

## A Primer on the Use of Military Character Evidence

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### I. Introduction

You are a young defense counsel sitting at your desk, dismayed over your huge case load, when the senior defense counsel (SDC) comes into your office. “First Lieutenant Smith, got a case for you: Marine Gunnery Sergeant [E-7] (Gunny) Jones has been accused of using marijuana, committing larceny and being in an unauthorized absence (UA) status from his unit. Gunny Jones is a decorated war veteran who received the Silver Star in Fallujah. The facts in this case do not sound good for your client, but the Gunny might have a chance of acquittal if you emphasize his excellent military career. Anyway, here is the file, familiarize yourself with it and be ready to brief me tomorrow on how you are going to present good military character evidence on the merits. Take a look at relevant case law; I think it can be offered, even for non-military offenses. Be ready to brief me tomorrow and explain exactly how you plan on introducing the evidence, over the objections of the trial counsel.”

After the SDC leaves your office you begin racking your brain; what does good military character (GMC) have to do with a larceny case? You quickly remember a primer you read in Naval Justice School (NJS) that talked about GMC and the GMC defense. As you recall GMC “refers to an accused [servicemember’s] introducing evidence of good military character in an attempt to convince the military judge or members that he did not commit the offense for which he is charged.”<sup>1</sup> Furthermore, GMC is introduced with the intended purpose to provide the “basis for an inference that the accused is too professional a soldier to have committed the offense with which he is charged.”<sup>2</sup> You know you will encounter objections from the trial counsel. What rules of evidence apply to admitting character evidence, and GMC in particular, on the merits? Can defense counsel present specific instances of conduct, such as Gunny Jones’s Silver Star? What tactical considerations should defense counsel make before deciding whether to use this evidence?

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<sup>1</sup> Lieutenant Colonel Paul A. Capofari, *Military Rule of Evidence 404 and Good Military Character*, 130 MIL. L. REV. 171, 171 (1990); see also Colonel Mike Hargis, *A View from the Bench: Findings, Sentencing, and the “Good Soldier.”* ARMY LAW., Mar. 2010, at 91, 91.

<sup>2</sup> Randall D. Katz & Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 MIL. L. REV. 117, 119 (2001).

### II. Some History of Character Evidence

Courts have always struggled with the proper use and limits of character evidence at trial. Good military character is unique to the military and requires an understanding of what GMC is and how character evidence fits within the Military Rules of Evidence (MREs). The incongruity between the MRE controlling GMC, the *Manual for Courts-Martial* (MCM) sections dealing with GMC, and the military courts’ interpretation of the rule(s) presents challenges for military practitioners.

#### A. Character Evidence and Good Military Character Evidence Defined

*The subject seems to gather mist which discussion serves only to thicken, and which we can scarcely hope to dissipate by anything further we can add.*<sup>3</sup>

Introduction of character evidence by the accused is done ultimately with the intent to create “enough of a favorable inference about the accused and his character to convince the trier of fact that the accused could not have done the crimes he is charged with by the government.”<sup>4</sup> Ultimately, the defense seeks to offer favorable character evidence attempting to create a “seed of doubt to prevent the members from believing that the government met their beyond a reasonable doubt burden.”<sup>5</sup> Additionally, the presentation of positive character evidence can “humanize [the accused] enabl[ing] fact finders and sentencing agencies to treat [him more favorably].”<sup>6</sup>

Falling within the larger category of character evidence is the “good character defense,” and the particular type used in this primer is the good military character.<sup>7</sup> This evidence is unique to the military and cannot be used on the merits in state or federal court. Good military character is evidence that highlights the military expertise and qualities of the accused. The offering of character evidence on the merits is

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<sup>3</sup> Nash v. United States, 54 F.2d 1006, 1007 (2d. Cir. 1932) (concerning the use of character evidence on the merits in a civilian trial).

<sup>4</sup> Katz & Sloan, *supra* note 2, at 119.

<sup>5</sup> *Id.*

<sup>6</sup> Lieutenant Colonel Richard R. Boller, *Proof of the Defendant’s Character*, 64 MIL. L. REV. 37, 40 (1974).

<sup>7</sup> See DAVID A. SCHLUETER, STEPHEN A. SALTZBURG, LEE D. SCHINASI & EDWARD J. IMWINKELRIED, *MILITARY EVIDENTIARY FOUNDATIONS* ch. 6, at 4-81 (1994) (good military character (GMC) subset of character evidence).

generally prohibited.<sup>8</sup> But in limited circumstances, evidence of the accused's GMC may be offered at trial, both during the findings phase and sentencing.<sup>9</sup>

## B. Good Military Character Before the Military Rules of Evidence

The soldier is in an environment where all weaknesses or excesses have an opportunity to betray themselves. He is carefully observed by his superiors—more carefully than falls to the lot of any member of the ordinary civil community; and all his delinquencies and merits are recorded systematically from time to time on his 'service record,' which follows him throughout his army career and serves as the basis for the terms of his final discharge.<sup>10</sup>

The history of character evidence predates the creation of the MRE<sup>11</sup> and involves introducing evidence of the accused's performance through documents and testimony.<sup>12</sup> The use of character evidence in defense of an accused dates back in part to a Supreme Court bribery case from 1948, *Michelson v. United States*. In *Michelson*, the Court held that the evidential use of "character, disposition and reputation," prohibited for prosecution, "is open to the defendant because character is relevant in resolving probabilities of guilt."<sup>13</sup> Also, the Court stated that "in some circumstances, [the testimony on defendant's good character] alone . . . may be enough to raise a reasonable doubt of guilt. . . ."<sup>14</sup> Thus, it is well recognized that character evidence can be a powerful tool for certain accused.<sup>15</sup>

Furthermore, the Court in *Michelson* stated that the defense may offer relevant character testimony so that the jury would infer that the defendant could not have done the

<sup>8</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(a) (2012) [hereinafter MCM] ("Evidence of a person's character or a trait of character is not admissible for the purposes of proving action in conformity therewith on a particular occasion.").

<sup>9</sup> *Id.*

<sup>10</sup> Lieutenant James F. Chapman, *Establishing and Rebutting Evidence of the Accused's Good Military Character*, JAG J., Nov. 1954, at 9, 9 (quoting JOHN HENRY WIGMORE, ON EVIDENCE § 59 (3d ed. 1940)).

<sup>11</sup> See Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 18 (1990) (Military Rules of Evidence (MREs) came into existence 1 September 1980).

<sup>12</sup> Boller, *supra* note 6, at 39 (providing a good discussion of presentation of character evidence).

<sup>13</sup> *Michelson v. United States*, 335 U.S. 469, 475–76 (1948).

<sup>14</sup> *Id.* at 476.

<sup>15</sup> Katz & Sloan, *supra* note 2, at 135.

crime because of his "favorable" character.<sup>16</sup> Accordingly, *Michelson* was speaking to the ultimate intent of offering character evidence for the accused, which is to attack the government's burden of proving the accused's guilt beyond a reasonable doubt. Good military character is merely a subset of character evidence, so the insights and holdings in *Michelson* apply.

Early versions of the MCM allowed the introduction of character evidence with few constraints.<sup>17</sup> The 1969 version stated that the "accused may introduce evidence of his own good character, including evidence of his military record and standing as shown by authenticated copies of efficiency or fitness reports or otherwise and evidence of his general character as a moral, well-conducted person."<sup>18</sup>

## C. Good Military Character After the Military Rules of Evidence

The advent of the MRE in 1980 replaced the broader "general good character" standard with a more restrictive standard, which allowed only "evidence of a pertinent trait."<sup>19</sup> For much of the next decade, military courts and practitioners attempted to determine what is a "pertinent trait" and when it was sufficiently "related" to a charged offense,<sup>20</sup> particularly when that trait was good military character.<sup>21</sup> Since then, the courts have generally favored an

<sup>16</sup> *Michelson*, 335 U.S. at 476 ("[A]ffirmative testimony that general estimate of his character is so favorable that jury may infer that he would not be likely to commit the offense charged.").

<sup>17</sup> Katz & Sloan, *supra* note 2, at 121.

<sup>18</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 138f.(2) (1969).

<sup>19</sup> MCM, *supra* note 8, MIL. R. EVID. 404(a)(1) analysis, at A-22-23.

<sup>20</sup> See *United States v. Hamneke*, 15 M.J. 609, 611 (N.M.C.M.R. 1982) (stating that for the introduction of evidence under MRE 404(a), there must be a showing that the evidence is of a character trait and that trait is pertinent to the offense charged and before the court); *United States v. Cooper*, 11 M.J. 815, 815 (A.F.C.M.R. 1981) (Air Force Court of Military Review clarified that GMC was admissible on the merits where there is "some direct connection between that specific character trait and offense charged."); *United States v. Fitzgerald*, 19 M.J. 695, 697 (A.C.M.R. 1984) (other than charges involving a purely military offense, such as disobedience of orders or absence without leave, in order for the specific trait of military character to be relevant in a trial, the defense must show a nexus between the offense charged and the performance of military duties).

<sup>21</sup> See *United States v. Piatt*, 17 M.J. 442, 446 (C.M.A. 1984) (GMC evidence admissible in assault case based on alleged abuse of trainees by USMC drill instructor; court found that character for performing his duties correctly was relevant to whether he performed them incorrectly by means of abuse); *United States v. McNeill*, 17 M.J. 451, 452 (C.M.A. 1984) (same holding for drill instructor accused of sodomy with an officer candidate in his charge); *United States v. Kahakauwila*, 19 M.J. 60, 62 (C.M.A. 1985) (GMC evidence admissible to defend against charge of selling marijuana in violation of Navy regulations, to show that accused "conformed to the demands of military law and was not the sort of person who would have committed such an act in violation of regulations"); *United States v. Vandelinder*, 20 M.J. 41, 44–45 (C.M.A. 1985) (holding that off-post drug offenses were closely related to military effectiveness, so that good military character was pertinent to them); *United States v. Court*, 24 M.J. 11, 14–15 (C.M.A. 1987) (overruling the service court, the CMA found GMC

expansive reading of good military character as a pertinent trait.<sup>22</sup>

Military Rule of Evidence (MRE) 404(a) is taken “without substantial change” from Federal Rule of Evidence 404(a).<sup>23</sup> There is some incongruity between what is contained in the text of MRE 404, the drafter’s analysis, and the subsequent interpretation by military courts as to what exactly qualifies as GMC.<sup>24</sup> It is within this grey area that

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admissible to defend against charge of conduct unbecoming an officer by means of sex offenses, even though offenses occurred off post; the court held that in prosecutions under the Uniform Code of Military Justice (UCMJ) Article 133, GMC evidence could be used either to show that the accused would never commit such an act, or that “the charged conduct was not ‘unbecoming’ because an officer of such fine character would never do anything that would seriously compromise his standing as an officer,” but also held that “it is the substance of the alleged misconduct which is pivotal to a determination whether such evidence is ‘pertinent’”; *but see* United States v. Hooks, 24 M.J. 713, 717 (A.C.M.R. 1987) (holding that accused’s good military character was not pertinent to accusation of off-post kidnapping and rape of German civilian); United States v. Cooper, 11 M.J. 815, 815 (A.F.C.M.R. 1981) (accused charged with possession of marijuana, court held that merely being charged under the code was not a sufficient connection to make the violation “military” in nature, thus warranting presentation of GMC).

<sup>22</sup> See United States v. Gleason, 43 M.J. 69, 75 n.11 (C.A.A.F. 1995) (“Consistent with the traditional military emphasis on the importance of good character, Mil.R.Evid. 404(a)(1) has been liberally construed to permit evidence of an accused’s general ‘good character.’”), *cited in* Elizabeth Lutes Hillman, *The “Good Soldier” Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879, 887 n.38 (1999). In *Gleason*, the court set aside a conviction of solicitation to commit murder for unlawful command influence (UCI). In so doing, the court found it possible that witnesses (who were discouraged from testifying by UCI) “would have been . . . willing to testify as character witnesses on the merits and to extol Gleason’s general good character and truthfulness” in light of his stellar service record, and that these character witnesses might have “generated a reasonable doubt.” *Gleason*, 43 M.J. at 75. See also United States v. Perez, 64 M.J. 239, 244 (C.A.A.F. 2006) (Soldier used “good Soldier” testimony to defend against charges of rape, forcible sodomy, and indecent acts with his stepdaughter, starting when she was five or six years old; the pertinence of this evidence was not litigated on appeal and the evidence may not have been objected to at trial); *Court*, 24 M.J. at 16 (Cox, J., concurring in part and dissenting in part) (“in my judgment, the fact that a person has given good, honorable, and decent service to his country is *always* important and relevant evidence for the triers of fact to consider”) (emphasis in original).

<sup>23</sup> MCM, *supra* note 8, MIL. R. EVID. 404(a) analysis, at A-22-23.

<sup>24</sup> The MCM states,

Rule 404(a) replaces 1969 Manual [paragraph] 138f and is taken without substantial change from the Federal Rule. Rule 404(a)(1) allows only evidence of a pertinent trait of character of the accused to be offered in evidence by the defense. This is a significant change from [paragraph] 138f of the 1969 Manual which also allows evidence of “general good character” of the accused to be received in order to demonstrate that the accused is less likely to have committed a criminal act. Under the new rule, evidence of general good character is inadmissible because only evidence of a specific trait is acceptable. *It is the intention of the Committee, however, to allow the defense to introduce evidence of good military character when that specific trait is pertinent. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders.*

defense counsel should seek to push the envelope of relevancy to get the evidence into the courtroom while the government may be attempting to have the “military nexus” maintain some sort of relevancy gatekeeping function.<sup>25</sup>

As a rule, GMC evidence on findings is introduced as a “pertinent character trait” of the accused under MRE 404(a)(1). It may therefore be proved only by reputation or opinion evidence under MRE 405(a). An exception occurs in the extremely rare circumstance when the character trait is an “essential element of an offense or defense”—for example, when the defense of entrapment is raised, so that the accused’s predisposition to commit the crime is at issue—in which case specific instances of conduct may be introduced under MRE 405(b).<sup>26</sup> Good military character includes specific traits such as courage, respect, and obedience to orders. Depending on the case, these specific traits may be relevant and admissible; the defense is not limited to a general opinion about GMC. However, testimony that an accused has not been known to commit the

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MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 22-32 (1984) (analysis of MRE 404), *quoted with emphasis added in* Katz & Sloan, *supra* note 2, at 124. While the drafters explicitly stated in their analysis that they were significantly changing the law, they also provided that evidence of good military character would be admissible when found to be pertinent. Neither the plain language of the rule, nor the drafters’ analysis provides guidance as to when good military character would be a “pertinent trait.” It has been left to the military courts to interpret the meaning of this language.

<sup>25</sup> Whether trial counsel actually should take this route is a question of tactics; if the Government’s case is otherwise strong, it may prefer to avoid the appellate issue by not opposing the evidence. “To avoid needless appellate issues and the attend risk of reversal on appeal, an experienced prosecutor will weigh the factors involved that will, in many cases, counsel a prudent course of action. . . .” United States v. Guthrie, 25 M.J. 808, 810 (A.C.M.R. 1988) (referring to government opposition to defense challenges for cause). See also United States v. Jensen, 25 M.J. 284, 289 (C.M.A. 1987) (Cox, J., concurring) (“In the present case, the military judge ruled against appellant on three very close issues, thus creating difficult appellate questions. . . . It is the Government’s *burden of persuasion* that has importance, not trial counsel’s effectiveness in keeping evidence out of the record. I sometimes wonder why the Government even bothers to object to admission of [credibility or impeaching] evidence in a trial before military judge alone.”).

<sup>26</sup> See United States v. Schelkle, 47 M.J. 110, 112 (C.A.A.F. 1998) (evidence of pertinent traits of appellant’s character offered by the defense, including general GMC and law-abidingness, was admissible but limited to reputation and opinion testimony; in particular, evidence that the good character witnesses had never seen the accused use drugs was *not* admissible because it was “specific instances” testimony); see also Hargis, *supra* note 1, at 91; Lieutenant Colonel Stephen R. Henley, *Developments in Evidence III: The Final Chapter*, ARMY LAW., May 1998, at 1, 6–7 & n.58 (“Considering that the Eighth Amendment prohibits the criminalization of a person’s status, character will rarely (if ever) be an essential element of an offense.”) (citing *Robinson v. California*, 370 U.S. 660, 667 (1962)). Lieutenant Colonel Henley argues that the defense of entrapment is the *only* circumstance that will make character an essential element of a crime or defense at court-martial. Henley, *supra*, at 7 & n.64 (citing United States v. Thomas, 134 F.3d 975, 978–80 (9th Cir. 1998)) (holding that accused claiming entrapment could offer “specific acts” evidence, including his own lack of an arrest record, as evidence against his predisposition to commit the crime).

specific crime at issue in the past is “specific acts” testimony and, as such, is normally inadmissible by the defense.<sup>27</sup>

### III. Application of GMC Evidence

#### A. Pretrial Preparation and Article 32 Hearings

*A pretrial investigation under Article 32, Uniform Code of Military Justice, provides a useful forum in which the accused’s counsel may present character evidence favorable to the defendant.*<sup>28</sup>

Both prosecutors and defense counsel should leave no proverbial stone unturned when it comes to seeking out character evidence—particularly GMC evidence—related to the case. The defense should seek out and interview individuals who will provide an honest and informed assessment of the accused’s character. Trial witnesses will only be able to testify if they have sufficient knowledge to give informed opinions about the accused or his reputation. A peer of similar rank may have seen and heard things unknown to a first sergeant or sergeant major who has not had the same face time and uncensored observation of the accused. On the other hand, senior leadership have more experience leading troops and a more seasoned notion of what GMC really is. Immediate leadership (such as squad leaders and platoon sergeants for a lower enlisted troop) strike a balance between these considerations, combining knowledge of the accused with experience that gives them credibility on the stand.<sup>29</sup>

In interviewing these witnesses, the defense must remember that the Government will also cast a wide net in search of rebuttal evidence and will interview military character witnesses regardless of whether they appear on the accused’s witness list. That is one reason why it is important to let the witnesses give their unvarnished opinions, good

and bad, during interviews, and not try to “push” them in the client’s favor.<sup>30</sup> If strong rebuttal evidence exists, the defense may wish to reconsider opening the door by introducing GMC evidence in the first place.<sup>31</sup> If the defense decides to use the evidence anyway, well-informed counsel should have a prepared response to the Government’s anticipated rebuttal.

In searching for character evidence, defense counsel should consider imaginative uses of GMC evidence.<sup>32</sup> In *United States v. Benedict*, the defense offered GMC evidence to support its position that the accused lacked mental responsibility for his actions. The defense theory was that the charged misconduct deviated so far from his outstanding military character, “that his acts must have resulted from insanity, because . . . he would never have committed a crime had he been in his right mind.”<sup>33</sup> Good military character is a powerful tool in the right case. Whether a given case is the right case is a matter of professional judgment.

Also important is determining where to find useful GMC witnesses. The accused’s immediate supervisor is a fine place to start. With whom does the accused eat lunch? Who are his “buddies?” Public Facebook or other social media

<sup>27</sup> *Schelke*, 47 M.J. at 112.

<sup>28</sup> *Boller*, *supra* note 6, at 37.

<sup>29</sup> It has been suggested that in a deployed environment the defense can make a case effectively untriable by demanding unavailable live witnesses to establish GMC. Major Frank M. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, ARMY LAW., Sept. 2010, at 12, 23. However, if the witness is unavailable within the meaning of MRE 804(a), the defense will have to find some substitute for his testimony or do without, unless the defense can show that the witness’ unavailability is the Government’s fault, or that that particular witness’ testimony is “of such central importance to an issue that it is essential to a fair trial,” in which case, the defense must also convince the military judge that no adequate substitute to the live testimony of that witness is available. MCM, *supra* note 8, MIL R. EVID. 703(b)(3); Major E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, ARMY LAW., Jan. 2012, at 20 & n.79. Counsel also have an ethical obligation to avoid dilatory practices and may not demand unavailable witness just to delay proceedings. See U.S. DEP’T OF ARMY, REG. 27-26, PROFESSIONAL CONDUCT FOR LAWYERS, app. B, r. 3.2 (1992) (Expediting Litigation).

<sup>30</sup> In talking to witnesses, counsel should be open about this point: “I’m defending Private Snuffy, but to do my job right, I have to know how things really are. So I’m asking you to tell me what he’s really like, and what you’ve seen him do, good and bad.” The witness interview is not the place for slashing cross-examination. Counsel on either side (but especially the prosecution) should also be open about the rule of equal access to witnesses under Article 46, UCMJ: “If the lawyer for the other side comes to see you, you should speak just as freely to him as you do to me. That’s the law, and that’s how we make sure the trial is fair.” Witnesses who understand that counsel want to hear the full evidence, the same as the other side will hear, are far less likely to slant what they say in the interview, and thus are far less likely to bring surprises to the witness stand.

<sup>31</sup> See *United States v. Hensley*, No. 34000, 2001 WL 765607 (A.F. Ct. Crim. App. 21 June 2001) (Appellant introduced evidence of good military character during sentencing and the government rebutted with evidence of three instances of misconduct. The military judge allowed the rebuttal evidence after balancing the probative value of the evidence with its prejudicial effect pursuant to MRE 403. Evidence of the three earlier instances of misconduct was relevant to rebut appellant’s showing specific instances of his good military character.); MCM, *supra* note 8, MIL. R. EVID. 405(a) (allowing evidence of a pertinent character trait offered by the accused “or by the prosecution to rebut the same”); Hargis, *supra* note 1, at 92 (“Under MRE 405(a), the Government can cross-examine a witness on relevant specific instances of conduct. The narrow the character trait offered by you under MRE 404(a)(1), the narrow the range of specific instances of conduct that will be relevant to challenge the basis of that opinion. However, ‘good military character’ is about as broad a character trait as possible. By offering this type evidence, you probably kick the character door off its hinges and allow the Government a nearly unfettered opportunity to cross-examine the witness.”).

<sup>32</sup> “[I]magination is the only limit of what demonstrates ‘good military character.’” Rosenblatt, *supra* note 29, at 12, 23.

<sup>33</sup> See *United States v. Benedict*, 27 M.J. 253, 262 (C.M.A. 1988). The trial court excluded the GMC evidence. The Court of Military Appeals held this exclusion to be error. The court did not test the error for prejudice because it was reversing the case on other grounds anyway, but admitted the possibility. *Id.*

profiles can provide long lists of “friends” to interview.<sup>34</sup> Do not let your investigation begin and end with the Government-provided discovery on your desk.

Concerning the hypothetical client, Gunny Jones, at your first meeting you should ask him to come back with a list of people he has worked with or for who would be able to speak to his character and reputation, good or bad. This preliminary list should not be limited to his present command, and should include prior assignments. Ask the client not only about previously charged misconduct, but uncharged accusations and any prior negative administrative actions he may have received.<sup>35</sup> As counsel you need to advise the Gunny that the Government will be looking to discover any negative character evidence that can strengthen the case against him. Even if the Government does not know you are considering a GMC defense, they may be looking for witnesses who can testify as to the accused’s lack of rehabilitative potential at sentencing,<sup>36</sup> and so discover any negative information that exists. The law of unintended consequences is alive and well with regard to using GMC. Thus, before using this kind of evidence and deciding how to use it, consider the Government’s possible responses.<sup>37</sup>

Good military character evidence can be helpful before trial in convincing the command to take some other route

than trial by court-martial.<sup>38</sup> This can be done informally, by informing the trial counsel or a commander of the accused’s background. It may also be done by presenting GMC evidence at an Article 32 hearing. If such evidence makes a favorable impression with the investigating officer (IO), he may recommend dismissal or resolution without resort to general court-martial.<sup>39</sup> While the IO’s recommendation is not binding,<sup>40</sup> it can sometimes influence the convening authority as to the proper disposition of the case.<sup>41</sup> Also, the hearing is an opportunity for the Government to see the GMC evidence uncovered by the defense, and this may influence the command through the trial counsel.

As only a few MREs apply at Article 32 hearings, counsel can and, in the right case, should present GMC evidence even if it will not be admissible at trial.<sup>42</sup> For example, at the Article 32 hearing but not at trial, specific instances of GMC may be presented to show the charged misconduct is out of character for the accused.

## B. Trial—Relevance of GMC to the Charged Offenses

Appellate cases suggest that, in the past, GMC evidence was difficult to present on the merits when the charges were not “military offenses” (that is, offenses without counterparts in civilian law, such as desertion or disobedience of lawful orders).<sup>43</sup> Later case law, however,

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<sup>34</sup> See Ronald L. Frey, *Defending Sex Crimes in the Digital Age*, ASPATORE, Sept. 2012, at 1, 2–3. However, attorneys should be wary of making “friend” requests in the course of obtaining information through social media. See Michael E. Lackey, Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 *TOURO L. REV.* 149, 178 (2012).

<sup>35</sup> See *United States v. Strong*, 17 M.J. 263, 266–67 (C.M.A. 1984) On sentencing, defense counsel had to “accept responsibility not only for specific evidence it offers, but also reasonable inferences drawn from it,” so that evidence of GMC during one time period could be rebutted by evidence from a different time period, because the original evidence “could not help but convince the military judge that the accused had an outstanding military character.”).

<sup>36</sup> For a discussion of rehabilitative potential evidence under Rule for Court-Martial (RCM) 1001(b)(5) and its limits, and tips on how to effectively oppose such evidence, see Edward J. O’Brien, *Rehabilitative Potential Evidence: Theory and Practice*, *ARMY LAW.*, Aug. 2011, at 5.

<sup>37</sup> See *United States v. Brewer*, 43 M.J. 43, 46–47 (C.A.A.F. 1995). In that case, the defense questioned a character witness about the accused’s good military character during a specific period of time to create the inference that he would not deceive the panel on the day of trial. The Government, on cross, asked the witness about specific instances of misconduct outside that period. The defense objected, the trial court overruled, and the Court of Appeals for the Armed Forces affirmed. The court held that the issue of the accused’s truthfulness was only relevant insofar as that truthfulness extended from the time the witness knew him until the day of trial (when he gave the testimony that the defense was trying to bolster), so that any misconduct falling between those times was relevant to the issue. *Id.* (citing *United States v. Pearce*, 27 M.J. 121, 124 (C.M.A. 1988)). The court did not word this finding as a universal rule, but stated that “[a]lthough appellant correctly points out that such cross-examination is limited under Mil.R.Evid. 405(a) to relevant instances of conduct, his artificial limitation of relevance to the same time period as that which formed the basis of the opinion sometimes would be illogical. This is such a case. . . .” *Id.* at 47.

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<sup>38</sup> Boller, *supra* note 6, at 39 (“The best way for a criminal defense lawyer to win a case is to never have to try it. Military pretrial procedure governing the disposition of charges lends itself to the dismissal or modification of charges at the initial stages of a prosecution . . . [i]t is good practice for a defense counsel to give a commander reasons to deal leniently with a defendant at the earliest possible stage of a case. The time spent getting statements from character witnesses at this stage of the proceeding will reward the defendant and his counsel many times over and even if the case is referred for trial.”).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* R.C.M. 405(a), discussion (“[R]ecommendations of the investigating officer are advisory.”).

<sup>41</sup> CRIMINAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR & SCH., CRIMINAL LAW DESK BOOK, at N-1 (2011) [hereinafter CRIMINAL LAW DESKBOOK] (The statutory purpose of the investigation is to inquire into the truth of the matter alleged in the charges, consider the forum of the charges and make recommendation as to the disposition of the charges.).

<sup>42</sup> *Id.* R.C.M. 405(i) (Military Rules of Evidence 301, 302, 303, 305, 412 & Section V do not apply.).

<sup>43</sup> See *Clemons*, 16 M.J. at 47 (An Army drill sergeant was charged with stealing his recruit’s property. Defense sought to enter GMC evidence to show how the charges were not consistent with his GMC. The trial judge excluded the evidence as he did not see GMC as pertinent for purposes of MRE 404(a)(1). However, the appellate court held that traits of good military character and character for lawfulness each evidenced “a pertinent trait of the character of the accused” in light of the principal theory of the defense case.); *United States v. Piatt*, 17 M.J. 442, 446 (C.M.A. 1984) (A Marine drill instructor was charged with having two of his recruits assault another recruit. Again, trial judge excluded the GMC evidence as it was “not pertinent.”); *United States v. McNeill*, 17 M.J. 451, 452 (C.M.A. 1984) (A Drill instructor was charged with wrongful sexual relations with a female officer candidate. Trial judge denied the accused ability to present

expanded the interpretation of when GMC is a “pertinent trait” for purposes of MRE 404(a)(1),<sup>44</sup> so that now GMC evidence is broadly admissible and its pertinence is rarely, if ever, litigated.

Nonetheless, in case the Government does contest the admissibility of the GMC evidence, the defense should be prepared to argue a military nexus to justify its use, regardless of what appears on the charge sheet.<sup>45</sup> In the hypothetical at the beginning of this article, Gunny Jones has been charged with larceny and unauthorized absence. There is precedent for admitting the GMC evidence as to the larceny charge,<sup>46</sup> the unauthorized absence charge,<sup>47</sup> and the drug charge.<sup>48</sup>

Regardless of whether the evidence will be held admissible in court, the defense must also consider the usefulness of the evidence. Most servicemembers have heard of senior leaders with stellar service records who sexually harassed and abused trainees;<sup>49</sup> will GMC evidence really convince them your client would not have committed a sex offense? After a decade of war, a great many panel members have deployed and seen all kinds of misconduct committed by brave servicemembers who volunteered in wartime and had multiple deployments to combat zones. Will your client’s good deployment history convince them that he could not have committed the crime? Good military character is an extremely broad character trait, and introducing it gives the prosecution an extremely broad scope for rebuttal.<sup>50</sup> Will the reward be worth the risk? Not

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his GMC to counter allegations. Appellate court held this was prejudicial error, as the GMC was pertinent to charges before the court.)

<sup>44</sup> See *United States v. Belz*, 20 M.J. 33 (C.M.A. 1985) (“The test of pertinence [relevance] is whether a “fact finder could reasonably infer that a person of GMC would be unlikely to participate in an activity that is so harmful to military effectiveness.”). See also *United States v. Lutz*, 18 M.J. 763, 771 (C.G.C.M.R. 1984) (“[T]he law permits admission of only a particular trait of character and then only when this particular trait is pertinent to a particular issue in the case.”).

<sup>45</sup> See *United States v. Fitzgerald*, 19 M.J. 695, 697 (A.C.M.R. 1984), *United States v. Kahakauwila*, 19 M.J. 60, 62 (C.M.A. 1984), and *McNeill*, 17 M.J. at 452.

<sup>46</sup> See *Clemons*, 6 M.J. at 47. See also *United States v. Thomas*, 18 M.J. 545, 549 (A.C.M.R. 1984) (“[T]here should be no question concerning the admissibility [of the good military character evidence] on the merits.”).

<sup>47</sup> See *United States v. Cooper*, 11 M.J. 815, 816 (A.F.C.M.R. 1981) (Offenses such as desertion and absence without leave are examples of offenses where evidence of GMC would be of probative value.).

<sup>48</sup> See *Kahakauwila*, 19 M.J. at 61.

<sup>49</sup> See Jim Forsyth, *U.S. Air Force Staff Sergeant Gets 20 Years for Rape, Sex Assault*, REUTERS.COM (Jul. 21, 2012), <http://www.reuters.com/article/2012/07/21/us-usa-military-sex-idUSBRE86J1E320120721>; Scott Wilson & Tom Bowman, *Soldier Cuts Deal in APG Scandal*, BALTIMORE SUN (May 21, 1997), [http://articles.baltimoresun.com/1997-05-21/news/1997141134\\_1\\_aberdeen-soldier-fort-leavenworth](http://articles.baltimoresun.com/1997-05-21/news/1997141134_1_aberdeen-soldier-fort-leavenworth).

<sup>50</sup> Hargis, *supra* note 1, at 92.

only legal doctrines of admissibility and relevance, but concerns of practical advocacy, must inform a defense decision to rely on GMC evidence.<sup>51</sup>

### C. Direct Examination

On direct, the defense is normally limited to reputation or opinion testimony to establish GMC. In order to present this type of circumstantial character evidence, counsel must show the following:

- (1) The accused has a relevant specific character trait, (2) the witness knows about the character trait, either personally or by reputation, (3) the witness states their opinion about the accused character trait, or states what the accused’s reputation is regarding that character trait.<sup>52</sup>

In basic terms, you can lay the foundation by showing how well your witness knows the accused. However, you can strengthen the foundation by bringing out the witness’s own military and leadership experience. That way, you not only show that he knows your client’s character, but that he knows what good military character is, so that the factfinder should take him seriously. The following is a hypothetical exchange of a GMC witness testifying on behalf of Gunny Jones as to the larceny charge and the witness’s opinion as to Gunny Jones’s character for GMC:

DC: First Sergeant Davis, tell us about your military background.

Wit: I joined the Marine Corps in 1996, went to Parris Island Recruit Training, followed on to the School of Infantry, went to an initial assignment with 2/6 Marines, Camp Lejeune, North Carolina, served as a Drill Instructor at Parris Island, deployed with 24th MEU, then assumed my present duties as first sergeant of B Co., 1/6 Marines.

DC: And outside of being first sergeant, what leadership positions have you held?

Wit: Squad leader, platoon leader, and senior drill instructor.

DC: First Sergeant Davis, do you know Gunny Jones?

Wit: Yes, then Staff Sergeant Jones was the senior enlisted advisor for my platoon during our deployment to Iraq back in 2008.

DC: When is the last time you saw Gunny Jones?

Wit: Most recently I see him here today sitting at the table over there.

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<sup>51</sup> See Hillman, *supra* note 22, at 901 nn. 110, 111 (interviews with experienced military defense counsel suggested that GMC evidence was most effective when the charged crime involved violation of a military duty, and when the charges were “relatively minor”).

<sup>52</sup> SCHLUETER, SALTZBURG, SCHINASI & IMWINKELRIED, *supra* note 7, at 171.

DC: Let the record show the witness is pointing at my client, Gunny Jones, sitting at defense counsel table.  
 DC: What contact, if any do you have with Gunny Jones?  
 Wit: Four years ago we were deployed for a year together as part of 1/6.  
 DC: 1/6?  
 Wit: First Battalion, Sixth Marines.  
 DC: Okay, back when you were deployed with him in 2008, how often did you see him?  
 Wit: All day, every day for a whole year.  
 DC: Have you kept in touch with him since your deployment in 2008?  
 Wit: Yes we talk at least once a week, sometimes a couple of times a week.  
 DC: Do you have an opinion about Gunny Jones' military character?  
 Wit: Yes.  
 DC: What is that opinion?  
 Wit: He is an outstanding Marine. He has always had excellent military character.  
 DC: And how is he for punctuality?  
 Wit: Excellent. He is one of the most punctual and squared away Marines I have ever had work for me.

TC: Lieutenant Smith, what is your opinion of Gunny Jones' military character?  
 Wit: I think he is a lousy Marine.  
 MJ: Cross-examination defense counsel?  
 DC: Yes, your honor. Lieutenant Smith, are you aware that Gunny Jones earned the Silver Star in Iraq?  
 Wit: I knew he had the award, yes sir.  
 DC: Did you know he received it for his heroic actions during the battle of Fallujah?  
 Wit: No sir.  
 DC: Were you aware that those heroic actions included Gunny Jones single handedly saving two Marines from enemy fire?  
 Wit: No, sir, I did not.  
 DC: Killing three insurgents with his bare hands?  
 Wit: No.  
 DC: And that on the same occasion he saved two Iraqi children from a burning building?  
 Wit: No, sir.  
 DC: Or that he was the top rated drill instructor at Parris Island for a whole year while serving on the drill field?  
 Wit: No, sir.  
 DC: Your Honor, I have no further questions for this witness.

The second, important way to utilize GMC to persuade the members to agree with your theme of the case is through cross-examination. As you have diligently interviewed both your witnesses and the opposing side's witnesses, you are more than prepared to cross-examine each witness who takes the stand.

#### D. Cross Examination

On cross examination, under MRE 405(a), counsel may inquire as to specific acts involving character, but extrinsic evidence is not allowed.<sup>53</sup> Thus, if the prosecution introduces a rebuttal witness who opines that your witness has bad military character, you can cross-examine him with specific instances of good conduct,<sup>54</sup> provided those instances lie within the scope of the prosecution's direct.<sup>55</sup>

<sup>53</sup> *Id.*

<sup>54</sup> See Colonel Francis A. Gilligan, *Credibility of Witnesses Under the Military Rules of Evidence*, 46 OHIO ST. L. J. 595, 633 (1985) (discussing character for truthfulness under MRE 608) (“[T]he proponent, during cross-examination of a witness who has testified to another witness’s character for untruthfulness, may ask about instances of good acts by the supposedly untruthful witness.”); see also O’Brien, *supra* note 36, at 11 (giving examples of specific acts in cross-examination of a Government “rehabilitative potential” witness).

<sup>55</sup> Cross-examination with specific instances of good conduct may open the door to specific instances of bad conduct on redirect examination. See *United States v. Fiorito*, No. 07-CR-0212(1), 2009 WL 1086518, at \*4 (D. Minn. Apr. 22, 2009) (concerning character for law-abidingness, cross-examination on specific instances “opens the door”); but see *United States v. Whiting*, 28 F.3d 1296, 1301 (1st Cir. 1994) (opposite holding concerning character for truthfulness). Military appellate courts do not appear to have resolved this issue with respect to GMC evidence, but they have held that cross-examination with specific instances of good conduct

#### E. Written Statements

In addition to witness examination, under MRE 405(c) “[t]he defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused.” If the defense does this, the prosecution may introduce written statements in rebuttal. The affidavits are subject to the same rules as direct testimony. So you can not use affidavits to introduce specific acts of good conduct that would be inadmissible under MRE 404(a)(1), and if you try, the military judge may respond by refusing to admit the evidence or by having it redacted.<sup>56</sup> To be both effective and admissible, an affidavit should contain the same kind of foundational information as a good direct examination—that is, both the witness’s own military and leadership background (to show that he knows GMC when he sees it) and information on how long and how often he has observed the accused (to show that he knows the accused’s GMC).

opens the door to specific instances redirect in the context of rehabilitative potential testimony at sentencing. *United States v. Eslinger*, 69 M.J. 522, 534 (A. Ct. Crim. App. 2010); *United States v. Foley*, No. 9802072, 2000 WL 703642, at \*1 (N-M. Ct. Crim. App. May 26, 2000) (citing *United States v. Mance*, 47 M.J. 742, 748 (1997)).

<sup>56</sup> See *United States v. Schelkle*, 47 M.J. 110, 110–12 (C.A.A.F. 1997) (upholding decision of military judge to redact character affidavits to exclude statements that the witnesses had never known him to use drugs, because these statements were inadmissible “specific instances”); *United States v. Kerr*, No. 32249, 1997 WL 801475, at \*2 (A.F. Ct. Crim. App. Dec. 12, 1997) (military judge ordered redaction of written defense character affidavits to remove inadmissible specific instances).

If the accused really has exhibited GMC, so that many witnesses are able to testify about it, consider a judicious mix of witnesses and written statements. A good witness can leave a powerful impression on the factfinder, but written statements go back into the deliberation room to be reread during deliberations. Three witnesses testifying about the accused's good conduct during the same period of service may seem redundant to the factfinder. One good witness backed up by a few written statements (to show that the witness's good opinion is shared by others) may accomplish as much or more.

#### F. Sentencing and Post-Trial

Discussion of character evidence on sentencing exceeds the scope of this article.<sup>57</sup> Rule for Court-Martial (RCM) 1001(c)(1)(B) makes "particular acts of good conduct or bravery" admissible on sentencing without the need to relax the Rules of Evidence under RCM 1001(c)(3). The defense counsel may wish to ask the judge to relax the rules anyway (for example, to admit unauthenticated documents showing GMC), but should be wary of the Government's ability to present rebuttal evidence under the relaxed rules. Only thorough pretrial preparation can ensure that the defense will make informed tactical decisions of this kind.

Good military character evidence can also be a powerful tool during the post-trial process when requesting deferment of confinement or clemency from the convening authority.<sup>58</sup> At this point counsel is not bound by the MRE and can present any and all forms of GMC.

#### IV. Conclusion

Defense counsel should strive to identify both good and bad military character evidence as early as possible before trial, to determine whether the risks of presenting such evidence outweigh its benefits. If the evidence is useful, the defense can use it to influence the command in the accused's favor before and after trial and to influence the factfinder in his favor during trial. Although the Government is unlikely to contest the admissibility of such evidence in the usual case, the defense should still be prepared to argue its admissibility to the military judge. Character evidence, particularly GMC evidence, is a powerful tool and if used wisely could result in an acquittal or reduced sentence for your client.

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<sup>57</sup> See Hargis, *supra* note 1, at 92–93 for a discussion of character evidence at sentencing.

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<sup>58</sup> See Boller, *supra* note 6, at 41–42.