

(c) *Conducting a Hearing so that the Members Cannot Hear It.* Except in cases tried before a special court-martial without a military judge, the military judge must conduct any hearing on a preliminary question so that the members cannot hear it if:

- (1) the hearing involves the admissibility of a statement of the accused under Mil. R. Evid. 301–306;
- (2) the accused is a witness and so requests; or
- (3) justice so requires.

(d) *Cross-Examining the Accused.* By testifying on a preliminary question, the accused does not become subject to cross-examination on other issues in the case.

(e) *Evidence Relevant to Weight and Credibility.* This rule does not limit a party's right to introduce before the members evidence that is relevant to the weight or credibility of other evidence.

Rule 105. Limiting Evidence that Is Not Admissible against Other Parties or for Other Purposes

If the military judge admits evidence that is admissible against a party or for a purpose – but not against another party or for another purpose – the military judge, on timely request, must restrict the evidence to its proper scope and instruct the members accordingly.

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time.

Rule 201. Judicial Notice of Adjudicative Facts

(a) *Scope.* This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) *Kinds of Facts that May Be Judicially Noticed.* The military judge may judicially notice a fact that is not subject to reasonable dispute because it:

- (1) is generally known universally, locally, or in the area pertinent to the event; or
- (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) *Taking Notice.* The military judge:

- (1) may take judicial notice whether requested or not; or
- (2) must take judicial notice if a party requests it and the military judge is supplied with the necessary information.

The military judge must inform the parties in open court when, without being requested, he or she takes judicial notice of an adjudicative fact essential to establishing an element of the case.

(d) *Timing.* The military judge may take judicial notice at any stage of the proceeding.

(e) *Opportunity to Be Heard.* On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the military judge takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) *Instructing the Members.* The military judge must instruct the members that they may or may not accept the noticed fact as conclusive.

Rule 202. Judicial Notice of Law

(a) *Domestic Law.* The military judge may take judicial notice of domestic law. If a domestic law is a fact that is of consequence to the determination of the action, the procedural requirements of Mil. R. Evid. 201 – except Rule 201(f) – apply.

(b) *Foreign Law.* A party who intends to raise an issue concerning the law of a foreign country must give reasonable written notice. The military judge, in determining foreign law, may consider any relevant material or source, in accordance with Mil. R. Evid. 104. Such a determination is a ruling on a question of law.

Rule 301. Privilege Concerning Compulsory Self-Incrimination

(a) *General Rule.* An individual may claim the most favorable privilege provided by the Fifth Amendment to the United States Constitution, Article 31, or these rules. The privileges against self-incrimination are applicable only to evidence of a testimonial or communicative nature.

(b) *Standing*. The privilege of a witness to refuse to respond to a question that may tend to incriminate the witness is a personal one that the witness may exercise or waive at his or her discretion.

(c) *Limited Waiver*. An accused who chooses to testify as a witness waives the privilege against self-incrimination only with respect to the matters about which he or she testifies. If the accused is on trial for two or more offenses and on direct examination testifies about only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified. This waiver is subject to Mil. R. Evid. 608(b).

(d) *Exercise of the Privilege*. If a witness states that the answer to a question may tend to incriminate him or her, the witness cannot be required to answer unless the military judge finds that the facts and circumstances are such that no answer the witness might make to the question would tend to incriminate the witness or that the witness has, with respect to the question, waived the privilege against self-incrimination. A witness may not assert the privilege if he or she is not subject to criminal penalty as a result of an answer by reason of immunity, running of the statute of limitations, or similar reason.

(1) *Immunity Requirements*. The minimum grant of immunity adequate to overcome the privilege is that which under either R.C.M. 704 or other proper authority provides that neither the testimony of the witness nor any evidence obtained from that testimony may be used against the witness at any subsequent trial other than in a prosecution for perjury, false swearing, the making of a false official statement, or failure to comply with an order to testify after the military judge has ruled that the privilege may not be asserted by reason of immunity.

(2) *Notification of Immunity or Leniency*. When a prosecution witness before a court-martial has been granted immunity or leniency in exchange for testimony, the grant must be reduced to writing and must be served on the accused prior to arraignment or within a reasonable time before the witness testifies. If notification is not made as required by this rule, the military judge may grant a continuance until notification is made, prohibit or strike the testimony of the witness, or enter such other order as may be required.

(e) *Waiver of the Privilege*. A witness who answers a self-incriminating question without having asserted the privilege against self-incrimination may be required to answer questions relevant to the disclosure, unless the questions are likely to elicit additional self-incriminating information.

(1) If a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct testimony of the witness in whole or in part, unless the matters to which the witness refuses to testify are purely collateral.

(2) Any limited waiver of the privilege under subdivision (e) applies only at the trial in which the answer is given, does not extend to a rehearing or new or other trial, and is subject to Mil. R. Evid. 608(b).

(f) *Effect of Claiming the Privilege*.

(1) *No Inference to Be Drawn*. The fact that a witness has asserted the privilege against self-incrimination cannot be considered as raising any inference unfavorable to either the accused or the government.

(2) *Pretrial Invocation Not Admissible*. The fact that the accused during official questioning and in exercise of rights under the Fifth Amendment to the United States Constitution or Article 31 remained silent, refused to answer a certain question, requested counsel, or requested that the questioning be terminated, is not admissible against the accused.

(3) *Instructions Regarding the Privilege*. When the accused does not testify at trial, defense counsel may request that the members of the court be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel's election will be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice.

Rule 302. Privilege Concerning Mental Examination of an Accused

(a) *General Rule*. The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under R.C.M. 706 and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings. This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by Mil. R. Evid. 305 at the examination.

(b) *Exceptions*.

(1) There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence.