened?

A. Well, yes, sir.

Q. And when the ISG confronted you in the snack bar, didn't you at first tell him that you were on the way to sick call?

A. I was going to go to sick call, sir.

Q. Isn't it true that the ISG examined your sick slip and discovered that it said you were sick in the stomach?

A. Yes, that's true.

Q. And it was only after the ISG examined your sick slip that you admitted you had lied about having stomach problems?

A. Yes, sir.

D. ***Drill 2: Impeach witness using the information gleaned from a Summarized Art. 15 form.***

1. The facts. The witness is SPC Rocky Balboa. He is a witness in an assault case and has just finished testifying on direct that he “saw the whole thing” and his buddy, the accused, was only defending himself from an unprovoked attack. The witness’s credibility is crucial for the defense.
2. Counsel will be given a copy of the enclosed DA Form 2627-1 and directed to impeach the witness. Counsel is free to ask you for a little more factual background. It is plain error to refer to the Article 15 in the cross-examination.
3. Sample solution.

Q. SPC Balboa, do you agree that a soldier should always tell the truth in the course of his duties?

A. Uh, yeah, I guess.

Q. You guess? Did you take an oath to tell the truth today?

A. Yeah.

Q. Is it important to tell the truth when you are under oath?

A. Yes.

Q. Very good. Is it important for a soldier to be truthful in the course of his regular duties?

A. Yes.

Q. You have not always told the truth in your Army career have you, SPC Balboa?

A. Well, uh, one time I made a mistake when filling out a BAQ form.

Q. Are you referring to the BAQ form that you filled out on 5 July 19XX?

A. Maybe.

Q. Are you referring to the form you filled out in which you claimed to have a dependent spouse, by the name of Adrienne Smith?

A. Yeah.

Q. You recall filling out that form?

A. Yes.

Q. The ISG directed you to complete the BAQ certification form?

A. Yes.

Q. The ISG told you that you were required to provide truthful information?

A. I don't remember that.

Q. You knew that the form would be used to determine how much BAQ you were entitled to receive?

A. Yeah, I knew that.

Q. You knew that you had a duty to provide truthful information?

A. Yeah, I guess.

Q. You wrote on that official Army form that Adrienne Smith was your wife?

A. Yeah.

Q. But Ms. Smith was not your wife at that time, was she?

A. No.

Q. In fact Ms. Smith did not even live with you at that time, did she?

A. No.

Q. In fact, you have never been married to Adrienne Smith or anybody else, have you?

A. No.

Q. But you signed that form saying that she was your wife on 5 July 19XX?

A. Yes.

Q. That was a lie, wasn't it?

A. It wasn't true.

E. ***Drill 3: Impeach on the basis of prior untruthful acts.***

1. The facts: The accused is charged with aggravated assault for beating a fellow soldier over the head with a crescent wrench. The accused claims self-defense and has testified as such. The accused has also produced a number of witnesses who testified as to his relevant character traits. One of the witnesses is the accused's brother who testified on direct that the accused is a truthful, peaceful, and law-abiding person. You have learned that the witness has a misdemeanor conviction for larceny; was recycled through basic training for cheating on the land navigation course (he found an answer key and shared it with his buddies); received an Article 15 for false official statement after he lied during an investigation into the land navigation cheating incident (essentially, he denied cheating when questioned by the company commander in the presence of his DI); and filed a bogus insurance claim (he falsely claimed that his car was broken into and the stereo was stolen).

2. The witness: the accused's brother has just finished testifying on direct examination. Conduct a cross-examination of the brother to discredit his testimony using prior untruthful acts.

3. Sample solution.

Q. You want this court to believe your brother is a truthful person don't you?

A. He is a truthful person.

Q. You want this court to believe that you are also a truthful person, isn't that right?

A. I am only telling the truth.

Q. You have not always been truthful with your military superiors have you?

A. I don't know what you are talking about.

Q. You graduated from basic training, didn't you?

A. Yes.

Q. However, you had to be recycled during basic training, didn't you?

A. Well, yes.

Q. In fact, you were recycled because you and several other soldiers cheated on the land navigation course.

A. It wasn't my idea.

Q. Isn't it true that you cheated on the land navigation course?

A. Yes.

Q. You found a copy of the answer key for the land navigation course, and used it to cheat on the test?

A. Yes.

Q. You showed the answer key to two other soldiers, didn't you?

A. Yes.

Q. Now after you had cheated on the land nav test, you were questioned about cheating on the test.

A. Eventually.

Q. The company commander questioned you, didn't he?

A. Yes.

Q. He questioned you in his office, didn't he?

A. I don't remember.

Q. Your drill instructor was present when the commander questioned you?

A. Yeah.

Q. You told the commander that you did not cheat on the test?

A. Yes.

Q. You told him that you did not know of any cheating on the test by anyone else?

A. Yes.

Q. That was not truthful, was it?

A. No.

Q. You have been untruthful at other times as well, haven't you?

A. No.

Q. Isn't it true that you once lied to your insurance company by filing a bogus claim about a car stereo you said had been stolen?

A. I don't know what you are talking about.

**Are you stuck here? Is this as far as you can go? You should ask follow up questions to clarify the incident in question and test the witness's commitment to his answer.*

Q. Allstate refused to renew your car insurance recently, isn't that correct?

A. They canceled it because I had too many points on my license.

**** Read the panel; do they believe you or do they think you are cashing in on this guy's poor driving record to inappropriately call into question his credibility?***

Q. You filed a claim with Allstate based on the alleged theft of your car stereo, right?

A. Right.

Q. At the time you filed the claim your policy was still in effect?

A. Yes.

Q. Allstate refused to pay your claim?

A. Yeah, they refused.

Q. Isn't it true that your car stereo was never stolen?

A. No.

Q. Isn't it true that you filed a false claim for your car stereo with Allstate?

A. No.

Q. It's true isn't it that Allstate canceled your policy right after you claimed your stereo was stolen?

A. No.

**** Move on, you are now stuck with this answer and have gone about as far as a judge will allow on this line of questioning. You are stuck with his answer. You probably won that round anyway.***



F. *Summarize the main teaching points.* Following the drills, conduct a discussion of lessons learned; distribute the sample solution; and summarize the main points:

- ✓ **Never refer to nonjudicial punishment which may have resulted from a prior untruthful act; concentrate on the misconduct itself.**
- ✓ **Develop the facts of a prior untruthful act so that the panel clearly understands the deception involved.**
- ✓ **Use cross-examination techniques that lead the witness to believe that you can prove his prior untruthful act.**



V.

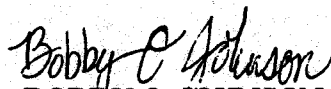
REFERENCES.

- A. Thomas A. Mauet, *Trial Techniques* 245-246 (4th ed. 1996).
- B. David A. Schlueter et. al., *Military Evidentiary Foundations* 130-133 (1994).

ATTESTING CERTIFICATE

Date: 1 Jan 19XX

I certify that I am the official records custodian of the records of nonjudicial punishment pertaining to SPC Rocky A. Blaboa, 111-11-1111, A Battery, 2nd Battalion, 3rd Field Artillery Regiment (Abn), and that the attached document consisting of one (1) page is a true and complete copy of the original DA Form 2627-1 which is maintained in my official custody.


BOBBY O. JOHNSON
SSG, USA
Brigade Legal NCO

SUMMARIZED RECORD OF PROCEEDINGS UNDER ARTICLE 15, UCMJ

For use of this form, see AR 27-10; the proponent agency is TJAG.

See Notes on Reverse Before Completing Form

This form will be used only in cases involving enlisted personnel and then *ONLY* when no punishment *OTHER THAN* oral admonition reprimand, restriction for 14 days or less, extra duties for 14 days or less, or a combination thereof has been imposed.

NAME	GRADE	SSN	UNIT
BALBOA, Rocky A.	E-4	111-11-1111	A Btry, 2/3 FA, Ft. Braxton, NC

1. On 15 July 19XX, the above service member was advised that I was considering imposition of nonjudicial punishment under the provisions of Article 15, UCMJ, Summarized Proceedings, for the following misconduct:
 On or about 5 July 19XX, with intent to deceive, you made an official statement to wit: that you were legally married to Adrienne Smith, which statement was totally false, and was then known by you to be false.

2. The member was advised that no statement was required, but that any statement made could be used against him or her in the proceeding or in a court-martial. The member was also informed of the right to demand trial by court-martial, the right to present matters in defense, extenuation and/or mitigation, that any matters presented would be considered by me before deciding whether to impose punishment, the type or amount of punishment, if imposed, and that no punishment would be imposed unless I was convinced beyond a reasonable doubt that the service member committed the misconduct. The service member was afforded the opportunity to take 24 hours to make a decision regarding these rights. No demand for trial by court-martial was made. After considering all matters presented, the following punishment was imposed:

Oral reprimand and restriction for 14 days.

3. The member was advised of the right to appeal to the Cdr. 2/3 FA, Ft. Braxton within 5 calendar days, that an appeal made at that time could be rejected as untimely, and that the punishment was effective immediately unless otherwise stated above. The member:

Elected immediately not to appeal Requested time to decide whether to appeal and the decision is indicated in item 4, below.

DATE	NAME, GRADE, AND ORGANIZATION OF IMPOSING COMMANDER	SIGNATURE
15 Jul 19XX	Cassius M. Clay, CPT, A Btry, 2/3 FA	<i>Cassius M. Clay</i>

4. (Initial appropriate block, date, and sign)

a. I do not appeal b. I appeal and do not submit matters for consideration c. I appeal and submit additional matters

DATE	NAME AND GRADE OF SERVICE MEMBER	SIGNATURE
15 Jul 19XX	Rocky A. Balboa, SPC	<i>Rocky A. Balboa</i>

5. After consideration of all matters presented in appeal, the appeal is:

Denied Granted as follows:

DATE	NAME, GRADE, AND ORGANIZATION OF COMMANDER	SIGNATURE

6. I have seen the action taken on my appeal. DATE SIGNATURE OF SERVICE MEMBER

7. ALLIED DOCUMENTS AND/OR COMMENTS

NOTES

- 1/ See AR 27-10 for further guidance. Ordinarily entries on this form will be handwritten in ink.
- 2/ Insert a concise statement of each offense in terms stating a specific violation and the Article of the UCMJ. If additional space is needed, use item 7 and/or continuation sheets as described in note 9 below.
- 3/ Inform the member that if he or she demands trial, trial could be by SCM, SPCM, or GCM. Additionally, inform the member that he or she may object to trial by SCM and that at SPCM or GCM he or she would be entitled to be represented by qualified military counsel, or by civilian counsel at no expense to the government. If the member is attached to or embarked in a vessel, he or she is not permitted to refuse Article 15 punishment. In such cases, all reference to a demand for trial will be lined out and an appropriate remark will be made in item 7 indicating the official name of the vessel and that the member was attached to or embarked in the vessel at the time punishment was imposed.
- 4/ Offenses determined not to have been committed will not be listed. If the imposing commander decides not to impose punishment, the member will be notified and no copies of this record will be prepared. If a punishment is suspended, the following statement should be added after it: "To be automatically remitted if not vacated before (date)."
- 5/ If the member immediately elects not to appeal, item 5 will not be completed.
- 6/ The imposing commander will initial the appropriate block.
- 7/ If the individual appeals, this form and all matters set forth in item 7 will be forwarded to the superior authority.
- 8/ The superior authority will initial the appropriate block. Refer to note 10, below.
- 9/ In this space indicate the number of pages as follows: Allied documents on appeal consist of _____ pages. Allied documents include all written matters considered by the imposing commander, submitted by the member on appeal, commander's rebuttal, and copies of supplementary actions taken on the punishment. Supplementary actions will be recorded in accordance with note 10. If additional space is needed for completion of any item(s), use plain bond headed "Continuation Sheet 1," etc.
- 10/ Applicable portions of the following suggested formats may be used to record action taken on an appeal and supplementary actions for summarized Article 15 proceedings. Appropriate language should be entered in item 7 or, if necessary, on continuation sheets.

a. Suspension, Mitigation, Remission, or Setting Aside.

On (date) the punishment(s) of _____
imposed on (date of punishment) (was) (were) (suspended and will be automatically remitted if not vacated before (date))
(mitigated to) (set aside, and all rights, privileges, and property affected restored) (by my order) (by order of) (the officer who
imposed the punishment) (the successor in command to the imposing commander) (as superior authority).

(Typed name, grade, and organization of commander)

/s/ _____

b. Vacation of Suspension

The suspension of the punishment(s) of _____
imposed on (date of punishment) (is) (are) hereby vacated. The unexecuted portion(s) of the punishment(s) will be duly executed.

(Typed name, grade, and organization of commander)

/s/ _____

- 11/ Racial/ethnic identifiers will be placed in item 7 (Chap 15, AR 27-10).

GENERAL COUNSELING FORM

For use of this form, see AR 635-200; the proponent agency is MILPERCEN

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: 5 USC 301, 10 USC 3012(G). **PRINCIPAL PURPOSE:** To record counseling data pertaining to service members.
ROUTINE USES: Prerequisite counseling under paragraphs 5-8, 5-13, chapters 11, 13 or section III, chapter 14, AR 635-200. May also be used to document failures of rehabilitation efforts in administrative discharge proceedings.
DISCLOSURE: Disclosure is voluntary, but failure to provide the information may result in recording of a negative counseling session indicative of subordinate's lack of a desire to solve his or her problems.

PART I - BASIC DATA

1. NAME (last, first, MI) <i>Ebov, Lars N.</i>	2. SOCIAL SECURITY NO. <i>121-21-2121</i>	3. GRADE <i>E-3/PFC</i>	4. SEX <i>M</i>
5. UNIT <i>HHC, 1st Coscom Ft BRAXTON, NC</i>	FOR TRAINING UNITS ONLY 6. WEEK OF TRAINING _____ 7. TRAINING SCORES HIGH _____ MED _____ LOW _____		

PART II - OBSERVATIONS

8. DATE AND CIRCUMSTANCES

On 10 Jan 19XX, PFC Ebov was released from the 0630 PT formation and given a sick call slip after he complained of stomach pains. He was ordered to report directly to sick call at TMC # 10. At about 0700 156 ROAD went to the mini-Px and found PFC Ebov eating donuts and a sausage-egg-and-cheese biscuit. When asked why he was not at sick call, PFC Ebov told 156 ROAD that he was on his way to the TMC. 156 ROAD then read PFC Ebov's sick slip and noted that it said "stomach pain". The 156 then asked PFC Ebov why he was stuffing his face if he had a stomach ache. PFC Ebov then admitted that he never had stomach pains that morning.



9. DATE AND SUMMARY OF COUNSELING

You are advised that lying to your squad leader and 156 is a very serious offense under the UCMJ and could result in an Article 15 or court-martial. This incident also undermines my trust in you. You have been in the Army for almost two years now and should understand that integrity is one of the most important values to a soldier.

I am going to recommend that the CO impose a bar to reenlistment on you. If you keep your nose clean and soldier hard, I will recommend that it be removed.

DISPOSITION INSTRUCTIONS

This form will be destroyed upon: reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement.

PART III - AUTHENTICATION	
10. NAME, GRADE, SIGNATURE OF COUNSELOR SVEN R. CRUNTCHER, SSG 	DATE 10 JAN 19XX
11. I acknowledge having been counseled by the above individual and understand the reason for this counseling session. I <u>concur</u> /nonconcur that the information above accurately reflects this counseling session. I nonconcur for the following reasons:	
12. NAME, GRADE, SIGNATURE OF INDIVIDUAL COUNSELED Lars N. Ebooy Dfc 	DATE 10 Jan 19XX
13. IF COUNSELED INDIVIDUAL REFUSES TO SIGN COUNSELING NOTES COUNSELOR WILL INITIAL THIS BLOCK.	
PART IV - REHABILITATION	
14. REHABILITATION RESULTS/COMMENTS	
15. NAME, GRADE, SIGNATURE OF INDIVIDUAL COUNSELED	DATE
16. NAME, GRADE, SIGNATURE OF COUNSELOR	DATE
PART V - UNIT COMMANDER INTERVIEW	
17. INTERVIEW RESULTS AND RECOMMENDATION	
18. NAME, GRADE, SIGNATURE OF UNIT COMMANDER	DATE

IMPEACHMENT: UNTRUTHFUL ACTS

COUNSEL HANDOUT



I.

TRAINING OVERVIEW.

- A. **Introduction.** Trial advocacy training will be conducted in the courtroom on _____, from ____ to ____ hours. The training will focus on impeachment by untruthful acts. First, I will lead a discussion of the law of impeachment by untruthful acts and associated trial techniques. During the second part of the training we will conduct several drills designed to reinforce the skills discussed in the first part of the training.
- B. **Preparation.** Bring your MCM to training. Review basic techniques of cross-examination and making and meeting objections.



II.

KEYS TO SUCCESS.

- A. Review basic cross-examination techniques.
- B. Review MRE 608(b).



III.

REFERENCES FOR FURTHER STUDY.

- A. Thomas A. Mauet, *Trial Techniques* 245-246 (4th ed. 1996).
- B. David A. Schlueter et. al., *Military Evidentiary Foundations* 130-133 (1994).

IMPEACHMENT: UNTRUTHFUL ACTS

SAMPLE SOLUTION



Drill 1: Counseling File

- Q. SPC Eboy, you took an oath today to tell the truth, correct?*
A. Yes, sir.
- Q. You want this court to believe your testimony today?*
A. They should.
- Q. Do you agree that it is important for a soldier to tell the truth even when he is not under oath in the courtroom?*
A. Yes.
- Q. You agree that a soldier should always be truthful with his chain of command?*
A. Yes.
- Q. But you have not always told the truth when speaking with your squad leader, have you?*
A. No, sir, I lied one time.
- Q. Are you referring to the incident on 10 Jan 19XX when you lied about stomach pains in order to get out of PT?*
A. Yes.
- Q. On that occasion, isn't it true that you lied about stomach problems in order to get a sick slip and get out of PT?*
A. Yes.
- Q. After getting the sick slip, you did not go to sick call, but instead you went to the snack bar and ate donuts, right?*
A. Basically.
- Q. Basically? Isn't that exactly what happened?*
A. Well, yes, sir.
- Q. And when the ISG confronted you in the snack bar, didn't you at first tell him that you were on the way to sick call?*
A. I was going to go to sick call, sir.

Q. Isn't it true that the ISG examined your sick slip and discovered that it said you were sick in the stomach?

A. Yes, that's true.

Q. And it was only after the ISG examined your sick slip that you admitted you had lied about having stomach problems?

A. Yes, sir.

Drill 2: Summarized Art. 15

Q. SPC Balboa, do you agree that a soldier should always tell the truth in the course of his duties?

A. Uh, yeah, I guess.

Q. You guess? Did you take an oath to tell the truth today?

A. Yeah.

Q. Is it important to tell the truth when you are under oath?

A. Yes.

Q. Very good. Is it important for a soldier to be truthful in the course of his regular duties?

A. Yes.

Q. You have not always told the truth in your Army career have you, SPC Balboa?

A. Well, uh, one time I made a mistake when filling out a BAQ form.

Q. Are you referring to the BAQ form that you filled out on 5 July 19XX?

A. Maybe.

Q. Are you referring to the form you filled out in which you claimed to have a dependent spouse, by the name of Adrienne Smith?

A. Yeah.

Q. You recall filling out that form?

A. Yes.

Q. The ISG directed you to complete the BAQ certification form?

A. Yes.

Q. The ISG told you that you were required to provide truthful information?

A. I don't remember that.

- Q. You knew that the form would be used to determine how much BAQ you were entitled to receive?**
A. Yeah, I knew that.
- Q. You knew that you had a duty to provide truthful information?**
A. Yeah, I guess.
- Q. You wrote on an that official Army form that Adrienne Smith was your wife?**
A. Yeah.
- Q. But Ms. Smith was not your wife at that time, was she?**
A. No.
- Q. In fact Ms. Smith did not even live with you at that time, did she?**
A. No.
- Q. In fact, you have never been married to Adrienne Smith or anybody else, have you?**
A. No.
- Q. But you signed that form saying that she was your wife on 5 July 19XX?**
A. Yes.
- Q. That was a lie, wasn't it?**
A. It wasn't true.

Drill 3: Prior Untruthful Acts

- Q. You want this court to believe your brother is a truthful person don't you?**
A. He is a truthful person.
- Q. You want this court to believe that you are also a truthful person, isn't that right?**
A. I am only telling the truth.
- Q. You have not always been truthful with your military superiors have you?**
A. I don't know what you are talking about.
- Q. You graduated from basic training, didn't you?**
A. Yes.
- Q. However, you had to be recycled during basic training, didn't you?**
A. Well, yes.

- Q. In fact, you were recycled because you and several other soldiers cheated on the land navigation course.**
- A. It wasn't my idea.**
- Q. Isn't it true that you cheated on the land navigation course?**
- A. Yes.**
- Q. You found a copy of the answer key for the land navigation course, and used it to cheat on the test?**
- A. Yes.**
- Q. You showed the answer key to two other soldiers, didn't you?**
- A. Yes.**
- Q. Now after you had cheated on the land nav test, you were questioned about cheating on the test.**
- A. Eventually.**
- Q. The company commander questioned you, didn't he?**
- A. Yes.**
- Q. He questioned you in his office, didn't he?**
- A. I don't remember.**
- Q. Your drill instructor was present when the commander questioned you?**
- A. Yeah.**
- Q. You told the commander that you did not cheat on the test?**
- A. Yes.**
- Q. You told him that you did not know of any cheating on the test by anyone else?**
- A. Yes.**
- Q. That was not truthful, was it?**
- A. No.**
- Q. You have been untruthful at other times as well, haven't you?**
- A. No.**
- Q. Isn't it true that you once lied to your insurance company by filing a bogus claim about a car stereo you said had been stolen?**
- A. I don't know what you are talking about.**

**Are you stuck here? Is this as far as you can go? You should ask follow up questions to clarify the incident in question and test the witness's commitment to his answer.*

Q. Allstate refused to renew your car insurance recently, isn't that correct?
A. They canceled it because I had too many points on my license.

** Read the panel; do they believe you or do they think you are cashing in on this guy's poor driving record to inappropriately call into question his credibility?*

Q. You filed a claim with Allstate based on the alleged theft of your car stereo, right?
A. Right.

Q. At the time you filed the claim your policy was still in effect?
A. Yes.

Q. Allstate refused to pay your claim?
A. Yeah, they refused.

Q. Isn't it true that your car stereo was never stolen?
A. No.

Q. Isn't it true that you filed a false claim for your car stereo with Allstate?
A. No.

Q. It's true isn't it that Allstate canceled your policy right after you claimed your stereo was stolen?
A. No.

** Move on, you are now stuck with this answer and have gone about as far as a judge will allow on this line of questioning. You are stuck with his answer. You probably won that round anyway.*

Tab D

Module 3

**Develop the Skill:
Impeachment**

Prior Conviction



The Advocacy Trainer

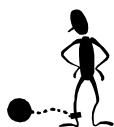
IMPEACHMENT BY PRIOR CONVICTION

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise will develop counsel's ability to impeach a witness by prior conviction. This method of impeachment is not frequently available to military attorneys. Counsel are more likely to use this skill with civilian witnesses, since few soldiers enlist with civilian convictions in their records and few are retained following a military conviction. Nonetheless, it remains a powerful weapon in counsel's arsenal.
- B. **Training Overview.** Training can be conducted by the instructor with one or more counsel and is divided into four phases: (1) preparation by instructor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions.



II. THE LAW.

A. *Qualifying Conviction.*



Only the following categories of convictions may be used to impeach a witness under MRE 609:

- Convictions for crimes of dishonesty and false statement (“*crimen falsi*”) are admissible to impeach any witness, including the accused, regardless of the punishment authorized or actually imposed. MRE 609(a)(2).

- Convictions for other crimes, if punishable by death, dishonorable discharge, or confinement in excess of one year, may be admissible, subject to the discretion of the court. The law of the jurisdiction in which the conviction was obtained governs the determination of maximum punishment. For military convictions, look to the maximum punishment prescribed by the President regardless of the level of court-martial. This category of convictions is subject to judicial balancing under the following standards:
 - Witnesses other than the accused: such convictions shall be admitted subject to MRE 403. MRE 609(a)(1).
 - The accused: such convictions shall be admitted only if the military judge determines that the probative value outweighs the prejudicial effect to the accused. MRE 609(a)(1).



If the conviction was obtained or the sentence of confinement completed more than 10 years ago (whichever is later), it is not admissible for impeachment purposes. MRE 609(b). The military judge may make exceptions, however, if:

- The proponent gives written notice to the adverse party of an intent to use it; **and**,
- The military judge determines that the probative value of the evidence substantially outweighs the prejudicial effect. MRE 609(b). Note that this test differs from MRE 403, because the test here leans toward excluding evidence, whereas the 403 balancing is geared toward inclusion of evidence.



For purposes of this rule, there is a “conviction” in a court-martial when a sentence has been adjudged. MRE 609(f).



Pendency of an appeal generally will not render convictions inadmissible, except that review of summary or special courts without a military judge must be completed before such convictions are admissible. MRE 609(e).



Pardon, annulment, or certificate of rehabilitation may bar use of such evidence. MRE 609(c).

- B. **Article 15s and Summary Courts-Martial.** Article 15s are not admissible under MRE 609. Summary court convictions may be used only if the witness was represented by counsel at the summary court or affirmatively waived the right to be represented by counsel. If the underlying misconduct reflected in the Article 15 or SCM is probative of untruthfulness, counsel may be permitted under MRE 608(b) to cross-examine the witness regarding the misconduct itself. (See Tab C, Module 2).
- C. **Juvenile Records.** Evidence of juvenile adjudications is generally not admissible. MRE 609(d).
- D. **Elements of the Foundation:**
1. *The witness is the person previously convicted.*
 2. *The previous conviction meets the qualifying criteria of MRE 609.*
 3. *The conviction was entered in a certain jurisdiction.*
 4. *The conviction was entered on a certain date.*
 5. *[The record of judgment is authenticated.][Add this element if the record is offered into evidence.]*

III.



PRACTICE POINTERS.

Motion in limine.

- ➔ Because resolution of issues of admissibility under MRE 609 often requires judicial balancing, both the proponent and the opponent of the witness should consider a motion in limine to obtain a ruling prior to trial. This is a tactical decision. Counsel may consider waiting for the other side to raise the issue if the prior conviction is clearly admissible and counsel desires the tactical advantage of surprise. Note that the discovery rules may require disclosure.

Method of proof.

- ➔ The witness may be impeached by prior conviction by eliciting the fact of the **conviction** on cross-examination; admitting into evidence an authenticated record of the conviction; or by testimony of someone present when the witness was convicted.

- ➔ The rule permits counsel to use either cross-examination or extrinsic evidence to prove the prior conviction. When the witness admits the facts pertaining to the conviction on cross-examination, however, the judge may exclude further evidence on the grounds that it is cumulative.
- ➔ There is more than one way to prove a prior conviction. Normally, cross-examination of the witness about the conviction is the preferred method. If the witness denies, mischaracterizes, or minimizes the nature of the conviction, then the impeachment value of the record is magnified. Always be prepared to do it both ways.
- ➔ A properly certified record of conviction is a self-authenticating document and needs no sponsoring witness. If opposing counsel objects to record of conviction on hearsay grounds, counsel should respond citing MRE 803(8).
- ➔ Most courts do not permit counsel to explore the details of the prior conviction. Some courts permit proof of the sentence imposed. The record of previous conviction (e.g., DD Form 493) usually indicates the sentence imposed. If the record is admissible, then cross-examination about the sentence imposed should also be admissible. Determine how far the military judge will permit you to go by asking him in an RCM 802 session.

Thorough investigation.

- ➔ Since this method of impeachment cannot be used unless counsel learn to thoroughly investigate the background of witnesses, training should include a discussion of procedures for obtaining records of conviction. For example, show counsel where to find enlisted files and how to check them for prior convictions. Civilian convictions may be noted on enlistment documents. Discuss CID's ability to run National Crime Information Center checks upon request.

IV.



SKILL DRILLS.

- A. ***Goal: Train counsel to use the following skills.***
 1. Basic cross-examination techniques covered in previous training.
 2. Determine whether a previous conviction is admissible under MRE 609.
 3. Impeach a witness who admits the prior conviction.

4. Impeach a witness who denies or mischaracterizes the conviction.

B. *Drill 1: Witness admits prior conviction.*

1. Supervisor or a volunteer poses as a witness. Proponent and opponent counsel are designated. Opposing counsel will cross-examine the witness concerning a prior conviction. Proponent counsel will make appropriate objections. Remaining counsel observe.
2. Supervisor states the nature of the prior conviction. Opposing counsel determines its admissibility under MRE 609. If the stated conviction qualifies, counsel will seek to impeach. Proponent counsel should object if he believes that the conviction does not qualify under 609. Instructor rules on any objections.
3. Sample solution:

Supervisor: CPT Jones, you are the TC and proponent of the witness. CPT Smith, you are the DC and opponent. CPT Jones has finished direct. CPT Smith, you will cross-examine. I am the witness, PVT Schmotz. I was convicted by general court-martial for willful dereliction of duty just two years ago. Proceed.

Q. PVT Schmotz, isn't it true that you were convicted at a general court-martial two years ago?

TC. Objection. This is improper impeachment under Rule 609.

MJ. Sustained.

Supervisor: Review the relevant rule to determine whether a prior conviction qualifies under MRE 609. Since the maximum punishment for willful dereliction under Art. 92 is six months confinement and the offense is not crimen falsi, the prior conviction does not qualify as impeachment under the rule. All right. I am still PVT Schmotz. Now I have a prior conviction by SPCM for false official statement (Art. 107) for claiming dependents on a BAQ certification form. The conviction occurred nine years ago. Proceed.

[See the enclosed sample solution to drill #1.]

C. *Drill 2: Witness denies or minimizes the conviction.*

1. Supervisor designates TC/DC and now plays the role of Mr. Marshall J. Douglas, who was punitively discharged from the service after a GCM conviction several years ago.

2. The DD Form 493 is attached. Counsel may glean all necessary information from this form.

3. Sample examination:

Supervisor: CPT Smith, you are the DC and the proponent of Mr. Douglas. CPT Jones, you are the TC and the opposing counsel. I am Mr. Douglas. You have P.E. 10 for identification. Proceed.

[See the enclosed sample solution to drill #2.]



D. **Summarize the main teaching points.** Following the drills, the instructor should summarize the main teaching points, elicit comments from the participants, and distribute sample solutions.

- ✓ **Thoroughly investigate each witness to ascertain the existence of prior civilian or military convictions.**
- ✓ **Only certain convictions which meet the criteria of MRE 609 may be used to impeach a witness.**
- ✓ **Article 15s and most summary courts-martial are not admissible under MRE 609.**
- ✓ **Be prepared to prove the existence of the prior conviction by cross-examination of the witness or by extrinsic evidence.**



V.

REFERENCES.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* chapt. 4 (1994).
- B. Stephen A. Saltzburg et al, *Military Rules of Evidence Manual* 666-685 (3rd ed. 1996 supp.).


Enclosures

Sample Solutions

DD Form 493, Extract of Military Records of Previous Convictions

Counsel Handout

EXTRACT OF MILITARY RECORDS OF PREVIOUS CONVICTIONS

IDENTIFICATION			
1. NAME (Last, First, Middle Initial) DOUGLAS, Marshall J.	2. SSN 666-66-6666	3. RANK PVT/CIV	4. UNIT/COMMAND NAME N/A
PART I - RECORD OF PREVIOUS CONVICTIONS BY COURTS-MARTIAL ¹			
5a. TYPE OF COURT-MARTIAL GENERAL	b. CM ORDER OR SCM NO. 00-200	c. HEADQUARTERS Ft. McNair, WASH, D.C.	d. ARTICLE(S) 81
e. SYNOPSIS OF SPECIFICATION(S) INCLUDING DATE OF OFFENSE (If more space is needed, continue on reverse.) Conspiracy to destroy federal property (original manuscript of the U.S. Constitution) on 4 July 19XX.			
f. SENTENCE ADJUDGED ² DD, confinement for 5 years, reduction to E-1, TF.			g. DATE SENTENCE ADJUDGED (YYMMDD) XX/12/01
			h. DATE SENTENCE FINALLY APPROVED ⁴ (YYMMDD) XX/06/05
i. I CERTIFY THE FOREGOING IS CORRECT ³			
(1) (a) TYPED OR PRINTED NAME OF PERSON SIGNING ORIGINAL ENTRY IN MILITARY RECORD (Last, First, Middle Initial) Johnson, Regina A.			(b) RANK CPT
(2) (a) TYPED OR PRINTED NAME OF PERSON SIGNING ORIGINAL ENTRY IN MILITARY RECORD (Last, First, Middle Initial)			(b) RANK
6a. TYPE OF COURT-MARTIAL	b. CM ORDER OR SCM NO.	c. HEADQUARTERS	d. ARTICLE(S)
e. SYNOPSIS OF SPECIFICATION(S) INCLUDING DATE OF OFFENSE (If more space is needed, continue on reverse.) 			
f. SENTENCE ADJUDGED ²			g. DATE SENTENCE ADJUDGED (YYMMDD)
			h. DATE SENTENCE FINALLY APPROVED ⁴ (YYMMDD)
i. I CERTIFY THE FOREGOING IS CORRECT ³			
(1) (a) TYPED OR PRINTED NAME OF PERSON SIGNING ORIGINAL ENTRY IN MILITARY RECORD (Last, First, Middle Initial)			(b) RANK
(2) (a) TYPED OR PRINTED NAME OF PERSON SIGNING ORIGINAL ENTRY IN MILITARY RECORD (Last, First, Middle Initial)			(b) RANK
PART II - ATTESTING CERTIFICATE BY CUSTODIAN			
7. NAME OF UNIT / COMMAND OF CUSTODIAN HHC, Headquarters Command		8. ADDRESS OF UNIT / COMMAND OF CUSTODIAN (Street, City, State, Zip Code) Ft. McNair, WASH, D.C.	9. DATE COMPLETED (YYMMDD) XX/XX/XX
I certify that I am the official custodian of the military personnel records pertaining to previous convictions by court-martial of the above-named person, and that the foregoing is a true copy of the entries contained therein. ¹			
10. TYPED NAME (Last, First, Middle Initial) Mulligan, Archibald M.	11. RANK CW3	12. OFFICIAL CAPACITY Adjutant	13. SIGNATURE 
<p>¹ Only admissible previous convictions will be listed. To determine admissibility, see rules on reverse. For Army personnel, the extract will be prepared from the Service Record or DA Form 2-2. For Air Force personnel, the extract will be prepared from AF Form 1226. For Navy personnel, the extract will be prepared from NAVPERS Form 1070/607 or Administrative Remarks, Page 13. For Marine Corps personnel, the extract will be prepared from NAVMC Form 118(13)-PD.</p> <p>² For convictions by summary courts-martial or special courts-martial without a military judge, entry is "Sentence as Approved."</p> <p>³ If the service record certification block being extracted fails to contain the required: (a) Signature of the personnel records custodian, request that custodian to take immediate corrective action; (b) rank and unit/command of the custodian of the conviction record, enter remark such as "None," "Rank not shown," "Unit/command not shown," as appropriate, in applicable block of the extract. Entries in this section are extracted from the source document. No actual signatures will be made in this section.</p> <p>⁴ Applies only to convictions by summary courts-martial and special courts-martial without a military judge. The date of sentence approval is the date that review has been completed pursuant to Article 64 or Article 66, if applicable</p>			

DD Form 493, OCT 84

Previous editions are obsolete

RULES FOR DETERMINING ADMISSIBILITY OF PREVIOUS CONVICTIONS

(See RCM 1001(b)(3), MCM, 1984)

There is a conviction in a court-martial when a sentence has been adjudged, except that a conviction by a summary court-martial or a special court-martial without a military judge is not admissible in a subsequent court-martial until review has been completed pursuant to

Article 64(a) or Article 66, UCMJ, if applicable. A vacation of a suspended sentence is not a conviction and is not admissible as such. An adjudication of guilt by a civilian forum is a conviction in accordance with the law of that jurisdiction.

INTRODUCING EVIDENCE OF PREVIOUS CONVICTIONS

NOTE: To be considered by a court-martial, previous convictions must be ADMITTED in evidence. Ordinarily, they are proved by introducing in evidence a duly authenticated extract copy of accused's military personnel record (DD Form 493). They may also be proved by the record of previous convictions or by the order promulgating the results of trial. After the Record of Previous Convictions has been marked for identification and shown to the defense counsel, the introduction proceeds as follows:

Trial Counsel: Prosecution Exhibit _____ for identification, a duly authenticated extract copy of the accused's military personnel record of previous conviction(s) by court-martial, is offered in evidence as Prosecution Exhibit _____.

Defense Counsel: (No objection.) (The accused objects to _____ on the grounds that _____.)

Military Judge (President): Prosecution Exhibit _____ for identification is (not) admitted in evidence as Prosecution Exhibit _____.

IMPEACHMENT BY PRIOR CONVICTION

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. **Introduction.** Trial advocacy training will be conducted in the courtroom on _____, from ____ to ____ hours. The training will focus on impeachment by prior conviction. First, I will lead a discussion of the law of impeachment by prior conviction and associated trial techniques. During the second part of the training we will conduct several drills designed to reinforce the skills discussed in the first part of the training.
- B. **Preparation.** Bring your MCM to training. Review basic techniques of cross-examination and making and meeting objections. Review MRE 609, 803(8), and 902.



II. KEYS TO SUCCESS.

Know the elements of the foundation for prior convictions.

1. *The witness is the person previously convicted.*
2. *The previous conviction meets the qualifying criteria of MRE 609 (i.e., felony or crimen falsi).*
3. *The conviction was entered in a certain jurisdiction.*
4. *The conviction was entered on a certain date.*
5. *[The record of judgment is authenticated][Add this element if the record of conviction offered into evidence.]*



III. REFERENCES FOR FURTHER STUDY.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* chapt. 4 (1994).
- B. Stephen A. Saltzburg et al, *Military Rules of Evidence Manual* 666-685 (3rd ed. 1996 supp.).

IMPEACHMENT BY PRIOR CONVICTION

SAMPLE SOLUTIONS



Drill 1

- Q. PVT Schmotz, isn't it true that you were convicted at a special court-martial nine years ago?*
- A. Yes.*
- Q. That court convicted you for a violation of Art. 107, false official statement, correct?*
- A. Yes, sir.*
- Q. And you were convicted of making a false official statement for lying about your BAQ entitlements?*
- A. Yes.*
- Q. Nothing further, your honor.*

Drill 2

- Q. Are you the same Marshall J. Douglas who was previously convicted by general court-martial in December 19XX?*
- A. Well, I don't know if it was general court-martial.*
- Q. Isn't it a fact that you were convicted of conspiracy to destroy the original manuscript of the United States Constitution in 19XX?*
- A. Well, no.*
- Q. Isn't it a fact that you were convicted of that crime on 17 September 1989, during the 200th anniversary of the ratification of that document?*
- A. It should never have been ratified!*
- Q. Please answer the question. Were you convicted of conspiracy to destroy the Constitution?*
- A. No, I was not.*

- Q. Isn't it a fact that you were sentenced to a dishonorable discharge and five years confinement for conspiracy to destroy the Constitution?**
- A. Uh, no, it was only two years.**
- Q. So, you now admit that you were convicted of that crime?**
- A. Well, yes, but it wasn't no GCM and I wasn't sentenced to no five years in jail.**
- Q. Your honor, the government moves to admit P.E. 10 for ID into evidence as P.E. 10.**
- MJ. Defense, what do you say?**
- DC. We object to this exhibit on the grounds of hearsay and lack of authentication.**
- MJ. Trial?**
- DC. Sir, P.E. 10 for ID is a self-authenticating document under MRE 902(4) and also falls within the hearsay exception under MRE 803(8).**
- MJ. The objection is overruled. P.E. 10 for ID will be admitted as P.E. 10. You may proceed.**
- Q. I am handing the witness P.E. 10. Mr. Douglas, this is an official record of your conviction. Please take a moment to read block "5f" of that record of conviction. Tell the court what block f states as the sentence you were given for the conspiracy to destroy the Constitution.**
- A. It says that I was sentenced to five years confinement, dishonorable discharge.**
- Q. Thank you. Nothing further.**

Tab D

Module 4

**Develop the Skill:
Impeachment**

Prior Inconsistent Statements



The Advocacy Trainer

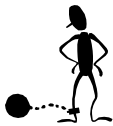
IMPEACHMENT: PRIOR INCONSISTENT STATEMENTS

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise develops counsel's ability to impeach a witness by cross-examination about a prior statement that is inconsistent with his trial testimony. This inconsistency may raise the inference that he is lying and that his testimony is not worthy of belief. Under some circumstances, prior statements that omit significant facts may also be characterized as prior inconsistent statements if the omitted facts are added to the account given under oath.
- B. **Training Overview.** Training can be conducted by the instructor with one or more counsel. The training is divided into four phases: (1) preparation by instructor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions.



II. THE LAW.


- A. **Use of the Prior Inconsistent Statement (PIS) for Impeachment Only.** MRE 613.





Form of the Prior Statement. The rule is clear that the PIS need not be in written form. Prior statements that may be used to impeach a witness can take the following forms:


- A written statement. Includes anything from a scribbled note on a "buck slip" to a standard form sworn statement to CID.
- Transcripts of prior testimony given at an Article 32 investigation, deposition, or trial session.

- Any oral statement made by the accused, which counsel has a good faith basis to believe was actually uttered.
- Omissions from a prior statement may also be considered as inconsistent statements if it would have been natural to mention the omitted information at the time the statement was made.
- Assertive or communicative conduct.

 ***Not required to show the statement to the witness.*** MRE 613 disposes of the common law rule that the witness be given the opportunity to see a prior written statement before cross-examination thereon. The statement must, however, be disclosed to the opposing counsel upon request.

 ***Extrinsic evidence of prior statement.*** The prior inconsistent statement may be admitted as extrinsic evidence only if two conditions are met: (1) the witness denies making the prior statement or denies that it is inconsistent; and (2) the inconsistency goes to a noncollateral matter. If the witness acknowledges the prior statement, then it is not allowed.

 ***Opportunity to explain or deny.*** If the prior statement is introduced, the witness must be given the opportunity to explain or deny the statement. In other words, impeachment with a prior statement always begins with examination of the witness concerning the prior statement.

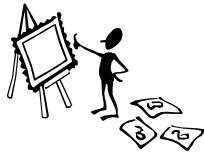
 ***Limiting instruction.*** When a prior inconsistent statement is used, the military judge shall give a limiting instruction upon request by the opposing party. The prior inconsistent statement is not substantive evidence! The prior statement may not be relied upon to prove an element of the offense or a defense. The statement, if admitted, will be accompanied by a limiting instruction from the judge that it can be considered only on the issue of the witness's credibility.

B. ***Prior Inconsistent Statement as Substantive Evidence.*** MRE 801(d).

☞ A prior inconsistent statement offered solely to impeach the witness under MRE 613 is hearsay and not admissible for the truth of the matter contained therein.

☞ A prior inconsistent statement is not hearsay if declarant and witness are the same and the prior statement was made under oath and subject to cross-examination. MRE 801(d)(1)(A).

☞ A prior inconsistent statement is not hearsay if it is a party-opponent admission. MRE 801(d)(2).



III.

THE ART.


A. ***The Canvas.*** On cross-examination, counsel will typically follow a 3-step process outlined below. The order of the three steps may vary depending on the witness. For example, a professional witness, such as a police officer, may recognize what's coming if you follow the standard pattern.


☞ **Commit** the witness to what he said on direct (“You told us on direct examination that you saw the accused with a knife, correct?”).


☞ **Validate** the witness's prior statement and its accuracy (“You made a statement about this case on 4 July 96, didn't you? And things were pretty fresh in your mind when you made that statement, correct? And you swore to tell the truth, didn't you?”).


☞ **Confront** the witness with the prior statement (“And you said in the 4 July statement, and I quote, ‘The accused was not carrying any weapon that I could see.’ That's what you said, right?”).

B. *Counsel may commit, dramatize, and confront in a number of ways:*

 Witness impeaches himself. Counsel may highlight the relevant portion of the witness's statement, mark the document as an exhibit for identification (always coordinate with the court reporter when marking an exhibit in advance), and present the document to the witness. The witness will then identify the document and confirm that it is his statement. Counsel may confront the witness with the conflicting language by having the witness read aloud the portion that counsel selected. Counsel may also have the witness read the preceding question (if the statement is in question-and-answer format) and then his own answer to that question.

 Counsel impeaches the witness. Counsel may simply have the witness confirm the existence of the prior statement, reinforce its credibility, and verify the conflicting testimony by quoting it to the witness. This approach removes the necessity of fumbling with the document, since it does not need to be handed to the witness.

 Viewgraph impeaches the witness. Counsel may wish to convert the documentary statement into a clear viewgraph and then project the document onto a screen. This way the members themselves can actually see the words that damn the witness.

 Statement impeaches the witness. When the witness denies making the statement, and the statement does not relate to a collateral matter, counsel may, after the witness has departed, present another witness who overheard the witness's out-of-court statement or who took the written statement from the witness. In such a case, the statement may be admitted for the limited purpose of showing that it was made, unless the statement is admissible as substantive evidence (*see* MRE 801).

C. Adapt validation technique to the form of the prior statement. The facts which are important at the validation stage of the impeachment will vary depending on the form of the statement (e.g., oral, written, sworn, testimonial, etc.). For example, if the prior statement was a sworn statement, then it is important to elicit the fact that the witness had the opportunity to review the statement, initialed each page, took an oath, and signed his name.

IV.



PRACTICE POINTERS.

- ***Impeach only on significant inconsistencies.*** Nit-picking about minor variations on insignificant details is often unimpressive as an impeachment technique. Panels understand that there will be minor variations in detail each time a story is told by a human being. Repeated attempts to call the witness a liar on the basis of these variations may be perceived as overreaching, rather than effective impeachment of the witness's credibility.
- ***Impeach only on true inconsistencies.*** Before launching into the impeachment technique, ensure that there is a true factual inconsistency rather than a mere semantic difference. Clarify the facts during the **commit** phase of the impeachment.
- ***Use impeachment by prior inconsistent statement sparingly.*** If overused it loses its impact. Avoid this problem by following the previous two rules.
- ***Be prepared to prove the inconsistent statement by extrinsic evidence.*** When interviewing a witness before trial, have a witness present who can later be called to testify about inconsistent statements made in the interview. Whenever possible, reduce significant pretrial statements to writing and have the witness swear to its truthfulness using the sworn statement form (DA Form 2823).

V.



SKILL DRILLS.

- A. ***Goal: Train counsel to use the following skills.***
 - 1. Use fundamental cross-examination skills covered in previous training.
 - 2. Impeach a witness using a prior inconsistent statement.
- B. ***Conduct the drills.***
 - 1. ***Preparation:*** You **must** practice these drills on your own (in front of the mirror, spouse, or in the car) or with another counsel with whom you feel comfortable before you stand up in front of your counsel.

2. *Role Play:* Counsel must really “loosen up” to obtain the full benefit from these drills.
3. *Execution:* **Get out of your office, away from the phones!** Go to the courtroom. Supervisor should demonstrate what he expects from counsel. After a demonstration, the supervisor then selects counsel to do the entire drill or has counsel collectively perform the drill, randomly selecting counsel to perform a part of the exercise.

C. ***Drill 1: Commit the witness to prior testimony.***

1. Supervisor’s Guide: This drill will familiarize counsel with the first step in the routine of impeachment by prior inconsistent statement. The instructor will play the part of the witness, reading the summary of testimony provided below. Each counsel will ask the witness two questions to commit him to some portion of the testimony given.
2. The facts: The witness testifies in a rape case. His testimony is as follows: On 3 July I was in the hallway of barracks building #3. It was about 0300. I was very thirsty that evening because my smoking is getting worse. I’ve smoked for several years now and I’ve increased to the point of three packs a day. Anyway, I was standing in the hallway at the vending machine. I couldn’t decide which kind of soda to get. As usual, the only two kinds in the machine were cherry cola and orange soda. I like the sweetness of cherry cola, but I also like the bouncy vitality of the orange soda. I couldn’t make up my mind whether I was in a cherry-mood or an orange-mood. But I wanted something. As I fished in my pocket for fifty cents I heard a sound, like a muffled yell, come from the room behind me. I heard something like a thump. As I turned to face the door, it burst open, and a naked woman ran past me, screaming “he’s trying to kill me!” As she rushed by me, a naked man followed her out of the room. He was a large, white male with brown hair. He seemed to be all shiny. I lunged at him, and we fell to the ground, grappling. As we wrestled, I tried to get a hold of him but I couldn’t - he seemed to be covered in some type of body oil. It smelled like perfume. But I noticed he had a strange, funky odor, emanating from him. He wasn’t carrying a weapon. We fought with our hands. He eventually slithered out of my grasp and ran away. I ran after the victim to protect her.

3. Sample counsel questions:

Q. You went into the hallway to get soda, isn't that correct?

Q. You said on direct that you could not identify the victim, isn't that true?

Q. The man you wrestled with had no weapon of any kind?

Q. You are certain of that?

D. ***Drill 2: Validate the prior statement.***

1. Supervisor's Guide: This drill will train counsel to perform the second step in the routine of impeachment by prior inconsistent statement. Again, the instructor will play the witness. Each counsel will ask one question of the witness to develop and create a verbal picture of the circumstances surrounding the prior oral statement.

2. The facts. Same scenario as in drill 1. CID reports that the alleged rape occurred in the early morning hours of 4 July at about 0500. The MPs arrived at the scene at about 0530 after the witness called 911. While the MPs conducted a room-to-room search looking for the suspect, the MP supervisor, SSG Wright, interviewed the witness near the soda machine where he attempted to tackle the suspect. At about 0600 the witness made a statement to CID. The witness stated that his mind was very clear after the incident, and that he got a good look at the victim and the assailant. The witness had not consumed any alcohol prior to the incident.

3. Sample counsel question:

Q. You called 911 after making sure the victim was safe?

Q. That was at about 0530?

Q. MP patrol arrived about 10 minutes later?

Q. You met the MPs when they arrived?

Q. SSG Wright was the first MP to arrive at the barracks?

Q. SSG Wright was in charge of the MP patrol at the barracks?

- Q: SSG Wright asked you to accompany him to the soda machine area?*
- Q: SSG Wright asked you to tell him exactly what happened?*
- Q: Who else was present when SSG Wright asked you what happened at the soda machine?*
- Q: It was about 0600 when SSG Wright interviewed you?*
- Q: This was less than an hour after you attempted to subdue the naked man?*
- Q: You understood that SSG Wright was investigating a possible rape?*
- Q: You knew that the information you gave to SSG Wright would be critical to the police investigation?*
- Q: You knew that what you told him might help catch a rapist?*
- Q: You knew that you had a duty to tell SSG Wright the truth?*
- Q: You knew that you had a duty to tell SSG Wright as many details as you could recall?*
- Q: The incident was pretty fresh in your mind when you made that statement, wasn't it?*
- Q: You told SSG Wright the truth at that time?*

E. Drill 3: Impeach the witness using a prior inconsistent statement.

1. Supervisor's Guide: The purpose of this drill is to train counsel to impeach a witness using a written prior inconsistent statement. Counsel will bring together all three steps of the impeachment process. The instructor should distribute copies of the attached Sworn Statement (DA Form 2823) to each of the counsel. After giving counsel a few minutes to read the statement, read the summary of testimony provided and then have each counsel cross-examine the witness. The goal is for each counsel to pick out one inconsistency between the testimony and the prior statement and to impeach the witness using the 3-step process of **commit, validate, and confront**. The instructor can vary his approach with each counsel. For some, readily admit the prior statement; for others, be evasive or flatly deny making the statement. Counsel should respond appropriately.
2. The prior statement. CID reports that the alleged rape occurred at approximately 0500 on 4 July. At about 0630 on 4 July, the witness was transported to CID and made a sworn statement on DA Form 2823 (see attached document). The witness stated that his mind was very clear after the incident, and that he got a good look at the victim and the assailant. The CID office is about a mile from the barracks where the alleged rape occurred. The witness was sworn to his statement, had a chance to read it over before signing it, initialed each page, and then signed it.
3. Testimony: "On 3 July I was in the hallway of barracks building number 3. It was about 0500. I had been very thirsty that evening because my smoking is getting worse. I've smoked for several years now and I've increased to the point of three packs a day. Anyway, I was standing in the hallway, at the vending machine. I couldn't decide which kind of soda to get. As usual, the only two kinds in the machine were cherry cola and orange soda. I like the sweetness of cherry cola, but I also like the bouncy vitality of the orange soda. I couldn't make up my mind whether I was in a cherry-mood or an orange-mood. But I wanted something. As I fished in my pocket for fifty cents I heard a sound, like a muffled yell, come from the room behind me. I heard something like a thump. As I turned to face the door, it burst open, and a naked woman ran past me, screaming 'he's trying to kill me.' As she rushed by me, a naked man followed her out of the room. He was white and very large, with dark brown hair. He seemed to be all shiny. I lunged at him, and we fell to the ground, grappling. We wrestled, and I tried to get a hold of him but I couldn't - he seemed to be covered in some type of body oil. It smelled like perfume. But I noticed he had a strange, funky odor, emanating from himself. He did not have any type of weapon. He was completely naked. He managed to break free from me. I initially tried to follow him but he ran up the stairs at the end of the hall. I decided to follow the victim, who had run outside. I guess I decided to stay with her and protect her. I walked

with her over to the 1SG's room, and turned her over to him and told him to call 911. Then I roused some of my buddies and we began a door-to-door search for the rapist. After about an hour, we spotted a guy coming from the area near the dumpsters. We ran over to him and stopped him. He was black, about medium build. He was dressed in PT clothes. As we got near to him, I noticed that weird, funky smell again, and I shouted 'that's the guy!' and we piled on top of him. Then the MPs came and said 'he's the guy.' That's the accused sitting in the courtroom today."

4. See sample solution. Comparing the testimony with the sworn statement you will note the following inconsistencies:
 - a. The day of the incident: 3 vs. 4 July. [Counsel may not want to impeach here. It is not critical to have him get it right. Try to refresh his recollection instead.]
 - b. Witness heard a "scream" vs. "muffled yell & thump." [You need to develop this testimony a little bit to determine if there is an actual inconsistency before attempting to impeach. As it stands there is not a significant inconsistency.]
 - c. Victim yelled "he raped me" vs. "he's trying to kill me." [This is a crucial difference. If counsel decides to impeach, in the commitment stage ensure that the witness denies that the victim said anything other than "he's trying to kill me." If he says both, then you might have an inconsistency by omission.]
 - d. Description of suspect: white, large vs. black, medium. [There are two inconsistencies here which are relevant to his ID of the accused. This is a genuine inconsistency. Impeach.]
 - e. Suspect naked vs. pants. [This is a major inconsistency that casts doubt on the witness's veracity. Impeach.]
 - f. Suspect unarmed vs. suspect w/knife. [Major inconsistency. When committing the witness to his testimony, nail him down on the sheath and the shiny object, and his contemporaneous thought of a knife.]
 - g. Witness called 911 vs. 1SG called 911. [Inconsistent, but not necessarily important. Leave it alone or attempt to clarify only.]

- h. ID'd the suspect first time vs. ID'd him 10 min later. [Again, this is significant because it may bear on the validity of the ID. Develop the testimony further to ascertain whether there is a true inconsistency. If so, then impeach.]



- F. **Summarize the main teaching points.** Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and recap the main points:

- ✓ **Use the format of Commit, Validate, and Confront to impeach by PIS.**
- ✓ **Impeach only on true inconsistencies.**
- ✓ **Distinguish between situations where the PIS comes in as substantive evidence and where it is solely for impeachment purposes.**



VI.

REFERENCES.

- A. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 613, 801(d)(1)(A), 804(b)(1) (1996).
- B. James W. McElhaney, *McElhaney's Trial Notebook* 409-423 (3d ed. 1994).
- C. Leonard Packel, *Trial Advocacy: A Systematic Approach* 82-85 (1984).
- D. David A. Schlueter et al., *Military Evidentiary Foundations* 139-152 (1994).
- E. Richard A. Givens, *Advocacy: The Art of Pleading a Cause* 124-126 (2d ed. 1985).

ENCLOSURES
Counsel Handout
DA Form 2823
Sample Solution

SWORN STATEMENT

For use of this form, see AR 190-45: the proponent agency is Office of The Deputy Chief of Staff for Personnel.

LOCATION Ft. Braxton, North Carolina	DATE 4 JUL XX	TIME 0700	FILE NUMBER CID230045112
LAST NAME, FIRST NAME, MIDDLE NAME GYRO, Morris A.	SOCIAL SECURITY NUMBER 828-82-8282		GRADE/STATUS E-5
ORGANIZATION OR ADDRESS 504th Military Intelligence Gp (Abn), Ft. Braxton, NC 28307-5100			

I, Morris A. Gyro, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

On 4 July I was standing at the soda machine. It was early in the morning. I was tired but alert. I was about to get a coke from the machine when I heard a noise behind me. It sounded like someone screaming. I whirled around, going into a crouch-type fighting position (I'm a blackbelt in Karate). A woman burst out of the room which I'd been standing in front of. She was naked and she looked very frightened. She screamed "He raped me!" or something like that, then ran past me. A naked man followed her out of the room at a fast pace. He was black, of approximately medium build. I dove at him and hit him in the waist-area with my shoulder. I drove him to the ground and we wrestled. I noticed he was wearing pants, and he had a knife sheath attached to his belt. I remember that because I remember seeing that and thinking instinctively "he's got a knife." I also saw him holding something shiny. We wrestled for a few seconds, but then he slipped out of my grasp and ran up the stairs at the end of the hallway. I ran after the victim, thinking I should stay with her. I called 911. Then I roused my 1SG and, after we got some of my buddies, we started a room to room search looking for the rapist. After a while we saw a guy by the dumpster. We ran over to him. He said he'd been doing PT. We questioned him for a few minutes, then let him go. As he walked past us, it struck me that he looked vaguely familiar. About ten minutes later, I saw him under a street light. I then recognized him as the rapist and I shouted "that's him!"

MAG

MAG

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT MAG	PAGE 1 OF 2 PAGES
---------	--	-------------------

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF TAKEN AT DATED CONTINUED."
THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE OF PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

STATEMENT (Continued)

MAG
MAG

AFFIDAVIT

I, Morris A. Gyro HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1, I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

WITNESSES:

SA John A. Razor
43d MP Det. (CID)
Ft. Braxton, NC
ORGANIZATION OR ADDRESS

ORGANIZATION OR ADDRESS

Morris A. Gyro
(Signature of Person Making Statement)

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 4th day of July, 19 XX at Ft. Braxton, NC

Alan W. Strate
(Signature of Person Administering Oath)

SA Alan W. Strate, CW3
(Typed Name of Person Administering Oath)
UCMJ art. 136(b)
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT **MAG**

IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. **Introduction.** Trial advocacy training will be conducted in the courtroom on _____, from _____ to _____ hours. The training will focus on impeachment by inconsistent statement. First, I will lead a discussion of the law of impeachment by prior inconsistent statement and associated trial techniques. During the second part of the training we will conduct several drills designed to reinforce the skills discussed in the first part of the training.
- B. **Preparation.** Bring your copy of the MCM to training. Review basic techniques of cross-examination.



II. KEYS TO SUCCESS.

- A. Review basic cross-examination techniques.
- B. Review MRE 613 and 801(d)(1)(A).



III. REFERENCES FOR FURTHER STUDY.

- A. Thomas A. Mauet, *Trial Techniques* 242-254 (4th ed. 1996).
- B. David A. Schlueter et. al., *Military Evidentiary Foundations* 139-152 (1994).

IMPEACHMENT: PRIOR INCONSISTENT STATEMENTS

SAMPLE SOLUTION



Q. *You testified that the man you tackled near the soda machine was completely naked?*

A. *That's right.*

Q. *You wrestled with him on the ground?*

A. *Yes.*

Q. *But you were unable to hold him?*

A. *Yeah. He was covered with oil.*

Q. *Since he was naked and covered with oil, there was no way to get a good hold on him?*

A. *Like a greased pig.*

Q. *You wanted to prevent him from chasing the woman, correct?*

A. *Yes, that's why I tried to hold him there.*

Q. *Do you remember seeing his genital area?*

A. *Well, sort of.*

Q. *Did you notice whether his penis was erect?*

A. *I don't remember.*

Q. *Could he have had underwear on?*

A. *No, he was definitely naked.*

** At this point you have succeeded in committing the witness to his testimony and eliminated any possibility of a simple lack of clarity.*

Q. *Now after your search for the suspect was over, you went down to CID headquarters, right?*

A. *Yes.*

Q. *Why did you go there?*

A. *They wanted me to make a report about what happened that morning.*

- Q. Do you recall talking to SA Strate at the CID office on the morning of 4 July?*
A. Yes.
- Q. Did he interview you about the incident at the barracks?*
A. Yes.
- Q. Where did he interview you?*
A. In his office.
- Q. How did he conduct the interview?*
A. He basically asked me what happened and then asked a few follow-up questions. Then he had me write out what I had told him.
- Q. Did you write it on an official form?*
A. No. He had me just write it on regular paper. Then he typed it up on some official form.
- Q. SA Strate gave you a chance to read the typed version of the statement?*
A. Yeah.
- Q. You read it carefully?*
A. Yes.
- Q. You did not find any errors on the form?*
A. Not that I recall.
- Q. You were asked to initial the form in several places?*
A. Yes.
- Q. SA Strate asked you to raise your right hand and swear to tell the truth before you signed the form, didn't he?*
A. Yes.
- Q. You swore that the statement on the form was the truth?*
A. Yes.
- Q. And it was the truth wasn't it?*
A. Yes.
- Q. You made the statement when the event was still fresh in your mind?*
A. Yes.
- Q. And then you signed the form?*
A. Yes.

** At this point the prior statement has been validated. Although it is not required, it is often a good technique to show the sworn statement to the witness and have him authenticate it. You are now ready to confront the witness with his prior inconsistency.*

Q. Now, your testimony today is that the man who you tackled was completely naked, correct?

A. Yeah.

Q. But your sworn statement to CID, that you gave under oath, states: “_____.” Isn’t that correct?

A. Uh, no.

** At this point the impeachment is technically complete. It would probably be better, however, to show him the statement and have him authenticate the signature before moving on.*

Tab D
Module 5

Develop the Skill:
Impeachment
Visual Observation



The Advocacy Trainer

IMPEACHMENT OF VISUAL OBSERVATION

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise will develop counsel's ability to impeach a witness who provides testimony about a visual observation by exposing factors that undermine the reliability of the witness's perception and memory of the observation.
- B. **Training Overview.** This training can be conducted by the instructor with two or more counsel and at least one additional participant. The training is divided into four phases: (1) preparation by the instructor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions.



II. THE LAW.



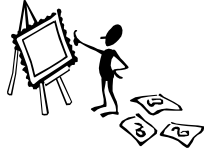
"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." MRE 602.



"The credibility of a witness may be attacked by any party, including the party calling the witness." MRE 607.



"Leading questions should not be used on direct examination of a witness. Leading questions are permitted on cross-examination." MRE 611(c).



III.

THE ART.

- A. ***Factors affecting the reliability of the testimony.*** When preparing the direct or cross-examination of a witness who will provide testimony about a visual observation, counsel must consider both the internal and the external factors that may affect the accuracy of such testimony. The proponent will normally seek to emphasize positive factors which support the credibility of the witness and to “reduce the sting” of negative factors. The opposing counsel will try to demonstrate the unreliability of the visual observation by exposing as many negative factors as possible.
- B. ***Internal factors:*** Internal factors affecting the reliability of a visual observation include both physiological and psychological characteristics of the observer (witness).
1. The most obvious example of an internal physiological factor is a visual defect (poor eyesight) and lack of adequate corrective lenses. Other factors are color blindness, physical disabilities, age, adaptation to darkness, and prior training. Prior training is often overlooked. Many soldiers have undergone extensive periods of night training, which may improve their ability to see at night. It is also well established that experienced police officers and other trained observers are more competent to observe and recall factual detail.
 2. Internal psychological factors include perception, memory and the witness’s ability to communicate. Perception is effected by a variety of factors, such as distorted focus on certain elements of the scene to the exclusion of others (e.g., focus on the weapon in an assault, rather than the facial features of the assailant). Personal expectations, such as bias, stereotypes, interpretations and assumptions (i.e., guessing) also affect the perceptual process. Human beings have a natural desire to fill in the gaps in observation or recall by guessing.
- C. ***External factors.*** External or environmental factors include such things as exposure time, line of sight, obstructions, lighting, weather, speed of movement, and distance. The traumatic nature of the event observed is also an important external factor that may impact the witness’s ability to observe or remember.



IV.

PRACTICE POINTERS.

- **Consider your tone.** It is not necessary to adopt a hostile or sarcastic tone when cross-examining a witness who is called to testify as to a visual observation. In fact, a friendly tone may produce better results in most cases. Even if the witness has given testimony that is adverse to your cause, the goal of such cross-examination is simply to elicit facts that affect the witness's ability to observe, interpret, and recall relevant facts accurately.
- **Avoid the ultimate question.** Witnesses are naturally reluctant to concede the inaccuracy of their observations and recollections, especially after they have testified on direct. Counsel must avoid the temptation to ask a question that directly challenges the accuracy of the witness by reciting the factors bearing on accuracy and then challenging the witness to agree that his original report or testimony was wrong. In addition to being argumentative, such ultimate questions usually produce unsatisfactory responses. When confronted with a direct challenge to their veracity, most witnesses forcefully reassert the certainty of their observations and memory. As a general rule, save the reliability argument for summation.
- **Scrutinize the witness's prior statements.** Examine the record for statements by the witness that show greater certainty about their observations at trial than immediately after the event. These inconsistencies may not be sharp enough to clearly qualify as prior inconsistent statements, but they do tend to show that the witness has lost his objectivity over time.
- **Examine the scene.** In order to prepare, you must conduct your own examination of the scene where the relevant observations took place. Ensure that you have similar lighting conditions and other environmental factors and have an assistant reenact the action. Measure distances and views from various angles. Consider using a diagram to enhance the testimony in court. All of these preparatory steps will greatly assist counsel in identifying external factors bearing on reliability.
- **Investigate and interview the witness before trial.** Explore factors that bear on accuracy of observation, interpretation, and memory.
- **Structure the testimony logically.** Cross-examination should be structured with the principle of "primacy and recency" in mind. Start and end with strong points.

V.



THE SKILL DRILLS.

- A. **Goals.** To train counsel to impeach a witness who provides testimony regarding his visual observations. The training is structured to allow counsel to practice both direct and cross-examination of the witness.
- B. **Conduct the drills.**
1. **Preparation:** These drills require the participation of at least one person who is unfamiliar to the trainees. Also, review the basic direct and cross-examination skills found in modules 1 and 2 of Tab B.
 2. **Time:** Plan on approximately one hour to conduct this training.
 3. **Execution: Get out of your office and away from the phones!** Go to the courtroom (or other location as indicated below). The Supervisor leads a discussion regarding direct and cross-examination of visual observation and then conducts the drills.
- C. **Drill 1:** Have counsel sit in the members' box to begin training. Have a soldier (one that counsel do not know and have not seen) enter the courtroom during your initial lecture. The soldier should stand by quietly for approximately 15 seconds. The soldier should then scream "I can't take it anymore," throwing a couple of casefiles at your feet. The soldier should then quickly exit the room, slamming the door. After the soldier leaves, have each counsel write a brief description of the soldier's actions in the room, including a physical description of the soldier. Pick two counsel to act as the TC and the DC, and one counsel to play the witness. Provide the TC and the DC with the correct physical description of the soldier, and an opportunity to interview the witness. (DO NOT provide the witness with the correct physical description.) Have counsel then direct and cross the witness on the soldier's actions and physical description. The witness should take his or her real life individual abilities and limitations into account. After the direct exam, stop and conduct a round-table discussion with counsel about the direct exam. Conduct the cross-examination and repeat the round-table discussion. Repeat the process with two additional counsel as TC and DC and another counsel as the witness. At the end of the drill, either have the soldier return and explain his actions, or provide all counsel with the soldier's correct physical description and actions.

- D. **Drill 2:** Find an area by an office window with some view blockers such as trees or bushes. Have counsel stand by the window. Have two soldiers outside (counsel may know these soldiers). Have one soldier scream “cut it out.” One soldier should begin pushing the other. After about three pushes by one soldier on the other, have both soldiers engage in a mutual pushing match for a short time. After counsel have observed the scene, again pick counsel to act as a witness, TC and DC. Tell counsel that identity is not the issue here – the issue is self-defense. Follow the same format as in drill one (direct, roundtable; cross, roundtable).
- E. **Drill 3:** Same facts as drill 2 but add the additional fact that the witness had been drinking alcohol prior to seeing the fight. Pick a counsel to be a witness and tell the witness that he had consumed a certain number of beers in a certain period (for example, six beers in a two-hour period). Have the witness use his real-life tolerance for alcohol in answering counsels’ questions. Have TC and DC focus on that issue.



- F. **Summarize the main teaching points.** Following the drills, conduct a discussion of lessons learned, and summarize the main points. Make sure counsel:

- ✓ **Emphasize witness strengths / minimize witness weaknesses on direct.**
- ✓ **Identify and exploit internal and external factors affecting reliability of the observations on cross.**
- ✓ **Avoid the ultimate issue (witness certainty) on cross; make the damaging points, and save the summation for argument.**
- ✓ **Adopt a proper tone in cross-examination.**
- ✓ **Structure the cross-examination for maximum effect.**

VI.



REFERENCES.

- A. Thomas A. Mauet, *Trial Techniques* 73-138 (4th ed. 1996).
- B. James W. McElhaney, *McElhaney's Trial Notebook* 337-364 (3d ed. 1994).
- C. Lawrence Taylor, *Eyewitness Identification* (1982).
- D. Elizabeth F. Loftus, *Eyewitness Testimony: Civil and Criminal* (1997).

ENCLOSURES
Counsel Handout
Sample Solution

IMPEACHMENT OF VISUAL OBSERVATION

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. Introduction. The next trial advocacy training session, scheduled on _____, from _____ to _____ hours, will focus on the skill of direct and cross-examination of a witness' visual observation. The training will be conducted in two parts. First, I will lead a discussion about the various factors that should be considered when questioning a visual observation witness. During the second part of the training, we will conduct a series of short advocacy drills intended to reinforce the skills and techniques addressed in the first part of the training.



II. KEYS TO SUCCESS.

- A. Preparation. Consider all the factors surrounding visual observation.
- B. Use your direct and cross-examination skills to demonstrate the factors surrounding visual observations to the members.



III. REFERENCES.

- A. Thomas A. Mauet, *Trial Techniques* 73-138 (4th ed. 1996).
- B. James W. McElhaney, *McElhaney's Trial Notebook* 337-364 (3d ed. 1994).
- C. Lawrence Taylor, *Eyewitness Identification* (1982).
- D. Elizabeth F. Loftus, *Eyewitness Testimony: Civil and Criminal* (1997).
- E. impeachment of visual observation.

IMPEACHMENT OF VISUAL OBSERVATION

SAMPLE SOLUTION



Drill 1: I Can't Take It Anymore!

- Q. You were seated in the panel box when the unidentified soldier came into the room, correct?*
- A. Yes.*
- Q. There were six other officers also seated in panel box at that time?*
- A. Yes, four trial counsel and two administrative law attorneys.*
- Q. You were all participating in the training being presented by MAJ MacGwire?*
- A. Yes.*
- Q. A soldier entered the courtroom through the double doors located behind the gallery, right?*
- A. I believe so.*
- Q. That entrance is located about 20 feet to the left of the panel box?*
- A. Yes.*
- Q. You were seated on the right end of the panel box?*
- A. I was in the second seat from the right end.*
- Q. Four officers were seated to your left in the panel box during the training?*
- A. Yes.*
- Q. How tall are you, CPT Brown?*
- A. Five feet, nine inches.*
- Q. The four officers seated to your left in the panel box are all taller than you, correct?*
- A. Two of them are taller and two are about my size.*
- Q. You did not have a clear view of the door where SPC Smith entered the courtroom, did you?*
- A. I had to lean back to see the door.*

- Q. So, you did not have a clear view of the door from where you were seated?**
A. Not a completely clear view, no.
- Q. CPT Brown, you are a brand new trial counsel, isn't that correct?**
A. Right off the assembly line.
- Q. So, you are eager to improve your trial advocacy skills?**
A. Yes.
- Q. You were in the courtroom on the morning of 22 July for advocacy training, weren't you?**
A. Yes I was.
- Q. The training was on methods of impeaching a witness?**
A. Yeah.
- Q. What do lawyers mean by "impeaching a witness"?**
A. Well, sir, impeachment is a set of trial techniques designed to discredit a witness as a reliable source of information.
- Q. Impeachment is a critical trial skill, then, isn't it?**
A. Yes.
- Q. You are eager to improve your impeachment skills?**
A. Yes.
- Q. So you were interested in the training on the morning of 22 July?**
A. Yes.
- Q. You were focused on the training when the soldier entered the room?**
A. Yes.
- Q. You did not recognize the soldier when he walked in on the training?**
A. No.
- Q. He was dressed in BDUs?**
A. Yes.
- Q. Did you notice anything strange about his uniform?**
A. Not that I recall.
- Q. You didn't look closely at the soldier when he first came in, did you?**
A. Well, I noticed him walk in the room.
- Q. But he looked like a regular soldier in duty uniform, right?**
A. Right. I figured he might need to see somebody in the room.

- Q. You did not pay much attention to him when he walked in the room?**
A. No. He didn't say anything.
- Q. Your attention was focused on the dynamic training by MAJ MacGwire?**
A. Yes.
- Q. You were totally surprised when the soldier in BDUs yelled and threw some files on the floor.**
A. We all were.
- Q. After this startling event happened, the soldier immediately turned and left the room, didn't he?**
A. Yes, it all happened pretty fast.
- Q. The soldier left the room the same way he came in?**
A. Yes.
- Q. Everybody in the panel box was trying to see who the soldier was as he left the room?**
A. Yeah, he had our attention.
- Q. You didn't stand up to get a look at him, did you?**
A. No.
- Q. But CPT Sosa did stand up right?**
A. Yes.
- Q. CPT Sosa blocked your view of the exit when he stood?**
A. Yes.
- Q. You couldn't see the soldier as he left the room?**
A. Well, I saw him when he threw the files on the floor.
- Q. But you could not see him the whole time as he fled the room?**
A. No, Sammy was in my way.
- Q. When CPT Sosa stood up, you turned toward MAJ MacGwire to see what his reaction was didn't you?**
A. Yes.
- Q. CPT Brown, when was your last eye examination?**
A. I think it was about two years ago in the basic course.
- Q. When you had your last eye examination, the doctor prescribed new glasses?**
A. Yes.

- Q. The doctor said your eyesight had become worse and you needed a new prescription?**
A. They were only slightly worse.
- Q. But the doctor gave you a new prescription?**
A. No, he ordered some Army glasses for me.
- Q. You did receive the Army glasses with the updated prescription?**
A. Yes.
- Q. They were not very stylish glasses were they?**
A. No.
- Q. You never wore the Army glasses?**
A. Nobody wears the BCGs, sir. Oh, sorry, sir, I didn't notice that you wore them.
- Q. That's OK, CPT Brown, you can't notice everything. You are near-sighted, right?**
A. Yes, sir.
- Q. On the morning of 22 July, you were still wearing your old wire-rimmed, designer glasses with the outdated prescription, weren't you?**
A. Yes, but...
- Q. Thank you, nothing further.**

Drills 2 & 3: The Shoving Match

- Q. CPT Brown, your office has air conditioning, doesn't it?**
A. Yes.
- Q. The A/C was working on 22 July?**
A. Yes.
- Q. The windows of your office were closed tight the whole day?**
A. Yes. I don't think they have ever been opened.
- Q. So, the window was closed when you saw the shoving match on 22 July?**
A. Yes.
- Q. The windows in your office are the double-ply, insulated kind, right?**
A. Yes.
- Q. The window in your office is dirty, isn't it?**
A. Pretty dirty.

- Q. It has never been cleaned since you were assigned there?*
A. I guess not.
- Q. When the sun shines on the window, you can see a film of dirt and dust all over the window?*
A. Unfortunately, yes.
- Q. The sun was shining on the window when the shoving match occurred?*
A. Yes.
- Q. You were standing about three feet from the window when you saw the shoving match?*
A. Yes.
- Q. The shoving match occurred on the grassy area below your window?*
A. Yes.
- Q. You had the radio turned on when you saw the shoving match?*
A. Yes.
- Q. You were listening to Z93 "All rock, all the time"?*
A. Yes.
- Q. The shoving took place about 20 feet away from the window?*
A. About that, yes.
- Q. There are bushes outside your window office?*
A. Yes.
- Q. They haven't been trimmed in a long time, have they?*
A. No.
- Q. In fact they provide pretty good shade for your office?*
A. Yes.
- Q. They also block your view to some extent.*
A. Yes, especially on the right side.
- Q. Some of the time during the fight, you couldn't see what was going on?*
A. Right. A couple times they moved to the right where I couldn't see so well.
- Q. When they moved to the right side of the window, you couldn't see them at all, could you?*
A. Uh, not really, but I could see some movement through the leaves.

Q. You were not able to see the whole shoving match, correct?

A. Yes.

Q. You didn't go to another window to get a better view?

A. No.

Q. This happened on a Saturday afternoon, right?

A. Yes.

Q. About 1430?

A. Yes.

Q. You had arrived at the office at about 1230?

A. Yes.

Q. You were alone in the office?

A. Yes.

Q. You were in civilian clothes?

A. Yes.

Q. You keep beer in the office refrigerator?

A. Yes.

Q. You drank about three beers after you got to the office?

A. Yes.

Q. And you already had a beer at lunch before getting to the office?

A. Yes.

Q. How much do you weigh, CPT Brown?

A. About 180 pounds.

Q. Are you a heavy drinker, CPT Brown?

A. No.

Q. Then it is fair to say that you were intoxicated at 1430 that day?

A. I wasn't drunk.

Q. You weren't completely sober, were you?

A. No.



Tab E

Develop the Skill: Foundations



The Advocacy Trainer

Tab E
Module 1

Develop the Skill: Foundations

Diagrams



The Advocacy Trainer

FOUNDATIONS: DIAGRAMS

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise develops counsel's ability to lay the proper foundation for a diagram. The foundation for this kind of demonstrative evidence is simple and should become second nature to all counsel. Lead a discussion of the law and practice pointers and then conduct the suggested drills. Consider using examples of good and bad techniques from recent records of trial throughout the training.
- B. **Training Overview.** Training can be conducted by the supervisor with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions.



II. THE LAW.

A. ***The Authentication Requirement.***



"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901.



Typically, a diagram is authenticated by a witness with personal knowledge of the scene, who testifies that the diagram is a "fair and accurate" depiction of the scene. Counsel must ensure that the witness explains labels and other markings on the diagram.



The sufficiency of the authenticating evidence is a question of fact for the military judge under MRE 104(a). In addition to the authentication requirement, the proponent of demonstrative evidence must be prepared to

respond to objections based upon relevance, confusion or unfair prejudice, and hearsay.



To authenticate a diagram, counsel must show it to the sponsoring witness, give him the opportunity to examine it, and ask the witness if it is a “fair and accurate” depiction. Except when exact distances are crucial, the diagram need not be to scale. The lack of exact scale may be pointed out on either direct or cross-examination. If the diagram is drawn to scale, that should be stated on the record and the scale shown clearly on the diagram.

B. *Elements of the Foundation.*

1. *The diagram depicts a certain area or object.*
2. *The witness is familiar with that area or object.*
3. *The witness explains the basis for his knowledge of the area or object.*
4. *The witness affirms the accuracy of the diagram.*



III.

PRACTICE POINTERS.

While the foundation for a diagram is relatively easy to establish, the effectiveness of the diagram as a persuasive tool depends on how well it is prepared and presented in court. Discuss the following points with counsel.

- ➔ ***Use only the highest quality computer-generated graphics.*** Panel members are accustomed to the graphic presentation of information. Every OPLAN briefing includes operational graphics. The routine use of computer-generated products has created high expectations for all graphic products among military professionals. Counsel must meet or exceed those expectations to be effective in court. A shabby diagram will be interpreted as an indication of a shabby case or investigation. Remember that a powerful diagram will continue selling your case even during deliberations.
- ➔ ***A large diagram with easel is better than an overhead projector.*** Generally, a large, easel-mounted foam board diagram is superior to other methods of presentation, such as an overhead projector. It is easier from a stage management perspective and it will dominate the deliberation room in a way that an overhead slide or facsimile cannot. Ensure that the diagram is large enough for the panel to see the detail without straining. Test it in the courtroom with someone unfamiliar with the case. If acetate is used, use non-glossy type to reduce glare.

- ***Prepare the diagram with the witness.*** Make sure that the sponsoring witness has complete confidence in the accuracy of the diagram. Resolve any questions about the diagram with the witness before trial.
- ***Practice stage management before trial.*** Obtain a good lightweight easel and adjust it in advance. Make sure that the diagram is positioned so that the panel can clearly see it. Determine whether the witness needs to dismount the stand to point at the diagram. Rehearse necessary movements with the witness.
- ***As a general rule, mark, annotate, and label the diagram with the witness before trial.*** It is usually better to have the witness mark the diagram before trial showing the locations of evidence or people that will be included in his testimony. Such annotations can then be incorporated into the computer graphics before final production of the exhibit. Marking a diagram in court as the witness testifies can be awkward, sloppy, and time-consuming. Under pressure, the witness may equivocate or make mistakes. You want a smooth, clear presentation of the evidence. There are exceptions to the rule, however. If you want to show progression or movement, there may be an advantage in having some markings made during testimony. Another advantage of in-court marking is the spontaneity of the act and its inherent tendency to hold the panel's interest and enhance the witness's credibility. Always seek the opinion of other counsel and those unfamiliar with the case before deciding which way to go.
- ***Tell the judge before trial what you plan to do.*** Judges hate surprises. If you tell the judge what you plan to do, he may give you some helpful advice about positioning and movement of the diagram. Prior notice in the R.C.M. 802 session also gives the opposing counsel an opportunity to express any concerns about the diagram or its use.
- ***Get help.*** Most organizations and installations have experts of some sort who can help you design, create, and display evidence. Consider engineers, medical personnel and others with technical or design experience to help generate such evidence. Be aware that many military "professional witnesses" (e.g., fingerprint and handwriting analysts from the CID lab) will create and carry their own demonstrative evidence.
- ***Tell the story twice.*** Don't forget another collateral benefit of diagrams and other demonstrative evidence: it permits you to tell a story at least two times. First, have the witness tell the story without assistance. Then, the witness will have the opportunity to tell the story a second time when laying the foundation for and explaining the exhibit. You might get the story out a third time if the witness then gets to use the exhibit by moving stickers or by drawing on it. On the other hand, consider raising an asked-and-answered objection when your opponent uses an exhibit as a pretext for needless repetition.

IV.



SKILL DRILLS.

A. *Goal: Train counsel to employ the following skills.*

1. Use direct examination techniques covered in previous training.
2. Lay a proper foundation for a diagram.

B. *Conduct the drills.*

1. *Preparation:* Conduct this training in the courtroom with all necessary props. Start with the enclosed diagram and the facts below, but also use several diagrams from old cases, if available.
2. *Role Play:* The instructor will play the roles of sponsoring witness and military judge. Designate counsel to play the roles of proponent and opponent. Remaining participants will sit in the panel box and make appropriate objections. In your discretion, you may wish to appoint a counsel as military judge.
3. *Execution:* Inform counsel of the elements of the foundation (provide on handout or chalkboard). Give counsel five minutes to prepare the foundation. Suggest you allow counsel to go through foundation once with notes. Have them lay foundation a second or third time, time permitting, using only the foundation elements listed on the handout, chalkboard or easel.

C. *Drill: Foundation for a Diagram.*

1. The facts. For the enclosed diagram, **SGT Callahan** is the witness. He was robbed at gunpoint at an automatic teller machine (ATM) during hours of darkness. SGT Callahan's girlfriend witnessed the robbery while waiting for him in his car. The ATM is marked "ATM." The street light is marked "Light." The victim's car is marked "Car."

2. In addition to laying the basic foundation, counsel will ask the witness to mark the exhibit indicating his position at the time of the robbery and the direction of the assailant's approach to the ATM.

3. *Sample foundation for a **Diagram**.*

*Q. **Sergeant Callahan, WHERE did the robbery occur?***

A. At the ATM machine at the intersection of Ardennes and Bastogne in the Division area.

*Q. **SGT Callahan, please direct your attention to the diagram on the easel to your left, which is marked Prosecution Exhibit ____ for Identification. Do you recognize this diagram?***

A. Yes.

*Q. **WHAT is it?***

A. It is a diagram of the area around the ATM machine where I was robbed.

*Q. **HOW do you recognize it?***

A. I've been in the Division for three years. I am very familiar with this area.

*Q. **HOW often did you use this ATM?***

A. About once or twice a week for the last three years.

*Q. **Is this diagram a fair and accurate representation of the area around the ATM?***

A. Yes, it looks good to me.

** [This completes the foundation of an unmarked diagram. Because this diagram is marked, it is necessary to have the witness explain the labels that have been superimposed on various objects on the diagram.]*

*Q. **SGT Callahan, HOW did you get to the ATM on the night of the robbery?***

A. I drove my car there.

*Q. **WHERE did you park your car when you got there?***

A. By the curb on Bastogne, about ten meters from the machine.

- Q. Is the position of your parked car shown on this diagram, P.E. ___ for ID?**
- A. Yes, sir, it is shown as a car with the word "Car" next to it on the diagram.**
- Q. HOW is the ATM machine marked on the diagram?**
- A. There is a picture of a building with the letters "ATM" next to it.**
- Q. You testified earlier that it was dark outside when you arrived at the ATM. Was the area around the ATM also dark?**
- A. No. It was lit fairly well by the streetlight located about five meters from the ATM.**
- Q. Can you please point out the location of the street lamp for the members of the court?**
- A. Yes, sir. There is a picture of a street lamp which is labeled "Light" on the diagram.**
- Q. SGT Callahan, tell us what happened after you arrived at the ATM.**
- A. Well, my girlfriend stayed in the car and I went to the machine to withdraw some cash. As I was entering my PIN number, a man in a ski mask came around the side of the machine and pointed a gun at me. He said that he would kill me if I didn't give him all my money.**
- Q. Your honor, request permission to have the witness approach the diagram.**
- MJ. Go ahead.**
- Q. Using the blue marker, please place an "X" where you were standing when the masked man approached you.**
- A. Yes, sir.**
- Q. The witness marked P.E. ___ for ID, as directed. Now using the red marker, draw an arrow to indicate the approach used by the gunman before he robbed you.**
- A. Yes, sir.**
- Q. The witness marked P.E. ___ for ID with a red arrow as directed.**

* [Counsel may offer the diagram into evidence at this time or any time before resting the case. The diagram may not be further marked after it is admitted. Opposing counsel may ask that the judge instruct the panel that the diagram is not to scale.]



D. *Summarize the main teaching points.* Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **High-quality graphics are a must with military panels.**
- ✓ **Memorize the foundational elements for diagram authentication.**
- ✓ **Know where to find them when recall fails.**
- ✓ **Plan and practice use of the diagram with the sponsoring witness.**



V. **REFERENCES.**

- A. David A. Schlueter et al., *Military Evidentiary Foundations* chapt. 4 (1994).
- B. Thomas A. Mauet, *Trial Techniques* chapt. 5 (4th ed. 1996).

ENCLOSURES
Counsel Handout
Diagram
Sample Solution

FOUNDATIONS: DIAGRAMS

COUNSEL HANDOUT

I. TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for diagrams and the effective use of diagrams at trial.
- B. Preparation. Bring your MCM to the training. Review basic techniques of direct examination, cross examination, and objections. Review MRE 901.

II. KEYS TO SUCCESS.

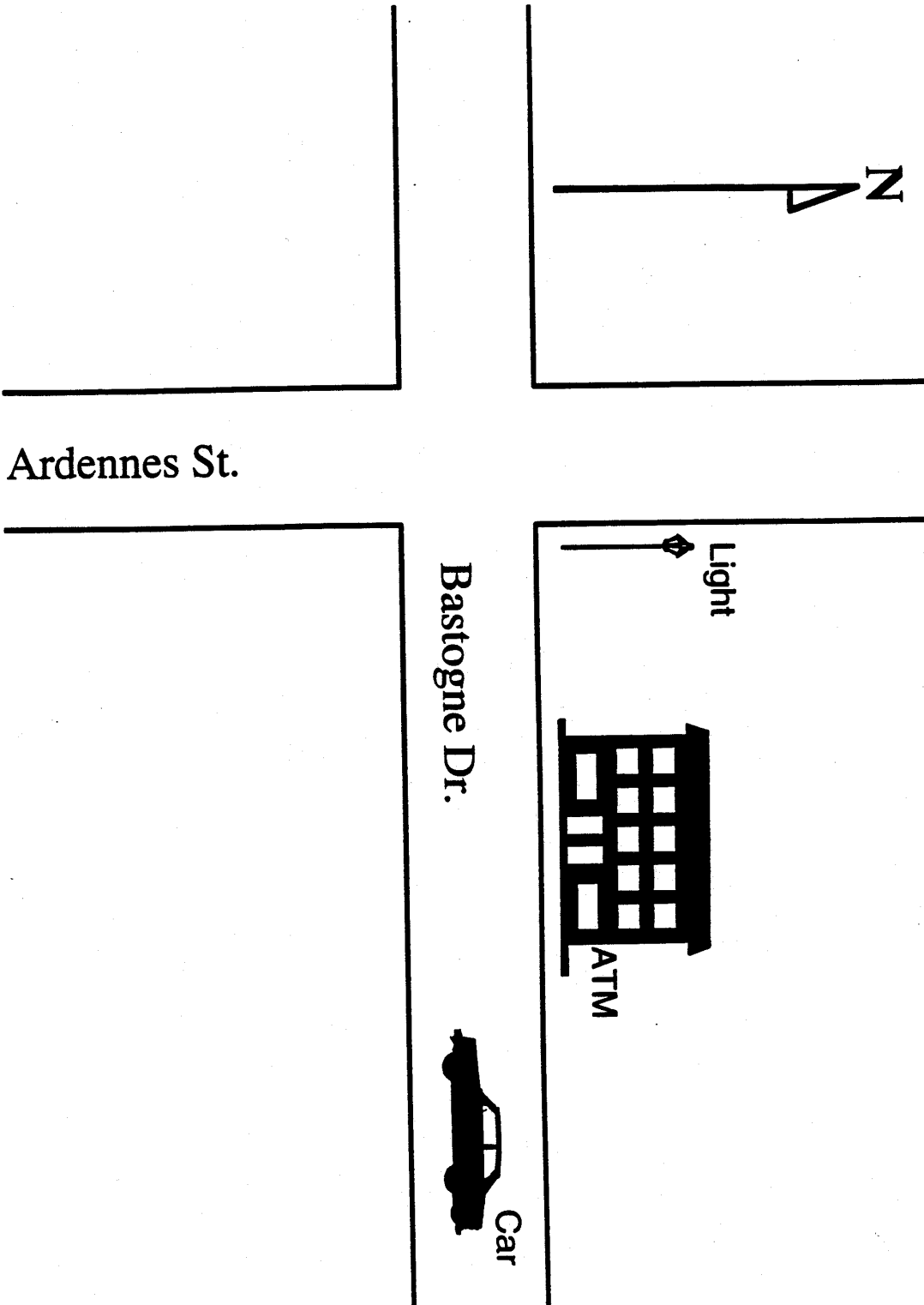
Know the Elements of a Foundation for Admission of a Diagram.

1. *The diagram depicts a certain area or object.*
2. *The witness is familiar with that area or object.*
3. *The witness explains the basis for his knowledge of the area or object.*
4. *The witness affirms the accuracy of the diagram.*

III. REFERENCES FOR FURTHER STUDY.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* chapt. 4 (1994).
- B. Thomas A. Mauet, *Trial Techniques* chapt. 5 (4th ed. 1996).

DIAGRAM



FOUNDATIONS: DIAGRAMS

SAMPLE SOLUTION



- Q. Sergeant Callahan, WHERE did the robbery occur?**
A. At the ATM machine at the intersection of Ardennes and Bastogne in the Division area.
- Q. SGT Callahan, please direct your attention to the diagram on the easel to your left, which is marked Prosecution Exhibit ___ for Identification. Do you recognize this diagram?**
A. Yes.
- Q. WHAT is it?**
A. It is a diagram of the area around the ATM machine where I was robbed.
- Q. HOW do you recognize it?**
A. I've been in the Division for three years. I am very familiar with this area.
- Q. HOW often did you use this ATM?**
A. About once or twice a week for the last three years.
- Q. Is this diagram a fair and accurate representation of the area around the ATM?**
A. Yes, it looks good to me.
- * [This completes the foundation of an unmarked diagram. Because this diagram is marked, it is necessary to have the witness explain the labels that have been superimposed on various objects on the diagram.]*
- Q. SGT Callahan, HOW did you get to the ATM on the night of the robbery?**
A. I drove my car there.
- Q. WHERE did you park your car when you got there?**
A. By the curb on Bastogne, about ten meters from the machine.
- Q. Is the position of your parked car shown on this diagram, P.E. ___ for ID?**
A. Yes, sir, it is shown as a car with the word "car" next to it.
- Q. HOW is the ATM machine marked on the diagram?**
A. It's shown as a building with the letters "ATM" next to it.

Q. You testified earlier that it was dark outside when you arrived at the ATM. Was the area around the ATM also dark?

A. No. It was lit fairly well by the streetlight located about five meters from the ATM.

Q. Can you please point out the location of the street lamp for the members of the court?

A. Yes, sir. It's pictured as a street lamp with the word "Light" next to it.

Q. SGT Callahan, tell us what happened after you arrived at the ATM.

A. Well, my girlfriend stayed in the car and I went to the machine to withdraw some cash. As I was entering my PIN number, a man in a ski mask came around the side of the machine and pointed a gun at me. He said that he would kill me if I didn't give him all my money.

Q. Your honor, request permission to have the witness approach the diagram.

MJ. Go ahead.

Q. Using the blue marker, please place an "X" where you were standing when the masked man approached you.

A. Yes, sir.

Q. The witness marked P.E. ___ for ID, as directed. Now using the red marker, draw an arrow to indicate the approach used by the gunman before he robbed you.

A. Yes, sir.

Q. The witness marked P.E. ___ for ID with a red arrow as directed.

*** [Counsel may offer the diagram into evidence at this time or any time before resting the case. The diagram may not be further marked after it is admitted. Opposing counsel may ask that the judge instruct the panel that the diagram is not to scale.]**

Tab E
Module 2

Develop the Skill: Foundations

*Refreshing Memory and
Past Recollection Recorded*



The Advocacy Trainer

**FOUNDATIONS:
REFRESHING MEMORY AND PAST RECOLLECTION
RECORDED
SUPERVISOR'S GUIDE**



I. SKILL OVERVIEW.

- A. **Goals.** When a witness's memory fails - whether due to stress, fatigue, discomfort or forgetfulness - counsel can attempt to refresh the witness's recollection. This exercise develops counsel's ability to lay the proper foundations to refresh a witness's memory and, if necessary, introduce a previous record of a fact recorded by the witness. Instructors should first lead a discussion of the law, review practice pointers and then conduct the suggested drills.
- B. **Training Overview.** This training module requires at least three participants: one supervisor and two counsel. The training is divided into four steps: (1) an instruction period; (2) counsel preparation time; (3) a practical exercise and critique; and (4) a sample solution review. It takes one hour to complete this training module. There are two scenarios that serve as training vehicles, one for refreshing memory and one for past recollection recorded.



II. THE LAW.

- A. **Refreshing a witness's memory.**



The forgetful witness is a common feature of courts-martial practice. When faced with a witness who cannot recall a particular fact, counsel can try to refresh her memory by referring to a writing, document or other aid. There are few, if any, limitations on the means counsel can use to refresh a witness's recollection. Some common aids include letters, objects, documents, magazines, newspaper clippings, income tax returns, smells, police reports, notes, photographs, prior Article 32 testimony, and tape recordings.

B. ***Elements of the foundation.*** The following elements establish the foundation for refreshing the recollection of a witness.

1. *Witness states she cannot recall a fact or event;*
2. *Witness states that a particular writing or other aid could help jog her memory;*
3. *Witness is given the writing to read or view silently to herself;*
4. *Witness returns the writing to counsel;*
5. *Witness states that the writing has refreshed her memory; and*
6. *Witness testifies to the fact or event, without further aid of the writing.*

C. ***Sample foundation.***

Q. Agent Edwards, what was the address of the house where you first encountered the accused on the date of his apprehension?

A. I can't remember. I know it was in the village of Hoenecken, but I can't remember anything more specific.

Q. Is there anything you could review which would help you remember?

A. Yes. I made a report shortly after the apprehension.

Q. Agent Edwards, I'm handing you what has been marked as Prosecution Exhibit 5 for Identification, a copy of which I am handing to the defense. What is it?

A. It's a copy of the report I made regarding this case.

Q. Please read it over silently to yourself.

(pause)


Q. I have retrieved Prosecution Exhibit 5 for Identification from the witness. Agent Edwards, does that refresh your memory?


A. Yes.

Q. What is the address of the house where you first encountered the accused on the day of his apprehension?

A. It was #3a Lerchenstrasse in the village of Hoenecken.

D. ***Recorded recollection.***

 Notwithstanding attempts to refresh a witness's memory, that witness may still be unable to independently remember a particular fact about which he has been called to testify. When there has been some sort of written record of that fact or event, the writing may qualify as an exception to the hearsay rule and be introduced into evidence as past recollection recorded and considered as substantive proof by the fact-finder. MRE 803(5).

 Elements of the Foundation. The following elements establish the foundation for introducing evidence of a past recorded fact as an exception to the hearsay rule for a witness's present recall of that fact.

1. *Witness cannot remember a fact or event on the stand;*
2. *Witness had firsthand knowledge at one time;*
3. *That knowledge is reflected in a memorandum or record made at or near the time the fact or event occurred;*
4. *Record was accurate and complete when made;*
5. *Record is in same condition now as when made; and*
6. *Witness still cannot completely and accurately recall the fact or event even after reviewing the record.*

E. ***Sample Foundation.***

Q. PFC Simpson, did you see the automobile as it sped away?

A. I was on the ground, but I looked up and saw the license plate.

Q. What was the tag number?

A. I don't recall. I know it was a Missouri tag, but I can't remember the numbers.

Q. Is there anything that would help you to recall?

A. Yes, I thought the number would be important so I scribbled it down a few minutes later when I found some paper.

NOTE: At this point, you would lay the same foundation you would to refresh recollection under MRE 612.

Q. I'm handing you what's been marked as Defense Exhibit D for Identification, a copy of which I have provided the government. What is it?

A. *It's the note I made of the license number.*

Q. *Please take a moment to read it over.*

(pause)

Q. *I'm retrieving Defense Exhibit D for Identification from the witness. Now, PFC Simpson, please tell the panel the number of the license plate.*

A. *Sir, I know it's going to sound strange, but I still can't remember.*

Q. *PFC Simpson, think again about Defense Exhibit D for Identification, When did you write this note?*

A. *About 10 minutes after the car sped away with the guys who stole my wallet.*

Q. *Are you sure it is accurate?*

A. *Yes. I kept repeating the license number to myself until I had a pencil and paper.*

Q. *I'm handing you again Defense Exhibit D for Identification. Your honor, I ask the court's permission for PFC Simpson to testify from past recollection recorded using Defense Exhibit D for Identification.*

MJ. *Objection?*

TC. *None.*

MJ. *The witness may testify.*

Q. *Tell the members the numbers on the license plate.*

A. *It was a Missouri plate with the number TGV 8765.*

DC. *Your honor, the defense offers Defense Exhibit D for Identification into evidence as Defense Exhibit D and asks that it be published to the members.*

TC. *The government objects your honor. The evidence is the witness's testimony, not the actual exhibit.*

MJ. *Agreed. The exhibit will not be published.*



III.

PRACTICE POINTERS.

A. *Present Memory Refreshed.*

- You must explain the elements of the foundation for recorded recollection to your witness before trial. Rehearse with them before trial and make sure they know that there is nothing wrong with failing to remember and reading a piece of paper on the stand to refresh their memory.
- Decide which cue words to use to prompt the witness. For example: “Do you recall anything else?”; “Not that I remember.” “Would anything help you to refresh your recollection?” “Yes.” “What is that?”
- Don’t be afraid to use this technique. It’s not sneaky or under-handed. It’s a legitimate advocacy tool and especially appropriate for witnesses testifying about technical data, easy-to-forget matters such as dates, license plates, serial numbers and nanogram levels, or for young or nervous witnesses.
- Be exact about the procedure. Be sure to withdraw the document so the witness testifies from memory (albeit his refreshed memory) and not from the piece of paper. Distinguish the use of a document to refresh memory from use of the document as a substitute for testimony, which will require an exception to the hearsay rules. When you are refreshing memory, the testimony, not the document, is the evidence; but you still mark the document as an exhibit and it becomes part of the record although it is not admitted into evidence.
- Show a copy of the document you use to refresh the witness’s memory to opposing counsel. More importantly, opposing counsel can introduce into evidence the portions your witness relies upon. You must ensure that it does not contain embarrassing or unhelpful information to your case. Don’t be sneaky and use an excerpt from a document if the full document will harm your case.
- Mask the document so that irrelevant or privileged information cannot be read. The rule requires the military judge to redact irrelevant or privileged information. Have a masked copy and an original ready for inspection.

- ➔ When you are on the other side, always take the time to read the entire document. Be sure to object if it sounds unduly suggestive or prompts the witness in a way you think the panel ought to know. If you are given the opportunity to be present during an out-of-court witness refreshment, do not decline and go to lunch. You never know what you might learn.
- ➔ Finally, even though the writing is read into evidence, it is not taken back with the panel members into deliberations unless offered by the adverse party.

B. *Past Recollection Recorded.*

- ➔ Why it's hearsay: You are offering an out-of-court statement (the contents of the contemporaneous writing) as evidence for the truth of its contents.
- ➔ Why it's admissible: It carries circumstantial guarantees of trustworthiness because it was made at or near the time of the incident.
- ➔ The writing itself need not be made by the testifying witness. It suffices if the witness adopted the record, if made at or near the time of the event, and the witness testifies, the record accurately reflects the facts.
- ➔ It will look better to the fact-finder if your witness can testify from his present memory. If the witness cannot remember, first try to refresh his memory according to MRE 612. If the witness still cannot remember, then lay the foundation for past recollection recorded.
- ➔ Though the witness may read from the document, the evidence is testimonial – the oral statement of the witness - not documentary. The writing itself should not be admitted into evidence unless offered by the opposing counsel.
- ➔ Remember, the document need not be formal –it can be a scrap of paper on which the witness scribbled a telephone number. However, opposing counsel can raise some skepticism about its authenticity, depending on the witness's veracity.

IV.



SKILL DRILLS.

- A. *Goal: Train counsel to employ the following skills.***

1. Use direct examination techniques covered in previous training.
2. Lay a proper foundation for refreshing memory.
3. Lay a proper foundation for past recollection recorded.

B. *Conduct the drills.*

1. *Preparation:* Conduct this training in the courtroom with all necessary props.
2. *Role Play:* The supervisor will play the roles of witness and military judge. Designate counsel to play the roles of proponent and opponent. Remaining participants will sit in the panel box and make appropriate objections. In your discretion, you may wish to appoint a counsel to act as military judge.
3. *Execution:* Inform counsel of the elements of the foundation (provide on handout or chalkboard). Give counsel five minutes to prepare. Counsel should go through the foundation once with notes. They should then lay the foundation again, using only the foundational elements listed on the handout, chalkboard or easel.
 - a. *Refreshing Memory.* Give counsel the basic facts of the case. PFC Smidly has been accused of child molestation. SGT Two Loose Latrek is the witness. He is a military police officer who recovered several items from the accused's house - to include tapes, magazines, articles of clothing, shoes, linen, and cards and letters addressed to his step-daughter. The offense occurred 13 months ago and Latrek failed to review his case file before testifying. When questioned by counsel, he forgets what items were seized. Latrek previously catalogued the items seized from the house on a DA Form 4137 Evidence/Property Custody Document.
 - b. *Past Recollection Recorded.* Give counsel the basic facts of the case. Johnson is an undercover officer with the installation drug suppression team. On 2 August, he sets out on a controlled buy using pre-recorded funds. Before the buy, he writes the serial numbers of five \$20 bills on a piece of paper, dates and initials, and places it in his wallet. He then conducts a buy-bust with the accused, PFC Doper. At trial, counsel asks about the serial numbers. Despite reviewing the paper, Johnson still cannot recite them from memory.



- C. **Summarize the main teaching points.** Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **Witnesses will forget essential facts because they are often nervous and unfamiliar with the surroundings.**
- ✓ **Memorize the foundational elements for refreshing memory and past recollection recorded.**
- ✓ **Know where to find them when recall fails.**
- ✓ **Any document can be used to refresh memory - it need not be prepared by the witness. By contrast, past recollection recorded must be made or adopted by the witness when the matter is fresh in the witness's memory.**
- ✓ **Documents used merely to refresh memory aren't admitted into evidence. Documents qualifying as past recollection recorded may be admitted but are only read to the trier of fact unless offered by the adverse party.**
- ✓ **Plan, prepare and practice with each witness.**



V.

REFERENCES.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* (1994).
- B. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).
- C. Edward J. Imwinkelried et al, *Courtroom Criminal Evidence* (2nd ed. 1994).
- D. Leonard Packel and Dolores B. Spina, *Trial Advocacy: A Systematic Approach* (ALI-ABA 1984).
- E. David Binder, *Hearsay Handbook* (3rd ed. 1993).

ENCLOSURES

Counsel Handout

DA 4137

Pre-recorded serial numbers

Sample Solution

**FOUNDATIONS:
REFRESHING MEMORY AND PAST RECOLLECTION
RECORDED
COUNSEL HANDOUT**



TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. You will master the technique of laying foundations for refreshing memory and past recollection recorded.
- B. Preparation. Bring your MCM to the training. Review basic techniques of direct examination, cross-examination, and objections. Review MRE 803(5).



KEYS TO SUCCESS.

- A. Steps for refreshing recollection must begin with a cue, such as “Can you remember?” or “Would anything help you to remember?” Whatever you choose, your witness must know its significance. Raise and discuss this point during pretrial preparation.
- B. Know the elements of a foundation for refreshing memory and past recollection recorded.
 - 1. *Refreshing memory.*
 - a. Establish witness memory is exhausted concerning specific fact or event;
 - b. Determine memory might be refreshed by reference to a particular writing or object;

- c. Give witness writing or object to read or view silently;
- d. Ask witness if item has refreshed her memory;
- e. Retrieve writing; and
- f. Ask witness to testify to the fact or event, without further aid of the item.

2. *Past recollection recorded.*

- a. Witness has insufficient recollection of a fact or event;
- b. Witness had firsthand knowledge at one time;
- c. Knowledge is reflected in a memorandum or record made at or near the time the event occurred;
- d. Copy of record given for inspection by opposing counsel;
- e. Record was accurate and complete when made;
- f. Record is in same condition now as when made;
- g. Witness still cannot completely and accurately recall the fact or event even after reviewing the record; and
- h. Fact read into the record.

III.



REFERENCES FOR FURTHER STUDY.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* (1994).
- B. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).
- C. David Binder, *Hearsay Handbook* (3rd ed. 1993).

FOUNDATIONS:
REFRESHING MEMORY AND PAST RECOLLECTION
RECORDED
SAMPLE SOLUTIONS



Refreshing Memory

- Q. SGT Latrek, do you recall what you removed from the accused's house?*
A. Well, not really, it has been almost a year since the apprehension and I forgot to review my notes before testifying today.
- Q. Would anything help you to refresh your memory (CUE PHRASE)?*
A. Yes. I filled out a DA Form 4137 the day we searched the house.
- Q. What is DA Form 4137?*
A. Yes, Sir. It's an Evidence and Property Control Document we fill out each time we take anything from the scene of a crime.
- Q. SGT Latrek, I'm handing you what's been marked as Prosecution Exhibit 7 for Identification, a copy of which I provided the defense. Do you know what it is?*
A. Yes. This is the 4137 I filled out the day we searched the house.
- Q. Please look over Prosecution Exhibit 7 for Identification and read it to yourself. (pause) I've retrieved Prosecution Exhibit 7 for Identification.*
- Q. Did Prosecution Exhibit 7 for Identification help you refresh your memory?*
A. Yes. I remember now. We took several pornographic videotapes from the accused's bedroom, dozens of books and magazines from his garage - all dealing with child prostitution, some blue jeans from his closet which his step-daughter told us he wore the last time she was molested, two cartons of cards and letters written by the accused and addressed to his step-daughter - every single one was sexually explicit, and finally, the bed sheets from the victim's bedroom.

Past Recollection Recorded

Q. Officer Johnson, what were the serial numbers of the bills you used to buy the cocaine from the accused?

A. I don't remember.

Q. Would anything help you refresh your recollection?

A. Well, I did write down the numbers of the bills I used before going out on the buy.

Q. Officer Johnson, I am handing you what's been marked as Defense Exhibit F for Identification. Do you recognize it?

A. Yes. It's the note I wrote with serial numbers of the bills I used that night.

Q. Please read it silently to yourself.

(Pause)

Q. I've retrieved Defense Exhibit D for Identification. Officer Johnson, can you now tell us what the serial numbers of the bills were?

A. Sorry. I still can't recall without referring to my piece of paper.

Q. With regard to that piece of paper, Defense Exhibit F for Identification, when did you write it?

A. About five minutes before I went out on the buy.

Q. Are you sure it is accurate?

A. Yes. I was looking at the numbers as I was writing them down and I checked them against each other twice just to make sure. Then I put the date of the buy and initialed on the top right hand corner.

Q. Is it in substantially the same condition now as when it was made?

A. Yes, exactly. I saw no alterations.

Q. Officer Johnson, I'm returning Defense Exhibit F for Identification to you. Your honor, I ask the court's permission for Officer Johnson to testify about the serial numbers using Defense Exhibit F for Identification.

TC. Objection.

MJ. Hold on defense. Trial counsel, did I hear you right. Did you just object?

TC. Yes, your honor.

MJ. Basis?

TC. *Uh, hearsay, your honor?*

MJ. *Objection overruled, the defense has laid more than an adequate foundation for Defense Exhibit F for Identification to be considered as past recollection recorded under Military Rule of Evidence 803(5). The witness may testify.*

Q. ***Officer Johnson, what were the serial numbers of the bills you used to allegedly purchase cocaine from my client?***

A. *A34592894A, B04294323D, A376406271H, E08006469D, and E47996370C.*

Q. ***Officer Johnson, were any of those bills found in my client's possession?***

A. *No sir, but if you let me explain....*

DC. ***Thank you, Officer Johnson, no need. You testified you used certain pre-recorded bills to purchase the cocaine. You also testified the seller was out of your sight for less than three seconds. Yet, none of those bills were found on my client. As I said in my opening statement, you apprehended the wrong man. No further questions.***

TC. *Objection, your honor. Counsel is testifying.*

MJ. *No lie.*

ITEM NO.	DATE	CHAIN OF CUSTODY <i>(Continued)</i>		PURPOSE OF CHANGE OF CUSTODY
		RELEASED BY	RECEIVED BY	
		SIGNATURE	SIGNATURE	
		NAME, GRADE OR TITLE	NAME, GRADE OR TITLE	
		SIGNATURE	SIGNATURE	
		NAME, GRADE OR TITLE	NAME, GRADE OR TITLE	
		SIGNATURE	SIGNATURE	
		NAME, GRADE OR TITLE	NAME, GRADE OR TITLE	
		SIGNATURE	SIGNATURE	
		NAME, GRADE OR TITLE	NAME, GRADE OR TITLE	
		SIGNATURE	SIGNATURE	
		NAME, GRADE OR TITLE	NAME, GRADE OR TITLE	
		SIGNATURE	SIGNATURE	
		NAME, GRADE OR TITLE	NAME, GRADE OR TITLE	
		SIGNATURE	SIGNATURE	
		NAME, GRADE OR TITLE	NAME, GRADE OR TITLE	
		SIGNATURE	SIGNATURE	
		NAME, GRADE OR TITLE	NAME, GRADE OR TITLE	
FINAL DISPOSAL ACTION				
RELEASE TO OWNER OR OTHER <i>(Name/Unit)</i> _____				
DESTROY _____				
OTHER <i>(Specify)</i> _____				
FINAL DISPOSAL AUTHORITY				
ITEM(S) _____ ON THIS DOCUMENT, PERTAINING TO THE INVESTIGATION INVOLVING _____ <i>(Grade)</i>				
_____ <i>(Name)</i> _____ <i>(Organization)</i> _____ <i>(IS) (ARE) NO LONGER</i>				
REQUIRED AS EVIDENCE AND MAY BE DISPOSED OF AS INDICATED ABOVE. <i>(If article(s) must be retained, do not sign, but explain in separate correspondence.)</i>				
_____ <i>(Typed/Printed Name, Grade, Title)</i> _____ <i>(Signature)</i> _____ <i>(Date)</i>				
WITNESS TO DESTRUCTION OF EVIDENCE				
THE ARTICLE(S) LISTED AT ITEM NUMBER(S) _____ (WAS) (WERE) DESTROYED BY THE EVIDENCE CUSTODIAN, IN MY PRESENCE, ON THE DATE INDICATED ABOVE.				
_____ <i>(Typed/Printed Name, Organization)</i> _____ <i>(Signature)</i>				

TLJ

3/31/97 1605

A34592894A \$20

B04294323D \$20

A376406271H \$20

E08006469D \$20

E47996370C \$20

Tab E

Module 3

Develop the Skill: Foundations

Bad Checks



The Advocacy Trainer

FOUNDATIONS: BAD CHECK

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise develops counsel's ability to lay the proper foundation for a bad check, a frequently encountered example of documentary evidence. The foundation for this kind of real evidence is simple and should become second nature to all counsel. Lead a discussion of the law and practice pointers and then conduct the suggested drills. Consider using examples of good and bad techniques from recent records of trial throughout the training.
- B. **Training Overview.** Training can be conducted by the supervisor with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions.



II. THE LAW.

A. **The Authentication Requirement.**



The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. MRE 901. In the case of a check, this means showing that the check was written by the accused, cashed by the financial institution, and returned for lack of sufficient funds.



Typically, a bad check is authenticated by two witnesses and a document.

- The first witness usually is the cashier from the store or bank where the accused cashed the check.

- The cashier need not be the one who cashed the check and need not recognize the accused, although these conditions are ideal.
- The cashier only needs to testify as to where and when the check was cashed and what the accused received for cashing the check. The cashier can do this by explaining the procedure for cashing checks and examining the markings on the check.
- The second witness is the custodian of the accused's check.
 - The custodian is the person to whom the check was sent once it was dishonored. For checks cashed at the post exchange, the person probably will be the installation check control officer, but it may also be a representative from the accused's bank.
 - The custodian can establish that the check was returned for insufficient funds by explaining the check return procedures and the dishonor stamp on the check.
 - ⇒ The insufficient funds stamps are admissible as an exception to the hearsay rule because they are a record of a regularly conducted activity. MRE 803(6).
 - ⇒ To establish the meaning of an insufficient funds stamp on a check, ask the judge to take judicial notice of U.C.C. § 3-510(b) (1977) (providing that a bank's dishonor stamp on a check is admissible as a business records exception to the hearsay requirement and creates a presumption of dishonor.) *United States v. Dababneh*, 28 M.J. 929 (N.M.C.M.R. 1989); *United States v. Dean*, 13 M.J. 676 (A.F.C.M.R. 1982).
 - The document is the original canceled check. If the original is not available, a photocopy may be an acceptable substitute.



The sufficiency of the authenticating evidence is a question of fact for the military judge under MRE 104(a). In addition to the authentication requirement, the proponent of demonstrative evidence must be prepared to respond to objections based upon relevance, confusion or unfair prejudice, and hearsay.

B. ***Elements of the Foundation.***

1. *The canceled check, bearing the accused's signature, is marked "dishonored for insufficient funds" or words to that effect.*
2. *The cashier is familiar with the procedures for cashing checks at the bank or merchant where the accused cashed the check in question.*
3. *The cashier establishes where the check was cashed and what the accused received in return.*
4. *The custodian was sent the check once it was dishonored.*
5. *The custodian establishes that the check was returned for insufficient funds and certain markings were made on the check in the normal course of business.*
6. *The trial counsel asks the judge to take judicial notice of U.C.C. § 3-510(b) in conjunction with MRE 902(9) to admit the dishonor stamps as an exception to the hearsay rule.*



III.

PRACTICE POINTERS.

Discuss the following points with counsel.

- ➔ ***Stipulation.*** Counsel should consider stipulating to the admissibility of the check. More likely than not, the plausible defense in a bad check case is that the accused did not have the knowledge or intent to commit the crime, i.e., the accused did not know that his or her account had insufficient funds. In addition to facilitating a good working relationship between counsel, a stipulation allows the parties to focus on the main issues of the case and preserves scarce legal resources. On the other hand, defense counsel can sometimes profit from government ineptness or imprecision so they should not stipulate when there is a reasonable chance that the government will fail to lay a proper foundation for the check.
- ➔ ***Rebuttal evidence.*** The prosecutor should have the accused's bank records or an officer from the accused's bank present to testify in rebuttal if the accused alleges that the check was dishonored because of a bank error.

IV.



SKILL DRILLS.

A. ***Goal: Train counsel to employ the following skills.***

1. Use direct examination techniques covered in previous training.
2. Lay a proper foundation for a bad check.

B. ***Conduct the drills.***

1. ***Preparation:*** Conduct this training in the courtroom with all necessary props. Start with the enclosed bad check and the facts below.
2. ***Role Play:*** The instructor will play the roles of the witnesses (cashier and custodian) and military judge. Designate counsel to play the roles of proponent and opponent. Remaining participants will sit in the panel box and make appropriate objections. In your discretion, you may wish to appoint a counsel as military judge.
3. ***Execution:*** Having informed counsel of the elements of the foundation (provide on handout or chalkboard), counsel shall be given five minutes to prepare the *foundation*. Suggest you allow counsel to go through foundation once with notes. Have them lay foundation a second or third time, using only the foundation elements listed on the handout, chalkboard or easel.

C. ***Drill: Foundation for a Bad Check.***

1. The facts. The accused, LT Minderbender, is the signatory of the enclosed check, cashed at the Fort Knight post exchange, and returned by the bank for insufficient funds. J. Yossarian is the head cashier at the post exchange. M. M. Major is the installation check control officer.

2. *Sample foundation for a **Bad check**: J. Yossarian, cashier.*

Q. Please state your full name, social security number, and address.

A. J. Yossarian, 123-45-6789, Fort Knight, USA.

Q. Please describe your job.

A. I am the head cashier at the Fort Knight post exchange. In addition to supervising the other cashier, I assist customers with minor financial transactions.

Q. Does your job involve cashing customers's checks?

A. Yes.

Q. What procedures does the post exchange use to cash customers' checks?

A. To cash a check, the post exchange requires that the customer have name, rank, home address, home telephone number, social security number, unit, and unit telephone number on the front of the check. Also, the check must be endorsed on the back. We require the customer to present his or her military identification card. The name on the ID card is checked against the name on the check. The signature on the check is compared with the signature on the ID card. The picture on the ID card is compared to the individual cashing the check. If the customer is in uniform, the name on the uniform is compared with the name on the check.

Q. What does a customer receive in return when he or she cashes a check?

A. The money for the amount the check is written, less any purchases, and a receipt.

Q. I hand you Prosecution Exhibit 1 for Identification [hand witness the check]; do you recognize that?

A. Yes, I do.

Q. Are there any markings on the check indicating it was cashed at your post exchange?

A. Yes.

** [Note: The endorsements and other markings on the check are admissible as an exception to the hearsay rule because they are records of a regularly conducted activity. MRE 803(6).]*

Q. Are those markings placed on the check by your post exchange at the time of the transaction by a person with knowledge of the transaction?

A. Yes.

Q. Are they made and kept in the regular course of business?

A. Yes.

Q. Please describe what each of those markings mean.

A. The marking reads "Fort Knight, USA." That means that the check was processed by our cash register at the Fort Knight post exchange.

3. Direct examination of the post *exchange* installation check custodian, M. M. Major.

Q. Please state your full name, social security number, and address.

A. M. M. Major, 987-65-4321, Fort Knight, USA.

Q. Please state what your job is and describe your duties.

A. I am the installation check custodian for the Fort Knight post exchange. I monitor the processing of checks through our facility from cashing until the checks are cleared.

Q. Do you receive checks that have been returned for insufficient funds in the course of your duties?

A. Yes, I do.

Q. What procedures are used to return these checks to you?

A. The bank where the customer's check bounced sends the check back to the Fort Knight post exchange, to my attention.

Q. I hand you P.E. 1 for Identification [hand witness the check]; do you recognize that?

A. Yes.

Q. Are there any markings on these checks indicating that they were returned to your office for insufficient funds?

A. Yes.

** [Note: If DC objects to the introduction of the dishonor stamps as hearsay, TC can state that the dishonor stamps are admissible as an exception to the hearsay rule because they are a record of a regularly conducted activity. MRE 803(6).]*

Q. Are those markings placed on the checks at the time the checks are returned by a person with knowledge of the status of the accused's account?

A. Yes.

Q. Are they made and kept in the regular course of business?

A. Yes.

Q. Please describe what each of those markings means.

A. The dishonor stamp on the front reads "returned for insufficient funds." That means that the customer did not have the funds in his or her account at the drawee bank at the time the check was cashed.

TC. Your honor, I request that you take judicial notice of U.C.C. section 3-510(b) (1977) which provides that, as a regular business practice, a bank's dishonor stamp on a check is admissible and creates a presumption of dishonor.

**[Counsel may offer the bad check into evidence.]*





- D. **Summarize the main teaching points.** Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **Memorize the foundational elements for check authentication.**
- ✓ **Know where to find them when recall fails.**
- ✓ **Stipulate the admissibility of the bad check into evidence, if possible.**



V.

REFERENCES.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* chapt. 4 (1994).
- B. Thomas A. Mauet, *Trial Techniques* chapt. 5 (4th ed. 1996).
- C. R. Peter Masterton, *Proving Economic Crime: A Guide for Prosecutors*, ARMY LAW., Apr. 1994, at 18.
- D. Henry R. Richmond, *Bad Check Cases: A Primer for Trial and Defense Counsel*, ARMY LAW., Jan. 1990, at 3.
- E. Timothy A. Raezer, *Introducing Documentary Evidence*, ARMY LAW., Aug. 1985, at 30.

ENCLOSURES
Counsel Handout
Sample Solution

FOUNDATIONS: BAD CHECKS

COUNSEL HANDOUT

I.



TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for a bad check at trial.
- B. Preparation. Bring your MCM to the training. Review basic techniques of direct examination, cross examination, and objections. MRE 803, 804, 901, and 902.

II.



KEYS TO SUCCESS.

Know the Elements of a Foundation for Admission of a Bad Check.

1. *The canceled check, bearing the accused's signature, is marked "dishonored for insufficient funds" or words to that effect.*
2. *The cashier is familiar with the procedures for cashing checks at the place where the accused cashed the check in question.*
3. *The cashier establishes where the check was cashed and what the accused received in return.*
4. *The custodian was sent the check once it was dishonored.*
5. *The custodian establishes that the check was returned for insufficient funds.*
6. *The trial counsel asks the judge to take judicial notice of U.C.C. § 3-510(b) in conjunction with MRE 902(9) to admit the dishonor stamps as an exception to the hearsay rule.*

III.



REFERENCES FOR FURTHER STUDY.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* chapt. 4 (1994).
- B. Thomas A. Mauet, *Trial Techniquesy* chapt. 5 (4th ed. 1996).
- C. R. Peter Masterton, *Proving Economic Crime: A Guide for Prosecutors*, ARMY LAW., April 1994, at 18.
- D. Henry R. Richmond, *Bad Check Cases: A Primer for Trial and Defense Counsel*, ARMY LAW., Jan. 1990, at 3.
- E. Timothy A. Raezer, *Introducing Documentary Evidence*, ARMY LAW., Aug. 1985, at 30.

ENCLOSURE

Bad Check

FOUNDATIONS: BAD CHECKS

BAD CHECK

LT MILO L. MINDERBENDER 221-54-9876 2910
22 HELLER DR. (804) 867-5300 20-22/1942
SCAGWAY, USA 99603

PAY TO THE ORDER OF Milo L. Minderbender \$ 250.00
Two hundred fifty dollars DOLLARS

NationsBank 75 Years of Military Banking
NationsBank of Texas, N.A.
Fort Sam Houston Banking Center Pl.
PO Box 8000 San Antonio Tx 78203

FOR Cash Milo L. Minderbender

| : 12345654 1968 - 221 - | - 122 - | - 00 || :

ENDORSE HERE

Milo L. Minderbender

Fort Knight, USA

Check for payment made and other items. Please detach this stub, and send "Original Document" to back.

FOUNDATIONS: BAD CHECKS

SAMPLE SOLUTION



Direct examination of the cashier

- Q. Please state your full name, social security number, and address.*
A. J. Yossarian, 123-45-6789, Fort Knight, USA.
- Q. Please describe your job.*
A. I am the head cashier at the Fort Knight post exchange. In addition to supervising my other cashier, I assist customers with minor financial transactions.
- Q. Does your job involve cashing customers's checks?*
A. Yes.
- Q. What procedures does the post exchange use to cash customers's checks?*
A. To cash a check, the post exchange requires that the customer have name, rank, home address, home telephone number, social security number, unit, and unit telephone number on the front of the check. Also, the check must be endorsed on the back. We require the customer to present his or her military identification card. The name on the ID card is checked against the name on the check. The signature on the check is compared with the signature on the ID card. The picture on the ID card is compared to the individual cashing the check. If the customer is in uniform, the name on the uniform is compared with the name on the check.
- Q. What does a customer receive in return when he or she cashes a check?*
A. The money for the amount the check is written, less any purchases, and a receipt.
- Q. I hand you Prosecution Exhibit 1 for Identification [hand witness the check]; do you recognize that?*
A. Yes, I do.
- Q. Are there any markings on the check indicating it was cashed at your post exchange?*
A. Yes.

** [Note: The endorsements and other markings on the check are admissible as an exception to the hearsay rule because they are records of a regularly conducted activity. MRE 803(6).]*

Q. Are those markings placed on the check by your post exchange at the time of the transaction by a person with knowledge of the transaction?

A. Yes.

Q. Are they made and kept in the regular course of business?

A. Yes.

Q. Please describe what each of those markings mean.

A. The marking reads "Fort Knight, USA." That means that the check was processed by our cash register at the Fort Knight post exchange.

Direct examination of the post exchange installation check custodian

Q. Please state your full name, social security number, and address.

A. M. M. Major, 987-65-4321, Fort Knight, USA.

Q. Please state what your job is and describe your duties.

A. I am the installation check custodian for the Fort Knight post exchange. I monitor the processing of checks through our facility from cashing until the checks are cleared.

Q. Do you receive checks that have been returned for insufficient funds in the course of your duties?

A. Yes, I do.

Q. What procedures are used to return these checks to you?

A. The bank where the customer's check bounced sends the check back to the Fort Knight post exchange, to my attention.

Q. I hand you P.E. 1 for Identification [hand witness the check]; do you recognize that?

A. Yes.

Q. Are there any markings on these checks indicating that they were returned to your office for insufficient funds?

A. Yes.

** [Note: If DC objects to the introduction of the dishonor stamps as hearsay, TC can state that the dishonor stamps are admissible as an exception to the hearsay rule because they are a record of a regularly conducted activity. MRE 803(6).]*

Q. Are those markings placed on the checks at the time the checks are returned by a person with knowledge of the status of the accused's account?

A. Yes.

Q. Are they made and kept in the regular course of business?

A. Yes.

Q. Please describe what each of those markings means.

A. The dishonor stamp on the front reads "returned for insufficient funds." That means that the customer did not have the funds in his or her account at the drawee bank at the time the check was cashed.

TC. Your honor, I request that you take judicial notice of U.C.C. section 3-510(b) (1977) which provides that, as a regular business practice, a bank's dishonor stamp on a check is admissible and creates a presumption of dishonor.

*** [Counsel may offer the bad check into evidence.]**

Tab E
Module 4

**Develop the Skill:
Foundations**

Business and Military Records



The Advocacy Trainer

FOUNDATIONS: BUSINESS AND MILITARY RECORDS

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise develops counsel's ability to lay the proper foundation for business and military records. This foundation typically has two components. First, counsel must authenticate a document. Second, counsel must satisfy the hearsay elements of MRE 803(6). Counsel must distinguish the two components but realize the typical in-court foundation couples the authentication *and* hearsay foundation into a seemingly single set of questions.
- B. **Training Overview.** Training can be conducted by the supervisor with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions.



II. THE LAW.

- A. **The Authentication Requirement.**



Authenticating Record with a Witness. The reason counsel want to introduce business or military records at trial is, most often, to get the jury to believe -- or at least to see -- facts contained within those records. Thus, counsel need to call a witness who can explain how those records are kept to support the inference that the information contained in those records is accurate. The witness does not need to be aware of the specific assertions contained within the records; he simply has to be able to identify the record and the reasons for which it was kept.

- Elements of Foundation. (MRE 901(b)(1)).
 - 1) The witness has personal knowledge of the business or military’s filing or record system;
 - 2) The witness removed the record in question from a certain file;
 - 3) It was a proper file or entry;
 - 4) The witness recognizes the exhibit as the record he or she removed from the files; and
 - 5) The witness specifies the basis on which he or she recognizes the exhibit.



Authenticating Without a Witness (Self-Authenticating Document). It may be that counsel seeks to introduce a military record the authenticity of which is *presumed* (e.g., a record of an Article 15 or DA Form 2A or 2-1 taken from the accused’s official files). The drill here is simpler, and does not require a sponsoring witness.

- Elements of Foundation. MRE 902(4a)
 - 1) *A document that purports to be a copy of an official record;*
 - 2) *A certificate attached to the copy (the certificate must state that the signatory is the custodian of official records and that the document is a true and accurate copy of an original, official record);*
 - 3) *A certificate that bears a presumptively authentic signature or seal.*

B. *Hearsay.*



Having established the authenticity of a ***record***, counsel must establish that the contents of the report are admissible as an exception to the hearsay rule. Counsel must understand that for hearsay purposes, there is no practical difference between the foundational elements for a “business” record and a “military” record. Moreover, counsel will see that there is a good deal of overlap between the foundations for authentication and for the hearsay exception. Indeed, laying the hearsay foundation usually serves to authenticate the record.

- Elements of the Foundation.
 - 1) *The report was prepared by a person having a relationship with the agency preparing the report;*
 - 2) *The person had a duty to report the information;*
 - 3) *The person had personal knowledge of the facts or events reported;*
 - 4) *The business report was prepared contemporaneously with the events;*
 - 5) *It was a routine practice of the business to prepare such reports;*
 - 6) *The report was reduced to written form; and*
 - 7) *The business report was made in the regular course of business.*

C. **Best evidence.** This rule excludes secondary evidence of a writing's contents. Where a writing's terms are *in issue*, counsel must either produce an original or duplicate or show the excuse for the non-production of the originals and present an admissible type of secondary evidence. While this rule is not applicable *simply because* a document may be offered into evidence, counsel must consider this rule whenever a document may be used.



III.

PRACTICE POINTERS.

- ➔ **Know Purpose of Admission, Anticipate Objections.** Counsel should remember, as part of their case preparation, to think through the items of evidence they intend to introduce, the reason that they intend to introduce such evidence, and possible objections. Obviously, counsel must be able to describe an item of evidence and explain its relevance to the court, yet counsel must always bear in mind that relevance is not the only test for admissibility.

- ***Fewer Witnesses.*** You need not call every witness who touched the evidence. The point of the Chain-of-custody (CofC) is to relieve the government from calling everyone in the chain. The evidence custodian is usually the best person to introduce the chain-of-custody. In addition, it is a good idea to call the individual who initiated the CofC (seized the drugs from the accused) and the person who closed the chain (typically the evidence custodian).
- ***Authentication, Hearsay and Best Evidence Rule.*** In the case of business and government records, the rules of evidence impose several requirements. First, the records must be authenticated: That is, counsel must demonstrate that the records are what counsel says that they are. Second, counsel must remember that the declarations contained within a business record are out-of-court declarations offered to prove the truth of the matter contained in those records, and, thus, hearsay. Consequently, counsel must establish that the records meet an applicable hearsay exception. Finally, if the terms of the record itself is in issue, the Best Evidence (“original document”) Rule may apply.
- ***Make it a Routine.*** Counsel should also understand that they will very often encounter these rules when trying to introduce a commonly-used law enforcement document such as a chain-of-custody form typically offered through the CID or MPI evidence custodian. The chain-of-custody form is the document that goes with an item of evidence through the various stages of the investigation (seizure, testing, etc.). The chain-of-custody helps to show relevance and to show that the item being offered in court is the item that was seized and tested by the government (identifying the item is easy if it is something distinctive, like a gun or a knife; more difficult if the item is more generic, like drugs).
- ***Unique vs. Fungible:*** Remember that fungible, that is, non-unique evidence requires a CofC. It is admissible after a showing of continuous custody that preserves the evidence in an unaltered state. For unique evidence, so long as your witness testifies to the unique characteristic, “I scratched my initials and date on the handle of the knife,” you don’t need a CofC.
- ***Presumption of Regularity.*** The CofC reflects a presumption of regularity by both law enforcement and forensic personnel. “[T]he government benefits from a presumption of proper handling while in the custody of a public officer, including law enforcement officers.” *United States v. Ortiz*, 9 M.J. 523, 525 (A.C.M.R. 1980).
- ***Lab tests*** are presumed to be trustworthy under the business records exception (MRE 803(6)) because the lab applies independent standards and is not part of a “prosecution team.”
- ***Defects.*** Remember, minor errors in handling or recording are not necessarily fatal. You need not exclude all theories of tampering or imperfection. *United*

States v. Wallace, 14 M.J. 1019 (A.C.M.R. 1982); *United States v. Hudson*, 20 M.J. 607 608-9 (A.F.C.M.R. 1985).

- ***Link it Up!*** Link the lab report with the CofC. Though lab reports are admissible under MRE 902(4a) they do not have probative value -- they are not authenticated as pertaining to a particular soldier or item of evidence -- until they are ***linked*** with the evidence on the CofC. Ensure you cross reference the specimen or evidence number on the CofC with the report received from the lab.
- ***Goes to Weight, Not Admissibility.*** Most defense objections to errors or missing links should be met with this response.
- ***Avoid Signing Voucher!*** Counsel should avoid becoming part of the CofC on DA Form 4137. Doing so makes counsel a potential witness in the evidence chain.

IV. SKILL DRILLS.

A. ***Goal: Train counsel to employ the following skills.***

1. Use direct examination techniques covered in previous training.
2. Lay a proper foundation for a Chain-of-Custody document (DA Form 4137) and a Lab Report.

B. ***Conduct the drills.***

1. ***Preparation:*** Conduct this training in the courtroom with all necessary props. Start with the enclosed chain-of-custody form and lab report. You must supply your own baggies.
2. ***Role Play:*** The supervisor will play the roles of sponsoring witness and military judge. Designate counsel to play the roles of proponent and opponent. Remaining participants will sit in the panel box and make objections.
3. ***Execution:***

- a. **Chain-of-custody.** Have counsel lay a foundation first for the chain-of-custody document. They should authenticate the baggies of heroin and then satisfy the hearsay requirements by asking the witness appropriate questions. A sample examination is provided below.
- b. **Lab Report.** Have counsel lay a foundation for the lab report through a self-**authenticating** certificate. Counsel should be told to lay a foundation for the lab report as a self-authenticating report. They should then realize they must draft a self-authenticating certificate, attach it to the exhibit, and then offer it with the proper foundation. A sample certificate is also attached.

C. *Drill: Foundation for Business Records.*

1. The facts. The accused, SGT Jones, is charged with drug distribution. On 15 July, Jones sold heroin to SA Bond. The government has the drugs, in a baggie marked with SA Bond's initials. The government wishes to offer the chain-of-custody; the document that tracks the substance from the seizure by SA Bond through the evidence custodian, SA Bean, to the CID drug lab back to SA Bean. It also has the laboratory report, describing the results of tests done on the heroin.
2. The evidence custodian, SA Bean, is on the stand. Trial counsel should assume that SA Bond already testified about the sale of drugs by the accused, and that SA Bond identified the baggie which the accused handed him (Bond had written his name on the baggie with an indelible pen).

D. *Sample foundation for a Chain-of-custody.*

Q. As the evidence custodian, did you receive the bag of heroin in this case?
A. Yes.

Q. From whom?
A. Agent Bond.

Q. When?
A. On 15 July, the night of the drug bust.

Q. Did you make a record when you received the evidence?
A. Yes.

Q. What did you do with it after you received it?
A. I placed it in the evidence room.

Q. Who has access to that room?

A. I do. It's locked when I'm not there. Everyone has to sign out evidence from me if they want to take it from the evidence room.

- Q. Did you at some point send the evidence to the CID Crime Lab at Fort Gillem?**
A. Yes, I did.
- Q. How did you send it to the lab?**
A. I sent it by registered mail.
- Q. Did you make a record when you sent the drugs to the laboratory?**
A. Yes.
- Q. Did you later receive the evidence back from the lab?**
A. Yes.
- Q. Did you record that as well?**
A. Yes.
- Q. Did you record all of this information regarding the movement of the evidence on the same document?**
A. Yes.
- Q. What is that document?**
A. It's a DA Form 4137, an evidence/property document or a chain-of-custody document.
- Q. What's the purpose of this form?**
A. To track a piece of evidence as it goes from one person or one office to the next.
- Q. Is such a form used for every piece of evidence processed by CID?**
A. Yes.
- Q. I'm handing you Prosecution Exhibit 10 for Identification. What is that?**
A. It's DA Form 4137, the chain-of-custody document for the heroin.
- Q. Does your name appear on this document?**
A. Yes.
- Q. Where does it appear the first time?**
A. The first time it appears is in the right column on the first line, under the "received by" column.
- Q. Is that your name and signature?**
A. Yes, it is.

Q. Did you enter your name and signature when you received the evidence from Agent Bond?

A. Yes, I did.

Q. Is that the normal procedure -- to make the entry each time the evidence is transferred?

A. Yes, it is.

Q. What is the entry to the left of yours?

A. It's the name and signature of Agent Bond.

Q. What do these two entries mean?

A. They mean that Agent Bond handed the suspected heroin to me on the fifteenth of July.

Q. You mentioned that you later sent the evidence to the laboratory. Is that reflected on the form?

A. Yes, it is.

Q. Please explain.

A. Notice on the next line I placed the evidence in the evidence room. Then you see the entry with my name showing it was shipped by registered mail with the registered mail number and the notation in the right column "transmitted to crime lab for examination."

Q. And then you mentioned you later received the evidence again. Is that reflected on this form?

A. Yes.

Q. Where?

A. If you look on the back of the form, after all of the notations made at the lab, you notice that I received the evidence in registered mail and placed it in the evidence room.

Q. Again your signature appears next to those entries. Did you make the entries at the time?

A. Yes.

E. *Sample foundation for a Lab Report.* Having established a chain-of-custody, you now want to ask additional questions to link the lab report with the chain-of-custody document.

Q. When the evidence came back from the lab with the chain-of-custody document, Prosecution Exhibit 10 for Identification, did any other documents come with it?

A. Yes.

Q. What other documents?

A. A laboratory report showing the results of testing performed on the evidence.

Q. Did that document come with a certification letter?

A. Yes.

Q. What letterhead appeared on that certificate?

A. The letterhead is from the U.S. Army Criminal Investigation Laboratory.

Q. Who signed the certificate?

A. Mr. Simmons.

Q. What is his position?

A. He's the records custodian at the lab.

Q. Was anything attached to the certificate signed by Mr. Simmons?

A. Yes.

Q. What was attached?

A. A laboratory report showing the results of testing done on the suspected heroin.

Q. Do you normally receive such reports in response to a request for testing of evidence?

A. Yes.

Q. Was the report you received on this occasion similar in format to other such reports you have received from the laboratory in the past?

A. Yes.

Q. Did you personally open the envelope containing the evidence, the chain-of-custody document and the report from the lab?

A. Yes.

Q. I'm now handing you Prosecution Exhibit 11 for Identification, a two page document. What is it?

A. It's the certificate from Mr. Simmons showing that the laboratory report is attached.

Q. What does the lab report pertain to?

A. It pertains to the bag of suspected heroin we sent to the lab.

Q. How do you know this?

A. Compare the specimen number noted in the top right hand corner of the chain-of-custody document.

Q. Prosecution Exhibit 10 for Identification?

** [Counsel may want to project on an overhead, use a blowup copy or provide a copy to each panel member of the CofC. This will depend on the complexity and importance of the evidence. Most CofC documents are routine and not worthy of extra time or theatrics.]*

A. Yes. Compare that specimen number on the chain-of-custody document with the specimen number mentioned in the cover letter from the lab and on the lab report that is attached to that letter.

Q. On Prosecution Exhibit 11 for Identification?

A. Yes. They are the same, meaning it's the same piece of evidence.

Q. I'm withdrawing Prosecution Exhibits 10 and 11 from the witness Your Honor, the Government asks that these two exhibits be admitted into evidence as Prosecution Exhibits 10 and 11.

MJ. Defense, any objection?

DC. Yes, Your Honor. I object on the ground that there has been insufficient authentication of the lab report. No sponsoring witness from the lab has verified the authenticity of this lab report.

MJ. Trial Counsel?

TC. Your Honor, testimony from a lab expert is unnecessary. The law generally presumes that public officials have properly performed their duties and that their purported signatures and seals are presumed genuine. This lab report is authenticated through the evidence custodian and under MRE 902(4a) by the attesting certificate attached to the document which indicates that the report is a true and accurate copy.

MJ. Objection overruled. Prosecution Exhibit 10 for ID is admitted as P.E. 10.

TC. Your Honor, at this point I would like to hand prosecution exhibits 10 and 11 to the court members and inform them of the results of the test on the heroin.

MJ. Go ahead.

TC. Please note that the lab report states that the substance in the CID evidence pouch numbered 96-CID4445503 tested by the laboratory was heroin.

** [Counsel must remember that the self-authenticating certificate is essential to allow admission of this lab report. They must pay close attention to the content of the certificate and in some cases prepare the certificate themselves to ensure its accuracy. Counsel must recall that the attesting certificate for such a lab report will contain language that ensures authentication requirements, 902(4a), and hearsay requirements, 803(6). Such language is provided in the student handouts.]*

** [The foundations for documents such as an Article 15, DA Form 2A and 2-1 are satisfied just like the lab report. Counsel must ensure the attesting certificates satisfy the foundational requirements.]*



- F. *Summarize the main teaching points.* Following the drills, conduct a discussion of lessons learned, distribute the sample solutions, and summarize the main points:

- ✓ **Memorize the foundational elements for a business record. Know where to find them when recall fails.**
- ✓ **Plan and practice foundations with the sponsoring witness.**



V.

REFERENCES.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* chapt. 4 (1994).
- B. Thomas A. Mauet, *Trial Techniques* chapt. 5 (4th ed. 1996).
- C. Trial Counsel Assistance Program (TCAP) Memo # 74, 110, 112.

ENCLOSURES

Counsel Handout

Lab Report

DA Form 4137, Chain-of-custody

Sample Solution

FOUNDATIONS: BUSINESS AND MILITARY RECORDS

COUNSEL HANDOUT



I.

TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for business and military records.
- B. Preparation. Bring your MCM to the training. Review basic techniques of direct examination, cross examination, and objections. Review MRE 901.



II.

KEYS TO SUCCESS.

- A. Know the Elements of a Foundation for Authenticating a Document.
 - 1. *The witness has personal knowledge of the business or military's filing or record system;*
 - 2. *The witness removed the record in question from a certain file;*
 - 3. *It was a proper file;*
 - 4. *The witness recognizes the exhibit as the record he or she removed from the files; and*
 - 5. *The witness specifies the basis on which he or she recognizes the exhibit.*
- B. Know the Elements of a Foundation for a Self-Authenticating Document.
 - 1. *A document that purports to be a copy of an official record;*
 - 2. *A certificate attached to the copy (the certificate must state that the signatory is the custodian of official records and that the document is a true and accurate copy of an original, official record);*

3. *A certificate that bears a presumptively authentic signature or seal.*
- C. Know the Elements of a Hearsay Foundation for a Business Record.
1. *The report was prepared by a person having a relationship with the agency preparing the report;*
 2. *The person had a duty to report the information;*
 3. *The person had personal knowledge of the facts or events reported;*
 4. *The business report was prepared contemporaneously with the events;*
 5. *It was a routine practice of the business to prepare such reports;*
 6. *The report was reduced to written form; and*
 7. *The report was made in the regular course of business.*

III.

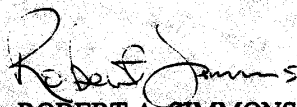


REFERENCES FOR FURTHER STUDY.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* chapt. 4 (1994).
- B. Thomas A. Mauet, *Trial Techniques* chapt. 5 (4th ed. 1996). Trial Counsel Assistance Program (TCAP) Memo # 74, 110, 112.

CERTIFICATE

I, Special Agent Robert A. Simmons, certify that I am the Records Custodian for the U.S. Army Criminal Investigation Division Command Forensic Laboratory, Fort Gillem, Georgia, and the attached Laboratory Report is a true and accurate copy of an original, official record in my custody, maintained in accordance with Army Regulations.

A handwritten signature in black ink, appearing to read "Robert A. Simmons". The signature is written in a cursive style with a large initial "R".

ROBERT A. SIMMONS
CW3, U.S. Army
Records Custodian

23 July 1997
Page 1 of 1

DIVISION REPORT

DRUG CHEMISTRY DIVISION:

Submitter Case Number: 0021-97-CID455
USACIL-CONUS Referral Number: 97-CID151-1234

Suspect(s): JONES, Frank R.

EXHIBITS:


Exhibit 1 - Clear plastic baggie in heat sealed pouch containing brown powder substance.
(Item 1, V# 144-97)

FINDINGS:

Examination of the powder contents of Exhibit 1 revealed the presence of heroin. Heroin is controlled by Schedule I of the Controlled Substances Act.

Amount (in grams):

<u>Exhibit</u>	<u>Received</u>	<u>Used</u>	<u>Returned</u>
1	0.58	0.03	0.55


JOHN PENNY
Forensic Chemist

EVIDENCE/PROPERTY CUSTODY DOCUMENT		MPRICID SEQUENCE NUMBER 0021-97-CID455		
For use of this form see AR 190-45 and AR 195-5; the proponent agency is US Army Criminal Investigation Command		CRD REPORT/CID ROI NUMBER		
RECEIVING ACTIVITY USACIDC		LOCATION FORT KNIGHT		
NAME, GRADE AND TITLE OF PERSON FROM WHOM RECEIVED <input checked="" type="checkbox"/> OWNER <input type="checkbox"/> OTHER		ADDRESS (include Zip Code) A Company, 1/44 Infantry, 21st Infantry Division Fort Knight		
LOCATION FROM WHERE OBTAINED Rec'd from the right hand of SGT Frank Jones		REASON OBTAINED Evidence	TIME/DATE OBTAINED 2250/15 July 1997	
ITEM NO.	QUANTITY	DESCRIPTION OF ARTICLES <i>(include model, serial number, condition and unusual marks or scratches)</i>		
1	1	Baggie of small quantity of suspected heroin, powder, brown in color. Placed in heat seal bag and Marked for ID: SMC, 2250, 15 July 97.//////////LAST ITEM.//////////		
CHAIN OF CUSTODY				
ITEM NO.	DATE	RELEASED BY	RECEIVED BY	PURPOSE OF CHANGE OF CUSTODY
1	15 Jul 97	SIGNATURE SM Refused to Sign	SIGNATURE <i>S Bond</i>	Evaluation as Evidence
		NAME, GRADE OR TITLE SGT Frank Jones	NAME, GRADE OR TITLE SA Sam Bond	
1	15 Jul 97	SIGNATURE <i>S Bond</i>	SIGNATURE <i>Roy Bean</i>	Released to Evidence Custodian
		NAME, GRADE OR TITLE SA Sam Bond	NAME, GRADE OR TITLE SA Roy Bean	
1	16 Jul 97	SIGNATURE <i>Roy Bean</i>	SIGNATURE Registered Mail	Forwarded to USACIL-CONUS for examination
		NAME, GRADE OR TITLE SA Roy Bean	NAME, GRADE OR TITLE #987654	
1	18 Jul 97	SIGNATURE Registered Mail	SIGNATURE <i>Pauline A. Gooch</i>	Received at USACIL-CONUS for examination
		NAME, GRADE OR TITLE #987654	NAME, GRADE OR TITLE Pauline A. Gooch, GS-09	
1	22 Jul 97	SIGNATURE <i>Pauline A. Gooch</i>	SIGNATURE <i>John Penny</i>	Examination
		NAME, GRADE OR TITLE Pauline A. Gooch, GS-09	NAME, GRADE OR TITLE SA John Penny, Drug Chem Div.	

DA FORM 4137, 1 JUL 76

Replaces DA FORM 4137, 1 Aug 74 and DA FORM 4137-R Privacy Act Statement 26 Sep 75 Which are Obsolete

LOCATION _____

DOCUMENT NUMBER _____

USAPPC V1.00

ITEM NO.	DATE	CHAIN OF CUSTODY (Continued)		PURPOSE OF CHANGE OF CUSTODY
		RELEASED BY	RECEIVED BY	
1	22 Jul 97	SIGNATURE <i>J. Penny</i>	SIGNATURE <i>Pauline Gooch</i>	Examination Complete
		NAME, GRADE OR TITLE SA John Penny, Drug Chem Div.	NAME, GRADE OR TITLE Pauline A. Gooch, GS-09	
1	24 Jul 97	SIGNATURE <i>Pauline Gooch</i>	SIGNATURE Registered Mail	Returned to Submitter
		NAME, GRADE OR TITLE Pauline A. Gooch, GS-09	NAME, GRADE OR TITLE #456789	
1	26 Jul 97	SIGNATURE Registered Mail	SIGNATURE <i>Roy Bean</i>	Received by Evidence Custodian
		NAME, GRADE OR TITLE #456789	NAME, GRADE OR TITLE SA Roy Bean, Evid. Custodian	
1	[trial]	SIGNATURE <i>Roy Bean</i>	SIGNATURE <i>Ludlow Porch</i>	Released to SJA-TC for court. Sealed Bag opened for court.
		NAME, GRADE OR TITLE SA Roy Bean, Evid. Custodian	NAME, GRADE OR TITLE Ludlow B. Porch, MAJ, JA	
		SIGNATURE	SIGNATURE	
		NAME, GRADE OR TITLE	NAME, GRADE OR TITLE	
		SIGNATURE	SIGNATURE	
		NAME, GRADE OR TITLE	NAME, GRADE OR TITLE	
		SIGNATURE	SIGNATURE	
		NAME, GRADE OR TITLE	NAME, GRADE OR TITLE	
FINAL DISPOSAL ACTION				
RELEASE TO OWNER OR OTHER (Name/Unit) _____				
DESTROY _____				
OTHER (Specify) _____				
FINAL DISPOSAL AUTHORITY				
ITEM(S) _____ ON THIS DOCUMENT, PERTAINING TO THE INVESTIGATION INVOLVING _____ (Grade)				
_____ (Name)		_____ (Organization)		_____ (IS) (ARE) NO LONGER
REQUIRED AS EVIDENCE AND MAY BE DISPOSED OF AS INDICATED ABOVE. (If article(s) must be retained, do not sign, but explain in separate correspondence.)				
_____ (Typed/Printed Name, Grade, Title)		_____ (Signature)		_____ (Date)
WITNESS TO DESTRUCTION OF EVIDENCE				
THE ARTICLE(S) LISTED AT ITEM NUMBER(S) _____ (WAS) (WERE) DESTROYED BY THE EVIDENCE CUSTODIAN, IN MY PRESENCE, ON THE DATE INDICATED ABOVE.				
_____ (Typed/Printed Name, Organization)				_____ (Signature)

FOUNDATIONS: BUSINESS RECORDS

SAMPLE SOLUTIONS



Drill: Chain of Custody

- Q. As the evidence custodian, did you receive the bag of heroin in this case?*
A. Yes.
- Q. From whom?*
A. Agent Bond.
- Q. When?*
A. On 15 July, the night of the drug bust.
- Q. Did you make a record when you received the evidence?*
A. Yes.
- Q. What did you do with it after you received it?*
A. I placed it in the evidence room.
- Q. Who has access to that room?*
A. I do. It's locked when I'm not there. Everyone has to sign out evidence from me if they want to take it from the evidence room.
- Q. Did you at some point send the evidence to the CID Crime Lab at Fort Gillem?*
A. Yes, I did.
- Q. How did you send it to the lab?*
A. I sent it by registered mail.
- Q. Did you make a record when you sent the drugs to the laboratory?*
A. Yes.
- Q. Did you later receive the evidence back from the lab?*
A. Yes.
- Q. Did you record that as well?*
A. Yes.

- Q. Did you record all of this information regarding the movement of the evidence on the same document?**
- A. Yes.
- Q. What is that document?**
- A. It's a DA Form 4137, an evidence/property document or a chain-of-custody document.
- Q. What's the purpose of this form?**
- A. To track a piece of evidence as it goes from one person or one office to the next.
- Q. Is such a form used for every piece of evidence processed by CID?**
- A. Yes.
- Q. I'm handing you Prosecution Exhibit 10 for Identification. What is that?**
- A. It's DA Form 4137, the chain-of-custody document for the heroin.
- Q. Does your name appear on this document?**
- A. Yes.
- Q. Where does it appear the first time?**
- A. The first time it appears is in the right column on the first line, under the "received by" column.
- Q. Is that your name and signature?**
- A. Yes, it is.
- Q. Did you enter your name and signature when you received the evidence from Agent Bond?**
- A. Yes, I did.
- Q. Is that the normal procedure -- to make the entry each time the evidence is transferred?**
- A. Yes, it is.
- Q. What is the entry to the left of yours?**
- A. It's the name and signature of Agent Bond.
- Q. What do these two entries mean?**
- A. They mean that Agent Bond handed the suspected heroin to me on the fifteenth of July.
- Q. You mentioned that you later sent the evidence to the laboratory. Is that reflected on the form?**
- A. Yes, it is.

- Q. Please explain.*
- A. Notice on the next line I placed the evidence in the evidence room. Then you see the entry with my name showing it was shipped by registered mail with the registered mail number and the notation in the right column "transmitted to crime lab for examination."*
- Q. And then you mentioned you later received the evidence again. Is that reflected on this form?*
- A. Yes.*
- Q. Where?*
- A. If you look on the back of the form, after all of the notations made at the lab, you notice that I received the evidence in registered mail and placed it in the evidence room.*
- Q. Again your signature appears next to those entries. Did you make the entries at the time?*
- A. Yes.*

Drill: Lab Report

Having established a chain-of-custody, you now want to ask additional questions to **link the lab report** with the chain-of-custody document.

- Q. When the evidence came back from the lab with the chain-of-custody document, Prosecution Exhibit 10 for Identification, did any other documents come with it?*
- A. Yes.*
- Q. What other documents?*
- A. A laboratory report showing the results of testing performed on the evidence.*
- Q. Did that document come with a certification letter?*
- A. Yes.*
- Q. What letterhead appeared on that certificate?*
- A. The letterhead is from the U.S. Army Criminal Investigation Laboratory.*
- Q. Who signed the certificate?*
- A. Mr. Simmons.*
- Q. What is his position?*
- A. He's the records custodian at the lab.*
- Q. Was anything attached to the certificate signed by Mr. Simmons?*
- A. Yes.*

Q. What was attached?
A. A laboratory report showing the results of testing done on the suspected heroin.

Q. Do you normally receive such reports in response to a request for testing of evidence?

A. Yes.

Q. Was the report you received on this occasion similar in format to other such reports you have received from the laboratory in the past?

A. Yes.

Q. Did you personally open the envelope containing the evidence, the chain-of-custody document and the report from the lab?

A. Yes.

Q. I'm now handing you Prosecution Exhibit 11 for Identification, a two page document. What is it?

A. It's the certificate from Mr. Simmons showing that the laboratory report is attached.

Q. What does the lab report pertain to?

A. It pertains to the bag of suspected heroin we sent to the lab.

Q. How do you know this?

A. Compare the specimen number noted in the top right hand corner of the chain-of-custody document.

Q. Prosecution Exhibit 10 for Identification?

** [Counsel may want to project on an overhead, use a blowup copy or provide a copy to each panel member of the CofC. This will depend on the complexity and importance of the evidence. Most CofC documents are routine and not worthy of extra time or theatrics.]*

A. Yes. Compare that specimen number on the chain-of-custody document with the specimen number mentioned in the cover letter from the lab and on the lab report that is attached to that letter.

Q. On Prosecution Exhibit 11 for Identification?

A. Yes. They are the same, meaning it's the same piece of evidence.

Q. I'm withdrawing Prosecution Exhibits 10 and 11 from the witness Your Honor, the Government asks that these two exhibits be admitted into evidence as Prosecution Exhibits 10 and 11.

MJ. Defense, any objection?

DC. Yes, Your Honor. I object on the ground that there has been insufficient authentication of the lab report. No sponsoring witness from the lab has verified the authenticity of this lab report.

MJ. Trial Counsel?

TC. Your Honor, testimony from a lab expert is unnecessary. The law generally presumes that public officials have properly performed their duties and that their purported signatures and seals are presumed genuine. This lab report is authenticated through the evidence custodian and under MRE 902(4a) by the attesting certificate attached to the document which indicates that the report is a true and accurate copy.

MJ. Objection overruled. Prosecution Exhibit 10 for ID is admitted as P.E. 10.

TC. Your Honor, at this point I would like to hand prosecution exhibits 10 and 11 to the court members and inform them of the results of the test on the heroin.

MJ. Go ahead.

TC. Please note that the lab report states that the substance in the CID evidence pouch numbered 96-CID4445503 tested by the laboratory was heroin.

** [Counsel must remember that the self-authenticating certificate is essential to allow admission of this lab report. They must pay close attention to the content of the certificate and in some cases prepare the certificate themselves to ensure its accuracy. Counsel must ensure that the attesting certificate for such a lab report will contain language that satisfies authentication requirements 902(4a) and hearsay requirements, 803(6). Such language is provided in the student handouts.]*

** [The foundations for documents such as an Article 15, DA Form 2A and 2-1 are satisfied just like the lab report. Counsel must ensure the attesting certificates satisfy the foundational requirements.]*

Tab E

Module 5

**Develop the Skill:
Foundations**

Photographs



The Advocacy Trainer

FOUNDATIONS: PHOTOGRAPHS

SUPERVISOR'S GUIDE




I. SKILL OVERVIEW.


- A. **Goals.** This exercise develops counsel's ability to lay the proper foundation for a photograph. The foundation for this kind of evidence is simple and should become second nature to all counsel. Lead a discussion of the law and practice pointers and then conduct the suggested drills. Consider using examples of good and bad techniques from recent records of trial.
- B. **Training Overview.** Training can be conducted by the supervisor with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions.




II. THE LAW.

A. ***The Authentication Requirement.***

 "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901.

 Typically, a photograph is authenticated by a witness who states that the photograph accurately and fairly depicts the scene in question. There is no need to address the mechanics of exposing or developing the film, or the camera's working condition.

 The sufficiency of the authenticating evidence is a question of fact for the military judge under MRE 104(a). In addition to the authentication requirement, the proponent of evidence must be prepared to respond to objections based upon relevance, confusion or unfair prejudice, and hearsay.

B. *Elements of the Foundation.*

1. *The witness is familiar with the object or scene.*
“Did you respond to a report of a damaged vehicle on 6 August 1997?”
2. *The witness explains the basis for his familiarity with the object or scene.*
“I now hand you P.E. 1 for identification. What is it?”
3. *The witness recognizes the object or scene in the photograph.*
“How do you recognize it?”
4. *The witness testifies the photograph is a “fair,” “accurate,” “true,” or “correct” depiction of the object or scene at the relevant time.*
“Does this photo fairly and accurately depict the car on 6 August 1997?”



III. **PRACTICE POINTERS.**

While it is relatively easy to establish the foundation for a photograph, the effectiveness of the photograph as a persuasive tool depends on how well it is prepared and presented in court. Discuss the following points with counsel.

- ➔ ***Photographs should be large and in color.*** Originals should be enlarged to 8” X 10” size, without loss of contrast, and mounted on stiff backing. Color photographs are preferable, especially where the scene has low contrast. If a particular photograph is critical, consider having it enlarged to poster size and having it mounted on poster board. Your TASC office on post can do this for you.
- ➔ ***Whom to call as a witness.*** The person who took the picture need not testify. Anyone familiar with the scene may verify the photo.
- ➔ ***Prepare the photograph with the witness.*** Make sure that the sponsoring witness has complete familiarity with the object or scene in the photograph. Resolve any questions about the photograph with the witness before trial.
- ➔ ***Using enlargements of photographs.*** When displaying an enlarged photograph in court, if possible, place the photo directly centered before the panel, about 10 feet away.
- ➔ ***When to admit an enlargement into evidence.*** Establish the foundation for the photograph and admit the photo into evidence while the witness is still on the stand. Have the witness go to the photo and explain the exhibit after the photo has been admitted.

- ***Tell the story twice.*** Don't forget another collateral benefit of photographs and other demonstrative evidence: it permits you to tell a story at least two times. First, have the witness tell the story without assistance. Then, the witness will have the opportunity to tell the story a second time when laying the foundation for and explaining the exhibit.

IV.  **SKILL DRILLS.**

A. ***Goal: Train counsel to employ the following skills.***

1. Use direct examination techniques covered in previous training.
2. Lay a proper foundation for a photograph.

B. ***Conduct the drills.***

1. ***Preparation:*** Conduct this training in the courtroom with all necessary props. Start with the enclosed photograph and the facts below.
2. ***Role Play:*** The instructor will play the role of the witness and military judge. Designate counsel to play the roles of proponent and opponent. Remaining participants will sit in the panel box and make appropriate objections. In your discretion, you may wish to appoint a counsel as military judge.
3. ***Execution:*** Inform counsel of the elements of the foundation (provide on handout or chalkboard). Give counsel five minutes to prepare the foundation. Suggest you allow counsel to go through the foundation once with notes. Have them lay the foundation a second and third time, using only the foundation elements listed on the handout, chalkboard or easel.

C. **Drill: Foundation for a Photograph.**

1. The facts. The accused was involved in the damage of a vehicle parked in the Fort Knight parking lot. The witness, SFC Ussell, has been called to verify testimony concerning the condition of the vehicle. The incident occurred in August 1997. The photograph depicts a brown two-door Oldsmobile Cutlass parked in a parking lot. The windshield of the vehicle is smashed.

2. *Sample foundation for a **Photograph**: SFC Ussell, witness.*

*Q. **Sergeant First Class Ussell, where do you work?***

A. I am the supply sergeant at Fort Knight, USA.

*TC. **Your Honor, I request that this be marked as Prosecution Exhibit 1 for Identification.** [Court reporter would so mark the exhibit and hand back to counsel.]*

MJ. The record will so reflect.

*TC. **Your Honor, I request permission to approach the witness.***

MJ. Permission granted.

*Q. **I now hand you P.E. 1 for Identification. What is it?***

A. It is a picture of a brown car in the Fort Knight parking lot. The car has its windshield smashed.

*Q. **How do you recognize it?***

A. I was on duty the morning of 6 August 1997. As part of my duty, I did an inspection of the parking lot. During my inspection of the lot, I discovered the car with its windshield broken. I took a picture of the vehicle in the parking lot to document my inspection.

*Q. **What viewpoint does this photograph show?***

A. The picture is centered on the passenger side front quarter panel of the car so that the windshield on the passenger side and the passenger side of the car are clearly in view.

*Q. **Does this photo fairly and accurately depict the car on 6 August 1997?***

A. It sure does.

*TC. **Your Honor, I now offer P.E. 1 for Identification into evidence as P.E. 1.***



D. *Summarize the main teaching points.* Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **Memorize the foundational elements for authentication of a photograph.**
- ✓ **Know where to find them when recall fails.**
- ✓ **Plan and practice the use of the photograph with the sponsoring witness.**
- ✓ **Photographs should be large and in color.**



V. **REFERENCES.**

- A. David A. Schlueter et al., *Military Evidentiary Foundations* chapt. 4 (1994).
- B. Thomas A. Mauet, *Trial Techniques* chapt. 5 (4th ed. 1996).

ENCLOSURES
Counsel Handout
Photograph
Sample Solution

FOUNDATIONS: PHOTOGRAPHS

COUNSEL HANDOUT

I. TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for a photograph at trial.
- B. Preparation. Bring your MCM to the training. Review basic techniques of direct examination, cross examination, and objections. Review MRE 901.

II. KEYS TO SUCCESS.

Know the Elements of a Foundation for Admission of a Photograph.

1. *The witness is familiar with the object or scene.*
2. *“Did you respond to a report of a damaged vehicle on 6 August 1997?”*
3. *The witness explains the basis for his familiarity with the object or scene.*
4. *“I now hand you P.E. 1 for identification. What is it?”*
5. *The witness recognizes the object or scene in the photograph.*
6. *“How do you recognize it?”*
7. *The witness testifies the photograph is a “fair,” “accurate,” “true,” or “correct” depiction of the object or scene at the relevant time.*
8. *“Does this photo fairly and accurately depict the car on 6 August 1997?”*

III. REFERENCES FOR FURTHER STUDY.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* chapt. 4 (1994).
- B. Thomas A. Mauet, *Trial Techniques* chapt. 5 (4th ed. 1996).

ENCLOSURE
Photograph

PHOTOGRAPH



FOUNDATIONS: PHOTOGRAPHS:

SAMPLE SOLUTION



- Q.** *Sergeant First Class Ussell, where do you work?*
A. *I am the supply sergeant at Fort Knight, USA.*
- TC.** *Your Honor, I request that this be marked as Prosecution Exhibit 1 for Identification. [Court reporter would so mark the exhibit and hand back to counsel.]*
- MJ.** *The record will so reflect.*
- TC.** *Your Honor, I request permission to approach the witness.*
- MJ.** *Permission granted.*
- Q.** *I now hand you Prosecution Exhibit 1 for Identification. What is it?*
A. *It is a picture of a brown car in the Fort Knight parking lot. The car has its windshield smashed.*
- Q.** *How do you recognize it?*
A. *I was on duty the morning of 6 August 1997. As part of my duty, I did an inspection of the parking lot. During my inspection of the lot, I discovered the car with its windshield broken. I took a picture of the vehicle in the parking lot to document my inspection.*
- Q.** *What viewpoint does this photograph show?*
A. *The picture is centered on the passenger side front quarter panel of the car so that the windshield on the passenger side and the passenger side of the car are clearly in view.*
- Q.** *Does this photo fairly and accurately depict the car on 6 August 1997?*
A. *It sure does.*
- TC.** *Your Honor, I now offer P.E. 1 for Identification into evidence as P.E. 1.*

Tab E
Module 6

Develop the Skill:
Foundations
Habit Evidence



The Advocacy Trainer

FOUNDATIONS: HABIT EVIDENCE

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** In our practice, laying the proper foundation for evidence is important for counsel to master. Counsel's ability to lay a foundation for an item of evidence develops confidence and provides for efficiency during the presentation of their case. This exercise develops counsel's ability to lay a proper foundation to introduce habit evidence. The supervisor should first lead a discussion of the law, review the practice pointers, and then conduct the suggested drill.
- B. **Training Overview.** The supervisor can conduct training with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of the practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions. It should take no longer than one hour to complete this training module.



II. THE LAW.

- A. "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." M.R.E. 406.
- B. M.R.E. 404 and 405 normally preclude introduction of evidence of prior acts to prove that an individual or organization acted in conformity with those acts. M.R.E. 406 creates an exception to the general ban on propensity evidence in two instances: (1) when the Government or defense offers evidence to show that a witness or the accused acted in conformity with a habit on a specific occasion; or (2) when the Government or defense offers evidence to show that an organization acted in conformity with a routine practice.

- C. The terms "habit" and "routine practice" are undefined in the Rule. For an act to achieve the status of habit or routine practice, it must be "regular, consistent and specific." Habitual conduct includes acts that occur with what has been termed "invariable regularity." Evidence of habit includes only specific actions taken routinely with little or no thought under certain circumstances. Examples might include using a car's turn signal, turning off the lights before leaving home, tying one's shoes in a double knot, etc.
- D. Habit evidence may not be introduced for the purpose of proving that an accused has the habit of engaging in criminal conduct or committing criminal acts. In other words, evidence of habit may not be used to circumvent the prohibitions found in M.R.E. 404(b) and 405.
- E. ***Elements of the Foundation: Habit Evidence or Routine Practice.***
1. *The witness is familiar with the person or business;*
 2. *The witness's familiarity has existed for a substantial period;*
 3. *The witness believes the person or business has a habit, a specific behavioral pattern; and*
 4. *The witness has observed the person or business act in conformity with the habit or business practice on multiple occasions.*



III.

PRACTICE POINTERS.

While it is relatively easy to establish the foundation for admitting evidence of an individual's "habit" or a business's "routine practice," the weight the panel will give the evidence depends on how well counsel prepares the witness, the thoroughness of the foundational questions, and the familiarity of the witness with the activity. Discuss the following points with counsel.

- ➔ **Habit evidence versus propensity.** Although these two types of evidence appear very similar, the law treats them differently. One way to distinguish them is to consider habit evidence as being more specific and predictable than character evidence. The admissibility of habit evidence must also comply with the other rules concerning character evidence. Therefore, the Government is unable to use habit evidence to show an accused's propensity to commit a certain crime, which would violate M.R.E. 404.

- **Occasions for use.** Habit evidence is useful when there is no witness with personal knowledge about how the accused or some other key player acted on a specific occasion. In this situation, either the Government or the defense may argue that the key player has a habit of acting a particular way in the circumstances in question. Thus the witness who testifies about a "habit" or "routine practice" does not need to have actual knowledge of the events in question, just personal knowledge of the *prior* acts giving rise to the "habit" or "routine practice."
- **Method of proof.** Habit evidence may only be proven by opinion evidence. Reputation evidence is not allowed. You should attempt to lay the foundation for the opinion evidence as substantially as possible to show familiarity with the accused's habit. When attempting to prove a habit or routine practice, consider the following five questions: (1) How often has the individual been observed performing the same conduct? (2) How similar is the past conduct with the conduct sought to be proved? (3) How unique is the conduct? (4) How uniformly or consistently has the conduct been performed? and (5) Does the conduct appear to be virtually automatic rather than discretionary in practice?
- **When to introduce the testimony in the case.** Critically analyze the strength of the habit evidence as a defense in your case. Employ the concepts of primacy and recency, i.e., introduce your strongest evidence first and last. Although corroboration is not required, if the accused or another witness with personal knowledge testifies about specifics in the case involving the habit evidence, presenting testimony immediately afterwards facilitates a logical presentation and strengthens the overall testimony. If the habit evidence is your best evidence, you should consider introducing it first or last. However, if the habit evidence is weak, yet you still feel it offers relevant evidence, consider introducing it in the middle of your case-in-chief.
- **Identify witnesses that may contradict the accused's habit.** Always ask your client if there is any evidence that would reduce the effectiveness of the habit evidence. Ensure that your own witnesses have not seen the accused fail to act consistently with the habit evidence you are offering. Be especially wary of potential rebuttal witnesses. If there are witnesses who will contradict your habit evidence, consider forgoing presentation of the evidence. The strength of this evidence is the consistent and repetitive nature of your client's response. If a witness is able to show that the accused does not always behave a certain way, the strength of this type of evidence is diminished.

IV.



SKILL DRILLS.

A. ***Goal: Train counsel to employ the following skills.***

1. Use direct examination techniques covered in previous training.
2. Determine the essential elements needed to establish habit evidence.
3. Lay a proper foundation for admitting habit evidence.

B. ***Conduct the drills.***

1. ***Preparation:*** Conduct this training in the courtroom with all necessary documents. Start with the enclosed statement of Sergeant Bill Day.
2. ***Role-Play:*** The supervisor will play the role of the judge. Designate counsel to play the role of defense counsel and the witness. The remaining participants will sit in the panel box and make appropriate objections.
3. ***Execution:*** Educate counsel about the elements of the foundation. Furnish counsel a list of the elements, either in a handout or on a chalkboard or easel. Give counsel Sergeant Day's statement and provide them fifteen minutes to prepare the foundation. Allow counsel to go through the foundation once with notes. Have them lay the foundation a second time, using only the foundation elements listed on the handout, chalkboard, or easel. Repeat the drill several times with each counsel.

C. ***Drill: Foundation for admitting Habit Evidence.***

1. ***The Facts.*** A Marine died in a traffic accident. He was one of two passengers in the car and was riding in the back seat. The autopsy and accident reconstruction expert testify that the dead Marine was not wearing a seat belt and would have lived had he been wearing such a safety restraint. The driver of the vehicle was not at fault for the accident. However, the Government charged him with negligent homicide for failing to ensure that the passengers in his car were wearing their seat belts as the state and installation law requires. The driver made a statement that both passengers had their seat belts on when he started his vehicle and began driving. He was unaware that the individual in the rear seat had unfastened his restraint (see attached sworn statement of Sergeant Day).

2. ***Sample foundation for the witness' testimony on the accused's habit.***

Q: Do you know Sergeant Joe Green?

A: Yes I do.

Q: How do you know him?

A: We are in the same unit together. We also live in the same apartment complex in town.

Q: Are you familiar with Sergeant Green's driving skills?

A: Yes I am.

Q: How is it that you are familiar with his driving skills?

A: We carpool to work during the week. Additionally, I have ridden in his car on the weekend if we both needed to run errands and occasionally, we have gone out after work with friends from the command.

Q: How long have you and Sergeant Green carpooled together?

A: Ever since we got back from deployment and my wife arrived. It has been over 18 months.

Q: How frequently does he drive during the week when you carpool together?

A: Sergeant Green drives three times a week, on Monday, Wednesday, and Friday. I drive on Tuesday and Thursday.

Q: How often do you ride in Sergeant Green's car besides carpooling to work together?

A: At least once a week and sometimes more.

Q: Was it common for you two to run errands on the way home from work?

A: Yes, we would stop by the store and pick up some groceries or go to the bank on Friday to get cash for the weekend.

Q: On these occasions when you ran errands on the way home from work, would you stay in the car or go with Sergeant Green?

A: I would always go along with him. I did not like to sit in the car by myself.

Q: Are you familiar with the term "habit"?

A: Yes, I am.

Q: What does it mean to you?

A: It means that someone always does something the same way.

Q: Did Sergeant Green have any particular habits when it came to driving a car?

A: Yes, he did.

Q: What was Sergeant Green's habit?

A: He always made you put on your seat belt before he started or moved the car.

Q: How many times did you see Sergeant Green behave consistent with this habit of making people in his car fasten their seat belt before he would start or move the car?

A: Every time I got in the car when he picked me up in the morning or when we got in the car together when running errands.

Q: Have you ever seen Sergeant Green behave consistently with this habit when other people were in his car?

A: Yes. The apartment complex we live in has many servicemembers living there from our command. He frequently gives others a ride to or from work.

Q: How often would you say that he gives other people rides?

A: Probably once a week.

Q: Does he make them wear their seat belts in the back seat?

A: Sergeant Green makes everyone that gets in his car wear their seat belts. No if, and, or buts about it. If you ride in his car, you wear a seat belt.

Q: Have you ever seen him fail to fasten his seat belt in his car?

A: Never. Even when he rode in my car, he always fastened his seat belt.

Q: Have you ever seen him allow someone else to ride in his car without fastening his or her seat belt?

A: No.

Q: Please explain what happens when you get in Sergeant Green's car in the morning?

A: I put my bag in the back seat then get in the passenger seat. After I sit down, I fasten my seat belt. Once Sergeant Green sees me fasten my seat belt he will put the car in gear and drive away.

Q: Has it always been this smooth?

A: No. When we first started car-pooling, I would not put on my seat belt. Sergeant Green would ask me to buckle up. Once the seat belt was on, he would drive away. I did not like wearing a seat belt so he always had to tell me at first. It got old hearing him say buckle up so I started fastening the seat belt once I got in the car. Occasionally, I will forget and Sergeant Green always reminds me.

Q: Is he this strict with people in the back seat?

A: Yes. When someone else is riding with us, he will actually turn his head around so that he can see if the other passenger has the seat belt fastened.

Q: Have you ever unbuckled your seat belt while riding in Sergeant Green's car?

A: Yes. In the mornings, the gate guard will frequently check identification cards for all people coming on base. I usually keep my wallet in my hand instead of putting it in my back pocket. If I forget, then I have to reach into my back pocket to get my wallet out. To do this, I must unbuckle my seat belt.

Q: Does Sergeant Green say anything to you about unbuckling your seat belt?

A: Not anymore, because I always fasten the seat belt as soon as I get my wallet. When we first started driving together, he would always remind me to buckle up after I unfastened the seat belt to get my wallet.



- D. *Summarize the main teaching points.* Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **Understand the foundational elements for habit evidence.**
- ✓ **Understand the distinction between habit evidence and character evidence**
- ✓ **Know how to employ these foundational elements.**



V.

REFERENCES.

- A. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID, 406 (1998).
- B. STEPHEN A. SALTZBURG, ET. AL., *MILITARY RULES OF EVIDENCE MANUAL* (4th ed. 1997).
- C. EDWARD J. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* ch. 10 (4th ed. 1998).

ENCLOSURES

Counsel Handout

Sergeant Day's Statement

Sample Solution

FOUNDATIONS: HABIT EVIDENCE

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for admitting habit evidence at trial.
- B. Preparation. Bring your MCM to the training. Review basic techniques of direct examination, cross examination, and objections. Additionally, review M.R.E. 406.



II. KEYS TO SUCCESS.

Know the Elements of a Foundation for admitting evidence of habit and routine practice.

1. *The witness is familiar with the person or business;*
2. *The witness's familiarity has existed for a substantial period;*
3. *The witness believes the person or business has a habit, a specific behavioral pattern; and*
4. *The witness has observed the person or business act in conformity with the habit or business practice on numerous occasions.*

III.



REFERENCES FOR FURTHER STUDY.

- A. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID, 406 (1998).
- B. STEPHEN A. SALTZBURG, ET. AL., *MILITARY RULES OF EVIDENCE MANUAL* (4th ed. 1997).
- C. EDWARD J. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* ch. 10 (4th ed. 1998).

ENCLOSURES

Sergeant Day's Statement

Sworn Statement of Sergeant Bill Day

I hereby make the following statement to Investigator Jones of the Criminal Investigative Division concerning my knowledge of Sergeant Joe Green:

I am presently assigned to Headquarters Battalion, 2nd Marine Division, Camp LeJeune, North Carolina. I live at 350 Oakwood Drive, Apartment 2A, Jacksonville, North Carolina.

Sergeant Joe Green is a fellow Noncommissioned Officer in our unit. I first met him before we deployed on a Mediterranean Cruise over two years ago. After returning from the float, my wife and I moved into the same apartment complex where Sergeant Green lives. Sergeant Green and I carpool to work during the week. I have also ridden in his car on the weekend if we both needed to run errands. Our families have also gone out together on the weekends and occasionally, we will go out after work with friends from the command. I have ridden in Sergeant Green's car outside of carpooling at least once a week and sometimes more over the past 18 months.

Sergeant Green and I have carpooled together ever since we returned from deployment and my wife arrived. It has been over 18 months. Sergeant Green normally drives three times a week, on Monday, Wednesday, and Friday. I drive on Tuesday and Thursday. We frequently stop by the store and pick up some groceries or go to the bank on Friday to get cash for the weekend. Whenever we run errands together, we both get out of the car; I don't like to sit in the car by myself.

I am familiar with the term "habit." It means that someone always does something the same way. Sergeant Green had the habit of always making you put on your seat belt before he started or moved the car. Every time I got in the car when Sergeant Green picked me up in the morning or when we got in the car together he made me wear my seat belt. Even when Sergeant Green rode in my car, he always fastened his seat belt.

If anyone else rode in Sergeant Green's car, he would always make them fasten their seat belt. The apartment complex we live in has many servicemembers living there from our command. He gives others a ride to or from work at least once a week. Sergeant Green makes everyone that gets in his car wear their seat belts. No if, and, or buts about it. If you ride in his car, you wear a seat belt.

On a typical morning, I follow the following routine. I put my bag in the back seat then get in the passenger seat. After I sit down, I fasten my seat belt. Once Sergeant Green sees me fasten my seat belt he will put the car in gear and drive away. It was not always this smooth. When we first started car-pooling I would not put on my seat belt. Sergeant Green would ask me to buckle up. Once the seat belt was on, he would drive away. I did not like wearing a seat belt so he always had to tell me at first. It got old hearing him say buckle up so I just started fastening the seat belt once I got in the car. Occasionally, I will forget and Sergeant Green

always reminds me. When someone else rides with us, he will actually turn his head so that he can see if they have their seat belt fastened.

Frequently, when we come to work in the mornings the gate guard will check identification cards for all people entering the base. I usually keep my wallet in my hand instead of putting it in my back pocket. If I forget, then I have to reach into my back pocket to get my wallet out. To do this, I must unbuckle my seat belt. When we first started driving together, he would always remind me to buckle up after I unfastened the seat belt to get my wallet. Sergeant Green does not have to remind me anymore because I always fasten the seat belt as soon as I get my wallet.

I hereby solemnly swear that the statement that I have given is the truth, the whole truth, and nothing but the truth, so help me God.

/s/ BILL DAY
Sergeant, USMC

FOUNDATIONS: HABIT EVIDENCE

SAMPLE SOLUTION



Q: *Do you know Sergeant Joe Green?*

A: *Yes I do.*

Q: *How do you know him?*

A: *We are in the same unit together. We also live in the same apartment complex in town.*

Q: *Are you familiar with Sergeant Green's driving skills?*

A: *Yes I am.*

Q: *How is it that you are familiar with his driving skills?*

A: *We carpool to work during the week. Additionally, I have ridden in his car on the weekend if we both needed to run errands and occasionally, we have gone out after work with friends from the command.*

Q: *How long have you and Sergeant Green carpooled together?*

A: *Ever since we got back from deployment and my wife arrived. It has been over 18 months.*

Q: *How frequently does he drive during the week when you carpool together?*

A: *Sergeant Green drives three times a week, on Monday, Wednesday, and Friday. I drive on Tuesday and Thursday.*

Q: *How often do you ride in Sergeant Green's car besides carpooling to work together?*

A: *At least once a week and sometimes more.*

Q: *Was it common for you two to run errands on the way home from work?*

A: *Yes, we would stop by the store and pick up some groceries or go to the bank on Friday to get cash for the weekend.*

Q: *On these occasions when you ran errands on the way home from work, would you stay in the car or go with Sergeant Green?*

A: *I would always go along with him. I did not like to sit in the car by myself.*

Q: *Are you familiar with the term "habit"?*

A: *Yes, I am.*

Q: What does it mean to you?

A: It means that someone always does something the same way.

Q: Did Sergeant Green have any particular habits when it came to driving a car?

A: Yes, he did.

Q: What was Sergeant Green's habit?

A: He always made you put on your seat belt before he started or moved the car.

Q: How many times did you see Sergeant Green behave consistent with this habit of making people in his car fasten their seat belt before he would start or move the car?

A: Every time I got in the car when he picked me up in the morning or when we got in the car together when running errands.

Q: Have you ever seen Sergeant Green behave consistently with this habit when other people were in his car?

A: Yes. The apartment complex we live in has many servicemembers living there from our command. He frequently gives others a ride to or from work.

Q: How often would you say that he gives other people rides?

A: Probably once a week.

Q: Does he make them wear their seat belts in the back seat?

A: Sergeant Green makes everyone that gets in his car wear their seat belts. No if, and, or buts about it. If you ride in his car, you wear a seat belt.

Q: Have you ever seen him fail to fasten his seat belt in his car?

A: Never. Even when he rode in my car, he always fastened his seat belt.

Q: Have you ever seen him allow someone else to ride in his car without fastening his or her seat belt?

A: No.

Q: Please explain what happens when you get in Sergeant Green's car in the morning?

A: I put my bag in the back seat then get in the passenger seat. After I sit down, I fasten my seat belt. Once Sergeant Green sees me fasten my seat belt he will put the car in gear and drive away.

Q: *Has it always been this smooth?*

A: *No. When we first started car-pooling, I would not put on my seat belt. Sergeant Green would ask me to buckle up. Once the seat belt was on, he would drive away. I did not like wearing a seat belt so he always had to tell me at first. It got old hearing him say buckle up so I start fastening the seat belt once I got in the car. Occasionally, I will forget and Sergeant Green always reminds me.*

Q: *Is he this strict with people in the back seat?*

A: *Yes. When someone else is riding with us, he will actually turn his head around so that he can see if the other passenger has the seat belt fastened.*

Q: *Have you ever unbuckled your seat belt while riding in Sergeant Green's car?*

A: *Yes. In the mornings, the gate guard will frequently check identification cards for all people coming on base. I usually keep my wallet in my hand instead of putting it in my back pocket. If I forget, then I have to reach into my back pocket to get my wallet out. To do this, I must unbuckle my seat belt.*

Q: *Does Sergeant Green say anything to you about unbuckling your seat belt?*

A: *Not anymore, because I always fasten the seat belt as soon as I get my wallet. When we first started driving together, he would always remind me to buckle up after I unfastened the seat belt to get my wallet.*

Tab E

Module 7

**Develop the Skill:
Foundations**

Voice Identification



The Advocacy Trainer

FOUNDATIONS: VOICE IDENTIFICATION

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This block demonstrates how to lay a foundation for **voice identification** and a **voice recording** through a lay witness familiar with the voice and recording device.
- B. **Training Overview.** Training can be conducted by the supervisor with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions.



II. THE LAW.

- A. **Using Voice Evidence.** There may be cases in which a voice has been heard over a phone or recorded and counsel seeks to identify the voice or admit the voice recording into evidence. For example, such an identification or recording could be direct evidence of an accused's misconduct if he were charged with making obscene phone calls (indecent language) or with threatening a witness. Alternatively, a victim's or witness's phone call to police may also have evidentiary value. As with other types of evidence, counsel seeking to introduce an identification or recording of the voice must present a witness who can identify the voice or exhibit, show that it is what it purports to be, and explain its relevance to the court. Counsel may rely upon lay opinion testimony to authenticate the voice or recording.

- B. ***Elements of the Foundation: Voice Identification.*** (MRE 901(b)(5)).
1. *The witness, at a specific time and place, heard a voice;*
 2. *The witness recognized the voice as that of a certain person;*
 3. *The witness is familiar with that person's voice;*
 4. *The witness explains the basis for his familiarity with that person's voice;*
 5. *The person made a statement during the conversation.*
- C. ***Elements of the Foundation: Recorded Voice Identification*** (MRE are silent on this foundation. See 58 A.L.R.2d 1024, 60 A.L.R.3d 333.)
1. *The recording device was capable of recording.*
 2. *The operator of the equipment was competent.*
 3. *The recording is authentic and correct.*
 4. *No changes, additions, or deletions have been made.*
 5. *Show how the recording was preserved.*
 6. *Identify the speaker.*

III.



SKILL DRILLS.

- A. ***Goal: Train counsel to employ the following skills.***
1. Use direct examination techniques covered in previous training.
 2. Lay a proper foundation for **oral** and **recorded** voice identification.
- B. ***Conduct the drills.***
1. ***Preparation:*** Conduct this training in the courtroom with all necessary props. On a cassette tape record the following statements for use by counsel during your training session. You should record the statements with the appropriate emotion.
 - a. “I’ll kill you, you bastard!” (phone call to victim’s residence.)

b. “Quick, hurry, my friend is lying on the sidewalk with blood all over him!” (911 call).

c. “I need help! I hurt bad, they just beat me up!” (911 call).

2. *Role Play:* The supervisor plays the roles of SPC Smith and military judge. You may opt to have one of your counsel play the military judge. Designate counsel to play the roles of proponent and opponent. Remaining participants will sit in the panel box and make appropriate objections.

3. *Execution:* Inform counsel of the elements of the foundations (provide on handout or chalkboard). Give them 10 minutes to prepare for two separate drills. Counsel, in turn, ask questions building on the questions asked by the first counsel, and then proceed around the room until the entire foundation is established. Each counsel asks one question. If the question does not establish some element of the foundation, the instructor will say “objection sustained” and move to the next counsel. When counsel believe that the foundation is complete, they should inform the supervisor. The supervisor should keep track of when the foundation is established so that he can pinpoint that for the counsel. Alternatively, and time permitting, the supervisor can designate counsel to lay the entire foundation. Each counsel will then individually lay the entire foundation.

a. Drill 1: (two versions below) Counsel will lay a foundation with a witness who heard statements over the phone and can recognize the voice that made the statement (see facts below).

b. Drill 2: Counsel will use the tape made earlier to introduce the evidence and identify the voice.

C. ***Drill 1 (Version 1): Voice Identification.***

1. The facts. The accused, SGT Jones, is charged with indecent language (Art. 134) and maltreatment of a subordinate (Art. 93). One evening, while serving as a medical orderly at a hospital, he made several obscene phone calls to one of his subordinates, who was working as CQ.

2. *Sample foundation for DRILL 1: Foundation for a **Voice Identification**.*

Q. SPC Smith (Victim), where were you on the evening of 4 October 97?

A. I was at the CQ duty desk, A Company, 1st Medical Battalion.

Q. What happened while you were there?

A. I received several phone calls over the course of two or three hours.

Q. Who was the caller?

A. SGT Jones.

Q. How do you know it was SGT Jones?

A. I've talked with him quite a lot. We're pretty close friends.

Q. How often have you spoken with him?

A. We've talked five or six times over the past week, on the job and back at the barracks.

Q. What condition was your telephone in when you received the calls?

A. Very good. I mean, the line was clear.

Q. How much background noise was there?

A. None. It was really quiet that night.

Q. What did SGT Jones say during this conversation?

A. He said over and over that he wanted to have sex with me, and what he wanted to do to me, but he used more vulgar language than that. He was also breathing really heavy, like he'd been running hard.

D. *Drill 1 (Version 2): Voice Identification.*

Using the statements provided in **III.B.1.**, the supervisor acts as the witness who heard the statements. For this exercise the supervisor and counsel will assume the statements were not recorded. The witness, played by the supervisor, must flesh out the witness's testimony.

- E. **Drill 2: Recorded Voice Identification.** Using the tape, counsel will lay the proper foundation.

Sample foundation for Drill 2: Foundation for a Recorded Voice (threat to kill).

TC. Where were you during the evening of 5 October 1997?

A. At home.

Q. What, if anything, happened?

A. I received a phone call from the accused.

Q. Did you answer the phone?

A. No.

Q. Do you have a telephone answering machine?

A. Yes.

Q. And how does the answering machine work?

A. When the phone rings and is not answered by the second ring, my recorded message begins telling the caller to leave a message. Then there is a beep and the caller's message is recorded.

Q. How do you access the recorded calls?

A. When I come home I simply push play and the tape plays the recorded messages.

Q. How old is the machine?

A. One year old.

Q. What condition is the machine in?

A. Excellent.

Q. What condition was it in the night of 5 October 1997?

A. Excellent.

Q. How often had you used the answering machine?

A. Daily for the last twelve months.

Q. Have you ever had a problem or found it inaccurate?

A. Never.

Q. Did you record any messages on the night of 5 October 1997.

A. Yes, I had been getting prank phone calls so I let the machine answer all my calls and that's why it recorded the accused's phone call.

- Q. What time did the accused call?**
A. About 2000 hours.
- Q. And what happened when the accused called?**
A. I let the phone ring and the answering machine clicked on. He then left a recorded message.
- Q. What did he say?**
A. He said, and I quote, "I'm going to gut you from head to toe the next time I see you! Pick up the phone!"
- Q. What did you do with the tape after this phone call?**
A. I took it out of the machine and locked it in the safe in my house until I brought it here today.
- Q. Is the tape in the same condition as when you took it from the machine?**
A. Yes.
- Q. Did you make any changes, additions or deletions to the tape?**
A. None.
- Q. How did you know the caller was the accused? [Continue with standard voice ID as described above.]**
- Q. I now hand you Prosecution Exhibit 4 for ID. What is it?**
A. It's the tape I've been talking about.
- Q. How do you recognize it?**
A. I wrote my name on it and the date when I took it out of the machine.
- Q. I offer P.E. 4 for ID as P.E. 4.**
- MJ. Objections?**
- DC. No.**
- MJ. P.E. 4 for ID is admitted as P.E. 4.**
- TC. I request permission to play the tape for the court members.**
- MJ. Proceed.**



F. ***Summarize the main teaching points.*** Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **Distinguish between the foundation for voice identification and voice recording - the latter requires questions regarding equipment reliability and tampering.**
- ✓ **Emphasize through foundation questions the witness's extensive prior familiarity with the accused or unique qualities of voice or a "turn of a phrase" commonly associated with the accused.**



IV.

REFERENCES.

- A. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 602, 901(b)(5) (1996).
- B. James W. McElhaney, *McElhaney's Trial Notebook* 311 (3d ed. 1994).
- C. David A. Schlueter et. al., *Military Evidentiary Foundations* 71-83 (1994).

FOUNDATIONS: VOICE IDENTIFICATION

COUNSEL HANDOUT



I.

TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for oral statement identification and recorded voice identification at trial.
- B. Preparation. Bring your MCM to the training. Review basic techniques of direct examination, cross examination, and objections. Review MRE 901.



II.

KEYS TO SUCCESS.

- A. Know the Elements of a Foundation for **Voice Identification**. (MRE 901(b)(5)).
1. *The witness, at a specific time and place, heard a voice;*
 2. *The witness recognized the voice as that of a certain person;*
 3. *The witness is familiar with that person's voice;*
 4. *The witness explains the basis for his familiarity with that person's voice;*
 5. *The person made a statement during the conversation.*
- B. Know the Elements of a Foundation for **Recorded Voice Identification**. (MRE are silent on this foundation. *See* 58 A.L.R.2d 1024, 60 A.L.R.3d 333.)
1. *The recording device was actually capable of recording.*
 2. *The operator of the equipment was competent.*
 3. *The recording is authentic and correct.*
 4. *No changes, additions, or deletions have been made.*
 5. *Show how the recording was preserved.*
 6. *Identify the speaker.*

III.



REFERENCES FOR FURTHER STUDY.

- A. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 602, 901(b)(5) (1996).
- B. James W. McElhaney, *McElhaney's Trial Notebook* 311 (3d ed. 1994).
- C. David A. Schlueter et. al., *Military Evidentiary Foundations* 71-83 (1994).

FOUNDATIONS: VOICE IDENTIFICATION

SAMPLE SOLUTIONS



Drill 1: Voice Identification

- Q. SPC Smith (Victim), where were you on the evening of 4 October 97?*
A. I was at the CQ duty desk, A Company, 1st Medical Battalion.
- Q. What happened while you were there?*
A. I received several phone calls over the course of two or three hours.
- Q. Who was the caller?*
A. SGT Jones.
- Q. How do you know it was SGT Jones?*
A. I've talked with him quite a lot. We're pretty close friends.
- Q. How often have you spoken with him?*
A. We've talked five or six times over the past week, on the job and back at the barracks.
- Q. What condition was your telephone in when you received the calls?*
A. Very good. I mean, the line was clear.
- Q. How much background noise was there?*
A. None. It was really quiet that night.
- Q. What did SGT Jones say during this conversation?*
A. He said over and over that he wanted to have sex with me, and what he wanted to do to me, but he used more vulgar language than that. He was also breathing really heavy, like he'd been running hard.

Drill 2: Recorded Voice Identification

- TC. *Where were you during the evening of 5 October 1997?*
A. *At home.*
- Q. *What, if anything, happened?*
A. *I received a phone call from the accused.*
- Q. *Did you answer the phone?*
A. *No.*
- Q. *Do you have a telephone answering machine?*
A. *Yes.*
- Q. *And how does the answering machine work?*
A. *When the phone rings and is not answered by the second ring, my recorded message begins telling the caller to leave a message. Then there is a beep and the caller's message is recorded.*
- Q. *How do you access the recorded calls?*
A. *When I come home I simply push play and the tape plays the recorded messages.*
- Q. *How old is the machine?*
A. *One year old.*
- Q. *What condition is the machine in?*
A. *Excellent.*
- Q. *What condition was it in the night of 5 October 1997?*
A. *Excellent.*
- Q. *How often had you used the answering machine?*
A. *Daily for the last twelve months.*
- Q. *Have you ever had a problem or found it inaccurate?*
A. *Never.*
- Q. *Did you record any messages on the night of 5 October 1997.*
A. *Yes, I had been getting prank phone calls so I let the machine answer all my calls and that's why it recorded the accused's phone call.*
- Q. *What time did the accused call?*
A. *About 2000 hours.*

- Q. And what happened when the accused called?**
A. I let the phone ring and the answering machine clicked on. He then left a recorded message.
- Q. What did he say?**
A. He said, and I quote, "I'm going to gut you from head to toe the next time I see you! Pick up the phone!"
- Q. What did you do with the tape after this phone call?**
A. I took it out of the machine and locked it in the safe in my house until I brought it here today.
- Q. Is the tape in the same condition as when you took it out of the machine?**
A. Yes.
- Q. Did you make any changes, additions or deletions to the tape?**
A. None.
- Q. How did you know the caller was the accused? [Continue with standard voice ID as described above.]**
- Q. I now hand you Prosecution Exhibit 4 for ID. What is it?**
A. It's the tape I've been talking about.
- Q. How do you recognize it?**
A. I wrote my name on it and the date when I took it out of the machine.
- Q. I offer P.E. 4 for ID as P.E. 4.**
- MJ. Objections?**
- DC. No.**
- MJ. P.E. 4 for ID is admitted as P.E. 4.**
- TC. I request permission to play the tape for the court members.**
- MJ. Proceed.**

Tab E
Module 8

Develop the Skill: Foundations

Identification of the Accused



The Advocacy Trainer

FOUNDATIONS: IDENTIFICATION OF THE ACCUSED

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** There may be cases where the accused's identity is in issue. In such cases, an out-of-court identification (ID) of the accused, occurring prior to trial (such as the victim picking the accused out of a lineup) may be admitted for the purpose of bolstering the credibility of the in-court identification and as substantive evidence of the truth of the identification.
- B. **Training Overview.** Training can be conducted by the supervisor with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions.



II. THE LAW.

- A. Generally, the rules of evidence prohibit bolstering (that is, introducing evidence to enhance a witness's credibility before her credibility is attacked). One exception to this rule is that of prior identification. Generally, if the witness has made an in-court identification of the accused, counsel may prove that she made a previous, out-of-court identification of the same person. Under MRE 321, the prior ID is not admitted as substantive evidence that the prior ID was correct; rather, it is admitted for the limited purpose of **increasing** the witness's **credibility**. In addition, MRE 801(d)(1)(C) permits the use of an ID as **substantive** evidence.
- B. Elements of the Foundation: **Prior Identification.** (MRE 321 & 801(d)(1)(C)).
1. *The witness has already made an in-court identification of the person;*
 2. *The witness had a pretrial opportunity to adequately observe the person;*
 3. *The pretrial encounter was conducted in a fair manner; and*
 4. *At the pretrial encounter, the witness properly identified the same person.*

III.



SKILL DRILLS.

A. **Goal:** *Train counsel to employ the following skills.*

1. Use direct examination techniques covered in previous training.
2. Lay a proper foundation for an identification.

B. **Conduct the drills.**

1. **Preparation:** Conduct this training in the courtroom. There are no required props for this drill. Supervisor must review MRE 321, 801 and the sample foundation provided below. Review of cited references is also recommended.
2. **Role Play:** The supervisor will play the roles of witness (SPC Smith) and military judge. Designate counsel to play the roles of proponent and opponent. Remaining participants will sit in the panel box and make appropriate objections.
3. **Execution:** Inform counsel of the elements of the foundation (provide on handout or chalkboard). Give them 10 minutes to prepare the foundation. Suggest you allow counsel to go through the foundation once with notes. Have them lay the foundation a second or third time, using only the foundation elements listed on the handout, chalkboard or easel.

C. **Drill: Foundation for a Prior Identification.** Give counsel the following facts and then have each lay the proper foundation. Alternatively, use the successive question drill technique.

1. The facts. The accused, SGT Jones, is at trial, charged with breaking into SPC Smith's room and raping her on 4 October 1996. Jones fled the scene and evaded capture. Some months after the crime, SGT Jones was arrested on suspicion of an unrelated offense. During a search incident to arrest, SPC Smith's purse is found in Jones's car. Jones was placed in a line-up with six other individuals of similar build and appearance. SPC Smith was brought in, and she picked out Jones on her second pass of the arrayed soldiers. She has just identified Jones in court as her attacker.

2. *Sample foundation for a **Prior Identification.***

*Q. **SPC Smith (Victim), where were you on the evening of 4 October 96?***

A. I was in my room at the A Company barracks.

*Q. **What happened while you were there?***

A. At about 0100 a man broke into my room, raped me at knifepoint, and then fled.

*Q. **Who was it who raped you?***

A. The accused.

*Q. **Would you please point him out and identify him?***

A. That man, SGT Jones (pointing).

*Q. **Your honor, the witness has identified the accused, SGT Jones. SPC Smith, how many times have you seen the accused?***

A. Four times.

*Q. **What were those occasions?***

A. Well, I first saw him when he raped me, then I saw him at the Article 32 hearing, I see him today in court, and I saw him one other time.

*Q. **What was the other time?***

A. At a lineup here on post.

*Q. **When was the lineup?***

A. In January 97.

*Q. **Where did the police hold the lineup?***

A. It was in the MP building.

*Q. **How was the lighting in the room?***

A. It was fine.

*Q. **How close were you?***

A. I was just about ten feet away.

*Q. **How were you facing?***

A. I was facing straight ahead, and looking at all the guys in the lineup.

*Q. **How long did the police give you to see the lineup?***

A. They said take as much time as I needed, but I only had to go up and down the lineup two times, so about five minutes.

Q. How many men were in the lineup?

A. Six.

Q. How were they dressed?

A. They all wore BDU T-shirts and BDU pants.

Q. How tall were they?

A. About the same height, around six feet.

Q. Did the police say anything about the lineup?

A. No. They brought me in, told me to take my time, and to turn and walk out if I recognized any of them.

Q. What were the men in the lineup doing?

A. Nothing. They just stood looking straight ahead.

Q. What happened after the lineup?

A. The police asked if I had recognized the rapist.

Q. What did you say?

A. I said yes, I did.

Q. Whom did you identify at the lineup?

A. The accused, the guy I just pointed out here.

DC. Your Honor, the defense requests a limiting instruction under Rule 105 to the effect that the fact that this witness identified her alleged attacker may be used only in assessing her credibility and not as substantive evidence that the person she identified in fact attacked her.

TC. May we have a sidebar or a 39(a) session, your Honor?

MJ. Approach for a sidebar.

TC. Your Honor, under MRE 321 and 801 we are permitted to introduce this witness's pretrial identification as substantive evidence. Thus, opposing counsel is not entitled to a limiting instruction. Indeed, because it is admissible as substantive evidence, the court members may also consider it on the issue of the weight to attach to the witness's credibility.

MJ. The request for a limiting instruction is denied. You may continue with your questioning.



D. ***Summarize the main teaching points.*** Following the drills, conduct a discussion of lessons learned, distribute the sample solutions, and summarize the main points:

- ✓ **Understand the difference between increasing the credibility of the witness with an ID and using the ID as substantive evidence.**
- ✓ **Rehearse the foundation with the witness.**



IV.

REFERENCES.

- A. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 321, 801(d)(1)(C) (1996).
- B. David A. Schlueter et. al., *Military Evidentiary Foundations* 124-127 (1994).
- C. CID Reg. 195-1, para. 5-16 (1 Oct. 1994).
- D. FM 19-20, Law Enforcement Investigations (Nov. 1985).

FOUNDATIONS: IDENTIFICATION OF THE ACCUSED

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for prior identification of an accused.
- B. Preparation. Bring your MCM to the training. Review basic techniques of direct examination, cross examination, and objections. Review MRE 321, 801.



II. KEYS TO SUCCESS.

- A. Know the Elements of a Foundation for Prior Identification of an Accused.
1. *The witness has already made an in-court identification of the person;*
 2. *The witness had a pretrial opportunity to adequately observe the person;*
 3. *The pretrial encounter was conducted in a fair manner; and*
 4. *At the pretrial encounter, the witness properly identified the same person.*



III. REFERENCES FOR FURTHER STUDY.

- A. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 321, 801(d)(1)(C) (1996).
- B. David A. Schlueter et. al., *Military Evidentiary Foundations* 124-127 (1994).
- C. CID Reg. 195-1, para. 5-16 (1 Oct. 1994).
- D. FM 19-20, Law Enforcement Investigations (Nov. 1985).

FOUNDATIONS: IDENTIFICATION OF THE ACCUSED

SAMPLE SOLUTION



- Q. SPC Smith (Victim), where were you on the evening of 4 October 96?**
A. I was in my room at the A Company barracks.
- Q. What happened while you were there?**
A. At about 0100 a man broke into my room, raped me at knifepoint, and then fled.
- Q. Who was it who raped you?**
A. The accused.
- Q. Would you please point him out and identify him?**
A. That man, SGT Jones (pointing).
- Q. Your honor, the witness has identified the accused, SGT Jones. SPC Smith, how many times have you seen the accused?**
A. Four times.
- Q. What were those occasions?**
A. Well, I first saw him when he raped me, then I saw him at the Article 32 hearing, I see him today in court, and I saw him one other time.
- Q. What was the other time?**
A. At a lineup here on post.
- Q. When was the lineup?**
A. In January 97.
- Q. Where did the police hold the lineup?**
A. It was in the MP building.
- Q. How was the lighting in the room?**
A. It was fine.
- Q. How close were you?**
A. I was just about ten feet away.
- Q. How were you facing?**
A. I was facing straight ahead, and looking at all the guys in the lineup.

- Q. How long did the police give you to see the lineup?**
A. They said take as much time as I needed, but I only had to go up and down the lineup two times, so about five minutes.
- Q. How many men were in the lineup?**
A. Six.
- Q. How were they dressed?**
A. They all wore BDU T-shirts and BDU pants.
- Q. How tall were they?**
A. About the same height, around six feet.
- Q. Did the police say anything about the lineup?**
A. No. They brought me in, told me to take my time, and to turn and walk out if I recognized any of them.
- Q. What were the men in the lineup doing?**
A. Nothing. They just stood looking straight ahead.
- Q. What happened after the lineup?**
A. The police asked if I had recognized the rapist.
- Q. What did you say?**
A. I said yes, I did.
- Q. Whom did you identify at the lineup?**
A. The accused, the guy I just pointed out here.
- DC. Your Honor, the defense requests a limiting instruction under Rule 105 to the effect that the fact that this witness identified her alleged attacker may be used only in assessing her credibility and not as substantive evidence that the person she identified in fact attacked her.**
- TC. May we have a sidebar or a 39(a) session, your Honor?**
- MJ. Approach for a sidebar.**
- TC. Your Honor, under MRE 321 and 801 we are permitted to introduce this witness's pretrial identification as substantive evidence. Thus, opposing counsel is not entitled to a limiting instruction. Indeed, because it is admissible as substantive evidence, the court members may also consider it on the issue of the weight to attach to the witness's credibility.**
- MJ. The request for a limiting instruction is denied. You may continue with your questioning.**

Tab E
Module 9

Develop the Skill: Foundations

Confessions



The Advocacy Trainer

FOUNDATIONS: ACCUSED'S WRITTEN CONFESSION*

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** In our practice, often the accused confesses to the crime. This exercise develops counsel's ability to lay a proper foundation to introduce an accused's written confession. The supervisor should first lead a discussion of the law, review practice pointers, and then conduct the suggested drill.
- B. **Training Overview.** The supervisor can conduct training with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions. It should take no longer than one hour to complete this training module.



II. THE LAW.

A. **Definitions.**



"Confession is an acknowledgement of guilt." M.R.E. 304(c)(1).



"Admission is a self-incriminating statement falling short of an acknowledgement of guilt, even if it is intended by its maker to be exculpatory." M.R.E. 304(c)(2).

* The term "confession" and "admission" are used interchangeably in this module. The law of self-incrimination does not discriminate between these two terms.

B. ***The Authentication Requirement.***

☞ “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” MRE 901.

☞ A rights warning certificate and written confession are best authenticated by a witness with knowledge of the documents. MRE 901(b)(1). Usually, the interrogating agent is the best witness to lay the authentication foundation.

C. ***Voluntariness of Statement.*** To be admissible, a statement by the accused (either a confession or admission) must be voluntary. MRE 304. Under certain circumstances, the accused must receive rights warnings, and must waive those rights, for the statement to be voluntary. MRE 305.

D. ***Hearsay.*** "A statement is not hearsay if . . . [it] is offered against a party and is (A) the party's own statement in either the party's individual or representative capacity . . ." MRE 801(d)(2). *See also* MRE 803(6).

E. ***Elements of the Foundation: A Confession.***

1. *The witness administered proper rights warnings.*
2. *The accused waived these warnings. (Introduce DA Form 3881 using the elements under Section F)*
3. *The witness heard, read or observed the accused's statement. (Introduce the written confession (DA Form 2823) using the elements under Section G)*
4. *The confession was voluntary.*

F. ***Elements of the Foundation: DA Form 3881 (Written Waiver of Rights Form).***

1. *The witness is familiar with DA Form 3881 (the rights warning form).*
2. *The witness explains the basis for his familiarity with DA Form 3881.*
3. *The witness identifies the exhibit as the DA Form 3881 relevant to the case.*
4. *The witness explains how he recognizes the exhibit.*

G. ***Elements of the Foundation: DA Form 2823 (Written Sworn Statement).***

1. *The witness is familiar with DA Form 2823 (the sworn statement form).*
2. *The witness explains the basis for his familiarity with DA Form 2823.*
3. *The witness identifies the exhibit as the DA Form 2823 relevant to the case.*
4. *The witness explains how he recognizes the exhibit.*



III.

PRACTICE POINTERS.

While it is relatively easy to establish the foundation for admitting an accused's confession, the weight the panel will give it depends on how well you prepare the witness and the thoroughness of the foundation questions. Discuss the following points with counsel.

- ***Carefully review the sworn statement and determine its inculpatory value.*** If the statement is exculpatory and does not contain any beneficial evidence, don't introduce the statement. If you introduce an exculpatory statement, the accused can present his story or theory without testifying.
- ***Be prepared to address bad information in the sworn statement.*** For example: the accused is charged with rape and states in his sworn statement that he and the victim previously had consensual intercourse prior to the rape.
- ***Prepare your witness.*** Usually, a law enforcement agent will be the witness you use to introduce the confession. Sometimes, however, the witness will be a member of the accused's chain of command. Regardless, it is essential to thoroughly prepare the witness. Explain to the witness why it is you are asking the foundational questions. A prepared witness will respond confidently and unequivocally.
- ***Have the agent explain in detail the procedures that he used when obtaining the accused's statement.*** Use common sense. It is not always necessary to do this in routine cases. Areas to cover include:
 - *the administration and waiver of rights,*
 - *the lack of restraints, i.e., the accused was not restrained and was free to leave,*

- *the length of the interrogation, and any breaks that occurred during the questioning (food, water, and restroom breaks),*
 - *the environment where the questioning occurred, i.e., describe the office setting,*
 - *the accused's physical and mental state,*
 - *the manner in which the confession was given (oral or written),*
 - *how the accused read the statement and corrected errors,*
 - *other witnesses to the statement, and*
 - *how the accused swore to the accuracy and truth of the statement.*
- ***Thoroughly go over the Rights Warning Procedure/Waiver Certificate (DA Form 3881) and the sworn statement (DA Form 2823) with the agent/witness.*** Through the witness, counsel must paint a clear picture of how the accused was advised of his rights and how the accused waived his rights. This is essential to show that the waiver of rights was voluntary. Further, the witness must explain the purpose of the sworn statement form and how the form was completed. Again, the focus of the testimony must establish that the confession was voluntary and accurate.
- ***When to introduce the statement in the case.*** Employ the concepts of primacy and recency, i.e., introduce your strongest evidence first and last. If the accused's statement is your best evidence, you should consider introducing it first or last. However, if the statement is weak, yet you still feel it offers relevant evidence, consider introducing it in the middle of your case-in-chief.
- ***Identify weaknesses.*** While conducting the direct examination of the witness, counsel should reveal weaknesses surrounding the taking of the statement. A common weakness counsel should address is the absence of audio/video recording. Prepare the witness so he can explain why there was no audio/video recording of the questioning. Addressing weaknesses during direct examination shows that the government is being forthright and just. Additionally, it takes the sting out of potential cross-examination. This is another time when you want to employ the concepts of primacy and recency. Since you are soliciting a weakness, consider placing this testimony somewhere in the middle of the examination. The idea is to address the weakness, but not highlight it.
- ***Once the statement is admitted, provide a copy to the trier of fact.*** This permits each panel member to look at the statement and follow along while the witness testifies.

IV.



SKILL DRILLS.

A. *Goal: Train counsel to employ the following skills.*

1. Use direct examination techniques covered in previous training.
2. Lay a proper foundation for a rights warning certificate and sworn confession.

B. *Conduct the drills.*

1. *Preparation:* Conduct this training in the courtroom with all necessary documents. Start with the enclosed documents (DA Forms 3881 and 2823) and the facts below.
2. *Role Play:* The supervisor will play the role of the witness and military judge. Designate counsel to play the role of trial counsel. The remaining participants will sit in the panel box and make appropriate objections. In your discretion, you may wish to appoint a counsel as military judge or use a military investigator as the witness. Using an investigator as a witness not only helps counsel work with a “real” witness, but educates the investigator about testifying and the foundation required for a confession.
3. *Execution:* Educate counsel about the elements of the foundation. Furnish counsel a list of the elements, either in a handout or on a chalkboard or easel. Give counsel the evidence (DA Forms 3881 and 2823) and fact scenario. Provide counsel fifteen minutes to prepare the foundation. Suggest you allow counsel to go through the foundation once with notes. Have them lay the foundation a second time, using only the foundation elements listed on the handout, chalkboard or easel.

C. ***Drill: Foundation for a Sworn Statement.***

1. ***The Facts.*** The accused is charged with rape. He gave a sworn statement describing what occurred with the victim and admitted to the intercourse, but claimed it was consensual. The accused was interviewed by Agent Moore, CID Field Office, Fort Brave. The office where the interview occurred was a “typical” CID office. The only people present during the interview were Agent Moore and the accused. Throughout the interview, the accused was not physically restrained and was afforded periodic breaks. The interview lasted three hours. The accused will claim that he was intoxicated and extremely tired at the time he gave the statement. In addition, the accused will claim the interview was extremely long and the agent would not let him leave the interview room to use the latrine.

2. ***Sample foundation for an accused's written confession.***

Q. Agent Moore, where do you work?

A. CID office on Fort Brave.

Q. Are you familiar with this case?

A. Yes, I am the lead agent in the case and interviewed the witnesses and the accused.

Q. How long have you been a CID agent?

A. 12 years sir.

Q. How long have you been at Fort Brave?

A. 2 years sir.

Q. What are your present duties?

A. Investigating felony crimes, interviewing witnesses, suspects, gathering evidence.

Q. What type of training do you undergo to qualify you as a CID agent?

A. Investigative procedures, legal training, search and seizure training, gathering evidence procedures, proper legal procedures for taking sworn statements and statements from suspects, etc.

Q. Approximately how many times have you obtained a sworn statement from a suspect?

A. Over 200 times.

Q. What are the procedures you follow when interviewing a suspect of a crime?

[Note: the witness will give a detailed account of the procedures]

WAIVER OF RIGHTS (DA FORM 3881)

Q. On March 25, 1998, did you obtain a sworn statement from the accused?

A. Yes.

Q. Where did you take the sworn statement?

A. At my office at CID.

Q. Why did the accused come into your office?

A. I called him and asked him if he would come in and discuss the allegation.

Q. What was the accused's response?

A. He said he would come in since he had nothing to hide.

Q. Did an agent pick the accused up or did he come in on his own?

A. On his own.

Q. What time did the accused arrive at your office?

A. Around 2225 hours

Q. Please describe your office?

** [Note: have the agent give a detailed description of the office]*

Q. Did you read the accused his rights before you questioned him?

A. Yes.

Q. How did you read him his rights?

A. I used a DA Form 3881, Rights Warning Procedure/Waiver Certificate.

TC. Your Honor, may I approach the witness?

MJ. Yes, you may.

Q. I am showing you P.E. 12 for ID. Do you recognize it? (Already have the document marked.)

A. Yes.

Q. What is it?
A. *It is the DA Form 3881, Rights Warning Procedure/Waiver Certificate.*

Q. Why are you familiar with this form?
A. *Because the accused and I signed the form.*

Q. Is P.E. 12 for ID the form you used in this case?
A. *Yes*

Q. How do you know?
A. *Because I recognize the accused's signature and my signature on the form*

Q. Did the accused sign the form in your presence?
A. *Yes.*

TC. Your Honor, I offer P.E. 12 for ID as P.E. 12.

MJ. It's admitted.

** [Note: Counsel should request to publish the exhibit at the appropriate time. Additionally, counsel should have copies for all the members. This permits the fact-finder to follow along on the form while you question the agent.]*

Q. Agent Moore, how did you use P.E. 12 to inform the accused of his rights against self-incrimination?
A. *After I obtained general information about the accused, I typed the information on the DA Form 3881. I then read the accused the rights listed under Section A of the form. I asked the accused if he understood his rights, which he indicated he did. I then had him initial the date and time blocks when the interview was conducted.*

Q. What did you do after you had the accused initial those blocks?
A. *I told the accused that he was suspected of rape, conspiracy to commit rape and kidnapping.*

Q. What did you do after you told the accused what he was suspected of?
A. *I typed on the form that the accused was suspected of rape and had him initial in Section A of the form.*

Q. What did you do after you had the accused initial Section A?
A. *I read the accused his rights directly from Section A of the DA Form 3881.*

Q. Using the DA Form 3881, would you please read the rights you gave the accused.

A. (Agent reads the rights directly from Section A)

Q. What was the accused doing while you were reading him his rights?

A. He was looking at me and appeared to be listening.

Q. What happened after you read the accused his rights?

A. I asked him if he had any questions about his rights or needed something repeated.

Q. What was the accused's response?

A. He said he heard his rights and didn't have any questions.

Q. What did you do after the accused stated he didn't have any questions?

A. I asked him if he understood his rights.

Q. What was the accused's response?

A. He said that he understood them.

Q. Did you have any reason to believe that the accused did not understand his rights?

A. No, he was listening and looking at me when I read them to him.

QUESTIONS ON ACCUSED'S PHYSICAL APPEARANCE

Q. Did the accused appear confused about his rights?

A. No.

Q. Please describe the accused's physical appearance when you gave him his rights?

A. Appeared normal. He was alert and quick to respond.

Q. Agent Moore, have you ever dealt with people in your work who were under the influence of alcohol or drugs?

A. Yes.

Q. Approximately how many times in your twelve years of law enforcement experience have you dealt with people under the influence of alcohol or drugs?

A. Easily over a hundred times.

Q. Did the accused appear that he was intoxicated?

A. No, not at all. He walked and talked fine.

Q. Were you ever close enough to the accused to smell alcohol on his breath if he had been drinking?

A. Yes, when I read him his rights and took his statement, I was only a few feet away from him.

Q. Did you smell any alcohol on his breath?

A. No.

Q. Did the accused appear that he was on drugs?

A. No, not at all.

Q. Was the accused slurring his words?

A. No. His speech was fine.

Q. How did the accused respond to your questions when you read him his rights?

A. Fine, he was quick to respond.

Q. If you thought the accused was intoxicated or under the influence of drugs, what would you have done?

A. I would have stopped the interview.

Q. Was the accused restrained in any way?

A. No. I told him he was free to leave any time he wanted.

WAIVER

Q. After providing the warnings, did the accused want to talk to you?

A. Yes.

Q. Did the accused agree to answer your questions at that time without an attorney being present?

A. Yes.

Q. Did the accused sign anything waiving his rights?

A. Yes, the accused signed Section B, DA Form 3881.

Q. Who else was present in your office?

A. Agent Smith.

Q. Was Agent Smith present throughout?

A. Yes.

Q. Where?
A. In the office with the accused and me.

Q. What was his role?
A. Observer. He signed as a witness under Block B of the DA Form 3881.

PROCEDURE FOR OBTAINING THE STATEMENT

Q. What happened after the accused waived his rights and agreed to give a statement?
A. I asked him if he wanted a break to use the latrine or get something to drink.

Q. What was the accused's response?
A. He said no.

Q. What happened next?
A. I obtained a sworn statement from the accused.

Q. Was Agent Smith present when you obtained the sworn statement?
A. Yes.

Q. Please describe how you obtained the sworn statement?
A. First, I had the accused tell me in his own words what happened with the victim.

Q. What did you do after the accused told you what happened?
A. I told the accused to tell me again what happened and that I would type what he said on the sworn statement form.

Q. What did you do after you typed the accused's statement?
A. After I was finished typing his narrative of the incident, I typed in questions I had on the sworn statement and typed in his responses to them.

Q. What happened after you typed in the accused's responses?
A. I asked the accused to read it carefully and make sure it was accurate.

Q. Did the accused read his statement?
A. Yes.

- Q. How do you know he read it?**
A. I watched him.
- Q. How long did it take for the accused to read his statement?**
A. Approximately 5 minutes.
- Q. What happened after the accused read his statement?**
A. I asked him if he wanted to make any changes to it?
- Q. What was his response?**
A. He said there were some words misspelled.
- Q. What did you do after he told you there were misspelled words?**
A. I told him to show me which words were misspelled and I corrected them and had him initial each correction.
- Q. What did you do after you had him initial each correction?**
A. I had the accused initial the end of each paragraph in the statement.
- Q. Why did you have the accused initial each paragraph?**
A. To ensure he read his statement.
- Q. Did the accused have any questions about his statement?**
A. No.
- Q. What did you do after you had the accused initial each paragraph?**
A. I typed in the accused's name, my name, and our location in the affidavit section of the sworn statement
- Q. What did you do after you typed in this information?**
A. I swore the accused to his statement and had him sign it.
- Q. What happened after you had the accused sign his statement?**
A. I signed the sworn statement.
- Q. What did you do after you signed the statement?**
A. I had Agent Smith sign as a witness to the statement.
- TC. Your honor, may I approach the witness?**
MJ. Yes.

Q. I am handing you what has been marked as P.E. 13 for ID, do you recognize it?

A. Yes.

Q. What is it?

A. It is the accused's statement.

Q. How do you know that it is the sworn statement you obtained from the accused?

A. Because it has his administrative information on the form and mine and his signature.

Q. Did the accused sign this statement in your presence?

A. Yes.

TC. Your honor, offer P.E. 13 for ID as P.E. 13?

MJ. It is admitted. (Have a copy for each member and publish them)





- D. *Summarize the main teaching points.* Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **Understand the foundational elements for the foundation of the rights warning certificate and written confession.**
- ✓ **Know how to employ these foundational elements.**
- ✓ **Plan and practice introducing the rights warning certificate and sworn statement with the agent.**
- ✓ **Have duplicate copies of the rights warning certificate and written confession for the members.**



V.

REFERENCES.

- A. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID, 304, 305, 801, 803 (1996).
- B. Edward J. Imwinkelried, *Evidentiary Foundations* chapt. 10 (4th ed 1998).

ENCLOSURES

Counsel Handout

DA Forms 3881 and 2823

Sample Solution

FOUNDATIONS: ACCUSED'S WRITTEN CONFESSION*

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for a rights warning certificate (DA Form 3881) and the accused's sworn statement (DA Form 2823) at trial.
- B. Preparation. Bring your MCM to the training. Review basic techniques of direct examination, cross examination, and objections. Additionally, review MRE 901.



II. KEYS TO SUCCESS.

Know the Elements of a Foundation for Admission of a rights warning certificate and written confession.

- A. ***Elements of the Foundation: A Confession.***
 - 1. *The witness administered proper rights warning.*
 - 2. *The accused waived these warnings. (Introduce DA Form 3881 using the elements under Section F)*
 - 3. *The witness heard, read or observed the accused's statement. (Introduce the written confession (DA Form 2823) using the elements under Section G)*
 - 4. *The confession was voluntary.*

* The term "confession" and "admission" are used interchangeably in this module. The law of self-incrimination does not discriminate between these two terms.

B. *Elements of the Foundation: DA Form 3881 (Written Waiver of Rights Form).*

1. *The witness is familiar with DA Form 3881 (the rights warning form).*
2. *The witness explains the basis for his familiarity with DA Form 3881.*
3. *The witness identifies the exhibit as the DA Form 3881 relevant to the case.*
4. *The witness explains how he recognizes the exhibit.*

C. *Elements of the Foundation: DA Form 2823 (Written Sworn Statement).*

1. *The witness is familiar with DA Form 2823 (the sworn statement form).*
2. *The witness explains the basis for his familiarity with DA Form 2823.*
3. *The witness identifies the exhibit as the DA Form 2823 relevant to the case.*
4. *The witness explains how he recognizes the exhibit.*



III.

REFERENCES FOR FURTHER STUDY.

- A. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID, 304, 305, 801, 803 (1996).
- B. Edward J. Imwinkelried, *Evidentiary Foundations* chapt. 10 (4th ed 1998).

ENCLOSURES

DA Forms 3881 and 2823

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

For use of this form, see AR 190-30; the proponent agency is ODCSOPS

DATA REQUIRED BY THE PRIVACY ACT

AUTHORITY: Title 10, United States Code, Section 3012(g)
PRINCIPAL PURPOSE: To provide commanders and law enforcement officials with means by which information may be accurately identified.
ROUTINE USES: Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.
DISCLOSURE: Disclosure of your Social Security Number is voluntary.

1. LOCATION CID Field Office, Fort Brave	2. DATE 26 May XX	3. TIME 2300	4. FILE NO. 98-2826
5. NAME (Last, First, MI) Tucker, James H.	8. ORGANIZATION OR ADDRESS Headquarters Company 45th Support Battalion Fort Brave		
6. SSN 278-46-7844	7. GRADE/STATUS SPC		

PART I - RIGHTS WAIVER/NON-WAIVER CERTIFICATE

Section A. Rights

The investigator whose name appears below told me that he/she is with the United States Army CID Field Office, Fort Brave and wanted to question me about the following offense(s) of which I am

suspected/accused: Rape

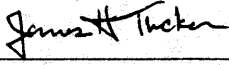
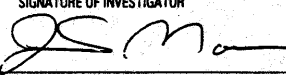
Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights:

- 1. I do not have to answer any question or say anything.
- 2. Anything I say or do can be used as evidence against me in a criminal trial.
- 3. (For personnel subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both.
- or -
- (For civilians not subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. I understand that this lawyer can be one that I arrange for at my own expense, or if I cannot afford a lawyer and want one, a lawyer will be appointed for me before any questioning begins.
- 1. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below.

5. COMMENTS (Continue on reverse side)
SPC Tucker waived his rights at 2315, 26 May XX; sworn statement is attached.

Section B. Waiver

I understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.

WITNESSES (If available)		3. SIGNATURE OF INTERVIEWEE 
1a. NAME (Type or Print) None	b. ORGANIZATION OR ADDRESS AND PHONE	4. SIGNATURE OF INVESTIGATOR 
2a. NAME (Type or Print) None	b. ORGANIZATION OR ADDRESS AND PHONE	5. TYPED NAME OF INVESTIGATOR Agent Jack S. Moore
		6. ORGANIZATION OF INVESTIGATOR CID Field Office, Fort Brave

Section C. Non-waiver

- 1. I do not want to give up my rights
 I want a lawyer I do not want to be questioned or say anything

2. SIGNATURE OF INTERVIEWEE

ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT (DA FORM 2823) SUBSEQUENTLY EXECUTED BY THE SUSPECT/ACCUSED

PART II - RIGHTS WARNING PROCEDURE

THE WARNING

- | | |
|---|---|
| <p>1. WARNING - Inform the suspect/accused of:</p> <ul style="list-style-type: none"> a. Your official position. b. Nature of offense(s). c. The fact that he/she is a suspect/accused. <p>2. RIGHTS - Advise the suspect/accused of his/her rights as follows:</p> <p>"Before I ask you any questions, you must understand your rights."</p> <ul style="list-style-type: none"> a. "You do not have to answer my questions or say anything." b. "Anything you say or do can be used as evidence against you in a criminal trial."
(For personnel subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer | <p>can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."</p> <p align="center">- or -</p> <p><i>(For civilians not subject to the UCMJ)</i> You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be one you arrange for at your own expense, or if you cannot afford a lawyer and want one, a lawyer will be appointed for you before any questioning begins."</p> <ul style="list-style-type: none"> d. "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate." <p>Make certain the suspect/accused fully understands his/her rights.</p> |
|---|---|

THE WAIVER

- | | |
|---|---|
| <p>"Do you understand your rights?"
(If the suspect/accused says "no," determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question.)</p> <p>"Have you ever requested a lawyer after being read your rights?"
(If the suspect/accused says "yes," find out when and where. If the request was recent (<i>i.e., fewer than 30 days ago</i>), obtain legal advice whether to continue the interrogation. If the suspect/accused says "no," or if the prior request was not recent, ask him/her the following question.)</p> | <p>"Do you want a lawyer at this time?"
(If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)</p> <p>"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?" <i>(If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect/accused says "yes," have him/her read and sign the waiver section of the waiver certificate on the other side of this form.)</i></p> |
|---|---|

SPECIAL INSTRUCTIONS

- | | |
|--|---|
| <p>WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE: If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.</p> <p>IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY: In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.</p> <p>PRIOR INCRIMINATING STATEMENTS:</p> <ul style="list-style-type: none"> 1. If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights he/she should be told that such statements do not obligate him/her to answer further questions. | <ul style="list-style-type: none"> 2. If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal. <p>NOTE: If 1 or 2 applies, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initialed by the suspect/accused.</p> <p>WHEN SUSPECT/ACCUSED DISPLAYS INDECISION ON EXERCISING HIS OR HER RIGHTS DURING THE INTERROGATION PROCESS: If during the interrogation, the suspect displays indecision about requesting counsel (for example, "Maybe I should get a lawyer."), further questioning must cease immediately. At that point, you may question the suspect/accused only concerning whether he or she desires to waive counsel. The questioning may not be utilized to discourage a suspect/accused from exercising his/her rights. (For example, do not make such comments as "If you didn't do anything wrong, you shouldn't need an attorney.")</p> |
|--|---|

COMMENTS *(Continued)*

SWORN STATEMENT			
<small>For use of this form, see AR 190-45; the proponent agency is ODCSOPS</small>			
LOCATION CID Field Office, Fort Brave	DATE 26 May XX	TIME 2330	FILE NUMBER 98-2826
LAST NAME, FIRST NAME, MIDDLE NAME Tucker, James H.	SOCIAL SECURITY NUMBER 278-46-7844		GRADE/STATUS SPC
ORGANIZATION OR ADDRESS Headquarters Company, 45th Support Battalion, Fort Brave			
<p>I, <u>SPC James H. Tucker</u>, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:</p> <p>My name is SPC James H. Tucker. I am assigned to Headquarters Company, 45th Support Battalion, Fort Brave. I have been stationed at Fort Brave for approximately two years.</p> <p>I have known PFC Beth Lewis for approximately six months; although we were never what you would call good friends, I've seen her off and on around post and at one or two intramural softball games. I think we may have both been at a couple of barracks parties, also.</p> <p>Before tonight, I had never been on a date with PFC Lewis, or ever really been together with her one-on-one socially. We have some common acquaintances, but, again, we were never what you'd call close friends.</p> <p>In the last several months I've heard some of the guys talking about PFC Lewis. The scuttlebutt and rumors pretty much have it that she's loose and likes to party. What I mean is that she has a reputation for being sexually active. However, before tonight, I never knew this for sure, and quite frankly, never really paid that much attention to any of it.</p> <p>I live in the barracks directly across the parking lot from PFC Lewis's barracks. Tonight, at around 1700, a bunch of us were hanging out in SPC Stewart's barracks room. We were drinking beer and listening to music. At around 1800 I noticed PFC Lewis was there. She was wearing a pair of satin shorts and a loose-fitting T-shirt. She came over and said "Hi." We had a casual conversation. She mentioned that she remembered seeing me at a softball game and a party. While we were talking, she was drinking a rum and coke. She appeared to be a little intoxicated. By this time I was pretty drunk. I suggested that we dance. She agreed. We danced a couple of fast songs. A slow song came along and she threw her arms around me and brought her body very close to mine. She then whispered in my ear, "How about we go to my room and have our own private party?" I could hardly believe my ears; I told her, "That works for me." The song ended and she said, "Give me ten minutes, then meet me in my room . . . I'll leave the door unlocked." She said good-bye to her friends and left the party. I had another beer and left the party. I went directly to PFC Lewis's room.</p> <p>The door to PFC Lewis's room was unlocked. I opened the door and peeked in; she was lying on the bed. She said to come on in. I locked the door when I went in. There was a lamp on, but it was very low. I went over to the bed and sat down. She pulled up her gown, and I began kissing her and touching her breasts. After a few minutes, I took off my shorts and underwear and got on top of her. She began to moan loudly, and I put my hand over her mouth so no one would hear her. She seemed to get even more excited, and was moving around even harder. We had sex for a few more minutes. At no time did she tell me "no" or "stop." Just at the point that I was about to climax, I withdrew my penis from her vagina and ejaculated all over her bed sheet and her nightgown. She was upset with me for messing up her bedding. Afterward, we just laid there together for a couple of minutes, catching our breath. I told her it was very good, but I hoped that no one heard us. PFC Lewis appeared very concerned; for the first time she told me that she wasn't exactly sure if we did the right thing. She told me that she had a boyfriend and that if he found out she had sex with me, he would get really mad. She told me this was a one-time deal, and that I was not to "tell a soul." I got dressed and left. I went back to the party.</p> <p>I returned to the party at around 2100. I started drinking heavily--mostly beers. At around 2200, Agent Moore arrived and asked me to accompany him to his office to talk about my sexual encounter with PFC Lewis. I agreed and went to his office for questioning.</p> <p>I am not sure how many beers I drank tonight. My best guess is somewhere between 12 and 15 beers.</p>			
EXHIBIT #98-2826-01	INITIALS OF PERSON MAKING STATEMENT <i>JHT</i>		PAGE 1 OF <u>2</u> PAGES
<small>ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT _____ DATED _____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE _____ OF _____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.</small>			

STATEMENT (Continued)

JHT

AFFIDAVIT

I, SPC James H. Tucker, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

James H. Tucker
(Signature of Person Making Statement)

WITNESSES:

None

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 26th day of May, 19 at Fort Brave

JS Moore
(Signature of Person Administering Oath)

ORGANIZATION OR ADDRESS

Agent Jack S. Moore
(Typed Name of Person Administering Oath)

ORGANIZATION OR ADDRESS

Article 136, UCMJ
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

JHT

PAGE 1 OF 2 PAGES

FOUNDATIONS: ACCUSED'S WRITTEN CONFESSION

SAMPLE SOLUTION



Q. Agent Moore, where do you work?

A. CID office on Fort Brave.

Q. Are you familiar with this case?

A. Yes, I am the lead agent in the case and interviewed the witnesses and the accused.

Q. How long have you been a CID agent?

A. 12 years sir.

Q. How long have you been at Fort Brave?

A. 2 years sir.

Q. What are your present duties?

A. Investigating felony crimes, interviewing witnesses, suspects, gathering evidence.

Q. What type of training do you undergo to qualify you as a CID agent?

A. Investigative procedures, legal training, search and seizure training, gathering evidence procedures, proper legal procedures for taking sworn statements and statements from suspects, etc.

Q. Approximately how many times have you obtained a sworn statement from a suspect?

A. Over 200 times.

Q. What are the procedures you follow when interviewing a suspect of a crime?

**** [Note: the witness will give a detailed account of the procedures]***

WAIVER OF RIGHTS (DA FORM 3881)

Q. On March 25, 1998, did you obtain a sworn statement from the accused?

A. Yes.

Q. Where did you take the sworn statement?

A. At my office at CID.

Q. Why did the accused come into your office?
A. I called him and asked him if he would come in and discuss the allegation.

Q. What was the accused's response?
A. He said he would come in since he had nothing to hide.

Q. Did an agent pick the accused up or did he come in on his own?
A. On his own.

Q. What time did the accused arrive at your office?
A. Around 2225 hours

Q. Please describe your office?

** [Note: have the agent give a detailed description of the office]*

Q. Did you read the accused his rights before you questioned him?
A. Yes.

Q. How did you read him his rights?
A. I used a DA Form 3881, Rights Warning Procedure/Waiver Certificate.

TC. Your Honor, may I approach the witness?

MJ. Yes, you may.

Q. I am showing you P.E. 12 for ID. Do you recognize it? (Already have the document marked.)
A. Yes.

Q. What is it?
A. It is the DA Form 3881, Rights Warning Procedure/Waiver Certificate.

Q. Why are you familiar with this form?
A. Because the accused and I signed the form.

Q. Is P.E. 12 for ID the form you used in this case?
A. Yes

Q. How do you know?
A. Because I recognize the accused's signature and my signature on the form

Q. Did the accused sign the form in your presence?
A. Yes.

TC. Your Honor, I offer P.E. 12 for ID as P.E. 12.

MJ. It's admitted.

** [Note: Counsel should request to publish the exhibit at the appropriate time. Additionally, counsel should have copies for all the members. This permits the fact-finder to follow along on the form while you question the agent.]*

Q. Agent Moore, how did you use P.E. 12 to inform the accused of his rights against self-incrimination?

A. After I obtained general information about the accused, I typed the information on the DA Form 3881. I then read the accused the rights listed under Section A of the form. I asked the accused if he understood his rights, which he indicated he did. I then had him initial the date and time blocks when the interview was conducted.

Q. What did you do after you had the accused initial those blocks?

A. I told the accused that he was suspected of rape, conspiracy to commit rape and kidnapping.

Q. What did you do after you told the accused what he was suspected of?

A. I typed on the form that the accused was suspected of rape and had him initial in Section A of the form.

Q. What did you do after you had the accused initial Section A?

A. I read the accused his rights directly from Section A of the DA Form 3881.

Q. Using the DA Form 3881, would you please read the rights you gave the accused.

A. (Agent reads the rights directly from Section A)

Q. What was the accused doing while you were reading him his rights?

A. He was looking at me and appeared to be listening.

Q. What happened after you read the accused his rights?

A. I asked him if he had any questions about his rights or needed something repeated.

Q. What was the accused's response?

A. He said he heard his rights and didn't have any questions.

Q. What did you do after the accused stated he didn't have any questions?

A. I asked him if he understood his rights.

Q. What was the accused's response?

A. He said that he understood them.

Q. Did you have any reason to believe that the accused did not understand his rights?

A. No, he was listening and looking at me when I read them to him.

QUESTIONS ON ACCUSED'S PHYSICAL APPEARANCE

Q. Did the accused appear confused about his rights?

A. No.

Q. Please describe the accused's physical appearance when you gave him his rights?

A. Appeared normal. He was alert and quick to respond.

Q. Agent Moore, have you ever dealt with people in your work who were under the influence of alcohol or drugs?

A. Yes.

Q. Approximately how many times in your twelve years of law enforcement experience how you dealt with people under the influence of alcohol or drugs?

A. Easily over a hundred times.

Q. Did the accused appear to be intoxicated?

A. No, not at all. He walked and talked fine.

Q. Were you ever close enough to the accused to smell alcohol on his breath if he had been drinking?

A. Yes, when I read him his rights and took his statement, I was only a few feet away from him.

Q. Did you smell any alcohol on his breath?

A. No.

Q. Did the accused appear to be on drugs?

A. No, not at all.

Q. Was the accused slurring his words?

A. No. His speech was fine.

Q. How did the accused respond to your questions when you read him his rights?

A. Fine, he was quick to respond.

Q. If you thought the accused was intoxicated or under the influence of drugs, what would you have done?

A. I would have stopped the interview.

Q. Was the accused restrained in any way?
A. No. I told him he was free to leave any time he wanted.

WAIVER

Q. After providing the warnings, did the accused want to talk to you?
A. Yes.

Q. Did the accused agree to answer your questions at that time without an attorney being present?
A. Yes.

Q. Did the accused sign anything waiving his rights?
A. Yes, the accused signed Section B, DA Form 3881.

Q. Who else was present in your office?
A. Agent Smith.

Q. Was Agent Smith present throughout?
A. Yes.

Q. Where?
A. In the office with the accused and me.

Q. What was his role?
A. Observer. He signed as a witness under Block B of the DA Form 3881.

PROCEDURE FOR OBTAINING THE STATEMENT

Q. What happened after the accused waived his rights and agreed to give a statement?
A. I asked him if he wanted a break to use the latrine or get something to drink.

Q. What was the accused's response?
A. He said no.

Q. What happened next?
A. I obtained a sworn statement from the accused.

Q. Was Agent Smith present when you obtained the sworn statement?
A. Yes.

Q. Please describe how you obtained the sworn statement?
A. First, I had the accused tell me in his own words what happened with the victim.

- Q. What did you do after the accused told you what happened?**
A. *I told the accused to tell me again what happened and that I would type what he said on the sworn statement form.*
- Q. What did you do after you typed the accused's statement?**
A. *After I was finished typing his narrative of the incident, I typed in questions I had on the sworn statement and typed in his responses to them.*
- Q. What happened after you typed in the accused's responses?**
A. *I asked the accused to read it carefully and make sure it was accurate.*
- Q. Did the accused read his statement?**
A. *Yes.*
- Q. How do you know he read it?**
A. *I watched him.*
- Q. How long did it take for the accused to read his statement?**
A. *Approximately 5 minutes.*
- Q. What happened after the accused read his statement?**
A. *I asked him if he wanted to make any changes to it?*
- Q. What was his response?**
A. *He said there were some words misspelled.*
- Q. What did you do after he told you there were misspelled words?**
A. *I told him to show me which words were misspelled and I corrected them and had him initial each correction.*
- Q. What did you do after you had him initial each correction?**
A. *I had the accused initial the end of each paragraph in the statement.*
- Q. Why did you have the accused initial each paragraph?**
A. *To ensure he read his statement.*
- Q. Did the accused have any questions about his statement?**
A. *No.*
- Q. What did you do after you had the accused initial each paragraph?**
A. *I typed in the accused's name, my name, and our location in the affidavit section of the sworn statement*
- Q. What did you do after you typed in this information?**
A. *I swore the accused to his statement and had him sign it.*

Q. What happened after you had the accused sign his statement?

A. I signed the sworn statement.

Q. What did you do after you signed the statement?

A. I had Agent Smith sign as a witness to the statement.

TC. Your honor, may I approach the witness?

MJ. Yes.

Q. I am handing you what has been marked as P.E. 13 for ID, do you recognize it?

A. Yes.

Q. What is it?

A. It is the accused's statement.

Q. How do you know that it is the sworn statement you obtained from the accused?

A. Because it has his administrative information on the form and mine and his signature.

Q. Did the accused sign this statement in your presence?

A. Yes.

TC. Your honor, offer P.E. 13 for ID as P.E. 13?

MJ. It is admitted. (Have a copy for each member and publish them)

Tab E
Module 10

Develop the Skill: Foundations

BAC Tests



The Advocacy Trainer

FOUNDATIONS: BREATHALYZER TEST RESULTS

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** After completion of this module, counsel will understand the foundational elements required for admission of breathalyzer test results. The counsel will master the predicate questions, be able to address objections to the admission of this evidence, and perform a direct examination of the witness.
- B. **Training Overview.** The supervisor can conduct training with one or more counsel. Training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions. If available, consider asking your local military police personnel to participate as role players. They will add realism to the exercise and receive valuable training as potential witnesses.



II. THE LAW.


- A. ***Proving a Drunk Driving Offense under Article 111 (Drunken or Reckless Operation of a Vehicle, Aircraft, or Vessel).***




The government may prove a drunk driving violation under Article 111, UCMJ, by showing that the accused was actually impaired or by showing that the accused had a blood or breath alcohol concentration (BAC) of 0.10 or greater as shown by chemical analysis (and that he was operating, physically controlling, or in actual physical control of a vehicle, aircraft or vessel).





Though these are independent theories of guilt, they often depend upon the same evidence. Proof of BAC of .10 or greater is sufficient for a conviction under the BAC theory, but it is also relevant and probative on the issue of actual impairment.

 Regardless of the theory alleged by the government, the testimony of the arresting officer and testimony regarding the accused's consumption of intoxicants and physical or mental impairment are normal parts of the prosecution's case.


B. *Breath/Blood-Alcohol Concentration (BAC).*

 The BAC is determined by chemical analysis of the breath or blood. The instrument used to ascertain the concentration of alcohol in the breath is known generically as a "breathalyzer," although it is often referred to by the brand name of the machine used in the jurisdiction (e.g. "The Intoxilyzer 5000").

 Proof of BAC is established through the testimony of the breathalyzer operator. The foundation for evidence of the breathalyzer test results must show that the test procedure and the instrument used are reliable. Reliability depends on the qualifications of the operator, adherence to specified test procedures, and proper calibration and functioning of the machine.

 Most breathalyzers also produce a printout, which records the test result. If either party wants to admit the printed test results, the operator's must authenticate it. The better view is that the printout is not hearsay because it is not a "statement" by a human declarant. If the trial judge holds that it is hearsay, then the proponent must lay the foundation for the public records exception of M.R.E. 803(8).¹

C. *Actual Drunkenness or Impairment.*

 A violation of Article 111 may also be proven by evidence of actual drunkenness or impairment. Such impairment may be inferred from the amount and nature of the intoxicating substance consumed by the accused, erratic operation of the vehicle, the arresting officer's observation of the accused, performance of field sobriety tests, and other evidence.

¹ See *United States v. DeWater*, 846 F.2d 528 (9th Cir. 1988) (holding that the trial court did not abuse its discretion in admitting the printed test result under the public records and reports exception in Fed. Rules Evid. 803(8)). The issue has not been addressed in any published opinion of the military courts.



The arresting officer's observations are normally recorded on DD Form 1920 (Alcoholic Influence Report) or civilian equivalent. The government cannot, however, admit this police report in evidence² and must rely on the officer's testimony.

D. Elements of the Foundation for Breathalyzer Test Results (Testimonial).

1. *The witness conducted an authorized breathalyzer test on the accused.*
2. *The witness was qualified and certified to operate the breathalyzer.*
3. *The breathalyzer was calibrated and in proper working order at the time of the test.*
4. *The witness followed prescribed testing procedures.*
5. *The test result was displayed/printed out by the breathalyzer.*

E. Elements of the Foundation for Breathalyzer Test Results (Documentary).

1. *The witness has laid a foundation for breathalyzer test results (see D above).*
2. *The witness can authenticate the document (M.R.E. 901).*
3. *The public record exception under M.R.E. 803(8)(B) applies:*
 - *There is a particular public office or agency.*
 - *That agency prepared a record or report of the breath test results in any form.*
 - *That agency had a legal duty to report breath test results.*
 - *The record or report contains the breath test results.]*

² This hearsay is inadmissible by the express terms of M.R.E. 803(8) ("excluding, however, matters observed by police officers and other personnel acting in a law enforcement capacity..."). Of course, opposing counsel should refer to the DD Form 1920 in preparing for cross-examination and may seek to admit the form as a prior inconsistent statement under M.R.E. 613.



III. PRACTICE POINTERS.

- ***Familiarize counsel with breathalyzer procedures.*** The test procedures for the certifying jurisdiction need to be strictly followed. Counsel must become thoroughly familiar with the test procedures of the certifying jurisdiction. The Provost Marshall's office at large installations will have a certified breathalyzer operator that can conduct a demonstration on the test procedures. Minor deviations from test procedure normally affect the weight but not the admissibility of the test result.
- ***Do not attempt to qualify breathalyzer operator as an expert.*** You do not need an expert *witness* to perfect a case under Article 111. No one needs to testify that the accused was "drunk" or "impaired" in order to secure a conviction.
- ***Corroborate the test result.*** Counsel should "bolster" BAC evidence with other evidence of the accused's pre and post-arrest behavior. Determine if your local law enforcement videotape the field sobriety tests or the post-arrest sessions at the police station/Provost Marshall's office. If they do not, recommend that videotaping the post-arrest sessions begin.
- ***Get the test printout admitted into evidence.*** Introduce the test results in documentary form, in addition to the Breathalyzer operator's testimony. This is a permissible method of repeating the same evidence of the BAC level. Additionally, the document is tangible and the members will take it back into the deliberation room.
- ***Combine BAC and impairment evidence.*** In cases where the BAC level is close to the legal limit (i.e., .10%) hammer the field sobriety tests evidence if the accused failed; conversely, the defense will nail their landing by establishing no failure. Test results will only get counsel into the legal presumption of intoxication. Evidence that the accused was or was not having difficulty controlling his physical faculties helps determine the intoxication question.

IV.



SKILL DRILLS.

A. *Goal: Train counsel to employ the following skills.*

1. Use direct examination techniques covered in previous training.
2. Lay a proper foundation for Breathalyzer test results.

B. *Conduct the Drill.*

1. *Preparation:* Conduct this training in the courtroom with all necessary props. It would be very helpful to conduct an OPD at the MP station and have a demonstration of how the breathalyzer works. Start with the facts below.
2. *Role-Play:* The instructor will play the role of the witness and military judge. Designate counsel to play the roles of proponent and opponent. Remaining participants will sit in the panel box and make appropriate objections. In your discretion, you may wish to appoint a counsel as military judge. [Highly encouraged: Use your local military police for this exercise.]
3. *Execution:* Inform counsel of the elements of the foundation (provide on handout, flip chart, overhead, or chalkboard). Give counsel five minutes to prepare the foundation. Counsel should go through the foundation once with notes. Counsel should then repeat the drill until they can lay the foundation a second and third time without notes.

C. ***Drill: Foundation for Breathalyzer Test Results.***

1. The facts: Captain Holly Golightly was stopped at the front gate of Fort Braxton at 0230 Saturday 2 December 19xx. Sergeant O.J. Berman stopped Captain Golightly for failure to dim lights upon approaching the gatehouse. Sergeant Berman noticed an odor of alcohol emanating from her breath and asked for the driver's identification and registration. When CPT Golightly was unable to accurately recite her birth date, Sergeant Berman asked her to exit the vehicle and perform a variety of field sobriety tests. Sergeant Berman apprehended Captain Golightly for DWI after she failed the finger-to-nose and one-legged stand tests. She was transported to the Provost Marshall's office (PMO). At the PMO, CPT Golightly consented to a breathalyzer test. Sergeant Berman took the accused to Sergeant Jack Daniels, the Breathalyzer operator. Sergeant Daniels took Captain Golightly to the Breathalyzer room where he advised her of her Article 31(b) rights and her right to observe the process and see the test results. Sergeant Daniels explained that for the next twenty minutes she needed to be observed by him; that she could not belch, burp, or regurgitate; that she could not place anything into her mouth, including gum or her fingers; and that she needed to remain in the room. After twenty minutes, Captain Golightly provided a valid breath sample. The test resulted in a BAC of 0.12 grams per 210 liters of breath.
2. In addition to the basic foundation for the operator's testimony, counsel will lay the necessary foundation for admission of the breathalyzer test printout.
3. Sample foundation for breathalyzer test results.

TC: Sergeant Daniels, what is your current duty assignment?

A: I am a Breathalyzer operator in the Accident Investigation Division, Provost Marshall's Office, Fort Braxton.

Q: How long have you been a Breathalyzer operator?

A: For 4 years. I have been a military police officer for eight years, but upon assignment to Fort Braxton, I was sent to school to become a Breathalyzer operator.

Q: What school did you attend?

A: It was a course put on by the Virginia Highway Patrol, Division of Forensic Science.

Q: How long is the course?

A: One week.

Q: What if any certification did you receive from the course?
A: The state certifies me to operate the Intoxicator 5000 breathalyzer machine.

Q: Do you have to maintain your certification?
A: Yes, I have to be recertified every year.

Q. On 2 December 19xx, were you certified to conduct breath analysis in the state of Virginia?
A. Yes I was.

** [NOTE: Be prepared to provide a copy of the certification if requested by the court.]*

Q. On 2 December 19xx, did you conduct a breath analysis on the accused, Captain Golightly?
A: Yes, I did.

Q. What device did you use to perform this test?
A. I used the Intoxicator 5000, which is the machine that I am certified on and the state requires us to use.

Q. Was the Intoxicator 5000 which you used to test CPT Golightly in good working condition on 2 December 19xx?
A. Yes it was.

Q. How do you know that the machine was in proper working condition that night?
A. Two reasons, sir. First, the machine is calibrated and inspected quarterly by the Virginia Department of Forensic Sciences. The machine used to test the accused had been checked and calibrated on November 29 19xx. Secondly, before conducting the test on CPT Golightly, I performed the required pretest procedures. The machine was working fine for the test on the accused.

Q. SGT Daniels, are you required to follow a standard procedure when conducting a breath test?
A. Yes, sir. The Virginia State Police have published a test procedure checklist that has been adopted by the Ft. Braxton Provost Marshal.

Q. Did you follow that procedure when you administered the breathalyzer test to CPT Golightly?
A. Yes, sir, I did.

Q. Please describe the procedures that you used?

A. Well, when she was brought into the office, I first explained what we were going to do. I told her that she had the right to observe the process and see the test reading. I told her that I needed to observe her for twenty minutes before I could take any breath samples and that she could not burp, regurgitate; or place any object into her mouth during that time.

Q. When did you start your observation time?

A. At 0330.

Q. After the observation time of twenty minutes, what did you do?

A. After twenty minutes, I began the test and just followed the machine prompts.

Q. What do you mean by “followed the machine prompts?”

A. The Intoxicator 5000 has preset defaults that basically guide the operator through each step of the procedure. It will not produce a valid reading unless the procedure is followed. I asked CPT Golightly to take a deep breath and blow into the machine. The subject has to blow hard enough to activate a whistle and sustain that for about ten seconds. CPT Golightly successfully completed the test as directed.

Q. How many samples did you take?

A. Well first there is a simulator result that does not involve the subject’s breath sample. Once I have that result, I ask the subject to blow into the instrument. I then wait 2 minutes and take a second sample to validate the result. If I have a good sample, I have the machine record the final result. I obtained a valid sample from CPT Golightly.

Q. What was the result of your breath analysis of Captain Golightl

A. The reading was a BAC of 0.12 grams per 210 liters of breath.

Q. Did you record that result in any way at the time of the test?

A. Yes, I obtained a printout of the BAC result from the Intoxicator.

* [At this point, counsel should authenticate the BAC printout and offer it into evidence. Optional: object on hearsay grounds to the admission of the printout and require counsel to respond by argument and, if necessary, additional foundation for a hearsay exception under M.R.E. 803(8).]



- D. *Summarize the main teaching points.* Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **Memorize the foundational elements for breathalyzer test results.**
- ✓ **Use your arresting officer to testify about the accused's pre and post-arrest behavior. Use FACTS that support your theory of intoxication; e.g. erratic driving, slurred speech, inability to stand.**
- ✓ **Introduce the breathalyzer test result printout. This provides tangible evidence for members to take to the deliberation room and is a permissible method of repeating the operator's testimony.**
- ✓ **Be prepared to respond to opponent's objections.**



V.

REFERENCES.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* (1994).
- B. Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* (4th ed. 1997).
- C. Paul C. Gianelli & Edward J. Imwinkelried, *Scientific Evidence* (1986).
- D. Andre a. Moenssens et al., *Scientific Evidence in Civil and Criminal Cases* (4th ed. 1995).

ENCLOSURES
Counsel Handout
Sample Solutions

FOUNDATIONS: BREATHALYZER TEST RESULTS

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. **Introduction.** We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for a blood-alcohol concentration (BAC) test result.
- B. **Preparation.** Bring your MCM to the training. Review basic techniques of direct examination, cross examination, and objections. Review MRE 803(6); 701; 702.



II. KEYS TO SUCCESS.

Know the elements of the Foundation for Breathalyzer Test Results (Testimonial).

1. *The witness conducted an authorized breathalyzer test on the accused.*
2. *The witness was qualified and certified to operate the breathalyzer.*
3. *The breathalyzer was calibrated and in proper working order at the time of the test.*
4. *The witness followed prescribed testing procedures.*
5. *The test result was displayed/printed out by the breathalyzer.*



III. REFERENCES FOR FURTHER STUDY.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* (1994).
- B. Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* (4th ed. 1997).
- C. Paul C. Gianelli & Edward J. Imwinkleried, *Scientific Evidence* (1986).
- D. Andre a. Moenssens et al., *Scientific Evidence in Civil and Criminal Cases* (4th ed. 1995).

ENCLOSURES
Drill Scenario

DRILL SCENARIO

Captain Holly Golightly was stopped at the front gate of Fort Braxton at 0230 Saturday 2 December 19xx. Sergeant O.J. Berman stopped Captain Golightly for failure to dim lights upon approaching the gatehouse. Sergeant Berman noticed an odor of alcohol emanating from her breath and asked for the driver's identification and registration. When CPT Golightly was unable to accurately recite her birth date, Sergeant Berman asked her to exit the vehicle and perform a variety of field sobriety tests. Sergeant Berman apprehended Captain Golightly for DWI after she failed the finger-to-nose and one-legged stand tests. She was transported to the Provost Marshall's office (PMO). At the PMO, CPT Golightly consented to a breathalyzer test. Sergeant Berman took the accused to Sergeant Jack Daniels, the Breathalyzer operator. Sergeant Daniels took Captain Golightly to the Breathalyzer room where he advised her of her Article 31(b) rights and her right to observe the process and see the test results. Sergeant Daniels explained that for the next twenty minutes she needed to be observed by him; that she could not belch, burp, or regurgitate; that she could not place anything into her mouth, including gum or her fingers; and that she needed to remain in the room. After twenty minutes, Captain Golightly provided a valid breath sample. The test resulted in a BAC of 0.12 grams per 210 liters of breath.

FOUNDATIONS: BREATHALYZER TEST RESULT

SAMPLE SOLUTION



- Q. Sergeant Daniels, what is your current duty assignment?**
A. I am a breathalyzer operator in the Accident Investigation Division, Provost Marshall's Office, Fort Braxton.
- Q. How long have you been a Breathalyzer operator?**
A. For 4 years. I have been a military police officer for eight years, but upon assignment to Fort Braxton, I was sent to school to become a Breathalyzer operator.
- Q. What school did you attend?**
A. It was a course put on by the Virginia Highway Patrol, Division of Forensic Science.
- Q. How long is the course?**
A. One week.
- Q. What if any certification did you receive from the course?**
A. The state certifies me to operate the Intoxicator 5000 breathalyzer machine.
- Q. Do you have to maintain your certification?**
A. Yes, I have to be recertified every year.
- Q. On 2 December 19xx, were you certified to conduct breath analysis in the state of Virginia?**
A. Yes I was.
- * [NOTE: Be prepared to provide a copy of the certification if requested by the court.]*
- Q. On 2 December 19xx, did you conduct a breath analysis on the accused, Captain Golightly?**
A: Yes, I did.
- Q. What device did you use to perform this test?**
A. I used the Intoxicator 5000, which is the machine that I am certified on and the state requires us to use.

- Q. Was the Intoxicator 5000 which you used to test CPT Golightly in good working condition on 2 December 19xx?**
- A. Yes it was.
- Q. How do you know that the machine was in proper working condition that night?**
- A. Two reasons, sir. First, the machine is calibrated and inspected quarterly by the Virginia Department of Forensic Sciences. The machine used to test the accused had been checked and calibrated on November 29 19xx. Secondly, before conducting the test on CPT Golightly, I performed the required pretest procedures. The machine was working fine for the test on the accused.
- Q. SGT Daniels, are you required to follow a standard procedure when conducting a breath test?**
- A. Yes, sir. The Virginia State Police have published a test procedure checklist that has been adopted by the Ft. Braxton Provost Marshal.
- Q. Did you follow that procedure when you administered the breathalyzer test to CPT Golightly?**
- A. Yes, sir, I did.
- Q. Please describe the procedures that you used?**
- A. Well, when she was brought into the office, I first explained what we were going to do. I told her that she had the right to observe the process and see the test reading. I told her that I needed to observe her for twenty minutes before I could take any breath samples and that she could not burp, regurgitate; or place any object into her mouth during that time.
- Q. When did you start your observation time?**
- A. At 0330.
- Q. After the observation time of twenty minutes, what did you do?**
- A. After twenty minutes, I began the test and just followed the machine prompts.
- Q. What do you mean by “followed the machine prompts?”**
- A. The Intoxicator 5000 has preset defaults that basically guide the operator through each step of the procedure. It will not produce a valid reading unless the procedure is followed. I asked CPT Golightly to take a deep breath and blow into the machine. The subject has to blow hard enough to activate a whistle and sustain that for about ten seconds. CPT Golightly successfully completed the test as directed.

Q. How many samples did you take?

A. Well first there is a simulator result that does not involve the subject's breath sample. Once I have that result, I ask the subject to blow into the instrument. I then wait 2 minutes and take a second sample to validate the result. If I have a good sample, I have the machine record the final result. I obtained a valid sample from CPT Golightly.

Q. What was the result of your breath analysis of Captain Golightly?

A. The reading was a BAC of 0.12 grams per 210 liters of breath.

Q. Did you record that result in any way at the time of the test?

A. Yes, I obtained a printout of the BAC result from the Intoxicator.

** [At this point, counsel should authenticate the BAC printout and offer it into evidence. Optional: object on hearsay grounds to the admission of the printout and require counsel to respond by argument and, if necessary, additional foundation for a hearsay exception under M.R.E. 803(8).]*

Tab E
Module 11

Develop the Skill: Foundations

Videotapes



The Advocacy Trainer

FOUNDATIONS: VIDEOTAPES

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise develops counsel's ability to lay the proper foundation for a videotape. Lead a discussion of the law and practice pointers, and then conduct the suggested drills.
- B. **Training Overview.** The supervisor can conduct training with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of training points and distribution of sample solutions.



II. THE LAW.

A. ***The Authentication Requirement.***



“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” MRE 901.



“Photographs include still photographs, X-ray films, videotapes and motion pictures.” MRE 1001(2).



The first method for authenticating a videotape is the **pictorial testimony method**. The videotape is authenticated by the testimony of a witness who is familiar with the scene depicted and states that the videotape is an accurate representation of the scene.



A second method for authenticating a videotape is the **silent witness method**. This method is used when no person can verify from personal knowledge, that the videotape actually represents what occurred (e.g. videotape at automatic teller machine). The videotape is authenticated by establishing the process by which the videotape is recorded, *i.e.* the installation of the camera, use and security of the camera, testing, removal of the film and testimony as to the chain of custody. The evidence proves the operation, security, and maintenance of the camera.

B. *Elements of the foundation for Pictorial Testimony (For foundations of photographs, see Tab E, Module 5).*

1. *The witness is familiar with the scene.*
2. *The witness explains the basis for his familiarity with the scene.*
3. *The witness recognizes the videotape.*
4. *The witness testifies the videotape is a “fair,” “accurate,” “true,” or “correct” depiction of the scene at the relevant time.*

C. *Elements of the Foundation by Silent Witness (operation, security, and maintenance of the camera system).*

1. *That the recording device was capable of recording at the relevant time.*
2. *The recording is authentic and correct (loading and removal of film done correctly).*
3. *No changes, additions, or deletions have been made to the film (operation, security, and maintenance of the camera system).*
4. *A showing of the manner of preservation of the recording.*





III.

PRACTICE POINTERS.

- ***Plan viewing angles.*** Ensure television monitors are sufficient in size and picture quality to allow all members to see them clearly. Consider using more than one monitor and have a plan for moving them into position for the presentation. The monitors should be positioned so that the panel, the military judge, the sponsoring witness, and the accused can see.
- ***Test the tape and the equipment.*** Any time counsel plans on using a videotape in court it is essential to test the equipment before trial and the morning of the trial to ensure it works. The relevant portion of the tape should be played from the beginning to the end when tested.
- ***Cue the tape in advance.*** If the tape needs to be cued to a particular segment, the counsel must personally do that preparation and double check immediately before the videotape will be used. Ensure the record reflects the portion of the videotape that was played (*e.g.*, from 1721 to 1742 on the videotape's clock or from counter __ to counter __).
- ***Rehearse the presentation.*** Because of the presentation logistics, counsel must rehearse the use of the videotape with the sponsoring witness.
- ***Alert the military judge.*** Advise the military judge in a pretrial 802 conference of your intent to use the video presentation and discuss courtroom logistics.
- ***Turn the volume off.*** If the videotape contains recordings as well, they will often constitute hearsay unless an exception applies, (*e.g.*, admission by the accused). Unless the hearsay *problem* is overcome, plan on having the audio turned off during the presentation. Ensure the record reflects that the audio was turned off.



IV.



SKILL DRILLS.

A. ***Goal: Train counsel to employ the following skills.***

1. Use direct examination techniques covered in previous training.
2. Lay a proper foundation for a videotape.

B. ***Conduct the drills.***

1. ***Preparation:*** Conduct this training in the courtroom with all necessary props. Have a videotape (*e.g.*, any videotape will do since the purpose is to handle the evidence).
2. ***Role Play:*** The instructor will play the role of the witness and military judge. Designate counsel to play the roles of proponent and opponent. Remaining participants will sit in the panel box and make appropriate objections. In your discretion, you may wish to appoint a counsel as military judge.
3. ***Execution:*** Inform counsel of the elements of the foundation (provide on handout or chalkboard). Give counsel five minutes to prepare the foundation. You may allow counsel to go through the foundation once with notes. Have them lay the foundation a second and third time, using only the foundation elements listed on the handout, chalkboard, or easel.

C. ***Drill 1: Foundation for a Videotape using the Pictorial Testimony Method.***

1. ***The Facts:*** The Criminal Investigative Division (Agent Oscar) has videotaped the area where the accused allegedly pushed the victim off a cliff. The film was shot two months after the alleged offense occurred. However, Agent Oscar had visited the area the day of the incident. Have counsel admit the videotape through Agent Oscar.

2. Sample Solution.

TC. Your Honor, I request permission to approach the witness.

MJ. Permission granted.

Q. I now hand you Prosecution Exhibit 1 for Identification. What is it?

A. It is a videotape I took on (Date) of an area known as Pine Cliff.

Q. How do you recognize it?

A. I placed my initials on it. I also reviewed the tape yesterday.

Q. When did you film the videotape?

A. On about _____ when you requested I go out and film the area.

Q. Had you ever been to Pine Cliff before you filmed the area?

A. Several times, I like to go to that area to picnic with my family.

Q. Have you been to Pine Cliff in the course of your duties?

A. Yes, I was there on _____, the day (victim's) body was discovered.

Q. Did you look around the area?

A. Yes, I was investigating and spent several hours examining the area.

Q. Please give a general description of the area known as Pine Cliff.

A. It's a beautiful area with lots of pine trees. The pine trees go straight up to the edge of the cliff. From the top of the cliff there is a thousand foot drop to jagged rocks below.

Q. Does this videotape fairly and accurately depict Pine Cliff on (date of body discovery)?

A. Yes, it does. The only real difference is the trees and foliage are a little greener than they were then.

TC. Your Honor, I now offer P.E. 1 for Identification into evidence as P.E. 1. After P.E. 1 is admitted, counsel should request permission to show the videotape to the members.

D. ***Drill 2: Foundation for a Videotape using the Silent Witness Method.***

1. ***The Facts:*** The accused is charged with using the victim's ATM card to commit a larceny of \$200.00 on 22 December 1997. Bank records show the withdrawal was made at 1721 hours. Ms. Kathryn Martin is the security officer for the Free Take Out bank. A camera is in place which films transactions at the ATM. Have counsel admit the videotape through Ms. Martin.

2. Sample solution.

Q. Are you currently employed at the Free Take Out bank as the security officer?

A. Yes, I am.

Q. Were you the security officer on 22 December 1997?

A. Yes, I was.

Q. What security procedures are employed on the ATM machines outside the bank?

A. I can't discuss all our security procedures.

Q. I'll be more specific. Is there a videotape which films ATM transactions?

A. Yes, there is.

Q. What type of camera?

A. It's a JVC industrial VCR Camcorder with an 18x zoom lens.

Q. Does it have any features to help determine the time and date?

A. Yes. As it films, the time in a 24-hour clock format and date, the day, month and year are in the upper right-hand corner of the film.

Q. Who maintains the camera?

A. I do unless I'm on vacation.

Q. Were you on vacation in December of 1997?

A. No, I wasn't.

Q. How do you maintain the camera?

A. The camera can film for a 24 hour period. I keep the film for a minimum of 30 days. Obviously, if we need the film for a longer time it's kept. On most days there is no reason to keep the film so we reuse it.

Q. How do you know the camera is working?
A. I check it everyday. I spot check it; I don't review the whole film. One thing I do is check to see it filmed me correctly when I use the ATM.

Q. Have you ever had any problems with the camera and film?
A. Only once, when I forgot to turn it back on after I had reloaded film.

Q. What do you do with the film after you spot check it?
A. I label it with the date and place it in my safe.

Q. What happens if you get a request for a transaction?
A. I will see first if I have the film, and then see if the transaction was captured.

** [Same steps to mark exhibit as in Drill 1 and approach the witness.]*

Q. Ms. Martin, I am now handing you Prosecution Exhibit ___ for Identification. Do you recognize it?
A. Yes, this is the ATM's videotape from 22 December 1997?

Q. How do you know that?
A. That is my writing on the label with the date and I brought this to you around 1200 today.

Q. Did this film the ATM area around 1721 hours?
A. Yes, it did. I've viewed the film and on the VCR in the courtroom you will find it between counter numbers ____ and ____.

Q. Has this film been altered or modified in anyway?
A. No, it hasn't.

Q. Have you kept control of this tape since the 23rd of December?
A. It's been in my possession at all times. The tape has been in my safe or sight since I removed it from the VCR on 23 December 1997. No one has tampered with it.

TC. Your honor, I now offer Prosecution Exhibit ___ for Identification into evidence. Specifically, I offer that portion of the tape between the videotape's clock 1720-1723 or counter __ and __.



- E. *Summarize the main teaching points.* Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **There are two primary methods of laying a foundation for a videotape. Know the foundation elements for authentication of a videotape using the *pictorial testimony* and *silent witness* methods.**
- ✓ **Know where to find foundation elements when recall fails.**
- ✓ **Plan and practice the use of the videotape with the sponsoring witness.**
- ✓ **Carefully plan courtroom logistics to ensure a smooth and professional presentation.**



V. REFERENCES.

- A. David A. Schlueter, et al., *Military Evidentiary Foundations* (1994).
- B. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).
- C. Edward J. Imwinkelried, *Evidentiary Foundations* (2nd ed. 1989).
- D. Andre A Moenssens, et al., *Scientific Evidence in Civil and Criminal Cases* (4th ed. 1995).
- E. *United States v. Kaspers*, 47 M.J. 176 (1997).
- F. *United States v. Reichart*, 31 M.J. 521 (A.C.M.R. 1990).

ENCLOSURES
Counsel Handout
Sample Solution

FOUNDATIONS: VIDEOTAPES

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for a videotape at trial.
- B. Preparation. Review MRE's 901 and 1001(2).



II. KEYS TO SUCCESS.

- A. Review basic techniques of effective direct examination.
- B. Preview the elements of the foundation for videotape listed below:
 - 1. **Elements of Foundation for Pictorial Testimony.**
 - *That the witness is familiar with the scene.*
 - *The witness explains the basis for his familiarity with the scene.*
 - *The witness recognizes the scene in the videotape.*
 - *The witness testifies the videotape is a "fair," "accurate," "true," or "correct" depiction of the scene at the relevant time.*

2. **Elements of the Foundation by Silent Witness.**

- *That the recording device was capable of recording at the relevant time.*
- *The recording is authentic and correct (loading and removal of film done correctly).*
- *No changes, additions, or deletions have been made to the film (operation, security, and maintenance of the camera system).*
- *A showing of the manner of preservation of the recording.*

III.



REFERENCES FOR FURTHER STUDY.

- A. David A. Schlueter, et al., *Military Evidentiary Foundations* (1994).
- B. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).
- C. Edward J. Imwinkelried, *Evidentiary Foundations* (2nd ed. 1989).
- D. Andre A Moenssens, et al., *Scientific Evidence in Civil and Criminal Cases* (4th ed. 1995).
- E. *United States v. Kaspers*, 47 M.J. 176 (1997).
- F. *United States v. Reichart*, 31 M.J. 521 (A.C.M.R. 1990).

FOUNDATIONS: VIDEOTAPES

SAMPLE SOLUTION



Drill 1: Foundation for a Videotape using the Pictorial Testimony Method.

** [Ensure witness has been properly introduced.]*

TC. *Your Honor, I request permission to approach the witness.*

MJ. *Permission granted.*

Q. *I now hand you Prosecution Exhibit 1 for Identification. What is it?*

A. *It is a videotape I took on (Date) of an area known as Pine Cliff.*

Q. *How do you recognize it?*

A. *I placed my initials on it. I also reviewed the tape yesterday.*

Q. *When did you film the videotape?*

A. *On about _____ when you requested I go out and film the area.*

Q. *Had you ever been to Pine Cliff before you filmed the area?*

A. *Several times, I like to go to that area to picnic with my family.*

Q. *Have you been to Pine Cliff in the course of your duties?*

A. *Yes, I was there on _____, the day (victim's) body was discovered.*

Q. *Did you look around the area?*

A. *Yes, I was investigating and spent several hours examining the area.*

Q. *Please give a general description of the area known as Pine Cliff.*

A. *It's a beautiful area with lots of pine trees. The pine trees go straight up to the edge of the cliff. From the top of the cliff there is a thousand foot drop to jagged rocks below.*

Q. *Does this videotape fairly and accurately depict Pine Cliff on (date of body discovery)?*

A. *Yes, it does. The only real difference is the trees and foliage are a little greener than they were then.*

TC. *Your Honor, I now offer P.E. 1 for Identification into evidence as P.E. 1. After P.E. 1 is admitted, counsel should request permission to show the videotape to the members.*

Drill 2: Foundation for Videotape using the Silent Witness Method.

* [Ensure the witness has been properly introduced.]

Q. *Are you currently employed at the Free Take Out bank as the security officer?*

A. *Yes, I am.*

Q. *Were you the security officer on 22 December 1997?*

A. *Yes, I was.*

Q. *What security procedures are employed on the ATM machines outside the bank?*

A. *I can't discuss all our security procedures.*

Q. *I'll be more specific. Is there a videotape which films ATM transactions?*

A. *Yes, there is.*

Q. *What type of camera?*

A. *It's a JVC industrial VCR Camcorder with an 18x zoom lens.*

Q. *Does it have any features to help determine the time and date?*

A. *Yes. As it films, the time in a 24-hour clock format and date, the day, month and year are in the upper right-hand corner of the film.*

Q. *Who maintains the camera?*

A. *I do unless I'm on vacation.*

Q. *Were you on vacation in December of 1997?*

A. *No, I wasn't.*

Q. *How do you maintain the camera?*

A. *The camera can film for a 24 hour period. I keep the film for a minimum of 30 days. Obviously, if we need the film for a longer time it's kept. On most days there is no reason to keep the film so we reuse it.*

Q. *How do you know the camera is working?*

A. *I check it everyday. I spot check it; I don't review the whole film. One thing I do is check to see it filmed me correctly when I use the ATM.*

Q. *Have you ever had any problems with the camera and film?*

A. *Only once, when I forgot to turn it back on after I had reloaded film.*

Q. What do you do with the film after you spot check it?

A. I label it with the date and place it in my safe.

Q. What happens if you get a request for a transaction?

A. I will see first if I have the film, and then see if the transaction was captured.

** [Same steps to mark exhibit as in Drill 1 and approach the witness.]*

Q. Ms. Martin, I am now handing you Prosecution Exhibit ___for Identification. Do you recognize it?

A. Yes, this is the ATM's videotape from 22 December 1997?

Q. How do you know that?

A. That is my writing on the label with the date and I brought this to you around 1200 today.

Q. Did this film the ATM area around 1721 hours?

A. Yes, it did. I've viewed the film and on the VCR in the courtroom you will find it between counter numbers ____ and ____.

Q. Has this film been altered or modified in anyway?

A. No, it hasn't.

Q. Have you kept control of this tape since the 23rd of December?

A. It's been in my possession at all times. The tape has been in my safe or sight since I removed it from the VCR on 23 December 1997. No one has tampered with it.

TC. Your honor, I now offer Prosecution Exhibit ___for Identification into evidence. Specifically, I offer that portion of the tape between the videotape's clock 1720-1723 or counter __ and __.

Tab E
Module 12

Develop the Skill: Foundations

X-rays



The Advocacy Trainer

FOUNDATIONS: X-RAY FILM

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise develops counsel's ability to lay the proper foundation for X-ray film. Lead a discussion of the law and practice pointers and then conduct the suggested drills.
- B. **Training Overview.** Training can be conducted by the supervisor with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of training points and distribution of sample solutions.



II. THE LAW.

A. *The Authentication Requirement.*




"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901.





"Photographs include still photographs, X-ray films, video tapes, and motion pictures." MRE 1001(2).



Typically, an X-ray is authenticated by a witness who states that the X-ray film accurately and fairly shows the condition of the patient's body as it was at the relevant date. There is no need to address the scientific basis for X-ray technology or that the X-ray machine was in good working order or properly used. (Note, however, that some courts may require evidence that the machine was in proper working condition.) The treating physician identifies the X-ray film as that of the particular patient.

-  Another method is to introduce an X-ray film as a business record. Medical facilities routinely take, label, and maintain X-ray films under established procedures, and rely on them for diagnosing and treating patients.

-  A third method is to treat the X-ray film as a readily identifiable article. This method may be utilized when the X-ray technician uses an identification assembly (*i.e.*, typed label with patient's name, date, sponsor's social security number, and hospital which is exposed on the film) during the X-ray.

-  The sufficiency of the authenticating evidence is a question of fact for the military judge under MRE 104(a). In addition to the authentication requirement, the proponent of evidence must be prepared to respond to objections based upon relevance, confusion or unfair prejudice, and hearsay. *See* MREs 403 and 803.

B. Elements of the foundation when using as photograph (photographs, See Tab E, Module 5).

1. *The witness (i.e., usually the treating doctor) is familiar with the patient's condition on the relevant date.*
2. *The witness explains the basis for his familiarity with the X-ray film.*
3. *The witness recognizes the X-ray film.*
4. *The witness testifies the X-ray film "fairly and accurately" shows the condition of the patient's body as it was on the relevant date.*

C. Elements of the foundation (using business records, See Tab E, Module 4).

1. *Witness is the custodian or other qualified witness.*
2. *X-ray film and label were made by a person with knowledge of the facts or made from information transmitted by a person with knowledge of the facts.*
3. *X-ray film was made at or near the time of the conditions (label) appearing on it.*
4. *X-ray film was made as part of the routine practice of the hospital.*
5. *X-ray film was kept in the course of a regular conducted business activity.*

D. **Elements of the foundation when using an identification assembly.**

1. *The operator was a qualified X-ray technician.*
2. *The operator filmed a certain part of a person's body at a certain time and place.*
3. *The operator used certain equipment that was in good working condition.*
4. *The operator used an identification assembly on the cassette (film).*
5. *The operator maintained custody of the film between filming and trial; the chain of custody includes proof of the proper development of the film (i.e., explanation of the identification assembly).*



III.

PRACTICE POINTERS.

- ***Is the x-ray necessary?*** As with any piece of evidence, evaluate whether there is a better way to prove the fact in issue. Presentation of x-rays in court will require special equipment and may pose foundational problems. If an expert is going to present the relevant testimony, ask if a professionally produced diagram would be a simpler and more effective way of communicating the information found on the x-ray. See MRE 705.
- ***Stipulate, if possible.*** If the issue of authentication is not really in doubt, the opposing counsel may be willing to stipulate to the admissibility of X-ray film.
- ***Check hospital procedures.*** Most hospitals use an identification assembly during the X-ray. Hospitals use typed labels inserted into the cassette (film). The X-ray technician places the patient's name, date and social security or patient file number in the corner of the film. This practice simplifies the task of authentication.
- ***Prepare for alternative methods of authentication.*** If the photograph or identification assembly methods are unavailable, prepare to use the business records method as a back up. Many hospital personnel can provide testimony to lay a business record foundation, and the doctor testifying as an expert may also have the requisite personal knowledge to lay this foundation.
- ***Ask the military judge.*** If you think that the x-ray will be needed, ask the military judge at an 802 conference early in the case what he will require to authenticate the x-ray.

- ➔ Occasionally, a court may require the proponent of the X-ray film to show the operator's qualifications, the working order of the X-ray, and a chain of custody for the X-ray cassette. It may be wise to seek admission of the x-ray at a pretrial 39a.
- ➔ ***Practice stage management.*** Presentation of testimony about x-ray film will require special equipment (i.e., a light board). Rehearse the use of such equipment and ensure it is in good working order prior to trial.



IV.

SKILL DRILLS.

A. ***Goal: Train counsel to employ the following skills.***

1. Use direct examination techniques covered in previous training.
2. Lay a proper foundation for X-ray film.

B. ***Conduct the drills.***

1. ***Preparation:*** Conduct this training in the courtroom with all necessary props. Use an X-ray film from the local military treatment facility.
2. ***Role-Play:*** The instructor will play the role of the witness and military judge. Designate counsel to play the roles of proponent and opponent. Remaining participants will sit in the panel box and make appropriate objections. In your discretion, you may wish to appoint a counsel as military judge.
3. ***Execution:*** Inform counsel of the elements of the foundation (provide on handout or chalkboard). Give counsel five minutes to prepare the foundation. Suggest you allow counsel to go through the foundation once with notes. Have them lay the foundation a second and third time, using only the foundational elements listed on the handout, chalkboard or easel.

C. **Drills:** Assume the following facts for each drill. Lola Mason (age 6) was taken to the Fort Apache military hospital for treatment. Her father (Major Frank Mason) brought Lola to the emergency room and explained she had fallen off her bike. Lola told the medical staff her left arm hurt and would not provide anymore information. Captain (Dr.) Butler examined Lola and ordered X-ray films of her left arm. Specialist Charlie Ward took two X-ray films of Lola's arm. Specialist Ward used a typed label to place Lola's name, date, (sponsor's) father's social security number, and Fort Apache hospital on the cassettes. The X-ray films revealed two spiral fractures of her left arm. The X-ray films were later examined by Dr. Sam Spock, the region's leading child abuse expert. Major Frank Mason is on trial for aggravated assault of a child under the age of 16 years.

1. *Drill 1.* Lay the foundation for the X-ray films through Captain Butler using the photograph method. Assume Captain Butler has already been qualified as an expert in the general practice of medicine.
2. *Drill 2.* Lay the foundation for the X-ray films through Ms. Kathryn Booth using the business record method. Assume Ms. Booth is a civilian employee of the hospital. She works in the patient records department.
3. *Drill 3.* Lay the foundation through Specialist Ward using the identification assembly method. The first time assume the judge does not require the operator's qualifications, etc. Repeat the drill assuming the judge requires the proponent to show the operator's qualifications, the working order of the X-ray, and a chain of custody for the X-ray cassette.





D. *Summarize the main teaching points.* Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points.

- ✓ **There are three foundation methods for X-ray films. The three methods are business record, identification assembly, and photograph.**
- ✓ **Know the law and foundation requirements for admitting X-ray film into evidence. Determine what the court requires for the foundation. It is possible that the court will require testimony that both the operator and machine were in working order and there is a chain of custody .**
- ✓ **Rehearse your presentation with your witness(es).**



V. REFERENCES.

- A. David A. Schlueter, et al., *Military Evidentiary Foundations* (1994).
- B. Edward J. Imwinkelried, *Evidentiary Foundations* (2nd ed. 1989).
- C. Andrew A. Moenssens, et al, *Scientific Evidence in Civil and Criminal Cases* (4th ed. 1995).
- D. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).

ENCLOSURES
Counsel Handout
Sample Solution

FOUNDATIONS: X-RAY FILM

COUNSEL HANDOUT

I.



TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for a X-ray film at trial.
- B. Preparation. Review MRE's 901 and 1001(2).

II.



KEYS TO SUCCESS.

- A. Know the elements of the foundation when using as a photophraph.
 - 1. *The witness (i.e., usually the treating doctor) is familiar with the patient's condition on the relevant date.*
 - 2. *The witness explains the basis for his familiarity with the X-ray film.*
 - 3. *The witness recognizes the X-ray film.*
 - 4. *The witness testifies the X-ray film "fairly and accurately" shows the condition of the patient's body as it was on the relevant date.*
- B. Know the elements of the foundation when using as a business record.
 - 1. *Witness is the custodian or other qualified witness.*
 - 2. *X-ray film and label were made by a person with knowledge of the facts or made from information transmitted by a person with knowledge of the facts.*
 - 3. *X-ray film was made at or near the time of the conditions (label) appearing on it.*
 - 4. *X-ray film was made as part of the routine practice of the hospital.*
 - 5. *X-ray film was kept in the course of a regular conducted business activity.*

- C. Know the elements of the foundation when using an identification assembly.
1. *The operator was a qualified X-ray technician.*
 2. *The operator filmed a certain part of a person's body at a certain time and place.*
 3. *The operator used certain equipment that was in good working condition.*
 4. *The operator used an identification assembly on the cassette (film).*
 5. *The operator maintained custody of the film between filming and trial; the chain of custody includes proof of the proper development of the film (i.e., explanation of the identification assembly).*

III.



REFERENCES FOR FURTHER STUDY.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* (1994).
- B. Edward J. Imwinkelried, *Evidentiary Foundations* (2nd ed. 1989).
- C. Andrew A. Moenssens, et al, *Scientific Evidence in Civil and Criminal Cases* (4th ed. 1995).
- D. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).

FOUNDATIONS: X-RAY FILM

SAMPLE SOLUTION



Drill 1: Laying the foundation using the photograph method.

Assume that Captain Butler has completed part of his testimony. He has described his initial examination of Lola Mason.

Q. Captain Butler, did you order any X-rays of Lola Mason during your examination and treatment on _____?

A. Yes, I did.

Q. For what parts of the body did you order X-rays?

A. I ordered two X-rays of her left arm, an anterior-posterior view and a lateral view.

TC. Your Honor, I request that this be marked as Prosecution Exhibits __ and __ for Identification.

MJ. The record will so reflect.

TC. I am showing Prosecution Exhibits __ and __ to the Defense Counsel.

TC. Your Honor, I request permission to approach the witness.

MJ. Permission granted.

Q. I now hand you Prosecution Exhibits __ and __ for Identification. Do you recognize them?

A. Yes, I do.

Q. What are they?

A. These are the two X-ray films of Lola's arm taken on _____.

Q. How do you recognize these particular X-ray films being of Lola Mason?

A. Well, the identification assembly is exposed on the film when the X-rays are taken.

Q. What information is in the identification assembly?
A. The identification assembly always has the patient's name, date, sponsor's social security, and our hospital's name on it. These X-ray films show them to be of Lola Mason taken on _____.

Q. Do the X-rays themselves help you determine who the patient is?
A. Both exhibits show spiral type fractures. This type fracture is unusual and I remember seeing those exact fractures when I first examined Lola Mason's X-rays.

Q. Do Prosecution Exhibits __ and __ for identification fairly and accurately portray the bones in Lola Mason's left arm as they were on _____?
A. Yes, they do.

TC. Your Honor, I now offer Prosecution Exhibit's. __ and __ for Identification into evidence as Prosecution Exhibits __ and __.

MJ. Does the Defense have an objection?

DC. No, your honor.

MJ. Prosecution Exhibits __ and __ for Identification are admitted into evidence as Prosecution Exhibits __ and __.

Drill 2: Laying the foundation using the business record method.

Q. Is your name Ms. Kathryn Booth?
A. Yes, it is.

Q. Your last name is spelled BOOTH?
A. That's correct.

Q. You're currently employed as a GS-5 at the Fort Apache hospital?
A. Yes, I am.

Q. What do you do at the hospital?
A. I work in radiology.

Q. What are your responsibilities regarding records?
A. I'm responsible for the radiology records. I ensure they are kept, maintained, filed and secured in accordance with our SOP.

Q. Are there orders and regulations that govern radiology records?
A. Yes, there are. DOD, Department of the Army and Fort Apache hospital orders all give guidance for records. They tell me everything I need to know.

- Q. Do you and others in the hospital follow those orders and regulations?**
A. Yes, we do.
- Q. What is in a radiology record?**
A. [Witness describes various parts of a record.]
- Q. Describe how these records are compiled?**
A. Whenever any care provider is doing something, he or she will document what he did on the appropriate form. One example is when you see the doctor. He or she will document on Standard Form ___ what occurred. Radiology keeps the same type of records.
- Q. Are X-ray films part of the record?**
A. Anytime X-rays are taken they become part of the patient's medical record. Our orders and common sense require it. X-ray films can be important for treatment now or in the future.
- Q. Who takes the X-rays and puts the information on the identification assembly?**
A. The X-ray technician.
- Q. When does the X-ray technician put the information on the label?**
A. At the time he takes the picture. The label is part of the X-ray film.
- Q. Are the taking and labeling of X-ray films part of the regular practice of the hospital?**
A. Yes, it happens everyday.
- Q. Are X-ray films used in the hospital?**
A. Yes, they are used every day. Doctors use the entire medical record every day. Before I go home every day, I pull the radiology records of any patient who has an appointment. I send the record to the department that will treat the patient.
- Q. Are radiology records, to include X-ray films, kept in the course of your hospital's regular practice?**
A. Yes, that is what I do every day. It's my job.
- TC. Your Honor, I request that this be marked as Prosecution Exhibits ___ and ___ for Identification.
- MJ. The record will so reflect.
- TC. I am showing Prosecution Exhibits ___ and ___ to the Defense Counsel.
- TC. Your Honor, I request permission to approach the witness.
- MJ. Permission granted.

Q. Ms. Booth, I'm showing you Prosecution Exhibits __ and __ for identification. Do you recognize them?

A. Yes, I do.

Q. What are Prosecution Exhibits __ and __?

A. They are X-ray films taken of Lola Mason at Fort Apache hospital on _____.

Q. How do you know that?

A. The X-ray labels tell me that. I also removed these X-ray films from Lola Mason's radiology record at your request.

TC. Your Honor, I now offer Prosecution Exhibit's. __ and __ for Identification into evidence as Prosecution Exhibits __ and __.

MJ. Does the Defense have an objection?

DC. No, your honor.

MJ. Prosecution Exhibits __ and __ for Identification are admitted into evidence as Prosecution Exhibits __ and __.

Drill 3: Laying the foundation using the identification assembly method.

PART I. Assume Specialist Ward has already identified himself.

Q. What do you do at the hospital?

A. I am an X-ray technician.

Q. Where were you on the afternoon of _____?

A. I was on duty at the hospital.

Q. Did you take any X-rays of Lola Mason?

A. Yes, I did. Dr. Butler ordered me to take some X-rays of her left arm.

Q. What did you do when Lola arrived at your department?

A. Her father was with her. I explained what I would be doing. I showed her the machine, table, and went into quite a bit of detail because she was young. I emphasized that she must tell me if I'm hurting her.

Q. What is the identification assembly?

A. It consists of typed labels inserted into the film cassette. The information is exposed when the X-ray is taken.

- Q. What letters and numbers do you use?**
- A. I use the patient's name, date, sponsor's social security number, and Fort Apache hospital. That's our SOP.**
- TC. Your Honor, I request that this be marked as Prosecution Exhibits __ and __ for Identification.**
- MJ. The record will so reflect.**
- TC. I am showing Prosecution Exhibits __ and __ to the Defense Counsel.**
- TC. Your Honor, I request permission to approach the witness.**
- MJ. Permission granted.**
- Q. Specialist Ward, I'm handing you Prosecution Exhibits __ and __ for identification. Do you recognize them?**
- A. Yes, sir.**
- Q. What are they?**
- A. They are the X-ray films I took of Lola's arm.**
- Q. How do you recognize them?**
- A. I recognize the type of film, and I see Lola Mason's name, our hospital, sponsor's social security number, and the date I shot the pictures.**
- Q. Do Prosecution Exhibits __ and __ fairly and accurately portray the bones and other internal structures of Lola's left arm as it was on _____?**
- A. Yes, they do.**
- TC. Your Honor, I now offer Prosecution Exhibit's. __ and __ for Identification into evidence as Prosecution Exhibits __ and __.**
- MJ. Does the Defense have an objection?**
- DC. No, your honor.**
- MJ. Prosecution Exhibits __ and __ for Identification are admitted into evidence as Prosecution Exhibits __ and __.**

PART 2. Establishing witness's qualification, working order of x-ray machine, and chain of custody.

Assume Specialist Ward has already identified himself.

Q. What do you do at the hospital?

A. I am an X-ray technician.

Q. How long have you worked as an X-ray technician?

A. For three years.

Q. What training have you had as an X-ray technician?

A. I went to a 12-week school at Fort Sam Houston in _____. The 12-week school was entirely devoted to X-rays.

Q. Have you had any further training since then which focused on X-rays?

A. Yes, I've been sent to two courses since then. Both were week long classes on X-rays.

Q. Where were you on the afternoon of _____?

A. I was on duty at the hospital.

Q. Did you take any X-rays of Lola Mason?

A. Yes, I did. Dr. Butler ordered me to take some X-rays of her left arm.

Q. What did you do when Lola arrived at your office?

A. Her father was with her. I explained what I would be doing. I showed her the machine, table, and went into quite a bit of detail because she was young. I emphasized that she must tell me if I'm hurting her.

Q. After providing your explanation, what did you do?

A. I set up the equipment.

Q. What equipment?

A. The X-ray machine and the identification assembly.

Q. What is an X-ray machine?

A. It is a source where X-rays are projected through an object such as an arm, and captured on film.

Q. What is the cassette?

A. It's the film. The X-rays make the impression on the film in the cassette.

Q. What is the identification assembly?

A. It consists of a typed label which is exposed on the film.

- Q. What information is on the label?**
A. *I use the patient's name, date, sponsor's social security number, and Fort Apache hospital. That's our SOP.*
- Q. What condition was the equipment in?**
A. *It was in proper working order.*
- Q. How do you know that?**
A. *I calibrate the machine monthly. I have not had any problems with the equipment at Fort Apache.*
- Q. How did you learn to check the equipment?**
A. *I was taught that at school at Fort Sam.*
- Q. How did you take Lola's X-ray?**
A. *I showed her how to position her arm. Then I stepped behind the leaded glass. I viewed Lola during the X-ray. I adjusted the amperage and voltage settings, and then I turned on the machine to make the exposure.*
- Q. After taking the X-ray, what did you do?**
A. *I re-entered the room, removed the cassette, repositioned the arm, and then repeated the process.*
- Q. After taking both X-rays, what did you do with the cassette?**
A. *I developed the cassettes.*
- Q. How did you learn how to develop X-rays?**
A. *Again, I was trained how to operate the machines at school. That's been my job for over three years.*
- Q. How did you develop the X-rays?**
A. *I fed the cassettes into the developer. The machine processes the film and spits it out when it is ready.*
- Q. What did you do with the film after you developed it?**
A. *I looked at it to make sure the exposure was correct and that the positioning was adequate and took it to Dr. Butler.*
- TC. *Your Honor, I request that this be marked as Prosecution Exhibits ___ and ___ for Identification.*
- MJ. *The record will so reflect.*
- TC. *I am showing Prosecution Exhibits ___ and ___ to the Defense Counsel.*
- TC. *Your Honor, I request permission to approach the witness.*

MJ. Permission granted.

Q. Specialist Ward, I'm handing you Prosecution Exhibits __ and __ for identification. Do you recognize them?

A. Yes sir.

Q. What are they?

A. They are the X-ray films I took of Lola's arm.

Q. How do you recognize them?

A. I recognize the type of film, and I see Lola Mason's name, our hospital, and the date I shot the pictures. I also recognize the general appearance of the bones depicted.

Q. Do Prosecution (Defense) Exhibits __ and __ fairly and accurately portray the bones and other internal structures of Lola's left arm as it was on _____?

A. Yes, they do.

TC. Your Honor, I now offer Prosecution Exhibit's. __ and __ for Identification into evidence as Prosecution Exhibits __ and __.

MJ. Does the Defense have an objection?

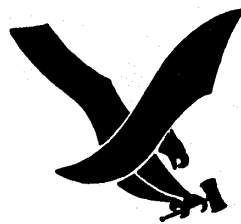
DC. No, your honor.

MJ. Prosecution Exhibits __ and __ for Identification are admitted into evidence as Prosecution Exhibits __ and __.

Tab E
Module 13

**Develop the Skill:
Foundations**

Fax and E-mail Documents



The Advocacy Trainer

FOUNDATIONS: FAX AND EMAIL DOCUMENTS

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise develops counsel's ability to lay a proper foundation for fax and email documents. If the document is a business or military record, counsel must also satisfy the hearsay components of MRE 803(6). (See Tab E, Module 4, for training on business and military record authentication under MRE 803(6)).
- B. **Training Overview.** The supervisor can conduct training with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercises and critique; and (4) summary of teaching points and a review of the sample solutions.



II. THE LAW.

- A. As with other records, fax and email records are authenticated to demonstrate that the information they contain is accurate or that the record came from a certain source. Because of the way these records are created and transmitted, however, they require unique foundation questions. These documents may be admissible: 1) for a non-hearsay purpose such as impeachment; 2) as a statement of a party-opponent; or, 3) as an exception to the hearsay rule, e.g., business records.
- B. The Authentication Requirement.
 - 1. **Authenticating a Fax Record.** The best method for laying a foundation for fax records is MRE 901(b)(9). This rule permits the proponent to show how a particular process or system works and that it produces accurate results.

2. ***Elements of Foundation:***
 - a. *The individual or organization uses a fax machine.*
 - b. *The fax machine is standard equipment that can both send and receive documents by telephone.*
 - c. *The fax machine accurately transmits copies of original documents inserted into that fax machine and receives such documents as well.*
 - d. *A procedure exists for checking mechanical and human error.*
 - e. *The fax machine accurately and automatically records the time and date of the transmittal.*
 - f. *The faxed document or cover sheet shows the phone number of the originating fax machine and the name and number of the person or organization to whom the document is directed.*

3. ***Authenticating an email record.*** There are two types of email records: 1) records of personal correspondence, such as informal messages between two people; and 2) records created in the course of a regularly conducted business activity, such as email inventory lists. The requirements for authentication differ depending on the type of email record at issue. For personal correspondence, lay the foundation similar to a chain of custody. For records created in the course of regularly conducted business, lay the foundation under MRE 901(b)(1).

4. ***Elements of Foundation for Personal Correspondence Email.***
 - a. *Introduce a copy of the correspondence. Include all routing information.*
 - b. *Introduce the routing records for each server which handles the message to verify that the message was processed as the recipient's printout indicates; and*
 - c. *Establish that the alleged author of the message had primary or exclusive access to the computer where the message originated.*

5. ***Elements of Foundation for Business Records Email.***
 - a. *The witness has personal knowledge of the business or military's filing or record system;*
 - b. *The witness removed the record in question from a certain file;*
 - c. *It was a proper file entry;*
 - d. *The witness recognizes the exhibit as the record he removed from the files; and*
 - e. *The witness specifies the basis on which he recognizes the exhibit.*



III.

PRACTICE POINTERS.

- ➔ ***Know the Purpose of Admission.*** Counsel must know whether the document is admitted for the truth of its contents or for some other purpose. If, for example, the document is only admitted to impeach a witness with a prior inconsistent statement, hearsay does not apply. (See MRE 613). However, if the document is admitted for its truth, the document must either be non-hearsay or meet a hearsay exception. The most common non-hearsay use is admissions by a party-opponent under MRE 801(d)(2). The most common hearsay exception is business records under MRE 803(6).
- ➔ ***Best Evidence.*** This rule excludes secondary evidence of a writing's contents. Where a writing's terms are in issue, counsel must either produce the original or duplicate, or show the excuse for the non-production of the originals and present an admissible type of secondary evidence. (See MRE 1002-1004). Therefore, fax records are generally not admissible unless the original was destroyed or is in the possession of the accused.
- ➔ ***Different Types of Email.*** Counsel must distinguish whether the email is a personal correspondence or a business/military record. The requirements for authentication will differ depending on the type of email. It is likely that personal correspondence will only be admitted to impeach a witness or if the correspondence is a statement by the accused. Email-generated business records will typically be admitted under MRE 803(6).
- ➔ ***New Law.*** The admissibility of email business records is not well settled. Some federal courts will not admit email documents under FRE 803(6). (See *Monotype Corp. v. International Typeface Corp.* 43 F.3d 443 (9th Cir. 1994)). To admit these records, the proponent must lay a foundation and persuade the military judge that MRE 803(6) should be read broadly.

IV.



THE SKILL DRILLS.

- A. Goal: Train counsel to employ the following skills.
1. *Use direct examination techniques covered in previous training.*
 2. *Lay a proper foundation for a fax document.*
 3. *Lay a proper foundation for a personal correspondence email document.*
 4. *Lay a proper foundation for an email-generated business/military record.*
- B. Conduct the drills.
1. *Preparation: Conduct this training in the courtroom with all necessary props. Start with the enclosed fax document, email correspondence, email business record, and email message log.*
 2. *Role Play: The supervisor will play the roles of the sponsoring witness and the military judge. Designate counsel to play the roles of the proponent and the opponent. Remaining participants will sit in the panel box and make objections.*
 3. *Execution: Inform counsel of the elements of the foundation for each type of document (fax, personal correspondence email, email generated business record). Review practice pointers with counsel. Stress that even after authentication, these documents can only be admitted (1) for a non-hearsay purpose (i.e., impeachment or admission of a party-opponent), or (2) as a hearsay exception (i.e., business/military record). Therefore, additional questions may be necessary.*
 - a. **Fax Document.** Have counsel lay a foundation to authenticate the fax document. Use the enclosed factual scenario and sample exam.
 - b. **Personal Correspondence Email.** Have counsel lay a foundation to authenticate the personal correspondence email. Use the enclosed factual scenario and sample exam.

- c. **Business Record Email.** Have counsel lay a foundation to authenticate the email-generated business record. Use the enclosed factual scenario and sample exam. (Supervisors may also want counsel to lay additional foundation to meet the requirements of MRE 803(6). Refer to Tab E, module 4, for additional foundation elements).

C. Drills.

- 1. **Drill # 1 (Fax Document).** Facts: The accused, SGT Thug is charged with robbery. Eyewitnesses said the assailant wore a black mask. A black ski mask was found near the crime scene. On 15 June, two weeks before the robbery, SGT Thug ordered a black ski mask from Mail Order Sports. SGT Thug used his personal fax machine to place the order. The trial counsel wants to show that Mail Order Sports' fax machine received the order for the ski mask from the accused's machine on 15 June. The prosecution has already established that the accused owned a fax machine, and the fax number. The accused denied placing the order and CID could not locate the original order. The trial counsel calls Mr. Clerk, the head of Mail Order Sports' merchandise orders department as a witness.



Sample foundation for a fax document.

Q. What is your occupation?

A. I am the head of the merchandise orders department for Mail Order Sports.

Q. Where do you work?

A. At the company headquarters.

Q. How long have you worked there?

A. Five years.

Q. What are your duties?

A. I maintain the records of all merchandise orders. This includes mail orders, phone orders and fax orders.

Q. How well do you know the merchandise order filing system?

A. I helped design the system two years ago and I know it very well.

Q. Mr. Clerk, did your company own a fax machine on 15 June?

A. Yes, the one in our department.

Q. How long had your company had that fax machine as of that date?

A. Four years.

Q. What brand is it?

A. A Canon X25.

Q. Have you ever used that machine?

A. I have used it hundreds of times to send and receive faxes.

Q. How do you fax a document to someone on that machine?

A. I fill out a cover sheet indicating the person to whom the document is directed and that person's fax number and phone number. The cover sheet also contains other information, such as the total number of pages being sent, the date and time of the transmission, and any additional routing information. I then feed the cover sheet and the document to be sent into the fax machine and it transmits them to the number I dialed. The machine automatically records the time and date of transmittal on the document faxed.

Q. What is the procedure when you receive a faxed document?

A. It is the reverse of the procedure I just described. The fax machine rings to let us know that a document is being received. When the fax comes out of the machine, we get the cover sheet that the person faxing the document has filled out followed by the document.

Q. How can you be sure that what you send and receive is an accurate transmission of the original document?

A. Whenever we respond to a faxed merchandise order, we send a copy of the fax back out with the merchandise. We tell customers to inform us of any errors on the order. Our fax order error rate is less than 1%.

Q. What happens if you get a fax that is not clear enough to read?

A. We call or fax the sender and request a clean copy. We will not fill an order until we receive a clean copy.

Q. How often do you have this problem?

A. It is very rare.

Q. Where were you this morning?

A. I was getting files for trial today.

Q. Where did you go to get the files?

A. I went to the file cabinet for the June fax orders.

Q. What did you find in that file?
A. I found a fax order from June 15.

Q. Mr. Clerk, I'm showing you what has been marked prosecution exhibit #1 for identification; do you recognize it?
A. Yes.

Q. What is it?
A. This is the one-page document and coversheet our fax machine received on June 15. It indicated it was sent from a fax machine with the number 454-9987. Our machine was called and this document was transmitted to it.

Q. How do you recognize it?
A. I recognize it by its contents and my initials which I placed on the fax when I received it on the 15th.

Q. Is this document in substantially the same condition it was when you received it?
A. Yes.

Q. What information is there on the document concerning the date, time, and telephone number?
A. There is a date and time entry located here at the top of the page, along with the phone number of the transmitter.

Q. Whose telephone number is that on the printed document?
A. That is the company's fax machine number.

2. **Drill # 2 (Personal Correspondence Email).** Facts: The accused, SSG Jones, sent an email from his personal computer to the personal computer of a female subordinate, SPC Smith. In the message, SSG Jones stated his desire to perform various sexual acts with SPC Smith. SSG Jones is charged with maltreatment. SPC Smith already testified that on 1 February she received an email message on her personal computer from "Sjones." The message stated SSG Jones's desire to perform various sex acts with her. She also testified that her email address is "Smith@ust.com." The message was marked as prosecution exhibit #1 for identification and it included all of the routing information. The routing information indicated that Internet Mail Service, a commercial email server, routed the message.

The trial counsel has also introduced evidence that SSG Jones owned a personal computer and modem on 1 February, and that he had an Internet address of "Sjones@mailservice.com."

The next witness is Mr. Stewart, the employee in charge of records for Internet Mail Service. Mr. Stewart brought a copy of Internet Mail Service's email message logs for 1 February. This log is marked as prosecution exhibit #2 for identification.



Sample foundation for personal correspondence email.

Q. Who do you work for?

A. I work for Internet Mail Service.

Q. What does your company do?

A. We are an Internet service provider. We get email messages from one organization or individual and transmit them to another.

Q. What do you do?

A. I'm the chief of records for serving operations. I oversee the generation and maintenance of our records of all the messages that we receive and send on to a destination.

Q. What kinds of messages do you handle?

A. All kinds, personal, business, government, and educational.

Q. When your company handles an email message, how is your firm's handling reflected at the message's final destination?

A. When they print out the heading at the final destination, the word "Internet Mail Service" will be included in an entry indicating that we were the server.

Q. Do the words "Internet Mail Service" automatically become a part of any message you handle?

A. Yes.

Q. What does the heading say about the message?

A. It gives an identification number and notes the date and time of handling the message.

Q. Mr. Stewart, I'm handing you prosecution exhibit #2 for identification. What is it?

A. It is a log of our email messages.

Q. What is a log?

A. It is a printout of the information on the handling of a message. At the end of every 12-hour period, our office prints out a log listing all the messages received or sent on our server system.

Q. What does this log show?

A. It documents the handling of messages for 1 February.

Q. What types of messages does the log list?

A. All incoming and outgoing messages routed through our server.

Q. Why do you prepare these logs?

A. For quality control and billing. The logs help us determine if the server is sending the messages to the right destinations. We also monitor the volume for billing purposes. We use the logs to bill our customers.

Q. How do you prepare these logs?

A. At the end of each 12 hour period, we print out our email records and store them.

Q. Who prepares them?

A. Me or one of the people I supervise.

Q. How do you recognize this record?

A. I recognize the contents. I personally went to the file and retrieved the log for 1 February. This is the log that I took from the files for that date.

TC. Your honor, I move to admit prosecution exhibit #2 for identification into evidence as marked.

MJ. Any objection?

DC. No objection.

Q. Mr. Stewart, look at the third entry on the log; what message did your server handle on 1 February?

A. According to the entry, we routed a message from the computer used by one of our customers, a person named Scott Jones. The entry is, "Sjones@mailservice.com."

Q. According to the log, who was the recipient of that message?

**A. The log says the recipient's email address "Smith@ust.com."
* [Based on this testimony and the testimony of SPC Smith, the trial counsel can now introduce prosecution exhibit #1 for ID, the email message that SPC Smith downloaded from her computer].**

3. **Drill #3 (Email generated business record).** Facts: The accused, PVT Garlan is charged with larceny of 30 VCR's from the furniture warehouse on 30 October. The furniture warehouse conducts a 100% inventory on all VCRs once a month. It is the established practice that the person conducting the inventory emails the property book officer at the completion of each inventory. The email message notes any discrepancies found by the person conducting the inventory.

In this case an inventory conducted two days before the alleged theft showed that three of the VCR's PVT Garlan is charged with stealing were not accounted for. The person who conducted the inventory is unavailable, and the only evidence of the discrepancy is the email message to the property book officer. Defense counsel seeks to admit the email message as proof that PVT Garlan did not steal the 3 VCRs in question. The defense calls Mr. Abby, the property book officer.



Sample foundation for business record email.

Q. What is your occupation?

A. I am the property book officer for the furniture warehouse.

Q. Where do you work?

A. At the warehouse on main post.

Q. How long have you worked there?

A. Five years.

Q. What are your duties?

A. I maintain and update hand receipts on all property. I ensure that regular inventories on all property are conducted. I also review any discrepancies noted by the individuals who conduct the inventories.

Q. How do the people conducting inventories inform you of a discrepancy?

A. They send an email message to my computer within 24 hours of the inventory. The message tells me that the inventory was conducted and notes any discrepancies.

Q. How well do you know the furniture warehouse filing system and the internal email system?

A. I helped design the system two years ago and I know it very well.

Q. Where were you this morning?

A. I was getting files for trial today.

Q. Where did you get the files?

A. I went to the saved email messages on my computer's hard drive. I looked for all email messages from 28-30 October.

Q. What did you find in that file?

A. I found the email message from 29 October regarding a VCR inventory conducted on the 28th.

Q. What did you do next?

A. I printed off a paper copy of that email message.

Q. I am showing you defense exhibit A for identification; do you recognize it?

A. Yes.

Q. What is it?

A. This is the paper copy of the email message I printed from my computer.

Q. How do you recognize it?

A. I recognize the contents of the message. Also, at the end of the message it has the name of the person who conducted the inventory in this case, Betty Brown. Betty worked at the warehouse for 22 years.

*** [Counsel will need to ask additional foundational questions to get the document admitted under MRE 803(6). See Tab E, module 4 for additional questions].**



- B. *Summarize the main teaching points.* Following the drills, conduct a discussion of lessons learned, distribute the sample solutions, and summarize the main points.



V.

REFERENCES.

- A. David A. Schlueter, et al., *Military Evidentiary Foundations* (1994)
- B. Thomas A. Mauet, *Trial Techniques*, chapt. 5 (4th ed. 1996).
- C. Anthony J. Dreyer, Note, *When the Postman Beeps Twice: The Admissibility of Electronic Mail Under the Business Records Exception of the Federal Rules of Evidence*, 64 *Fordham L. Rev.* 2285 (1996).

ENCLOSURES

Counsel Handout

Fax Document and Header

Personal Correspondence Email Message

Email Server Log

Email Business Record

Sample Solutions

FOUNDATIONS: FAX AND EMAIL DOCUMENTS

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for fax and email documents at trial.
- B. Preparation. Bring your MCM to the training. Review basic techniques of direct examination, cross examination, and objections. Review MRE 901 and MRE 803(6).



II. KEYS TO SUCCESS.

- A. **Know the elements of a foundation for authenticating a fax.**
 - 1. *The individual or organization uses a fax machine.*
 - 2. *The fax machine is standard equipment that can both send and receive documents by telephone.*
 - 3. *The fax machine accurately transmits copies of original documents inserted into that fax machine and receives such documents as well.*
 - 4. *A procedure exists for checking mechanical and human error.*
 - 5. *The fax machine accurately and automatically records the time and date of the transmittal.*
 - 6. *A fax cover sheet, sent with the faxed document, shows the phone number of the originating fax machine and the name and number of the person or organization to whom the document is directed.*

B. Know the elements of foundation for authenticating correspondence email.

1. *Introduce a copy of the entire correspondence, including all routing information.*
2. *Introduce the routing records for each server which handles the message to verify that the message was processed as the recipient's printout indicates; and*
3. *Establish that the author of the message had primary or exclusive access to the computer where the message originated.*

C. Know the elements of foundation for authenticating a business records email.

1. *The witness has personal knowledge of the business or military's filing or record system;*
2. *The witness removed the record in question from a certain file;*
3. *It was a proper file entry;*
4. *The witness recognizes the exhibit as the record he removed from the files; and*
5. *The witness specifies the basis on which he recognizes the exhibit.*

III. SKILL DRILL FACT SCENARIOS.

- A. ***Drill # 1 (Fax Document).*** Facts: The accused, SGT Thug, is charged with robbery. Eyewitnesses said the assailant wore a black mask. A black ski mask was found near the crime scene. On 15 June, two weeks before the robbery, SGT Thug ordered a black ski mask from Mail Order Sports. SGT Thug used his personal fax machine to place the order. The trial counsel wants to show that Mail Order Sports' fax machine received the order for the ski mask from the accused's machine on 15 June. The prosecution has already established that the accused owned a fax machine and the fax number. The accused denied placing the order and CID could not locate the original order. The trial counsel calls Mr. Clerk, the head of Mail Order Sports' merchandise orders department, as a witness.

- B. ***Drill # 2 (Personal Correspondence Email).*** Facts: The accused, SSG Jones, sent an email from his personal computer to the personal computer of a female subordinate, SPC Smith. In the message, SSG Jones stated his desire to perform various sexual acts with SPC Smith. SSG Jones is charged with maltreatment. SPC Smith already testified that on 1 February she received an email message on her personal computer from "Sjones." The message stated SSG Jones desire to perform various sex acts with her. She also testified that her email address is "Smith@ust.com." The message was marked as prosecution exhibit #1 for identification and it included all of the routing information. The routing information indicated that Internet Mail Service, a commercial email server, routed the message.

The trial counsel has also introduced evidence that SSG Jones owned a personal computer and modem on 1 February, and that he had an Internet address of "Sjones@mailservice.com."

The next witness is Mr. Stewart, the employee in charge of records for Internet Mail Service. Mr. Stewart brought a copy of Internet Mail Service's email message logs for 1 February. This log is marked as prosecution exhibit #2 for identification.

- C. ***Drill #3 (Business record email).*** Facts: The accused, PVT Garlan, is charged with larceny of 30 VCR's from the furniture warehouse on 30 October. The furniture warehouse conducts a 100% inventory on all VCRs once a month. It is the established practice that the person conducting the inventory sends an email to the property book officer at the completion of each inventory. The email notes any discrepancies found by the person conducting the inventory.

In this case an inventory conducted two days before the alleged theft showed that three of the VCR's PVT Garlan is charged with stealing were not accounted for. The person who conducted the inventory is unavailable, and the only evidence of the discrepancy is the email message to the property book officer. Defense counsel is seeking to admit the email message as proof that PVT Garlan did not steal the 3 VCRs in question. The defense calls Mr. Abby. Mr. Abby is the property book officer.

IV.



REFERENCES FOR FURTHER STUDY.

- A. David A. Schlueter, et al., *Military Evidentiary Foundations* (1994).
- B. Thomas A. Mauet, *Trial Techniques*, chapt. 5 (4th ed. 1996).
- C. Anthony J. Dreyer, Note, *When the Postman Beeps Twice: The Admissibility of Electronic Mail Under the Business Records Exception of the Federal Rules of Evidence*, 64 *Fordham L. Rev.* 2285 (1996).

ENCLOSURES

Fax Document and Header

Personal Correspondence Email Message

Email Server Log

Email Business Record

Ima Thug
1355 Maple St.
Topeka, Kansas 66776
Phone/Fax (897) 454-9987

facsimile transmittal

To: Mail Order Sports Fax: (897) 454-0098

From: Ima Thug (897) 454-9987 Date: June 15, 1998

1355 Maple St.

Topeka, KS 66776

Re: Clothing Request Pages: 1

CC:

Urgent For Review Please Comment Please Reply Please Recycle

Notes: Please send me one large black ski mask to the above address as soon as possible. I will pay C.O.D. If this fax is unreadable or if you cannot fill my order, please call or fax me at the above listed number.

CONFIDENTIAL

Subj: "Hooking Up"
Date: 98-02-01 19:30:24 EST
From: Sjones@mailservice.com (Jones, Scott T.)
To: Smith@ust.com (Smith, Susan)

Susan, I can't hold back any longer. Do you feel the same way about me that I feel about you? I would love to be alone with you in a quiet place. I would make you feel like the women you are. I want to kiss and touch you all over. I dream of you constantly. Say you feel the same. What do you say we get "hooked up?" Scott.

-----Headers-----

Return-Path: <Sjones@mailservice.com (Jones, Scott T.)>
Received: from ry-za03.mx.ust.com [172.31.36.99] by air-za05.mail.ust.com (v41.14) with SMTP; Thu, 01 Feb 1998 19:30:24 EST
Received: from Sjones@mailservice.com (Jones, Scott T.) [206.151.16.10] by ry-za03.mx.ust.com [172.31.36.99] by air-za05.mail.ust.com (v41.14) with SMTP; Thu, 01 Feb 1998 19:30:24 EST for <Smith@ust.com>
Message-ID: <35212D3501D80010@mailservice.com>
From: Sjones@mailservice.com (Jones, Scott T.)
To: Smith@ust.com (Smith, Susan)
Date: 98-02-01 19:30:24 EST
Subj: "Hooking Up"
X-Mailer: Connect2SMTP 4.20A MHS/SMF

Email Server Log Mail Service 1 February 1998

Return-Path: <Sjones@mailservice.com (Jones, Scott T.)>
Received: from rly-za03.mx.ust.com [172.31.36.99] by air-za05.mail.ust.com (v41.14) with SMTP; Thu, 01 Feb 1998 19:30:24 EST
Received: from Sjones@mailservice.com (Jones, Scott T.) [206.151.16.10] by rly-za03.mx.ust.com [172.31.36.99] by air-za05.mail.ust.com (v41.14) with SMTP; Thu, 01 Feb 1998 19:30:24 EST for <Smith@ust.com>
Message-ID: <35212D3501D80010@mailservice.com>
From: Sjones@mailservice.com (Jones, Scott T.)
To: Smith@ust.com (Smith, Susan)
Date: 98-02-01 19:30:24 EST
Subj: "Hooking Up"
X-Mailer: Connect2SMTP 4.20A MHS/SMF

Subj: 28 October Inventory
Date: 98-10-29 09:30:24 EST
From: Bbrown.fortsmith.army.mil (Brown, Betty DPW)
To: Aabby.fortsmith.army.mil (Abby, Alvin PBO)

Mr. Abby, I completed the 100% inventory on the warehouse VCRs yesterday (28 Oct.). There were three VCRs listed on the inventory that I was unable to locate. They are all Samsung Model # 22334. The serial numbers of the missing VCRs are:

#3344457739S
#9998898676T
#4908984923S

Betty Brown x3345

FOUNDATIONS: FAX AND EMAIL

SAMPLE SOLUTIONS



Drill #1

- Q. What is your occupation?*
A. I am the head of the merchandise orders department for Mail Order Sports.
- Q. Where do you work?*
A. At the company headquarters.
- Q. How long have you worked there?*
A. Five years.
- Q. What are your duties?*
A. I maintain the records of all merchandise orders. This includes mail orders, phone orders and fax orders.
- Q. How well do you know the merchandise order filing system?*
A. I helped design the system two years ago and I know it very well.
- Q. Mr. Clerk, did your company own a fax machine on 15 June?*
A. Yes, the one in our department.
- Q. How long had your company had that fax machine as of that date?*
A. Four years.
- Q. What brand is it?*
A. A Canon X25.
- Q. Have you ever used that machine?*
A. I have used it hundreds of times to send and receive faxes.

- Q. How do you fax a document to someone on that machine?**
A. *I fill out a cover sheet indicating the person to whom the document is directed and that person's fax number and phone number. The cover sheet also contains other information, such as the total number of pages being sent, the date and time of the transmission, and any additional routing information. I then feed the cover sheet and the document to be sent into the fax machine and it transmits them to the number I dialed. The machine automatically records the time and date of transmittal on the document faxed.*
- Q. What is the procedure when you receive a faxed document?**
A. *It is the reverse of the procedure I just described. The fax machine rings to let us know that a document is being received. When the fax comes out of the machine, we get the cover sheet that the person faxing the document has filled out followed by the document.*
- Q. How can you be sure that what you send and receive is an accurate transmission of the original document?**
A. *Whenever we respond to a faxed merchandise order, we send a copy of the fax back out with the merchandise. We tell customers to inform us of any errors on the order. Our fax order error rate is less than 1%.*
- Q. What happens if you get a fax that is not clear enough to read?**
A. *We call or fax the sender and request a clean copy. We will not fill an order until we receive a clean copy.*
- Q. How often do you have this problem?**
A. *It is very rare.*
- Q. Where were you this morning?**
A. *I was getting files for trial today.*
- Q. Where did you go to get the files?**
A. *I went to the file cabinet for the June fax orders.*
- Q. What did you find in that file?**
A. *I found a fax order from June 15.*
- Q. Mr. Clerk, I'm showing you what has been marked prosecution exhibit #1 for identification; do you recognize it?**
A. *Yes.*
- Q. What is it?**
A. *This is the one-page document and coversheet our fax machine received on June 15. It indicated it was sent from a fax machine with the number 454-9987. Our machine was called and this document was transmitted to it.*

- Q. How do you recognize it?**
A. I recognize it by its contents and my initials which I placed on the fax when I received it on the 15th.
- Q. Is this document in substantially the same condition it was when you received it?**
A. Yes.
- Q. What information is there on the document concerning the date, time, and telephone number?**
A. There is a date and time entry located here at the top of the page, along with the phone number of the transmitter.
- Q. Whose telephone number is that on the printed document?**
A. That is the company's fax machine number.

Drill #2

- Q. Who do you work for?**
A. I work for Internet Mail Service.
- Q. What does your company do?**
A. We are an Internet service provider. We get email messages from one organization or individual and transmit them to another.
- Q. What do you do?**
A. I'm the chief of records for serving operations. I oversee the generation and maintenance of our records of all the messages that we receive and send on to a destination.
- Q. What kinds of messages do you handle?**
A. All kinds, personal, business, government, and educational.
- Q. When your company handles an email message, how is your firm's handling reflected at the message's final destination?**
A. When they print out the heading at the final destination, the word "Internet Mail Service" will be included in an entry indicating that we were the server.
- Q. Do the words "Internet Mail Service" automatically become a part of any message you handle?**
A. Yes.
- Q. What does the heading say about the message?**
A. It gives an identification number and notes the date and time of handling the message.

- Q. Mr. Stewart, I'm handing you prosecution exhibit #2 for identification. What is it?**
- A. It is a log of our email messages.**
- Q. What is a log?**
- A. It is a printout of the information on the handling of a message. At the end of every 12-hour period, our office prints out a log listing all the messages received or sent on our server system.**
- Q. What does this log show?**
- A. It documents the handling of messages for 1 February.**
- Q. What types of messages does the log list?**
- A. All incoming and outgoing messages routed through our server.**
- Q. Why do you prepare these logs?**
- A. For quality control and billing. The logs help us determine if the server is sending the messages to the right destinations. We also monitor the volume for billing purposes. We use the logs to bill our customers.**
- Q. How do you prepare these logs?**
- A. At the end of each 12 hour period, we print out our email records and store them.**
- Q. Who prepares them?**
- A. Me or one of the people I supervise.**
- Q. How do you recognize this record?**
- A. I recognize the contents. I personally went to the file and retrieved the log for 1 February. This is the log that I took from the files for that date.**
- TC. Your honor, I move to admit prosecution exhibit #2 for identification into evidence as marked.**
- MJ. Any objection?**
- DC. NO objection.**
- TC. Mr. Stewart, look at the third entry on the log; what message did your server handle on 1 February?**
- A. According to the entry, we routed a message from the computer used by one of our customers, a person named Scott Jones. The entry is, "Sjones@mailservice.com."**
- Q. According to the log, who was the recipient of that message?**
- A. The log says the recipient's email address was "Smith@ust.com."**

** [Based on this testimony and the testimony of SPC Smith, the trial counsel can now introduce prosecution exhibit #1 for ID, the email message that SPC Smith downloaded from her computer].*

Drill #3

Q. What is your occupation?

A. I am the property book officer for the furniture warehouse.

Q. Where do you work?

A. At the warehouse on main post.

Q. How long have you worked there?

A. Five years.

Q. What are your duties?

A. I maintain and update hand receipts on all property. I ensure that regular inventories on all property are conducted. I also review any discrepancies noted by the individuals who conduct the inventories.

Q. How do the people conducting inventories inform you of a discrepancy?

A. They send an email message to my computer within 24 hours of the inventory. The message tells me that the inventory was conducted and notes any discrepancies.

Q. How well do you know the furniture warehouse filing system and the internal email system?

A. I helped design the system two years ago and I know it very well.

Q. Where were you this morning?

A. I was getting files for trial today.

Q. Where did you go to get the files?

A. I went to the saved email messages on my computer's hard drive. I looked for all email messages from 28-30 October.

Q. What did you find in that file?

A. I found the email message from 29 October regarding a VCR inventory conducted on the 28th.

Q. What did you do next?

A. I printed off a paper copy of that email message.

Q. I am showing you defense exhibit A for identification, do you recognize it?

A. Yes.

Q. What is it?

A. This is the paper copy of the email message I printed from my computer.

Q. How do you recognize it?

A. I recognize the contents of the message. Also, at the end of the message it has the name of the person who conducted the inventory in this case, Betty Brown. Betty worked at the warehouse for 22 years.

** [Counsel will need to ask additional foundational questions to get the document admitted under MRE 803(6). See Tab E, module 4 for additional questions].*

Tab E
Module 14

**Develop the Skill:
Foundations**

Fingerprints



The Advocacy Trainer

FOUNDATIONS: FINGERPRINTS

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. Goals. Understand the foundational requirements for admission of fingerprint evidence.
- B. Training Overview. Training can be conducted with one or more counsel and is divided into four phases. First, review the materials contained within this module (and the cited references, if desired), and have counsel review the counsel handout provided. Second, instruct counsel on the law and discuss the practice pointers. Third, engage in one or more practical exercises; after which, provide a critique. Finally, summarize teaching points and distribute the sample solution.



II. THE LAW.

A. *Reliability and Admissibility.*



The reliability of fingerprint evidence to prove the identity of a person is well established.



It is generally held that fingerprint evidence, when competent, relevant, and material, and when presented by a qualified expert, is admissible for the purposes of establishing the identity of an individual.

B. *Foundation Requirements.*



The introduction of fingerprint evidence has two parts: 1) the introduction of the fingerprints found at the scene (latent prints) and the fingerprints taken from the accused (present prints); and 2) the expert's opinion that the

fingerprints are the accused's. Each part has its own foundational requirements.

1. **The Fingerprints.**

- *The witness is qualified to (lift latent) (take present) fingerprints;*
- *The witness did so in proper manner;*
- *The witness safeguarded the fingerprints (testifies to circumstances making it unlikely that substitution or tampering occurred); and*
- *The exhibit is the fingerprint (lifted) (taken) by the witness.*

2. **Expert Opinion.**

[This module does not cover the foundational requirements for having the witness recognized by the military judge as an expert or the scientific validity of fingerprint evidence. (See generally Tab C, Module 5)]

- *The witness observed the two sets of fingerprints (those lifted from the scene and those taken from the accused); and*
- *The witness has an opinion.*

III.



PRACTICE POINTERS.

- ➔ ***Chain-of-Custody.*** The individual taking the latent fingerprints from the crime scene most likely will log the fingerprint as an item of evidence, which necessitates the use of a chain-of-custody document to establish the fingerprint's authenticity.
 - You need not call every witness who touched the evidence. The point of the chain-of-custody document is to relieve the government from calling everyone in the chain.
 - Counsel should avoid becoming part of the chain-of-custody.

➔ **Use Enlargements.** The impact of fingerprint evidence is increased tenfold when the members can see the fingerprints and join the expert in making the comparison in open court.

- Use highest quality enlargements.
- Using large diagrams on easels rather than an overhead projector eliminates problems of glare and readability.
- Before trial, practice moving and positioning the enlargements with the witness.
- Before trial, mark, annotate, and label enlargements with the witness.
- Before trial, tell the judge and opposing counsel what you plan to do.

IV.



SKILL DRILLS.

A. **Goal:** Train counsel to employ the following skills.

1. Lay a proper foundation for the admission of the fingerprints.
2. Lay a proper foundation for the admission of an expert's opinion concerning the fingerprints.

B. **Conduct the Drills.**

1. **Preparation:** Conduct this training in the courtroom with a minimum of two participants—a supervisor and one counsel. The supervisor should review the materials prior to the training and select one or more drills.
2. **Role Play.** The supervisor plays the role of the witness, military judge, and evaluator. Designate counsel to lay the foundation. Remaining participants sit in the panel box and make appropriate objections. In your discretion, you may wish to appoint a counsel as the military judge.
3. **Execution.** The training is divided into four steps: (1) a short period of instruction (15 minutes); (2) counsel preparation time (10 minutes); (3) one or more drills and critique (5-10 minutes); and, (4) a review of the sample solution (15 minutes)

C. ***The Drill.***

1. Witness #1: Evidence technician who took the fingerprints at the crime scene.
2. Witness #2: Special Agent who took the accused's fingerprints.
3. Witness #3: Fingerprint expert.
4. Examination of the Witnesses: Evaluate counsel's ability to lay the proper foundations.



D. ***Summarize the main teaching points.*** Following the drill, conduct a discussion of lessons learned, distribute the sample solution, **and summarize the main points.**

- ✓ **Memorize the foundational elements for the admissibility of fingerprints and expert opinion concerning the prints.**
- ✓ **Know the reference(s) to find the foundational elements.**
- ✓ **Fingerprint evidence is *so well established* that you can ask the military judge to take *judicial notice* of the scientific principle behind fingerprinting.**



V. **REFERENCES.**

- A. David A. Schlueter et al, *Military Evidentiary Foundations*, 91-99, 115-116 (1994).
- B. Edward J. Imwinkelried, *Evidentiary Foundations*, 279-298 (1998).

ENCLOSURES
Counsel Handout
Drill Scenario
Sample Solutions

FOUNDATIONS: FINGERPRINTS

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from _____ to _____ hours. The training will focus on laying the foundation for admission of fingerprint evidence.
- B. Preparation. Bring your MCM to the training. Review basic rules concerning fingerprint evidence—MRE 901(b)(3).



II. KEYS TO SUCCESS.

- A. **Know the Elements of a Foundation for the Fingerprints Themselves.**
- *The witness is qualified to (lift latent) (take present) fingerprints;*
 - *The witness did so in proper manner;*
 - *The witness safeguarded the fingerprints (testifies to circumstances making it unlikely that substitution or tampering occurred); and*
 - *The exhibit is the fingerprint (lifted) (taken) by the witness.*

B. Know the Elements of a Foundation for an Expert Opinion.

- *The witness observed the two sets of fingerprints (those lifted from the scene and those taken from the accused); and*
- *The witness has an opinion.*



III.

REFERENCES FOR FURTHER STUDY.

- A. David A. Schlueter et al, *Military Evidentiary Foundations*, 91-99, 115-116 (1994).
- B. Edward J. Imwinkelried, *Evidentiary Foundations*, 279-298 (1998).

ENCLOSURE
Drill Scenario

FOUNDATIONS: FINGERPRINTS

DRILL SCENARIO

I. OVERVIEW.

The purpose of this drill is to enhance counsel's ability to lay a proper foundation for admission of fingerprint evidence and to elicit an opinion concerning the identity of the latent prints taken from the crime scene. Counsel will conduct a mock examination of Tom Jones, the crime scene technician who "lifted" the latent prints from the scene; Bert H. Dink, the CID agent who took the accused's prints when the accused was interviewed; and Herb Albert, an expert in the area of fingerprint analysis. Pay special attention to the foundational requirements for admission of real evidence, demonstrative evidence, and eliciting an opinion. Upon completion of the exercise, a sample solution will be provided.

II. FACTS.

The home of Ray Stevens, a civilian, was burglarized and several items were stolen, including a television set. Evidence Technician Tom Jones, of the state law enforcement agency (SLED), was at the crime scene and was able to lift several prints from the window that was the point of entry. Fingerprints were taken of all members of the Stevens family and they were all ruled out as the source of the prints taken from the window. Several weeks later, the local cops apprehended the accused, Specialist (SPC) Jules English, when he tried to pawn a TV identified as being stolen from the Stevens' home. SPC English was turned over to the military for prosecution and has been charged with burglary and larceny. During the initial interview, CID Special Agent Bert Dink took SPC English's fingerprints. The latent prints from the window were given to CID and compared by Herb Albert to the prints taken directly from SPC English. Mr. Albert is of the opinion that the latent prints belong to the accused.

III. TASK.

- A. Conduct a direct examination of Tom Jones for the admission of the latent prints taken from the crime scene, P.E. 1 for ID, and the enlargement, P.E. 2 for ID.
- B. Conduct a direct examination of Special Agent Dink for the admission of the fingerprints taken from the accused, P.E. 3 for ID, and the enlargement, P.E. 4 for ID.
- C. Conduct a direct examination of Herb Albert to elicit his opinion concerning the identity of the fingerprints taken from the crime scene.

FOUNDATIONS: FINGERPRINTS

DRILL SCENARIO -- SAMPLE SOLUTIONS



Latent Fingerprints

Q: *Mr. Jones, were you involved in the investigation of the burglary and theft from the home of Mr. Stevens?*

A: *Yes, I was.*

Q: *What was your involvement?*

A: *I was the evidence technician assigned to the case.*

Q: *What did you do in that capacity?*

A: *Well, Detective Torme was in charge. He believed a rear window was the point of entry and asked if I could get any prints from it.*

Q: *As an evidence technician, have you received training in obtaining fingerprints from a crime scene?*

A: *Yes.*

Q: *What training have you received?*

A: *I attended the FBI Academy's month-long training program. I also have attended many local and state fingerprint training seminars. Additionally, experienced evidence technicians supervised me while I performed on-the-job fingerprint training.*

Q: *Turning your attention to this case, did you get prints?*

A: *Yes, I got a very good thumbprint off the lower casing of the window.*

Q: *How did you get the prints?*

A: *I dusted the area that I thought most likely to have a print. The powder showed a latent print. I then used a special adhesive to lift the print and place it on a fingerprint card.*

Q: *What did you do with the fingerprint card?*

A: *I entered it into evidence as item 1 on the custody document and kept it with me until I could give it to the evidence custodian.*

- Q: What, if anything, did you do with the card before you turned it into the evidence custodian?**
- A: I made a copy of the card for Torme's case file.**
- Q: Mr. Jones, I'm showing you what has been marked as Prosecution Exhibit 1 for identification. Do you recognize this exhibit?**
- A: Yes, I do.**
- Q: What is Prosecution Exhibit 1 for identification?**
- A: It is the fingerprint card I made from the Stevens crime scene.**
- Q: How do you recognize it?**
- A: I wrote the date, time, and place the print was lifted on the fingerprint card and recognize this as my handwriting.**
- Q: Is this card and the print that appears on it in the same condition as when you gave it to your evidence custodian?**
- A: Yes it is.**
- Q: Is this the thumbprint that you lifted from the window at Mr. Stevens' home?**
- A: Yes it is.**
- Q: Mr. Jones, I'm now showing you what has been marked Prosecution Exhibit 2 for identification and ask if you recognize it?**
- A: Yes, I do.**
- Q: What is Prosecution Exhibit 2 for identification?**
- A: It is a 2½-foot by 3-foot enlargement of the thumbprint that I lifted .**
- Q: Is it an accurate depiction of the print that you lifted?**
- A: Yes.**
- Q: Your honor, I have retrieved Prosecution Exhibits 1 and 2 for identification from the witness and ask that they be admitted into evidence as Prosecution Exhibits 1 and 2.**

Direct Fingerprints

- Q:** *Special Agent Dink, did you interview the accused in connection with the burglary and theft from the Stevens' home?*
- A:** *Yes, I did.*
- Q:** *Other than questioning the accused, what else did you do during that interview?*
- A:** *I took his fingerprints.*
- Q:** *How did you take his fingerprints?*
- A:** *I started with SPC English's left hand, first with his pinkie finger. I took his finger, rolled it across the inepad, and then rolled it on the fingerprint card leaving an ink print of his finger on the card. I did this with each of his fingers.*
- Q:** *What did you do with the fingerprint card?*
- A:** *I had typed in his name, the date, place, and my name before I took his prints. After taking his prints, I initialed the card, made a copy for the case file and placed the original in an evidence bag with a chain-of-custody document and placed that in the evidence locker.*
- Q:** *Special Agent Dink, I'm now showing you what has been marked as Prosecution Exhibit 3 for identification. Do you recognize this exhibit?*
- A:** *Yes, I do.*
- Q:** *What is Prosecution Exhibit 3 for identification?*
- A:** *It is the fingerprint card I made with SPC English.*
- Q:** *How do you recognize it?*
- A:** *I recognize my handwriting on the card and on the seals on the evidence bag.*
- Q:** *Is this card and the print that appears on it in the same condition as when you placed it in the evidence locker?*
- A:** *Yes it is.*
- Q:** *Special Agent Dink, I'm now showing you what has been marked as Prosecution Exhibit 4 for identification and ask if you recognize it?*
- A:** *Yes, I do.*
- Q:** *What is Prosecution Exhibit 4 for identification?*
- A:** *It is a 2½ foot by 3 foot enlargement of the right thumb print that I took from SPC English.*

Q: Is it an accurate depiction of the print that you lifted?

A: Yes.

Q: Your honor, I have retrieved Prosecution Exhibits 3 and 4 for identification from the witness and ask that they be admitted into evidence as Prosecution Exhibits 3 and 4.

Expert Opinion

[This solution assumes the appropriate foundation was laid for the acceptance of the witness as an expert by the court. See generally Tab C, Module 5)]

Q: Mr. Albert, I'm handing you what has been admitted into evidence as Prosecution Exhibits 1 and 3. Have you had the opportunity to review these items prior to today?

A: Yes. These items were in the CID evidence locker. I retrieved them from the evidence custodian for the purposes of examination. I examined them and then returned them to the evidence custodian.

Q: You said you conducted an examination. What exactly did you do?

A: I compared Prosecution Exhibit 1 against the individual prints appearing on Prosecution Exhibit 3. I did this both with the naked eye and under a microscope.

Q: Have you formed an opinion concerning these exhibits?

A: Yes, I have.

Q: What is your opinion?

A: It is my opinion that the individual who made this right thumbprint on Prosecution Exhibit 3 is the same individual who made the thumbprint found on Prosecution Exhibit 1.

Q: I have retrieved the exhibits from the witness. Mr. Albert, I draw your attention to Prosecution Exhibits 2 and 4. Do you recognize these exhibits?

A: Yes. Prosecution Exhibit 2 is an enlargement of Prosecution Exhibit 1, the single thumbprint. Prosecution Exhibit 4 is an enlargement of just the right thumb print shown on Prosecution Exhibit 3.

Q: Using these exhibits, would you please explain how you came to your conclusion that they are both from the same individual?

A: [witness does as asked]

Tab E
Module 15

**Develop the Skill:
Foundations**

*Reputation / Opinion
Evidence*



The Advocacy Trainer

FOUNDATIONS: REPUTATION & OPINION EVIDENCE

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** After completion of this module, counsel will understand the foundational requirements for eliciting testimony concerning a pertinent character trait of another in the form of an opinion or reputation.
- B. **Training Overview.** Training can be conducted with one or more counsel and is divided into four phases. First, prepare by reviewing the materials contained within this module and the cited references. Counsel should prepare by reviewing the counsel handout. Second, instruct counsel on the law and discuss the practice pointers. Third, engage in one or more practical exercises, then provide a critique. Finally, summarize teaching points and distribute the sample solution.



II. THE LAW.

- A. **Limits on the Admissibility of Character Evidence.**



Generally, evidence of a person's character or of a character trait is not admissible. But, as with any good rule, there are exceptions.

- "Evidence of a pertinent trait of the character of the accused offered by the accused or by the prosecution to rebut the same" is one exception to the general rule. MRE 404(a)(1).
- "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" is another exception. MRE 404(a)(2).
- As is "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." MRE 404(a)(2).

- A final exception is evidence of a witness's character for truthfulness. MRE 404(a)(3); MRE 608(a).



The manner in which such evidence may be elicited is limited to opinion and reputation testimony. The use of specific instances of conduct is limited to cross-examination of an opinion or reputation and the establishment of bias, prejudice, or motive to misrepresent.

- "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." MRE 405(a).
- "The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation." MRE 608(a).

B. *Elements of the Foundation.*

1. **Opinion** - Before a witness may state his opinion, counsel must elicit testimony that:
 - *the witness is personally acquainted with (the accused) (the victim) (the witness);*
 - *the witness knows (the accused) (the victim) (the witness) well enough to have formed a reliable opinion;*
 - *the witness has an opinion; and*
 - *establish a nexus between the character trait and the charged offenses.*
2. **Reputation** - Before a witness may state (the accused's) (the victim's) (another witness's) reputation, counsel must elicit testimony that:
 - *the witness is a member of a particular group (social, professional, residential, etc.);*
 - *the (accused) (victim) (other witness) is a member of that group;*
 - *the (accused) (victim) (other witness) has a reputation within that group;*
 - *the witness has been a member of that group long enough to have learned of the (accused's) (victim's) (other witness's) reputation within that group;*
 - *the witness knows of that reputation; and*

- *establish a nexus between the trait offered by reputation and the charged offenses.*



III.

PRACTICE POINTERS.

The foundation for eliciting character evidence is simple to establish. The problems faced by counsel usually arise in the issues of relevance, timing, and method. Discuss the following points with counsel.

- ➔ ***Be sure character evidence is relevant.*** For example, the accused's reputation for sobriety is a nice reputation, but it adds nothing of value in a larceny case; it is irrelevant and inadmissible.
- ➔ ***Relevance of Good Military Character.*** An accused's good military character is generally relevant in every instance. *United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988)(holding that good military character is relevant in sexual molestation case); *United States v. Belz*, 20 M.J. 33 (C.M.A. 1985)(holding that good military character is relevant in drug offense prosecution). Don't limit yourself merely to eliciting opinion or reputation evidence. Have your witness explain what the term "good military character" means to him or her.
- ➔ ***Credibility is attacked by character for truthfulness.*** Character for honesty does not equate to truthfulness. MRE 608(a)(1) limits counsel to eliciting an opinion as to a witness's character for truthfulness.
- ➔ ***Be sure of your timing.*** The government can only attack character traits of an accused in rebuttal. A witness's credibility can be attacked only after the witness testifies. Witness's credibility can be bolstered only after it has been attacked.
- ➔ ***What constitutes an attack on a witness's credibility.*** The attack must be sufficient to call into question the witness's character for truthfulness. Contradictory evidence and cross-examination do not, in and of themselves, attack a witness's credibility. The evidence or cross-examination must be of sufficient quality to call into question the witness's character, not merely address the weight to be given to the witness's testimony.
- ➔ ***Witness rules apply to the accused as a witness.*** The accused's character for truthfulness is only relevant after the accused testifies and can be bolstered only after it has been attacked.
- ➔ ***Know what you can elicit.*** The proponent of the evidence is limited to eliciting an opinion or a reputation. Counsel may inquire into specific conduct only in cross-examination of a stated opinion or reputation.

- ***Don't confuse character evidence with evidence of bias, prejudice, or motive to misrepresent.*** MRE 608(c) governs proving a witness's bias, prejudice, or motive to misrepresent and allows for the use of specific conduct under certain circumstances.

IV.



SKILL DRILLS.

A. ***Goal: Train counsel to employ the following skills.***

1. Lay a proper foundation for the admission of character evidence in the form of reputation.
2. Lay a proper foundation for the admission of character evidence in the form of an opinion.

B. ***Conduct the Drills.***

1. ***Preparation:*** Conduct this training in the courtroom with a minimum of two participants—a supervisor and one counsel. Supervisor should review the materials prior to the training and select one or more drills.
2. ***Role Play.*** The supervisor plays the role of the witness, military judge, and evaluator. Designate counsel to lay the foundation. Remaining participants sit in the panel box and make appropriate objections. In your discretion, you may wish to appoint a counsel as the military judge.
3. ***Execution.*** The training is divided into four steps: (1) a short period of instruction (15 minutes); (2) counsel preparation time (10 minutes); (3) one or more drills and critique (5-10 minutes); and, (4) a review of the sample solution (15 minutes).

C. ***The Drills.*** Evaluate counsel's ability to lay the proper foundation.

1. Drill #1: Accused's Reputation for Truthfulness.
2. Drill #2: Opinion as to Accused's Good Military Character.
3. Drill #3: Victim's Reputation for Peacefulness.
4. Drill #4: Opinion as to Victim's Character for Peacefulness.

5. Drill #5: Victim's Reputation for Truthfulness.
6. Drill #6: Opinion as to Victim's Character for Truthfulness.



D. *Summarize the main teaching points.* Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points.

- ✓ **Memorize the foundational elements for the admissibility of an opinion and reputation.**
- ✓ **Know where to find them when recall fails.**
- ✓ **Accused's good military character is always relevant.**
- ✓ **Witness's character for truthfulness can be attacked only after witness has testified.**
- ✓ **Witness's character for truthfulness can be bolstered only after attacked.**



V.

REFERENCES.

David A. Schlueter et al, *Military Evidentiary Foundations* (1994) pp 133-137, 165-178.

ENCLOSURES
Counsel Handout
Drills 1-6
Sample Solutions

FOUNDATIONS: REPUTATION & OPINION EVIDENCE

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from _____ to _____ hours. The training will focus on laying the foundation for character evidence in the form of opinion and/or reputation.
- B. Preparation. Bring your MCM to the training. Review basic rules concerning character evidence—MRE 401, 404, 405, and 608.



II. KEYS TO SUCCESS.

- A. Know the Elements of a Foundation for Opinion Character Evidence.
 - 1. *The witness is personally acquainted with (the accused) (the victim) (the witness).*
 - 2. *The witness knows (the accused) (the victim) (the witness) well enough to have formed a reliable opinion.*
 - 3. *The witness has an opinion.*
 - 4. *Nexus between the character trait and the offenses charged.*

B. Know the Elements of a Foundation for Reputation Character Evidence.

1. *The witness is a member of a particular group (social, professional, residential, etc.).*
2. *The (accused) (victim) (other witness) is a member of that group.*
3. *The (accused) (victim) (other witness) has a reputation within that group.*
4. *The witness has been a member of that group long enough to have learned of the (accused's) (victim's) (other witness's) reputation within that group.*
5. *The witness knows of that reputation.*
6. *The nexus between the character trait and the charged offenses.*



III.

REFERENCES FOR FURTHER STUDY.

David A. Schlueter et al, *Military Evidentiary Foundations* (1994) pp 133-137, 165-178.

ENCLOSURE
Drill Scenarios

FOUNDATIONS: REPUTATION & OPINION EVIDENCE

DRILL SCENARIOS

DRILL #1: Accused's Reputation for Truthfulness

I. OVERVIEW.

The purpose of this drill is to enhance counsel's ability to lay a proper foundation for eliciting character evidence of the accused in the form of reputation. Counsel will conduct a mock examination of Petty Officer First Class (E-6) Ronald McDonald, a crewman of the USS NEVERSAIL and member of the ship's Acey-Deucey Association, based on the scenario provided. Pay special attention to the foundational requirements for eliciting a reputation. Upon completion of the exercise, a sample solution will be provided.

II. FACTS.

The accused, Second Class Petty Officer (E-5) Burt King, is charged with a single specification of larceny from the exchange. Upon exiting the exchange, the accused's shopping bag tripped the security alarm. The accused approached the nearest cashier to have his bag examined. The bag contained an expensive bottle of men's cologne that the accused did not pay for. At trial, the accused testified and claimed he was unaware that the item was in his bag. During a searing cross-examination, the trial counsel challenged the accused's truthfulness.

Petty Officer First Class (E-6) Ronald McDonald is a member of the accused's command, the USS NEVERSAIL. Both McDonald and King are members of the NEVERSAIL's Acey-Deucey Association, a shipboard organization of first (Acey) and second class (Deucey) petty officers. Acey-Deucey Associations are widely accepted throughout the Navy; their purpose is to promote morale, professional growth and community service. McDonald has been a member of the NEVERSAIL Acey-Deucey Association since reporting aboard 2 ½ years ago. King has been a member for 14 months and has a reputation within the organization as being very truthful.

III. TASK.

Conduct an examination of Petty Officer McDonald. Elicit the accused's reputation within the Acey-Deucey Association for truthfulness.

DRILL #2: Accused's Good Military Character

I. OVERVIEW.

The purpose of this drill is to enhance counsel's ability to lay a proper foundation for eliciting character evidence of the accused in the form of an opinion. Counsel will conduct a mock examination of LT Roy Rogers, the accused's division officer aboard the USS NEVERSAIL, based on the scenario provided. Pay special attention to the foundational requirements for eliciting an opinion. Upon completion of the exercise, a sample solution will be provided.

II. FACTS.

The accused, Second Class Petty Officer (E-5) Burt King, is charged with a single specification of larceny from the exchange. Upon exiting the exchange, the accused's shopping bag tripped the security alarm. The accused approached the nearest cashier to have his bag examined. In checking the contents of the bag, an expensive bottle of men's cologne was found that had not been purchased according to the accused's receipt. The accused claimed he was unaware that the item was in his bag.

LT Roy Rogers is the W-3 Division Officer (Weapons Department) onboard USS NEVERSAIL. He is the accused's division officer and has been since the accused reported aboard 14 months ago. LT Rogers observed the accused closely over the past 14 months, including an extended deployment. LT Rogers is of the opinion that the accused is an outstanding sailor of exemplary military character.

III. TASK.

Conduct an examination of LT Rogers. Elicit his opinion as to the accused's good military character.

DRILL #3: Victim's Reputation for Peacefulness

I. OVERVIEW.

The purpose of this drill is to enhance counsel's ability to lay a proper foundation for eliciting evidence of the victim's character for peacefulness in the form of reputation. Counsel will conduct a mock examination of Mary Muffet, a member of the same residential community as the victim of an aggravated assault, based on the scenario provided. Pay special attention to the foundational requirements for eliciting a reputation. Upon completion of the exercise, a sample solution will be provided.

II. FACTS.

The accused is charged with assault with a means likely to produce grievous bodily harm, a metal pipe. In cross-examination of the prosecution witnesses, the defense has suggested that the victim of the assault, Jack Horner, was the aggressor.

Mary Muffet has been living in Gossamer Heights, a small subdivision of twenty families, for six years. Jack Horner has been a resident of Gossamer Heights for eight years. The families of Gossamer Heights are highly social, most having lived in the community for ten years or more. Jack Horner has a reputation within Gossamer Heights as a peaceful man, the type of guy who never displays a temper and can be called upon to smooth the way when tempers flare.

III. TASK.

Conduct an examination of Mary Muffet. Elicit Jack Horner's reputation for peacefulness within Gossamer Heights.

DRILL #4: Victim's Character for Peacefulness

I. OVERVIEW.

The purpose of this drill is to enhance counsel's ability to lay a proper foundation for eliciting evidence of the victim's character for peacefulness in the form of an opinion. Counsel will conduct a mock examination Jack Sprat, the victim's supervisor, based on the scenario provided. Pay special attention to the foundational requirements for eliciting an opinion. Upon completion of the exercise, a sample solution will be provided.

II. FACTS.

The accused is charged with assault with a means likely to produce grievous bodily harm, a metal pipe. In cross-examination of the prosecution witnesses, the defense has suggested that the victim of the assault, Jack Horner, was the aggressor.

Jack Sprat has been Jack Horner's supervisor for eight years, ever since Horner began working at the Goose & Goose Lumber Yard. Over that period of time, Sprat has seen Horner placed in stressful situations dealing with sudden quick-fill orders, hung-over workmen, and mean spirited bullies. In Sprat's opinion, Horner is a very peaceful person, the kind of guy to turn the other cheek and ignore attempts to rile him.

III. TASK.

Conduct an examination of Jack Sprat. Elicit his opinion as to Jack Horner's character for peacefulness.

DRILL #5: Victim's Reputation for Truthfulness

I. OVERVIEW.

The purpose of this drill is to enhance counsel's ability to lay a proper foundation for eliciting evidence of the victim's character for truthfulness in the form of reputation. Counsel will conduct a mock examination of Jack B. Nimble-Quick, a member of the Gossamer Rifle & Gun Club, based on the scenario provided. Pay special attention to the foundational requirements for eliciting a reputation. Upon completion of the exercise, a sample solution will be provided.

II. FACTS.

The accused has been charged with indecent assault against Pam Umpkinteen. The accused denies touching Umpkinteen in any manner. Pam testified for the government

Jack B. Nimble-Quick is a member of the Gossamer Heights Rifle & Gun Club. Jack has been a member since high school (some ten years ago) as have most of the members of the club who are Jack's age (25). Jack has known Pam Umpkinteen for more than ten years, as have most of Jack's cronies at the Rifle & Gun Club. Jack and his club cronies often discuss the women of Gossamer Heights. Among the men at the club, Pam has the reputation of a scheming liar.

III. TASK.

Conduct an examination of Jack B. Nimble-Quick to elicit Pam Umpkinteen's reputation for truthfulness.

DRILL #6: Opinion as to Victim's Character for Truthfulness

I. OVERVIEW.

The purpose of this drill is to enhance counsel's ability to lay a proper foundation for eliciting evidence of another witness's character for truthfulness in the form of an opinion. Counsel will conduct a mock examination of Jill Fetchapale, friend of the alleged rape victim, based on the scenario provided. Pay special attention to the foundational requirements for eliciting an opinion. Upon completion of the exercise, a sample solution will be provided.

II. FACTS.

The accused has been charged with indecent assault against Pam Umpkinteen. The accused denies touching Umpkinteen in any manner. Pam testified for the government.

Jill Fetchapale has known Pam Umpkinteen for fourteen years (since third grade when Jill moved to Gossamer Heights). Jill and Pam were classmates throughout their school years and have many of the same friends. Jill is of the opinion that Pam is a very untruthful person, the kind of woman who exaggerates to make herself seem more important.

III. TASK.

Conduct an examination of Jill Fetchapale to elicit her opinion of Pam Umpkinteen's character for truthfulness.

FOUNDATIONS: REPUTATION & OPINION EVIDENCE

SAMPLE SOLUTIONS



DRILL #1: Accused's Reputation for Truthfulness

Q: *Petty Officer McDonald, how long have you been assigned to the NEVERSAIL?*

A: *Two and a half years.*

Q: *Did you report aboard as a first class petty officer?*

A: *Yes, I did.*

Q: *Does the NEVERSAIL have an Acey-Deucey Association?*

A: *Yes, it does.*

Q: *What is an Acey-Deucey Association?*

A: *It is a professional organization open to all first and second class petty officers aboard the NEVERSAIL. It's purpose is to promote morale, professional growth and community service.*

Q: *Are you a member?*

A: *Yes, I am.*

Q: *How long have you been a member?*

A: *I joined immediately upon checking aboard the ship.*

Q: *Is Petty Officer King a member?*

A: *Yes, he is.*

Q: *How long has he been a member?*

A: *He joined shortly after reporting aboard as well. So, I'd say about 14 months.*

Q: *Does Petty Officer King have a reputation within the Acey-Deucey Association concerning his truthfulness?*

A: *Yes, he does.*

Q: *Do you know what that reputation is?*

A: *Yes, I do.*

Q: *What is that reputation?*

A: *Everyone in the association believes Petty Officer King to be a truthful man.*

DRILL #2: Accused's Good Military Character

Q: *LT Rogers, do you know Petty Officer King?*

A: *Yes, I do.*

Q: *How do you know him?*

A: *He works in my division, W-3, onboard the NEVERSAIL.*

Q: *How long has he worked for you?*

A: *Fourteen months, ever since he reported on board the ship.*

Q: *How often do you see him during a work day?*

A: *Quite often. The division consists of about 15 people, so I see a lot of all the sailors that work for me.*

Q: *How often do you talk with Petty Officer King?*

A: *I talk to him every day about work related matters and we had several long conversations during the last deployment that were more personal. His schooling, family situation, goals, that sort of thing.*

Q: *What does good military character mean to you?*

A: *Someone who takes his duties seriously, takes care of subordinates, is reliable, and trustworthy. Someone I would want to go to combat with.*

Q: *Do you have an opinion concerning his military character ?*

A: *Yes, I do.*

Q: *What is your opinion concerning Petty Officer King's military character?*

A: *I think Petty Officer King is an outstanding sailor of exemplary military character.*

DRILL #3: Victim's Reputation for Peacefulness

Q: *Miss Muffet, where do you live?*

A: *I live in Gossamer Heights.*

Q: *What is Gossamer Heights?*

A: *It's a small subdivision of about twenty homes just south of town.*

Q: *How long have you lived there?*

A: *Six years.*

Q: *How many of your neighbors do you know?*

A: *I know everyone who lives there. The community's social committee is very active in planning things so that we get to know everyone.*

Q: *Do you know Jack Horner?*

A: *Yes, he's lived in Gossamer Heights longer than I have. Everyone knows Jack.*

Q: *Does Mr. Horner have a reputation within the Gossamer Heights community concerning his peacefulness?*

A: *Yes, he does.*

Q: *What is that reputation?*

A: *Jack is considered a very peaceful person. He's the type of guy who never displays a temper and can be called upon to smooth the way when tempers flare.*

DRILL #4: Victim's Character for Peacefulness

Q: Mr. Sprat, where do you work?

A: At the Goose & Goose Lumber Yard.

Q: Do you know Jack Horner?

A: Yes, I do. He works for me.

Q: How long has he worked for you?

A: Eight years.

Q: How closely have you observed Mr. Horner over the years?

A: Very closely.

Q: Does the work at Goose & Goose Lumber Yard ever get stressful?

A: Every now and then.

Q: In what way?

A: Oh, sometimes the guys, not Mr. Horner, but others, will come to work hungover and acting mean. Sometimes we get a rapid-fill order that has everyone jumping. Things like that.

Q: Do you have an opinion concerning Mr. Horner's character for peacefulness?

A: Yes, I do.

Q: What is your opinion?

A: Jack's a very peaceful person, the kind of guy to turn the other cheek and ignore attempts to rile him.

DRILL #5: Victim's Reputation for Truthfulness

Q: Mr. Nimble-Quick, do you belong to any clubs?

A: Yes, I'm a member of the Gossamer Heights Rifle & Gun Club.

Q: How many members does the club have?

A: Oh, probably seventy-five to a hundred.

Q: Where do most members of the club live?

A: All the members live in Gossamer Heights.

Q: Do you know Pam Umpkinteen, the alleged victim in this case?

A: Yes.

Q: How do you know her?

A: She and I were in high school together and she still lives in Gossamer Heights.

Q: Do most members of the Gossamer Heights Rifle & Gun Club know her?

A: Yes, she has lived on Gossamer Heights for several years.

Q: Does Ms. Umpkinteen have a reputation for truthfulness among the members of the club that know her?

A: Yes.

Q: What is that reputation?

A: Everyone thinks she is a lying witch.

DRILL #6: Opinion as to Victim's Character for Truthfulness

Q: *Ms. Fetchapale, do you know Pam Umpkinteen?*

A: *Yes, I do.*

Q: *How do you know her?*

A: *I've known Pam ever since third grade when I first moved to Gossamer Heights.*

Q: *How long has that been?*

A: *Fourteen years.*

Q: *How would you describe your relationship?*

A: *Well, we've been classmates off and on since the third grade and we have many of the same friends. I guess you would say we are friends, but not very close.*

Q: *How often have you seen Ms. Umpkinteen since you graduated from school?*

A: *I see her around town, at parties and other social events.*

Q: *Do you have an opinion as to her character for truthfulness?*

A: *Yes.*

Q: *What is your opinion?*

A: *Pam's not a very truthful person. She tends to exaggerate quite a bit.*

Tab E
Module 16

**Develop the Skill:
Foundations**

*Fungible and Non-Fungible
Evidence*



The Advocacy Trainer

FOUNDATIONS: FUNGIBLE AND NON-FUNGIBLE EVIDENCE

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** In our practice, laying the foundation for various types of evidence is crucial for counsel to master. Counsel's ability to lay a foundation for an item of evidence develops confidence and provides for efficiency during the presentation of their case. This exercise develops counsel's ability to lay a proper foundation to introduce non-fungible (unique, readily identifiable) and fungible (non-distinguishable) items of evidence. This module also incorporates laying the foundation for a chain-of-custody document that normally accompanies fungible items of evidence. For further reference on introducing a chain-of-custody document, see Tab E, Module 4. The supervisor should first lead a discussion of the law, review the practice pointers, and then conduct the suggested drills.
- B. **Training Overview.** The supervisor can conduct training with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of the practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions. It should take no longer than one hour to complete this training module.





II. THE LAW.


A. **Definitions.**




Demonstrative Evidence. Demonstrative evidence is used during a trial as a demonstration or a prop. The item may also be used as a substitute or duplicate of an actual item of evidence. There is no requirement that the piece of demonstrative evidence have any actual historical connection to the case. Demonstrative evidence will normally not be admitted as evidence in the trial or used by the members during their deliberations. The proponent must still lay the foundation to show it is substantially similar to the real item of evidence.

 **Real or Physical Evidence.** Tangible evidence (either non-fungible or fungible) that has a historical connection to the case, i.e., the actual weapon used during an assault. The proponent is required to show that the item of evidence is the real thing. Real evidence is admitted at trial and may be taken with the members for use during their deliberations.

 **Non-fungible Evidence.** Items of evidence that are unique in nature and readily identifiable because of their distinct characteristics. The characteristics may be intrinsic to the item, such as its color, make or model, functions, or a serial number. Characteristics making the item readily identifiable may also be extrinsic, i.e., notches, marks, or an evidence tag placed on the item by a witness.

 **Fungible Evidence.** Items of evidence that are not readily identifiable because of their generic nature, such as a baggy of marijuana. Items of fungible evidence are normally identified and tracked with a chain-of-custody document. Such evidence requires additional steps to become admissible.

B. The Authentication Requirement.

 “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” M.R.E. 901.

C. Elements of the Foundation: Non-fungible item of evidence.

1. *The object has a unique characteristic;*
2. *The witness observed the characteristic on a previous occasion;*
3. *The witness identifies the exhibit as the object;*
4. *The witness rests the identification on his present recognition of the characteristic; and*
5. *To the best of the witness’s knowledge, the exhibit is in the same condition as it was when the witness initially saw or received the item.*

D. Elements of the Foundation: Fungible item of evidence.

1. *The witness is familiar with the item of evidence;*
2. *The witness acquired this familiarity by obtaining the item;*

3. *The witness properly safeguarded the item while it was in his possession to prevent the evidence from being lost or altered;*
4. *The witness ultimately disposed of the item (retention, destruction, or transfer to another individual);*
5. *Prior to disposition, the witness prepared a chain-of-custody document that accompanied the item;*
6. *To the best of his knowledge, the witness can positively identify the item of evidence as that which he previously had custody over; and*
7. *That the item of evidence is in the same condition as it was when he had custody previously.*

E. *Elements of the Foundation: Chain-of-Custody Document (Authenticity).*

1. *The witness has personal knowledge of the business's or military's filing or records system;*
2. *The witness removed the record (chain-of-custody document) in question from a certain file;*
3. *It was a proper file or entry;*
4. *The witness recognizes the exhibit as the record (chain-of-custody document) he removed from the file; and*
5. *The witness specifies the basis on which he recognizes the exhibit.*

F. *Elements of the Foundation: Chain-of-Custody Document (Hearsay).*

Having established the authenticity of a record, counsel must establish that the contents of the chain-of-custody document are admissible as an exception to the hearsay rule. Counsel must understand that for hearsay purposes, there is no practical difference between the foundational elements for a “business” record and a “military” record. Moreover, counsel will see that there is a good deal of overlap between the foundations for authentication and for the hearsay exception. Indeed, laying the hearsay foundation usually serves to authenticate the record.

1. *The chain-of-custody document was prepared by a person having a relationship with the agency preparing the chain-of-custody document;*
2. *The person had a duty to record the information on the chain-of-custody document;*

3. *The person had personal knowledge of the facts or events recorded in the chain-of-custody document;*
4. *The chain-of-custody document was prepared contemporaneously with the events;*
5. *It was a routine practice of the business to prepare chain-of-custody documents;*
6. *The chain-of-custody document was reduced to written form; and*
7. *The chain-of-custody document was made in the regular course of business.*



III.

PRACTICE POINTERS.

While it is relatively easy to establish the foundation for admitting items of evidence and chain-of-custody documents, the weight the panel will give the items depends on how well you prepare the witness and the thoroughness of the foundational questions. Discuss the following points with counsel.

- ➔ **Carefully review each item of evidence and ensure that it has not been altered, unless such alteration can be explained.** This is crucial to your case and may raise ethical problems if evidence has been altered. Frequently tests will be performed on an item of evidence. This may cause quantities of the substance to be consumed (testing to determine the nature of a suspected controlled substance) or the appearance to be altered in some manner (residue from fingerprint analysis).
- ➔ **Considerations for admitting evidence in a case with multiple items.** Employ the concepts of primacy and recency, i.e., introduce your strongest evidence first and last. A decision must also be made on the order the evidence will be admitted. First, counsel must determine which witnesses are necessary to lay the foundation for the items of evidence. Depending on the types of evidence, this could be a relatively few number of witnesses to several different individuals. Next, counsel need to determine whether each individual item of evidence will be admitted separately and in a particular order or whether all foundational witnesses will be called and the items admitted when each separate foundation has been satisfied. Admitting each item separately may take more time and result in witnesses needing to be recalled to testify about other items of evidence. On the other hand, judicial economy may necessitate taking testimony from all foundational witnesses concerning all items of evidence of which they are familiar. If counsel feels that it is important for a particular item of evidence to be

admitted early so that subsequent testimony is clearer, then the item should be admitted first.

- **Pretrial admission of evidence.** To the extent possible, counsel should use motions in limine to determine the admissibility of evidence before the trial on the merits. Knowing which items of evidence will be admissible may result in changes in strategy or even a case being dismissed. It also prevents lengthy delays once the members have been seated. Although an item of evidence has been admitted pretrial, ensure that adequate testimony is presented at trial to show the members the full weight and evidentiary richness associated with the evidence.
- **Handling items of evidence pretrial.** Counsel should avoid at all costs taking possession of an item of evidence. Taking possession of an item of evidence makes counsel a potential witness and may result in an effort by opposing counsel to call the attorney as a witness and preclude their further participation in the case. Always have law enforcement personnel keep possession of the evidence, to include bringing it to trial and opening any sealed container. Once the item of evidence has been removed from its container, law enforcement personnel must keep the evidence in their possession until it is admitted.
- **Marking items of evidence.** Government exhibits are identified as Prosecution Exhibits (PE) and marked with Arabic numbers. Defense exhibits are identified as Defense Exhibits (DE) and marked with capital letters. Appellate exhibits are identified as Appellate Exhibits (AE) and marked with roman numerals. Counsel should try to determine what order the items will be admitted and have them marked sequentially. This will aid counsel in ensuring that their evidence has been admitted and assist the military judge in keeping track of the evidence. It will also prevent the members from wondering if they missed something if you admit PE 12 first. Counsel should always seek the assistance of the court reporter when marking exhibits.
- **Be aware of discrepancies in the handling of evidence that violate law enforcement standard operating procedures.** Frequently, law enforcement agencies will have internal standard operating procedures that dictate how evidence is to be maintained. Rarely will violations of these procedures result in the evidence being excluded. For this drastic remedy to occur, the military judge would have to find that the internal procedures were created with the intent to create a right for the person challenging the violation. Failure of law enforcement personnel to follow internal procedures may have drastic effects on the members in determining witness credibility. At a minimum, the law enforcement personnel will be embarrassed and made to look like they are sloppy. Such an appearance may give the members the hook to acquit an accused in a close case. If the violation is identified before trial, counsel will have time to address the issue and prepare the witness for a potentially vigorous cross-examination.

- ➔ **Witness preparation.** Always go over the foundational questions with law enforcement personnel to identify any problems. This provides the added benefit of allowing the witness to practice his answers so that they appear more polished before the members.

- ➔ **Publication of evidence.** After an item of evidence is admitted, the proponent may publish it to the members. Counsel need to determine when to publish the item to the members. Normally, you should publish the item and give the members the chance to inspect it immediately after its admission into evidence. This will enable them to examine the item and follow along with subsequent testimony about the item. This examination by the members may prompt questions from them. Publishing the evidence when the witness is still available avoids the delay of having to recall the witness.

- ➔ **Originals and Copies.** The original item of evidence must accompany the members to the deliberation room. If an item of evidence is capable of being reproduced, then counsel should arrange to have copies for the military judge, opposing counsel and each member.



IV.



SKILL DRILLS.

A. *Goal: Train counsel to employ the following skills.*

1. *Use direct examination techniques covered in previous training.*
2. *Lay a proper foundation for non-fungible and fungible items of evidence.*
3. *Lay the proper foundation for a chain-of-custody document.*

B. *Conduct the drills.*

1. ***Preparation:*** Conduct this training in the courtroom with all necessary documents. The supervisor will need a radio and a baggie with cinnamon or sugar to simulate heroin. This will be the evidence used in the drill. Start with the non-fungible item of evidence then progress to the fungible item and associated chain-of-custody document.
2. ***Role-Play:*** The supervisor will play the role of the judge. Designate counsel to play the role of trial counsel and the witness. The remaining participants will sit in the panel box and make appropriate objections. In your discretion, you may wish to use a military investigator as the witness. Using an investigator as a witness not only helps counsel work with a “real” witness, but educates the investigator about testifying and the foundation required to admit a particular item of evidence.
3. ***Execution:*** Educate counsel about the elements of the foundation. Furnish counsel a list of the elements, either in a handout or on a chalkboard or easel. Give counsel the evidence (portable stereo and bag of heroin) and fact scenario. Provide counsel fifteen minutes to prepare the foundation. You might want to allow counsel to go through the foundation once with notes. Have them lay the foundation a second time, using only the foundation elements listed on the handout, chalkboard or easel.

C. **Statement of Facts:** A larceny in the barracks occurred. A small portable stereo and some CDs were taken. The accused's roommate noticed the accused carrying a portable stereo fitting the description of some of the stolen property shortly after the larceny. The accused's roommate notified his supervisor. Ultimately, a search authorization was obtained and law enforcement personnel searched the accused's wall-locker. Inside the wall-locker, they found a portable stereo and a plastic baggie containing a brown powdery substance suspected to be heroin. The agent conducting the search confiscated both items. He put the make, model, and serial number of the portable stereo on his report before securing the portable stereo in his personal evidence locker. The agent filled out a chain-of-custody document for the suspected heroin and relinquished control of the substance to the evidence custodian for safekeeping. The accused is charged with larceny of non-military property and possession of a controlled substance.

D. **Drill: Foundation for Items of Evidence.**

Q. Agent Moore, where do you work?

A. CID office on Fort Brave.

Q. What are your duties at the CID office on Fort Brave?

A. I am a criminal investigator.

Q. How long have you been a criminal investigator?

A. Two years at Fort Brave. Before this assignment, I was a criminal investigator at Fort Eustis for three years.

Q. What are your job duties?

A. I investigate all types of crime that fall within our jurisdiction. That includes larcenies of personal property under \$10,000, simple assaults and batteries, drug use and similar offenses.

Q. Do your duties as a criminal investigator include confiscating and safeguarding evidence?

A. Yes. If the investigation involves evidence, we are taught how to seize, label, and safeguard it.

Q. Can you explain the various procedures that you follow?

A. The first thing you must consider is the type of evidence. If it is something that can be easily identified, something with a serial number, you record the features and then lock it in your evidence safe. If the item is valuable or needs to be tested, you would turn it into the evidence custodian. If the evidence is something that cannot be identified by its unique characteristics, you mark it somehow. Generally, you would put your initials on it and the date it was seized. You would also fill out a chain-of-custody document so that the item of evidence can be tracked and not

mixed up with other similar items of evidence that you could not readily distinguish.

Q. Do you recall investigating a suspected larceny on 25 January 1998?

A. *Yes. The unit contacted me and told me that someone broke into a soldier's room and some stereo equipment and CDs were taken. Another soldier saw his roommate with a portable stereo that matched the description of the stolen property. The commanding officer issued a search authorization and I searched the soldier's room.*

Q. Did you find any evidence of the crime?

A. *Yes, I found a small portable stereo that the victim identified as his. He had the serial number on his warranty card. I also found a baggie of what I thought could be heroin.*

Q. What did you do with this evidence?

A. *I took custody of each item and brought them back to the CID office.*

Q. What did you do with the stereo?

A. *I recorded the make, model, and serial number of the portable stereo on my report and placed it in my evidence locker. It has remained there until I brought it with me today. Before coming in to testify, I let the court reporter mark it. I kept it with me until you had me place it on the table over there.*

Q. What did you do with the baggie of suspected heroin?

A. *I put my initials and the date on the baggie. I then filled out a chain-of-custody document and turned it over to the evidence custodian. This morning I checked it out from the evidence custodian and brought it to trial with me. The court reporter marked it also and it is over on the table as well.*

Q. I would like to direct your attention to the portable stereo. What can you tell us about the stereo you seized from the accused's wall-locker?

A. *It was a Sony miniature cassette/CD player. The model number was 2710. The serial number was Y2BF0001.*

Q. I am showing you what has been marked as Prosecution Exhibit 1 for ID. Do you recognize it?

A. *Yes, this is the stereo I seized from the accused's wall-locker.*

Q. How do you know that?

A. *Well it is the same make and model that I seized. In addition, the serial number on the back is the same one that I recorded and matches what the victim gave me. The features all match what my report contains. I got that stereo out of my evidence locker this morning and brought it with me.*

- Q. Does anyone else have access to your evidence locker?**
- A. No, each agent has a small evidence locker and the individual agent is the only one with a key.**
- Q. Is the stereo in the same condition now as when you seized it?**
- A. Yes. It has been locked in my evidence locker and has not changed. The only time it was out, was when either you or Captain Jones (the defense counsel) came by to look at it. As far as I can tell, it is in the exact same condition.**
- TC. Your honor, the Government offers Prosecution Exhibit 1 for ID into evidence as Prosecution Exhibit 1.**
- MJ. Any objections to Prosecution Exhibit 1 for ID?**
- DC. No objection.**
- MJ. Prosecution Exhibit 1 for ID is admitted and the words for ID are stricken. You may publish the exhibit to the members when you desire.**
- TC. Your honor, I would like to publish Prosecution Exhibit 1 at this time. Bailiff, would you please hand the President of the Court Prosecution Exhibit 1.**
- Q. Agent Moore – I would now like you to turn your attention to the other item of evidence seized from the accused’s wall-locker. Do you recall what it was?**
- A. Yes. It was a plastic ziplock baggie with a brown powdery substance inside.**
- Q. What did you do with this item of evidence?**
- A. I took custody of the evidence and put my initials and the date on the baggie with a permanent marker. When I got back to CID, I filled out the chain-of-custody document. Then I turned the baggie and chain-of-custody document over to the evidence custodian.**
- Q. I am handing you Prosecution Exhibit 2 for ID. Do you recognize this item?**
- A. Yes. I seized this baggie from the accused’s wall-locker.**

- Q. How can you be so sure?**
A. Well the baggie has my initials and the date I put on it when I seized it. I also recognize my handwriting. As I mentioned earlier, I got this evidence from the evidence custodian this morning and I checked the evidence control number on the chain-of-custody document with my police report. They both matched.
- Q. Agent Moore – I would now like you to tell the members what a chain-of-custody document is and how it is used?**
A. A chain-of-custody document is a form that we use to keep track of certain items of evidence. Once the document is filled out, it stays with the particular item of evidence. What I mean by that is the chain-of-custody document is attached to the actual item of evidence and anyone who takes possession of the item has to fill out the document to reflect this.
- Q. How did you learn this?**
A. They taught us this during military police school. I also had some refresher training when I went to the criminal investigator course. When I checked in here, the evidence custodian ran through the specific procedures used here.
- Q. Was there a chain-of-custody document in this case?**
A. Yes, on the heroin.
- Q. How do you know this?**
A. I filled it out myself.
- Q. Agent Moore – I am showing you what has been marked as Prosecution Exhibit 3 for ID. Do you recognize this document?**
A. Yes I do. It is the chain-of-custody document for the suspected heroin I seized from the accused's wall-locker.
- Q. How do you recognize this document?**
A. Well, it has my name as the investigator on it. My name is in the block releasing it to the evidence custodian and on the last entry for bringing it here today. This morning I got the baggie and chain-of-custody document from the evidence custodian. The document also has the case control number and the evidence control number. Both of these match my report.
- Q. To the best of your knowledge, is the document filled out correctly?**
A. Yes, it is.
- Q. Is the document in the same condition it was when you last saw it?**
A. The only thing that changed was the entry by the evidence custodian releasing it to the laboratory for testing and the laboratory returning the substance for safe keeping. Otherwise, it is identical.

- Q. What exactly did you do with the plastic baggie once you seized it?**
- A. I put it in my coat pocket and kept it on me until I got back to CID. Then I filled out the chain-of-custody document and turned it over to the evidence custodian. I did this right when I got back. I did not want to keep the stuff on me.**
- Q. Did anyone else touch the baggie before you relinquished it to the evidence custodian?**
- A. No one. I kept it on me and then handed it right over to the evidence custodian.**
- Q. Are you certain that is the baggie that you seized from the accused's wall-locker?**
- A. Yes. Positive. It has my initials and the date on the bag. I also recognize the substance inside.**
- Q. Is the baggie and substance contained within the baggie in substantially the same condition as it was when you had it in your possession?**
- A. Yes. I know that a little is missing from the test. Other than that, it is identical.**
- TC. Your honor, the Government offers Prosecution Exhibits 2 and 3 for ID as Prosecution Exhibits 2 and 3.**
- MJ. Any objections to Prosecution Exhibits 2 and 3 for ID?**
- DC. Yes your honor. I object to the writing on the chain-of-custody document as hearsay. Furthermore, Prosecution Exhibit 2 for identification cannot be admitted until Government Counsel has successfully admitted Prosecution Exhibit 3 for identification.**
- MJ. Are those your only objections?**
- DC. Yes your honor. We do not challenge the authenticity of the document.**
- TC. Your honor. This is a business record.**
- MJ. It may very well be. However, until you lay an adequate foundation, the defense objection is sustained.**
- Q. Agent Moore, who requires that a chain-of-custody document be prepared and maintained?**
- A. CID .**

Q. Do you work at CID?

A. Yes I do.

Q. Do you have a duty to prepare a chain-of-custody document?

A. Yes, I do.

Q. When did you fill out the chain-of-custody document?

A. Right before I released it to the evidence custodian.

Q. Did you have personal knowledge of the information reported on the chain-of-custody document?

DC. Objection your honor. Trial counsel is leading the witness.

TC. Your honor, this is merely foundational. Leading questions are permissible for this purpose.

MJ. You are correct. The objection is over-ruled. Agent Moore, you may answer the question.

A. Yes I had personal knowledge at the time I filled out the chain-of-custody document.

Q. Is filling out the chain-of-custody document a routine practice of CID?

A. Yes.

Q. Why did you fill out the chain-of-custody document in this case?

A. It was required as part of my duties. Also, this was fungible evidence and we needed to be sure that it was properly handled and safe guarded.

TC. Your honor, the Government once again offers Prosecution Exhibits 2 and 3 for ID as Prosecution Exhibits 2 and 3.

MJ. Any other objections to Prosecution Exhibits 2 or 3 for ID?

DC. No objections.

MJ. Prosecution Exhibits 2 and 3 for ID are admitted and the words for ID are stricken. You may publish the exhibit to the members when you desire.

TC. Your honor, I would like to publish Prosecution Exhibits 2 and 3 at this time. Bailiff, would you please hand the President of the Court Prosecution Exhibits 2 and 3 and give the President and each member a copy of Prosecution Exhibit 3 as well.



E. *Summarize the main teaching points.* Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **Understand the foundational elements for fungible and non-fungible items of evidence and chain-of-custody documents.**
- ✓ **Know how to employ these foundational elements.**
- ✓ **Plan and practice introducing various items of evidence with the agent.**
- ✓ **Have duplicate copies of documentary evidence for the members.**



V.

REFERENCES.

- A. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID, 801, 803, 901 (1998).
- B. Edward J. Imwinkelried, *Evidentiary Foundations* ch. 10 (4th ed 1998).

ENCLOSURES
Counsel Handout
Sample Solution

FOUNDATIONS: FUNGIBLE AND NON-FUNGIBLE EVIDENCE

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for fungible and non-fungible items of evidence and chain-of-custody documents at trial.
- B. Preparation. Bring your MCM to the training. Review basic techniques of direct examination, cross examination, and objections. Additionally, review M.R.E.s 801, 803, 901.



II. KEYS TO SUCCESS.

Know the Elements of a Foundation for fungible and non-fungible items of evidence and chain-of-custody documents.

- A. ***Elements of the Foundation: Non-fungible item of evidence.***
1. *The object has a unique characteristic;*
 2. *The witness observed the characteristic on a previous occasion;*
 3. *The witness identifies the exhibit as the object;*
 4. *The witness rests the identification on his present recognition of the characteristic; and*
 5. *To the best of the witness's knowledge, the exhibit is in the same condition as it was when the witness initially saw or received the item.*
- B. ***Elements of the Foundation: Fungible item of evidence.***
1. *The witness is familiar with the item of evidence;*
 2. *The witness acquired this familiarity by obtaining the item;*

3. *The witness properly safeguarded the item while it was in his possession to prevent the evidence from being lost or altered;*
4. *The witness ultimately disposed of the item (retention, destruction, or transfer to another individual);*
5. *Prior to disposition, the witness prepared a chain-of-custody document that accompanied the item;*
6. *To the best of his knowledge, the witness can positively identify the item of evidence as that which he previously had custody over; and*
7. *That the item of evidence is in the same condition as it was when he had custody previously.*

C. *Elements of the Foundation: Chain-of-Custody Document (Authenticity).*

1. *The witness has personal knowledge of the business's or military's filing or records system;*
2. *The witness removed the record (chain-of-custody document) in question from a certain file;*
3. *It was a proper file or entry;*
4. *The witness recognizes the exhibit as the record (chain-of-custody document) he removed from the file; and*
5. *The witness specifies the basis on which he recognizes the exhibit.*

D. *Elements of the Foundation: Chain-of-Custody Document (Hearsay).*

1. *The chain-of-custody document was prepared by a person having a relationship with the agency preparing the chain-of-custody document;*
2. *The person had a duty to record the information on the chain-of-custody document;*
3. *The person had personal knowledge of the facts or events recorded in the chain-of-custody document;*
4. *The chain-of-custody document was prepared contemporaneously with the events;*
5. *It was a routine practice of the business to prepare chain-of-custody documents;*

6. *The chain-of-custody document was reduced to written form; and*
 7. *The chain-of-custody document was made in the regular course of business.*
- E. *The Facts.* A larceny in the barracks occurred. A small portable stereo and some CDs were taken. The accused's roommate noticed him carrying a portable stereo fitting the description of some of the stolen property shortly after the larceny. The accused's roommate notified his supervisor. Ultimately, a search authorization was obtained and law enforcement personnel searched the accused's wall-locker. Inside the wall-locker, they found a portable stereo and a plastic baggie containing a brown powdery substance suspected to be heroin. The agent conducting the search confiscated both items. He put the make, model, and serial number of the portable stereo on his report before securing the portable stereo in his personal evidence locker. The agent filled out a chain-of-custody document for the suspected heroin and relinquished control of the substance to the evidence custodian for safekeeping. The accused is charged with larceny of non-military property and possession of a controlled substance.



REFERENCES FOR FURTHER STUDY.

- A. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID, 801, 803, 901 (1998).
- B. Edward J. Imwinkelried, *Evidentiary Foundations* ch. 10 (4th ed 1998).

FOUNDATIONS: FUNGIBLE AND NON-FUNGIBLE EVIDENCE

SAMPLE SOLUTION



Q. Agent Moore, where do you work?

A. CID office on Fort Brave.

Q. What are your duties at the CID office on Fort Brave?

A. I am a criminal investigator.

Q. How long have you been a criminal investigator?

A. Two years at Fort Brave. Before this assignment, I was a criminal investigator at Fort Eustis for three years.

Q. What are your job duties?

A. I investigate all types of crime that fall within our jurisdiction. That includes larcenies of personal property under \$10,000, simple assaults and batteries, drug use and similar offenses.

Q. Do your duties as a criminal investigator include confiscating and safeguarding evidence?

A. Yes. If the investigation involves evidence, we are taught how to seize, label, and safeguard it.

Q. Can you explain the various procedures that you follow?

A. The first thing you must consider is the type of evidence. If it is something that can be easily identified, something with a serial number, you record the features and then lock it in your evidence safe. If the item is valuable or needs to be tested, you would turn it into the evidence custodian. If the evidence is something that cannot be identified by its unique characteristics, you mark it somehow. Generally, you would put your initials on it and the date it was seized. You would also fill out a chain-of-custody document so that the item of evidence can be tracked and not mixed up with other similar items of evidence that you could not readily distinguish.

Q. Do you recall investigating a suspected larceny on 25 January 1998?

A. Yes. The unit contacted me and told me that someone broke into a soldier's room and some stereo equipment and CDs were taken. Another soldier saw his roommate with a portable stereo that matched the description of the stolen property. The commanding officer issued a search authorization and I searched the soldier's room.

- Q. Did you find any evidence of the crime?**
A. Yes, I found a small portable stereo that the victim identified as his. He had the serial number on his warranty card. I also found a baggie of what I thought could be heroin.
- Q. What did you do with this evidence?**
A. I took custody of each item and brought them back to the CID office.
- Q. What did you do with the stereo?**
A. I recorded the make, model, and serial number of the portable stereo on my report and placed it in my evidence locker. It has remained there until I brought it with me today. Before coming in to testify, I let the court reporter mark it. I kept it with me until you had me place it on the table over there.
- Q. What did you do with the baggie of suspected heroin?**
A. I put my initials and the date on the baggie. I then filled out a chain-of-custody document and turned it over to the evidence custodian. This morning I checked it out from the evidence custodian and brought it to trial with me. The court reporter marked it also and it is over on the table as well.
- Q. I would like to direct your attention to the portable stereo. What can you tell us about the stereo you seized from the accused's wall-locker?**
A. It was a Sony miniature cassette/CD player. The model number was 2710. The serial number was Y2BF0001.
- Q. I am showing you what has been marked as Prosecution Exhibit 1 for ID. Do you recognize it?**
A. Yes, this is the stereo I seized from the accused's wall-locker.
- Q. How do you know that?**
A. Well it is the same make and model that I seized. In addition, the serial number on the back is the same one that I recorded and matches what the victim gave me. The features all match what my report contains. I got that stereo out of my evidence locker this morning and brought it with me.
- Q. Does anyone else have access to your evidence locker?**
A. No, each agent has a small evidence locker and the individual agent is the only one with a key.
- Q. Is the stereo in the same condition now as when you seized it?**
A. Yes. It has been locked in my evidence locker and has not changed. The only time it was out was when either you or Captain Jones (the defense counsel) came by to look at it. As far as I can tell, it is in the exact same condition.

- TC. ***Your honor, the Government offers Prosecution Exhibit 1 for ID into evidence as Prosecution Exhibit 1.***
- MJ. *Any objections to Prosecution Exhibit 1 for ID?*
- DC. *No objection.*
- MJ. *Prosecution Exhibit 1 for ID is admitted and the words for ID are stricken. You may publish the exhibit to the members when you desire.*
- TC. ***Your honor, I would like to publish Prosecution Exhibit 1 at this time. Bailiff, would you please hand the President of the Court Prosecution Exhibit 1.***
- Q. ***Agent Moore – I would now like you to turn your attention to the other item of evidence seized from the accused’s wall-locker. Do you recall what it was?***
- A. *Yes. It was a plastic ziplock baggie with a brown powdery substance inside.*
- Q. ***What did you do with this item of evidence?***
- A. *I took custody of the evidence and put my initials and the date on the baggie with a permanent marker. When I got back to CID, I filled out the chain-of-custody document. Then I turned the baggie and chain-of-custody document over to the evidence custodian.*
- Q. ***I am handing you Prosecution Exhibit 2 for ID. Do you recognize this item?***
- A. *Yes. I seized this baggie from the accused’s wall-locker.*
- Q. ***How can you be so sure?***
- A. *Well the baggie has my initials and the date I put on it when I seized it. I also recognize my handwriting. As I mentioned earlier, I got this evidence from the evidence custodian this morning and I checked the evidence control number on the chain-of-custody document with my police report. They both matched.*
- Q. ***Agent Moore – I would now like you to tell the members what a chain-of-custody document is and how it is used?***
- A. *A chain-of-custody document is a form that we use to keep track of certain items of evidence. Once the document is filled out, it stays with the particular item of evidence. What I mean by that is the chain-of-custody document is attached to the actual item of evidence and anyone who takes possession of the item has to fill out the document to reflect this.*
- Q. ***How did you learn this?***
- A. *They taught us this during military police school. I also had some refresher training when I went to the criminal investigator course. When I checked in here, the evidence custodian ran through the specific procedures used here.*

- Q. Was there a chain-of-custody document in this case?**
A. Yes, on the heroin.
- Q. How do you know this?**
A. I filled it out myself.
- Q. Agent Moore – I am showing you what has been marked as Prosecution Exhibit 3 for ID. Do you recognize this document?**
A. Yes I do. It is the chain-of-custody document for the suspected heroin I seized from the accused's wall-locker.
- Q. How do you recognize this document?**
A. Well, it has my name as the investigator on it. My name is in the block releasing it to the evidence custodian and on the last entry for bringing it here today. This morning I got the baggie and chain-of-custody document from the evidence custodian. The document also has the case control number and the evidence control number. Both of these match my report.
- Q. To the best of your knowledge, is the document filled out correctly?**
A. Yes, it is.
- Q. Is the document in the same condition it was when you last saw it?**
A. The only thing that changed was the entry by the evidence custodian releasing it to the laboratory for testing and the laboratory returning the substance for safe keeping. Otherwise, it is identical.
- Q. What exactly did you do with the plastic baggie once you seized it?**
A. I put it in my coat pocket and kept it on me until I got back to CID. Then I filled out the chain-of-custody document and turned it over to the evidence custodian. I did this right when I got back. I did not want to keep the stuff on me.
- Q. Did anyone else touch the baggie before you relinquished it to the evidence custodian?**
A. No one. I kept it on me and then handed it right over to the evidence custodian.
- Q. Are you certain that is the baggie that you seized from the accused's wall-locker?**
A. Yes. Positive. It has my initials and the date on the bag. I also recognize the substance inside.
- Q. Is the baggie and substance contained within the baggie in substantially the same condition as it was when you had it in your possession?**
A. Yes. I know that a little is missing from the test. Other than that, it is identical.
- TC. Your honor, the Government offers Prosecution Exhibits 2 and 3 for ID as Prosecution Exhibits 2 and 3.**

MJ. Any objections to Prosecution Exhibits 2 and 3 for ID?

DC. Yes your honor. I object to the writing on the chain-of-custody document as hearsay. Furthermore, Prosecution Exhibit 2 for identification cannot be admitted until Government Counsel has successfully admitted Prosecution Exhibit 3 for identification.

MJ. Are those your only objections?

DC. Yes your honor. We do not challenge the authenticity of the document.

TC. Your honor. This is a business record.

MJ. It may very well be. However, until you lay an adequate foundation, the defense objection is sustained.

Q. Agent Moore, who requires that a chain-of-custody document be prepared and maintained?

A. CID.

Q. Do you work at CID?

A. Yes I do.

Q. Do you have a duty to prepare a chain-of-custody document?

A. Yes, I do.

Q. When did you fill out the chain-of-custody document?

A. Right before I released it to the evidence custodian.

Q. Did you have personal knowledge of the information reported on the chain-of-custody document?

DC. Objection your honor. Trial counsel is leading the witness.

TC. Your honor, this is merely foundational. Leading questions are permissible for this purpose.

MJ. You are correct. The objection is over-ruled. Agent Moore, you may answer the question.

A. Yes I had personal knowledge at the time I filled out the chain-of-custody document.

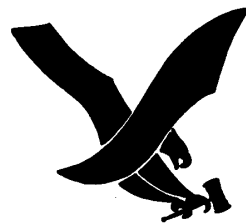
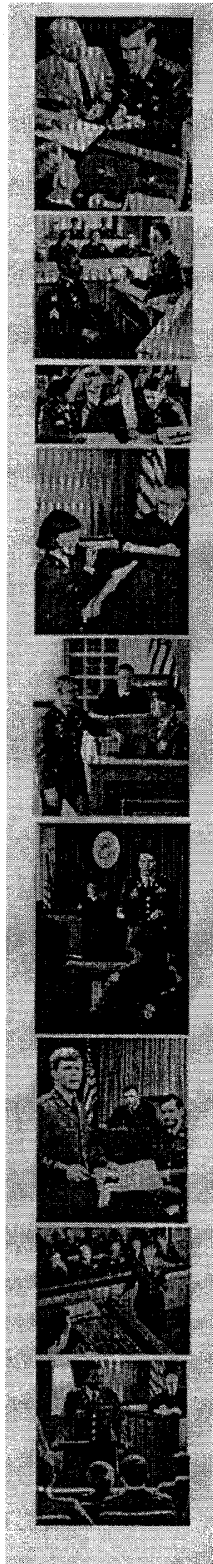
Q. Is filling out the chain-of-custody document a routine practice of CID?

A. Yes.

- Q. Why did you fill out the chain-of-custody document in this case?*
- A. It was required as part of my duties. Also, this was fungible evidence and we needed to be sure that it was properly handled and safe guarded.*
- TC. Your honor, the Government once again offers Prosecution Exhibits 2 and 3 for ID as Prosecution Exhibits 2 and 3.*
- MJ. Any other objections to Prosecution Exhibits 2 or 3 for ID?*
- DC. No objections.*
- MJ. Prosecution Exhibits 2 and 3 for ID are admitted and the words for ID are stricken. You may publish the exhibit to the members when you desire.*
- TC. Your honor, I would like to publish Prosecution Exhibits 2 and 3 at this time. Bailiff, would you please hand the President of the Court Prosecution Exhibits 2 and 3 and give the President and each member a copy of Prosecution Exhibit 3 as well.*

Tab F

Hearsay



The Advocacy Trainer

HEARSAY – THE FUNDAMENTALS

SUPERVISOR’S GUIDE



I. CHAPTER OVERVIEW.

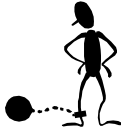
- A. **Goals.** The fundamental purpose of the prohibition against hearsay is to exclude from the fact-finder any prior out of court statement of a witness, offered for its truth, unless there are sufficient guarantees of trustworthiness for the truth of the statement. Under the rules of evidence, admissible hearsay statements are divided into three basic categories: **exemptions** from the definition of hearsay; **exceptions**, where the witness’s availability at trial is immaterial; and **exceptions**, where a declarant is unavailable at trial.

This Tab develops counsel’s understanding and ability to admit the most common hearsay statements. This overview will cover legal and practical considerations of each form of hearsay statement addressed in this Tab. This Tab will also provide counsel with a pullout guide with the common hearsay rules as a reference.

- B. **Training Overview.** The instructor can conduct each training module in this Tab with one or more counsel. The training is divided into four phases: (1) preparation by instructor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions.

The fundamentals of hearsay outlined in this introduction are common to all methods of hearsay and should be incorporated into the instruction of each module in this Tab. If time permits, the supervisor should consider training on more than one hearsay module at a time to demonstrate the relationship between the rules. If time does not permit, consider teaching the hearsay modules in order until completed, without any other modules in between. It is important that counsel have an opportunity to understand the different foundational requirements in each rule to get a good understanding of how the rules relate to each other.

II.



THE LAW.

- A. **Hearsay.** Any prior **out of court statement** made by a declarant offered for the **truth of its contents** is hearsay. A statement can be oral, written, or even nonverbal conduct, as long as it is intended as an assertion. (M.R.E. 801(a) – (c)). Generally, all such statements are inadmissible unless they fall under a specific exception created by the Rules of Evidence or by an Act of Congress applicable to trials by court-martial. (M.R.E. 802).

Any attempt to offer a prior statement of a witness raises the possibility of a hearsay objection. In that case, the proponent must be prepared to explain why the statement either is not hearsay (i.e. the statement is not offered for its truth) or that it falls within one of the exemptions of rule 801(d) or into one of the exceptions to the hearsay rule.

Counsel should also bear in mind that statements offered to impeach the credibility of a witness are not hearsay because they are not offered to prove the truth of the matter asserted. Counsel may impeach by proving bias or motive to fabricate under M.R.E. 608(c); by attacking credibility with a prior inconsistent statement under M.R.E. 613; by demonstrating bad character for truthfulness and veracity under M.R.E. 405; or by showing prior bad conduct under M.R.E. 404(b).

- B. **Exemptions to the hearsay rule.** M.R.E. 801(d)(1) provides that certain statements are not hearsay, if (1) the declarant testifies at the trial or hearing, (2) the declarant is subject to cross-examination concerning the statement; and (3) the statement is one of the following:
1. Inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at the trial, hearing, or other proceeding, or deposition; or
 2. Consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive; or
 3. One of identification of a person made after perceiving the person.

C. ***Admission by party-opponent.*** Also, M.R.E. 801(d)(2) provides that admissions made by a party-opponent are not hearsay, if the statement is offered against the party and is:

1. the party's own statement; or
2. a statement the party has manifest his adoption of or belief in its truth; or
3. a statement by a person authorized by the party to make a statement concerning the subject; or
4. a statement by the party's agent or servant concerning the matters within the scope of the agency/employment, made during the relationship; or
5. a statement by a co-conspirator made during the course of and in furtherance of the conspiracy.

D. ***Exceptions to the hearsay rule.*** Exceptions to the hearsay rule are admissible based on their reliability. There are three categories of exceptions: M.R.E. 803, where the availability of the declarant is immaterial; M.R.E. 804, where the declarant must be unavailable at trial before statements are admissible; and M.R.E. 807, residual hearsay.

Many of the rules under M.R.E. 803 do not depend on the availability of the declarant. These rules are considered firmly rooted hearsay exceptions based on a long history of demonstrated reliability. The most common exceptions, covered in this Tab, include: M.R.E. 803(1) ***Present sense impressions***; M.R.E. 803(2) ***Excited utterance***; and M.R.E. 803(4) ***Statements for purposes of medical diagnosis or treatment***.

The exceptions listed in M.R.E. 804 require the declarant to be unavailable for trial. This rule will be covered in other modules.

E. ***Use as substantive evidence.*** All prior statements admissible under M.R.E. 801(d), M.R.E. 803 and M.R.E. 804 are admissible as substantive evidence at trial. Therefore, contents of any prior statement admitted at trial as either a hearsay exemption or exception can be argued as evidence before the fact-finder.

Statements offered for a purpose other than the truth of the matter asserted are not substantive evidence. When using these statements in argument, counsel's argument must be consistent with the purpose for which the statement was offered.



III.

PRACTICE POINTERS.

- ***Clarity and simplicity.*** Effective use of hearsay statements depends upon an accurate knowledge of the rules and the ability to identify all the possible basis for admissibility of prior statements made by a witness. Counsel must identify all prior statements made by a witness and then evaluate whether the statement may be offered for the truth of its contents or for some other permissible purpose. Ask yourself, do you want the trier of fact to accept the contents of the statement as true, or are you offering it for another purpose, i.e. to show knowledge, etc. If not offered for its truth, the statement is not hearsay. On the other hand, if the answer is yes, determine which of the hearsay exemptions or exceptions apply to make the statement admissible.

- ***Laying the proper foundation for admissibility.*** When attempting to admit prior hearsay statements of a witness, counsel must lay the proper foundation. These steps should be identified in advance to avoid any delay or confusion at trial. The more prepared counsel is to lay a proper foundation and offer these prior statements, the more persuasive counsel will be at trial. Statements offered under M.R.E. 801(d)(1) require the declarant to testify in the current trial. One part of the foundation may be the presence of the witness at trial or a showing of unavailability. Statements offered under M.R.E. 804 require a showing of unavailability. Statements offered under M.R.E.s 803 and 807 are admissible whether or not the declarant testifies at the current trial.

- ***Consistent and Inconsistent Statements.*** Note the distinction between statements under M.R.E. 801(d)(1)(A) and (d)(1)(B). For *inconsistent* statements under M.R.E. 801(d)(1)(A), they must be made under oath at a prior proceeding. If a prior inconsistent statement does not satisfy these requirements, it may only be used to impeach the credibility of the witness and not as substantive evidence. There is no requirement that prior *consistent* statements under M.R.E. 801(d)(1)(B) be made under oath or at a prior proceeding. The declarant must presently testify as a witness in the current trial to offer prior consistent or inconsistent statements. See Tab D for use of prior statements to rehabilitate, bolster, or impeach witness credibility.

- ***Use of hearsay statements.*** Counsel must always analyze prior statements made by all witnesses as well as the accused and determine if the statements will help their case. A clear theory of the case and an understanding of the opponent's case is critical to understanding if prior statements help or hurt your case.

- ***Substantive evidence.*** Once prior statements are admitted under any of the hearsay rules, they can be treated like any other evidence at trial. Counsel must be careful to record the judge's ruling on admissibility of prior statements and argue only those admitted as substantive evidence. Remember that statements offered for a purpose other than the truth of the matter asserted (i.e. impeachment, intent, etc.) are not admissible as substantive evidence.

- ***All hearsay statements are not admissible.*** Assuming counsel has adequately prepared to have prior statements of a witness admitted, that is not the end of the analysis. Counsel must also consider other evidentiary rules that may impact the court's decision to admit prior statements. Counsel should consider the authenticity requirements of M.R.E. 901, relevance under M.R.E. 401 and 403, and the best evidence rule of M.R.E. 1002. Counsel should also be familiar with the requirements under M.R.E. 104 concerning preliminary questions of admissibility and relevance.

- ***Relationship between hearsay rules.*** Counsel should note the interconnectedness of the hearsay exceptions or exemptions. A statement may qualify for admission under more than one exemption or exception. For example, a statement that qualifies as a present sense impression under M.R.E. 803(1) may also qualify as an excited utterance under M.R.E. 803(2) if the event caused the declarant to be startled. In addition, statements that qualify as an excited utterance may qualify as a statement made for the purposes of diagnosis or treatment under M.R.E. 803(4). The reverse can also be true. The key is for counsel to recognize all of the alternate theories of admissibility at trial, if necessary.



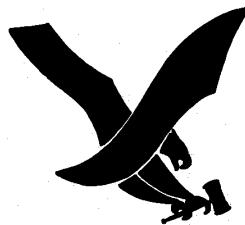
IV.

REFERENCES.

- A. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 801-805 (1998).
- B. Stephen A. Saltzburg et. al., *Military Rules of Evidence Manual*, Fourth Edition, sect. VIII (1997).
- C. Thomas A. Mauet, *Trial Techniques*, 238-266 (4th ed. 1996).

Tab F
Module 1

Hearsay
Present Sense Impression



The Advocacy Trainer

HEARSAY: PRESENT SENSE IMPRESSION

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise develops counsel's ability to lay the proper foundation for admission of a statement of a present sense impression. Lead a discussion of the law and practice pointers and then conduct the suggested drill. Consider using examples of good and bad techniques from recent records of trial, if available.
- B. **Training Overview.** Training can be conducted with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions.



II. THE LAW.

- A. **The Doctrine. M.R.E. 803(1).**



A statement describing or explaining an event or condition made while the declarant perceived it or immediately thereafter is called a present sense impression. The declarant may or may not be testifying about the event or condition. The statement must have been made at the time of the event or condition or as soon thereafter as possible (e.g., while observing a physical attack or after participating in an event). Typically, a statement of a present sense impression is offered by the declarant or through the testimony of a witness who heard it. This hearsay exception is recognized because of the indicia of reliability: the contemporaneous nature of the statement describing an event while observing it precludes the reflection necessary to fabricate a statement. Unlike an excited utterance, it does not require a startling event.



When introducing a present sense impression, counsel should be prepared for the opposition to attack the credibility of the declarant, such as whether the declarant had an opportunity to reflect and modify any initial thought.

Remember, the admissibility of the statement is based on the reduced likelihood that the declarant made a conscious or deliberate misrepresentation. While time is not the controlling foundational element, the statement must be made at the time of the event, or the first available opportunity after the event. Courts contemplate a statement within minutes to a few hours after the event, not days.

B. *Elements of the Foundation.*

1. *An event occurred;*
2. *The declarant had personal knowledge of the event (not required to be startling event);*
3. *The declarant made the statement while observing or soon after the event; and*
4. *The statement "describes" or "explains" the event.*



III. PRACTICE POINTERS.

The foundation for the statement of a present sense impression is relatively easy to establish. In military practice, this exception is rarely litigated. However, to be effective, counsel must demonstrate that an event or condition existed and that the statement was made while the declarant was perceiving it or within a reasonable time after the event. Courts will generally evaluate admissibility on a case-by-case basis. Discuss the following points with counsel.

- **Declarant need not testify.** The benefit of a statement of a present sense impression is that you do not need the person who actually made the statement. You only need a person who heard it. This is especially helpful when the declarant is a small child or the spouse of the accused who suddenly becomes “unavailable” at trial.
- **The key to admissibility.** To qualify as a present sense impression, the statement must be made at the time of the event, immediately thereafter or at the first available opportunity. There is no hard and fast rule about how much time is considered “immediately thereafter.” However, the contemporaneousness of the statement is crucial to its admission. Also, while corroboration is not required in the language of the rules, courts will look to any independent corroboration to determine if the statement qualifies as a present sense impression. (Note: if the declarant does not testify, the Confrontation Clause must be satisfied. To determine if the statement is reliable enough to satisfy the Confrontation Clause, the trial court cannot consider extrinsic corroborating evidence. The foundation

by counsel should demonstrate to the court a nexus between when the statement was made and what event triggered the statement to qualify as a present sense impression.

- **Focus on the event (trigger) and the time lapse between the event and the statement.** The time between when the statement was made and the event that triggered the statement should be counsel's focus. The burden is on the proponent of the statement to establish its admissibility. The key is whether the declarant had time to think the event through and calculate an answer. If so, the "circumstantial guarantee of trustworthiness" evaporates, and the statement is inadmissible. Courts have considered the amount of time between the event and the statement, concluding that times ranging from twelve hours up to two and a half weeks was too long. The court's analysis looks closely at the event and the timing of the statement. Two reported military cases addressing M.R.E. 803(1) warrant review. Counsel is encouraged to view these cases as research aids and not to rely on these reported cases without further research.
- In *Unites States v. Brown*, 48 M.J. 578, 584 (A.C.C.A. 1998) (aff'd on other grounds), the court found that a statement made by one Special Agent to another, while changing places during an interrogation, about an admission of guilt made by the suspect in the initial interrogation was an event for purposes of M.R.E. 803(1). The court held, however, that the military judge erred in admitting the statement as a present sense impression because there was no evidence to establish that the statement was made contemporaneously or immediately after the interview, as required by M.R.E. 803(1).
 - *Unites States v. Evans*, 23 M.J. 665, 670 (A.C.M.R. 1986), is the only reported military case where a statement qualified as a present sense impression. In that case, the court focused on both the event and the timing of the statement to assess its admissibility. In *Evans*, the 4 year old rape victim said "yes, it feels better, just like when my Daddy took it out," in response to a question by a nurse about whether a bath made her feel better. The statement occurred two days after the rape. The court found the statement met the requirements under M.R.E. 803(1) because the statement -- identifying her daddy as the source of her injury was made contemporaneously with the event -- the bath. Note -- the event in *Evans* is the bath that takes place after the rape and the statement explains why the bath makes her "feel better."
 - When faced with use of such a statement, be aware of the exception's limitation. Few cases have been decided in the military based on this exception. As a result, counsel must ensure the proper foundation has been met to make the statement admissible. The same principle that supports admissibility -- the lack of opportunity for calculation -- also carries limitations, such as errors in perception and interpretation, which could lead to well-intentioned but inaccurate statements. Counsel must be prepared to articulate other available reasons that may make these statements admissible.

IV.



SKILL DRILLS.

A. **Goal:** *Train counsel to employ the following skills.*

1. Use direct examination techniques covered in previous training.
2. Lay a proper foundation for a statement of a present sense impression.

B. **Conduct the drills.**

1. *Preparation:* Conduct this training in the courtroom. Start with the facts below.
2. *Role Play:* The supervisor will play the role of the military judge. Designate counsel to play the roles of proponent and opponent. Another counsel will play the role of the witness. Remaining participants will sit in the panel box and make appropriate objections. In your discretion, you may wish to appoint a counsel as the military judge.
3. *Execution:* Inform counsel of the elements of the foundation (provided on handout or chalkboard). Give counsel five minutes to prepare the foundation. Allow counsel to go through the foundation several times with notes. Have them lay the foundation several more times without notes.

C. **Drill:** *Foundation for a Present sense impression.*

1. The fact situation is a robbery. The witness, **Chase Low**, was walking the two blocks from the downtown subway stop to work when he witnessed a man in a brown jacket run by him into the subway station. An unidentified bystander next to him asked if he saw the man grab the woman's purse? Chase Low responded that he did not see the purse snatching and the bystander explained that he saw the guy grab the woman's black purse from her shoulder and tuck it inside his jacket then run past them into the subway station. Upon arriving in the office, approximately 10 minutes later, he went to his boss and said "On my way to the office from the subway, this lady's purse was snatched, in broad daylight." He described the details he recalled of the robber (twenty-something, white male, with short brown hair, wearing a brown jacket, jeans and sneakers) to his boss, Mr. Ron High, and repeated what the bystander told him about the robbery. He then proceeded to his office to

work. The issue was identification of the accused as the person who committed the robbery.

[Note: This sample provides for introduction of the statement of the unidentified bystander to the witness Mr. Low involving the actual robbery. Have one set of counsel lay the foundation for the testimony of Mr. Low, then switch roles and repeat the drill.]

2. Sample foundation for a **Present sense impression**: Chase Low is the witness.

Q. Where were you on the morning of January 29, 19XX, at approximately 0730?

A. I was just outside the downtown subway station at the corner of Main and Broadway Streets, Fort Knight, Missouri.

Q. Why were you there?

A. I was on my way to work. I had just gotten off the subway that arrived at the downtown stop at 0725.

Q. Did anything unusual happen?

A. Yeah, that lady over there in the red dress got her purse snatched (pointing to the victim).

Q. What did you see?

A. Well, the only thing I saw was this guy (pointing to the accused) run past me into the subway station just after I got outside the door. [Counsel should describe the identification for the record.]

Q. Did you actually see the accused snatch the purse?

A. No, I only saw him run past me. But this guy standing next to me saw it and asked me if I saw the guy take the purse.

Q. Did he tell you he saw the robbery?

A. Yes. He described what he saw and identified the guy that ran past us into the subway station as the robber.

Q. Do you know the person who told you he saw the accused grab the purse?

A. No, I didn't catch his name. He just turned to me after that guy ran by and asked me if I saw him grab the lady's purse.

Q. Do you know if anyone else observed the purse snatching?

A. I'm not sure, but there were several dozen people in the area going to and from the subway.

Q. Did you speak to any other bystanders about the robbery?

A. No.

Q. Can you describe this person who told you about the robbery?

A. He was a white male, maybe thirty or thirty five, about five foot four, he was dressed in a business suit. I believe I have seen him before at the downtown subway stop. He looked familiar, like I had seen him before, but I don't know him.

Q. Where was he at the time of this robbery?

DC. Objection, calls for a legal conclusion.

MJ. Sustained. Rephrase the question, counsel.

Q. Okay, where was he at the time of the "alleged" robbery?

A. He had exited the subway station in front of me, I'd say about 5 feet in front of me. He was approximately 10 feet from the subway station door.

Q. How was he facing?

A. We were both heading north, away from the subway station, in the direction where the purse snatching took place, approximately 10 feet in front of him.

Q. How much time passed from the time you observed the man run into the subway station until the unidentified bystander told you what he saw?

A. Immediately, within seconds. I would estimate from 3-5 seconds after the accused ran by me.

Q. Do you recall what the bystander said to you?

[Note: At this point opposing should object on the grounds that it calls for hearsay. Counsel would proceed by stating that although the statement is hearsay, it falls within the present sense impression exception under M.R.E. 803(1).]

A. Yes. He turned around to me and asked if I had seen the guy that just ran past us into the subway station snatch that woman's purse.

Q. What were his gestures?

A. He was pointing at the man who had just run by us into the subway station.

Q. Did he say anything else?
A. Yes. When I told him I didn't see the guy grab the purse, he said the guy just walked up to the lady and grabbed her black purse off her shoulder and stuck it inside his jacket.

Q. What did you do then?
A. I just said something like, "In broad daylight," then continued the two blocks to my office.

Q. Do you see the person that ran past you in court today?
A. Yes. That's him over there (pointing to the accused). [Counsel should describe the identification for the record.]



D. **Summarize the main teaching points.** Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **Memorize the foundational elements for the admissibility of a statement of present sense impression.**
- ✓ **Have them available to consult if recall fails.**
- ✓ **Key to admissibility is that an event occurred and the statement describing or explaining the event occurred while observing the event or at the first available opportunity to speak.**
- ✓ **These statements are reliable because of the absence of an opportunity for the declarant to reflect and fabricate a lie.**
- ✓ **For events that are startling, use the excited utterance exception, M.R.E. 803(2).**



V. REFERENCES.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* ch. 11 (1994).
- B. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).

ENCLOSURES
Counsel Handout
Sample Solution

HEARSAY: PRESENT SENSE IMPRESSION

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for a present sense impression. It should take approximately _____ minutes/hrs to complete this exercise.
- B. Preparation. Bring your MCM to the training. Review basic techniques of direct examination, cross examination, and objections. Review M.R.E. 901, 801, 802, 803(1), and 806.
- C. The fact situation is a robbery. The witness, **Chase Low**, was walking the two blocks from the downtown subway stop to work when he witnessed a man in a brown jacket run by him into the subway station. An unidentified bystander next to him asked if he saw the man grab the woman's purse. Chase Low responded that he did not see the purse snatching and the bystander explained that he saw the guy grab the woman's black purse from her shoulder and tuck it inside his jacket then run past them into the subway station. Upon arriving in the office, approximately 10 minutes later, he went to his boss and said "On my way to the office from the subway, this lady's purse was snatched, in broad daylight." He described the details he recalled of the robber (twenty-something, white male, with short brown hair, wearing a brown jacket, jeans and sneakers) to his boss, Mr. Ron High, and repeated what the bystander told him about the robbery. He then proceeded to his office to work. The issue was identification of the accused as the person who committed the robbery.

[Note: This sample provides for introduction of the statement of the unidentified bystander to the witness Mr. Low involving the actual robbery. Have one set of counsel lay the foundation for the testimony of Mr. Low, then switch roles and repeat the drill.]

II.



KEYS TO SUCCESS.

Know the elements of a foundation for admission of a statement of present sense impression.

1. *An event occurred.*
2. *The declarant had personal knowledge of the event (need not be the declarant testifying, only someone who heard the statement).*
3. *The declarant made the statement while observing the event or soon after.*
4. *The statement “describes” or “explains” the event.*

III.



REFERENCES FOR FURTHER STUDY.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* ch. 11 (1994).
- B. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).

HEARSAY: PRESENT SENSE IMPRESSION

SAMPLE SOLUTION



Q. Where were you on the morning of January 29, 19XX, at approximately 0730?

A. I was just outside the downtown subway station at the corner of Main and Broadway Streets, Fort Knight, Missouri.

Q. Why were you there?

A. I was on my way to work. I had just gotten off the subway that arrived at the downtown stop at 0725.

Q. Did anything unusual happen?

A. Yeah, that lady over there in the red dress got her purse snatched (pointing to the victim). [Counsel should describe the identification for the record.]

Q. What did you see?

A. Well, the only thing I saw was this guy (pointing to the accused) run past me into the subway station just after I got outside the door. [Counsel should describe the identification for the record.]

Q. Did you actually see the accused snatch the purse?

A. No, I only saw him run past me. But this guy standing next to me saw it and asked me if I saw the guy take the purse.

Q. Did he tell you he saw the robbery?

A. Yes. He described what he saw and identified the guy that ran past us into the subway station as the robber.

Q. Do you know the person who told you he saw the accused grab the purse?

A. No, I didn't catch his name. He just turned to me after that guy ran by and asked me if I saw him grab the lady's purse.

Q. Do you know if anyone else observed the purse snatching?

A. I'm not sure, but there were several dozen people in the area going to and from the subway.

Q. Did you speak to any other bystanders about the robbery?

A. No.

Q. Can you describe this person who told you about the robbery?

A. He was a white male, maybe thirty or thirty five, about five foot four, he was dressed in a business suit. I believe I have seen him before at the downtown subway stop. He looked familiar, like I had seen him before, but I don't know him.

Q. Where was he at the time of this robbery?

DC. Objection, calls for a legal conclusion.

MJ. Sustained. Rephrase the question, counsel.

Q. Okay, where was he at the time of the "alleged" robbery?

A. He had exited the subway station in front of me, I'd say about 5 feet in front of me. He was approximately 10 feet from the subway station door.

Q. How was he facing?

A. We were both heading north, away from the subway station, in the direction where the purse snatching took place, approximately 10 feet in front of him.

Q. How much time passed from the time you observed the man run into the subway station until the unidentified bystander told you what he saw?

A. Immediately, within seconds. I would estimate from 3-5 seconds after the accused ran by me.

Q. Do you recall what the bystander said to you?

A. Yes. He turned around to me and asked if I had seen the guy that just ran past us into the subway station snatch that woman's purse.

Q. What was his tone of voice?

A. He was talking fast, with a surprised look on his face.

Q. What were his gestures?

A. He was pointing at the man who had just run by us into the subway station.

Q. Did he say anything else?

[Note: At this point opposing counsel should object on the grounds that it calls for hearsay. Counsel would proceed by stating that although the statement is hearsay, it falls within the excited utterance exception under M.R.E. 803(2).]

A. Yes. When I told him I didn't see the guy grab the purse, he said the guy just walked up to the lady and grabbed her black purse off her shoulder and stuck it inside his jacket.

Q. What did you do then?

A. I just said something like, "In broad daylight," then continued the two blocks to my job.

Q. Do you see the person that ran past you in court today?

A. Yes. That's him over there (pointing to the accused). [Counsel should describe the identification for the record.]

Tab F
Module 2

Hearsay
Excited Utterance



The Advocacy Trainer

HEARSAY: EXCITED UTTERANCE

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise develops counsel's ability to lay the proper foundation for an excited utterance. Lead a discussion of the law and practice pointers and then conduct the suggested drills. Consider using examples of good and bad techniques from recent records of trial.
- B. **Training Overview.** Training can be conducted with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions.



II. THE LAW.

- A. **The Doctrine. MRE 803(2).**



An excited utterance is a statement made by a person, who may or may not be testifying, relating to a startling event or condition. The statement must have been made while the person was under the stress of excitement caused by the event or condition (e.g., following a physical attack, observing a shocking incident, or escaping from an abuser). Typically, an excited utterance is offered through the testimony of a witness who heard it; it is a hearsay exception recognized principally because of the inference of reliability.



When introducing an excited utterance as an exception to the hearsay requirement, counsel should be prepared for the opposition to attack the supporting credibility of the declarant.

B. ***Elements of the Foundation.***

1. *An event occurred;*
2. *The event was startling, or stressful;*
3. *The declarant was a participant in the event (e.g., victim) or an observer;*
4. *The declarant made a statement about the event; and*
5. *The declarant made the statement while in a state of excitement.*



III.

PRACTICE POINTERS.

The foundation for an excited utterance is relatively easy to establish. Its effectiveness, however, depends on how well it is prepared and presented in court. Discuss the following points with counsel.

- ➔ ***Declarant need not testify.*** The benefit of the excited utterance exception is that you don't need the person who actually made the statement. You only need a person who heard it. This is especially helpful when the declarant is a small child or the spouse of the accused who suddenly becomes "unavailable" at trial.
- ➔ ***The degree of excitement is not the key to admissibility.*** Different events strike people different ways. Because our vulnerabilities vary, there is no objective test for what qualifies as a triggering event. It "must be considered in the light and experience of the particular declarant." *United States v. Urbina*, 14 M.J. 962 (A.C.M.R. 1982). Courts will look to the "age, physical and mental condition . . . [and] basis for knowing the statement to be true" when evaluating whether the person was excited when making the statement.
- ➔ ***The stress in recalling the event is different from the stress caused by the event.*** Only the latter could qualify as an excited utterance. *United States v. Barrick*, 41 M.J. 696 (A.F. Ct. Crim. App. 1995).
- ➔ ***Focus on the impulse, not the time lapse.*** While "time" is one of the factors a court should consider in assessing spontaneity, there is no rigid timetable. The key is whether the declarant had time to think the event through and calculate an answer; if this is so, the "circumstantial guarantee of trustworthiness" evaporates, and the statement is inadmissible. *United States v. Grant*, 42 M.J. 340 (1995). The courts, however, are more inclined to allow some leeway with children, because of their unsophisticated sense of time and the fact that they may not have immediate access to someone to whom such a statement could be made. *United States v. Morgan*, 40 M.J. 405 (C.M.A. 1994).

- ***When faced with use of such a statement, be aware of the exception's limitations.*** The same principle that supports admissibility -- the lack of opportunity for calculation -- also carries limitations, such as errors in perception and interpretation, which could lead to well-intentioned but inaccurate statements. This may not lead to exclusion of the statement, but will be worth raising on cross-examination or in argument.

IV.  **SKILL DRILLS.**

A. ***Goal: Train counsel to employ the following skills.***

1. Use direct examination techniques covered in previous training.
2. Lay a proper foundation for an excited utterance.

B. ***Conduct the drills.***

1. ***Preparation:*** Conduct this training in the courtroom. Start with the facts below.
2. ***Role Play:*** The supervisor will play the role of the witness and military judge. Designate counsel to play the roles of proponent and opponent. Remaining participants will sit in the panel box and make appropriate objections. In your discretion, you may wish to appoint a counsel as the military judge.
3. ***Execution:*** Inform counsel of the elements of the foundation (provided on handout or chalkboard). Give counsel five minutes to prepare the foundation. Allow counsel to go through the foundation once with notes. Have them lay the foundation a second or third time, without notes. They may still refer to the foundation elements listed on the handout, chalkboard, or easel.

C. **Drill: Foundation for an Excited Utterance.**

1. The fact situation is an assault. The witness, **Courtney Lexander**, was teaching a basketball camp to a group of youth at noon on the outdoor university courts on the corner of Iwo Jima Street and Corregidor Avenue, Fort Knight, Missouri. A group of adult men were playing basketball on the adjacent court. One of the men was driving for a lay-up, when he was suddenly struck to the ground, a pool of blood forming around his head. Courtney was shocked and amazed. So was another man, an unidentified bystander who was playing in the game. The man was facing the action when it occurred. Courtney overheard the man say “he didn’t hit him, he rejected the ball into the little guy’s face!” The issue was whether the victim was hit by the ball or punched by the accused.

2. Sample foundation for an **Excited Utterance**: Courtney Lexander, witness.

Q. Where were you at noon on 29 July 1997?

A. I was at the outdoor basketball courts at the corner of Iwo Jima Street and Corregidor Avenues, Fort Knight, Missouri.

Q. Why were you there?

A. I was teaching a basketball camp to some local kids.

Q. Did anything unusual happen?

A. Yeah, I guess you could say so. A guy did get his nose broken.

Q. What did you see?

A. Well, it was pretty disgusting. Eight guys were playing four-on-four on the court next to us. One of them, a real little guy, stole the ball at half-court and was going in for a lay-up. A tall guy in black shorts came racing down to defend. The little guy went up for a shot, when all of a sudden he collapsed, grabbing his face. He began bleeding immediately, wailing, and then I saw a pool of blood.

Q. How many people saw this?

A. Not including the kids at the camp, I’d say eight people in the immediate area.

Q. Did you notice their reaction?

A. Yes. We were all shocked. It happened so fast, most of us just froze in place. As soon as we looked, we could see that the little guy was injured and bleeding badly. It was an awful sight.

- Q. Who else besides you was in the crowd looking on?**
A. There were a number of people standing on the sidelines observing, but there was one guy in particular who stood out.
- Q. What was his name?**
A. I didn't get his name.
- Q. What did he look like?**
A. He was a white male, maybe thirty or thirty five, about five foot four, he had his shirt off, and I remember he was wearing really small black running shorts.
- Q. Where was he at the time of this assault?**
DC. Objection, calls for a legal conclusion.
MJ. Sustained. Rephrase the question, counsel.
- Q. Okay, where was he at the time of the "alleged" assault?**
A. He was right in front of me, at half-court where the men were playing.
- Q. How was he facing?**
A. He was looking right where the injury took place.
- Q. What was his condition right after the alleged assault?**
A. He was just like the rest of us -- shocked and amazed.
- Q. What was his facial expression?**
A. He had his mouth open. I guess he was dumbfounded at first.
- Q. What was his tone of voice?**
A. He was shouting in a loud voice.
- Q. What were his gestures?**
A. He was pointing at the man who had been on defense and gesturing wildly.
- Q. What was his emotional state?**
A. He was really excited and upset.
- Q. Did he say anything?**
A. Yes.
- Q. How much time had elapsed?**
A. About 10 seconds.

Q. What did this man say about the “alleged” assault?

** [Note: At this point opposing counsel would most likely object on the grounds that it calls for hearsay. Counsel would proceed by stating that although the statement is hearsay, it falls within the excited utterance exception under MRE 803(2).]*

A. He said that the fellow in the black shorts made a clean block and stuffed the basketball into the little guy’s face.



D. **Summarize the main teaching points.** Following the drills, conduct a discussion of lessons learned, distribute the sample solution, **and summarize the main points:**

- ✓ Memorize the foundational elements for the admissibility of an excited utterance.
- ✓ Know where to find them when recall fails.
- ✓ Prepare for the declarant to be attacked by the opposition.
- ✓ This exception is based upon an inference of the declarant’s sincerity.



V. REFERENCES.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* chapt. 11 (1994).
- B. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).

ENCLOSURES
Counsel Handout
Sample Solution

HEARSAY: EXCITED UTTERANCE

COUNSEL HANDOUT



I.

TRAINING OVERVIEW.

- A. Introduction. We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for an excited utterance.
- B. Preparation. Bring your MCM to the training. Review basic techniques of direct examination, cross examination, and objections. Review MRE 901, 801, 802, 803(2), and 806.



II.

KEYS TO SUCCESS.

Know the Elements of a Foundation for Admission of an Excited Utterance.

1. *An event occurred.*
2. *The event was startling or stressful.*
3. *The declarant was a participant in the event or an observer.*
4. *The declarant made a statement about the event.*
5. *The declarant made the statement while in a state of excitement.*



III.

REFERENCES FOR FURTHER STUDY.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* chapt. 11 (1994).
- B. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).

HEARSAY: EXCITED UTTERANCE

SAMPLE SOLUTION



- Q. Where were you at noon on 29 July 1997?**
A. *I was at the outdoor basketball courts at the corner of Iwo Jima Street and Corregidor Avenues, Fort Knight, Missouri.*
- Q. Why were you there?**
A. *I was teaching a basketball camp to some local kids.*
- Q. Did anything unusual happen?**
A. *Yeah, I guess you could say so. A guy did get his nose broken.*
- Q. What did you see?**
A. *Well, it was pretty disgusting. Eight guys were playing four-on-four on the court next to us. One of them, a real little guy, stole the ball at half-court and was going in for a lay-up. A tall guy in black shorts came racing down to defend. The little guy went up for a shot, when all of a sudden he collapsed, grabbing his face. He began bleeding immediately, wailing, and then I saw a pool of blood.*
- Q. How many people saw this?**
A. *Not including the kids at the camp, I'd say eight people in the immediate area.*
- Q. Did you notice their reaction?**
A. *Yes. We were all shocked. It happened so fast, most of us just froze in place. As soon as we looked, we could see that the little guy was injured and bleeding badly. It was an awful sight.*
- Q. Who else besides you was in the crowd looking on?**
A. *There were a number of people standing on the sidelines observing, but there was one guy in particular who stood out.*
- Q. What was his name?**
A. *I didn't get his name.*
- Q. What did he look like?**
A. *He was a white male, maybe thirty or thirty five, about five foot four, he had his shirt off, and I remember he was wearing really small black running shorts.*
- Q. Where was he at the time of this assault?**

DC. *Objection, calls for a legal conclusion.*

MJ. *Sustained. Rephrase the question, counsel.*

Q. ***Okay, where was he at the time of the “alleged” assault?***

A. *He was right in front of me, at half-court where the men were playing.*

Q. ***How was he facing?***

A. *He was looking right where the injury took place.*

Q. ***What was his condition right after the alleged assault?***

A. *He was just like the rest of us -- shocked and amazed.*

Q. ***What was his facial expression?***

A. *He had his mouth open. I guess he was dumbfounded at first.*

Q. ***What was his tone of voice?***

A. *He was shouting in a loud voice.*

Q. ***What were his gestures?***

A. *He was pointing at the man who had been on defense and gesturing wildly.*

Q. ***What was his emotional state?***

A. *He was really excited and upset.*

Q. ***Did he say anything?***

A. *Yes.*

Q. ***How much time had elapsed?***

A. *About 10 seconds.*

Q. ***What did this man say about the “alleged” assault?***

[Note: At this point opposing counsel would most likely object on the grounds that it calls for hearsay. Counsel would proceed by stating that although the statement is hearsay, it falls within the excited utterance exception under MRE 803(2).]

A. *He said that the fellow in the black shorts made a clean block and stuffed the basketball into the little guy’s face.*

Tab F
Module 3

Hearsay

*Statements for Purposes of
Medical Diagnosis or Treatment*



The Advocacy Trainer

HEARSAY: STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise develops counsel's ability to lay the proper foundation for admission of statements made for the purpose of medical diagnosis or treatment. Lead a discussion of the law and practice pointers and then conduct the suggested drill. Consider using examples of good and bad techniques from recent records of trial.
- B. **Training Overview.** Training can be conducted with one or more counsel. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions.





II. THE LAW.


- A. **The Doctrine. M.R.E. 803(4).**




A statement describing medical history, past or present symptoms or sensations, or a statement of the cause of a medical problem disclosed for the purpose of treatment or diagnosis may qualify as an exception under the hearsay rule. To be admissible, the statement must be made to medical personnel (e.g. physician, nurse or psychiatrist or social worker) or to another (e.g. family member or babysitter) so long as the statement is made for the purpose of diagnosis or treatment.

 The declarant is not required to testify. In *White v. Illinois*, 112 S.Ct. 736 (1992), the Supreme Court held that statements made by a four-year-old victim for the purpose of securing medical treatment were admissible, whether or not the victim testified, because the statement had sufficient guarantees of reliability. The Court held that the medical treatment exception is firmly rooted.

 In the case of child witnesses, the foundational requirement that the statement be made for the purpose of diagnosis or treatment may be difficult. Military courts have been willing to relax this standard in the case of very young witnesses, especially in sexual abuse cases.

 Statements under M.R.E. 803(4) may be presented in an appropriate case as evidence of a fresh complaint, such as a sexual assault. Typically, a statement made for purposes of medical diagnosis or treatment is offered by the declarant or through the testimony of a witness who heard the statement. This hearsay exception is based on a presumption that a person seeking relief from a medical condition has an incentive to make accurate statements. In the case of very young children, statements made to family members or others, and later disclosed to medical personnel on behalf of the child, may be admissible. Note, the statement must be made anticipating medical treatment. It is not required that the statement be used for medical treatment.

 When introducing a statement made for purposes of medical diagnosis or treatment, counsel should be prepared for the opposition to attack the credibility of the declarant or witness, such as whether there is any bias or motive to fabricate. Additionally, anticipate attacks concerning whether a declarant made the statement expecting or understanding any medical benefit would result. This is especially true in sexual abuse cases with young victims.

B. *Elements of the Foundation.*

- 1. The declarant made a statement of a past or present medical condition;*
- 2. The statement described the onset or source of the medical condition or injury;*
- 3. The statement was made to medical personnel (e.g. nurse, hospital staff, ambulance personnel, social workers, or psychiatrist) or non-medical personnel for purposes of a medical diagnosis or treatment; and*
- 4. The declarant or the witness who heard the statement must testify (see business record exception for medical record entries under M.R.E. 803(6)).*

III.



PRACTICE POINTERS.

Foundation. Like other hearsay exceptions involving the declarant's state of mind or physical condition, the foundation for statements made for purposes of medical diagnosis or treatment is relatively easy to establish. Its effectiveness, however, depends on how well it is prepared and presented in court. Discuss the following points with counsel:

- **Declarant need not testify.** The benefit of a statement made for purposes of medical diagnosis or treatment is that the person who actually made the statement does not have to testify. You must, however, present either the declarant or a person who heard the statement, whether a medical care provider or family member. This is especially helpful when the declarant is a small child or the spouse of the accused who suddenly becomes "unavailable" at trial.
- **The key to admissibility.** What makes this evidence admissible is the expectation of receiving medical treatment. While there is no definitive test for what qualifies as a statement made for purposes of diagnosis or treatment, some expected medical benefit to the declarant is essential in laying a proper foundation. In the case of young witnesses, the courts have relaxed this rule. The rule also allows statements made to doctors for the purpose of diagnosis or consultation in preparation for litigation. Although the declarant does not generally make these statements in anticipation of receiving any medical benefit, they are allowed by the rule as being consistent with M.R.E. 703.
- **Focus on the circumstances surrounding the making of the statement.** While the element of time is one of the factors a court should consider in assessing reliability, the totality of the circumstances surrounding the statement must be evaluated. Was the statement voluntarily disclosed as a result of a complaint from the declarant of a medical condition? Did the statement result from questioning about an observed condition, such as redness of vaginal area of a small child? Was the statement made to medical personnel? The key is whether the declarant made the statement anticipating some medical benefit or treatment. For young children unable to understand or appreciate the medical benefit requirement, all the details surrounding the statement must be scrutinized. Remember, the courts are more inclined to allow some leeway with statements of children, because of their unsophisticated sense of time and the fact that they may not have immediate access to someone to whom such a statement could be made.
- **Admissibility of hearsay within hearsay.** When a third party is testifying about a statement received from the declarant, and repeated to medical personnel for treatment (such as parent, teacher or babysitter), M.R.E 805 applies to hearsay within hearsay).

- **When faced with use of such a statement, be aware of the exception's limitations.** The same principle that supports admissibility -- the accuracy of a statement based on the incentive to get a medical benefit -- also carries limitations, such as motive to fabricate or misrepresent, which could lead to claims of coaching or otherwise improper motive to lie. Counsel should examine this carefully, especially in the case of sexual assault involving older victims. Also, while statements of the source of an injury are frequently made to investigators or law enforcement personnel, those statements generally are not admissible under this rule. This may also include statements made to child protective service personnel, unless some medical benefit can be attached to the statements. Such statements may not qualify under this rule, but counsel should look to other exceptions to the hearsay rule for admissibility. If the statement fails to qualify for any exception to the hearsay rule, consider offering the statement for a non-hearsay purpose under M.R.E. 413, 414, or 404(b).



IV.



SKILL DRILLS.

A. ***Goal: Train counsel to employ the following skills.***

1. Use direct examination techniques covered in previous training.
2. Lay a proper foundation for statements made for the purpose of medical diagnosis or treatment.

B. ***Conduct the drill.***

1. *Preparation:* Conduct this training in the courtroom. Start with the facts below.
2. *Role Play:* The supervisor will play the role of military judge. Designate counsel to play the roles of proponent and opponent. Another counsel or legal specialist should play the role of the witness. Remaining participants will sit in the panel box and make appropriate objections. In your discretion, you may wish to appoint a counsel as the military judge.
3. *Execution:* Inform counsel of the elements of the foundation (provided on a handout or chalkboard). Give counsel five minutes to prepare the foundation. Allow counsel to go through the foundation several times with notes. Have them lay the foundation several more times without notes.

C. ***Drill: Foundation for Statements for purposes of medical diagnosis or treatment.***

1. The fact situation is a sexual assault. The witness, Courtney Alexander, is the preschool teacher of Suzy Q, a four-year-old student at the ABC Day Care Center. On February 12, Ms. Alexander noticed Suzy Q refused to sit in her chair during story hour. When asked why she would not sit down, Suzy said it hurt her “pee-pee” when she sat in the chair. Ms. Alexander took Suzy to the bathroom and visually examined her vaginal area. It appeared red and swollen. She told Suzy she would call her mother and take her to the school nurse to look at her hurt “pee-pee.” On the way to the nurse’s office, Ms. Alexander asked Suzy what happened to her “pee-pee” and she responded that her mother’s boyfriend, Greg, put his “pee-pee” on her “pee-pee” and she saw “white stuff” come out of his “pee-

pee.” Ms. Lexander telephoned Mrs. Q and advised Suzy’s mother what she observed and what Suzy told her. Once she arrived at the nurse’s office, Ms. Lexander told the nurse, Ms. Hathaway, that Suzy told her it hurt her “pee-pee” when she sat down and that her mother’s boyfriend put “white stuff” from his “pee-pee” on her when he rubbed his “pee-pee” on hers. The issue is the source of the injury to Suzy Q.

2. Sample foundation for a statement made for the purpose of medical diagnosis or treatment: Courtney Lexander, is the witness.

Q. Where were you on Friday, February 12, 1999?

A. *I was in my class room, Room 202, at the ABC preschool where I am a teacher.*

Q. Is Suzy Q in your preschool class?

A. *Yes.*

Q. Was she in your class on that day?

A. *Yes.*

Q. Did anything unusual happen with Suzy Q on that day?

A. *Yes. I noticed that she would not sit down during story hour and when I asked why, she said her “pee-pee” hurt when she sat down.*

Q. Did anyone else overhear Suzy when she said this?

A. *No, there were just the two of us in the corner of the classroom. My teaching assistance, Nancy, was in the far corner of the classroom with the other students.*

Q. What did you do when she told you her “pee-pee” hurt?

A. *Well, Suzy has been a student with us for the last 2 years and I have been her teacher all that time. I know she refers to her vagina as her “pee-pee,” so I thought I should take her to the bathroom and look at her vagina to see if she had an injury or some other problem that our school nurse should look at.*

Q. When you took her to the bathroom, what happened?

A. *I pulled down her pants and her under pants and looked at her vagina. It looked red and swollen, so I decided to call her mother and take her to the nurse for a medical assessment.*

Q. What happened next?

A. *I put Suzy’s clothes back on and told her we were going to the nurse to let her look at it. I also told her we would call her mother.*

- Q. Was anyone else around when you examined Suzy's vagina?**
A. No. It was only the two of us in the bathroom the entire time we were there.
- Q. What happened next?**
A. On the way to the nurse's office, I asked Suzy how her "pee-pee" got hurt and she said...
- Q. In the two years that you have been Suzy's teacher, have you ever taken her to the nurse before?**
A. Yes, on numerous occasions.
- Q. Could you describe some of the circumstances where you have taken her to the nurse's office?**
A. Let's see. On several occasions she has received scrapes and scratches from playing with the other children in school. On some of the occasions, my assistant or myself noticed the incident and took Suzy to the nurse. On other occasions, she has come to us crying after being scratched by one of the other students. It has never been anything serious. Our school policy is to take all children with injuries, no matter how slight, to the nurse to make a medical determination if further care is needed.
- Q. How many times in the last 2 years would you estimate this has happened?**
A. It's hard to say, but I would guess approximately 4-6 times. With toddlers and children this age, scrapes and scratches are common. Plus the kids like the "Barney" bandages that the nurse puts on their scratches.
- Q. Have there been other times that you have taken Suzy to the nurse, aside from any injuries?**
A. Yes. It is also the policy at our school that all medication is kept and administered by our nurse. Suzy has on several occasions--approximately 4-6 that I can recall--taken medication for ear infections, colds and stuff like that. I can't be certain of the exact number, but the nurse would have the records.
- Q. So over the last two years, you would estimate that Suzy has been to the nurse's office close to a dozen times?**
A. That is correct, based on my recollection. It could be a few more or a few less.
- Q. What happened on the way to the nurse's office?**
A. I asked Suzy how her "pee-pee" got hurt.

[This line of questioning was designed to elicit from the witness the fact that the victim has experience with going to the school nurse for medical care and treatment. At this point, request to continue questioning the witness about the statement of the victim, as an exception to the hearsay rule based on the medical diagnosis or treatment exception. In the event the judge is reluctant to accept this basis for admissibility, see M.R.E. 801(1) Present Sense Impression.]

Q. What did she say?

A. She said her mother's boyfriend Greg had put his "pee-pee" on her "pee-pee" and made white stuff come out of his "pee-pee."

Q What did you do next?

A. I was shocked and appalled at what I was hearing. I immediately reported the circumstances, my actions, and Suzy's statement to the nurse. I felt pretty certain that Suzy had just described being sexually assaulted by her mother's boyfriend. I then left Suzy in the nurse's care and used the phone in her office to call Mrs. Q. and report to her what Suzy said to me.

Q While in the nurse's office did you hear Suzy say anything else?

A. Yes. I heard her repeat to the nurse what she said to me about Greg putting his "pee-pee" on her "pee-pee" when asked by the nurse how she got hurt. After about 5 minutes, I had to go to the administrator's office to report what was happening and wait for Suzy's mother.

[Note: Counsel should call both Ms. Lexander and Nurse Hathaway to testify at trial, whether the victim testifies or not. It may be best to call both these witnesses instead of the victim. In preparing the testimony of Nurse Hathaway, counsel should lay the foundation of the circumstance surrounding the making of the statement, starting from the statement from Ms. Lexander when they arrive in her office, through the statements made directly by the victim to the nurse. Be prepared for an objection based on hearsay within hearsay for the statements from the victim to Ms. Lexander to Nurse Hathaway. See M.R.E. 805.]



D. **Summarize the main teaching points.** Following the drills, conduct a discussion of lessons learned, distribute the sample solution, and summarize the main points:

- ✓ **Memorize the foundational elements for the admissibility of a statement made for purposes of medical diagnosis or treatment.**
- ✓ **Have a handy reference for them if recall fails.**
- ✓ **This exception is based on the expectation of receiving medical treatment. A declarant is expected to have an incentive to be truthful to get a medical benefit.**
- ✓ **Statements to third parties are admissible if counsel can show the connection between the statement and the expectation of receiving medical treatment. Look to the facts surrounding the statement, as well as past dealings with medical personnel, to demonstrate the expectation, especially with very young children.**
- ✓ **Always consider other hearsay exceptions.**



V.

REFERENCES.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* ch. 11 (1994).
- B. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).
- C. Stephen A. Saltzburg, et. al., *Military Rules of Evidence Manual* (4th ed. 1997).

ENCLOSURES
Counsel Handout
Sample Solution

**HEARSAY: STATEMENTS FOR PURPOSES OF
MEDICAL DIAGNOSIS OR TREATMENT
COUNSEL HANDOUT**



I. TRAINING OVERVIEW.

- A. **Introduction.** We will conduct trial advocacy training in the courtroom on _____, from ____ to _____ hours. The training will focus on laying the foundation for a statement made for the purposes of medical diagnosis or treatment.
- B. **Preparation.** Bring your MCM to the training. Review basic techniques of direct examination, cross examination, and objections. Review M.R.E. 901, 801, 802, 803(4), 805 and 806. It should take _____ minutes/hours to complete this exercise.
- C. **The fact situation is a sexual assault.** The witness, **Courtney Alexander**, is the preschool teacher of **Suzy Q**, a four-year-old student at the ABC Day Care Center. On February 12, Ms. Alexander noticed Suzy Q refused to sit in her chair during story hour. When asked why she would not sit down, Suzy said it hurt her “pee-pee” when she sat in the chair. Ms. Alexander took Suzy to the bathroom and visually examined her vaginal area. It appeared red and swollen. She told Suzy she would call her mother and take her to the school nurse to look at her hurt “pee-pee.” On the way to the nurse’s office, Ms. Alexander asked Suzy what happened to her “pee-pee” and she responded that her mother’s boyfriend, Greg, put his “pee-pee” on her “pee-pee” and she saw “white stuff” come out of his “pee-pee.” Ms. Alexander telephoned Mrs. Q and advised Suzy’s mother what she observed and what Suzy told her. Once she arrived at the nurse’s office, Ms. Alexander told the nurse, Ms. Hathaway, that Suzy told her it hurt her “pee-pee” when she sat down and that her mother’s boyfriend put “white stuff” from his “pee-pee” on her when he rubbed his "pee-pee" on hers. The issue is the source of the injury to Suzy Q.

II.



KEYS TO SUCCESS.

Know the elements of a foundation for admission of a statement made for purposes of medical diagnosis or treatment.

1. *The declarant made a statement of a past or present medical condition;*
2. *The statement described the onset or source of the medical condition or injury;*
3. *The statement was made to medical personnel (e.g. nurse, hospital staff, ambulance personnel, social workers, or psychiatrist) or non-medical personnel for purposes of a medical diagnosis or treatment; and*
4. *The declarant or the witness who heard the statement must testify (see business record exception for medical record entries under M.R.E. 803(6)).*

III.



REFERENCES FOR FURTHER STUDY.

- A. David A. Schlueter et al., *Military Evidentiary Foundations* ch. 11 (1994).
- B. Thomas A. Mauet, *Trial Techniques* (4th ed. 1996).
- C. Stephen A. Saltzburg, et. al., *Military Rules of Evidence Manual* (4th ed. 1997).

**HEARSAY: STATEMENTS FOR PURPOSES OF
MEDICAL DIAGNOSIS OR TREATMENT
SAMPLE SOLUTION**



- Q. Where were you on Friday, February 12, 1999?*
A. I was in my class room, Room 202, at the ABC preschool where I am a teacher.
- Q. Is Suzy Q in your preschool class?*
A. Yes.
- Q. Was she in your class on that day?*
A. Yes.
- Q. Did anything unusual happen with Suzy Q on that day?*
A. Yes. I noticed that she would not sit down during story hour and when I asked why, she said her “pee-pee” hurt when she sat down.
- Q. Did anyone else overhear Suzy when she said this?*
A. No, there were just the two of us in the corner of the classroom. My teaching assistance, Nancy, was in the far corner of the classroom with the other students.
- Q. What did you do when she told you her “pee-pee” hurt?*
A. Well, Suzy has been a student with us for the last 2 years and I have been her teacher all that time. I know she refers to her vagina as her “pee-pee,” so I thought I should take her to the bathroom and look at her vagina to see if she had an injury or some other problem that our school nurse should look at.
- Q. When you took her to bathroom, what happened?*
A. I pulled down her pants and her under pants and looked at her vagina. It looked red and swollen, so I decided to call her mother and take her to the nurse for a medical assessment.
- Q. What happened next?*
A. I put Suzy’s clothes back on and told her we were going to the nurse to let her look at it. I also told her we would call her mother.

- Q. Was anyone else around when you examined Suzy's vagina.**
A. No. It was only the two of us in the bathroom the entire time we were there.
- Q. What happened next?**
A. On the way to the nurse's office, I asked Suzy how her "pee-pee" got hurt and she said...
- Q. In the two years that you have been Suzy's teacher, have you ever taken her to the nurse before?**
A. Yes, on numerous occasions.
- Q. Could you describe some of the circumstances where you have taken her to the nurse's office?**
A. Let's see. On several occasions she has received scrapes and scratches from playing with the other children in school. On some of the occasions, my assistant or myself noticed the incident and took Suzy to the nurse. On other occasions, she has come to us crying after being scratched by one of the other students. It has never been anything serious. Our school policy is to take all children with injuries, no matter how slight, to the nurse to make a medical determination if further care is needed.
- Q. How many times in the last 2 years would you estimate this has happened?**
A. It's hard to say, but I would guess approximately 4-6 times. With toddlers and children this age, scrapes and scratches are common. Plus the kids like the "Barney" bandages that the nurse puts on their scratches.
- Q. Have there been other times that you have taken Suzy to the nurse, aside from any injuries?**
A. Yes. It is also the policy at our school that all medication is kept and administered by our nurse. Suzy has on several occasions--approximately 4-6 that I can recall--taken medication for ear infections, colds and stuff like that. I can't be certain of the exact number, but the nurse would have the records.
- Q. So over the last two years, you would estimate that Suzy has been to the nurse's office close to a dozen times?**
A. That is correct, based on my recollection. It could be a few more or a few less.
- Q. What happened on the way to the nurse's office?**
A. I asked Suzy how her "pee-pee" got hurt.

[This line of questioning is designed to elicit from the witness the fact that the victim has experience going to the school nurse related to medical care and treatment. At this point, request to continue questioning the witness about the statement of the victim, as an exception to the hearsay rule based on the medical diagnosis or treatment exception. In

the event the judge is reluctant to accept this basis for admissibility, see M.R.E. 801(1) Present Sense Impression.]

Q. What did she say?

A. *She said her mother's boyfriend Greg had put his "pee-pee" on her "pee-pee" and made white stuff come out of his "pee-pee."*

Q. What did you do next?

A. *I was shocked and appalled at what I was hearing. I immediately reported the circumstances, my actions, and Suzy's statement to the nurse. I felt pretty certain that Suzy had just described being sexually assaulted by her mother's boyfriend. I then left Suzy in the nurse's care and used the phone in her office to call Mrs. Q. and report to her what Suzy said to me.*

Q. While in the nurse's office did you hear Suzy say anything else?

A. *Yes. I heard her repeat to the nurse what she said to me about Greg putting his "pee-pee" on her "pee-pee" when asked by the nurse how she got hurt. After about 5 minutes, I had to go to the administrator's office to report what was happening and wait for Suzy's mother.*

[Note: Counsel should call both Ms. Lexander and Nurse Hathaway to testify at trial, whether the victim testifies or not. It may be best to call both these witnesses instead of the victim. In preparing the testimony of Nurse Hathaway, counsel should lay the foundation of the circumstance surrounding the making of the statement, starting from the statement from Ms. Lexander when they arrive in her office, through the statements made directly by the victim to the nurse. Be prepared for an objection based on hearsay within hearsay for the statements from the victim to Ms. Lexander to Nurse Hathaway. See M.R.E. 805.]

RESIDUAL HEARSAY

SUPERVISOR'S GUIDE



I. SKILL OVERVIEW.

- A. **Goals.** This exercise develops counsel's ability to lay the proper foundation for admission of statements under the Residual Hearsay Exception. Supervisors should lead a discussion of the law, provide practice pointers and then conduct a drill. Use the drill at the end of this module or use residual hearsay statements from a case in your office.
- B. **Training Overview.** Training can be conducted with a supervisor, one or more counsel, and one witness. If you have more than one counsel, assign one counsel to oppose admission of the statements. The training is divided into four phases: (1) preparation by supervisor and counsel; (2) instruction on the law and discussion of practice pointers; (3) practical exercise and critique; and (4) summary of teaching points and distribution of sample solutions.



II. THE LAW.

- A. **The Residual Hearsay Rule.** Military Rule of Evidence 807 combines the residual hearsay exceptions from Rules 803(24) and 804(b)(5).
- A statement not specifically covered by any of the other exceptions to the hearsay prohibition but having equivalent circumstantial guarantees of trustworthiness, is admissible if the court determines that: the statement is offered as evidence of a material fact; the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

- Before offering a statement as residual hearsay, the proponent must make known to the adverse party notice of the proponent's intention to offer the statement as residual hearsay, the particulars of the statement, and the name and address of the declarant.

B. *Requirements for admission.*

- *Materiality.* A statement admitted under Mil. R. Evid. 807 must be relevant under Mil. R. Evid. 401, which states that the evidence must “have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” In other words, the proponent must establish relevance in order to prove materiality.
- *Necessity.* Unavailability of the declarant is not a requirement, but often the proponent must prove unavailability in order to demonstrate the best evidence requirement. The framers of the military rules of evidence noted that the rule was taken directly from the Federal Rules without change. The framers avoided the issue of whether this exception should only be used in the rarest of circumstances or could apply in a more general sense. Recanting witnesses and allegations that child declarants have been impermissibly tainted by the proceedings are circumstances that may require the admission of a residual hearsay statement as the best remaining evidence.
- *Reliability.* The military judge must find that the statement has the same guarantees of trustworthiness of a statement admitted under Mil. R. Evid. 803 or 804.
- *Interests of justice.* If the military judge finds that the statement is material, necessary, and reliable, he then must find that admission of the statement serves the interests of justice. In other words, the military judge needs to do a balancing test similar to the one required by Mil. R. Evid. 403. However, case law does require that the military judge state for the record that he came to the conclusion that admission of the statement served the interests of justice.



III.

PRACTICE POINTERS.

- A. ***Foundation.*** The foundation for the introduction of a statement under the residual hearsay exception must be clearly established. It is important that counsel are prepared to discuss why a statement should be allowed into evidence under the residual hearsay exception and why the statement is the best evidence. The framers of the military rules of evidence wrote that the residual hearsay exception is intended to apply “to highly reliable and necessary evidence.” The foundation will normally be presented to the military judge in an Article 39(a) session. During the Article 39(a) session, the judge will probably hear the proffered testimony and argument concerning its admission.
- B. ***Elements of the foundation.***
- The declarant made a statement;
 - The statement is reliable;
 - The statement is more probative of the fact than any other evidence which is reasonably available to the proponent;
 - The statement is offered to prove a material fact;
 - The general purpose of these rules and the interests of justice will best be served by admission of the statement;
 - The proponent gave notice to the opposing party of the intention to offer the statement, the particulars of the statement, including the identity of the declarant.

- C. ***The keys to admissibility.*** In order to establish admissibility, the proponent must show not only the materiality, necessity, and reliability of the statement, but also how admission of the statement furthers the interest of justice. The proponent must effectively argue what material fact the statement is the best evidence for, why the statement is the best evidence, and why the statement is reliable. The natural conclusion should be that admission of the statement would serve the interests of justice.
- D. ***Notice.*** The proponent must provide specific notice of his intent to seek admission of the statement to the opposing party sufficiently before the trial or hearing so the adverse party may prepare to meet it. Notice includes the intention to offer the specific statement, the statement itself, the circumstances surrounding the making of the statement, and the name and address of the declarant. Although not required, the better practice is to give this notice in writing.
- E. ***Alternative Theory of Admission.*** Counsel can use admission as residual hearsay as an alternative argument for statements where admission under another exception is possible but questionable.
- F. ***Reliability.*** When arguing whether a statement is reliable, counsel should explore the totality of the circumstances surrounding the statement.
- G. ***The declarant need not testify.*** Counsel must establish that the proffered statement is the most probative evidence offered on the point for which it is to be introduced. Circumstances will arise where the declarant is unavailable, which is not an insurmountable problem. However, in those circumstances, the proponent must be prepared to address confrontation clause issues.
- H. ***Confrontation Clause Issues.***
- When the declarant does not testify at trial, the proponent must make sure the statements satisfy the accused's Sixth Amendment right to confront witnesses. Since residual hearsay is not firmly rooted, the proponent must show the circumstances surrounding the making of the statement, show the statements are so trustworthy that adversarial testing would be expected to add little, if anything, to the statements' reliability.

- The indicia of reliability must arise from the circumstances in which the statement was made. The proponent can use extrinsic evidence to corroborate the information contained in the out-of-court statement.

I. **Statements to Law Enforcement Agents.** Military courts have expressed reservations concerning statements to members of law enforcement and are cautious about admitting them. However, these statements are not *per se* unreliable. Thus, counsel need to ensure that the indicia of reliability for such a statement are very strong.

IV. **SKILL DRILLS.**

A. **Goal:** Train counsel to employ the following skills:

1. Prepare a written notice of the intent to admit a statement under the residual hearsay exception.
2. Lay a proper foundation for the admission of a statement under the residual hearsay exception.

B. **Conduct the drill.**

1. **Preparation:** Give notice of the time and date of the training with direction to prepare, prior to training, a written notice of the intent to admit a statement under the residual hearsay exception. At the training, counsel should be prepared to lay the foundation for and present argument for the admission of a statement under the residual hearsay exception. If you have a second counsel, he or she should be prepared to cross-examine the witness and argue against admission. Coordinate to conduct this training in the courtroom.
2. **Role Play:** The supervisor will play the role of military judge. Designate counsel to play the roles of proponent and opponent. Another counsel or legal specialist should play the role of the witness. Remaining participants will sit in the panel box.

3. *Execution:* Select the provided fact scenario or use one of your own. Ensure the scenario includes a statement that one would seek admission under the residual hearsay exception. Prior to the training, have the proponent prepare a written notice of intent to offer the statement you selected as residual hearsay. At the training, have the proponent seek admission of the statement. At a minimum, counsel should conduct at least one direct examination. The second counsel should be given an opportunity to cross-examine the witness. Both parties should be allowed to present argument.

C. *Drill.*

1. SGT Lane is pending charges for the wrongful distribution of marijuana. You have evidence that on June 14, 20XX SGT Lane sold marijuana to an undercover CID agent and agreed to provide more marijuana to the undercover agent on a future date. You suspect the SGT Lane has been dealing marijuana over a long period of time, but you only have solid proof of the undercover controlled purchase.
2. During the investigation of SGT Lane, a CID agent talked to Mrs. Jones. Mrs. Jones is the spouse of a soldier and lives in government quarters near the Lanes. Mrs. Jones and Mrs. Lane are best friends. Mrs. Jones told the CID agent that she suspected SGT Lane was dealing marijuana out of their government quarters because of things Mrs. Lane had told her. The Lanes have lived in these government quarters since March 20XX. The Joneses have lived in their quarters since January 20XX. Mrs. Jones told the CID agent that just before Memorial Day Weekend in May 20XX, Mrs. Lane came to her and asked if Mrs. Jones could watch the Lanes' two children (Y, a six year old boy and Z, a two year old girl) for a couple of hours on Memorial Day beginning at 1900. Mrs. Jones said that Mrs. Lane looked very upset when she made this request. Mrs. Jones said that she was afraid that SGT Lane was physically abusing her and Mrs. Jones asked her what was wrong.

3. At first, Mrs. Lane said nothing was wrong. This only made Mrs. Jones more suspicious. Mrs. Jones reminded Mrs. Lane that they were best friends and that she could tell Mrs. Jones anything. Mrs. Jones told her that if Mrs. Lane had a problem, Mrs. Jones would do anything she could to help. Mrs. Lane finally broke down and told her that she and SGT Lane were so far in debt they didn't know what to do. Mrs. Lane said that SGT Lane had started selling "stuff" a couple of months ago just to earn some extra money. She said that things were getting worse and now SGT Lane was selling "stuff" out of their quarters. She didn't like him selling "stuff" out of the quarters, especially when the children were around. At first, it wasn't so bad because SGT Lane was very discrete and he was only selling to other soldiers. Now SGT Lane seemed to be in over his head and he was selling to civilians too. Some of these civilians seemed like pretty dangerous people, and SGT Lane is bringing them into their home. Mrs. Lane said she did not want her children in the quarters when these people were there.

4. Mrs. Lane told Mrs. Jones that she had witnessed two transactions in April 20XX. On one occasion, a civilian man came to the house unexpectedly and wanted to buy some "stuff." SGT Lane tried to tell him that he didn't have any but the civilian didn't believe him. After about 30 minutes of arguing, the civilian told SGT Lane that he knew SGT Lane had some "stuff" and said he wasn't leaving until he got some. SGT Lane finally agreed to sell it just to get him to leave. Mrs. Lane said that when the arguing started, she took the children into a bedroom and started a movie for them to watch. Mrs. Lane said she went back out to the living room and heard more arguing. She actually saw the sale of the "stuff."

5. Mrs. Lane said that about a week later the same civilian man came back with two friends. After the last incident, she told SGT Lane she didn't want them in her home. She told SGT Lane she didn't want him doing this in their home in front of their children. He agreed not to do in their home anymore. When this civilian man showed up again, SGT Lane tried to go outside to make the sale, but the civilian man insisted on coming into the quarters. Mrs. Lane said she got scared and took the children back into the bedroom.

6. She went out to make sure SGT Lane was all right, and she saw SGT Lane and the civilians sitting around the living room. She saw SGT Lane sell a bag of “stuff” to the same civilian man. She said SGT Lane tried to get them to leave, but the civilians wouldn’t leave. They took some of the “stuff” out of the bag, rolled it, and started smoking it right there in the living room. SGT Lane tried hard to get them to leave, but they just wouldn’t leave until they were ready to leave.
7. Mrs. Lane said she didn’t like the fact that SGT Lane was selling it out of their quarters. She said she didn’t like strangers showing up at their house demanding things. She said she didn’t like them smoking in her house with the children around. When she said these things to Mrs. Jones, she seemed very upset and desperate to find a way out. She said they were still in debt and she didn’t know what to do. She said the civilian man was coming back on Memorial Day to buy some more. Mrs. Jones told Mrs. Lane she would help any way she could, but she told Mrs. Lane they had to find a way out. Mrs. Jones asked Mrs. Lane if SGT Lane was selling anything besides marijuana, and Mrs. Lane said no. Mrs. Jones asked Mrs. Lane if she was involved in the selling, and she said no. Mrs. Jones told Mrs. Lane to bring the children by any time she needed.
8. The trial counsel has no reason to suspect Mrs. Lane of helping her husband sell marijuana. Mrs. Lane would not speak to the CID agents. She refused to testify at SGT Lane’s Article 32 Investigation. She has indicated that if she’s subpoenaed to testify at trial, she will refuse to testify against her spouse. (*See M.R.E. 504(a)*) The trial counsel has charged SGT Lane with the two distributions of marijuana to the civilian man. Since Mrs. Lane will not testify, the trial counsel must introduce Mrs. Lane’s out-of-court statements.
9. The trial counsel plans to offer the out-of-court statements as excited utterances and as residual hearsay. The trial counsel is not confident the judge will allow the statements as excited utterances because the statements were made so long after the startling event (the second distribution). Do not litigate admission of these statements under the excited utterance theory. Prepare the foundation for admission as residual hearsay.

D. *Summarize the main teaching points.*

- ✓ **Memorize the foundational elements for residual hearsay.**
- ✓ **Have a handy reference for them if recall fails.**
- ✓ **This exception is based on circumstantial guarantees of trustworthiness surrounding the making of the statement.**
- ✓ **The hearsay statement must be the most probative evidence available to the proponent on that fact.**
- ✓ **The proponent of residual hearsay must give notice to his or her opponent.**
- ✓ **Always consider other hearsay exceptions.**



V.

REFERENCES.

- A. **STEPHEN A. SALTZBURG, ET. AL., MILITARY RULES OF EVIDENCE 1002 (4th ed. 1997).**
- B. **DAVID A. SCHLUETER, ET. AL., MILITARY EVIDENTIARY FOUNDATIONS 347 (1994).**

ENCLOSURES:

Counsel Handout
Sample Solution

RESIDUAL HEARSAY

COUNSEL HANDOUT



I. TRAINING OVERVIEW.

- A. **Introduction.** The next trial advocacy training session, scheduled on _____, from _____ to _____ hours, will focus on residual hearsay. The training will be conducted in two parts. First, I will lead a discussion about the law and techniques necessary for admitting residual hearsay. You will then prepare written notice of your intent to offer residual hearsay. Second, in the courtroom setting, you will call a witness and lay the foundation for residual hearsay.
- B. **Preparation.** Counsel must bring their Manual for Courts-Martial to this trial advocacy training session.



II. KEYS TO SUCCESS.

- ✓ **Foundation.** The elements of the foundation are:
- The declarant made a statement;
 - The statement is reliable;
 - The statement is more probative of the fact than any other evidence which is reasonably available to the proponent;
 - The statement is offered to prove a material fact;
 - The general purpose of these rules and the interests of justice will best be served by admission of the statement;

- The proponent gave notice to the opposing party of the intention to offer the statement, the particulars of the statement, including the identity of the declarant.
- ✓ ***Confrontation Clause.*** If the declarant does not testify at trial, the Confrontation Clause must be satisfied.



III.

REFERENCES FOR FURTHER STUDY.

- A. STEPHEN A. SALTZBURG, ET. AL., **MILITARY RULES OF EVIDENCE** 1002 (4th ed. 1997).
- B. DAVID A. SCHLUETER, ET. AL., **MILITARY EVIDENTIARY FOUNDATIONS** 347 (1994).

RESIDUAL HEARSAY

SAMPLE SOLUTION



The declarant made a statement.

Q: Mrs. Jones, where do you live?

A: I live in government quarters, unit 106.

Q: Do you know Mrs. Penny Lane?

A: Yes, she's my neighbor. She lives in unit 102.

Q: Was she your neighbor in May, 20XX?

A: Yes. The Lanes have lived in these government quarters since March 20XX. We have lived in our quarters since January 20XX

Q: Did you have a conversation with Mrs. Lane just before Memorial Day Weekend in May, 20XX?

A: Yes.

Q: What did Mrs. Lane tell you?

A: Mrs. Lane asked me if I could watch her children for a couple of hours on Memorial Day beginning at 1900. She was very upset when she asked me this.

Q: Did she explain why she needed you to her children?

A: Yes. She was very reluctant at first, but finally she told me what was going on. Mrs. Lane said she and her husband were in debt. She said that SGT Lane had started selling "stuff" a couple of months ago just to earn some extra money. She said that things were getting worse and now SGT Lane was selling "stuff" out of their quarters. She didn't like him selling "stuff" out of the quarters, especially when the children were around. She said at first, it wasn't so bad because SGT Lane was very discrete and he was only selling to other soldiers. Now SGT Lane seemed to be in over his head and he was selling to civilians too. She said some of these civilians seemed like pretty dangerous people, and she was upset because SGT Lane was bringing them into their home. Mrs. Lane said she did not want her children in the quarters when these people were there.

Q: Did she explain why she didn't want her children in the quarters when these people were there?

A: Yes. She was afraid of them. Mrs. Lane told me that she had witnessed two transactions in April 20XX. On one occasion, a civilian man came to the house unexpectedly and wanted to buy some "stuff." She said SGT Lane tried to tell him that

he didn't have any but the civilian didn't believe him. After about 30 minutes of arguing, the civilian told SGT Lane that he knew SGT Lane had some "stuff" and said he wasn't leaving until he got some. SGT Lane finally agreed to sell it just to get him to leave. Mrs. Lane said that when the arguing started, she took the children into a bedroom and started a movie for them to watch. Mrs. Lane said she went back out to the living room and heard more arguing. She actually saw the sale of the "stuff."

Q: You said Mrs. Lane said she witnessed two transactions. What about the other one?

A: Mrs. Lane said that about a week later the same civilian man came back with two friends. After the first incident, she told SGT Lane she didn't want them in her home. She told SGT Lane she didn't want him doing this in their home in front of their children. He agreed not to do in their home anymore. When this civilian man showed up again, SGT Lane tried to go outside to make the sale, but the civilian man insisted on coming into the quarters. Mrs. Lane said she got scared and took the children back into the bedroom. She went out to make sure SGT Lane was all right, and she saw SGT Lane and the civilians sitting around the living room. She saw SGT Lane sell a bag of "stuff" to the same civilian man. She said SGT Lane tried to get them to leave, but the civilians wouldn't leave. They took some of the "stuff" out of the bag, rolled it, and started smoking it right there in the living room. SGT Lane tried hard to get them to leave, but they just wouldn't leave until they were ready to leave.

Q: Did she say what was going to happen on Memorial Day?

A: Yes. Mrs. Lane said the civilian man was coming back on Memorial Day to buy some more.

Q: Mrs. Lane said her husband was selling "stuff." Do you know what she meant by stuff?

A. Yes, marijuana. I told Mrs. Lane I would help any way I could, but I told her they had to find a way out. I asked Mrs. Lane if SGT Lane was selling anything besides marijuana, and she said no.

The statement is reliable.

Q: How did Mrs. Lane appear to you when she told you these things?

A. Very upset. At first, I thought that SGT Lane was physically abusing her. I asked her what was wrong but she didn't want to tell me. At first, Mrs. Lane said nothing was wrong. This only made me more suspicious. I told her that we are best friends and that she could tell me anything. Mrs. Jones told her that if Mrs. Lane had a problem, Mrs. Jones would do anything she could to help. Mrs. Lane finally broke down and told me what was going on.

Q: So you and Mrs. Lane are best friends?

A: Yes, we've become very good friends ever since they moved in.

Q: Did Mrs. Lane show any physical signs of being upset?

A: Yes. Her voice was quivering when she spoke. Her hands were trembling. She was very scared.

Q: She was afraid for her children?

A: Yes, and her husband too.

The trial counsel should argue that the statements are reliable because Mrs. Lane was talking to her best friend, Mrs. Lane was upset when she made the statements (similar to the guarantee of trustworthiness for the excited utterance), and because Mrs. Lane was reluctant to tell Mrs. Jones why she was upset.

The statement is more probative of the fact than any other evidence that is reasonably available to the proponent.

The trial counsel must argue that the civilian man's identity is unknown and Mrs. Lane has indicated she will not testify against her husband. She will invoke spousal incapacity under M.R.E. 504(a). These statements are the only evidence available to the government on two specifications.

The statement is offered to prove a material fact.

The trial counsel must argue that this evidence is proof of the two specifications charging SGT Lane with wrongful distribution of marijuana to the civilian man.

The general purpose of these rules and the interests of justice will best be served by admission of the statement.

The trial counsel must argue that without this evidence the fact finder will hear no evidence to prove two specifications. The interests of justice require that the members hear this evidence since it is reliable, and the fact-finder can determine if it constitutes proof beyond a reasonable doubt.

The proponent gave notice to the opposing party of the intention to offer the statement, the particulars of the statement, including the identity of the declarant.

The trial counsel should offer the written notice of intent to offer residual hearsay as an appellate exhibit.