

admitted as substantive evidence, precede any motive to fabricate or improper influence that it is offered to rebut. *United States v. Allison*, 49 M.J. 54 (C.A.A.F. 1998). Where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut. *United States v. Faison*, 49 M.J. 59 (C.A.A.F. 1998). This interpretation of the rule is consistent with the Supreme Court's decision in *Tome v. United States*, 513 U.S. 150 (1995)."

Delete the Analysis to M.R.E. 803(24).  
Delete the Analysis to M.R.E. 804(b)(5).

Insert the following Analysis for M.R.E. 807:

"MRE 807 was adopted on 30 May 1998 without change from the Federal Rule and represents the residual exception to the hearsay rule formerly contained in MRE 803(24) and MRE 804(b)(5).

"The Rule strikes a balance between the general policy behind the Rules of Evidence of permitting admission of probative and reliable evidence and the congressional intent that 'that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances.' S. Rep. No. 1277, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 7051, 7066. MRE 807 represents the acceptance of the so-called 'catch-all' or 'residual' exception to the hearsay rule. Because of the Constitutional concerns associated with hearsay statements, the courts have placed specific foundational requirements in order for residual hearsay to be admitted. See *United States v. Haner*, 49 M.J. 72 (C.A.A.F. 1998). These requirements are: necessity, materiality, reliability, and notice.

"The necessity prong 'essentially creates a "best evidence" requirement.' *United States v. Kelley*, 45 M.J. 275 (C.A.A.F. 1996) (citing *Larez v. City of Los Angeles*, 946 F.2d 630, 644 (9th Cir. 1991)). Coupled with the rule's materiality requirement, necessity represents an important fact that is more than marginal or inconsequential and is in furtherance of the interests of justice and the general purposes of the rules of evidence. See *United States v. Gonzalez*, 2003 CCA Lexis 57 (A.F.Ct.Crim.App. 2003).

"In order to fulfill the reliability condition, the proponent of the statement must demonstrate that the statement has particularized guarantees of trustworthiness as shown from the totality of the circumstances. *Idaho v. Wright*, 497 U.S. 805 (1990). The factors

surrounding the taking of the statement and corroboration by other evidence should be examined to test the statement for trustworthiness. The Court of Appeals for the Armed Forces has held that the Supreme Court's prohibition against bolstering the indicia of reliability under a Sixth Amendment analysis does not apply to a residual hearsay analysis. Therefore, in addition to evidence of the circumstances surrounding the taking of the statement, extrinsic evidence can be considered. *United States v. McGrath*, 39 M.J. 158 (C.M.A. 1994)."

Amend Part IV, Punitive Articles, para. 16(c)(1)(a) by replacing the word "Transportation" with the words "Homeland Security."

Amend Part V, Nonjudicial Punishment Procedure, paragraph 1(h), by renaming existing paragraph 1(h) to 1(i) and inserting the following new paragraph 1(h):

(h) "Applicable standards. Unless otherwise provided, the service regulations and procedures of the servicemember shall apply."

Amend the Analysis section of Part V, Nonjudicial Punishment Procedure, paragraph 1(h), by renaming it paragraph 1(i) and inserting the following as paragraph 1(h):

"200 Amendment: Subsection (h) is new. This subsection was added to clarify that nonjudicial punishment proceedings conducted in a combatant or joint command are to be conducted in accordance with the implementing regulations and procedures of the service to which the accused is a member."

Amend Part V, Nonjudicial Punishment Procedure, paragraph 2(a) by deleting "Unless otherwise" and replacing with "As."

Amend Part V, Nonjudicial Punishment Procedure, paragraph 2(a) by inserting the following after the second sentence:

"Commander includes a commander of a joint command."

Amend Part V, Nonjudicial Punishment Procedure, paragraph 2(a) by inserting the phrase "of a commander" in the third sentence after the words "the authority."

Amend the Analysis accompanying Part V, Nonjudicial Punishment Procedure, paragraph 2 by inserting the following paragraph:

"200 Amendment: Subsection (2) was amended to clarify the authority of the commander of a joint command to impose nonjudicial punishment upon service members of the joint command."

Amend Part V, Nonjudicial Punishment Procedures, paragraph 7(e),

by replacing the word "Transportation" with the words "Homeland Security."

Delete Appendix 3.1.

Amend Appendix 21, Introduction, paragraph b (Supplementary Materials) by replacing the word "Transportation" with the words "Homeland Security."

Amend the Introduction to Appendix 22 by inserting the following at the end of the first sentence:

"(the department under which the Coast Guard was operating at that time.)"

Amend the Introduction to Appendix 22 by replacing the word "Transportation" located at the second paragraph with the words "Homeland Security."

Dated: August 11, 2003.

**Patricia L. Toppings,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### List of Institutions of Higher Education Ineligible for Federal Funds

**AGENCY:** Department of Defense.

**ACTION:** Notice.

**SUMMARY:** This document is published to identify institutions of higher education that are ineligible for contracts and grants by reason of a determination by the Secretary of Defense that the institution prohibits or in effect prevents military recruiter access to the campus, students on campus, or student directory information. It also implements the requirements set forth in section 983 of title 10, United States Code, and 32 CFR part 216. The institution of higher education so identified is: William Mitchell College of Law, St. Paul, Minnesota.

**ADDRESSES:** Director for Accession Policy, Office of the Under Secretary of Defense for Personnel and Readiness, 4000 Defense Pentagon, Washington, DC 20301-4000.

**FOR FURTHER INFORMATION CONTACT:** Major Brenda K. Leong, (703) 695-5529.

Dated: August 11, 2003.

**Patricia L. Toppings,**

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