**Section 400.705 Witnesses**

a) Competency to Testify. Every person is competent to be a witness unless this Section provides otherwise. (Il. Mil. R. Evid. 601)

b) Need for Personal Knowledge. A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This subsection (b) is subject to the provisions of Section 400.715(a)(2) relating to the opinion testimony by expert witnesses. (Il. Mil. R. Evid. 602)

c) Oath or Affirmation to Testify Truthfully. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so. (Il. Mil. R. Evid. 603)

d) Interpreter. An interpreter is subject to the provisions of this Section relating to qualifications as an expert and the administration of an oath or affirmation that the interpreter will make a true translation. (Il. Mil. R. Evid. 604)

e) Military Judge's Competency as a Witness

1) The presiding military judge may not testify as a witness at any proceeding of that court-martial. A party need not object to preserve the issue.

2) This Section does not preclude the military judge from placing on the record matters concerning docketing of the case. (Il. Mil. R. Evid. 605)

f) Member's Competency as a Witness

1) A member of a court-martial may not testify as a witness before the other members at any proceeding of that court-martial. If a member is called to testify, the military judge must, except in a special court-martial without a military judge, give the opposing party an opportunity to object outside the presence of the members.

2) During an inquiry into the validity of a finding or sentence, a member of a court-martial may not testify about any statement made or incident that occurred during the deliberations of that court-martial; the effect of anything on that member's or another member's vote; or any member's mental processes concerning the finding or sentence, except that a member may testify on the question of whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial and whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. The military judge may not receive a member's affidavit or evidence of a member's statement on these matters.

3) Exception. A member may testify about whether:

A) extraneous prejudicial information was improperly brought to the member's attention;

B) unlawful command influence or any other outside influence was improperly brought to bear on any member; or

C) a mistake was made in entering the finding or sentence on the finding or sentence forms. (Il. Mil. R. Evid. 606)

g) Who May Impeach a Witness. The credibility of a witness may be attacked by any party, including the party calling the witness, except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon showing of an affirmative damage. This subsection (g) does not apply to statements admitted pursuant to Section 400.720(a)(2), (a)(3) or (c). (Il. Mil. R. Evid. 607)

h) A Witness's Character for Truthfulness or Untruthfulness

1) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to these limitations:

A) the evidence may refer only to character for truthfulness or untruthfulness; and

B) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

2) Specific Instances of Conduct

A) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Section 400.705(i), may not be proved by extrinsic evidence.

B) They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:

i) concerning character of the witness for truthfulness or untruthfulness; or

ii) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

C) The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

3) Evidence of Bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced. (Il. Mil. R. Evid. 608)

i) Impeachment by Evidence of a Criminal Conviction

1) General Rule

A) For the purposes of attacking the credibility of a witness, evidence that the witness has been convicted of a crime, except on a plea of nolo contendere, is admissible but only if the crime:

i) was punishable by death, dishonorable discharge or imprisonment in excess of one year under the law under which the witness was convicted; or

ii) involved dishonesty or false statement regardless of the punishment.

B) In either instance described in subsection (i)(1)(A), the court shall determines whether the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.

2) Time limit. Evidence of a conviction under this Manual is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from confinement, whichever is later.

3) Effect of Pardon, Annulment or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this subsection (i) if:

A) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure; and

B) the procedure under which the procedure listed in subsection (i)(3)(A) was granted or issued required a substantial showing of rehabilitation or was based on innocence.

4) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this subsection (i). The military judge may, however, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult, and the military judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

5) Pendency of Appeal. The pendency of an appeal from the underlying criminal conviction does not render evidence of that conviction inadmissible. Evidence of the pendency of an appeal is admissible. (Il. Mil. R. Evid. 609)

j) Religious Beliefs or Opinions. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that, by reason of his or her nature, the witness' credibility is impaired or enhanced. (Il. Mil. R. Evid. 610)

k) Mode and Order of Examining Witnesses and Presenting Evidence

1) Control by the Military Judge. The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

A) make the interrogation and presentation effective for the ascertainment of the truth;

B) avoid needless consumption of time; and

C) protect witnesses from harassment or undue embarrassment.

2) Scope of Cross-Examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of his or her discretion, permit inquiry into additional matters as if on direct examination.

3) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness or an unwilling witness or an adverse party or an agent of an adverse party, as defined by Section 2-1102 of the Code of Civil Procedure, interrogation may be by leading questions.

4) Remote Live Testimony of a Child

A) In a case involving abuse of a child or domestic violence, the military judge shall, subject to the requirements of subsection (k)(4)(C), allow a child victim or witness to testify from an area outside the courtroom.

B) Definitions. For purposes of this subsection (k)(4):

i) "Child" means a person who is under the age of 16 at the time of his or her testimony;

ii) "Abuse of a Child" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

iii) "Exploitation" means child pornography or child prostitution;

iv) "Negligent Treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter or medical care, so as to endanger seriously the physical health of the child;

v) "Domestic Violence" means an offense that has as an element the use, attempted use, or threatened use of physical force against a person and is committed by:

* a current or former spouse, parent or guardian of the victim;
* a person with whom the victim shares a child in common;
* a person who is cohabiting with or has cohabited with the victim as a spouse, parent or guardian; or
* a person similarly situated to a spouse, parent or guardian.

C) Remote live testimony will be used only when the military judge makes a finding on the record that a child is unable to testify in open court in the presence of the accused, for any of the following reasons:

i) The child is unable to testify because of fear;

ii) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;

iii) The child suffers from a mental or other infirmity; or

iv) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.

D) Remote live testimony of a child shall not be utilized when the accused elects to absent himself or herself from the court room. (Il. Mil. R. Evid. 612)

l) Writing Used to Refresh a Witness' Memory

1) If a witness uses a writing to refresh his or her memory for the purpose of testifying, either while testifying or before testifying, if the military judge determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness on that writing, and to introduce in evidence for the purpose of impeachment those portions that relate to the testimony of the witness.

2) If it is claimed that the writing contains privileged information or matters not related to the subject matter of the testimony, the military judge shall examine the writing in camera, excise any privileged information or unrelated portions, and order delivery of the remainder to the entitled party. Any portion withheld over objections shall be attached to the record of trial as an appellate exhibit.

3) If a writing is not produced or delivered pursuant to order under this subsection (l), the military judge shall make any order justice requires, except that, when the prosecution elects not to comply, the order shall:

A) strike the testimony; or

B) if, in his or her discretion, the military judge determines that the interests of justice so require, declare a mistrial.

4) This subsection (l) does not preclude disclosure of information required to be disclosed under other provisions of this Manual. (Il. Mil. R. Evid. 612)

m) Witness' Prior Statement

1) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request it shall be shown or disclosed to opposing counsel.

2) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is first afforded an opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement, or the interests of justice otherwise require. This provision does not apply to admissions in Section 400.720(a)(2)(B).

n) Calling and Interrogation of Witnesses by the Court-Martial

1) Calling by the Court-Martial. The military judge may, sua sponte, or at the request of the members or the suggestion of a party, call witnesses. All parties are entitled to cross-examine those witnesses. The military judge shall determine whether it is appropriate to recall a witness under this Manual.

2) Interrogation by the Court-Martial. The military judge or members may interrogate witnesses, whether called by the military judge, the members or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions or the course of questioning and so that questions may be asked on behalf of the court by the military judge in a form acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.

3) Objections. Objections to calling of witnesses by the military judge or the members or to the interrogation by the military judge or the members may be made at the time, or at the next available opportunity when the members are not present. (Il. Mil. R. Evid. 614)

o) Excluding Witnesses

At the request of the prosecution or defense, the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the orders sua sponte. This subsection (o) does not authorize exclusion of:

1) the accused;

2) a member of an armed service or an employee of the United States or of the State of Illinois designated as a representative of the United States or of the State of Illinois by the trial counsel;

3) a person whose presence is shown by a party to be essential to the presentation of the party's case;

4) a person authorized by statute to be present at courts-martial; or

5) any victim of an offense from the trial of an accused for that offense because that victim may testify or present any information in relation to the sentence or that offense during the presentencing proceedings. (Il. Mil. R. Evid. 615)