**Section 400.720 Hearsay Exclusions**

a) Definitions. The following definitions apply to this Section:

1) "Declarant" means a person who makes a statement.

2) "Hearsay" means a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. A statement is not hearsay if it is:

A) a prior statement by the witness. In a criminal case, the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

i) *inconsistent with* the declarant's *testimony at the trial or hearing, and:*

• *was made under oath at a trial, hearing or* other *proceeding or in a deposition;*

• *narrates, describes or explains an event or condition of which* the declarant *had personal knowledge,* and *the statement is proved to have been written or signed by* the declarant;

• the declarant *acknowledged under oath the making of the statement in* *his* or her *testimony at the hearing or trial in which the admission into evidence of the prior statement is being* sought; *at* another *trial, hearing or other proceeding; or in a deposition; or*

• *the statement is proved to have been accurately recorded by a tape recorder, videotape recording,* or *any other similar electronic means of sound recording;* or [725 ILCS 5/115-10.1]

ii) *one of identification of a person made after perceiving* the person; or [725 ILCS 5/115-12]

B) an admission by a party-opponent offered against a party and is:

i) the party's own statement in either the party's individual or representative capacity;

ii) a statement of which the party has manifested the party's adoption or belief in its truth;

iii) a statement by a person authorized by the party to make a statement concerning the subject;

iv) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agent or servant, made during the existence of the relationship;

v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy; or

vi) a statement by a person, or a person on behalf of an entity, in privity with the party or jointly interested with the party.

3) "Statement" means:

A) an oral or written assertion; or

B) nonverbal conduct of a person, if it is intended by the person as an assertion. (Il. Mil. R. Evid. 801)

b) Hearsay Rule

Hearsay is not admissible except as provided by this Manual or by any Act of Congress applicable in trials by court-martial or by Illinois Supreme Court Rules. (Il. Mil. R. Evid. 802)

c) Exceptions to Hearsay Regardless of Declarant Availability

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

1) Illinois has not adopted the federal Present Sense Impression to the hearsay rule (Federal Rules of Evidence 803(1)).

2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

3) A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including:

A) A statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will; or

B) A statement of declarant's then existing state of mind, emotion, sensation or physical condition to prove the state of mind, emotion, sensation or physical condition of another declarant at the time or at any other time when the state of the other declarant is an issue in the action.

4) Statements for Purposes of Medical Diagnosis or Treatment

A) Statements made for the purpose of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the symptoms, pain or sensations insofar as reasonably pertinent to diagnosis or treatment but, subject to Section 400.715(a)(2), not including statements made to a healthcare provider consulted solely for the purpose of preparing for litigation or obtaining testimony for trial; or

B) In prosecution for violation of Sections 11-1.20, 11-1.30, 11-1.40, 11-1.50 and 11-1.60 of the Criminal Code of 2012 or of a violation of an identical or closely-related provision of the criminal law of the state where the offense occurred, and assimilated under Code Section 149, statements made by the victim to medical personnel for purposes of medical diagnoses or treatment, including a description of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source of the symptoms, pain or sensation insofar as reasonably pertinent to diagnosis or treatment.

5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence, but may not itself be received as an exhibit unless offered by an adverse party.

6) Record of Regularly Conducted Activity

A) A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation. This evidence shall be presented by the testimony of the custodian or other qualified witness, or by certification that complies with Section 400.725(b)(2)(K) or any other statute permitting certification in a criminal proceeding in a court of the United States. This exception from the hearsay rule applies unless the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness. The exception does not, in criminal cases, include medical records.

B) The term "business" as used in this subsection (c)(6) includes the armed forces, a business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit.

C) The following are admissible under this subsection (c)(6) as a record of a fact or event if made by a person within the scope of the person's official duties and those duties included a duty to know or to ascertain through appropriate and trustworthy channels of information the truth of the fact or event and to record that fact or event:

i) enlistment papers;

ii) physical examination papers;

iii) outline figure and fingerprint cards;

iv) forensic laboratory reports;

v) chain of custody documents;

vi) morning reports and other personnel accountability documents;

vii) service records;

viii) officer and enlisted qualification records;

ix) records of court-martial convictions;

x) logs;

xi) unit personnel diaries;

xii) individual equipment records;

xiii) guard reports;

xiv) daily strength records of prisoners; and

xv) rosters of prisoners.

7) Absence of Entry in Records Kept in Accordance with the Provisions of subsection (c)(6). Evidence that a matter is not included in the memoranda reports, records or data compilations, in any form, kept in accordance with the provisions of subsection (c)(6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

8) Public Records and Reports

A) Records, reports, statements or data compilations in any form, of public offices or agencies, setting forth:

i) the activities of the office or agency;

ii) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and, in criminal cases, medical records and matters observed by police officers and other law enforcement personnel; or

iii) against the government, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

B) Notwithstanding subsection (c)(8)(A)(ii), the following are admissible under this Section as a record of a fact or event if made by a person within the scope of the person's official duties and those duties include a duty to know or ascertain through appropriate and trustworthy channels of information that truth of the fact or event and to record that fact or event:

i) enlistment papers;

ii) physical examination papers;

iii) outline figure and finger print cards;

iv) forensic laboratory reports;

v) chain of custody documents;

vi) morning reports and other personnel accountability documents;

vii) service records;

viii) officer and enlisted qualification records;

ix) records of court-martial convictions;

x) logs;

xi) unit personnel diaries;

xii) individual equipment records;

xiii) guard reports;

xiv) daily strength records of prisoners; and

xv) rosters of prisoners.

9) Records of Vital Statistics. Facts contained in records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the report was made to a public office pursuant to requirements of law.

10) Absence of Public Record or Entry. To prove the absence of a record, report, statement or data compilation in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Section 400.725(b) or testimony, that diligent search failed to disclose the record, report, statement, data compilation or entry.

11) Records of Religious Organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in a regularly kept record of a religious organization.

12) Marriage, Baptismal and Similar Certificates. Statements of fact obtained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a time thereafter.

13) Family Records. Statements of facts concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscription on family portraits, engravings on urns, crypts or tombstones, etc.

14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of the kind in that office.

15) Statements in Documents Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

16) Statements in Ancient Documents. Statements in a document in existence 20 years or more, the authenticity of which is established.

17) Market Reports; Commercial Publications. Market quotations, tabulations, directories, lists (including government price lists), or other published compilations generally used and relied upon by the public or by persons in particular occupations.

18) Reputation Concerning Personal or Family History

A) Reputation:

i) among members of the person's family by blood, adoption or marriage;

ii) among the person's associates; or

iii) in the community.

B) The reputation investigation shall concern the person's birth, adoption; marriage; divorce; death; legitimacy; relationship by blood; adoption or marriage; ancestry; or other similar fact of the person's personal or family history.

19) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

20) Reputation as to Character. Reputation of a person's character among the person's associates or in the community.

21) Judgment of Previous Conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death, dishonorable discharge, or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by Code Section 56 at the time of the conviction applies without regard to whether the case was tried by general, special or summary court-martial.

22) Judgment as to Personal, Family or General History or to Boundaries. Judgments as proof of matters of personal, family or general history, or boundaries essential to the judgment, if the same would be provable by evidence of reputation.

23) Receipt or Paid Bill. A receipt of a paid bill as prima facie evidence of the fact of payment and a prima facie evidence that the charge was reasonable. (Il. Mil. R. Evid. 803)

d) Exceptions to Hearsay When the Declarant is Unavailable

1) Definition. *"Unavailability as a Witness" means situations in which* the *declarant*:

A) *is exempted by ruling of the* military judge *on the ground of privilege from testifying concerning the subject matter* of the *declarant's statement*;

B) *persists in refusing to testify concerning the subject matter of the declarant's statement despite an order* of the military judge *to do so;* [725 ILCS 5/113-10.2(c) and 725 ILCS 4/115-10.2a(c)]

C) *testifies to a lack of memory of the subject matter of the declarant's statement;*

D) *is unable to be present or to testify at the hearing because of health or then existing physical or mental illness or infirmity;*

E) *is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance* (or, in the case of a hearsay exception under subsection (d)(3)(B), (C) or (D), the declarant's attendance or testimony *by process or other reasonable means*; or[725 ILCS 5/115-10.2a(c)]

F) is unavailable within the meaning of Code Section 49(d)(2).

2) *A declarant is not unavailable as a witness if the* declarant's *exemption, refusal, claim of lack of memory, inability or absence is due to the procurement or wrongdoing of the proponent of* the *declarant's statement for* the purpose *of preventing the witness from attending or testifying*.

3) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

A) Former Testimony. Testimony given as a witness at another hearing of the same or different proceeding, or in an evidence deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross- or redirect examination. A record of testimony given before courts-martial, courts of inquiry, military commissions, or other military tribunals, and before proceedings pursuant to or equivalent to those required by Code Section 32 is admissible under this subsection (d)(3)(A) if that record is a verbatim record. This subsection (d)(3)(A) is subject to the limitations set forth in Code Sections 49 and 50.

B) Statement Under Belief of Impending Death. In a prosecution for homicide or for any offense resulting in the death of the alleged victim, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

C) Statement Against Interest. A statement that was, at the time of its making, so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

D) Statement of Personal or Family History

i) A statement concerning the declarant's own: birth; adoption; marriage; divorce; legitimacy; relationship by blood, adoption or marriage; ancestry; or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or

ii) a statement concerning the matters listed in subsection (d)(3)(D)(i), and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

E) Forfeiture by Wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. (Il. Mil. R. Evid. 804)

e) Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception or exclusion to the hearsay rule. (Il. Mil. R. Evid. 805)

f) Attacking and Supporting the Declarant's Credibility

1) When a hearsay statement, or a statement described in subsections (a)(2)(B)(iii), (iv) or (v), has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness.

2) The military judge may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.

3) If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination. (Il. Mil. R. Evid 806)