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Practice Notes

View from the Bench

Using Character and Outside Acts to Prove Your Case

By Lieutenant Colonel Christopher E. Martin

It is useless to attempt to reason a man out of a thing he was never reasoned into.¹

We tend to analyze people and events by using assumptions to fill in the gaps.

This tendency is exactly why Military Rule of Evidence (M.R.E. or Rule) 404² and related rules exist. We so often judge others by

context or past behavior that a logical check is needed to ensure that we move beyond assumptions, and consider the actual evidence at hand. Hence, M.R.E. 404 normally prohibits use of a person's character or

character trait to prove that on a particular occasion the person acted in accordance with the character or trait.³ Accusations must rise or fall on their own facts.

Good trial practice, then, includes presenting whatever direct evidence is available: a telling of the "facts" as the party believes them to be. But after the facts are asserted, the real convincing often comes through returning to assumptions in a more appropriate form known as inferences.⁴ If direct evidence is the factual "telling," then M.R.E. 404-type evidence is part of the "showing"—the circumstantial who, what, when, where, why, or how that puts the facts in context to persuade the factfinder.

Character evidence and the use of evidence for non-character purposes is a robust and nuanced area of the law. There is no substitute for research and careful thought based on the unique facts of a case. The goal of this note is to provide a framework for analysis. Follow this framework, supported by case research and the facts of your case, and you will have a reliable method for determining how to use character or related evidence.

Step One: Is Actual Character Relevant?

The first question should always be whether evidence of actual character is relevant to your case. Rule 404(a) provides three exceptions to the general prohibition against character evidence.

On the Defensive: Evidence by the Accused, About the Accused

First, the accused can offer up evidence of his or her own trait that is pertinent to the charged offense.⁵ The key word is "pertinent." In a forcible rape case, for example, an opinion that the accused is a peaceable or peaceful person may be admissible under this rule.⁶ For a crime of dishonesty, such as larceny, an opinion that the accused is honest may be admissible, because it speaks to the permissible inference that an honest person does not steal.⁷ This same part of the rule, however, limits when the non-specific trait of general military character, or "good Soldier," evidence may be used. The Rule specifically prohibits evidence of general military character for the offenses listed therein, including rape and larceny.⁸

It is crucial to understand the distinction between “pertinent” character evidence and evidence of general military character under M.R.E. 404(a). A Soldier accused of rape might be able to defend against the rape by presenting evidence that he is “peaceful,” but he may not under M.R.E. 404(a)(2) introduce evidence that he did not commit the rape because he is a “good Soldier,” because evidence that the accused is a good duty performer, reliable Soldier, or the like is simply not pertinent to the question of whether he committed rape. On the other hand, an accused may present “good Soldier” evidence for offenses not specifically excluded, such as absence without leave or conduct unbecoming an officer and a gentlemen, on the theory that a “good Soldier” does not do such things.⁹

Under M.R.E. 405, character evidence must, with only a few exceptions, be introduced in the form of reputation or opinion, such as “I believe he is an honest person.” The specific *instances* that form the basis of the opinion are inadmissible on direct examination.¹⁰ But good advocates understand that a witness must still have a proper basis to form his or her opinion. So while a military judge may properly stop a witness from testifying on direct about *what* she observed about the accused, the witness can and should explain in general terms *how* she came to form her opinion about the accused.

A properly laid foundation can be nearly as persuasive as describing the underlying acts themselves.¹¹ Like the trait itself, the foundation must be pertinent, or relevant. If the character trait is honesty, foundational testimony about three deployments and numerous firefights that the accused and witness experienced together is likely to generate a sustained objection. On the other hand, evidence that the witness observed the accused being forthright in tense situations would be a solid basis to render an opinion as to honesty. The more sound the basis for the witness’s opinion, the more likely the military judge will admit it, and the more likely the factfinder will find it persuasive.

A final option, to which the defense holds the key, is to introduce character evidence through the use of affidavits or “other written statements.”¹² The limitations as

to reputation or opinion evidence and other rules of evidence still apply, and the prosecution may rebut in kind this evidence if introduced.¹³

When an accused admits evidence of a pertinent character trait, “good Soldier” or otherwise, the prosecution may rebut it. This is when specific instances come into play, subject to the discretion of the military judge, and usually in the form of “did you know” or “have you heard” questions.¹⁴ If the defense witness’s testimony was, for example, that the accused is a peaceful person, the prosecution can ask on cross-examination if the witness was aware that the accused assaulted his wife. Asking such questions requires a good faith basis, and the military judge will instruct that the question, and the answer (if the witness admitted knowledge), may be considered only for the purpose of assessing the witness’s testimony and/or to rebut the opinion.¹⁵ Even with such limiting instructions, such questions can be damaging, and the offering party should carefully consider potential impeachment when deciding whether to offer character evidence.

On the Offensive: Evidence by the Accused, About the Alleged Victim

Next, M.R.E. 404(a)(2)(B) allows the accused to proactively offer a pertinent trait of the victim, subject to the limitations of M.R.E. 412. It also allows the prosecution to rebut any trait so offered, and opens the door for a prosecution attack-in-kind of the accused’s same trait, if the door is so opened.¹⁶ Similarly, M.R.E. 404(a)(2)(C) allows the prosecution to rebut a claim that the alleged victim was the first aggressor in a homicide or assault case.¹⁷ A survey of reported cases suggests that neither provision is widely used, although each should be considered in instances where they are relevant.

Credibility is Always in Issue for a Testifying Witness

And finally within this area, M.R.E. 404(a)(3) makes clear that it does not overwrite the longstanding rule, as embodied in M.R.E. 607, M.R.E. 608, and M.R.E. 609, that a witness’s character for truthfulness or untruthfulness is always in issue when he or she testifies.¹⁸ As with character evidence,

evidence as to truthfulness or untruthfulness is offered in the form of reputation or opinion, subject to the military judge allowing cross-examination about specific instances of conduct in order to probe the basis of the witness’s opinion.¹⁹ However, although evidence introduced under M.R.E. 404 is admissible as substantive evidence on the merits, evidence offered under M.R.E. 608 or M.R.E. 609 to impeach a witness is only admissible to determine the credibility of the witness.²⁰

Step Two: What do Outside Acts Say about the Offense?

If opinion or reputation evidence could be described as fairly limited in scope, then M.R.E. 404(b) leans the other way. The whole point is to allow in extrinsic evidence of acts not on the charge sheet, to draw some permissible inference. This is powerful circumstantial proof when properly applied. M.R.E. 404(b) allows either side to present evidence of a “crime, wrong, or other act” when the evidence is offered for a non-character, non-propensity purpose.²¹ But if “non-character” evidence is the subject, then why does this part of the Rule follow right after a longer discussion in the same Rule about character? Because M.R.E. 404 on the whole reflects the idea that the same evidence can sometimes lead down both a character and a non-character path. Understand this distinction, and you are well on your way toward mastery in this area.

Consider this example: an accused is charged with stealing portable gaming devices from two barracks rooms in his hallway and selling them in local pawn shops. There is evidence of an uncharged offense that, six months ago, the accused stole a custom hunting knife from his roommate and pawned it. A direct opinion from the roommate that the accused is a “thief” would be excluded under M.R.E. 404(a)(1)-(2).²² Testimony from the roommate might, however, be admissible under an M.R.E. 404(b) theory that the accused had a “plan” to steal his roommate’s hunting knife and sell it for a profit, and that he had this same plan, to sell stolen items for a profit, when he took the portable gaming devices. The correct focus is on the pertinent purpose, the *plan*; allowing evidence of the prior larceny is just a vehicle to explain

that purpose and is limited accordingly.²³ The conceptual overlap between character and non-character uses may be obvious, but the distinction is crucial under the law and to how the facts may be considered by the factfinder.

Habit evidence under M.R.E. 406²⁴—a close cousin of M.R.E. 404—is another useful tool for distinguishing the permissible uses of character-related evidence. Consider an AWOL (Absent Without Leave) case. Testimony that the accused was “the type of person to go AWOL” would be prohibited by M.R.E. 404.²⁵ Evidence of an uncharged act, that the accused previously went AWOL for three days to see his girlfriend, might be admissible to prove that the accused had the same motive, to see his girlfriend, when he committed the charged AWOL offense. Evidence that the accused always reported for duty at 0800 hours would be habit evidence.²⁶ Character evidence permits “more general character or character traits;”²⁷ M.R.E. 404(b) permits a pertinent purpose, such as motive, when it exists across both an uncharged and charged offense; and habit evidence “requires proof of a very specific, frequently repeated behavioral pattern.”²⁸ Understanding these distinctions should help apply the rules.

Step Three: Introducing Outside Acts

Non-character evidence is full of potential when properly applied. Ask the following five questions in every case, three of which are reflected in the familiar holding of *United States v. Reynolds*,²⁹ and you will be prepared to leverage whatever evidence is available.

Question One: Do I have evidence of an outside act?

Potential evidence under M.R.E. 404(b) may be broader than you think. Although sometimes called “uncharged misconduct,”³⁰ M.R.E. 404(b) allows much more than that. The outside acts do not have to be unlawful or “bad” acts.³¹ They do not even have to be prior acts.³² They do not have to be acts by the accused.³³ And they can be offered by either the prosecution or the defense.³⁴ The non-character purposes are not limited to the examples listed in the Rule itself.³⁵ The outside acts must, however, have some

independent relevance, for a non-character purpose, under M.R.E. 401 and 402.³⁶ And when requested by the accused, the prosecution must provide notice of M.R.E. 404(b) evidence that it intends to use at trial.³⁷

Finally, keep in mind that uncharged acts that are intrinsically connected to the charged offense may be admissible apart from M.R.E. 404(b) as part of the *res gestae*, or evidence that helps place the charged act in context.³⁸ An example might be evidence, as an uncharged act, that the accused took pictures during an alleged assault. Unless there is a specific reason to exclude it, a relevant uncharged act that occurs in the midst of a charged act usually does not fall within the limitations of M.R.E. 404(b).

Question Two: Does the evidence reasonably support a finding by the court members that the person committed the other crimes, wrongs or acts?³⁹

It is up to the military judge to decide whether to admit M.R.E. 404(b) evidence, as a matter of conditional relevance under M.R.E. 104(b).⁴⁰ However, it is *not* the role of the military judge to decide whether the outside acts occurred, but rather simply to decide whether court members could reasonably conclude that the other acts occurred, and that the person in question committed them. As the Supreme Court explained in relation to the analogous federal rules, “[i]n determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.”⁴¹

Question Three: Does the outside evidence make some fact of consequence more or less probable?⁴²

This is often where counsel stumble. Although the CAAF’s admonition against “broad talismanic incantations of words such as intent, plan, or modus operandi”⁴³ might sound overly familiar, the need for this constant reminder has unfortunately

stood the test of time. Each of the permitted uses listed in M.R.E. 404(b), sometimes summarized by the mnemonic “KIPPOMIA,”⁴⁴ are unique words with unique meanings.⁴⁵ Again, this list is not exclusive.⁴⁶ It would take a much longer article to cover all of the significant nuances and distinctions of non-character uses of evidence. But then again, that is your homework. Take the time to think through your case and the possible non-character uses of the evidence at issue. Motions to admit or exclude M.R.E. 404(b) evidence rise or fall on this very point. It always boils down to another mnemonic: CYA, or Can You Articulate?

Question Four: Is this evidence subject to a rule of exclusion or a rule of super-inclusion?

Remember that when outside sexual acts or behavior are at issue, the landscape can change. When acts relate to an alleged victim, for example, M.R.E. 412⁴⁷ may exclude evidence that would otherwise be relevant under M.R.E. 404(b) or related rules. When acts relate to the accused, M.R.E. 413 and 414,⁴⁸ on the other hand, may allow evidence of other sexual offenses or acts of child molestation, even if they would be excluded under M.R.E. 404(b). And even if these acts would also be admissible under M.R.E. 404(b), acts admitted under M.R.E. 413 or 414 may be offered for any purpose, including to show propensity, which goes beyond what M.R.E. 404(b) itself allows.⁴⁹ The point here is that M.R.E. 404(b), like all rules of evidence, cannot be applied in a vacuum.

Question Five: Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice?⁵⁰

Whichever side of the argument you are on, do not assume that evidence will come in just because it is available. All evidence must be legally and logically relevant, and not excluded under M.R.E. 403.⁵¹ The military judge has wide discretion to exclude even relevant evidence if the probative value of the evidence is substantially outweighed by the various concerns listed in M.R.E. 403. The same reminder is due here: Can You Articulate? Arguing evidence in context helps refine the presentation of evidence, and also helps the judge make

well-informed decisions about the use of the evidence. As in most things, preparation and forethought go a long way towards the effective use of character or character-related evidence.

Step Four: What Should You Introduce?

This is where the art of trial practice comes in. Good advocacy means always seeing the big picture. Perhaps you can find a way to introduce character evidence, or a non-character use for evidence, but should you? Will opinion evidence do more harm than good by opening up rebuttal to areas that one side would rather not revisit? Will uncharged acts actually detract from the storyline and confuse the members? Every case is different, and the decision is yours. But when you decide to open the door to character evidence or non-character uses, the proof remains the same: Can You Articulate? When you can, you are well on your way to both telling and showing your side of the case. **TAL**

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- Jonathan Swift, in *A DICTIONARY OF THOUGHTS: BEING A CYCLOPEDIA OF LACONIC QUOTATIONS* 468 (Tryon Edwards, ed., F.B. Dickerson Co. 1908).
- MANUAL FOR COURTS-MARTIAL, UNITED STATES, Mil. R. Evid. 404 (2016) [hereinafter MCM].
- MCM, *supra* note 2, Mil. R. Evid. 404(a)(1).
- Inference* BLACK'S LAW DICTIONARY 700 (5th ed. 1979).
- MCM, *supra* note 2, Mil. R. Evid. 404(a)(2)(A).
- See, e.g.*, United States v. Credit, 8 M.J. 190, 192-93 (C.M.A. 1980) ("As rape is a crime of violence, appellant could defend against it by presenting evidence of his good character for peaceableness.").
- See, e.g.*, United States v. Pearce, 27 M.J. 121 (C.M.A. 1998) (finding an opinion as to honesty relevant to a charge of larceny, but noting that such an opinion cannot be used to impermissibly bolster a witness's character for truthfulness until after that character has been challenged).
- MCM, *supra* note 2, Mil. R. Evid. 404(a)(2)(A).
- See generally id.*
- MCM, *supra* note 2, Mil. R. Evid. 405(a)-(b).
- See* THE 2018 ADVOCACY TRAINER: A MANUAL FOR MILITARY JUSTICE PRACTITIONERS (Peter K. Odom ed., Office of the Judge Advocate General 2018), for good demonstrations and hands-on exercises.

- MCM, *supra* note 2, Mil. R. Evid. 405(c).
- Id.*
- MCM, *supra* note 2, Mil. R. Evid. 405(a). *See also* Michelson v. United States, 335 U.S. 469 (1948); United States v. Pearce, 27 M.J. 121 (C.M.A. 1988); United States v. White, 36 M.J. 306 (C.A.A.F. 1993).
- See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHMARK, 1116 (10 Sept. 2014) [hereinafter MILITARY JUDGE'S BENCHMARK] for a sample instruction.
- MCM, *supra* note 2, Mil. R. Evid. 404(a)(2)(B).
- Id.* Mil. R. Evid. 404(a)(2)(C).
- Id.* Mil. R. Evid. 607, 608, 609.
- Id.* Mil. R. Evid. 608(a)-(b).
- Id.* Mil. R. Evid. 608, 609. *See also* United States v. Robertson, 39 M.J. 211 (C.A.A.F. 1994).
- MCM, *supra* note 2, Mil. R. Evid. 404(b)(1)-(2).
- Keep in mind that the defense normally holds the key to direct character evidence. *See* Michelson, *supra* note 14.
- The military judge will instruct on the specific purpose for which the evidence may be considered. *See* Military Judge's Benchbook, *supra* note 15, at 1102.
- MCM, *supra* note 2, Mil. R. Evid. 406.
- STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 406.02 at 4-176 (7th ed. 2011).
- Id.*
- DAVID A. SCHLUETER ET AL., MILITARY EVIDENTIARY FOUNDATIONS § 6-8 at 260 (4th ed. 2010).
- Id.*
- United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989).
- See, e.g., id.* at 109 (referencing a "substantial survey of the cases and statutes dealing with uncharged misconduct.").
- See, e.g.*, United States v. Molinaro, 11 F.3d 853, 863 (9th Cir. 1993) ("Prior acts need not be unlawful to be admissible... [t]he critical requirement is that the evidence be offered for a purpose other than to prove the defendant's propensity to engage in the conduct charged.").
- See* United States v. Young, 55 M.J. 193, 196 (C.A.A.F. 2001) (discussing the widely-accepted view in both military and federal practice that uncharged acts may occur before, during, or after the charged offense).
- The Rule refers to crimes, wrongs, or other acts in relation to a "person," not the accused specifically. *See* MCM, *supra* note 2, Mil. R. Evid. 404(b)(1).
- See, e.g.*, United States v. Benson, 48 M.J. 734 (A.F. Ct. Crim. App. 1998) (in court-martial for assault with a loaded firearm against a civilian, the military judge erred when he disallowed the defense from presenting evidence about prior threats with a gun made by the civilian, after the civilian testified that he wasn't the kind of person who would try to take someone's life).
- See* MCM, *supra* note 2, Mil. R. Evid. 404(b)(2).
- See* United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989) (*citing* United States v. Ferguson, 28 M.J. 104, 109 (C.M.A. 1989)); *see also* discussion of "Question Three," *infra*. Practical application of M.R.E. 404(b) almost always contemplates the use of uncharged acts. *But see* United States v. Guardado, 75 M.J.

- (Army Ct. Crim. App. 2016), *rev'd in part*, 77 M.J. 90 (C.A.A.F. 2017) (distinguishing M.R.E. 404(b) uses of charged offenses from the C.A.A.F.'s prohibition, in United States v. Hills, 75 M.J. 350 (C.A.A.F. 2016), against using unproven, charged acts to argue propensity for those same charged acts). Given that M.R.E. 404(b) is the subject of "much litigation," *Reynolds*, 29 M.J. at 108, counsel for both sides must always be prepared to articulate intended M.R.E. 404(b) uses.
- MCM, *supra* note 2, Mil. R. Evid. 404(b)(2)(A)-(B).
- See, e.g.*, United States v. Metz, 34 M.J. 349, 351 (C.A.A.F. 1992) (in addition to being admissible under M.R.E. 404(b), evidence, in a murder trial, that the accused had lifted up his wife by the nose and "roughed her up" were part of the *res gestae* of the murder, to help place identity and intent evidence against the accused in context); United States v. Tobin, 38 C.M.R. 423 (C.M.A. 1968) (uncharged misconduct evidence that was "part and parcel" of the charged offenses did not require a limiting instruction).
- See Reynolds*, 29 M.J. at 109.
- MCM, *supra* note 2, Mil. R. Evid. 104(b).
- United States v. Mirandes-Gonzalez, 26 M.J. 411, 413-14 (C.M.A. 1988) (*quoting* Huddleston v. United States, 485 U.S. 681, 690 (1988)).
- See Reynolds*, 29 M.J. at 109.
- United States v. Brannan, 18 M.J. 181, 185 (C.M.A. 1984).
- Knowledge, Intent, Plan, Preparation, Opportunity, Motive, Identity, Absence of Mistake. *See* M.R.E. 404(b)(2). The mnemonic "KIPPOMIA" is sometimes taught to counsel as a practical memory aid. *See, e.g.*, CRIM. LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, CRIMINAL LAW DESKBOOK (July 2018).
- See, e.g.*, United States v. Jenkins, 48 M.J. 594 (A. Ct. Crim. App. 1998) (distinguishing, in an M.R.E. 404(b) analysis, the terms "motive," "intent," and "plan.").
- See* United States v. Castillo, 29 M.J. 145, 150 (C.M.A. 1989) ("[T]he sole test under Mil.R.Evid. 404(b) is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime.").
- MCM, *supra* note 2, Mil. R. Evid. 412.
- MCM, *supra* note 2, Mil. R. Evid. 413, 414.
- See* the C.A.A.F.'s discussion of M.R.E. 413 in United States v. Wright, 53 M.J. 476, 480 (C.A.A.F. 2000) ("Contrasted to Rule 404(b)'s 'general prohibition' against propensity evidence, 'the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing on any matter to which it is relevant.'" (quoting discussion by Congresswoman Susan Molinari).
- See* United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989).
- MCM, *supra* note 2, Mil. R. Evid. 403.