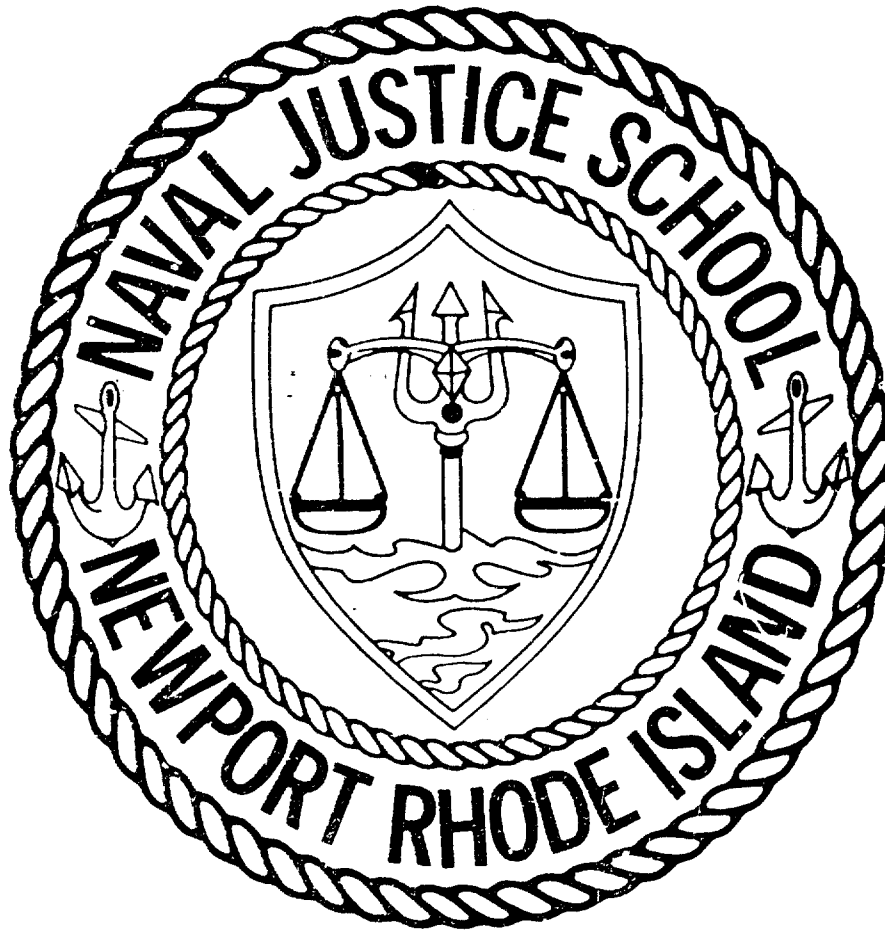


4

AD-A210 405

# EVIDENTIARY



# FOUNDATIONS

**SDTICD**  
 ELECTED  
 JUL 12 1989

*Ch* **H**



**DISTRIBUTION STATEMENT A**  
 Approved for public release;  
 Distribution Unlimited

JANUARY 1989

000 BY 77 064

NAVAL JUSTICE SCHOOL

NEWPORT, RHODE ISLAND 02841-5030

Naval Justice School publications are updated periodically to incorporate recent changes in the law. Each edition contains the date of the new edition (month and year). As new editions containing major substantive changes are printed for distribution to students, copies are furnished to the Defense Documentation Center (DDC) and the National Technical Information Service (NTIS) for republication and sale. The availability of texts through these agencies lags approximately six months behind the date of the printing at the Naval Justice School. If updated or additional copies of publications are desired, the DDC or the NTIS should be contacted directly to obtain the date of the edition available and ordering information. Copies are not available from the Naval Justice School.

Commands not already registered with the DDC may obtain registration forms and information on ordering publications by writing to:

Defense Documentation Center  
Cameron Station  
Attention: Code DDR-2  
Alexandria, Virginia 22314

Individual purchasers may obtain information on ordering publications by writing to:

National Technical Information Service  
5285 Port Royal Road  
Springfield, Virginia 22151

EVIDENTIARY FOUNDATIONS

Evidentiary Foundations Under the Military Rules of Evidence:

Predicate Questions

INTRODUCTION

Presenting or opposing evidence is at the heart of all trial work. While there can be no substitute for an attorney's familiarity with the Military Rules of Evidence, a compilation of sample foundational questions can aid the new trial lawyer in the presentation of his or her case. To that end, this publication has been prepared. It is hoped that it will simplify the task of the new Navy-Marine Corps trial attorney by giving concrete examples of predicate questions and other trial evolutions which may be adapted for use in typical court-martial cases. → to p-11

Not every rule has been covered. Those situations which are commonly encountered in the field or fleet have been made the subject of an example. Should you feel that particular examples are inadequate or that additional areas should be covered, please write the Evidence Division, Naval Justice School, Newport, RI 02841-5030. Your suggestions are always welcome.

Preparation is the key to successful trial work. Do not assume that you can substitute the samples in this text for plain hard work. Rather, you should use this aid to practice as a means of making your preparation a little easier.



<b>Accession For</b>	
NTIS GRA&I	<input checked="" type="checkbox"/>
DTIC TAB	<input type="checkbox"/>
Unannounced	<input type="checkbox"/>
Justification	
By _____	
Distribution/	
<b>Availability Codes</b>	
Dist	Avail and/or Special
A-1	

TABLE OF CONTENTS

*f.p.i.*

Introduction	i
Table of contents:	ii
<b>Section I (General Provisions)</b>	
Common Trial Objections	I-1
Offer of Proof	I-13
Handling Exhibits--Generally	I-15
<b>Section II (Judicial Notice)</b>	
Judicial Notice of Adjudicative Facts	II-1
Judicial Notice of Domestic Law	II-2
<b>Section III (Exclusionary Rule and Related Matters)</b>	
Accused's Confession	III-1
Line Up Identification of the Accused	III-5
Photographic Identification of Accused	III-7
<b>Section IV (Privileges)</b>	
Spousal Incapacity	IV-1
Confidential Communication Made During Marriage	IV-3
Protecting the Identity of an Informant	IV-5
<b>Section V (Witnesses)</b>	
Child Witness	V-1
Impeachment by Proof that the Witness Lacks Specific Competency	V-3
Qualifying an Interpreter	V-5
Reputation for Truthfulness or Untruthfulness	V-7
Character for Truthfulness or Untruthfulness	V-9
Impeachment through Evidence of Bias	V-11

fr p. 11

Section V (continued)

Impeachment by Prior Conviction	V-13
Refreshing Recollection	V-14
Impeachment with Prior Inconsistent Sworn Statement	V-15
Impeachment with Prior Inconsistent Unsworn Statement	V-17

Section VI (Opinion and Expert Testimony)

Opinion of Military Character	VI-1
Opinion of Relevant Character Trait	VI-3
Lay Witness' Opinion of Speed	VI-5
Lay Witness' Opinion of Intoxication	VI-7
Qualifying an Expert - Generally	VI-9
Expert in Body Fluids	VI-12
Opinion of Forensic Chemist	VI-14
Qualifying a Narcotics Paraphernalia Expert	VI-16
Fingerprint Expert	VI-18
Expert as to Value	VI-20

Section VII (Hearsay)

Accused's Confession	VII-1
Present Sense Impressions	VII-2
Statements for Purposes of Medical Diagnosis or Treatment	VII-3
Past Recollection Recorded	VII-5
Records of Regularly Conducted Activity	VII-7
Absence of Entry in Records of Regularly Conducted Activity	VII-9
Public Records and Reports	VII-11
Absence of Public Record or Entry	VII-13

to p. 14

Section VII (continued)

Price Lists (Computer Record Sample) VII-14

Reputation as to Character VII-16

Former Testimony VII-17

*fr. p. III*  
Section VIII (Authentication and Identification); *and*

Identification of Uniquely Identifiable Items VIII-1

Identification of Fungible Items VIII-3

Authentication of Private Documents by a Witness who Observed Document's Execution VIII-7

Authentication of Private Documents by a Witness Familiar with the Author's Handwriting Style VIII-9

Verification of a Chart or Diagram VIII-11

Authentication of X-Rays VIII-12

Self-Authentication of Documents of the United States Accompanied by an Attesting Certificate VIII-14

Section IX (Contents of Writings, Recordings, and Photographs)

Verification of Photographs IX-1

→ Keywords: Military law, Naval personnel, Marine Corps personnel, law enforcement, (SDIO)

**SECTION I**  
**GENERAL PROVISIONS**

## COMMON TRIAL OBJECTIONS

Mil. R. Evid. 103

Procedure:

1. State "Objection!"
2. State specific ground or grounds for objection.
  - Example: "Objection, Your Honor. The question is irrelevant."
3. Argue after permission from military judge obtained.
  - The objections listed below merely illustrate some of the common objections made in court. They are by no means exhaustive of the vast number of objections one might make or encounter.

## I. Witnesses

## A. Competency (Mil. R. Evid. 601)

- I object to this witness' testimony on the ground that (he) (she) is an incompetent witness.
- (He) (she) (does) (did) not have sufficient mental capacity to (observe) (recollect) (relate) the events in question.

## B. Types of witnesses

## 1. Experts (Mil. R. Evid. 702, 703)

- a. Opposing counsel is asking the witness to state an expert opinion, but counsel has not shown that the witness qualifies as an expert.
- b. Although the witness is an expert in the field of \_\_\_\_\_, the question's subject-matter related to another area of expertise, namely, the field of \_\_\_\_\_.

## 2. Laymen

- a. There has been no showing that the witness' testimony is rationally based and helpful to understanding the testimony (Mil. R. Evid 701).
- b. The question asks the witness to state (his) (her) mere opinion rather than facts.



C. Examination of witnesses (Mil.R.Evid. 611)

1. Scope of examination

-- The question exceeds the proper scope of (cross)(redirect) (recross) examination. The question relates to a matter which was not covered on (direct) (cross) (redirect) examination.

2. Improper questions or answers

- a. The question is leading. Opposing counsel is unfairly attempting to suggest an answer to the witness.
- b. The question assumes facts which are not in evidence.
- c. The question is ambiguous and confusing to the witness. I would request that opposing counsel clarify the question for the witness' sake.
- d. Opposing counsel is asking a compound question; he has really asked (two) (three) questions, namely, \_\_\_\_\_ and \_\_\_\_\_ (and \_\_\_\_\_). I request that counsel separate the question into parts and ask the questions one at a time.
- e. I object to the answer on the ground that it is non-responsive to my question. I further request that you instruct the court members to disregard the answer.
- f. The question is repetitive; it has already been asked and answered.

D. Credibility (See Mil.R.Evid. 607-609)

1. Bolstering

-- Opposing counsel is attempting to bolster his witness' credibility before the credibility has been attacked.

2. Impeachment

- a. Opposing counsel is using an improper method of impeachment:
  - Although the witness is a drug addict, the opposing counsel has not shown that the addiction affected the witness' veracity.
- b. The opposing counsel is using extrinsic evidence to contradict the witness on a collateral matter.

- c. The opposing counsel did not lay a proper foundation for the (reputation) (opinion) evidence of the witness' untruthfulness.
- d. The act of misconduct opposing counsel is attempting to prove does not affect the witness' credibility.
- e. The type of conviction opposing counsel is attempting to prove is not for a type of offense which affects the witness' credibility.

### 3. Rehabilitation

- Opposing counsel is improperly attempting to rehabilitate (his) (her) witness' credibility:
  - (1) By specific acts of good conduct.
  - (2) Since the opinion rendered as to peacefulness does not rehabilitate a witness where credibility is attacked.

## II. The content of witnesses' testimony

### A. Relevance (See Mil.R.Evid. 401)

#### 1. General concepts

- a. The evidence opposing counsel is offering is irrelevant; (he) (she) is offering it to prove a proposition which is not in issue in this case.
- b. The evidence opposing counsel is offering is irrelevant; it does not have any tendency to prove or disprove an issue in this case.
- c. The probative value of the evidence is substantially outweighed by its prejudicial effect (Mil.R.Evid. 403).
- d. The evidence will unduly arouse the court member's emotions.
- e. The evidence will create a collateral issue which will distract the court members' attention from the main issues.
- f. The consideration of this evidence will be very time-consuming.
- g. The evidence is cumulative and a waste of the court's time.

2. Authentication (Mil.R.Evid. 901, 902)

a. Writings

- (1) The opposing counsel has not shown that the witness is sufficiently familiar with the accused's handwriting to identify his signature.
- (2) The opposing counsel has not shown that the writing qualifies as an ancient document; (he) (she) has not shown that:
  - (a) The document is 20 years old.
  - (b) The document was obtained from a place of custody natural for such documents.
  - (c) The document's appearance is not suspicious [Mil.R.Evid. 901(b)(8)].
- (3) The official record's attesting certificate is insufficient (Mil.R.Evid. 902):
  - (a) The certificate does not state that the attached document is a true copy of the original, official record.
  - (b) The certificate does not state that the signatory signed in (his) (her) official capacity.
  - (c) The signatory was not the record's custodian or the custodian's deputy or assistant.

b. Photographs and diagrams (Mil.R.Evid. 901)

- Opposing counsel has not verified the (photograph) (diagram):
- (a) There is no evidence that the (photograph) (diagram) is a faithful representation of the (scene) (object) depicted.
  - (b) There is no evidence that the conditions shown in the (photograph) (diagram) are substantially similar to the conditions existing at the time of the event in question.

c. Real evidence

- (1) The item of evidence does not have a readily identifiable characteristic, and the opposing counsel has not established a complete chain of custody.
- (2) The missing link in the chain is \_\_\_\_\_.

d. Speaker

- The opposing counsel has not shown that the witness was sufficiently familiar with \_\_\_\_\_'s voice to identify (his) (her) voice.

e. Tests and experiments

- The opposing counsel has not shown that:
- (a) The conditions prevailing at the time of the test were substantially similar to those prevailing at the time of the event in question.
  - (b) The underlying scientific principle is valid.
  - (c) The instrument successfully embodies the scientific principle.
  - (d) At the time of the test, the instrument was in good working order.
  - (e) The person conducting the test possessed the necessary qualifications to operate the instrument.
  - (f) On the occasion in question, the person operated the instrument properly.
  - (g) The witness has the necessary qualifications to interpret the test's results.

3. Character evidence and uncharged misconduct

a. Trial counsel

- I object to this testimony on the ground that:
- (a) The specific character trait mentioned by the witness is not relevant to the charged offense.
  - (b) An inadequate foundation had been laid for the opinion or reputation evidence offered.

b. Defense counsel

(1) Character evidence (Mil.R.Evid. 404, 608)

-- I object to this testimony on the ground that:

- 1- The accused has not placed (his) (her) character in issue.
- 2- Although the general character of the accused has been placed in issue, the prosecution may not introduce evidence of a specific character trait which is not relevant to the charged offense(s).
- 3- Although the accused's character as to a specific trait has been placed in issue, the prosecution cannot introduce evidence of the accused's general character.
- 4- The prior conviction was not properly authenticated.

(2) Uncharged misconduct (Mil.R.Evid. 404)

-- I object to this testimony on the ground that:

- 1- The act of misconduct is not relevant.
- 2- The act of misconduct does not have substantial value in providing any fact in issue.
- 3- The danger of unfair prejudice resulting from proof of the act far outweighs the act's slight probative value (Mil.R.Evid. 403).

B. Competence

1. Best evidence (Mil.R.Evid. 1001-1004)

a. The evidence opposing counsel is offering violates the best evidence rule (or original document rule).

(1) The best evidence rule applies here because (the opposing counsel is attempting to prove a fact which is part of an essentially written transaction) (the proponent is attempting to use a document to prove that the fact occurred),

AND

(2) The duplicate submitted is not legible.

b. The evidence opposing counsel is offering is neither the original document nor a duplicate.

2. Hearsay (Mil.R.Evid. 801-806)

The evidence is hearsay. The evidence consists of an assertive, extrajudicial (statement) (writing) (act), and counsel is offering the evidence to prove the truth of the assertion. The evidence does not fall within any of the recognized exceptions to the hearsay rule.

(If opposing counsel argues that the evidence falls within an exception, specify the element of the foundation which you believe is lacking.)

a. Accomplice exemption [Mil.R.Evid. 801(d)]:

- Statement by a co-conspirator
- in furtherance of
- an independently proved conspiracy
- then in progress
- which the accused was once a member of

b. Admission by silence exemption [Mil.R.Evid. 801(a)]:

- An incriminating or accusatory statement
- made in the accused's presence
- which the accused heard and understood
- the accused said nothing or made an evasive reply
- under the same circumstances, a reasonable, innocent man would have denied or objected to the statement

c. Regularly conducted activity records exemption (Mil.R.Evid. 803)

- Routine entry
- made in the regular course of the activity (business)

- at or near the time of the transaction
- not prepared principally for purposes of prosecution
- d. Dying declarations exemption (Mil.R.Evid. 804)
  - Decedent
    - complete declaration
    - concerning the event inducing the dying condition
    - a prosecution for homicide or an offense resulting in death
    - at the time, the declarant had an expectation of imminent death
- e. Excited utterance exemption (Mil.R.Evid. 803)
  - Statement by a participant or observer
    - concerning the circumstances of a
      - startling,
      - independently proved event
    - made while the declarant was still under the event's influence
- f. Public record exemption (Mil.R.Evid. 803)
  - A written record
    - properly prepared
    - by an official
    - with a duty to record the fact or event
    - and a duty to know or ascertain the truth of the matter
    - not prepared principally for purposes of prosecution
- g. Past recollection recorded exemption (Mil.R.Evid. 803)
  - A writing
    - prepared by

- the witness
- or by a third party but verified by the witness
- while the event was still fresh in the witness' mind
- at the time prepared, the witness knew the record was correct
- now, even after reading the document, the witness cannot fully recollect the facts recorded

3. Privileges (Mil.R.Evid. 501-504)

- The question relates to a confidential communication in the course of a privileged relationship between (attorney and client) (penitent and clergyman) (husband and wife), and the privilege's holder, \_\_\_\_\_, invokes the privilege.

4. Fourth amendment (Mil.R.Evid. 311). The property offered by the trial counsel should be suppressed because:

a. Search improperly authorized by commander

- Probable cause for the search was lacking.
- The property seized was not specifically described in the order authorizing the search.
- The place to be searched was not specifically described in the order authorizing the search.
- The information provided is insufficient to have established probable cause.
- The information presented to the commander contains false statements which the affiant knew to be false.
- The commander authorizing the search was not neutral and detached.

b. Immediate action unnecessary (Mil.R.Evid. 316)

- There was no need for immediate action to prevent the (removal) (disposal) of an item subject to seizure.



c. Consent lacking (Mil.R.Evid. 314)

- The Government has not shown by clear and convincing evidence that the accused freely consented to the search.
- The accused did not consent, he (she) only acquiesced to authority.

d. Search not incident to proper apprehension (Mil.R.Evid. 314)

- There was no probable cause for the apprehension.
- The search preceded the apprehension.
- The search's scope exceeded the area within the apprehendee's immediate control.
- The search of the premises exceeded the area within the apprehendee's immediate control.
- There were no exigent circumstances justifying a warrantless search of the automobile (Mil.R.Evid. 315).
- The (inspection) (inventory) of the accused's (personal belongings) (car) (locker) was a subterfuge for a search (Mil.R.Evid. 313).
- The search was not incidental to the apprehension since it was remote in (time) (and) (place).

e. Miscellaneous

- There was no justification for requesting the accused to report to the military police station to give (fingerprints) (handwriting exemplars) (voice exemplars).

f. Fruit of the poisonous tree (Mil.R.Evid. 311)

- \_\_\_\_\_ is the product or fruit of a prior, illegal search; the police obtained \_\_\_\_\_ by exploiting the illegal search.
- The accused does not have standing to object because:
  - (He) (she) was not legitimately on the premises at the time of the search.
  - (He) (she) has no interest in the place searched or properly seized.

-- (He) (she) did not have a justifiable expectation of privacy against governmental intrusion.

5. Fifth amendment and article 31 (Mil.R.Evid. 304-306)

-- The accused's statement should be suppressed because the statement was involuntary in the pre-Miranda sense; it was obtained as the result of (physical abuse) (threats) (prolonged interrogation) (denial of necessities) (improper inducement).

-- The accused's statement should be suppressed because the accused was not properly warned of his (article 31) (Miranda) rights; although (he) (she) was acting in an official capacity, and/or was in a position of authority the questioner failed to advise the accused of:

-- The nature of the offense;

-- (his) (her) right to remain silent;

-- the consequences of foregoing (his) (her) right to remain silent;

-- (his) (her) right to consult and have counsel present during the interrogation;

-- (his) (her) right to military counsel free of charge;

-- (his) (her) right to retain civilian counsel; or

-- (his) (her) right to both military and civilian counsel.

-- The accused's statement should be suppressed because the prosecution has not shown a knowing, intelligent, and voluntary waiver of the accused's rights to remain silent and counsel.

-- The accused's statement should be suppressed because the questioner failed to stop the interrogation when the accused indicated that (he) (she) wished to invoke his rights.

-- The accused's statement should be suppressed because it was the product of (an illegal search) (a prior involuntary or unwarned statement).

6. Sixth amendment (Mil.R.Evid. 321)

-- Testimony concerning the witness' pretrial identification of the accused should be suppressed because (the identification procedure was unnecessarily suggestive) (the accused was entitled to counsel at the identification but counsel was absent and there was no waiver of the right to counsel).

- The witness should not be permitted to make an in-court identification because (he) (she) previously identified the accused at a pretrial confrontation that was unnecessarily suggestive and the prosecution has failed to show by clear and convincing evidence that there is an independent basis for the in-court identification.
- The witness should be permitted to make an in-court identification of the accused because (he) (she) previously identified the accused at a pretrial identification at which the accused was denied counsel and the prosecution has failed to show by clear and convincing evidence that there is an independent basis for the in-court identification.

### III. Substitutes for witnesses' testimony

#### A. Depositions (Mil.R.Evid. 804)

- The deposition hearing was not conducted properly (specify the procedural defect).
- The opposing counsel has not shown that the deponent is unavailable to appear and testify personally.

#### B. Judicial notice (Mil.R.Evid. 201, 201A)

- The fact, \_\_\_\_\_, is not a proper subject for judicial notice. The fact is neither a matter of common knowledge nor a matter capable of ready and indisputable verification.

#### C. Stipulations

- The (trial counsel) (defense counsel) (accused) has not consented to this stipulation.

(If you have any independent evidentiary objections to the contents of a stipulation of expected testimony or a document's contents, you should specify that objection.)

## OFFER OF PROOF

Mil. R. Evid. 103

Procedure: In order to preserve for appeal a ruling by the military judge which excludes evidence, the proponent should:

1. Ask for an article 39a session;
2. state that you intend to make an offer of proof;
3. state what the witness would have testified to if you had been permitted to pursue the line of inquiry; and
4. state the purpose for which you offered the evidence.

Predicate questions: Sample

1. What is your name?
2. State your rank, armed force, and unit?
3. What billet do you occupy in that unit?
4. How long have you acted as company clerk?
5. Do you know an individual by the name of PFC Bad Apple?
6. If you see that individual in the courtroom, would you please point to him?  

--- Let the record reflect that the witness has identified the accused.
7. How do you know PFC Bad Apple?
8. How long have you known him?
9. What is the extent of your contact with him?
10. How well do you know the accused?
11. What other contacts, if any, have you had with the accused?
12. During the time that you have known him, what were the accused's duty assignments?
13. To what extent, if any, did you observe the performance of the accused's military duties?

Objection: Irrelevant.

Sustained.

14. Your Honor, I request an article 39(a) session.

MJ: Granted.

MJ: This article 39(a) session is called to order.

TC: Let the record reflect that this article 39(a) session was called to order at 0930, that the trial counsel, defense counsel, accused, reporter, and military judge are in attendance and that it is being conducted out of the hearing of the members. Trial counsel, you may proceed.

15. Your Honor, I intend to make an offer of proof.

MJ: You may proceed.

16. If the witness had been permitted to testify, he would state that he has observed the accused's performance of his military duties, the accused's conduct in the military community, his attitude toward the military and his responsibilities, and that as a result of these observations, he has formed an opinion of the accused's military character. The witness would state this opinion is that the accused's military character is poor. This testimony is relevant to the rebuttal of the military character evidence introduced by the defense in its case. Your Honor, I also request that you reconsider your ruling on the defense objection in view of this offer of proof.

## HANDLING EXHIBITS--GENERALLY

Mil.R.Evid. 104

Procedure: The proponent should:

1. Have the exhibit to be offered marked for identification by the reporter. Some military judges prefer and the Uniform Rules of Practice encourage when practical, that each counsel mark his or her own exhibits prior to trial in order to save time. This procedure may prove unwieldy if more than a few exhibits are to be introduced.
2. After asking the military judge for permission to approach the witness, show the exhibit to the witness and ask him or her what it is.
3. Ask the witness how he or she recognizes it. Have him or her identify any marks or characteristics which he or she is relying upon to make the identification.
4. Have the witness explain where the exhibit was obtained.
5. Have the witness explain how it came into his or her custody.
6. Determine whether the exhibit is in the same or similar condition as when he or she originally took it into custody.
7. Make the exhibit relevant through the testimony of the witness or that of other witnesses, if the exhibit is not relevant on its face.
8. Offer the exhibit into evidence after retrieving it from the witness, showing it to opposing counsel for inspection and possible objection, and requesting that the words, "for identification" be deleted.
9. Publish the exhibit to the members at the appropriate time if it is accepted into evidence.
10. Refer to the exhibit during argument; don't forget about it.

SECTION II  
JUDICIAL NOTICE

JUDICIAL NOTICE OF ADJUDICATIVE FACTS

Mil. R. Evid. 201

Procedure:

1. Ask the military judge to take judicial notice of facts that are:
  - a. Known universally, locally, or in the area pertinent to the event; or
  - b. capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
2. If necessary, provide the military judge with information, marked as appellate exhibits, to support the request.

Procedure:

1. Your Honor, I request that the court take judicial notice that 25 January 1981 was on a Sunday.
2. In support of my request, I offer what the reporter has marked as AE V which is a 1981 U.S. Government Printing Office planning calendar. AE V has been previously shown to the defense counsel.

Any objections, defense counsel?



JUDICIAL NOTICE OF DOMESTIC LAW

Mil.R.Evid. 201A

Procedure:

1. Ask the military judge to take judicial notice of domestic law.
2. If necessary, provide the military judge with information to support the request.

Predicate questions:

1. Your Honor, I request that this document be marked as the next appellate exhibit in order.

Yes.

- Let the record reflect that the reporter has marked this document as AE VI and returned it to me.
2. Your Honor, I request that you judicially notice Agreed View 17 under the Protocol and Official Minutes of 29 September 1953, amending Article XVII of the Administrative Agreement between the United States and Japan, which authorizes United States Armed Forces law enforcement personnel to enter dwellings outside areas in use by United States Forces and make searches therein incident to "hot pursuit" of U.S. Forces members. In support of that request, I have had marked as AE VI a true copy of Agreed View 17.
    - Let the record reflect that I am showing AE VI to the defense counsel for his inspection.
    - Let the record reflect that the defense counsel has returned AE VI to me and that I am presenting it to the military judge in support of my request for judicial notice of Agreed View 17.

Any objections, defense counsel?

SECTION III  
EXCLUSIONARY RULE  
and  
RELATED MATTERS

## ACCUSED'S CONFESSION

Mil.R.Evid. 304 & 305

Procedure: The proponent must:

1. Give notice of the existence of all statements made by the accused that are relevant, known to the trial counsel and in the control of the armed forces, prior to arraignment.
2. Respond to any motion or objection of the defense:
  - a. If the defense specifies the grounds upon which the motion or objection is made, the proponent need respond only to the grounds thus asserted.
  - b. If the defense is allowed to make a general motion or objection the proponent must respond accordingly.

Predicate questions: Sample - general motion to suppress response

1. Please state your full name and address.
2. Where are you employed?
3. How long have you worked for the Naval Investigative Service?
4. Were you so employed on the last day of May of this year?
5. Did you have an occasion to see an individual by the name of Private Accused on that date?
6. Who is Private Accused?
7. Let the record reflect that the witness pointed to the accused.
8. Where did you see him?
9. Where is your office located?
10. Approximately what time of the day was it when you saw the accused?
11. What happened when the accused was brought to your office?
12. After offering the accused a cup of coffee, what did you do?
13. How did you advise the accused of his rights?  
(elicit both article 31 and Miranda/Tempia rights, in detail)
14. What, if anything, did you use to advise the accused of his rights?

15. Your Honor, I request permission to approach the witness.  
Yes.
16. Let the record reflect that I am handing the witness what has previously been marked as AE I.
17. Special Agent Witness, what is that document?
18. How do you recognize it?
19. Besides your signature at the bottom of the page, how do you recognize it?
20. Whose signature other than your own appears on the document?
21. When did the accused sign the document?
22. How did you use this to give the accused his rights?
23. And what do the initials represent on the various clauses?
24. Whose initials are those?
25. What happened after the accused read and initialed AE I.
26. What did the accused say in response to your question, "did he understand his rights?"
27. What happened then?
28. What was the accused's response to your question of whether "he had any questions?"
29. What happened next?
30. How did the accused indicate that he did not want a lawyer and was willing to answer your questions?
31. After the accused affixed his signature to the bottom of AE I, what did you do?
32. How long did you question the accused?
33. Describe the accused's physical appearance at this time.
34. Describe the accused's state of apparent sobriety.
35. Describe the accused's manner of speech.

36. What, if any, difficulty did the accused have in understanding your questions?
37. What, if any, promises did you make to the accused during the interview?
38. What, if any, threats did you make to the accused during the course of the interview?
39. What, if any, force did you employ during the course of the interview?
40. What bodily comforts, other than coffee, were offered to the accused during the course of the interview?
41. How long did the entire interview last?
42. How many breaks did you take during this period of time?
43. What desires did the accused express with regard to terminating the interview?
44. After orally questioning the accused, what did you do next?
45. How did you reduce the accused's statement to writing?
46. What happened after you typed up the statement?
47. How long did the accused take to read the statement over?
48. What procedure was followed to correct any mistakes in the written statement?
49. Who initialed the pen-and-ink corrections?
50. How many times did the accused actually make such corrections?
51. What, if any, questions did the accused ask concerning the written statement?
52. What happened then?
53. Where did the accused sign the statement?
54. How do you know he signed it on the last page and in each margin?
55. Directing your attention to pages two through five of AE I, what are those documents?
56. How do you know that it is the accused's written statement?
57. Whose signature appears on the last page and in each margin?
58. How do you know that?

59. And whose initials appear throughout the pages of the document?
60. Let the record reflect that I am retrieving the document from the witness and showing the exhibit to the defense counsel for his inspection.
61. Let the record reflect that the defense counsel has returned the exhibit to me. Your Honor, at this time, the government offers AE I into evidence. The government is prepared to argue unless the defense has questions of the witness.

## LINE UP IDENTIFICATION OF THE ACCUSED

Mil.R.Evid. 321

Procedure: The proponent must show that:

1. The witness has made an in-court identification of the accused;
2. the witness made a previous out-of-court identification of the accused;
3. there is a basis for both identifications; and
4. the out-of-court identification was conducted in a fair manner.

Predicate questions: Sample

1. Preliminary questions are asked and answered.
2. Who stabbed you?
3. If you see that individual in the courtroom today, will you please point him out.
4. Let the record reflect that the witness has pointed to the accused.
5. How long did you see the accused before he stabbed you?
6. And how long afterwards?
7. How far away were you before he stabbed you?
8. What was the lighting like at the time?
9. What, if any, problems were you having with your eyesight at that time?
10. How many times have you seen the accused?
11. Besides at the time of the incident and today, when was the other?
12. Where was this?
13. What time did this lineup occur?
14. What was the lighting like in the room?
15. How far away were you from the men in the lineup?
16. How many men were in the lineup?
17. What, if anything, were you told by the Naval Investigative Service agents present before the lineup began?

18. What procedures were followed?
19. How were the men in the lineup arrayed?
20. What differences, if any, existed among the men in the lineup?
21. What differences in age group of the men existed?
  - (race)
  - (height)
  - (weight)
  - (build)
  - (hairstyle)
  - (complexion)
  - (facial hair)
  - etc.
22. What suggestions, if any, were made to you as you viewed the lineup?
23. What, if anything, was said to you as you viewed the lineup?
24. Prior to the lineup, how many of the men were shown to you individually, if any?
25. What were the results of the lineup?
26. Who did you select?
27. Let the record reflect that the witness pointed to the accused.
28. What made you pick the accused?
29. How positive were you that it was the accused?
30. Who else, if anyone, did you select?
31. What, if anything, was your selection of the accused based upon other than your observation of him at the time of the stabbing?



## PHOTOGRAPHIC IDENTIFICATION OF ACCUSED

Mil.R.Evid. 321

Procedure: The proponent must show that:

1. An identification has been made in-court by a witness (not necessarily the witness who is testifying about the out-of-court identification);
2. there was a basis for this identification;
3. the out-of-court identification process was conducted in a fair manner; and
4. at the out-of-court identification process, an identification identical to the in-court identification was made.

Predicate questions: Sample - witness other than the one who made the in-court identification

1. State your name and address.
2. Where do you work?
3. How long have you worked for the Naval Investigative Service Office?
4. What is your position there?
5. Do you know an individual by the name of Lance Corporal Accused?
6. If you see the individual that you know as Lance Corporal Accused in court today, please point to him.
7. Let the record reflect that the witness pointed to the accused.
8. How do you know the accused?
9. When did you begin work on his case?
10. Did you have occasion to interview a Mrs. Eyewitness in connection with your investigation?
11. Where did that interview take place?
12. When did it take place?
13. How long after the alleged offense did this take place?
14. Who was present at the time?
15. Did you have occasion to conduct a photographic display identification with Mrs. Eyewitness?

16. What is a photographic display identification?
17. What procedures are followed when you conduct such an identification, in general?
18. What, if anything, did you say to Mrs. Eyewitness before permitting her to see the photographs?
19. How were the photographs displayed?
20. What type of photographs were used in the display -- color or black and white?
21. What differences, if any, were there?
22. What other differences among the photographs were there?
23. How many photographs were used?
24. Describe the nature of the photographs used.
25. What were the differences in age group of the individuals portrayed?
  - (race)
  - (height)
  - (weight)
  - (build)
  - (hairstyle)
  - (complexion)
  - (facial hair)
  - etc.
26. What suggestions did you make to Mrs. Eyewitness as she viewed the photo display?
27. What, if anything, was said to Mrs. Eyewitness while she viewed the photo display?
28. What were the results?
29. How did Mrs. Eyewitness indicate that she recognized one of the photographs?
30. Whose photograph did she select?
31. To whom are you referring?
32. Let the record reflect that the witness has pointed to the accused.
33. What, if anything, did you or any other person present say after Mrs. Eyewitness made her selection?

34. When Mrs. Eyewitness made her selection, what hesitancy did she display?

35. Etc.

Note: The photo display may be used and introduced if necessary.

SECTION IV

PRIVILEGES

## SPOUSAL INCAPACITY

Mil. R. Evid. 504

Procedure: The witness seeking to invoke the privilege must:

1. Show that witness spouse married the party spouse and that they are still married.
2. The party attempting to invoke the exceptions to the privilege must:
  - a. Show that the witness spouse, the property of the witness spouse, or a child of either was the victim of the crime;
  - b. show that a third party was the victim of the crime, which was committed in the course of a crime against the witness spouse;
  - c. show that the marriage was a sham; or
  - d. show that the crime charged involved the witness spouse in prescribed immoral conduct (e.g., transportation of the witness spouse in interstate commerce for purposes of prostitution).

Predicate questions:

- DC: Your Honor, at this article 39a session, I request permission to call Mrs. Accused, the government's next witness, for the purpose of voir dire. I expect to establish that she will refuse to testify against the accused on the grounds of the husband-wife privilege.
- a. State your name and address.
  - b. Mrs. Accused, isn't it true that on 1 July of this year, you married Seaman John Accused?
  - c. Isn't it true that Seaman John Accused, the man you married on 1 July, is seated right next to me?
  - d. Isn't it true that you are still married to Seaman Accused?
  - e. Isn't it true that no divorce proceedings or legal separation proceedings have ever been begun by you since your marriage to Seaman Accused?
  - f. There has never been an annulment proceeding either, isn't that correct?
  - g. Do you wish to testify against your husband?
- No.

- TC: Your Honor, the government requests an opportunity to voir dire the witness.
- a. Mrs. Accused, do you and your husband have any children?
  - b. How many do you have?
  - c. Please state their names.
  - d. Where do those children live?
  - e. Where did the children live on 15 December of this year?
  - f. On the 15th of December, at approximately 1000 hours, who was present in your family's home?
  - g. Were both children home?
  - h. What happened at that time?
  - i. What happened to your oldest child as a result of that argument with your husband?
  - j. How was the child injured?
  - k. Who else, if anyone, was involved in this argument?
  - l. What did your husband do after he struck the child?

-- TC: Your Honor, this voir dire examination demonstrated that no husband-wife privilege exists under Mil. R. Evid. 504 since it is clear that the victim of the assault with which the accused is charged is the child of both the accused and this witness.

CONFIDENTIAL COMMUNICATION MADE DURING MARRIAGE

Mil.R.Evid. 504(b)

Procedure: The party seeking to invoke the privilege must:

1. Show that the communication was made privately to the spouse while the party and the spouse were husband and wife and not divorced, or separated as provided by law; and
2. prove that the communication was made under circumstances indicating that it was not intended to be disclosed to third persons other than those reasonably necessary for transmission.

Predicate questions:

- TC: Please tell the court what the accused said on the 22nd of May.
  - a. DC: Objection. Your Honor, the answer to that question would violate the husband-wife confidential communication privilege of Mil.R.Evid. 504(b). An article 39a session is requested to discuss this point further.
- MJ: Very Well. The members will withdraw from the courtroom. This article 39a session is called to order. Let the record reflect that all parties are present. The military judge and the court reporter are also present. The members are absent. Defense counsel, you may proceed.
  - b. Your Honor, I request permission to voir dire the witness to establish the basis for my objection.  
Proceed.
  - c. Mrs. Accused, isn't it true that on 1 January of last year you married Seaman Johnny Accused?
  - d. Seaman Johnny Accused, is sitting to my right, isn't that correct?
  - e. Isn't it true that you and Seaman Accused lived together as man and wife from 1 January of last year until 1 July of this year?
  - f. Isn't it true that during that entire period, neither you nor your husband began any separation, divorce, or annulment proceedings with regard to your marriage?
  - g. Mrs. Accused, you did not leave your husband until after 1 July, isn't that true?

- h. Now, on 22 May of this year, you and your husband were living together as man and wife, correct?
- i. When Seaman Accused engaged you in the conversation to which the trial counsel alluded earlier, isn't it true that only you and your husband were present?
- j. Isn't it true that this conversation took place in the privacy of your home?
- k. And isn't it true that prior to telling you anything, your husband shut the doors and told you to "Keep this to yourself"?

-- No further questions at this time. Your Honor, the defense renews its objection.



## PROTECTING THE IDENTITY OF AN INFORMANT

Mil.R.Evid. 507

Procedure: The proponent of the privilege must:

1. Assert the privilege on behalf of the United States; and
2. establish that the informant, whose identity is sought to be protected, furnished information resulting in an investigation of a possible violation of law to a person whose official duties included the discovery, investigation, or prosecution of crime.

Predicate questions: Sample

1. TC: I object to that question on the ground that it calls for the identity of an informant, which is privileged under Mil.R.Evid. 507.
2. TC: Your Honor, I request permission to voir dire the witness to establish the basis for the assertion of the privilege.  
  
Yes.
3. What is your occupation?
4. How long have you been an NIS agent?
5. Were you an NIS agent on 20 July of this year?
6. When did you first come into contact with the person to whom you referred in response to the defense counsel's previous question?
7. What happened when you met this person?
8. What type of report of a crime did he make?
9. Were you in your office at this time?
10. Who else, if anyone, was present at the time that the report was made?
11. Why did you take the report?
12. To whom, if anyone, have you disclosed the identity of the person who gave you the information about the accused?
13. How have you referred to this person's identity in your official reports of investigation?

By informant number - not by name.

14. Your Honor, I have no further questions and I renew the subject claim of privilege, on behalf of the United States.

**SECTION V**

**WITNESSES**

## CHILD WITNESS

Mil.R.Evid. 601

Procedure: It is no longer necessary to establish the competency of the child witness under Mil.R.Evid. 601; however, the proponent must still lay an adequate foundation if any weight is to be given to the child's testimony by the factfinder. To do this, the proponent must:

1. Establish that the child has the capacity to observe;
2. demonstrate that the child has the capacity to remember;
3. show that the child has the capacity to relate; and
4. prove the child recognizes a duty to tell the truth.

Predicate questions:

1. What is your name?
2. What is your address?
3. What grade are you in?
4. What school do you attend?
5. What is your teacher's name?
6. How well do you see?
7. How well do you hear?
8. How old are you?
9. When is your birthday?
10. How many brothers and sisters do you have?
11. What are their names?
12. How do you do in school?
13. Where do you go to church?
14. What do you learn in Sunday school?
15. What will God do if you don't tell the truth today?
16. What would your parents think if you don't tell the truth today?
17. What is a promise?



IMPEACHMENT BY PROOF THAT THE WITNESS  
LACKS SPECIFIC COMPETENCY

Mil.R.Evid. 602

Procedure: The opponent must:

1. Attack the witness' inability to discern the fact testified to during the witness' direct; and
2. demonstrate the circumstances surrounding an event if the event is the basis for the attack.

Predicate questions: Sample - physical disability

1. Preliminary questions are asked and answered.
2. Ensign Witness, isn't it true that you are nearsighted?
3. So, in fact, you have difficulty seeing anything at a distance, isn't that so?
4. You wear eyeglasses, isn't that correct?
5. These glasses have been prescribed for you by a doctor, isn't that so?
6. Now, you had your eyes examined when you joined the Navy, isn't that so?
7. And the Navy doctor gave you some glasses, isn't that so?
8. Are the glasses that you're wearing today in court, the same ones that the Navy doctor gave you?
9. In fact, the glasses that you're wearing today in court are the glasses that you've had for the last two years, isn't that right?
10. You don't wear the Navy glasses because you don't like the styling, isn't that so?
11. Now, on direct examination, you said you saw the accused clearly at the time of incident, isn't that so?
12. Isn't it true that you were standing almost 100 yards away at that time?
13. And it was almost dark at the time, isn't that so?
14. The only light available to illuminate the scene was the street light on the corner, isn't that so?

15. And, isn't it a fact, that you can't be absolutely certain that that light was on?
16. Now, let's return to your glasses for the moment. Which glasses were you wearing on that evening, the Navy's or yours?
17. So, you were wearing the glasses that were prescribed for you over two years ago, is that correct?
18. Isn't it true that your Navy glasses are stronger than your own glasses?
19. In fact, there's a substantial difference in strength between the two, isn't that so?
20. Etc.

## QUALIFYING AN INTERPRETER

Mil.R.Evid. 604 & 702

Procedure: The proponent must:

1. Qualify the interpreter as an expert in translation of English and the subject language; and
2. have the interpreter swear or affirm that he or she will make a true translation.

### PREDICATE QUESTIONS:

1. State your full name and address.
2. What is your place of employment?
3. What position do you occupy in the staff judge advocate's office, Commander, U.S. Naval Forces Japan?
4. How long have you worked as a legal advisor and translator?
5. Where did you work before that?
6. How long did you work in the civilian employment office?
7. In what languages are you proficient?
8. Where did you first learn to speak English?
9. What formal courses in English have you taken?
10. Where did you take these courses?
11. Where did you attend college?
12. What courses in English did you take while studying at Tokyo University?
13. What other studies have you made of the English language?
14. During your thirteen years as a legal advisor and translator for U.S. Naval Forces, Japan, what duties have you had with regard to the translation of Japanese into English and vice versa?
15. How often do you perform such tasks?
16. Do you have occasion to write English in the course of your employment?
17. How often?

18. Have you ever been called upon to perform as an interpreter in a judicial proceeding?
19. How many times?
20. Other than in the Japanese courts, have you ever acted as an interpreter in a judicial proceeding?
21. How many times have you so acted in a court-martial?
22. How often do you speak English?
23. How often do you speak Japanese?
24. In what other capacities have you acted as an interpreter for U.S. Forces?
25. How many times has your interpretation of English into Japanese, or vice versa, been found to be inaccurate?
26. Your Honor, do you desire further questions of the witness?  
No; does counsel for defense desire to voir dire the witness?  
No, Your Honor.  
Very well, the witness will be recognized as an expert in the translation of Japanese and English. Trial Counsel, you may swear the interpreter.
27. Raise your right hand. "Do you swear (affirm) that in the case now in hearing you will interpret truly the testimony you are called upon to interpret (so help you God)?"



## REPUTATION FOR TRUTHFULNESS OR UNTRUTHFULNESS

Mil.R.Evid. 608 & 405

Procedure: The proponent must show:

1. That the witness is a member of the same community as the subject;
2. that the witness has resided or worked in the community for a substantial period of time;
3. that the subject has a reputation for truthfulness or untruthfulness in the community; and
4. that the witness is familiar with the subject's reputation.

Predicate questions:

1. State your name, rank, and armed force.
2. What is your unit?
3. How long have you worked there?
4. What position do you have there?
5. Where do you live?
6. How long have you lived there?
7. Do you know an individual by the name of Lance Corporal Johnny Witness?
8. How do you know him?
9. How long have you known him?
10. Where does Lance Corporal Witness work?
11. Is that the same unit in which you work?
12. How long has Lance Corporal Witness worked there?
13. Where does Lance Corporal Witness live?
14. Is that the same barracks in which you live?
15. How long has he lived there?
16. What, if any, occasions have you had to meet with Lance Corporal Witness socially?
17. How frequently have you met him socially?

18. Does Lance Corporal Witness have a reputation for truthfulness or untruthfulness in the unit in which you both work?
19. Does Lance Corporal Witness have a reputation for truthfulness or untruthfulness in the barracks in which you both live?
20. What is that reputation, in the unit?

## CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

Mil.R.Evid. 608 & 405

Procedure: The proponent must show:

1. That the witness is personally acquainted with the subject;
2. that the witness knows the subject well enough to have formed an opinion of the subject's truthfulness or untruthfulness;
3. that the witness has such an opinion; and
4. given that opinion, the witness would or would not believe the subject under oath.

Predicate questions:

1. State your name, unit, armed force and rank.
2. What position do you fill in that unit?
3. How long have you worked there?
4. Do you know an individual by the name of Seaman Witness?
5. How long have you known him?
6. Where does he work?
7. Is that the same unit to which you belong and in which you work?
8. What is the command relationship between you and Seaman Witness?
9. How many other personnel are there between you and Seaman Witness in the chain of command?
10. In what other units have you served with Seaman Witness?
11. Describe the command relationship between you and Seaman Witness in those units.
12. What, if any, contact do you have with Seaman Witness socially?
13. In a given week, how many days do you have personal contact with Seaman Witness?
14. Do you have an opinion of his truthfulness?
15. What is that opinion?

Note: If a witness is competent to render an opinion about a person's character trait, as well as state a person's reputation as to that character trait, the foundation for each can be combined into a single line of questioning establishing the requisite contact the witness has with both the person and the person's community.

## IMPEACHMENT THROUGH EVIDENCE OF BIAS

Mil. R. Evid. 608

Procedure: The opponent must:

1. Lay the foundation if the impeaching evidence is based on an event:
  - a. Showing where the event occurred;
  - b. when it occurred; and
  - c. what occurred.
2. Show the relationship between the accused and the witness if the impeaching evidence is based on commonality of interest, etc.

Predicate questions: Sample - relationship

1. Preliminary questions are asked and answered.
2. Now Lance Corporal Witness, you indicated on direct testimony that you knew the accused, isn't that correct?
3. In fact, you know the accused very well, isn't that so?
4. Isn't it true that you consider him one of your best friends?
5. In fact, you consider him to be your best friend, isn't that so?
6. Now, you've known the accused for over a year, isn't that so?
7. Went to boot camp together, correct?
8. You asked to be assigned to the same unit, isn't that correct?
9. You'd like to help the accused whenever possible, isn't that so?
10. And you would be very upset if he were convicted of the charges against him today, isn't that right?

-- Sample - event

1. Preliminary questions are asked and answered.
2. Do you know an individual by the name of Seaman Witness (the opposing side's witness who has testified against the accused)?
3. How do you know him?
4. How long have you known him?

5. Directing your attention to the 5th of June of this year, did you have occasion to see Seaman Witness?
6. Where was this?
7. Who else was there, if anyone?
8. Anyone else besides the accused?
9. What was taking place?
10. Who was playing pool?
11. Who won the game?
12. What happened at the conclusion of the game?
13. Who paid whom?
14. How much was paid by Seaman Witness to the accused?
15. What, if anything did Seaman Witness say to the accused at that time?
16. What happened next?
17. No further questions.

## IMPEACHMENT BY PRIOR CONVICTION

Mil.R.Evid. 609

Procedure: The opponent must:

1. Show that the witness was previously convicted of a crime:
  - a. That was punishable by death, dishonorable discharge, or imprisonment; or
  - b. that involved dishonesty or false statement.
2. Show that the conviction took place within the preceding ten years. Note, however, that a military judge may, in the interest of justice, allow use of convictions older than ten years. Mil.R.Evid. 609(b).

Predicate questions: Sample

1. Preliminary questions are asked and answered.
2. Isn't it true that you are the Private First Class Witness who was convicted of larceny at a special court-martial last year?
3. Isn't it correct that that court-martial was convened aboard this very base?
4. Isn't it true that the larceny of which you were convicted was for stealing a stereo from a Corporal Victim?

## REFRESHING RECOLLECTION

Mil.R.Evid. 612

Procedure: The examiner should:

1. Have the witness state that he or she cannot recall a fact or event;
2. have the witness state that a certain writing or object will refresh his or her memory;
3. mark the writing or object as an appellate exhibit, unless it is to be offered on the merits;
4. show it to opposing counsel for inspection;
5. tender it to the witness;
6. ask the witness to silently read or study the object;
7. have the witness state that his or her memory is revived; and
8. retrieve the writing or object and proceed with the examination.

Predicate questions: Sample

1. Do you recall the serial number of the weapon?
2. Did you at one time know the serial number?
3. What, if anything, might help you to remember?
4. Your Honor, I request that this document be marked as the next appellate exhibit in order.
  - Let the record reflect that I am showing what has been marked as AE II to counsel for the accused for his inspection.
  - Let the record reflect that counsel for the accused has returned AE II and that I am now handing it to the witness.
5. Special Agent Jones, what is that document?
6. Please read the document to yourself and indicate to me when you are finished.
7. Have you finished?
  - Let the record reflect that I am retrieving AE II from the witness.
8. Now that you've read the document, do you remember the serial number? What was the serial number?



## IMPEACHMENT WITH PRIOR INCONSISTENT SWORN STATEMENT

Mil.R.Evid. 613 & 801(d)(1)(A)

Procedure: The opponent should:

1. Show that the witness made a prior statement at a certain time and place;
2. show that the witness' earlier statement is inconsistent with his current testimony;
3. commit the witness to the current testimony before discussing the inconsistent statement;
4. show that the statement was sworn and was made while the declarant was subject to the penalty of perjury at a trial, deposition, hearing, or other proceeding; and
5. if the statement is to be proved by extrinsic evidence, afford the witness an opportunity to explain or deny it.

Predicate questions: Sample

1. Preliminary questions are asked and answered.
2. Now, Seaman Witness, isn't it true that in response to a question of the trial counsel, you testified that Seaman Accused was present in your room on the night of the alleged offense?
3. And you're positive that he was there, is that right?
4. No doubt in your mind?
5. You couldn't have made a mistake about that?
6. You remember it distinctly, is that right?
7. Now Seaman Witness, I want to direct your attention to the 9th of July of this year. Do you recall that date?
8. Isn't it true that you testified at the article 32 investigation in this case on that date?
9. Isn't it true that you were called as a witness for the government at that investigation?
10. That investigation took place less than two weeks after the accused was allegedly in your room, isn't that so?
11. In fact, it was just nine days later, isn't that correct?
12. Did you have a good night's sleep prior to testifying that day?

13. You were well rested then, correct?
14. And nothing unusual had occurred to upset you beforehand, isn't that so?
15. Who was present at that hearing?
16. Where did it take place?
17. Approximately what time were you called to the witness stand?
18. Isn't it true that you were administered an oath by the investigating officer before beginning your testimony?
19. You had to raise your right hand and swear to tell the truth, isn't that so?
20. In fact, you took the same oath then that you did today, isn't that so?
21. Did you take that oath seriously at that time?
22. A reporter was present, isn't that so?
23. And he appeared to be making a tape of every word that was said, correct?
24. The investigating officer asked you questions, didn't he?
25. Isn't it true that the investigating officer did not pressure you to testify one way or the other?
26. You had plenty of time to think about your answers, isn't that true?
27. The investigating officer wanted you to tell the truth, correct?
28. And you told the truth, correct?
29. Do you remember making the following statement at the article 32 investigation, "The accused was not in my room."?
30. And that statement was made under oath, correct?
31. Just nine days after the event, correct?
32. And now it is three months later, correct?
33. Isn't it true that your memory was fresher then?

-----  
Note: A prior inconsistent statement admissible under Mil.R.Evid. 613 and 801(d)(1) will be admissible not only for impeachment but also as substantive evidence.

## IMPEACHMENT WITH PRIOR INCONSISTENT UNSWORN STATEMENT

Mil.R.Evid. 613

Procedure: The opponent should:

1. Show that the witness made a prior statement at a certain time and place;
2. show that the witness' earlier statement is inconsistent with his current testimony;
3. commit the witness to the current testimony before discussing the inconsistent statement; and
4. if the statement is to be proved by extrinsic evidence, afford the witness an opportunity to explain or deny it.

Predicate questions: Sample

1. Preliminary questions are asked and answered.
2. LT Witness, isn't it true that you testified on direct that you only had one drink at the time of the incident?
3. Do you know an individual named Capt Good Friend?
4. In fact, Capt Friend is a close friend of yours, isn't that so?
5. Do you recall talking to him about the incident of 4 May of this year?
6. Isn't it true that this conversation took place in your BOQ room?
7. Isn't it true that this conversation took place only a few hours after the incident?
8. Isn't it true you had calmed down by the time you had this conversation with Capt Friend?
9. You felt just fine at that time, correct?
10. Isn't it true that your memory of what happened was fresher then than it is now?
11. Isn't it true that you told Capt Friend during that conversation on the 4th of May that you'd had four or five drinks at the time of the incident?

-----  
**Note:** A prior unsworn inconsistent statement is admissible only under Mil.R.Evid. 613 for impeachment purposes and is not admissible as substantive evidence under Mil.R.Evid. 801(d)(1)(A).

SECTION VI  
OPINION  
and  
EXPERT TESTIMONY

## OPINION OF MILITARY CHARACTER

Mil.R.Evid. 405 (admissible if military character is a relevant trait under the issues involved in the case)

Procedure: The proponent must show:

1. That the witness is personally acquainted with the subject;
2. that the witness knows the subject well enough to have formed an opinion of the subject's military character; and
3. that the witness has such an opinion.

Predicate questions:

1. State your name, rank, unit and armed force.
2. What position do you fill in that unit?
3. How long have you worked there?
4. Do you know an individual by the name Seaman Johnny Accused?
5. If you see him in the courtroom today, would you please point to him?  
  
-- May the record reflect that the witness has pointed to the accused.
6. How long have you known Seaman Accused?
7. How do you know him?
8. How well do you know him?
9. Where does Seaman Accused work?
10. Is that the same unit in which you work?
11. Where else, if anywhere, have you served with him?
12. During the time that you served with Seaman Accused, what were his duty assignments?
13. To what extent, if any, did you observe the performance of his military duties?
14. During the time that you knew him, to what extent have you observed his conduct in the military community?
15. In any given week, how many days of the week would you have personal contact with the accused?

16. How many hours of the day would you have such personal contact?
17. As a result of your contacts with Seaman Accused, have you observed his attitude toward the military and his responsibilities in the military?
18. To what extent?
19. Have you observed his attitude with respect to his military superiors?
20. To what extent?
21. As a result of your knowledge of and your contacts with Seaman Accused, do you have an opinion of his military character?
22. What is that opinion?

## OPINION OF RELEVANT CHARACTER TRAIT

Mil.R.Evid. 405

Procedure: The proponent must show:

1. That the witness is personally acquainted with the subject;
2. that the witness knows the subject well enough to have formed an opinion of the subject's character trait for honesty, violence, peacefulness, etc.; and
3. that the witness has such an opinion.

Predicate questions: Sample

1. State your name, rank, unit and armed force.
2. What position do you fill in that unit?
3. How long have you worked there?
4. Do you know an individual by the name of Corporal Accused?
5. If you see him in the courtroom today, would you please point to him?  
  
-- Let the record reflect that the witness has pointed to the accused.
6. How long have you known Corporal Accused?
7. How do you know him?
8. How well do you know him?
9. In what units have you served together?
10. To what extent, if any, do you have social contact with Corporal Accused?
11. How often do you have such contact?
12. In any given week, how many days of the week do you have personal contact with Corporal Accused?
13. How many hours of the day do you have personal contact with Corporal Accused?
14. Have you had occasion to observe Corporal Accused's reaction to others, both socially and professionally?
15. Have you had occasion to observe Corporal Accused's reaction to others in stressful situations?

16. To what extent?
17. As a result of your knowledge of and your contacts with Corporal Accused, do you have an opinion of his character for peacefulness?
18. What is that opinion?



## LAY WITNESS' OPINION OF SPEED

Mil.R.Evid. 701

Procedure: The proponent must show that:

1. The witness was in a position to observe;
2. the witness did in fact observe;
3. the observation was based on sufficient data to form a reliable opinion; and
4. the witness will state the opinion.

Predicate questions: Sample

1. Preliminary questions are asked and answered.
2. Where were you on the morning of 1 January of this year?
3. In which direction were you facing?
4. How far away were you from the intersection of "A" and "B" streets?
5. What if anything, did you observe while standing there?
6. How long did you observe the black truck before it entered the intersection?
7. How long did you see the Navy vehicle before it entered the intersection?
8. Do you have a driver's license?
9. How long have you been driving?
10. What types of vehicles do you drive?
11. Do you have a government driver's license?
12. How long have you had that?
13. Have you observed other vehicles, cars, and trucks in motion during these years?
14. From your experience, how well can you estimate the speed of vehicles?
15. What were the lighting conditions like on 1 January of this year?
16. What, if any, problems were you having with your eyesight at that time?

17. What, if any, obstacles were between you and the two vehicles?
18. Do you have an opinion of how fast the two vehicles were traveling at the time of the collision?
19. Please state that opinion.
20. Compared to the Navy vehicle, how fast was the black truck traveling at the moment of impact?

## LAY WITNESS' OPINION OF INTOXICATION

Mil.R.Evid. 701

Procedure: The proponent must:

1. Show that the witness was in a position to observe;
2. show that the witness did in fact observe;
3. show that the observation was based on sufficient data to form a reliable opinion; and
4. have the witness state the opinion.

Predicate questions: Sample

1. Preliminary questions are asked and answered.
2. Where were you on the evening of 21 July of this year?
3. Who else was present, if anyone?
4. Let the record reflect that the witness pointed to and stated the name of the accused.
5. How long was the accused in your company that evening?
6. How closely were you observing him?
7. Are you generally familiar with the effects of alcoholic beverages on people?
8. How have you gained that familiarity?
9. Do you drink yourself?
10. Have you ever observed a person who was intoxicated?
11. How often?
12. Please describe the accused's appearance on the evening of 21 July.
13. How was he dressed?
14. Describe his speech.
15. Describe his muscular coordination.
16. What odor, if any, could you smell on his breath?
17. Describe the condition of his eyes.

18. Describe his complexion.
19. Describe the clarity and coherence of his speech.
20. As a result of your observations, did you form an opinion of the accused's sobriety or lack thereof?
21. Please state that opinion.

## QUALIFYING AN EXPERT - GENERALLY

Mil.R.Evid. 702

Procedure: The proponent must demonstrate that:

- The witness is an expert in the field of inquiry by showing that the witness has: (for example)
  - a. Acquired degrees from educational institutions;
  - b. acquired other specialized training;
  - c. obtained licenses to practice in the field;
  - d. worked in the field for a substantial period of time;
  - e. authored professional publications in the field;
  - f. taught or lectured in the field;
  - g. won awards or received other professional recognition; and/or
  - h. testified as an expert previously.

Predicate questions: In general

1. Please state your full name and address.
2. What is your profession?
3. How long have you worked in that field?
4. What is your formal education?
5. From where did you obtain your bachelor's degree?
6. What was your major at Harvard?
7. From where did you obtain your master's degree?
8. What was your major at Yale?
9. From where did you receive your doctor's degree?
10. And your major at Duke?
11. What academic honors did you receive?
12. What did you do after graduating from Duke?
13. How long did that internship last?

14. And where was it?
15. Where did you perform your residency?
16. What is a residency?
17. Where did you go after that?
18. And what specialty did you practice there?
19. Before beginning to practice in Rhode Island, what licenses did you have to obtain?
20. What is involved in that process?
21. When did you get your license?
22. How long have you practiced in Rhode Island?
23. During that time, how many patients have you treated?
24. What professional publications have you authored?
25. What professional articles have you written?
26. In what professional journals were those articles published?
27. How often have your works been published?
28. What positions have you held at the Rhode Island University School of Medicine?
29. How long have you been Dean?
30. How long have you taught there?
31. Where else have you taught?
32. What percentage of your time is spent teaching and what percentage is spent treating patients?
33. What subjects do you teach?
34. To what professional organizations do you belong?
35. What is required to join the American Society of Big Shot Doctors?
36. What professional awards have you won?
37. What does the Honorary Degree of Big Time Medicine mean?
38. How many doctors receive that award in a given year?

39. How many times have you testified as an expert in the field of medicine before today?
40. How many times has a court failed to recognize you as an expert?
41. Etc.





13. What was that conclusion?
14. Please explain the significance of that conclusion in layman's terms.
15. Compare your conclusion to accepted principles of scientific certainty in the field of blood analysis.

(urine)  
(semen)  
(saliva)  
(etc.)

16. What is the likelihood of error in your conclusion (better you should ask than the opponent)?
17. Etc.

## OPINION OF FORENSIC CHEMIST

Mil. R. Evid. 702

Procedure: The proponent must:

1. Qualify the witness as an expert in the field of forensic chemistry (see "QUALIFYING AN EXPERT - GENERALLY");
2. show that the witness has observed certain facts;
3. show that as a result of these observations and based on his or her expertise, he or she has formed an opinion; and
4. have the witness state the opinion and explain its importance.

Predicate questions:

1. Qualify the witness as an expert (see "QUALIFYING AN EXPERT-GENERALLY").
2. Have you had occasion in your work at the crime lab to chemically analyze substances to determine whether they are, or contain, controlled substances?
3. How many times?
4. Have you had occasion to chemically analyze substances to determine whether they are or contain marijuana?
5. How many times?
6. How many controlled substances analyses do you perform in any given week?
7. Have you ever had any of your analyses proven wrong?
8. Your Honor, I request permission to approach the witness.
9. Let the record reflect that I am handing prosecution exhibit 3 for identification to the witness. Now, Mr. Chemist, I want you to take a close look at it.
10. What is prosecution exhibit 3 for identification?
11. How do you recognize it?
12. When did you mark the container?
13. When did you first see prosecution exhibit 3 for identification?
14. What sort of mail was used to send this to you?

15. When you signed for and took possession of the package from NIS, in what condition was it?
16. What, if any, evidence of tampering or alteration was present?
17. What did you do with the package and its contents?
18. When you opened the package, what was the condition of its contents?
19. During the time that the package and its contents were in your custody, what steps did you take to safeguard them?
20. What did you do with the contents of the inner package?
21. What tests did you perform?
22. Describe the microscopic examination.
23. Describe the color test used by you on that day.
24. Describe the microcrystalline tests employed.
25. Describe the chromatography tests that you used.
26. What variations, if any, did you employ in these tests from normal, accepted procedure?
27. What was the result of these tests?
28. In your professional opinion, what is the chemical composition of prosecution exhibit 3 for identification?
29. What is the basis for your opinion?
30. What did you do with the exhibit after your tests were completed?
31. How did you wrap it for mailing?
32. What type of mail did you use to return it to NIS?
33. How did the condition of the package and its contents differ from when you received it?
34. Etc.

QUALIFYING A NARCOTICS PARAPHERNALIA EXPERT

Mil.R.Evid. 702

Procedure: The proponent must demonstrate that:

-- The witness is an expert in the field of narcotics paraphernalia.

Predicate questions:

1. Please state your full name and also give your address.
2. What is your occupation?
3. How long have you worked as a Naval Investigative Service Agent?
4. In what division do you work at present?
5. Where did you work before that?
6. What specialized training in the field of narcotics do you possess?
7. Of what did that training consist?
8. Where did you receive that training?
9. What courses did you take?
10. How many hours of this training have you received?
11. Have you ever participated in the investigation of illegal narcotics activities?
12. How often?
13. Over what period of time?
14. Have you ever arrested or apprehended individuals for engaging in narcotic-related activities?
15. How many times?
16. Have you ever discussed narcotics and narcotic activities with any of these people?
17. How many times?
18. During the course of these conversations, have you discussed the identification and use of narcotic paraphernalia?
19. How many times?

20. Have you ever been asked by other members of law enforcement agencies to render an opinion as to whether certain articles were narcotic paraphernalia?
21. How many times?
22. Have you ever been recognized as an expert in narcotic paraphernalia in a civilian court or court-martial?
23. How many times?
24. Are you familiar with the term "roach clip"?
25. How did you gain that familiarity?
26. What is a "roach clip"?
27. What are the uses of a "roach clip"?
28. Please describe a "roach clip."
29. What are some of the distinctive features of a "roach clip"?
30. Etc.

## FINGERPRINT EXPERT

Mil. R. Evid. 702

Procedure: The proponent must:

1. Qualify the witness as an expert in the field of fingerprint analysis;
2. show that the witness has compared latent fingerprints to inked fingerprints;
3. show that as a result of these comparisons the witness has arrived at an opinion as to the source of the latent fingerprint; and
4. have the witness state what that opinion is.

Predicate questions:

1. Qualify the witness as an expert in the field of fingerprint analysis (see "QUALIFYING AN EXPERT - GENERALLY").
2. What is a "latent" fingerprint?
3. What is an "inked" fingerprint and how does it differ from a "latent" fingerprint?
4. What are the distinguishing characteristics of a person's fingerprints?
5. How do people leave fingerprints behind?
6. How are fingerprints compared?
7. How are fingerprints used to identify persons?
8. Why can you identify specific individuals from their fingerprints?
9. How accurate are such identifications?
10. Within the realm of scientific certainty, what are the chances for error in making such an identification?
11. How many cases are you aware of in which two people have had the same fingerprint?
12. Your Honor, I request permission to approach the witness.
13. Let the record reflect that I am handing what has been previously marked as prosecution exhibit 5 for identification to the witness.
14. What is that exhibit (referring to the latent print)?
15. How do you recognize it?

16. Where did you get it?
17. (go through necessary identification and custody procedures)
18. Your Honor, I request permission to approach the witness again.
19. Let the record reflect that I am handing the witness what has been previously marked as prosecution exhibit 6 for identification.
20. What is that exhibit (referring to the inked print)?
21. How do you recognize it?
22. Where did you get that exhibit?
23. (go through the necessary identification and custody procedures)
24. What did you do with those two prints when you received them?
25. How did you analyze them?
26. What were you looking for?
27. Did you arrive at any conclusion as a result of your examination and comparison of prosecution exhibits 5 and 6 for identification?
28. What is that conclusion?
29. Upon what factors did you rely to reach that opinion?
30. How many points of comparison did you make between the two prints?
31. What is the total number of points of identification that you found?
32. How many such points are required by the profession in general to make an acceptable identification?
33. How many points of dissimilarity did you find?
34. Please demonstrate to the court the manner in which you made your conclusion (use blow-up photos if available).
35. Within the realm of scientific certainty, what chance of error exists that someone other than the accused made both prints?

## EXPERT AS TO VALUE

Mil.R.Evid. 702

Procedure: The proponent must:

1. Qualify the witness as an expert in the field of value appraisal;
2. show that the witness has observed certain facts or examined certain property;
3. show that as a result of these observations and based on his or her expertise, he or she has formed an opinion; and
4. have the witness state the opinion and explain its basis.

Predicate questions:

1. Qualify the witness (see "QUALIFYING AN EXPERT - GENERALLY").
2. As an insurance appraiser for Acme Insurance Co., do your duties include appraising, buying, and selling personal property?
3. How long have you been so employed?
4. Where is most of your business conducted?
5. Describe in a general way how you conduct your business.
6. Have you had occasion to appraise, buy, and sell wrist watches?
7. How many times?
8. Explain the term "fair market value" to the members of the court.
9. Have you had occasion to determine the "fair market value" of wrist watches in the Newport, Rhode Island area?
10. How many times?
11. Your Honor, I request permission to approach the witness.
12. Let the record reflect that I am handing the witness what has previously been marked as prosecution exhibit 1 for identification.
13. What is prosecution exhibit 1 for identification?
14. When, if ever, have you seen that watch before?
15. For what purpose did you examine it?
16. How do you know that prosecution exhibit 1 for identification is the same watch that you examined previously?



17. What is the condition of the watch compared to when you examined it previously?
18. In what condition is the watch?
19. Based on your examination, were you able to form an opinion as to the fair market value of prosecution exhibit 1 for identification?
20. What is that opinion?
21. Upon what is that opinion based?
22. Let the record reflect that I am retrieving prosecution exhibit 1 for identification from the witness and am handing it to the defense counsel for his inspection and possible objection.

SECTION VII

HEARSAY

ACCUSED'S CONFESSION

Mil. R. Evid. 801

Procedure:     See "ACCUSED'S CONFESSION" - Mil. R. Evid. 304 & 305 in  
                          section III

## PRESENT SENSE IMPRESSIONS

Mil.R.Evid. 803(1)

Procedure: The proponent must show that:

1. An event occurred;
2. the declarant observed the event; and
3. the declarant made a statement describing or explaining the event while it was occurring or immediately thereafter.

Predicate questions: Sample

1. Preliminary questions are asked and answered.
2. Where were you on the evening of 1 July of this year?
3. Who was with you, if anyone?
4. What were you doing?
5. What happened as you were playing pool?
6. Who is Seaman Accused?
7. If you see the individual you know as Seaman Accused in the courtroom, will you point to him (let the record reflect that the witness pointed to the accused)?
8. What happened when Seaman Accused entered the pool room?
9. How long did you observe them?
10. Where did you go?
11. How far away from the pool room is the snack bar?
12. How long did you stay there?
13. What did you do after you bought your Coke?
14. How long did it take for you to return to the pool room?
15. What did you find when you got there?
16. Where was the accused?
17. In what condition was Seaman Victim?
18. What, if anything, did he say to explain this condition?
19. Who, if anyone, did Seaman Victim say had stabbed him?

STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT

Mil.R.Evid. 803(4)

Procedure: The proponent must:

1. Show that the statement was made for purpose of diagnosis or treatment; and
2. the statement was reasonably pertinent to diagnosis or treatment.

Predicate questions: Sample

1. Preliminary questions are asked and answered.
2. When did you see Seaman Victim?
3. In what capacity?
4. How many times did you see her?
5. What is a medical history?
6. Who took the medical history in Seaman Victim's case?
7. Why is a medical history taken?
8. Why was it taken in this case?
9. What, if anything, is the patient told before the medical history is taken?
10. What, if anything, did you tell Seaman Victim prior to taking the medical history in her case?
11. What did Seaman Victim say about how she suffered her injuries?

-- Sample - opponent

1. Objection, your Honor, hearsay.

It appears to be an exception, counselor.

2. Your Honor, may I voir dire the witness to establish the basis for the objection?

Yes.

3. Doctor Witness, isn't it true that you saw Seaman Victim at the request of the trial counsel?

4. Isn't it true that Seaman Victim came to your office so that you could examine her so that, in turn, you could testify here today?
5. Isn't it true that you did not enter Seaman Victim on your patient log?
6. Isn't it true that you did not prescribe any medication for Seaman Victim?
7. You did not prescribe any therapy for her, is that correct?
8. In fact, isn't Seaman Victim under the care of Doctor Doolittle?
9. In fact, isn't the only reason that you saw her because the trial counsel asked you to do so?
10. Your Honor, I have no further questions. I renew my objection.

PAST RECOLLECTION RECORDED

Mil. R. Evid. 803(5)

Procedure: The proponent must show that:

1. The witness once had personal knowledge of the fact recorded;
2. the witness made or adopted a memorandum or record concerning the fact;
3. the record was made or adopted when the fact was fresh in the witness' mind;
4. the witness can testify that the memorandum or record reflected the fact correctly; and
5. the witness cannot completely and accurately recall the fact even though the memorandum or record is reviewed.

The proponent must also:

6. Have the memorandum or document marked as an appellate exhibit;
7. tender it to opposing counsel for inspection and the witness for review; and
8. if admitted, read the document to the factfinder since it may not be received as an exhibit unless offered by the adverse party.

Predicate questions: After failing to refresh recollection

1. Now that you've read appellate exhibit II, do you remember the serial number of the gun?
2. What is appellate exhibit II?
3. How did you recognize it?
4. When was this document prepared?
5. Who prepared it?
6. How much time elapsed after you saw the serial number on the gun and the time that you prepared this document?
7. How did you prepare the document?
8. Where was the gun when you wrote down the serial number?
9. At the time then, was the serial number fresh in your mind?

10. How clear in your mind was the serial number at the time that you wrote it down?
  - Let the record reflect that I am showing what has previously been marked as AE II to counsel for the defense once again.
  - Let the record reflect that counsel for the defense has returned AE II to me. Your Honor, I request permission to approach the witness.
  - Let the record reflect that I am handing the witness AE II once again.
11. Special Agent Jones, I ask you once again: What is that document?
12. How do you recognize it again?
13. Is this the same document to which you earlier referred?
14. Please read AE II to the members of the court.
15. What does that figure represent?
  - Let the record reflect I am retrieving AE II from the witness and handing it to the court reporter for inclusion in the record.



## RECORDS OF REGULARLY CONDUCTED ACTIVITY

Mil.R.Evid. 803(6)

Procedure: The proponent must show:

1. That the person who prepared the report had a business duty to report the information;
2. that the person who prepared the report had personal knowledge of the facts recorded or gained his knowledge from a reliable source;
3. that the report was prepared at or near the time of the facts recorded;
4. that it was a regular practice of the business to make the report;
5. that the report was kept in the regular course of business; and
6. that the report pertained to acts, events, conditions, opinions, or diagnoses.

Predicate questions: Sample

1. State your name and address.
2. Where do you work?
3. How long have you worked there?
4. What are your duties there?
5. Do those duties include the responsibility of maintaining the files concerning receipts of merchandise at the Navy Exchange?
6. Please explain the procedures employed in making the receipts at the Navy Exchange with regard to incoming merchandise.
7. Your Honor, I request that this document be marked as the next defense exhibit in order.  
  
-- Let the record reflect that the reporter has marked this document as defense exhibit A for identification and returned it to me.
8. Your Honor, I request permission to approach the witness.
9. Mr. Witness, I hand you what has been marked as defense exhibit A, for identification. What is that document?
10. (authenticate document)
11. Who prepared that document?

12. How do you know that?
13. Who is \_\_\_\_\_?
14. As a file clerk, what are \_\_\_\_\_'s duties?
15. When is \_\_\_\_\_ supposed to make documents such as DE A, for identification?
16. How often are these receipts prepared?
17. What form do these receipts take?
18. Why do the file clerks and not someone else make these receipts?
19. What is done with the receipt after the file clerk prepares it?
20. When your office receives it, what is done with the receipt?
21. Where are the receipts filed?
22. And where did DE A for identification come from?
23. When did you remove DE A for identification from the files?
24. Was DE A for identification prepared in the regular course of business at the Navy Exchange?
25. Is DE A for identification the sort of document which the Navy Exchange regularly prepares in the course of its business?
26. Was DE A for identification prepared at or near the time of the events described therein?
27. Your Honor, let the record reflect that I am retrieving DE A for identification from the witness.
28. (establish document's relevancy if required)
29. Your Honor, I now offer defense exhibit A for identification into evidence as defense exhibit A, and request that the words, "for identification" be deleted. Let the record reflect that I am showing the document to the trial counsel for his inspection and possible objection.

ABSENCE OF ENTRY IN RECORDS OF REGULARLY CONDUCTED ACTIVITY

Mil.R.Evid. 803(7)

Procedure: The proponent must:

1. Lay the general foundation for records of regularly conducted activity;
2. establish that a search of the files of such records was made by the witness and that the search was thorough;
3. demonstrate that the search did not result in the discovery of the absent entry; and
4. show that the absent entry was of the kind for which a record would regularly be made and preserved.

Predicate questions: Sample

1. State your name and address.
2. Where do you work?
3. How long have you worked there?
4. What are your duties there?
5. Do those duties include the responsibility of maintaining the files that concern the registration of firearms at NETC Newport?
6. Please explain the procedures employed in registering a firearm.
7. Who prepares such registration cards?
8. How do you know that?
9. When are these cards completed in relation to the time that a person brings a firearm in to be registered?
10. How often are these cards prepared?
11. Where is the information that appears on the card obtained?
12. How is it obtained?
13. Once the card is completed, what is done with it?
14. Where are the cards filed?
15. How often are these files checked for accuracy?
16. What is the significance of a card being completed and filed?

17. How is information retrieved from the card file?
18. Who conducts a card search?
19. How is a card search conducted?
20. Mr. Witness, did you have occasion to search the firearm registration file sometime after the 2nd of May of this year?
21. When did you conduct such a search?
22. Why did you do so?
23. What was the result of your search?
24. How was that search conducted?
25. How thorough was your search?
26. What is the significance of the results of your search with regard to one .22 caliber rifle bearing serial number 1234567?
27. If that rifle had been registered, would you have found a registration card?

## PUBLIC RECORDS AND REPORTS

Mil.R.Evid. 803(8)

Procedure: The proponent must show that:

1. The record is in official custody of a public office or agency;
2. the person who prepared the record was a public official;
3. the person who prepared the record had a duty to record that fact in the record;
4. the person who prepared the record had a duty to know or to ascertain from reliable sources the facts recorded; and
5. the record was properly prepared and made within the scope of the duties of the person preparing it.

Predicate questions: Sample

1. State your name, rank, unit. and armed force.
2. What billet do you fill at the Naval Education and Training Center?
3. How long have you worked there?
4. What is the Naval Education and Training Center?  

(It's an official part of the U.S. Navy, which is part of the Department of Defense, which, in turn, is part of the U.S. Government.)
5. Your Honor, I request that this document be marked as prosecution exhibit 1 for identification.  

-- Let the record reflect that the reporter has marked this document as PE 1 for identification and returned it to me. Your Honor, I request permission to approach the witness.
6. LT Witness, I hand you what has been marked as PE 1 for identification and ask you to examine it. What is PE 1 for identification?
7. LT Witness, please describe your duties as personnel officer at NETC Newport, R.I.
8. In particular, what are your duties with regard to the preparation of documents like PE 1 for identification?
9. How did you recognize PE 1 for identification?
10. Who prepared PE 1 for identification?

11. After the document was typed by your personnel clerk, who signed it?
12. How was the document prepared?
13. What regulations govern the preparation of documents like PE 1 for identification?
14. And what procedures were followed in the preparation of PE 1?
15. Why was PE 1 for identification prepared?
16. Where did you obtain the information that was recorded in PE 1 for identification?
17. Why did you obtain that information?
18. Once the documents like PE 1 for identification are prepared, what is done with them?
19. Why are they kept there?
20. Where was PE 1 for identification filed?
21. How did it come to be here in court today?
22. When did you remove it from the files at NETC Newport Personnel Office?
23. Your Honor, I now offer prosecution exhibit 1 for identification into evidence, and request that the words "for identification" be deleted. Let the record reflect that I am showing the document to defense counsel for his inspection and possible objection.

ABSENCE OF PUBLIC RECORD OR ENTRY

Mil. R. Evid. 803(10)

Procedure:

Predicate questions:

)  
)  
)  
)

See "ABSENCE OF ENTRY IN RECORDS OF  
REGULARLY CONDUCTED ACTIVITY"

## PRICE LISTS

Mil.R.Evid. 803(17)

Procedure: The proponent must show:

1. The exhibit is a market quotation, tabulation, directory, list, or other published compilation;
2. the exhibit is generally used and relied upon by the public or by persons in a particular occupation; and
3. the exhibit is authentic.

Predicate questions: Sample - computer price list

1. State your name and address.
2. What is your place of business?
3. What position do you hold there?
4. How long have you worked for the Naval Supply Depot as an accountant?
5. What are your duties there?
6. Do those duties include responsibilities with regard to price lists?
7. How does the Naval Supply Depot maintain its price lists?
8. What type of computer is used?
9. How long have you used that computer?
10. What procedures are used to maintain NSD's price lists?
11. What safeguards are used to ensure the accuracy of those lists?
12. How often is the computer serviced and checked?
13. What form do the price lists take?
14. How do you retrieve a particular price list from the computer?
15. Your Honor, I request permission to approach the witness.
16. Let the record reflect that I am handing the witness defense exhibit 3 for identification. Mr. Computer Witness, please examine it and indicate to me when your examination is completed.
17. What is defense exhibit 3 for identification?



18. How do you know it is a NSD price list for F-18 tail hook parts?
19. From where did this price list come?
20. Who retrieved the data from the NSD computer?
21. How did you do that?
22. When did you do that?
23. What condition was the computer in at the time you retrieved this data?
24. Now, Mr. Computer Witness, what exactly does the data on that price list represent?
25. Who uses the information on that list?
26. Why is it used by NSD and other Naval components?
27. How often is it so used?
28. When is it so used?
29. To what extent are price lists like defense exhibit 3 for identification relied upon by NSD and the other Naval units who use it?
30. How do you know that?
31. Give the court an example of how NSD relies upon the data found in defense exhibit 3 for identification?
32. Mr. Computer Witness, what does the figure, "\$1m" at the bottom of the price list mean?
33. (ask clarification questions as needed)
34. Let the record reflect that I am retrieving defense exhibit 3 for identification from the witness and am handing it to the trial counsel for his inspection and possible objection. Let the record reflect that the trial counsel has returned the exhibit to me and that I am handing it to the military judge. Your Honor, I offer defense exhibit 3 for identification into evidence and request that the words, "for identification" be deleted.

REPUTATION AS TO CHARACTER

Mil.R.Evid. 803(21)

Procedure & predicate questions: See "REPUTATION FOR TRUTHFULNESS  
OR UNTRUTHFULNESS" - Mil.R.Evid. 608  
& 405

## FORMER TESTIMONY

Mil.R.Evid. 804(b)(1)

Procedure: The proponent must show that:

1. The former testimony was taken at another hearing of the same or different proceeding, or in a deposition;
2. the opponent had an opportunity and similar motive to develop the former testimony by cross, direct or redirect examination;
3. the former testimony was recorded verbatim at the first hearing;
4. as a practical matter, that the witness testified under oath; and
5. the declarant is not available to testify at the proceeding at which the former testimony is introduced.

Predicate questions: Sample

1. Establish the death of the declarant, Seaman Former Witness, through the introduction of his death certificate (see "RECORDS OF REGULARLY CONDUCTED ACTIVITY OR PUBLIC RECORDS").
2. Call a witness who was present at the former hearing.
3. State your name, rank, unit, and armed force.
4. What billet do you currently fill at the Naval Legal Service Office Yokosuka?
5. How long have you been a court reporter?
6. Were you a court reporter on the 6th of February of this year?
7. Where?
8. What type of proceeding were you acting as reporter for on that day?
9. What is an article 32 investigation?
10. Who was the subject of that investigation?

SECTION VIII  
AUTHENTICATION  
and  
IDENTIFICATION

## IDENTIFICATION OF UNIQUELY IDENTIFIABLE ITEMS

Mil. R. Evid. 901

Procedure: The proponent must show that:

1. The object has a unique characteristic;
2. the witness observed this characteristic on a previous occasion;
3. the witness identifies the object as the one which he has seen previously, based on the characteristic; and
4. the witness states that the object is in the same condition now as it was at the time that he previously observed it.

Predicate questions:

1. What did you find when you returned to your room?
2. What, if anything, did you find to be missing?
3. Describe the radio.
4. What make is it?
5. What model is it?
6. What, if anything, distinguished that radio from any other of the same make and model?
7. How long had you had that radio?
8. Your Honor, I request that this be marked as the next prosecution exhibit in order.
9. Let the record reflect that the reporter has marked this as PE 2 for identification. I now show PE 2 for identification to the defense counsel for his inspection.
10. Let the record reflect that the defense counsel has returned PE 2 for identification to me. Your Honor, I request permission to approach the witness.
11. Let the record reflect that I am showing PE 2 for identification to the witness.
12. Seaman Witness, what is that object?
13. How do you recognize it?
14. In what way, if any, has the condition of the radio changed since you last saw it?

15. Let the record reflect that I am retrieving PE 2 for identification from the witness. Your Honor, I now offer PE 2 for identification into evidence and request that the words, "for identification" be deleted.

-- Note, the relevancy of the exhibit should ordinarily be established before the object is introduced.

\*\*\*\*\*

-- Note: This manner of identification can also be used with a readily identifiable container holding fungible goods (see, e.g., United States v. Madela, 12 M.J. 118 (C.M.A. 1981))

## IDENTIFICATION OF FUNGIBLE ITEMS

Mil.R.Evid. 901

Procedure: The proponent must show:

1. That the witness initially received the object but subsequently transmitted it to another;
2. that the witness safeguarded it while it was in his custody in such a manner that substitution or alteration was unlikely;
3. the object was marked or accompanied by a means which permits the witness to identify the object as that which he had received and safeguarded earlier; and
4. the object is in substantially the same condition as when the object was in the possession of the witness.

Predicate questions: Sample

1. What did you find, if anything, in the accused's locker during the inspection?
2. What did you do with this sack?
3. What did you see inside the sack?
4. What did it look like?
5. What did it smell like?
6. What did you do with the sack and its contents?
7. After marking the sack with your initials and the date, what did you do with the sack and its contents?
8. Who is Special Agent Niso?
9. How did you give the sack to him?
10. What did he do with the sack?
11. After marking the sack with his initials and the time and date, what did Special Agent Niso do with it?
12. What was the condition of the sack and its contents at the time that you turned it over to Special Agent Niso compared to when you first found it?
13. Describe the precautions, if any, that you took to safeguard the sack and its contents from the time you first took it into your possession until the time you released it to Special Agent Niso.

-- Your Honor, I request permission to approach the witness.

14. Let the record reflect that I am showing the witness that which has been previously marked as prosecution exhibit 16 for identification. What is that object?
15. How do you recognize it?
16. Compared to when you last saw the sack and its contents, what are their respective conditions?
17. Let the record reflect that I am retrieving the exhibit from the witness. No further questions.

The next witness is called:

-- Preliminary questions are asked and answered

18. Do you know an individual named Master-at-Arms Witness?
19. Did you have occasion to see him on the last day in March of this year?
20. What, if anything, did Master-at-Arms Witness give you on that date?
21. Describe this sack.
22. Describe the sack's contents.
23. What did you do with the sack and its contents after receiving it?
24. What did you do with the sack after marking it with your initials, the time and the date?
25. Where is this safe located?
26. How many people other than yourself have access to that safe?
27. How secure is the office in which the safe is located?
28. How long did the sack and its contents remain in the safe?
29. Who removed the sack and its contents from the safe?
30. What was the condition of the sack and its contents at that time?
31. What did you do with the sack and its contents then?
32. What is a NIS file/case number?
33. What did you do with the sack after marking it with the NIS file/case number?
34. Who placed it in the mail?



35. What type of mail was used?
36. Who addressed the package?
37. Where was it mailed?
38. When did you next see the sack and its contents?
39. How did it return to your possession?
40. What type of mail was used to send it to you?
41. After picking it up from the post office, what did you do with it?
42. When you returned to your office, did you open the package?
43. What condition was it in compared to when you had mailed it to the crime lab two weeks previously?
44. How do you know it was the same sack and contents which you mailed to the crime lab?
45. Besides the same NIS file/case number, what, if anything, makes you sure that it was the same one?
46. After inspecting it, what did you do with the sack and its contents?
47. Is that the same safe you previously described?
48. How many other personnel had access to the safe at that time?
49. When did you next remove the sack and its contents from the safe?
50. Is today the only time that the sack and its contents have been removed from the safe since you put it in there after receiving it back from the crime lab?  
  
-- Your Honor, I request permission to approach the witness.
51. Special Agent Niso, I show you what has been previously marked as PE 16 for identification and ask you what it is.
52. How do you recognize it?
53. Compared to when you last saw the object, what is its condition?
54. Compared to when you first received the object from Master-at-Arms Witness, what is the condition of the object?
55. Let the record reflect that I am retrieving PE 16 for identification from the witness. No further questions.

The next witness is called:

-- Preliminary questions are asked and answered.

56. Let the record reflect that I am handing PE 16 for identification to the witness. Mr. Chemist, what is that object?
57. How do you recognize it?
58. Other than the lab number on the sack, what, if anything, makes you sure that it is the same sack that you received in the mail on 4 April of this year?
59. Anything else?
60. What type of mail was used to send this to you?
61. Describe the condition of the package when it was delivered to you.
62. What, if any, signs of tampering were evident on the package?
63. What did you do after inspecting the package?
64. When did you mark the sack with the lab number that you previously mentioned?
65. What did you do then?
66. After finishing your analysis of the sack's contents, what did you do with the sack and its contents?
67. Who prepared the package?
68. To whom did you address it?
69. What type of mail did you use to send it to Special Agent Niso?
70. Describe the condition of the sack and its contents both when you received them and when you mailed them.
71. When, if ever, did you leave the sack and its contents unattended by yourself while it was in your custody?  
  
(go into the results of the analysis)
72. Let the record reflect that I am showing defense counsel PE 16 for identification for his inspection and possible objection.
73. Let the record reflect that the defense counsel has returned the object to me. Your Honor, I request that the exhibit be admitted into evidence and the words, "for identification" be deleted.

AUTHENTICATION OF PRIVATE DOCUMENTS  
BY  
A WITNESS WHO OBSERVED THE DOCUMENT'S EXECUTION

Mil.R.Evid. 901, 1001, & 1002

Procedure: The proponent must show that:

1. The witness observed the document's execution;
2. the witness recognizes the exhibit as the document previously executed; and
3. how the witness recognizes the exhibit.

Predicate questions: Sample - check

1. Preliminary questions are asked and answered.
2. You stated that the accused entered your store on the afternoon of 1 July of this year. What happened after that?
3. Who was present at the time?
4. Your Honor, I request that this document be marked as the next prosecution exhibit in order.
5. Let the record reflect that the reporter has marked this as prosecution exhibit 10 for identification and returned it to me. Your Honor, may I approach the witness?
6. Mr. Storekeeper, I hand you what has been marked as prosecution exhibit 10 for identification and ask, what is that document?
7. How do you recognize it?
8. At the time it was signed and then given to you, how long did you examine it?
9. How carefully did you look at it, at that time?
10. Who signed this check?
11. How do you know that?
12. What characteristics of the check are you relying upon to identify it?
13. Whose signature appears on the back of the check?
14. When did you affix your signature to the back of the check?
15. What did you do with the check after signing it?

16. When did you next see the check?
17. Why was it returned to you?
18. (continue with questions as necessary)
19. Let the record reflect that I am retrieving the exhibit from the witness and handing it to the defense counsel for his inspection and possible objection. Let the record reflect that the defense counsel has returned the exhibit to me and that I am handing it to the military judge. Your Honor, I offer prosecution exhibit 10 for identification into evidence at this time. I request that the words, "for identification" be deleted and that the exhibit be published to the members at the appropriate time.

AUTHENTICATION OF PRIVATE DOCUMENTS  
BY  
A WITNESS FAMILIAR WITH THE AUTHOR'S HANDWRITING STYLE

Mil.R.Evid. 901, 1001, & 1002

Procedure: The proponent must show that:

1. The witness is familiar with the author's handwriting style;
2. the basis for that familiarity; and
3. the witness recognizes the author's handwriting on the exhibit.

Predicate questions: Sample - letter

1. Preliminary questions asked and answered.
2. Do you know an individual by the name of Seaman Accused?
3. How do you know him?
4. How long have you known him?
5. How well do you know him?
6. Are you familiar with his handwriting?
7. How familiar?
8. How often have you seen the accused sign his name?
9. Over what period of time have you observed the accused sign his name?
10. Your Honor, I request permission to approach the witness.
11. Let the record reflect that I am handing the witness PE 2 for identification. Petty Officer Witness, please examine the document.
12. Petty Officer Witness, what does that document appear to be?
13. Who signed that letter?
14. Why do you say that?
15. Let the record reflect that I am retrieving the document from the witness, and handing it to the defense counsel for his inspection and possible objection.

16. Let the record reflect that I am presenting prosecution exhibit 2 for identification to the military judge. Your Honor, I offer prosecution exhibit 2 for identification into evidence. I request that the words, "for identification" be deleted and that the document be published to the members at the appropriate time.

(it is assumed that the exhibit was proved to be an original prior to its introduction)

## VERIFICATION OF A CHART OR DIAGRAM

Mil.R.Evid. 901

Procedure: The proponent must show:

1. The witness is familiar with the area or object depicted in the chart or diagram;
2. the basis of that familiarity;
3. the witness recognizes the chart or diagram as depicting the area or object with which he is familiar; and
4. the witness states that the chart or diagram is accurate.

Predicate questions: Sample - diagram

1. Preliminary questions are asked and answered.
2. Are you familiar with the fantail of USS MIDWAY?
3. How familiar?
4. How often have you been there?
5. Over what period of time have these visits taken place?
6. Your Honor, I request permission to have this diagram marked as prosecution exhibit 1 for identification.
7. Your Honor, I request permission to approach the witness.
8. Chief Witness, please examine prosecution exhibit 1 for identification. You may step down from the witness stand to do so if you like.
9. What does that exhibit appear to be?
10. How do you recognize it?
11. How accurate is that diagram?
12. Other than not being to scale, how accurate is it?
13. How accurately does it show the relationship of the engine testing mount to the safety nets?
14. (continue questions as needed)

Note that some military judges may prefer to have the diagram marked as an appellate exhibit. The exhibit may be offered after it has been verified or after all witnesses who will use it during their testimony have taken the stand.

## AUTHENTICATION OF X-RAYS

Mil.R.Evid. 901, 1001 & 1002

Procedure: The proponent must:

1. Show that the witness was a qualified x-ray technician at the time the x-ray was taken;
2. the witness took the relevant x-ray at a certain time and place;
3. the witness used equipment in good working order to take the x-ray;
4. the witness used correct procedures, including identification procedures, to take the x-ray;
5. the witness maintained proper chain of custody between the time the x-rays were taken and the time that they were developed; and
6. the witness recognizes the exhibit as the relevant x-ray.

Predicate questions: Sample

1. State your name, rank, unit, and armed force.
2. What is your billet or position at Naval Hospital, Newport?
3. How long have you worked as an x-ray technician?
4. What is your formal education?
5. What specialized training have you had as an x-ray technician?
6. Where did you receive that training?
7. What type of courses did you take?
8. How long did this training last?
9. Directing your attention to the 2nd of May of this year, were you at work?
10. And, did you have an occasion to see an individual by the name of Injured Victim?
11. Who is Injured Victim?
12. What did you do when Injured Victim arrived at the laboratory?
13. What happened next?
14. What equipment did you set up?



15. What is an x-ray machine?
16. What is a cassette?
17. What is the identification assembly?
18. What was the condition of the x-ray machine, cassette, and identification assembly?
19. How do you know that?
20. What did you do after preparing the machine and related equipment for use?
21. After making the exposure, what did you do?
22. What did you do with the cassette?
23. Where was the cassette between the time of its exposure and its development?
24. Who else handled the cassette during that time period?
25. Who developed the cassette?
26. How did you develop the cassette?
27. What happened next?
28. Your Honor, I request permission to approach the witness.
29. Let the record reflect that I am handing the witness prosecution exhibit 2 for identification. Corpsman Witness, I want you to examine it closely.
30. What is prosecution exhibit 2 for identification?
31. How do you recognize it?
32. How did this exhibit come to be here today?
33. Where did you get it this morning?
34. Is it in the same condition as when you pulled it from the hospital files?

SELF-AUTHENTICATION OF DOCUMENTS OF THE UNITED STATES  
ACCOMPANIED BY AN ATTESTING CERTIFICATE

Mil.R.Evid. 902(4a)

Procedure:

1. A true copy of an official record must be attached to a certificate.
2. The certificate must:
  - a. State that the signatory is a custodian of the record;
  - b. state that the copy of the document is true and accurate; and
  - c. be signed in the custodian's official capacity.

Predicate questions:

1. Your Honor, I request that this document be marked as the next defense exhibit in order.
2. Let the record reflect that this document has been marked as defense exhibit 3 for identification and that the reporter has returned it to me.
3. Your Honor, I offer what has been marked as defense exhibit 3 for identification into evidence. It purports to be a true copy of the accused's enlistment contract and is accompanied by an attesting certificate which states that its signatory is the custodian of the file in which the original is maintained, that the copy is true and accurate and that the certificate was signed in the custodian's official capacity. It is requested that you take judicial notice of the signature and of the custodian's duties.
4. Let the record reflect that I am showing defense exhibit 3 for identification to the trial counsel for her inspection and possible objection.
5. Let the record reflect that the trial counsel has returned the document to me and that I am handing the document to the military judge. Your Honor, I offer defense exhibit 3 for identification into evidence at this time and request that the words, "for identification" be deleted.

SECTION IX  
CONTENTS OF WRITINGS,  
RECORDINGS,  
and  
PHOTOGRAPHS

## VERIFICATION OF PHOTOGRAPHS

Mil.R.Evid. 901, 1001 and 1002

Procedure: The proponent must show:

1. That the witness is familiar with the object depicted in the photograph;
2. the witness has a basis for that familiarity;
3. the witness recognizes the object depicted in the photograph as that with which he or she is familiar;
4. the photograph is a fair depiction of the object at the relevant time; and
5. the photograph is an original (negative or any print therefrom).

Predicate questions: Sample

1. State your name, rank, unit, and armed force.
2. What billet do you fill?
3. How long have you worked in the motor pool?
4. What are your duties there?
5. As a mechanic, do you have occasion to work on the general's jeep?
6. How often would you work on that jeep in a given month?
7. How many times have you seen that jeep since you began working in the motor pool?
8. Your Honor, I request permission to approach the witness.
9. Let the record reflect I am showing, what has been previously marked as prosecution exhibit 3 for identification to the witness.
10. Corporal Witness, what is prosecution exhibit 3 for identification?
11. How do you recognize it?
12. What perspective or viewpoint does that photograph give of the general's jeep?
13. How accurate is that photograph?

14. How accurately does it show the condition of the jeep on 15 December of last year?

-- Let the record reflect that I am retrieving prosecution exhibit 3 for identification from the witness. No further questions.

The next witness is called:

-- Preliminary questions are asked and answered.

15. Your Honor, I request permission to approach the witness.

16. Seaman Witness, I hand you what has been marked as prosecution exhibit 3 for identification and ask you what it is.

17. How do you know that?

18. When was that picture developed?

19. Who developed it?

20. Who made the prints?

21. From what were the prints made?

22. Where is the negative?

23. What, if any, alterations were made to prints?

24. What, if any, alteration appears on PE 3 for identification?

25. No further questions. Let the record reflect that I am retrieving the exhibit from the witness and handing it to the defense counsel for her inspection and possible objection. Your Honor, at this time, I offer prosecution exhibit 3 for identification into evidence and request that the words, "for identification" be deleted.