

New Developments in Evidence 2000

Major Victor M. Hansen
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

Introduction

This past year's cases addressing the rules of evidence once again illustrate the dynamic nature of evidence law. The breadth and scope of issues covered by the rules of evidence truly is daunting. Appellate courts examining evidentiary issues with the benefit of 20/20 hindsight often see issues that practitioners in the heat of battle overlook. Reading these appellate court opinions can be both enlightening and frustrating from the viewpoint of the trial practitioner. Enlightening because the appellate courts may discuss the rules and provide explanation on a level that trial practitioners have never considered. Frustrating because it may seem impossible to reach that level of sophistication in the context of a trial.

Nonetheless, practitioners are not absolved of the responsibility of knowing and correctly applying the rules of evidence just because the task is challenging and sometimes overwhelming. This article is an attempt to distill some of the most important lessons and trends in evidence law over the past year to aid trial practitioners in their task. The focus is primarily on cases from the Court of Appeals for the Armed Forces (CAAF). The article also discusses significant federal circuit cases, one Supreme Court case, and a few service court cases.

Differing Standards of Logical and Legal Relevance

Over the past two terms, the CAAF has scrutinized urinalysis cases very closely. Last term, the CAAF surprised many practitioners with their opinions in *United States v. Graham*¹ and *United States v. Campbell*.² In both cases, the CAAF argu-

ably departed from previous case law in reversing two urinalysis convictions.³ The court continued the trend this year in *United States v. Matthews*⁴ by applying a standard for logical and legal relevance that is stricter for urinalysis cases than in other contexts.

Military Rule of Evidence (MRE) 401 defines logical relevance as evidence that has any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence.⁵ Practitioners have long recognized that this is a low standard.⁶ Military Rule of Evidence 403 sets out the requirements for legal relevance, stating that even relevant evidence can be excluded if the probative value is substantially outweighed by the risk of unfair prejudice, confusion, delay or cumulativeness.⁷ To understand how the CAAF is applying a stricter standard for logical and legal relevance in urinalysis cases than in other areas, it is helpful to look first at how the court applies these concepts in other cases. *United States v. Burns*,⁸ a case decided this year, provides a good example.

Typical Application of Logical and Legal Relevance

In *Burns*, an officer and enlisted panel convicted the accused of conspiracy to commit rape and indecent acts.⁹ On the night of the crime, the accused held a party at his apartment and a number of airmen attended. All of the partygoers, including the accused and the victim, were drinking heavily. Late into the night everyone left except for the victim, the accused, and two other male airmen. The victim eventually fell asleep.¹⁰ She later awoke and found herself naked in the bedroom with one of

1. 50 M.J. 56 (1999).

2. 50 M.J. 154 (1999), supplemented in reconsideration at 52 M.J. 386 (2000).

3. Major Walter M. Hudson & Major Patricia A. Ham, *United States v. Campbell: A Major Change for Urinalysis Prosecutions?*, ARMY LAW., May 2000, at 38.

4. 53 M.J. 465 (2000).

5. Military Rule of Evidence 401 provides that: "Relevant evidence means evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 401 (2000) [hereinafter MCM].

6. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 473 (4th ed. 1997).

7. MCM, *supra* note 5, MIL. R. EVID. 403.

8. 53 M.J. 42 (2000).

9. *Id.* at 42.

the male airman having sex with her. She heard other voices in the room and started to struggle. Then someone held her wrists while the airman continued to have sex with her. Once she was released, she ran out of the apartment and a passing motorist picked her up and took her back to base.¹¹ The accused later admitted to removing the victim's clothes and molesting her but said any sexual intercourse between her and the other airmen was consensual.¹²

The next day the police searched the accused's apartment and found an unopened condom at the head of the accused's bed on the floor. The government introduced a photo of the condom at trial claiming that this sexual paraphernalia was relevant to show the existence of a conspiracy to commit rape. The defense objected on relevancy grounds because there was no link between the condom and the alleged crimes.¹³ The military judge admitted the evidence over the defense objection.¹⁴

The CAAF ruled that under MRE 401, this evidence was relevant to corroborate the victim's statement that the rape occurred in the bedroom and as evidence of the conspiracy.¹⁵ The CAAF also said that since the charge was conspiracy, as long as the condom was linked to one of the co-conspirators that was sufficient to make it relevant against the accused.¹⁶

Guidance

There is nothing particularly new or earth shattering about the holding in *Burns*. It is simply a good reminder of the low standard for logical relevance under MRE 401. The language in the rule, "any tendency," means just what it says. In this case, the nexus between the crime and an unopened condom found in a bedroom is very slight at best. Yet, given the low standard of MRE 401 and the relatively innocuous nature of the evidence, it satisfies the basic criteria. It is also interesting to note that the evidence was deemed to be admissible to show the location of

the crime, even though it does not appear from the record that the government offered it for that purpose at trial. This case is interesting when compared with *United States v. Matthews*,¹⁷ because it illustrates how the CAAF applies logical and legal relevance in a much stricter fashion in urinalysis cases.

A Stricter Application of Relevance

Staff Sergeant Matthews, an Air Force Office of Special Investigations (OSI) agent, was randomly selected to provide a urine sample on 29 April 1996.¹⁸ That sample tested positive for delta-9-Tetrahydrocannabinol (THC). Twenty-three days after she submitted the first sample, the accused was tested again as part of a command directed urinalysis. She tested positive for THC on the second sample as well.¹⁹ The accused was only charged with the first use. At trial, the accused put on a good soldier defense. The accused testified in her defense. On direct examination, she testified that she had not used marijuana between the 1st and 29th of April. She also testified that she had no idea how the sample could have tested positive for THC.²⁰

After the accused testified on direct examination, the military judge allowed the government to introduce evidence of the second positive urinalysis which took place on 21 May. The government introduced expert testimony that this second positive urinalysis was from a separate use.²¹ The judge admitted this evidence as rebuttal evidence under MRE 404(b) to show knowing use by the accused.²² The judge specifically held that the probative value of this evidence was not outweighed by the risk of unfair prejudice, citing MRE 403.²³

The judge did place some limitations on this evidence. He ruled that the government could not use this evidence to impeach the accused's character for truthfulness under MRE 608(b).²⁴ In spite of this ruling, however, the military judge

10. *Id.* at 43.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 44.

16. *Id.*

17. 53 M.J. 465 (2000).

18. *Id.* at 467.

19. *Id.*

20. *Id.*

21. *Id.* at 468.

held that the accused's testimony that she did not use marijuana at any time between 1 and 29 April opened the door to impeachment with evidence of the second positive urinalysis.²⁵ He also instructed the members that they could consider this evidence of a second positive urinalysis to assess the credibility of the accused's testimony.²⁶

At trial and on appeal, the defense contended that this was not proper rebuttal evidence because the accused had done nothing more than deny the elements of the offense. The Air Force court disagreed.²⁷ That court said that the accused asserted an innocent ingestion defense by testifying that she had no qualms about the collection and testing procedure and that she had no idea of how the THC got into her system.²⁸ Moreover, the court noted that by putting on a good soldier defense,

she opened the door under 404(a)(1)²⁹ to allow the government to cross examine witnesses with evidence of bad character.³⁰ The court analogized this case to *United States v. Trimper*³¹ and held that a date specific denial coupled with a good soldier defense is analogous to a sweeping denial that allows the government to impeach with contradictory facts both to attack the accused's credibility and rebut evidence of good military character.³²

The CAAF disagreed. First the court noted that while the accused opened the door to rebuttal evidence of her good military character by testifying that she was a good soldier, MRE 405(a)³³ limits that evidence to cross-examination about specific acts.³⁴ The rule does not allow introduction of extrinsic evidence, as was done here where the government introduced

22. Military Rule of Evidence 404(b) provides in part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident[.]

MCM, *supra* note 5, MIL R. EVID. 404(b).

23. *Matthews*, 53 M.J. at 468.

24. Military Rule of Evidence 608(a) states:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for untruthfulness has been attacked by opinion or reputation evidence or otherwise.

MCM, *supra* note 5, MIL R. EVID. 608(a).

25. *Matthews*, 53 M.J. at 469.

26. *Id.*

27. *United States v. Matthews*, 50 M.J. 584 (A.F. Ct. Crim. App 1999).

28. *Id.* at 588.

29. MRE 404 (a) provides in part:

Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except: (1) Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same.

MCM, *supra* note 5, MIL R. EVID. 404(a)(1).

30. *Matthews*, 50 M.J. at 588.

31. 28 M.J. 460 (C.M.A. 1989). In *Trimper*, the accused, an Air Force judge advocate, was charged with several specifications of wrongful use of marijuana and cocaine in violation of Article 112(a), UCMJ. In his defense the accused testified that he had never used drugs. To rebut that claim, the government was allowed to introduce the test results of a urine sample submitted by the accused to a civilian hospital. The testing occurred outside of the charged incidents and it revealed that the accused's urine tested positive for cocaine. The then Court of Military Appeals held that the accused by his own testimony and sweeping denials opened the way for the prosecution to use the test results, even though the results would have otherwise been inadmissible. *Id.* at 461.

32. *Matthews*, 50 M.J. at 588-589.

33. Military Rule of Evidence 405(a) provides: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." MCM, *supra* note 5, MIL R. EVID. 405(a).

34. *United States v. Matthews*, 53 M.J. 465, 470 (2000).

the actual test results. The court also said that the cross-examination should be limited to acts committed prior to the charged offense.³⁵ Here the act occurred twenty-three days after the charged offense. This portion of the opinion is arguably dicta because, as the CAAF noted, the military judge did not instruct the members on this theory of admissibility.³⁶ The comment does, however, raise some concerns discussed below.

The CAAF also disagreed with the military judge and the Air Force court that the extrinsic evidence of the second urinalysis was admissible to impeach the accused's credibility with contradictory facts.³⁷ First, the trial judge did not adequately instruct the members on how they may properly consider this evidence as impeachment.³⁸ More importantly, the evidence did not impeach the accused's very carefully limited testimony that she did not knowingly use drugs between 1 and 29 April, because the evidence did not contradict that point.³⁹

Finally, consistent with their opinion last year in *Graham*, the CAAF said that this evidence does not prove knowing use on the date charged. Here the majority rejected Judge Crawford's argument that this evidence was admissible to prove guilty knowledge under the doctrine of chances.⁴⁰ Judge Crawford argued in dissent that it was unlikely that the accused would repeatedly be innocently involved in drug use, and thus the second urinalysis was admissible to show her guilty knowledge.⁴¹ The majority rejected that argument, reasoning that there was no factual predicate about how the accused ingested the marijuana on either occasion. Such a factual predicate, the majority said, is required in order to make this theory of admissibility relevant.⁴² The CAAF held that evidence of an unlawful substance in an accused's urine at a time before the charged offense may not be used to prove knowledge on the date charged. Further, evidence of an unlawful substance in the accused's urine after the date of the charged offense and not

connected to the charged offense may not be used to prove knowing use on the date of the charged offense.⁴³

Guidance

The standard for logical relevance is any tendency. The CAAF showed in *Burns* how low that standard can be. Yet in *Matthews*, when the case involves an uncharged urinalysis, the requirements seem more stringent and the court is scrutinizing the evidence much more closely. A couple of points warrant further comment. First, at the trial level, it does not appear that the government argued that evidence of the second positive urinalysis could be used in cross-examining the accused and other character witnesses under MRE 404(a)(1) and MRE 405(a), to rebut her good military character claim. Had this theory been argued at trial, the majority's statement that cross-examination should be limited to acts that occurred prior to the charged offense would have even more significance. The court did not rely on any legal authority for their proposition other than the opinion of the authors of the *Military Rules of Evidence Manual*.⁴⁴ The authors of that treatise do not cite to any legal authority for that opinion. Nothing in the language of the rule or the drafter's analysis places any time restriction on the use of evidence in cross-examination. In fact, there are similar federal district court cases where post offense misconduct is used.⁴⁵

The rationale for excluding post offense misconduct when cross-examining a character witness under MRE 405(a) seems to be that the court is only concerned with the accused's character at the time of the offense, and only prior misconduct would be relevant to the accused's character on that date. This rationale does not make sense. As the Air Force court noted, to accept that proposition would require a court to hold that an accused can state that "my good military character should create a reasonable doubt in your mind that I knowingly used mar-

35. *Id.*

36. *Id.*

37. *Id.* at 471.

38. *Id.* The CAAF noted that the military judge instructed the members that the second positive urinalysis could be considered in their assessment of appellant's credibility without giving any further guidance. This instruction was also contradictory to his earlier ruling that MRE 608 was not a proper basis for the admission of the second urinalysis. *Id.*

39. *Id.*

40. *Id.* at 470.

41. *Id.* at 473 (Crawford, J., dissenting).

42. *Id.* at 470-471.

43. *Id.* at 470.

44. *Id.* (citing SALTZBURG, *supra* note 6, at 572).

45. See, e.g., *Crowder v. United States*, 141 F.3d 1202 (D.C. Cir. 1998). In *Crowder*, the government used post-offense misconduct under Federal Rule of Evidence (FRE) 404(b) to prove the accused's identity at the time of the offense.

ijuana between the 1st and the 29th of April, but all bets are off after that date.”⁴⁶ Certainly, misconduct within a few days of the charged offense may be logically relevant as to the accused’s character on the date of the offense. A leopard cannot change its spots that quickly. Instead of a blanket prohibition, a better approach is to look at each case on its facts and for the military judge to consider the timing of the misconduct as one factor to weigh in the logical and legal relevance analysis.

The second point of note in *Matthews* is that the majority views the doctrine of chances theory of admissibility very narrowly. According to the majority, unless there is some evidence of how the accused ingested the substance into her system on each occasion, a second positive urinalysis for the same drug would never be relevant to show her knowledge. In a paper urinalysis case there will rarely be a sufficient factual predicate of the various ingestions. The factual predicate that the court should focus on is not the circumstances surrounding the ingestions, but the fact that the accused tests positive for the same drug more than once over a short time period and asserts an innocent ingestion defense. The fact that the accused tests positive in another instance logically rebuts the claim that the charged use was unknowing, since the chances of two visits by the dope fairy⁴⁷ are rare.

In spite of these criticisms, practitioners must appreciate the trend of a majority of the CAAF judges. Reading *Matthews* together with the CAAF’s opinions in *Campbell* and *Graham* from last term, the inescapable conclusion is that a majority of the CAAF is scrutinizing urinalysis cases very closely. The government is more restricted than in the past on the methods they can use in order to obtain a conviction. Attempts to prove the accused’s knowledge with evidence of prior or post offense use will probably fail.

Character Evidence

The next series of cases involve various aspects of character evidence, primarily of the accused. Some interesting points here are that the appellate courts do not like profile evidence of the accused or any other witnesses, and the rules apply equally

to both parties. There are also a few examples where very old uncharged misconduct is admitted under MRE 404(b) but recent post offense misconduct may not be admissible under MRE 413.

What’s Good for the Goose . . .

The Air Force court reminded defense counsel that the character rules apply equally to them as they do to the government. In *United States v. Dimberio*,⁴⁸ an officer and enlisted panel convicted the accused of aggravated assault against his child.⁴⁹ On the evening and early morning hours of 2-3 February 1997, the accused was alone with his son upstairs for several hours. In the morning, the baby’s mother was awakened by the baby’s cry and she ran upstairs to see the accused putting the baby in the crib. The child had dried blood around his nose and mouth and his nose was red.⁵⁰ The wife took the child to the hospital that morning and further examination revealed that the baby had been severely injured and the injuries were consistent with being shaken in the hours immediately before the examination.⁵¹ The accused made some partial admissions about handling the baby in a rough manner and then invoked his rights. At trial, the defense theory was that the wife had equal access to the child and she could have been the source of the injury.⁵²

In support of this theory, the defense first introduced testimony from an expert in child abuse who testified that shaken baby syndrome is a quick, unthinking act that can be triggered by anger, frustration, or stress.⁵³ The defense next wanted to call a psychiatrist regarding the mental health diagnosis of the accused’s wife. The defense expert, Dr. Sharbo, reviewed the wife’s medical records and interviewed her. He diagnosed her with a non-specific personality disorder with narcissistic, histrionic, and borderline traits. The expert also opined that she could not be expected to handle stressful situations well. The military judge excluded the evidence as irrelevant because there was no link to the mother’s impulsive behavior and violence.⁵⁴

The Air Force court affirmed the conviction. The court said that what the defense was really trying to do was to introduce

46. *United States v. Matthews*, 50 M.J. 584, 589 (A.F. Ct. Crim. App. 1999).

47. The term dope fairy comes from the Air Force court’s opinion in *United States v. Graham*, 46 M.J. 583, 586 (A.F. Ct. Crim. App. 1997).

48. 52 M.J. 550 (A.F. Ct. Crim. App. 1999).

49. *Id.* at 552.

50. *Id.* at 553.

51. *Id.*

52. *Id.* at 554.

53. *Id.* at 555.

54. *Id.* at 556.

profile evidence of the wife and show that she was predisposed to act in a certain manner. This is something that the character rules do not allow.⁵⁵ The court rejected the defense argument that this evidence was admissible under MRE 404(b), “other crimes, wrongs, or acts,” to show the wife’s mental state. First, the court said that even if the accused’s wife had this mental condition, such a character trait does not equate to evidence of a guilty state of mind, which is the type of mental state contemplated by MRE 404(b).⁵⁶ The Air Force court, like the military judge, also questioned the logical and legal relevance of this evidence because there was no evidence that the wife acted violently when stressed or that people with histrionic personalities are more or less likely to shake a baby than anyone else.⁵⁷

As another indication that the defense was attempting to introduce profile evidence, the Air Force court noted that MRE 404(b) refers to evidence of other crimes, wrongs, or acts. In this case, however, the defense was not offering acts, but a mental diagnosis; in other words, character evidence. The rules do not allow this. The only character trait that is admissible for a witness other than the accused or the victim is a witness’s character for truthfulness or untruthfulness.⁵⁸ The court said that the wife’s mental diagnosis was not probative of truthfulness or untruthfulness.⁵⁹ The court also rejected the defense argument that due process requires the court to relax the rules of evidence when evaluating evidence favorable to the defense. The court held that evidence proffered by the accused must meet the same standards for admissibility as those imposed on the prosecution.⁶⁰

Guidance

This opinion explains the concepts of legal and logical relevance and their relationship to the character rules very clearly. An attempt to launch a character assault on a witness is not allowed. The opinion is a good reminder to practitioners that

under MRE 404(a)(3) and MRE 608 the only character trait of a witness other than the accused or the victim that the law is concerned with is the witness’s character for truthfulness or untruthfulness. The opinion also tells trial lawyers that the evidence must satisfy the basic requirements of relevance, even if it is expert testimony and even if the expert has the requisite qualifications. There are no special exceptions for expert witnesses or defense proffered evidence. The rules mean what they say and apply equally to both sides. There is no special exception that allows the military judge to apply a different and lower standard of relevance simply because the evidence is being offered by the defense. One final point from this opinion: Even though courts tend to interpret MRE 404(b) broadly to allow bad acts evidence for a non-character theory of relevance, the rule must be complied with. Military Rule of Evidence 404(b) is not an exception to the rules prohibiting propensity evidence. In order for evidence to come in under MRE 404(b), counsel must convincingly articulate a non-character theory of relevance.

How Old is Too Old?

The next two cases deal with MRE 404(b) evidence in the context of past sexual assaults. Both of these cases were litigated before MRE 413⁶¹ and MRE 414⁶² came into effect, which may change the outcome in future cases. Both cases involved very old incidents of past sexual assaults. In one case, the CAAF found the evidence inadmissible, in the other, the court said the evidence was properly admitted. These cases serve as a reminder that admissibility of MRE 404(b) evidence is very fact specific, and it is difficult to glean rules that will apply across the board.

The first case is *United States v. Baumann*.⁶³ The accused, Sergeant Baumann, was convicted in 1997 by an officer and enlisted panel of indecent acts and indecent liberties with a

55. MCM, *supra* note 5, MIL. R. EVID. 404.

56. *Dimberio*, 52 M.J. at 557-8.

57. *Id.*

58. Military Rule of Evidence 404 (a) provides in part: “Evidence of a person’s character or a trait of a person’s character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except: (3) Evidence of a character of a witness, as provided in Mil. R. Evid. 607, 608, and 609.” MCM, *supra* note 5, MIL. R. EVID. 404(a)(3).

59. *Dimberio*, 52 M.J. at 558.

60. *Id.* at 559.

61. Military Rule of Evidence 413 provides in part: “(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused’s commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.” MCM, *supra* note 5, MIL. R. EVID. 413(a).

62. Military Rule of Evidence 414 provides in part: “(a) In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused’s commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.” MCM, *supra* note 5, MIL. R. EVID. 414(a).

63. 54 M.J. 100 (2000).

child.⁶⁴ The accused was charged with having his eleven-year-old daughter masturbate him and placing his hands on his daughter's breasts and between her legs. The government admitted a statement that the accused made to the military police. In the statement, the accused admitted, among other things, to masturbating in front of his daughter in order to teach her how boys masturbate.⁶⁵ The government also introduced the testimony of the victim and the accused's wife.

The defense theory was that the accused's wife coached the victim to embellish and lie about the deliberate touching because she wanted a divorce.⁶⁶ In response to questions from the military judge, the accused's wife testified that she initiated divorce proceedings in March 1997 after finding out about the alleged abuse that occurred in 1992 as well as other information she found out about the accused from his mother. She did not explain what this other information was.⁶⁷

Later, one of the members submitted a question asking what Mrs. Bauman had found out from the accused's mother. Over defense objection, Mrs. Bauman was allowed to testify that the accused's mother told her that the accused had sexually molested his younger sisters when he was thirteen, some twenty-five years earlier.⁶⁸ The military judge ruled that this evidence was admissible under MRE 404(b) to explain why the accused's wife ultimately decided to initiate divorce proceedings and to rebut the defense claim that Mrs. Bauman had coached her children to make accusations against the accused. The judge also ruled that this evidence was not unduly prejudicial under MRE 403.⁶⁹ The judge followed the wife's testimony with a limiting instruction.⁷⁰

The CAAF held that it was harmless error for the military judge to admit this evidence.⁷¹ First, on the hearsay issue, the CAAF said that because the evidence was offered to show what was said to the accused's wife that caused her to seek a divorce, it was offered for a non-hearsay purpose.⁷² The court then did an MRE 404(b) analysis. The CAAF ruled that this evidence was being admitted for a proper non-character purpose, not to

show that the accused had a propensity to commit this type of crime. The court said that this evidence was relevant under MRE 404(b) to show the wife's motive for seeking a divorce. The defense had argued that nothing in MRE 404(b) allows the actions of the accused to prove the motive of another person. According to the CAAF, even though MRE 404(b) does not specifically allow for this, the list of permissible uses of uncharged misconduct in the rule is not exclusive, and other non-character theories such as this are permissible.⁷³

The evidence is still subject to an MRE 403 balancing and it is here that the court said that the trial judge erred. The CAAF said that the government already had ample evidence of the wife's motive for a divorce without this evidence. The need for this evidence was, therefore, relatively low. On the other hand, the potential for unfair prejudice and confusion was great and the military judge abused his discretion by admitting this evidence. In light of the other evidence of the accused's guilt, however, the court ruled that the error was harmless.⁷⁴

Guidance

Baumann is a good case for understanding the workings of MRE 404(b) and serves as a reminder that the potential uses of MRE 404(b) evidence are not limited to the factors listed in the rule. Consistent with the federal courts, the CAAF has repeatedly held that this is a rule of inclusion. The key to satisfying 404(b) is that the party offering the evidence must articulate a valid non-character theory of relevance. This, however, does not end the analysis. Military Rule of Evidence 403 may still exclude otherwise relevant evidence because of unfair prejudice or other concerns. Here the court focused on the government's need for this evidence. Necessity is often an important factor when litigating admissibility of evidence under MRE 403. If the proponent has less inflammatory evidence that can prove the same issue, the MRE 403 scale may be tipped against admitting the evidence. Although this case was litigated before

64. *Id.* at 101.

65. *Id.*

66. *Id.* at 102.

67. *Id.*

68. *Id.* at 103.

69. *Id.* at 102.

70. *Id.* at 103.

71. *Id.* at 105.

72. *Id.*

73. *Id.* at 104.

74. *Id.* at 105.

the promulgation of MRE 414 the same MRE 403 analysis should apply.

The other interesting point to note is that the military judge and the CAAF did not comment on the fact that the uncharged misconduct occurred some twenty-five years earlier while the accused was still a juvenile. The CAAF avoided that issue by saying that the focus of their analysis is not on the underlying conduct, but rather on the wife's reaction to the information. The court, however, cannot ignore the potential prejudice that the uncharged misconduct itself could have on the members. Although the court did not address the issue directly, the age of the incident and the accused's status as a juvenile at the time may also have played a role in their MRE 403 analysis. As we see from this case and the case that follows, the fact that the uncharged misconduct occurred several years in the past is not in and of itself dispositive of the MRE 403 issue.

The second case, *United States v. Tanksley*,⁷⁵ involved uncharged misconduct that was nearly thirty years old. A panel convicted the accused, a Navy Captain of indecent liberties with his child and other offenses.⁷⁶ The accused first married in 1959. He and his wife had four daughters. The accused and his first wife divorced in 1980 amid allegations that the accused physically and sexually abused his daughters.⁷⁷ Captain Tanksley later remarried and had a daughter from this second marriage. In 1993, the accused, his new wife, and his now six-year-old daughter were visiting with one of his older daughters. During the visit, an older daughter noticed an incident where the accused and his six-year-old took a shower together and then the accused had his six-year-old dry him off.⁷⁸ This incident brought back memories of the abuse the elder daughter had suffered at the hands of the accused years before, so she reported the incident to law enforcement and social workers.⁷⁹ Captain Tanksley was subsequently charged with indecent liberties for this incident in the shower and one other incident in the bathtub.⁸⁰

75. 54 M.J. 169 (2000).

76. *Id.* at 170.

77. *Id.* at 171.

78. *Id.*

79. *Id.*

80. *Id.* at 173.

81. *Id.* at 174.

82. *Id.*

83. *Id.* at 175.

84. *Id.*

85. *Id.* at 176.

86. *Id.*

At trial, the victim did not testify. The government did introduce the testimony of the accused's oldest daughter, who testified that when she was a young child the accused sexually molested her in the bathtub. These incidents involved bathing her, digitally penetrating her, and fondling her. By the time she was nine or ten, the accused began raping her.⁸¹ The military judge admitted this evidence under MRE 404(b) to show the accused's intent to molest his now six-year-old daughter. These thirty-year-old incidents showed the accused's lustful intent.⁸² The defense objected to this evidence on MRE 404(b) grounds because the uncharged misconduct was too remote and dissimilar to the charged offenses. The defense also argued that the uncharged misconduct evidence diluted the presumption of innocence and should be precluded under MRE 403 because the evidence was unfairly prejudicial.⁸³ The military judge overruled these objections.

The CAAF affirmed the conviction, holding that the trial judge did not abuse his discretion by admitting this uncharged misconduct. The court noted that intent is an element of the offense and, consistent with previous case law, a pattern of lustful intent in one set of circumstances is relevant to show lustful intent in a different set of circumstances.⁸⁴ The court also noted that although the prior incident was thirty years old, the two incidents were very similar and evidenced an intent by the accused to sexually abuse his daughters when they reached a certain age. The court rejected the defense counsel's argument that the uncharged misconduct must be almost identical for it to be relevant and admissible.⁸⁵ The CAAF also agreed that the probative value of this evidence was not outweighed by unfair prejudice.⁸⁶

Guidance

Although the CAAF in *Baumann* did not discuss the age of the uncharged misconduct, it was a factor that the court dis-

cussed in *Tanksley*. The court overcame the time gap concern by stating that a pattern of lustful intent in one situation can be used to show lustful intent on another occasion, so long as the acts are similar in nature. It is on this point that Judge Effron dissented. According to the dissent, the incidents that occurred some thirty years ago involved significant differences in the nature of the acts and surrounding circumstances.⁸⁷ For example, the prior incidents were done in secret, involved digital penetration, and did not include the daughter drying off her father. None of those facts were present in the charged offenses. Because of these differences, Judge Effron said that the government failed to show a pattern of conduct that would make this evidence admissible under MRE 404(b).⁸⁸

The majority and dissenting opinions provide a good example of how narrowly or how broadly courts can read MRE 404(b). The trend in sexual assault and child abuse cases over the last several years has been to read MRE 404(b) very broadly in order to allow for the admission of uncharged misconduct. In fact, the majority's language stating that a pattern of lustful intent on one occasion can be used to show a pattern on another occasion sounds disturbingly like propensity evidence.

With the promulgation of MRE 413 and MRE 414, any pretense that this evidence is not being used as propensity evidence is gone. The dissent recognized this, noting that after the promulgation of MRE 414 this evidence may be admissible. Judge Effron correctly recognized, however, that just because evidence is admissible under MRE 414, the evidence is not per se admissible under MRE 404(b).⁸⁹ The cases discussing MRE 413 and MRE 414 sometimes blur this distinction.

Both *Baumann* and *Tanksley* also illustrate the very factual analysis necessary when litigating the admissibility of evidence under MRE 404(b). The similarity of the uncharged misconduct to the charged offense and the availability of other, less prejudicial evidence to prove the disputed issue are both important in this analysis. These factors also have a role in admitting evidence under the new MRE 413 and MRE 414.

Propensity Evidence is Here to Stay

Military Rules of Evidence 413 and 414 have now been in effect for a few years. These rules represent a significant depar-

ture from the long-standing prohibition against using uncharged misconduct to show that the accused is a bad person or has the propensity to commit criminal misconduct. The language of both rules state that in a court-martial for sexual assault and child molestation offenses, evidence that an accused committed other acts of sexual assault or child molestation can be considered for its bearing on "any matter to which it is relevant."⁹⁰ While the language "any matter to which it is relevant" does not specifically mention propensity, the practical effect of these rules is to allow admission of propensity evidence. As discussed above, courts addressing uncharged misconduct under MRE 404(b) have consistently held that the only thing MRE 404(b) does not allow the proponent to do is use the evidence to show propensity. In sexual assault and child molestation cases the only new "matter" for which the fact finder can now consider the uncharged misconduct, that they could not before these new rules, is the accused's propensity to commit these types of crimes.

This year two cases have finally made their way up to the CAAF for review of these rules. Not surprisingly, in both cases the CAAF followed the lead of the federal courts and held that these new rules of evidence are constitutional. Interestingly, however, some members of the court believe that post offense misconduct is per se excluded under these new rules.

The first case addressed MRE 413.⁹¹ In *Wright*, officer members tried the accused. He pleaded guilty to indecent assault of P in October 1996. He pleaded not guilty but was convicted of indecent assault of D in April 1996, assault consummated by a battery on D in August of 1996, and house-breaking of P's room in October 1996.⁹² At trial, the government wanted to introduce evidence of the indecent assault against P that the accused pleaded guilty to show that he had the propensity to commit the offenses against D, six and three months earlier. The government argued that evidence of the October indecent assault would already come before the members to prove the housebreaking charge and MRE 403 should not, therefore, exclude the use of the evidence for propensity purposes.⁹³ The military judge agreed, finding that the indecent assault against P was close in time and similar in nature to the other charged offenses, and MRE 413 allowed this evidence to prove propensity.⁹⁴ The military judge also held that MRE 413 was constitutional.⁹⁵

87. *Id.* at 179 (Effron, J., dissenting).

88. *Id.*

89. *Id.*

90. MCM, *supra* note 5, MIL. R. EVID. 413, 414.

91. *United States v. Wright*, 53 M.J. 476 (2000).

92. *Id.* at 478.

93. *Id.*

On appeal the defense challenged the constitutionality of MRE 413. The defense claimed that the use of this propensity evidence violates the Due Process Clause of the Fifth Amendment.⁹⁶ Relying on a number of recent federal court cases,⁹⁷ the CAAF rejected the defense challenge and held that MRE 413 was constitutional. According to the court, MRE 403 plays an important role in evaluating the admissibility of this evidence and because the trial judge is required to do a balancing before admitting this evidence, that is a sufficient due process protection.⁹⁸ Judge Crawford, writing for herself and Judge Cox listed several factors that the judge should consider in the MRE 403 analysis. These factors include: Sufficiency of the evidence of the *prior act* (emphasis added); probative weight of the evidence (similarity); potential for less prejudicial evidence; distraction of the factfinder; time needed to prove the *prior conduct* (emphasis added); temporal proximity; frequency; presence or lack of intervening circumstances; and relationship between the parties.⁹⁹

Guidance

The CAAF's ruling in this case is not surprising given the treatment of these rules in the federal courts. Even the concurring and dissenting opinions do not challenge the constitutionality of the rules. Judge Gierke's dissent does raise another concern. Judge Gierke contends that because the MRE 413 evidence used by the government was post-offense misconduct, the trial judge should not have admitted it.¹⁰⁰ The government was using an offense which occurred in October to prove the accused's propensity to commit the crimes that occurred the preceding April and August. According to Judge Gierke, this result was not intended by the rule and any post offense mis-

conduct should be excluded under MRE 403.¹⁰¹ Judge Gierke raises an interesting issue, and even Judge Crawford in the court's opinion addresses the factors that should be considered under MRE 403 in the context of prior acts.

There is nothing in the rule, however, that requires the other offenses to have occurred prior to the charged offense. Arguably, so long as the other offenses are related closely enough in time to the charged offense to make them probative, it should not matter that the incident occurred after the charged offense. It may be a factor for the judge to consider but it should not operate as a blanket exclusion of this evidence. Further, Judge Gierke's reliance on the legislative history and comments made by Senator Dole to support his opinion is unnecessary since the court should consider the legislative history only when the plain language of the rule is unclear.¹⁰² Here the language of the rule is not unclear. It says "evidence of similar crimes." Instead of a per se ban that Judge Gierke suggests, the better approach would be to consider the timing of the uncharged misconduct as one factor to consider under MRE 403.

In the second case the CAAF looked at the constitutionality of MRE 414.¹⁰³ In *Henley*, an officer panel convicted the accused of committing oral sodomy on his natural son and daughter.¹⁰⁴ The abuse took place over several years. At trial, the government introduced incidents outside the statute of limitations under MRE 414 to show the accused's propensity to commit the charged offenses. The military judge admitted the evidence under MRE 414 to show propensity, and under MRE 404(b) to prove a common plan, motive and preparation.¹⁰⁵ At trial and on appeal, the defense challenged the constitutionality of MRE 414.¹⁰⁶

94. *Id.* at 479-80.

95. *Id.*

96. *Id.* at 481.

97. *See, e.g.,* United States v. Mound, 149 F.3d 799 (8th Cir. 1998), United States v. Castillo, 140 F.3d 874 (10th Cir. 1998), United States v. LeCompte, 131 F.3d 767 (8th Cir. 1997), United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998).

98. *Wright*, 53 M.J. at 482.

99. *Id.* (emphasis added).

100. *Id.* at 486 (Gierke, J., dissenting).

101. *Id.* at 486-87 (Gierke, J., dissenting).

102. *See* United States v. Faulk, 50 M.J. 385, 390 (1999). ("If the statute is unclear, we look at legislative history."). Some commentators view statements like those made by Senator Dole on the floor of Congress as "junk legislative history." ABNER MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 36 (1997).

103. United States v. Henley, 53 M.J. 488 (2000).

104. *Id.* at 489-90.

105. *Id.* at 490.

106. *Id.*

The Air Force court ruled that the evidence was admissible under MRE 404(b), and that they did not need to address the MRE 414 issue.¹⁰⁷ The Air Force court reasoned that MRE 404(b) was a more restrictive rule than MRE 414 and evidence admitted under MRE 404(b) would moot any issues of admissibility under MRE 414.¹⁰⁸ The CAAF agreed with the Air Force court's approach and affirmed the trial judge's ruling.¹⁰⁹ The CAAF went on to say that in light of their opinion in *Wright*, MRE 414 is constitutional and this evidence would have been admissible under MRE 414 to show the accused's similar sexual molestation of his children.¹¹⁰

Guidance

The CAAF, like the Air Force court, resolved the issue on MRE 404(b) grounds. Unfortunately, the court's reasoning in this case misses the mark. Even if the evidence is admissible under MRE 404(b), that should not automatically render it admissible under MRE 414. Evidence admitted under MRE 404(b) can only be admitted for a non-character purpose. This means that the military judge should give a limiting instruction to the panel to specifically tell them that they cannot consider this evidence to conclude that the accused has a bad character or has a propensity to commit criminal misconduct.¹¹¹ Contrast this with the theory of admissibility of evidence under MRE 414. Here the evidence is expressly admitted for its tendency to show the accused's propensity to commit this type of offense. Because the theories of admissibility under MRE 404(b) and MRE 414 differ, evidence admitted under MRE 404(b) does not moot questions of admissibility under MRE 414. Evidence admitted under MRE 404(b) with a proper limiting instruction may not be unfairly prejudicial, and yet the same evidence offered under MRE 414 to show propensity may be more prejudicial than probative. It is confusing for the court to mix the MRE 404(b) analysis with the MRE 414 analysis since the rules are expressly intended to allow proof of different things. Also, sloppiness in the distinction leads to confusion and an eviscer-

ation of the character protections found in MRE 404(b). This was the concern raised by Judge Effron on a similar issue in his dissent in *Tanksley* discussed above.

The CAAF did go on to briefly address the constitutional attack on MRE 414, and consistent with their opinion in *Wright*, held that MRE 414 is constitutional. The opinions in *Wright* and *Henley* are important for trial judges and practitioners. Until now, there may have been some hesitation in using these new rules and allowing the government to argue propensity because use of propensity evidence goes against traditional notions of how uncharged misconduct may be used. Now that the CAAF has expressly found these new rules to pass constitutional muster, judges may be more willing to admit this evidence and allow the government to argue propensity. This will make the defense's job more difficult in sexual assault and child molestation cases where the accused has other incidents of similar misconduct.

MRE 513 Provides the Only Protections

In 1996, the Supreme Court recognized for the first time a psychotherapist - patient privilege in the federal system.¹¹² In October 1999, the President promulgated a psychotherapist-patient privilege for the military under MRE 513.¹¹³ The question the CAAF addressed in two cases this year is whether a privilege existed between 1996 and November 1999 when MRE 513 went into effect. In both cases, *United States v. Rodriguez*¹¹⁴ and *United States v. Paaluhi*¹¹⁵ the CAAF held that the privilege created by the Court in *Jaffee* did not apply to the military.¹¹⁶ The basis for the CAAF's opinion is that the military privilege rules have a different history than the federal rules. Specifically, the language of MRE 501(d) expressly rejects a medical officer privilege, and since psychiatrists fall within this definition, no privilege existed prior to 513.¹¹⁷

107. *United States v. Henley*, 48 M.J. 864, 870-71 (A.F. Ct. Crim. App. 1998).

108. *Id.*

109. *Henley*, 53 M.J. at 487.

110. *Id.*

111. Military Rule of Evidence 105 provides: "When evidence which is admissible as to one party or for a purpose but not admissible as to another party or for another purpose is admitted, the military judge, upon request, shall restrict the evidence to its proper scope and instruct the members accordingly." MCM, *supra* note 5, MIL. R. EVID. 105.

112. *Jaffee v. Redmond*, 518 U.S. 1 (1996).

113. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (1999).

114. 54 M.J. 156 (2000).

115. 54 M.J. 181 (2000).

116. *Rodriguez*, 54 M.J. at 161.

Guidance

The outcome in these cases reflects the history of the privilege rules and reminds practitioners that the privilege rules developed differently than the other rules of evidence. This is one area where the military rules are distinct from the federal rules. Another interesting point in *Paaluhi* is that the CAAF reversed the conviction, not because of a privilege violation, but because it was ineffective assistance for the defense attorney to have the accused talk to a military psychologist without having the psychologist appointed to the defense team first.¹¹⁸ *Paaluhi* has future significance in cases where the MRE 513 privileges may not apply.¹¹⁹ Because of the large number of broad exceptions under MRE 513, counsel cannot rely on the privilege in all cases and assume that all communications to a counselor or therapist are privileged.

Witness Impeachment

There were some interesting cases dealing with impeachment issues this year. One case came from the Supreme Court. In one CAAF case, the court applied that Supreme Court holding. In another case, the CAAF examined a common method of cross-examination and ruled that it was impermissible.

The Danger of Removing the Sting

Good trial advocates know that one of the fundamental rules of trial practice is to establish and maintain credibility with the trier of fact. In almost every case there is likely to be some unfavorable information about your client, the conduct of the investigation, or a key witness that could damage your case. In

order to maintain credibility with the fact finder, a good advocate often brings unfavorable information out about their case or client before the opposing party has a chance. By “drawing the sting” with these preemptive tactics, counsel has more control of the information and shows the fact finder that he has nothing to hide.

A recent Supreme Court holding¹²⁰ cautions defense counsel that there is a danger with these preemptive tactics. If the defense objects to the admissibility of the unfavorable evidence in limine and loses, and then introduces the unfavorable evidence preemptively, they waive any objection on appeal.

In *Ohler*, the defendant drove a van carrying approximately eighty-one pounds of marijuana from Mexico to California. A U.S. Customs agent at the border searched the van and discovered the drugs. Maria Ohler was charged with importation of marijuana and possession of marijuana with the intent to distribute.¹²¹ Before trial, the government moved in limine to admit Ohler’s 1993 felony conviction for possession of methamphetamine. The government wanted to admit this evidence under Federal Rule of Evidence (FRE) 404(b) as character evidence, and under FRE 609 (a)(1)¹²² as impeachment evidence.¹²³

The trial judge did not allow this evidence under FRE 404(b), but ruled that if the accused testified, the prosecution could impeach her with her prior conviction under FRE 609(a)(1).¹²⁴ In spite of this ruling, the defendant testified in her own defense and denied any knowledge of the eighty-one pounds of marijuana found in the van she was driving. In order to lessen the anticipated impact of the prosecution’s cross-examination, the defendant on direct examination also admitted

117. *Id.* at 157-160. Military Rule of Evidence 501 (d) says: “Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.” MCM *supra* note 5, MIL.R. EVID. 501(d).

118. *Paaluhi*, 54 M.J. at 184-85.

119. Military Rule of Evidence 513 provides that there is no privilege under the rule:

- (1) when the patient is dead;
- (2) when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;
- (3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;
- (4) when a psychotherapist or assistant to a psychotherapist believes that a patient’s mental or emotional condition makes the patient a danger to any person, including the patient;
- (5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;
- (6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;
- (7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or
- (8) when admission or disclosure of a communication is constitutionally required.

MCM, *supra* note 5, MIL. R. EVID. 513(d).

120. *Ohler v. United States*, 529 U.S. 753 (2000).

121. *Id.* at 754.

to the previous felony conviction.¹²⁵ The defendant was convicted and sentenced to thirty months in prison.¹²⁶

The defense appealed the conviction, claiming that the trial court's in limine ruling allowing the prosecution to impeach her with the prior conviction was in error.¹²⁷ The Ninth Circuit did not address the substance of the accused's complaint. The court ruled that because it was the defense that introduced the evidence of the prior conviction during direct examination, they waived the right to appeal the trial judge's in limine ruling.¹²⁸ The Supreme Court granted certiorari¹²⁹ to resolve a conflict among the circuits on this issue.¹³⁰

In a five to four decision, the Court affirmed the Ninth Circuit's ruling and held that a defendant who preemptively introduces evidence of a prior conviction on direct examination may not claim on appeal that the admission of the evidence was erroneous.¹³¹ The defendant argued before the Court that FRE 103 and FRE 609 create an exception to the general rule that a party who introduces evidence cannot complain on appeal that the evidence was erroneously admitted. The Court rejected this argument out of hand, noting that Rule 103 simply requires the party to make a timely objection to an evidentiary ruling but is silent on when a party waives an objection.¹³² Likewise, Rule

609 authorizes the defense to elicit the prior conviction on direct examination but makes no mention of waiver.¹³³

The majority was equally unsympathetic to the defendant's argument that it would be unfair to apply waiver in this situation. The defendant contended that the waiver rule would force them to either forego the preemptive strike and appear to the jury to be less credible, or make a preemptive strike and lose the opportunity to appeal.¹³⁴ The Court responded by noting that this is just one of the many difficult tactical decisions that trial practitioners are faced with. The defendant's decision to testify brings with it any number of potential risks. These risks include the possibility of impeachment with a prior conviction. The Court pointed out that the government must also balance the decision to cross-examine with a prior conviction against the danger that an appellate court will rule that such impeachment was reversible error.¹³⁵

The Court was unwilling to let the defendant have her cake and eat it too by short circuiting the normal trial process. According to the Court, to allow the defense to object to evidence they introduced would deny the government its usual right to decide, after the accused testifies, whether or not to use her prior conviction.¹³⁶ This outcome would also run counter to

122. Federal Rule of Evidence 609(a)(1) provides:

For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.

FED. R. EVID 609(a)(1). Note that the balancing test for admitting a prior felony conviction against an accused is different and more stringent than the Rule 403 balancing test used for other witnesses.

123. *Ohler*, 529 U.S. at 755.

124. *Id.*

125. *Id.*

126. *Id.*

127. *United States v. Ohler*, 169 F.3d 1200, 1201 (9th Cir. 1999).

128. *Id.* at 1203.

129. *Ohler v. United States*, 528 U.S. 950 (1999).

130. The Eighth and Ninth Circuits follow the waiver rule. The Fifth Circuit held that appellate review was still available even after the preemptive questioning. *Ohler*, 529 U.S. at 755.

131. *Id.* at 754.

132. *Id.* at 756.

133. *Id.*

134. *Id.* at 757.

135. *Id.* at 758.

136. *Id.* at 758.

the Court's earlier holding on a similar issue in *Luce v. United States*.¹³⁷

Finally, the accused contended that the waiver rule unconstitutionally burdens her right to testify. The Court held that while the threat of the government's cross-examination may deter a defendant from testifying, it does not prevent her from taking the stand, stating: "[It is not] inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify."¹³⁸

Justice Souter led the four justice dissent. The dissent said that the majority's reliance on *Luce* was misplaced. The holding in *Luce* was based on the practical realities of appellate review. Since the accused in *Luce* never testified, there was simply no way for an appellate court to know why. Further, the appellate court could never compare the actual trial with the one that might have occurred if the accused had taken the stand.¹³⁹ According to the dissent, *Ohler's* case was different because it was very clear on the record that the only reason the defense impeached their own client was because of the judge's in limine ruling. An appellate court would have no difficulty in conducting a harmless error analysis based on the record.¹⁴⁰

The dissent also attacked the majority's common sense rationale for their decision. According to the dissent, this is one exception to the general rule that a party cannot object to their own evidence.¹⁴¹ In a rare reference to FRE 102,¹⁴² Justice Souter said that allowing the defendant to initiate preemptive questioning and still preserve the issue on appeal promotes the fairness of the trial while fully satisfying the purposes of FRE 609.¹⁴³

Guidance

The majority opinion in *Ohler* is an important warning for defense counsel. It means that counsel will have to consider

even more carefully the consequences of advising their clients whether or not to testify. Are the benefits of taking the stand outweighed by the risk of possible impeachment with prior convictions? If so, is it better for the defense to at least lessen the blow by eliciting the incriminating evidence on direct examination and forfeit the opportunity to appeal the judge's decision to allow the impeachment? These are difficult questions and the answer will obviously vary according to the particular circumstances of each case. The point for defense counsel is that they must fully appreciate what is at stake before deciding to draw the sting.

It is also important to note that while the opinion is limited to the context of impeachment with a prior conviction, the majority's rationale can apply to other forms of impeachment and other situations where the defense may want to engage in preemptive questioning of their own client or other defense witnesses. Here again, defense counsel should be very cautious and make the decision only after fully considering all of the potential consequences.

CAAF Applies *Ohler*

Soon after the Supreme Court decided *Ohler*, the CAAF had the opportunity to apply it in a military case. In *United States v. Cobia*,¹⁴⁴ the accused was convicted by a military judge of rape, forcible sodomy with a child, indecent acts with a child, and adultery.¹⁴⁵ Over several years, the accused had sexually groomed his thirteen year-old stepdaughter and committed various sexual acts with her including intercourse on several occasions.¹⁴⁶ Prior to the court-martial, the accused had been tried and pleaded guilty in state court to five felony counts including incest and indecent acts.¹⁴⁷ He was tried for two of these same offenses (rape and sodomy) at his court-martial.¹⁴⁸

137. 469 U.S. 38 (1984). In *Luce*, the Court held that a criminal defendant who did not take the stand could not appeal an in limine ruling to admit prior convictions under FRE 609(a).

138. *Ohler*, 529 U.S. at 759 (citing *McGautha v. California*, 402 U.S. 183, 215 (1971)).

139. *Id.* at 760 (Souter, J., dissenting).

140. *Id.* at 761 (Souter, J., dissenting).

141. *Id.* (Souter, J., dissenting).

142. Rule 102 provides: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102.

143. *Ohler*, 529 U.S. at 764 (Souter, J., dissenting).

144. 53 M.J. 305 (2000).

145. *Id.* at 306.

146. *Id.* at 307-308.

147. *Id.* at 307.

Before trial, the defense moved to suppress this prior conviction, claiming that because there were no allocution rights afforded to the accused in state court, the accused accepted the guilty plea without understanding its impact in order to get a reduced sentence.¹⁴⁹ The military judge ruled that this evidence was inadmissible under MRE 404(b), but was admissible for impeachment purposes.¹⁵⁰ During the defense case, the accused testified and the defense counsel introduced the prior conviction and had the accused explain the guilty plea process and that the accused did not fully understand what was happening. On cross-examination, the trial counsel was able to get the accused to admit that he read the charges, that he understood them, and that he was satisfied with his civilian counsel in that prior case.¹⁵¹

The CAAF, citing to *Ohler*, held that since the defense introduced this evidence during the direct examination of the accused, they waived any objection on appeal.¹⁵² All five of the CAAF judges agreed on that point. Judge Crawford and Judge Cox went on to say in dicta, that this evidence was admissible, not only under MRE 609, but also under the common law theory of impeachment by contradiction.¹⁵³ When the accused completely denied the commission of the charged acts, the defense opened the door for the government to impeach the accused with the contradictory facts of the prior conviction.¹⁵⁴

Judge Sullivan and Judge Effron agreed that *Ohler* applied in this case and the defense waived any objection by introducing the conviction on their case in chief.¹⁵⁵ The concurrence did express some doubts about the judge's in limine ruling that allowed this impeachment. Judge Sullivan was concerned about the prejudicial effect of using a conviction for the same offense that the accused is charged with to impeach him. Because this was a trial before a military judge alone, that prejudice was minimized.¹⁵⁶

This case is a good follow-on to *Ohler* and a reminder to defense counsel that when they lose the pre-trial motion and then introduce the evidence to remove the sting, they waive the issue for appeal. The case is also interesting because of the opinion (albeit advisory) on impeachment by contradiction. This form of impeachment is not codified in the rules and not often used. It can be effective where the extrinsic evidence goes to a significant issue at trial and directly contradicts the testimony of the witness. Finally, Judge Sullivan's concurrence is a warning to military judges that he and Judge Effron believe trial judges should rarely, if ever, allow the government to impeach the accused under MRE 609 with a conviction for the same offense that the accused is being tried for.

Liar, Liar

Both *Ohler* and *Cobia* involve impeachment with prior convictions under FRE and MRE 609. Although this can be an effective method of impeachment, it comes up only rarely in courts-martial. A much more common form of impeachment is to attack a witness's character for untruthfulness under MRE 608.¹⁵⁷ There is a difference, however, between attacking a witness's character and getting a witness to comment on the credibility of another witness's testimony. In *United States v. Jenkins*,¹⁵⁸ the CAAF held that it was error for the judge to allow the trial counsel to cross over that line and get the witness to comment on the truthfulness of other witnesses' testimony.

In *Jenkins*, an officer and enlisted panel convicted the accused of larceny and forgery for his involvement in a scheme to cash government checks with fake identification cards.¹⁵⁹ The defense theory was that the real perpetrators and the

148. *Id.*

149. *Id.* at 308.

150. Military Rule of Evidence 609(a)(1) provides:

For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Mil. R. Evid. 403, if the crime was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.

MCM, *supra* note 5, MIL. R. EVID. 609(a)(1).

151. *Cobia*, 53 M.J. at 309.

152. *Id.* at 310.

153. *Id.* Impeachment by contradictory facts goes beyond an attack on the witness's credibility. When there are facts in direct contradiction to the witness's in court testimony on a material issue, extrinsic evidence can be used to prove those contradictory facts.

154. *Id.*

155. *Id.* at 311, (Sullivan, J., concurring).

156. *Id.*

accused's old girl friend framed him.¹⁶⁰ The accused testified in his defense. On cross examination the government asked the accused a number of questions about what other witnesses had testified to and then asked the accused numerous times if these witnesses were lying. In response to some of these questions the accused testified that other witnesses had lied in their testimony.¹⁶¹ The government then argued in closing that either the accused was guilty or all of the government's witnesses were lying.¹⁶² The defense did object to these questions at trial.¹⁶³

On appeal, defense claimed it was improper for the trial counsel to ask these questions because it infringed on the role of the jury to decide credibility issues.¹⁶⁴ The CAAF noted that there was a split among the federal courts on whether the trial counsel can ask the accused to opine whether the witnesses against him are lying.¹⁶⁵ The court adopted the "*Ritcher* principle" established in the Second Circuit.¹⁶⁶ Under this approach, prosecutorial cross-examination that compels the accused to state that witnesses against him lied is improper. If the trial counsel engages in this type of questioning, the court must determine if the improper questioning was prejudicial.¹⁶⁷

The CAAF's rationale for adopting this approach is that this type of questioning violates the MRE 608 limitations, which allow for opinions on a character trait for honesty or dishonesty only. These questions are improper because the witness is becoming a human lie detector and the answers are not helpful or relevant to the fact finder.¹⁶⁸ In this case, however, the court

held that the improper questions did not rise to the level of plain error. The CAAF reasoned that since the defense's theory was that the accused was framed, the questions by the government merely reinforced that theory.¹⁶⁹

Guidance

The rules of impeachment and relevance do not allow the witness to comment on the credibility of other witnesses' testimony. However, when, as here, the defense theory is that the accused was framed, the defense is in effect calling the government witnesses liars. If the defense elects to go down that road, it seems only fair that the government should be allowed to ask the accused specifically who framed him and who is lying. In order for the fact finders to find the truth, the government should be allowed to force the accused to give specifics. Otherwise, the accused can make very vague and general claims without being forced to specify the allegations. The CAAF in effect reached this conclusion by holding that any error in the trial counsel's questioning was harmless. This case is an important warning to practitioners in spite of the harmless error conclusion. Counsel must be very careful not to elicit opinions from anyone, including the accused, about the truthfulness of other witnesses' testimony.

157. Military Rule of Evidence 608(a) states:

(a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for untruthfulness has been attacked by opinion or reputation evidence or otherwise.

MCM, *supra* note 5, MIL. R. EVID. 608(a).

158. 54 M.J. 12 (2000).

159. *Id.* at 13.

160. *Id.* at 14.

161. *Id.* at 15.

162. *Id.* at 16.

163. *Id.* at 15.

164. *Id.* at 16.

165. *Id.*

166. The approach taken by the Second Circuit came from the case of *United States v. Richards*, 826 F.2d 206 (2nd Cir. 1987).

167. *Jenkins*, 54 M.J. at 17.

168. *Id.* at 16.

169. *Id.* at 18.

Expert Testimony

Expert testimony continues to be one of the most dynamic areas of evidence law. The CAAF decided several cases this year touching on various aspects of expert testimony from the qualifications of the expert, and the helpfulness of the testimony, to the reliability of the evidence. There is also an interesting trend developing in the federal circuits. After the Supreme Court's ruling in *Kumho Tire v. Carmichael*,¹⁷⁰ some courts are putting significant limitations on various types of forensic evidence.

Expert Qualifications

In 1993 the CAAF in the case of *United States v. Houser*¹⁷¹ set out a framework for analyzing the admissibility of expert testimony and evidence. The court distilled the various rules of evidence relating to expert testimony down into six factors. These factors are: the qualifications of the expert; the subject matter of the expert testimony; the basis of the expert testimony; the legal relevance of the evidence; the reliability of the evidence; and whether the probative value of the evidence outweighs other considerations.¹⁷² In recent years, most of the focus from the Supreme Court has been on the fifth factor, the reliability of the evidence.¹⁷³ The following cases from CAAF illustrate that practitioners need to satisfy all of the prongs and cannot focus on one at the exclusion of others.

Expert Qualifications

In the first case, *United States v. McElhaney*,¹⁷⁴ the court looked at the qualifications of the expert. During the sentenc-

ing phase of the accused's trial for carnal knowledge, sodomy, and indecent acts with his wife's young niece, the government called an expert (Dr. Morales) to testify about the rehabilitative potential of the accused, and victim impact.¹⁷⁵ The defense objected, claiming that Dr. Morales' opinion lacked the proper foundation because it came only from his in-court observations and information from the victim about the accused.¹⁷⁶ The expert said he could not diagnose the accused because he had not interviewed him nor had he reviewed his medical records.¹⁷⁷ The military judge ruled that Dr. Morales could testify about specific victim impact, future dangerousness, and that the accused's behavior was consistent with the profile of a pedophile. Dr. Morales was not allowed to testify that the accused was diagnosed as a pedophile.¹⁷⁸ In his testimony, Dr. Morales testified about pedophilia and strongly implied that the accused was a pedophile, and he had little hope of rehabilitation.¹⁷⁹

The CAAF held that it was error for the judge to admit evidence from Dr. Morales about the future dangerousness of the accused as related to pedophilia.¹⁸⁰ Citing to *Houser*, the court noted that the expert lacked the proper foundation for this testimony. Dr. Morales was a child psychiatrist, not a forensic psychiatrist. He had not interviewed the accused or reviewed his medical records, and he himself testified that he could not give a diagnosis of pedophilia without interviewing the accused.¹⁸¹ The court noted that lack of contact with the accused usually impacts the weight of the evidence, not its admissibility. In this case, however, these other factors showed that the witness lacked a proper foundation and his testimony really amounted to labeling the accused as a pedophile.¹⁸²

170. 526 U.S. 137 (1999).

171. 36 M.J. 392 (C.M.A. 1993).

172. *Id.* at 397.

173. *See* *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993); *Gen. Electric v. Joiner*, 522 U.S. 136, (19 97); *Kumho Tire v. Charmichael*, 526 U.S. 137 (1999).

174. 54 M.J. 120 (2000).

175. *Id.* at 132.

176. *Id.* at 133.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 134.

181. *Id.* at 133.

182. *Id.* at 134.

Guidance

This case is an important reminder to practitioners that experts cannot be given a blank check once they are on the witness stand. The first *Houser* factor that the expert must satisfy is that they have the necessary qualifications. The third factor is that the expert must have a proper basis for his testimony. In this case, even if Dr. Morales was able to testify about victim impact, he lacked the proper expertise and the proper basis to talk about the future dangerousness of the accused. Counsel must understand the need to establish a complete foundation for all of the issues or information that the expert is going to testify about.

Expert Testimony on Rehabilitation Potential

The CAAF decided another closely related case involving the accused's future dangerousness. In *United States v. Latoree*,¹⁸³ the accused pleaded guilty to sodomizing a seven year-old girl.¹⁸⁴ In a Rule for Courts-Martial (RCM) 802¹⁸⁵ session the defense raised an issue of the government's expert witness testifying about recidivism and rehabilitation potential because he did not have an adequate basis for the testimony. The military judge deferred ruling on the issue and the defense did not raise the objection later.¹⁸⁶ In sentencing, the government expert testified, in response to both defense and government questioning, that during treatment most sexual offenders admit to other, previously unknown sexual assaults. The expert also speculated on the accused's rehabilitation potential.¹⁸⁷

On appeal, the defense claimed it was error for the expert to provide this information. The CAAF treated the defense's concern raised at the RCM 802 session as an objection on the record but cautioned counsel that concerns stated in an RCM

802 session do not qualify as an objection on the record under MRE 103(a)(1).¹⁸⁸ The CAAF ruled that the expert evidence lacked relevance and failed the reliability standards as required by *Daubert*.¹⁸⁹ The court noted that the basis of the expert's testimony was limited to his own work with inmates. This experience was too limited and too cursory to meet the *Daubert* requirements. The court also held that this evidence was not relevant since there was no attempt to link the accused to these studies.¹⁹⁰ Because of the other evidence in the case, the CAAF ruled that any error in admitting the testimony was harmless.¹⁹¹

Guidance

In this case, the CAAF takes a slightly different approach to the expert testimony. Here, the CAAF looked at the lack of a foundation that would make the expert's opinion reliable under the fifth *Houser* factor. Because the government failed to show the reliability of the expert's methods or conclusions, or link those methods and conclusions to this particular accused, the evidence was not reliable. This case, like *McElhane*, is a good example of the need for practitioners to do a complete analysis of the expert's testimony. Even though the expert may be qualified under MRE 702,¹⁹² there is more to the analysis, and a qualified expert does not necessarily mean reliable testimony. The proponent of the evidence must still lay a proper foundation to show that the evidence is reliable and that it satisfies all of the *Houser* factors.

Expert Opinions on Credibility

The problem of experts commenting on the credibility of other witnesses is a recurring issue that the CAAF seems to address in some form every year. Two years ago, in *United*

183. 53 M.J. 179 (2000).

184. *Id.* at 179.

185. MCM, *supra* note 5, R.C.M. 802.

186. *Id.* at 180.

187. *Id.* at 180-81.

188. *Id.* at 181. Military Rule of Evidence 103 states:

(a) Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and (1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.]

MCM, *supra*, note 5, MIL. R. EVID. 103(a)(1).

189. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

190. *Latorre*, 53 M.J. at 182.

191. *Id.*

192. MCM, *supra* note 5, MIL. R. EVID. 702.

States v. Birdsall,¹⁹³ the CAAF reversed a conviction because two government experts opined about the credibility of the child victims. The case set out a clear explanation of the law and why this type of evidence is not helpful to the members. This year the CAAF looked at two cases where experts and other witnesses commented on the credibility of other witness's in-court testimony. The outcome in these cases illustrates how the CAAF's analysis may change depending on the forum.

In *United States v. Armstrong*,¹⁹⁴ an officer and enlisted panel convicted the accused of indecent acts with his daughter.¹⁹⁵ The accused made a statement to the police and testified at trial that any contact with his daughter was not of a sexual nature. On rebuttal the government called an expert in child abuse.¹⁹⁶ The expert worked as a "validator." Her job was to evaluate children and determine if they display symptoms of sexual abuse. The defense objected to her testimony, claiming, among other things, that she would become a human lie detector.¹⁹⁷ The military judge overruled the objection and allowed the expert to testify that the victim showed symptoms consistent with abuse. In response to government questioning, the expert testified that in her opinion the victim suffered abuse at the hands of her father.¹⁹⁸ The defense did not object to this answer. Immediately after her testimony, the military judge gave a limiting instruction.¹⁹⁹

On appeal, the CAAF held that it was reversible error for the expert to testify in this fashion. The witness in effect became a human lie detector and the testimony was highly prejudicial

given the nature of the crime and the credibility battle between the accused and the victim.²⁰⁰ Interestingly, the court also held that the military judge's curative instruction was not enough to render the error harmless.²⁰¹

Contrast this case with *United States v. Robbins*,²⁰² where the CAAF reached a different outcome, based in part on the fact that *Robbins* was a judge alone case. Here the accused was charged with two specifications of sodomy with a child under sixteen.²⁰³ The victim testified and the government also called a social worker to tell about statements the victim and her mother made to the social worker. While laying the MRE 803(4) foundation, the expert testified that her job was to do intake interviews and refer cases to a panel of clinicians who substantiate cases. She said that in this case, the panel substantiated the allegation.²⁰⁴ A second witness also testified about what the victim told her. This witness testified that when the victim reported the incident to her, she appeared not to be lying.²⁰⁵ The defense did not object to any of this evidence.²⁰⁶

The granted issue on appeal was whether the witness's comments on the credibility of the victim rose to the level of plain error.²⁰⁷ The CAAF distinguished this case from prior cases, and held that because this was a judge alone case and the judge is presumed to know and apply the law correctly, any error was harmless.²⁰⁸ The CAAF also said that the statements touching on credibility were incidental to the hearsay foundation and there was no prejudicial error.²⁰⁹

193. 47 M.J. 404 (1998).

194. 53 M.J. 76 (2000).

195. *Id.*

196. *Id.* at 80.

197. *Id.*

198. *Id.* at 81.

199. *Id.*

200. *Id.*

201. *Id.* at 82.

202. 52 M.J. 455 (2000).

203. *Id.* at 456.

204. *Id.*

205. *Id.* at 457.

206. *Id.*

207. *Id.*

208. *Id.* at 458.

209. *Id.*

Guidance

These two cases illustrate that while it is error for any witness, lay or expert, to testify about the credibility of another witness, the error may not be prejudicial in a judge alone forum where the judge is presumed to know and apply the law correctly. The cases also serve as another reminder to counsel of the need to work carefully with expert witnesses and not allow them to comment on ultimate questions of credibility. Practitioners who are not sensitive to this issue run the risk of either a mistrial or a reversal of the conviction on appeal. Once this testimony is before the members, a curative instruction may not be an adequate remedy.

Federal Courts Re-Look at Handwriting Experts

A final area to cover under expert testimony is a trend developing in some federal courts that may impact on military cases. The Supreme Court's decision in *Kumho Tire* held that all types of expert testimony and evidence must undergo a reliability determination.²¹⁰ *Kumho Tire* puts the same gatekeeping obligation on the trial judge to keep out unreliable nonscientific expert testimony that *Daubert* placed on judges evaluating scientific evidence. This means that courts are carefully scrutinizing some forms of nonscientific expert testimony for the first time, and some courts do not like what they see.²¹¹ This is particularly true with handwriting experts and questioned document examiners. Two more district courts this year are following the trend to limit the expert's testimony to comparing characteristics of a known and questioned document or signature.²¹² Courts are preventing the expert from testifying either that a certain individual was the author of a questioned document or to their degree of certainty about a match. These courts reason that the methods underlying this evidence are weak and very subjective. As of yet, there are no reported military cases that have taken up this issue, but it appears to be an area ripe for challenge.

New Federal Rules

On 1 December 2000 several changes to the Federal Rules of Evidence went into effect. By operation of MRE 1102,

these rules will automatically apply to the military on 1 June 2002 unless the President takes a contrary action.²¹³ The federal rules that changed are FRE 103, 404(a), 701, 702, 703, 803(6), and 902. Each of the rules is set out below with the new or changed language underlined, followed by a brief explanation.

Changes to FRE 103

Rulings on Evidence:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

This change removes the requirement for counsel to renew an objection that has been definitively ruled on at a previous court session, including motions in limine. Counsel still have the obligation to clarify when the judge's ruling is definitive in order to preserve the issue. Further, the amendment does not preclude the judge from revisiting a definitive in limine ruling at the time the evidence is offered. Finally, the amendment is not intended to affect the Supreme Court's rulings in *Luce v. United States*²¹⁴ or *Ohler v. United States*,²¹⁵ discussed above.

210. *Kumho Tire v. Carmichael*, 526 U.S. 137, 141 (1999).

211. *United States v. Hines*, 55 F. Supp. 2d. 62 (D. Mass. 1999). In *Hines*, the district court judge conducted a close scrutiny of the government's handwriting expert. The judge ruled that because of a lack of reliability, the expert could not opine that the accused was the author of the questioned document. *Id.* at 69-70.

212. *United States v. Ruthaford*, 104 F. Supp. 2d 1190 (D. Neb. 2000); *United States v. Santillan*, 1999 U.S. Dist. Lexis 21611 (N.D. Ca.).

213. Military Rule of Evidence 1102 states: "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President." MCM, *supra* note 5, MIL. R. EVID. 1102.

214. 469 U.S. 38 (1984).

215. 529 U.S. 753 (2000).

Character Evidence Generally:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.

This change to Ruel 404(a) is potentially very significant. The drafters say it is intended to provide a more balanced presentation of the evidence when the accused decides to attack the victim's character. Under the current rule, even if the accused attacks the victim's character, the accused's character is still off limits, and the jury does not have the opportunity to consider an equally relevant character trait of the accused. Under the new rule that will change. Once the accused goes after a pertinent character trait of the victim, the accused automatically subjects himself to attack on that same trait. The easiest illustration is where the defense is trying to paint the victim as the aggressor in a homicide case by introducing evidence of the victim's violent character. With the change to these rules, the government can now offer evidence of the accused's character for violence, even though the accused has not introduced any evidence that he is a peaceful person.

Changes to FRE 701

Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

The change to Ruel 701 is designed to prevent parties from avoiding the reliability requirements for expert testimony. Before this change, some parties were trying to slip expert opinion testimony in under the guise of lay witness testimony and thus avoid the requirements of Rule 702 and *Daubert*. This change is intended to put a stop to that practice.

Testimony by Experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The changes to FRE 702 incorporate the Supreme Court's holdings in, *Daubert*, *Joiner*, and *Kumho Tire*. The language of the rule provides more detail about the reliability requirements that expert testimony must satisfy. The most helpful change is the explanation the drafters added in the comments to FRE 702. In the comments to the rule, the drafters give a good synopsis and explanation of the *Daubert* factors, as well as other factors that trial courts can consider when evaluating the reliability of expert testimony.

Changes to FRE 703

Bases of Opinion Testimony by Experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

This change is intended to limit the amount of inadmissible testimony that an expert can refer to when testifying about the basis of his opinion. The problem before this change was that experts could smuggle inadmissible testimony before the fact finders when discussing the basis for their opinion. This smuggling happens because FRE 703 clearly says that the facts or data that the expert relies on do not need to be admissible in order for the expert to use them in reaching his opinion. The example is where the expert relies on medical reports and other

third party hearsay to form his opinion. Simply because the medical reports or other information is hearsay, does not mean the expert's opinion does not have a proper basis. The problem occurs when the expert refers to that inadmissible hearsay in his testimony. The change now limits the expert to his opinion only. He cannot introduce otherwise inadmissible facts or data along with that opinion unless the court determines that the probative value of that evidence in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect.

Note that this is not a Rule 403 balancing. Under Rule 403, admissibility is presumed and evidence is only excluded if its probative value is substantially outweighed by undue prejudice. Here, the balancing test is exactly the opposite. Prejudice is presumed and the evidence only comes in if substantially outweighed by probative value. This will most likely happen when the opposing counsel opens the door to this evidence in their cross-examination of the expert.

Changes to FRE 803(6) and FRE 902

FRE 803(6), Hearsay exceptions, availability of declarant immaterial:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FRE 902, Self authentication:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (B) was kept in the course of the regularly conducted activity; and (C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

The amendments to rule 803(6) and 902(11) add new procedures which allow parties to authenticate certain domestic records of regularly conducted activity without calling a foundation witness. There is also a new Rule 902(12) for certain foreign documents. This new rule only applies in civil cases.

Conclusion

If there is one unifying theme from these cases it is that evidence law continues to be the bread and butter of every trial practitioner's life. Trial and defense counsel must have more than a passing familiarity with the rules. To successfully litigate cases, counsel need to become intimately familiar with the rules and be able to apply them in the heat of battle. Hopefully, this article will assist counsel in this endeavor.