

UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

UNITED STATES)	GENERAL COURT-MARTIAL
)	
v.)	DEFENSE RESPONSE TO
)	GOVERNMENT MOTION IN LIMINE
Douglas Wacker)	(Exclude Improper Victim
Captain)	Cross-Examination)
U.S. MARINE CORPS)	
)	19 October 2010
)	
)	

1. **Nature of Motion.**

This is a defense response brief in opposition to the Government’s motion as referenced in the caption.

2. **Summary of Facts.**

- a. Capt Wacker was requested by Jessica Brooder and Elizabeth Easley to rent a hotel room and engage in a consensual encounter with the women in New Orleans, LA on 3 April 2007.
- b. In 2004, Jessica Brooder pled guilty to driving under the influence.
- c. Elizabeth Easley was involved in an automobile accident around June 2007 and she indicated in her journal that she had lied to the insurance adjuster regarding the extent of her injuries and medical treatment.
- d. Elizabeth Easley was also in a traffic accident in 2001 and did not have insurance.

3. **Discussion.**

A. EVIDENCE OF JESSICA BROODER’S DUI CONVICTION IS ADMISSIBLE FOR IMPEACHMENT PURPOSES.

The closest analogous offense that Ms. Brooder was convicted of under the UCMJ would

be Article 111, drunken driving. At most a person could receive is 6 months and a BCD.

Similarly, California VC Section 23536 allows a punishment of up to 6 months. However, there are other grounds for admission of Ms. Brooder's criminal DUI conviction other than MRE 609.

For example, MRE 401 provides that all relevant evidence is admissible. MRE 403 only excludes relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.

United States v. Meghdadi, 60 M.J. 438 (CAAF 2005) held that M.R.E. 608(c) [Evidence of bias] permits introduction of evidence, extrinsic or otherwise, tending to establish bias, prejudice, or motive to misrepresent on the part of a witness. M.R.E. 613(b) [Extrinsic evidence of prior inconsistent statement of witness] permits the extrinsic evidence of prior inconsistent statements if the witness denies making them, or equivocates.

In this case, the defense will put on evidence that Ms. Brooder wanted to have a consensual three way with Capt Wacker and another woman while the three of them were intoxicated, but not substantially incapacitated. This obviously calls into question Ms. Brooder's judgment and her judgment when she is intoxicated as she was in New Orleans in April 2007 and as she was in 2004 when she was cited for DUI. The fact that Ms. Brooder has had another alcohol related incident in the recent past is very relevant to the fact that Ms. Brooder behaves without judgment when she drinks alcohol and behaves outside of the societal norms (for potentially some members) when she is impaired. The members need to hear this. The members need to understand how it is possible that an otherwise normal looking woman could engage in the unusual behavior the defense will offer: a consensual three way. Ms. Brooder will not be overly embarrassed because her DUI conviction is discussed. This is surely a matter that Ms. Brooder reported when she applied for the State Bar. Further, the members will not be confused. This is a minor issue that the members

will give the appropriate weight when weighing the credibility of Ms. Brooder's entire testimony. This is why the DUI citation and DUI incident should be allowed for brief exploration on cross by the Defense.

B. EVIDENCE OF ELIZABETH EASLEY LYING TO AN INSURANCE ADJUSTER IN CONNECTION WITH A CLAIM FOR DAMAGES IS ADMISSIBLE FOR IMPEACHMENT PURPOSES.

Ms. Easley is going to claim that Capt Wacker attempted to sexually assault her (even though she has previously testified under oath that she can't recall what happened that night). The defense has obtained evidence in discovery that indicates that Ms. Easley lied to an insurance adjuster as part of a claim for monetary damages. Ms. Easley said that she lied to an adjuster in her diary journal.

MRE 608b allows the defense to impeach a witness regarding their truthfulness. MRE 613 allows extrinsic evidence to be admitted if the witness denied making a previous statement, equivocates or is offered an opportunity to rebut the same.

United States v. Harrow, 65 M.J. 190 (CAAF 2007) noted that the process of impeachment by prior inconsistent statement is a tool to attack the credibility and/or recollection of a witness. Harrow said that by showing self-contradiction, the witness can be discredited as a person capable of error. Harrow noted that MRE 613(b) provides that extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to explain or deny the same. Harrow said that if the inconsistency is not admitted by the witness, or the witness equivocates, extrinsic evidence may be admitted for impeachment purposes.

United States v. James, 61 M.J. 132 (CAAF 2005) held that MRE 608(c) provides that 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.

MRE 608b allows the Defense to cross examine Ms. Easley for the purpose of attacking the witness's character for truthfulness. Under MRE 613, extrinsic evidence of Ms. Easley's prior statement that she lied to an insurance adjuster is admissible if Ms. Easley takes the stand in the trial in this case and denies that she said it or equivocates. Because this testimony of Ms. Easley concerns her truthfulness as a witness, this is not a collateral issue and is fair game by the Defense in order to impeach Ms. Easley. Ms. Easley lied in connection with a civil claim according to her journal. That is a BIG deal...lying in an insurance investigation. Ms. Easley has applied to become a member of a State's Highest Bar as an attorney, a group sworn to be truthful to others in all dealings. The Defense must be permitted to explore the same before the members when she is asking them to believe her recollection of the seminal events of this case.

4. **Relief Requested.** The defense respectfully requests that the Government's motion, which is the subject of this response brief be denied in full and that the defense be allowed to impeach Ms. Easley and Ms. Brooder about their DUI conviction and lying to an insurance adjuster, respectively.

5. **Burden of Proof.** The burden of proof is on the Government, as the moving party of its own motion. The burden is preponderance of the evidence.

6. **Argument.** The defense desires oral argument.

7. **Evidence.** The defense requests the following witnesses and evidence. All witnesses' full names and contact information are believed to be in the possession of the trial counsel.

- ELIZABETH EASLEY

- JESSICA BROODER
- EXHIBIT A: JOURNAL ENTRY EXCERPT

The foregoing pleading was served via electronic means on the opposing counsel and court on this

date: 19 October 2010

/s/

Capt C. P. HUR
Defense Counsel