**Impeachment and Character Evidence Exercise:**

Each student will practice impeaching a witness with a prior inconsistent statement. Assume that Amn Vidal Hill has just finished testifying for the defense in *Cohran.* He testified that Cohran was with him at a party on the date of the alleged incident and that they left the party sometime after 0200 hours. Amn Hill then drove Tony and Red home.

Each student will be asked to lay a foundation for character evidence. Assume that during cross-examination of Amn Sills, the defense counsel implied that Amn Sills is lying. Her character for truthfulness is now an issue. Each student will call Amn Rachel Hayes and lay a foundation for

Amn Hayes’ opinion that Amn Sills is a truthful person. Each student will then conduct a cross-examination of Amn Hayes and attempt to undermine that opinion.

INCONSISTENT STATEMENTS

1. General Principles.

A witness may be impeached through several different techniques: bias (Mil. R. Evid. 608(c)), prior conviction (Mil. R. Evid. 609), prior bad acts, prior inconsistent statements (Mil. R. Evid. 613), etc. This section will focus on impeaching a witness through prior inconsistent statements. To impeach a witness with a prior inconsistent statement, there must be a *real* inconsistency between the in-court testimony and the out-of-court statement of the witness.

The prior statement may be written or oral.

1. The main purpose of impeaching with a prior inconsistent statement is to discredit (attack the credibility of) an opposing witness or the testimony given by confronting the witness with a prior statement that is inconsistent with the in-court statement. In certain circumstances, the prior inconsistent statement can be used as substantive evidence.
2. The impeaching attorney does not have to show the prior inconsistent statement (if written) to the witness during examination, but the statement must be disclosed to opposing counsel upon request.
3. Mil. R. Evid. 613 states that “[e]xtrinsic evidence of a prior inconsistent statement…is not admissible unless the witness is afforded an opportunity to explain or deny…” the statement.

1. If you are impeaching a witness (whether the accused or not) with a prior inconsistent written statement, and the witness denies making the statement or can’t remember (equivocates), you should read the appropriate part to the witness and then ask him to admit having made it. Do not give the statement to the witness to read. Imwinkelried suggests refreshing the recollection of the witness; however, it is difficult to effectively do unless you are experienced. It is better to read the statement yourself or introduce extrinsic evidence.
2. If a portion of a prior inconsistent statement is read, the opponent may request to have the entire statement read. Mil. R. Evid. 106.

1. Impeaching Technique. The “Three C’s” Method.
   1. COMMIT the witness to his in-court testimony. Restate the fact asserted in the witness’ own words. If you only paraphrase his in-court testimony, he may not admit to saying it, or you give him a chance to explain what he said. The following question is an example of committing the witness to his in-court testimony:

Q: Airman Johnson, you testified on direct that, “I saw Airman Blue start the fight,” right?

* 1. CREDIT the impeaching statement as the more correct one because it was given closer to the event. You do this by focusing on the time, date, and place of the prior statement. For example, if only an oral statement was made, use the following: (If a written statement was made, you may want to ask the witness about taking an oath to tell the truth, his signature on the form, etc)

Q: Airman Johnson, you talked to the Special Agent Pool right after the fight, didn’t you?

A: Yes.

Q: Your interview was only about an hour after the fight?

A: Yes.

Q: It was very fresh on your mind, wasn’t it?

A: Yes.

Q: You knew why Special Agent Pool, was interviewing you, didn’t you?

A: Yes.

Q: You knew the importance of telling the truth?

A: Yes.

* 1. CONFRONT the witness with the prior inconsistent statement. Read the inconsistent fact to the witness and have him admit the inconsistency.

a. If the witness admits saying the prior inconsistent statement, you stop.

Q: On the 17th of June, only an hour after the fight, you spoke with Special Agent Pool and said that you didn’t see who started the fight, correct?

A: Yes.

b. If the witness says he can’t remember or denies saying the prior inconsistent

statement, you should do the following:

(1) When the statement was orally made:

Q: On the 17th of June, only an hour after the fight, you spoke with Special Agent Pool and said that you didn’t see who started the fight, correct?

A: No (or I don’t remember).

Q: So you never said to Special Agent Pool that you didn’t see who started the fight?

A: That’s correct.

On rebuttal, you should call Special Agent Pool to prove-up the prior inconsistent statement for purposes of impeachment only. If the witness is a party-opponent then it can be used for impeachment and as substantive evidence.

(2) When the statement was written:

Q: On the 17th of June, only an hour after the fight, you spoke with Special Agent Pool and said that you didn’t see who started the fight, correct?

A: No (or I don’t remember).

Q: I will read directly from your written statement that you gave on the night of the fight and gave an oath to tell the truth, quote, “I arrived shortly after the fight began. I didn’t see who started the fight.” You said this didn’t you?

A: Yes.

If the answer is “No (or I don’t remember)” you may want to re-credit the prior inconsistent statement and offer it into evidence. If the witness is a party- opponent, you should have already offered it into evidence. If the witness is not a party-opponent and will not agree to even making the statement, call Special Agent Pool to testify on rebuttal about the prior inconsistent statement and to lay the foundation for the written statement. Then offer it into evidence.

1. Evidentiary Value.
   1. A prior inconsistent statement may always be used for the limited purpose of impeaching a witness. Your opponent may object to a prior unsworn inconsistent statement by stating that it is hearsay. Your response should be that you are not admitting it for the truth of the matter asserted; it is for the purpose of impeaching the witness. A limiting instruction on this issue should be given to the members.
   2. If a party-opponent made the prior inconsistent statement, it will qualify as an admission under Mil. R. Evid. 801(d)(2) and can be used to impeach and as substantive evidence.
   3. If a non-party made the prior inconsistent statement, it may be used as substantive evidence *only if* the prior statement was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or a deposition. Mil. R. Evid. 801(d)(1)(A).

RECOLLECTION

1. Foundation for Refreshing Recollection of a Witness. Mil. R. Evid. 612.

1. Elements.

a. Witness states that he cannot recall a fact or event on the stand.

b. Witness states that a certain writing/object could help refresh his or her memory.

c. Attorney gives the witness the writing/object.

d. Attorney asks witness to silently read the writing or study the object.

e. [Attorney retrieves the writing or object before continuing with the examination.]

f. Witness states his memory has now been refreshed.

g. Witness testifies from revived memory.

2. For an example, *see* Imwinkelried, *et al*, Military Evidentiary Foundations, 2d ed., § 11-5[2], pg 493-95.

3. Practice Tips.

a. Touch base with your witness immediately prior to trial to ensure his testimony will be what you expect. This will also serve to assess his recollection of events.

b. If he is having difficulty remembering details, review prior statements with him. Make sure the witness understands he cannot testify from his notes. Explain the procedures you will use if you need to refresh his memory.

c. Remember to provide opposing counsel a copy of any document/item reviewed by the witness in anticipation of trial IAW Mil. R. Evid. 612. This will include your own notes (!!) if you allow the witness to review them in preparation for trial. (Bad idea.)

d. Anything can be used to refresh recollection. The writing/object does not have to be admissible into evidence.

e. Witness statements are most commonly used to refresh recollection. Always have a clean copy of each witness statement available and ready to be marked, should the need arise.

f. Mark the writing/object as an Appellate Exhibit because it will not be offered or admitted into evidence. NOTE: This differs from Imwinkelried’s guidance to mark it as a prosecution exhibit. Remember the military judge controls Appellate Exhibits, so ask him for permission to number the document, e.g., “with your permission, I will mark Mrs. Vanes’ handwritten note as Appellate Exhibit IV…it is a one-page document.” (You, of course, know the next appellate exhibit number in line because you have been tracking exhibits on your “Exhibit Worksheet.”)

B. Foundation for Admitting a Witness’ Past Recollection Recorded. Mil. R. Evid. 803(5).

1. Elements.

a. Witness formerly had personal knowledge of the fact or event recorded.

b. Witness subsequently prepared a record of the facts.

c. Witness prepared the record while the events were still fresh in witness’ memory.

d. Witness can vouch that when the record was prepared, the record was accurate.

e. At trial, the witness cannot completely and accurately recall the facts even after reviewing the document.

2. For an example, *see* Imwinkelried, *et al*, Military Evidentiary Foundations, 3d ed., § 11-5[1], pg 490-93. *See also* Mauet, Trial Techniques, 7th ed., Chapter VI, § 6.3, para. 15, pg 212-14 (disregard steps 6-8; in military practice; generally we do not offer the exhibit into evidence. To identify the document or thing for the record of trial, we usually mark the exhibit as an appellate exhibit).

3. Practice Tips.

a. Remember: This is a substitute for witness testimony. As such, the document is not offered or admitted into evidence, nor does it go with the members into deliberations. The contents of the document are simply read to the members.

b. Mark the document as an Appellate Exhibit. NOTE: This differs from Imwinkelried’s guidance to mark it as a prosecution exhibit.

c. To improve the flow of your examination, combine the elements of refreshing recollection and past recollection recorded. That way if the witness’ memory is not refreshed, you can move directly to reading the information into the record.

CHARACTER EVIDENCE

A. Military Rule of Evidence (MRE) 404(a)(1) allows an accused to introduce a “pertinent” character trait as circumstantial evidence that the accused is not the kind of person who would commit the charged offense. Rule 404(a)(2) permits an accused to introduce pertinent character traits of the alleged victim. Once the accused opens these doors, however, the prosecution may offer character evidence of the accused or alleged victim in rebuttal. *See* MRE 404(a). Rule 608(a) allows either party to present evidence concerning a witness’ character for truthfulness or untruthfulness.

B. What are “pertinent” character traits under MRE 404(a)(1)? Although for purposes of this exercise you are limited to character for truthfulness (always relevant when a witness testifies), pertinent character traits relevant to this scenario may also include:

1. Character for temperance; and

2. Good military character or the “good soldier defense.”

C. Methods of Proving Character. Mil. R. Evid. 405 and 608.

On direct examination, counsel elicits character evidence by way of opinion and/or reputation evidence.

**Foundational Requirements:**

Relevant character trait.

Qualified witness. The witness must *know* about the accused’s character trait, either personally or by reputation.

* 1. To establish personal knowledge, the witness must be able to testify that he has had sufficient periodic contacts with the accused. Ask the witness WHO the accused is, WHAT contact the witness has had with the accused, WHEN does the witness have contact with the accused, and HOW long that contact has lasted. Knowledge of the accused must be based on a relevant time period. For example, if the witness had knowledge of the accused five years ago, but hasn’t spoken to the accused since then, the witness’ opinion testimony as to the accused’s truthfulness is likely irrelevant.
  2. When reputation evidence is used, the witness must testify that he has heard of the accused’s reputation in the community. Such evidence must be based on a relevant community (i.e., duty section, squadron; *See* MRE 405(d)). Ask the witness WHAT community, and WHEN/HOW he learned of the accused’s reputation. A witness does not have to know the accused personally to offer reputation evidence.

Witness offers opinion or reputation evidence.

For examples, *see* Imwinkelried, *et al*, Military Evidentiary Foundations, 2d ed., § 5-8[2]-[3], pg 231-34, § 5-15[3], pg 256-66, and § 6-4[2], pg 273-74. *See also* Mauet, Trial Techniques, 7th ed., Chapter V, § 5.9, para. 3, pg 156-160.

2. On cross-examination, counsel can use specific instances of conduct to impeach the witness’ opinion or reputation evidence. Mil.R.Evid. 405(a).

* 1. The cross‑examiner is stuck with the witness’ answer. Extrinsic evidence is not permitted to prove up the specific instance of conduct in question.
  2. The charged offense does not count as a “specific instance of conduct” to test the witness’ opinion.
  3. Counsel must have a good-faith basis for asking about the specific instance of conduct.
  4. The specific instance of conduct must be relevant to the character witness’ testimony, i.e., relates to the character trait of untruthfulness.
  5. For a discussion on impeachment of a character witness, *see* Imwinkelried, *et al*, Military Evidentiary Foundations, 3d ed., § 5-8[4], pg 234-5. *See also* Mauet, Trial Techniques, 7th ed., Chapter VII, § 7.9, para. 2, pg 308-10.

3. As an alternative to live witnesses, in order to accommodate the “world wide disposition of the armed forces,” affidavits attesting to reputation or opinion are permissible in military courts-martial. Manual for Courts-Martial, Analysis of the Mil. R. Evid., A22-35; M.R.E. 405(c).