THE DICTIONARY OF COMMON EVIDENTIARY ISSUES

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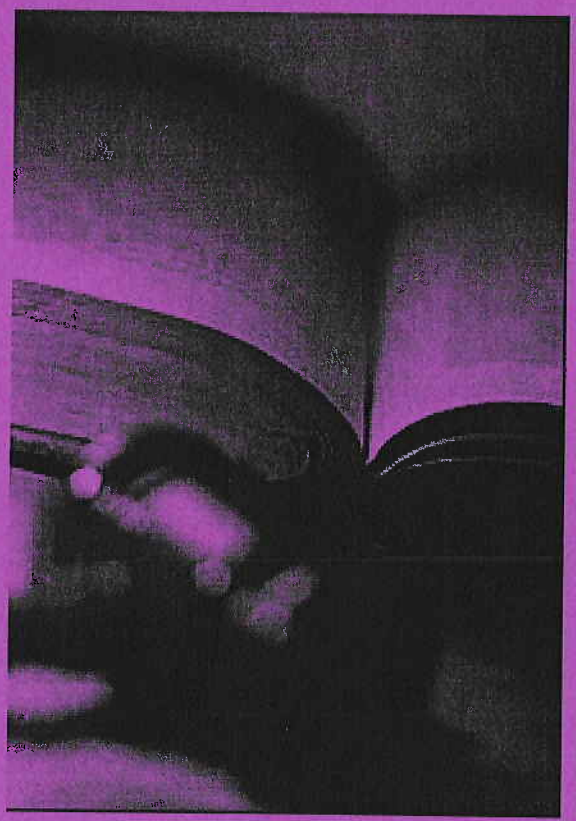

MAJ David E. Coombs

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1 This document is based in part upon a trial counsel handbook created in 1997 by the author along with CPT Raynette Passos under the guidance and direction of MAJ Mark Dupont, the 1st Cavalry Division Chief of Military Justice. A version of that document was adapted to serve the purposes of a defense counsel handbook in 2000. The author takes little, if any credit, for the originality of the ideas contained within this document (unless the idea is misguided or the information is inaccurate, and then he assumes total responsibility). The current status of information within this publication is due to the author's experience, independent study, and the benefit of excellent evidence hornbooks. *See* Stephen A. Saltzburg et al., Military Rules of Evidence Manual (6th ed. 2006); *see also*, David A. Schlueter et al., Military Evidentiary Foundations (2nd ed. 2000). I anticipate this document will change significantly in the near future, providing additional chapters on other common evidentiary issues not currently covered within. The author invites any comments or suggested changes at david.coombs@hqda.army.mil.

I. GENERAL PROVISIONS

A. RULE 103: OBJECTIONS BY COUNSEL

1. Military Judge's Objective. Make timely, well-reasoned rulings on counsel's objections; require counsel to state and explain their objections accurately.

2. Key Points.

a. Rule 103 places the responsibility for raising and preserving evidentiary issues upon counsel.
b. Nowhere is waiver construed more strictly than with evidentiary objections. If counsel does not make a timely objection, they have generally waived the issue (absent plain error), especially as the government.
c. Counsel should stand, and clearly state their objection as soon as practical. This may be after the question by opposing counsel has been asked, or after the witness gives an unanticipated response. In rare instances, when the question alone may prejudice the opposition, it may be proper to object as the question is being asked. However, this should be the exception and not the rule. In order to accurately access the objection, you will need to hear the question.
d. After objecting, counsel should state their grounds for an objection. You should require counsel to be more specific than the old standby "irrelevant, immaterial and incompetent." As you fine tune your ear, you should be able to anticipate when an objection is proper and the appropriate grounds for the objection. It is important to note that counsel are not required to cite evidentiary rules by number in order to adequately preserve objections for later appellate review. So long as counsel makes sufficient arguments to make the issue known to you, the issue will be preserved. *United States v. Datz*, 61 M.J. 37 (2005).

3. Ruling on Objections. Under Rule 103, allegations of error are preserved for review once you make a definitive ruling on an evidentiary issue and counsel has otherwise satisfied the requirements of Rule 103(a).

a. Provisional Rulings - If you intend for your ruling to be provisional, you should inform counsel of this fact and invite counsel to raise the issue again at the appropriate time. When handling motions in limine, it is often preferable to give provisional rulings in order to allow for full development of the issue at trial.
b. Record of Offer and Ruling – Rule 103(b) allows you the discretion to enhance any offer of proof by counsel. You may add a comment to the record that explains the nature or form of the offer, the objection, or your ruling. Thus, you may make special findings concerning the reasons for your rulings.

4. Erroneous Rulings.

a. Under Rule 103(a) no error may be found to exist on appeal unless: Error materially prejudices a substantial right of the accused; and in the case of a ruling admitting evidence, a timely objection or motion to strike is made by counsel stating the specific

ground for the objection; or in the case of a ruling excluding evidence, the proponent must make an offer of proof (unless it is clear from the record exactly what was at issue).

b. Constitutional Errors – requires reversal unless a the error is harmless beyond a reasonable doubt.
c. Nonconstitutional Errors – requires reversal when the error has a substantial influence on findings.

5. Standard of Review – Evidentiary rulings by you are subjected to an abuse of discretion standard. The only exception is those instances where you are required to conduct a proper balancing test under Rule 403 and fail to do so. Additionally, arguably your rulings on the admission of uncharged misconduct under Rule 404(b) will also be subjected to something less than abuse of discretion

6. Bridging the Gap Training of Counsel.

a. Counsel should object whenever they feel the instinct to do so in order to avoid waiver of the issue. After objecting, they should pause. By pausing before stating grounds counsel accomplish two things: (a) they gain an extra second or two to think, and (b) they give you the chance to sustain (or, unhappily, to overrule) the objection before being forced to state the grounds. If counsel can't come up with a "tag" for the objection (e.g., relevancy, asked and answered), then they should give their reasoning. "Your honor, counsel is asking the witness to talk about the theory of urinalysis testing when all he did was run the sample through the machine." The short objection would be "lack of foundation" or "competency," but that sentence accomplishes the same purpose.
b. When do you object? Counsel should wait until the question is asked but state their objection before the witness starts to answer.
c. Be aware of the panel. Panels may be inclined to think that objections are lawyers' gamesmanship. A smart counsel considers this in deciding whether to object. A panel may assume that counsel are trying to hide harmful evidence. While members may indulge this from the defense, they may suspect the government of quashing evidence inconsistent with its theory of guilt. An overruled objection also calls attention to unhelpful evidence that might otherwise have seemed less prominent; counsel should not highlight their opponent's evidence.
d. Style. Oral advocacy is important even when stating an objection, especially in front of a panel. Counsel should choose their wording carefully and be aware of their demeanor. As always, avoid the temptation to smarminess or feigned outrage, but a weary tone may be appropriate, e.g., in making a reluctant "leading" objection after counsel has persisted in leading. Similarly, true outrage may be valid when counsel has led a witness to an obviously objectionable area.
e. Plan, plan, plan. Counsel should know (or should have a good idea) before trial what objections they should make during the trial. By anticipating and writing out their objections, counsel will appear better prepared during the trial. Similarly counsel should know that their opponent will likely object to certain questions that they will ask. In such cases, by preparing a response, counsel can reduce fumbling at trial, respond appropriately and keep the focus on their case.
f. Stay cool when an opponent objects. Counsel do not forfeit their legal standing by being courteous, and may even endear themselves to you or the panel by responding with firm politeness to objections, even trivial ones.

g. Prepare to make an accurate offer of proof. When an opponent objects, for example, on relevancy or hearsay grounds counsel should be prepared to make an offer of proof. Counsel must be prepared to state what the witness will say and why this witness may properly, for example, quote the victim or lay the foundation for the checks or lab report, or offer an opinion as to cause of death. Counsel may make an oral offer (Rule 103(a)(2)) or may present the offer in question and answer form (Rule 103(b)).
h. Prepare witnesses. Counsel should instruct witnesses in advance of trial to stop speaking the moment an objection is made and not to speak again until directed by the judge.
i. Use motions in-limine. It is risky for counsel to wait until their opponent asks a question to object. When counsel anticipate that their opponent will ask certain questions or offer certain evidence that is objectionable, they should prepare a motion in-limine to seek you ruling in advance.
j. Speak to the judge, never to opposing counsel. Counsel should never address their opponent when making an objection and never let their opponent force them to answer him. Counsel make objections and judges make rulings
k. State their case outside the hearing of the members. Counsel should not exploit the opportunity to argue an objection in front of the members. If the substance of the discussion could taint the panel -- for good or bad – counsel should request an Article 39(a) session.

7. Sample.
TC: Tell me what Mr. Hoege told you.
DC: Objection your Honor, Hearsay.
MJ: Counsel?
TC: Your honor, may we have a brief 39(a) session?
MJ: Certainly. Members, we need to discuss a matter outside of your presence. If you would, please go into the deliberation room.
(Panel departs)
MJ: Trial Counsel?
TC: Yes your honor, the government believes this statement qualifies as an exception to the hearsay rule under MRE 803(2). At the time Mr. Hoege said "I can't believe the accused just hit that man in the face," he was under the stress of excitement caused by witnessing the startling event. The statement was made minutes after seeing the accused hit the victim in the face.
MJ: Defense?
DC: Your honor, the statement was made approximately five minutes after allegedly seeing my client strike the victim in the face. During that five minutes, Mr. Hoege had plenty of opportunity to think about what he saw and to reflect on what he saw. The defense believes that given the lapse of time, this statement should not qualify as an excited utterance. Additionally, we believe Mr. Hoege had a bias against my client. Mr. Hoege lost his job due to my client complaining about his teaching style. This gives Mr. Hoege a motive to make a false accusation against my client..
MJ: Defense, I am going to overrule your objection. I believe the statement by Mr. Hoege qualifies as an excited utterance. However, you may obviously, on cross-examination, highlight to the panel any issues they should consider regarding the trustworthiness of his statement.
MJ: Anything further?
TC: No, your Honor.

DC: No, your Honor.
MJ: Bailiff, please call the members.

8. List of Objections

OBJECTIONS TO QUESTIONS:
Ambiguous - MRE 611(a) - The question may be taken in more than one sense.
Argumentative - MRE 611(a) - (1) Counsel summarizes facts, draws a conclusion, and demands that the witness agree, or (2) Counsel's question is an argument in the guise of a question.
Asked and answered - MRE 611(a) - Unfair to emphasize evidence through repetition. Greater leeway allowed on cross.
Assumes a fact not in evidence - MRE 103(c) and 611(a) - Question contains a fact that has not been entered into evidence.
Beyond scope - MRE 611(b) - Question unrelated to examination immediately preceding, counsel should be required to call witness as own.
Bolstering - MRE 608(a) - Attempting to support character for truthfulness prior to attack by opponent.
Calls for conclusion - MRE 602, 701, 702 - Witnesses must testify to facts, conclusions must be left to the members (and counsel during closing arguments). Watch for "why" and "would" questions. Those often call for conclusions.
Calls for improper opinion - MRE 602, 701, 702 - Used when an expert hasn't been properly qualified or when a lay person's testimony would be beyond the scope of the rules.
Calls for narrative - MRE 103(c), 611(a) - Question may allow witness to ramble and possibly present hearsay, incompetent or irrelevant evidence. MJ has broad discretion here.
Calls for speculation - MRE 602 - Question requires witness to guess.
Compound - MRE 611(a) - More than one question contained in counsel's question.
Counsel testifying - MRE 603 - When counsel is making a statement, not asking a question.
Confusing and unintelligible - MRE 611(a) - Counsel has used unfamiliar words, disjointed phrases or has confused the facts or evidence.
Cumulative - MRE 102 and 611(a) - Repeated presentation of testimony is unfair, unnecessary and wastes time. MJ is responsible to control this.
Degrading question - MRE 303 - question is immaterial and used simply to humiliate.
Hearsay (question) - MRE 802 - Answer would elicit hearsay and no exception has been shown.
Improper - If you know the question is bad but can't think of the basis, use this to give you time to think. The MJ may sustain you anyway and supply the basis. If not, you've gained that moment to decide on a basis. Don't overuse this!
Improper impeachment - MRE 607-610 - Only specific, limited means of impeachment are authorized.
Improper use of memorandum - MRE 612 - Used when opposing counsel has confused present recollection refreshed (MRE 612) and past recollection recorded (MRE 803(5)).

Improper use of prior statement - MRE 613 - when counsel is attempting to introduce extrinsic evidence of the statement without affording witness opportunity to explain or deny.
Irrelevant - MRE 402 (see also 401 and 403) - Doesn't tend to prove or disprove any fact or circumstances related to any issue before the factfinder.
Leading - MRE 611(c) - When the form of the question suggests the answer.
Misstating the evidence - MRE 103 - Question either misstates what a witness said earlier or mischaracterizes earlier evidence. Similar to assuming facts not in evidence.

OBJECTIONS TO EVIDENCE (ANSWERS):
Best evidence rule - MRE 1002 - If the contents of the document are to be proved, the original must be offered or its absence accounted for.
Cumulative - MRE 102 and 611(a) - Repeated presentation of evidence is unfair, unnecessary and wastes time. MJ is responsible to control this.
Expert witness not qualified - MRE 702 - Lack of foundation for specific expertise.
Hearsay (answer) - MRE 801-805 - Question didn't call for hearsay, but witness gave it anyway. Counsel should move to strike and ask MJ to instruct members to disregard answer.
Improper bolstering - MRE 608(a) - Using some form other than character for truthfulness.
Improper characterization - MRE 404, 405, 611(a) - Attempting to use improper means to prove character.
Improper lay opinion - MRE 701 - Failure to limit the opinion to a rational basis of the witness' perceptions.
Incompetent witness - MRE 104(a), 602, 603, 605, 606 - Lack of qualification, mental capacity, or personal knowledge.
Incompetent evidence - MRE 103, 104 and Section III - Illegally seized evidence and involuntary confessions and admissions. Ask for a 39(a), if the evidence is even suggested by the question, consider asking for a mistrial.
Irrelevant - MRE 402 (see also 401 and 403) - Doesn't tend to prove or disprove any fact or circumstances related to any issue before the factfinder.
Narrative response - MRE 103(c) and 611(a) - Witness rambling beyond scope of question.
Prejudice outweighs probative value - MRE 403 - Request immediate 39(a). Argue the 403 balancing test. Don't ever let the members hear you call evidence prejudicial, it will stick with them!)
Uncharged Misconduct - MRE 404(b) - Not admissible to show action in conformity therewith, see rule for exceptions.
Unresponsive - MRE 103(c) and 611(a) - Answer not to the question asked, usually from a hostile witness.

LACK OF FOUNDATION:
For expert opinion - MRE 702
For exhibit - MRE 104, 401, 801-805
Exhibit not properly authenticated - MRE 901(a)-903 - failure to prove that the exhibit is in fact what it is claimed to be.

PRIVILEGES: Used where the question/answer would violate one of the following privileges.

Clergy - MRE 503
Comment on or inference from claim of privilege - MRE 512 - Ask for an instruction.
Government information/classified - MRE 505-506
Spousal privilege - MRE 504
Identity of informant - MRE 507
Attorney-client - MRE 502
Mental examination of accused - MRE 302
Self-incrimination - MRE 301

B. RULE 104: PRELIMINARY QUESTIONS

1. Military Judge's Objective. To properly resolve preliminary questions that requires the application of procedural or evidentiary rules.

2. Key points.

a. Rule 104(a) questions of admissibility of evidence are matters determined solely by you and not the members.
b. Under Rule 104(a), five particular issues are reserved for your determination:
(i) Whether an individual is fit to be a witness (Rule 601).
(ii) Whether there is a privilege protecting a witness from disclosing certain information (Rules 501-513);
(iii) Whether evidence is admissible;
(iv) Whether a continuance should be granted; and
(v) Whether a particular witness is available.
c. When deciding a preliminary issue under Rule 104(a), you are not bound by the rules of evidence except with respect to privileges.
d. You should conduct any hearing outside of the presence of the members.
e. Rule 104(c). You alone determine whether the evidence is relevant. A preponderance of the evidence standard governs preliminary fact finding under Rule 104(a). *Huddleson v. United States*, 485 U.S. 681 (1988).
f. Your responsibility is not to decide whether you believe the evidence; you only decide whether a reasonable court-member could believe it. In otherwords, you decide if there is a sufficient factual predicate for admissibility of the evidence, weight and credibility are matters for the fact-finder. Rule 104(e).
g. Under Rule 104(b), you also determine whether there is a sufficient factual predicate to permit the evidence to come before the members. In deciding this issue, you should ask yourself two questions: First, will the court-members find it helpful in deciding the case accurately. If no, exclude the evidence. If the answer is yes, is there sufficient evidence to warrant a reasonable court-member in believing the evidence? If no, the evidence is excluded. If yes, the evidence is admitted.
h. Under Rule 104(d), the accused may testify upon a preliminary matter. By doing so, the accused is subject to cross-examination only on the preliminary matter. The accused is not subject to cross-examination as to other issues in the case.

C. RULE 105: LIMITED ADMISSIBILITY

1. Military Judge's Objective. Understand and give the proper instruction when evidence may be admissible for one party or for one purpose, and yet inadmissible for another party or another purpose.

2. Key points.

a. The rule embodies the view that, as a general rule, evidence should be received if it is admissible for any purpose.
b. The rule places the major responsibility for requesting a limiting instruction upon counsel.
c. Counsel should state the grounds for limiting the evidence to a particular purpose.
d. If counsel requests a limiting instruction, they should be prepared to offer the court the specific language to use for the limiting instruction.
e. A limiting instruction may be given at the time the evidence is received, as part of the general instructions, or at both times.
f. More than a mere referee: As recognized recently in *United States v. Dacosta*, "a military judge 'is more than a mere referee, and as such [she] is required to assure that the accused receives a fair trial.'" 63 M.J. 575, 583 (Army Ct.Crim.App. 2006) *citing United States v. Graves*, 1 M.J. 50, 53 (C.M.A 1975). Under this obligation to assure the accused receives a fair trial, you may have a *sua sponte* duty to give certain instructions. *See United States v. McDonald*, 57 M.J. 18, 20 (2002) ("Even though not requested, a military judge has a *sua sponte* duty to give certain instructions when reasonably raised by the evidence....")

3. Bridging the Gap Training of Counsel:
a. Counsel should not request a limiting instruction if the instruction would simply highlight the opposing counsel's evidence. This is a matter or trial litigation skills. By drawing attention to the evidence with a
limiting instruction, counsel need to understand that they may be actually hurting their case.
b. If counsel plan on requesting a limiting instruction, they should notify the court in advance in order to discuss the wording of the instruction. Ideally, this will take place prior to the testimony of the witness so that the limiting instruction, if appropriate, can be given at the time the evidence is elicited.

D. RULE 106: REMAINDER OF WRITINGS RULE

1. Military Judge's Objective. Allow counsel to use Rule 106 to give the Judge or the court-members an accurate and clear understanding of a writing or recording offered by opposing counsel.

2. Key points.

a. Counsel may effectively use the rule when their opposition attempts to offer only a portion of a writing or recorded statement. The rule allows counsel to require their opposition "at that time" to introduce any other portion of the document or recording in question, or an entirely different document when "fairness" demands it.
b. The rule is a timing rule and not a rule of additional admissibility. In *United States v. Cannon*, 33 M.J. 376 (C.M.A. 1991), the defense counsel examined the prosecutrix about inconsistencies between trial testimony and a previous OSI statement. Relying on Rule 106, the trial counsel thereafter offered the witness' entire OSI statement which contained extrinsic offense evidence. Reversing the conviction, the court held the military judge should have excluded the evidence. Rule 106 does not justify admitting an entire statement merely to show that one segment of it is consistent with previous testimony.
c. Under Rule 106, the party offering evidence is required to introduce more evidence than they want to. In such a situation, it is the offering party that is introducing the evidence.
d. *Goldwire* Trap - Counsel should understand that in the context of a confession or an admission of an accused, this distinction is potentially an important one. If defense uses Rule 304(h)(2), instead of Rule 106, to admit other portions of an admission or confession when only part of the alleged admission or confession is introduced, the defense has placed the accused's character for truthfulness in issue. Under Rule 806, the government may impeach the credibility of the offered portions of the confession just as they could if the accused had taken the stand and testified under oath. *See United States v. Goldwire*, 55 M.J. 139 (2001). In the author's opinion, this should not be the case if the other portions of an admission or confession of an accused are offered by the government due to the requirements of Rule 106.

II. JUDICIAL NOTICE

1. Military Judge's Objective. To admit proof of easily ascertained or generally known facts in order to save the time and costs of more formal methods of proof.

2. Key points.

a. Goal of Rule 201: to seek notice of "almanac-type facts" to avoid the cumbersome, time-consuming proof process. For example:
(i) That 5 December 2005 was a Monday.
(ii) That a gram is equal to about 1/29 ounce.
(iii) That the distance from Heidelberg to Kaiserslautern is about 100 kilometers.
(iv) That it was still daylight at 2000 hours on 15 July at Fort Riley, Kansas.
(v) That a post's speed limit is 25 mph unless otherwise posted.
b. How to do it. Counsel simply ask you to "take judicial notice of the fact that...." Additionally, the rule allows you to take judicial notice *sua sponte*.
c. Counsel should have something to back up their request for judicial notice. Ideally, the request for judicial notice will be in pleading format (standard caption with the topic being "Request for Judicial Notice"). Counsel should attach their documentary proof to the request and provide an advance copy to opposing counsel. The request should be marked as an appellate exhibit.
d. In deciding upon whether to take judicial notice, you may rely upon otherwise inadmissible evidence, such as affidavits, letters, or other hearsay.
e. The taking of judicial notice is not a substitute for the rigors of proof. The members are not bound by your finding of judicial notice. Even if you instruct the panel that you have taken judicial notice of certain facts, the panel, as the fact-finder, is as free to disregard it as it is to rely on it. Therefore, it would seem that the opponent of the judicially noticed fact should be allowed to offer evidence to rebut it.
f. Do not take judicial notice of matters that are clearly opinion or matters of inference. For example, you should refuse to take judicial notice of the fact that possession of a certain amount of illegal drugs is proof of intent to distribute. Such a matter is best left for argument because it is not inherently subject to unquestioned objective proof.

III. RELEVANCY AND ITS LIMITS

A. RULE 401: RELEVANCY

1. Military Judge's Objective. To ensure that only relevant evidence is presented to the factfinder.

2. Key points.

a. Logically relevant evidence is evidence that in some degree advances the inquiry. The standard is "any tendency." This is the lowest possible standard and shifts the emphasis from admissibility to weight. Thus, the test for logical relevance is whether the item of evidence has any tendency whatsoever to affect the balance of probabilities of the existence of a fact of consequence.

b. A military judge has four basic choices when ruling on relevancy issues:
   (i) exclude the evidence;
   (ii) admit the evidence;
   iii) admit the evidence subject to a limiting instruction; or
   (iv) admit part of the evidence and exclude part.

c. You should require counsel to (a) describe the evidence; (b) explain how that evidence relates to a consequential issue at bar; and (c) indicate how the offered evidence will establish the fact in question.

d. In order to be relevant, the evidence must go to a consequential issue. If the government is offering evidence under Rule 404(b) to prove knowledge and knowledge is not in dispute, the evidence is not of consequence to the action and as such is not relevant.

e. Almost every issue in evidence law involves the idea of relevance. In fact, a relevancy objection, although often overlooked, is frequently the most valid objection available to counsel. Military courts have used Rule 401 to expand the amount of information available to the members. *See*, e.g., *United States v. Tomlinson*, 20 M.J. 897 (A.C.M.R. 1985) (Rule 401 was "intended to broaden the admissibility" of most evidence.)

3. Applying Rule 402. Irrelevant evidence is never admissible. It is not admissible because it does not assist the trier of fact in reaching an accurate and fair result. The Rule requires the court to address three separate questions before admitting evidence: a) Does the evidence qualify under Rule 401's definition? b) Does the evidence violate any of the five prohibitions listed in Rule 402? c) Does the evidence satisfy any provision requiring a Rule 403 related judicial assessment of the probative value of the evidence? *See, e.g.*, Rules 403, 412, 413, 414, 803(6), 804(b)(5), 807, and 1003.

B. RULE 403: UNFAIR PREJUDICE

1. Military Judge's Objective. To allow counsel to properly exclude relevant evidence which is unduly prejudicial, confusing to the members, cause undue delay, a waste of time, or is a presentation of needlessly cumulative evidence.

2. Key points.

a. Rule 403 is an often cited rule and perhaps one of the most important rules due to the power given to you to exclude probative evidence.
b. Rule 403 does favor admissibility and will exclude relevant evidence only if it is substantially outweighed by any attendant or incidental probative dangers. Among the factors specifically mentioned in the rule are "the danger of unfair prejudice, confusion of the issues, or misleading the members."
c. If evidence is logically relevant under Rule 401, the evidence may still be excluded if it is not legally relevant under Rule 403. Determining whether evidence is legally relevant requires you to weigh several different concepts against each other in order to reach a proper resolution under the Rule. When conducting a Rule 403 balancing test, you should consider the following factors: the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the factfinder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties. *United States v. Berry*, 61 M.J. 91 (2005).
d. Special Findings. It is wise for you to detail any 403 balancing test on the record and preferably in special findings. If you do a detailed 403 balancing, a reviewing court will rarely second-guess your decision as long as it is reasonably supported by the record.
e. When conducting a Rule 403 balancing, questions of witness credibility (in a members case) are for the court members and not for you to decide. In such cases, you may not exclude the evidence just because you don't believe the witness.
f. Unfair Prejudice? It is important to not only understand what this term means, but also who we are interested in protecting from unfair prejudice. Counsel often either misapply the rule or do not understand who the rule is intended to protect. In a sense, all evidence that either the government or defense seeks to introduce is intended to prejudice the opponent. If it didn't prejudice the opponent, why would counsel want to admit the evidence? Rule 403 is really concerned about how the factfinder will view the evidence. Unfair prejudice under Rule 403 exists when a factfinder might react to the proffered evidence in a way (usually emotional) that causes the factfinder to potentially ignore other admissible evidence and decide the case on an improper basis. *United States v. Owens*, 16 M.J. 999 (A.C.M.R. 1983) (describing unfair prejudice as existing "if the evidence is used for something other than its logical, probative force"). Also, under Rule 412, the unfair prejudice is not to the victim, it is to the government's case (again the concern being the factfinder will decide the case on an improper basis).

(1) PROPER PREJUDICE EXAMPLE: SPC Smiffy is charged with assault upon PVT Jones. The government seeks to introduce evidence from CPT Honest who will testify he heard SPC Smiffy say "the next time I see PVT Jones he is a dead man." The defense might try to keep the testimony out under a number of justifications, but under Rule 403, although the evidence is prejudicial and a member may use it to determine that

SPC Smiffy likely assaulted PVT Jones, this type of prejudice is proper because it comes from the member's belief that the accused committed the charged offense.

(2) IMPROPER PREJUDICE EXAMPLE: Same facts as above except CPT Honest is going to testify he heard SPC Smiffy say "the next time I see PVT Jones he is a dead man, because I belong to the "bare knuckles gang" that encourages members to beat people up." Under Rule 403, the defense would have a much better argument to keep out the portion of the statement regarding SPC Smiffy's gang membership. The risk of admitting the entire statement is that the members may develop a negative feeling about SPC Smiffy based upon their feelings about individuals that belong to a gang. Those impressions would be an example of unfair prejudice since they are unrelated to the probative value the gang information has with respect to the charged offense. Instead, they flow from the members' reactions to information about the accused that would cause loathing whether or not it was linked to the events of the alleged offense. The risk of the members believing the accused is a wretch that deserves punishment no matter what the evidence is regarding the assault is an example of unfair prejudice under Rule 403.

3. Substantially Outweighed? The fact Rule 403 contains this verbiage suggests that if it is a close call in your mind, the evidence should come in. Only when you are confident the evidence will do more harm than good should you exclude it. When considering this question, you can look at some additional factors such as: the strength of the probative value of the evidence (i.e., a high degree of similarity); the importance of the fact to be proven; whether there are alternative means of accomplishing the same evidentiary goal; the ability of the panel to adhere to a limiting instruction, or the ability to alter the evidence and thus lower the prejudice by deleting the most prejudicial portions.

4. Bridging the Gap Training of Counsel: Although counsel frequently invokes Rule 403, they rarely argue it correctly. Instruct counsel that it is important for your consideration that they avoid undefined and conclusory arguments. Instead, they need to clearly indicate how the objectionable evidence will impact on the members ability to properly evaluate the evidence and reach an appropriate and accurate result. Additionally, they need to argue why the identified danger substantially outweighs any probative value the evidence may possess.

C. RULES 404 AND 405: CHARACTER EVIDENCE

1. Military Judge's Objective: Appropriately limit when character evidence may and may not be used under Rule 404 and the manner in which it may be presented under Rule 405.

2. Key points.

a. Character evidence is inadmissible to prove that a person acted in conformity therewith on a specified occasion. "The State may not show the defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." *Michelson v. United States*, 335 U.S. 469, 475 (1948).

b. Every Rule has its exceptions and Rule 404 is no different. Character evidence is admissible in three separate situations:

(i) Character of the Accused: The accused may offer, and the government may rebut character evidence concerning a pertinent character trait of the accused which makes it unlikely that the accused committed the charged offense. "Pertinent" in Rule 404(a) means the same thing as "relevant" as that term is defined in Rule 401.

(ii) Character of the Victim. The accused may offer and the government may rebut character evidence concerning a pertinent trait of the victim's character that makes it likely that the victim acted in a certain way on a specified occasion. For example, the accused is permitted, when relevant, to show that the victim was the aggressor by introducing evidence of the victim's character for violence. *United States v. Rodriguez*, 28 M.J. 1016 (A.F.C.M.R. 1989).

(iii) Character of a Witness: when a witness takes the stand, their character for truthfulness is at issue. Evidence about that witness's character for truth-telling is permitted to support an inference that the witness has acted at trial in conformity with the witness's usual respect for truth. Rule 404(a)(3) allows use of character evidence as provided in Rules 607, 608 and 609.

c. If the accused decides to offer character evidence, under Rule 405, the accused is limited to reputation or opinion testimony unless character is an essential element of an offense or defense (essentially entrapment).

d. Character is rarely an element of a crime, claim, or defense. An example is evidence of the accused's predisposition to sell drugs in an entrapment defense, or the character of the victim in a criminal defamation action. Such evidence escapes the general proscription against character evidence because it is not offered to prove conformity, but because of the significance of the trait in relation to the crime. In such situations, proof may be made by means of opinion or reputation evidence or specific instances of a person's conduct IAW MRE 405(a) and (b).

e. The foundation for reputation or opinion testimony is (i) the person has a particular character trait; (ii) the witness has an opinion about the trait, or is familiar with the person's reputation concerning that particular trait, or can testify concerning specific acts relevant to the trait; (iii) the witness states an opinion, relates the reputation, or, under very limited circumstances, testifies about specific instances of conduct relevant to the trait in issue.

f. Examples of pertinent character trait: Larceny>trustworthiness; Drunkenness>sobriety.

g. An accused's general good military character is a pertinent character trait if there is a nexus, however strained or slight, between the crime circumstances and the military. The defense, in virtually every case, and certainly in every "military" offense prosecution, may attempt a "good soldier defense" by presenting the accused's good military character evidence. *United States v. Wilson*, 28 M.J. 48 (C.M.A. 1989). Consider the impact of *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994) (service discrediting behavior or conduct prejudicial to good order inherent in all enumerated offenses).

h. In situations where the accused offers a pertinent character trait of the alleged victim, it is important to understand that this then opens the door for the government to offer evidence of the same character trait, if relevant, of the accused (even without the accused first bringing his or her character into evidence). Rule 404(a)(1). (June 2002 Amendment). Additionally, the rule also contains a limited exception permitting the government to introduce evidence of the victim's character trait for peacefulness to rebut any evidence introduced by the defense to suggest that the victim was the aggressor in a homicide or assault case. The type of proof is generally limited to opinion and reputation.

Character Evidence

Accused's Evidence	Government Response	2002 Amendment
Accused has peaceful character	Accused has violent character	*No change*
Victim has violent character	Victim has peaceful character	***Accused* has violent character**
Victim acted first	Victim has peaceful character	*No change*

i. Self-Defense - The most common use purpose for presenting character evidence of the victim is in self-defense cases. When the accused is charged with an assaultive offense, self defense may be presented under two separate theories. One allows specific incidents of conduct and the other does not. Thus, it is important for counsel to clearly indicate which theory they are relying upon.

(i) State of mind of the accused: under this theory, the accused presents evidence that he was aware of the victim's past acts and reputation for being a violent person. Based upon this knowledge, the accused reasonably believed he was in danger and responded accordingly. Under this theory, state of mind of the accused is a non-character purpose of the evidence. As such, Rules 404 and 405 do not apply. The accused is free to present specific incidents of conduct. The purpose of this evidence is not to show the propensity of the victim on the date in question, but the basis for the accused's reactions to the victim. *See generally*, *United States v. Dobson*, 63 M.J. 1

(2006) (military judge erred by not admitting specific acts evidence to show the appellant's state of mind at the time of the victim's death (a non-character purpose)).

(ii) Victim's conduct at the time of the offense: the second theory implicates Rule 404(a)(2) and the restrictions of Rule 405. Under this defense theory, the defense is attempting to show the victim actually started the fight. While the defense could clearly discuss the specific acts of the victim at the time of the assault (disputed facts and not character evidence), the accused could not present past specific acts of the victim to prove the victim was violent person. The main difference between these two theories is focused primarily upon the accused's knowledge prior to the assault. In the first, the accused is aware of the past acts, and it is these acts which were the driving force behind the accused actions, as opposed to the second theory, where the accused was not aware of the previous acts and is instead offering those acts for a propensity purpose (unless the acts are specifically offered as disputed facts). Confused? That is understandable. It is a minor difference, but important for you to nail the counsel down on their theory of admissibility to avoid an outcome similar to that in *Dobson*.