Feature

A View from the Bench

Not the Discovery You Wanted, but Maybe the Discovery You Deserve

By Lieutenant Colonel Robert E. Murdough

You can't always get what you want
But if you try sometimes
You just might find
You get what you need[1]

The Defense Perspective: Oh great! The case just got referred, now we can finally get into real discovery. Let's ask for all the things on our list. But we don't know what we don't know. What else might be out there? Let's use the standard discovery request to make sure we don't miss anything.

The Government Perspective: Oh great . . . Here's the same discovery request we get in every case, right down to the typos. How many ways can they ask for the same thing? Let's see if we can figure out what they really want, then we'll deny everything else as "vague and overbroad" and see if they put up a fight.

The Judge's Perspective: Oh great. A motion to compel. I'm probably going to have to grant a hearing just to get the Defense to explain in plain English what they're really requesting, and then let's see if the Government can really look me in the eye and explain why they shouldn't give it to them. Tell me we're going to have a continuance without telling me we're going to have a continuance.

Military discovery practice[2] is routinely described as "liberal" and "broad."[3] For decades, the *Manual for Courts-Martial* (*Manual*) has reminded practitioners that military discovery is "broader than is required in Federal practice" and is "quite liberal," because "broad discovery" is "essential to the administration of military justice."[4] In theory, this should seem very straightforward. And yet, discovery problems plague military justice practice, leading to delays,[5] mistrials,[6] outright dismissals of charges,[7] and appellate reversals.[8] Meanwhile, "the typical boilerplate request for discovery"[9] can confound defense efforts to obtain relevant evidence, obscuring the requester's true need and intent. The end result is that neither side gets the discovery they want, even though often they get the discovery (or the discovery problems) they deserve.

A review of the military's discovery caselaw shows that many and probably most discovery violations are not the result of practitioners' bad faith or malicious intent.[10] A dearth of unethical prosecutors in our midst should be reassuring, but not surprising. This then begs the question: why do problems persist? This article does not aim to answer this question so much as to reduce their recurrence. Nonetheless, I offer a couple of theories at the outset.

First, discovery in the military is "broader than required in Federal practice" in part because of the unique nature of military life. In the military, unlike in any civilian jurisdiction, "the Government" that investigates and prosecutes the accused is also the accused's employer and potentially their landlord, doctor, grocery store, insurance provider, child's school, fitness center, cafeteria, and more. And if that is not enough, the same is often true for the investigators, alleged victims, and trial witnesses. In each of these roles, the Government *writ large* generates records and data about Service members. This greatly broadens the possible scope of a prosecutor's "reasonable diligence" in searching for and identifying discoverable evidence. At the same time, it requires increased diligence and precision on the part of requesting defense counsel.

Another reason is the dearth of established standards and practices. The U.S. Department of Justice has a comprehensive (and public) policy for how its attorneys will meet their discovery and disclosure obligations,[11] including a step-by-step process for discovery in criminal cases,[12] and both mandatory training for all new Federal prosecutors and ongoing training for all prosecutors specifically on discovery obligations.[13] By contrast, most of the military Services appear to have few Service-level discovery policies; the Marine Corps and Air Force are notable exceptions.[14] This means, particularly in the Army, that policies (when they exist) are inconsistent across various installations and offices, training occurs at best on an *ad hoc* basis, and best practices and lessons learned across a Service (and among all Services) are not always identified, disseminated, codified, or preserved. This gap in policy and training means that some prosecutors may not fully grasp the breadth and significance of their discovery obligations, leading to the kinds of unnecessary "not in bad faith, but still a violation" outcomes described above.

This "view from the bench" is not meant to serve as a substitute for such policies and training, but perhaps to explain why such policies and training are useful for both prosecutors and defense attorneys and to assist in their creation or modification. From at least this judge's perspective, a great deal of friction, delay, inefficiency, frustration, and potential for error at the trial level could be resolved with more precision on the part of the defense and greater understanding on the part of prosecutors.

The next section—The Law of Discovery—reviews the statutory and regulatory structure of the military's discovery and production systems. The final section—Discovery Practice and Litigation—explores the relevant caselaw and the lessons practitioners can glean from it, alongside recommendations and best practices.

The Law of Discovery

The starting point for military discovery is Article 46(a) of the Uniform Code of Military Justice (UCMJ), which reads:

> In a case referred for trial by court-martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.[15]

This simple statutory mandate belies the complex procedural structure created by the remainder of Articles 46 and 47, as well as the "regulations as the President may prescribe" to which it refers—primarily (though, as described below, not entirely) Rules for Courts-Martial (RCM) 701 and 703.[16] Owing primarily to the traditionally command-centric nature of military justice, where the authority to issue orders and to obligate the necessary funds to effectuate them resides with commanders, the trial counsel, as the representative of the military authority, is in practice personally responsible for obtaining evidence on behalf of the defense counsel and the court-martial. This includes effectuating the accused's constitutional right to compulsory process to obtain witnesses and evidence in their favor.[17] Above this statutory and regulatory scheme, the constitutional doctrines of *Brady v. Maryland,*[18] including its progeny *Giglio v. United States*[19] and *Kyles v. Whitley*,[20] apply to courts-martial to the same degree as all Federal trials.

This means that military trial counsels' discovery duties include their duty as prosecutors and "representative[s] . . . of . . . [the] sovereignty"[21] to ensure a constitutionally fair trial, their duty as the face and representative of military authority, and their duty as the enabler and facilitator of the defense's rights to evidence and witnesses. Identifying the contours of these responsibilities, as discussed more below, requires attentive participation by both prosecutors and defense counsel, as well as military judges when necessary.[22] But first, this part reviews the regulatory framework that establishes the discovery process.

What the Government Must Do Without Being Asked

The *Manual* imposes certain discovery-like obligations between preferral and referral of charges. Once charges are preferred, subject to ordinary restrictions on privileged material, work product, contraband, and the like, the trial counsel must "as soon as practicable" provide the defense not only copies of the charges, but any materials that accompanied the charges when preferred.[23] Usually this includes the reports of the investigation(s) upon which the charges are based. Among other things, this allows the defense to explore the basis for the accuser's

knowledge and belief in the truth of the charges.[24]

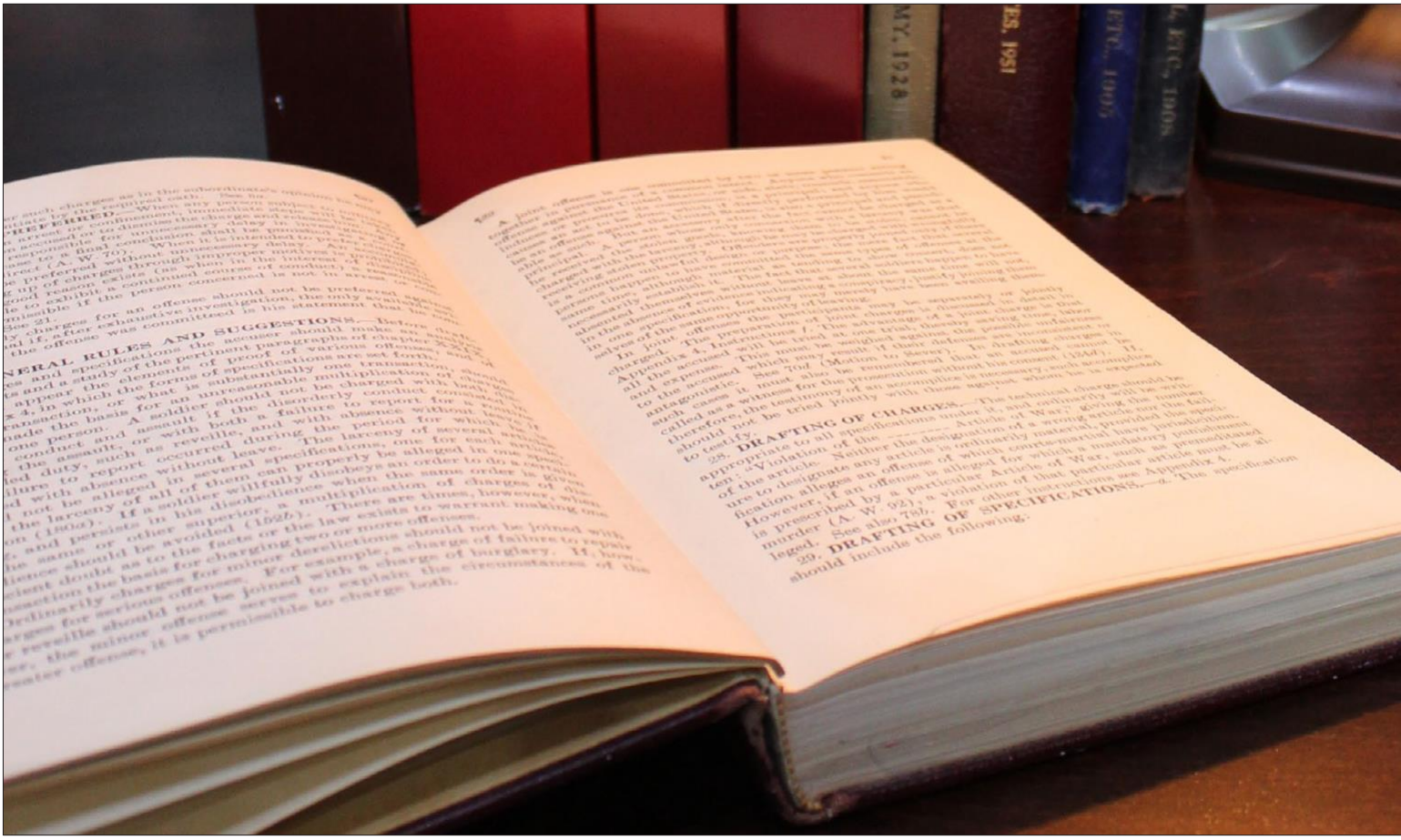
The Article 32 preliminary hearing, though explicitly "not intended to serve as a means of discovery,"[25] provides certain notice requirements for both parties. The trial counsel must inform the hearing officer and defense counsel of the name and contact information for all witnesses the Government intends to call, notice of any other evidence the Government intends to offer, as well as notice of any other supplemental information the Government intends to submit.[26] Once complete, it is the trial counsel's responsibility (though in practice the hearing officer will often do this themselves) to provide the accused with a copy of the report.[27]

And upon referral of charges, the trial counsel must provide[28] the defense with the papers that accompanied the charges at referral, the written determinations and recommendations by special trial counsel or commanders, papers associated with a rehearing or new trial, the convening order, and any sworn or signed statement relating to an offense charged in the case that is in the possession of the trial counsel.[29] Most likely, the first and last would have already been provided at an earlier step, but the requirement to provide written statements triggers an extra check for the prosecution.

From preferral to referral, the basic premise is that the trial counsel must provide whatever evidence supports the action being taken. But once charges are referred, RCM 701 applies in full, along with many other rules scattered throughout the *Manual*, triggering multiple discovery and notice requirements even in the absence of a defense request:

Lady Justice, pictured at the 68th Military Judges Course Graduation, The Judge Advocate General's Legal Center and School, Charlottesville, VA. (Credit: Billie Suttles, TJAGLCS)

- names and contact information of witnesses the trial counsel intends to call in the prosecution case in chief or to rebut one of the special defenses listed in RCM 701(b)[30]
- records of prior convictions of the accused of which the trial counsel is aware and *may* offer for any purpose on the merits[31]
- in a capital case, specific aggravating factors that the Government asserts warrant the death penalty[32]
- statements of the accused and derivative evidence[33]
- evidence seized from the person or property of the accused that the prosecution intends to offer at trial[34]
- evidence of a prior identification of the accused at a lineup or other identification process and derivative evidence that the prosecution intends to offer at trial[35]
- notice of evidence of prior crimes, wrongs, or acts the prosecution intends to offer under Military Rule of Evidence 404(b), including the permitted purpose and reasoning that supports the purpose[36]
- notices related to classified evidence[37]
- notice of intent to offer evidence under the residual hearsay exception[38]
- notice of intent to offer a record self-authenticated as a "certified domestic record of a regularly conducted activity"[39]
- notice of intent to offer a record self-authenticated as a "certified record generated by an electronic process or system"[40]
- notice of intent to offer a record self-authenticated as "certified data copied from an electronic device, storage medium, or file"[41]
- evidence favorable to the defense[42]



The *Manual for Courts-Martial* (Credit: LTC Mary E. Jones)

The last item on that list is probably the most litigated doctrine in discovery law, because—as described in the next section—while the obligation exists even in the absence of any defense request,[43] the scope of the obligation is extremely case-dependent and the stakes are exceptionally high.[44]

The duty to disclose favorable information stems from both *Brady* and RCM 701(a)(6). While RCM 701(a)(6) is sometimes analogized as the implementation of *Brady* within the military,[45] this description is imprecise. RCM 701(a)(6) differs from *Brady* in timing, scope, and remedy.

A prosecutor's constitutional *Brady* obligation requires disclosure of the evidence to the defense with sufficient time to make use of it at trial. *Brady* does not require the Government to point out evidence that the defense already knows or reasonably should know.[46] RCM 701(a)(6), on the other hand, requires disclosure "as soon as practicable" and does not expressly exclude evidence of which the defense may already be aware.[47]

A constitutional *Brady* violation occurs when evidence not disclosed is "material," which means "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[48] Thus, the scope of *Brady* is inherently retrospective; it requires a post-trial examination of what happened at trial. The scope of RCM 701(a)(6), on the other hand, is prospective—it requires disclosure of any evidence that "reasonably tends" to negate or reduce the degree of guilt, reduce the punishment, or adversely affect the credibility of any prosecution witness or evidence.[49] Because it is prospective, it is inherently broader and does not depend on a *post hoc* assessment of, for example, the strength of the Government's case or the materiality of the evidence at issue.[50] And while the remedy for a *Brady* violation is always reversal of the conviction,[51] a violation of RCM 701(a)(6) is treated the same as a violation of any other discovery rule.[52]

Thus, at trial, RCM 701(a)(6) rather than *Brady* better reflects the breadth of the prosecutor's obligations to disclose favorable evidence, and trial-level litigation focuses on whether the Government is obligated to provide certain evidence or categories of evidence. How the contours of this evidence change in each case is discussed more below.[53] Luckily for prosecutors, diligent compliance with RCM 701(a)(6) should also satisfy their *Brady* obligations.

What the Defense Must Request (If They Want It)

Certain provisions in the *Manual* require the Government to provide information or evidence only when asked to do so by the defense. These include, for example, information to be offered at sentencing,[54] written questionnaires to panel members,[55] and written materials considered by the convening authority when selecting panel members.[56] If the defense wants these, the defense needs to ask. Also, notwithstanding that it is not a

discovery vehicle, the procedures of Article 32 preliminary hearings allow the defense to request production of witnesses and evidence relevant to the limited scope and purpose of the hearing.[57]

But the bulk of defense discovery requests are based in RCM 701(a)(2) and RCM 703(f).[58] Generally, the former deals with material that is in the possession, custody, or control of military authorities, and the latter deals with material that is not.

RCM 701(a)(2) requires the trial counsel, upon the defense's request, to provide "books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items"[59] and "results or reports of physical or mental examinations, and of any scientific tests or experiments, or copies thereof . . . the existence of which is known or by the exercise of due diligence may become known to the trial counsel"[60] if any of these items are "within the possession, custody or control of military authorities"[61] and:

(i) the item is relevant to defense preparation;
(ii) the Government intends to use the item in the case in-chief at trial;
(iii) the Government anticipates using the item in rebuttal; or
(iv) the item was obtained from or belongs to the accused.[62]

The latter three requirements are fairly straightforward and the scope of the Government's discovery responsibilities is easy to define. Most defense discovery requests, and most litigation resulting therefrom, arise from the first—defining what is "relevant to defense preparation" in each case, which is discussed further below.

As mentioned in the introduction, defense counsel in courts-martial have no independent ability to subpoena evidence or issue any form of compulsory process. Thus, for evidence outside of military possession, custody, or control, the defense must submit a request for evidence to the trial counsel under RCM 703(f). This request "shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence."[63]

All the above are usually combined into a single "discovery request" served on the trial counsel shortly after referral of charges. As discussed below, a well-thought-out, precise, and comprehensive discovery request is often the starting point to effective discovery practice.[64]

The Defense's Reciprocal Obligations

Though discovery is *mostly* one-directional, from the Government to the defense, the defense has limited obligations of notice and disclosure as well. The defense, like the trial counsel, is required to identify its witnesses and provide sworn or signed statements known by the defense to have been made by those witnesses in connection with the case.[65] And, upon request from the trial counsel, the defense must identify witnesses and evidence to be offered at sentencing.[66] If the defense requests discovery of books, papers, documents, data, photographs, tangible objects, buildings, or places under RCM 701(a)(2)(A), the defense must, upon request from the trial counsel, provide this category of evidence to the Government when the item is within the possession, custody, or control of the defense *and* the defense intends to use it in its case in chief at trial.[67] Similarly, if the defense requests discovery of examinations or scientific tests under RCM 701(a)(2)(B), the defense must, upon request from the trial counsel, provide this category of evidence to the Government if the defense intends to use the item itself, or it was prepared by a witness the defense intends to call, in its case in chief at trial.[68] Additionally, the defense is bound by the same notice requirements found in the Military Rules of Evidence, for example, those concerning self-authenticating documents or residual hearsay.[69]

Here, it is important to highlight RCM 914, which is the military implementation of the *Jenks* Act.[70] The rule states:

> After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement by the witness that relates to the subject matter concerning which the witness has testified [71]

For prosecution witnesses, the rule applies to any statement in the possession of "the United States."[72] For defense witnesses, the rule applies to any statement in the possession of the accused or defense counsel.[73]

For the Government, this rule is in most situations superfluous—it is difficult to conceive of such a statement that would not already be provided to the defense under RCM 701. Problems arise for the Government when the statement *once* was in the possession of the Government but is subsequently lost or destroyed.[74] But the rule applies equally to defense witnesses. Thus, when the defense calls a witness (other than the accused), any statements or documents prepared and any recorded communication from that witness to the defense counsel *about the subject matter of their testimony* now become subject to disclosure under this rule. This is especially significant when it comes to defense expert witnesses, who may prepare a number of statements or documents in preparation for their testimony.

As the discussion to the rule states, "counsel should anticipate legitimate demands for statements under this and similar rules;"[75] defense counsel must be alert to this requirement and prepared to respond to such requests from the Government if required, because they likely will happen mid-trial.

Role of the Military Judge

From the first session of the court-martial, the military judge controls the timing of discovery. The military judge may (and, at least in a contested trial, usually will) "specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just."[76] Frequently, a military judge will do so using a pretrial order or trial management order.

These orders are significant in a couple of aspects. First, they are a lawful exercise of the judge's ability to regulate discovery and, more broadly, "exercise reasonable control over the proceedings to promote the purposes of [the RCM and the *Manual*]" including the rules pertaining to discovery.[77] As the Army Court of Criminal Appeals recently reminded practitioners, "a court's deadlines are not frivolous, nor are the orders they issue."[78] Thus, even if a provision in the *Manual* requires a certain notice or disclosure to be made only "before trial begins," counsel disregard the earlier suspense at their peril.

Second, at the outset of trial, any motion to compel discovery or production of evidence is forfeited if it is not made before the accused enters a plea,[79] which normally occurs at the initial session of the court-martial,[80] unless the military judge finds good cause to allow such motion at a later point.[81] For a time, at least in the Army, defense counsel would routinely "defer entering a plea," presumably to extend this extremely short suspense.[82] After the Army Court of Criminal Appeals discouraged such a practice and the potential gamesmanship that could ensue,[83] today, few if any Army judges will permit the accused to defer entering a plea at arraignment. Instead, the issuance of the pretrial order, setting deadlines for discovery requests and follow-on motions to compel discovery and production, is itself good cause to defer filing such requests and motions, without needing to defer entering a plea until the motion is resolved.[84] But after *that* deadline has passed, the party must have good cause for failing to meet the suspense set in the order—and "good cause does not exist when 'the [moving party] knew or could have known about the evidence in question before the relevant deadlines.'"[85]

In addition to regulating the timeline, the military judge resolves discovery disputes once presented to them. As discussed above, the defense must first request evidence under RCM 701(a)(2) and 703(f) through the trial counsel. If the trial counsel denies the request, the matter is then ripe to put before the military judge in a motion for appropriate relief to compel the Government to either permit discovery or to produce the evidence.[86] Disputes about what is relevant to defense preparation under RCM 701(a)(2), where the Government must look under RCM 701(a)(6), or whether evidence should be produced under RCM 703(f), form the bulk of discovery litigation, which is the subject of the next part.

Discovery Practice and Litigation

The sections above discussed the law of discovery and the relevant procedural rules that govern it. This part talks about how to execute these procedures, both for the Government and defense.

Defense—Request What You Need, and Show Your Work

In practice, discovery begins in earnest when the defense submits a discovery request, which usually combines rote requests for panel questionnaires, sentencing material, and the like with requests for evidence in the possession, custody, or control of military authorities under RCM 701(a)(2) and requests for production under RCM 703(f). And after many years both as a litigator and judge, I have come to believe that the near-ubiquitous discovery template used throughout the Army inhibits more than facilitates useful discovery. These requests can be characterized by inconsistent levels of specificity and a lack of focus. They can also risk appearing as if the defense is throwing spaghetti at a wall to see whether the trial counsel or military judge will help make any of it stick. More streamlined, focused, and precise requests will almost certainly be of more use to defense counsel than the twelve-page miasma in current use.

Defense counsel who use the typical discovery request appear to approach discovery from the viewpoint of casting as wide a net as possible (the fishing metaphor is deliberate). Such requests are riddled with phrases like "any and all," "including but not limited to," "in whatever form and wherever located," and so on, even to the point of repetition. In writing this, I reached into the files of several dozen concluded cases and at random pulled a couple defense motions to compel discovery to which the counsel had appended their original discovery request.[87] Unsurprisingly, though each contained a few requests unique to that case, they were for the most part identical—including, for example, three different phrasings in three different paragraphs seeking medical records of any alleged victim, repeatedly asking for records of "Article 15s" and "nonjudicial punishment" (which are the same thing), and most were exceedingly broad in scope yet scant on detail.

Why does this matter? Why not just ask for everything that might exist and see what happens? When it comes to RCM 701(a)(2), there is a key distinction between a general request and a specific request, and the obligations of the trial counsel to follow up on them.

In *United States v. Ellis*, the Army Court of Criminal Appeals listed three necessary components of a "specific request" under this rule:

> First, the request must, on its face or by clear implication, identify the specific file, document, or evidence in question.
>
> Second, unless the request concerns evidence in the possession of the trial counsel, the request must reasonably identify the location of the evidence or its custodian.
>
> Third, the specific request should include a statement of expected [relevance] of the evidence to preparation of the defense's case unless the relevance is plain.[88]

A specific request does not just say "what," it includes "where" and "why." Caselaw gives several examples of the difference between general and specific:

General	Specific
"Any record of prior conviction, and/or nonjudicial punishment of any prosecution witness"[89]	Disciplinary record of the lead investigator, who the defense learned had previously been disciplined[90]
"Disclosure of all evidence affecting the credibility of any and all witnesses, potential witnesses, complainants, and persons deceased who were in any way involved with the instant case and/or any charged or unrelated offenses, including but not limited to ..... "[91]	Agreement between a specific named witness and the Government to cooperate[92]
"All known evidence tending to diminish the credibility of witnesses or alleged victims or alleged co-actors, including, but not limited to ..... "[93]	By-name request for clinical post-assault notes at an identified clinic[94]
"All relevant associated reports"[95]	Update to the Criminal Investigation Division (CID) case activity summary[96]
"Any results of scientific reports or experiments"[97]	"Any reports, memos for record, or other documentation relating to [q]uality [c]ontrol and/or inspections pertaining to quality control at [an identified laboratory] for the three quarters prior to [Appellant]'s sample being tested, and the available quarters since [Appellant]'s sample was tested.[98]

The difference between the two is significant both for the scope of the trial counsel's obligations to look for the evidence and the effect of an error on appellate review. When a defense request for discovery is a general request, the breadth of the trial counsel's obligation to search for the evidence is limited to whatever reasonable diligence requires in that case—"a request for information under RCM 701(a)(2) must be specific enough that the trial counsel, through the exercise of due diligence, knows where to look."[99] And "neither Article 46 [implemented through, *inter alia,* RCM 701] nor the *Brady* line of cases require the prosecution to review records that are not directly related to the investigation of the matter that is the subject of the prosecution, *absent a specific defense request* identifying the entity, the type of records and the type of information."[100]

When the defense makes a general request, the trial counsel does not need to rifle through unrelated personnel records, email archives, cloud file storage, etc., to see what might be there. After exercising reasonable diligence, the trial counsel may properly respond that there is no responsive information.[101] On the other hand, when the defense points the trial counsel to a specific item and tells them where to look, the trial counsel is expected to go there and "actually ask" if the evidence exists.[102] And, "[t]o the extent that relevant files are known to be under the control of another governmental entity, the prosecution must make that fact known to the defense and engage in 'good faith efforts' to obtain the material."[103]

In other words, a narrow request requires *more* from the prosecution than a broad request. The more narrow the request, the more the prosecution has "reasonable notice or prospect" that relevant (and possibly exculpatory) evidence may be found there.[104] And, on appeal, when the defense makes a specific request and the prosecution erroneously withholds evidence, the burden is on the Government to prove that the nondisclosure was harmless *beyond a reasonable doubt*, rather than the more deferential "reasonable probability of a different outcome" standard applied to a general request.[105] Finally, exhaustively repeating the prosecutor's "existing obligations under *Brady*"[106] without particularity or specificity is just meaningless extra volume; repeatedly asking for "any evidence affecting credibility" with different wording does not in any way broaden the scope of the prosecutor's responsibilities to search for that sort of material. RCM 701(a)(6) and *Brady* apply equally "whether there is a general request or no request at all."[107]

Rather than continuously and inefficiently submitting rote requests into the ether of discovery procedure, Larry Pozner and Roger Dodd suggest a much better approach:

> The discovery process works best and is most economically conducted when it is aimed at proving a defined theory of the case, or attacking the opponent's presumed or announced theory of the case. The lawyer cannot ask a corporation to produce all documents on all issues. Even if it were possible to do so, the result would be stacks of useless paper. Instead, the advocate first formulates a theory of the case before envisioning what types of documents might exist to support that theory [108]

Discovery, like every other aspect of trial preparation and practice, is best employed in service of the defense's theory of the case—"a cogent statement of an advocate's position that justifies the verdict he or she is seeking."[109] This of course requires the defense counsel to *have* a theory of the case and do some legwork themselves before and during the discovery process, so they can focus their time going after what really matters. The discovery process is not "a substitute for their own efforts to assemble and select relevant admissible evidence."[110]

To put it in plain, useful terms, it is counterproductive for defense counsel to demand that the trial counsel identify and then rifle through the medical records of every witness while pointedly yet needlessly reminding them that the military does not recognize a doctor-patient privilege by citing a twenty-year old case.[111] As the caselaw referenced above shows, it is far more beneficial to identify a specific record or location where records are expected to be, articulate the ex-

Absent a specific request, the trial counsel barely needs to lift a finger to go broader than what is likely already going to be provided anyway under other discovery rules. The broader requests are actually easier for the trial counsel to deny once they have looked where they are already expected to look anyway, and less likely to yield favorable results for the defense before the trial or appellate courts.

pected relevance to the defense preparation, and require the trial counsel to go look. Placing scare quotes around words like "titling" and "local file," in the midst of an exhaustive list of all possible types of personnel records ("including but not limited to") diminishes the efficacy of the request when these terms have official definitions in published policies, especially when these policies also indicate with specificity *where* such records are maintained.[112]

The trial counsel is not required to "search for the proverbial needle in a haystack. [They] need only exercise due diligence in searching [their] own files and those police files readily available to [them]."[113] Absent a specific request, the trial counsel barely needs to lift a finger to go broader than what is likely already going to be provided anyway under other discovery rules. The broader requests are actually *easier* for the trial counsel to deny once they have looked where they are already expected to look anyway, and less likely to yield favorable results for the defense before the trial or appellate courts.

Government's Responsibilities—How Far Do You Need to Go?

As described above, when the defense makes a specific request under RCM 701(a)(2) for records in the possession of military authorities, the trial counsel is expected to "actually ask" if those records exist.[114] In other words, they must go to the place the defense says to look and look there, if it is within the possession of military authorities. If the prosecution refuses, the defense can file a motion for appropriate relief.[115] When the defense makes a request for evidence outside of military possession, the defense request must comply with RCM 703(f), which includes "a statement of where it can be obtained" as well as "a description of each item sufficient to show its relevance and necessity."[116] If the trial counsel disputes the existence or relevance of the evidence, the defense can file a motion for appropriate relief.[117] Whether under RCM 701 or 703, as long as the request is specific enough and the relevance of the evidence at issue can be discerned, the trial counsel is likely required to "go look."

Much like precision and specificity can help the defense in crafting better requests, precision and specificity can help the trial counsel craft better responses—and possibly head off litigation by avoiding misunderstanding. One simple improvement is to respond in complete sentences. Instead of merely replying "granted" or "denied as irrelevant, vague, and/or overbroad" to each paragraph in the defense request, be specific. For example:

> The Government will produce A, B, and C. If the defense believes that there are other relevant records responsive to this request, the Government requests that the defense identify the location where they may be found or appropriate custodian of record.
>
> Or,
>
> The Government will produce CID file xxx-xxx-xxx and the AR 15-6 investigation dated yyy conducted by n into the conduct alleged in Specification 2 of Charge III. If the defense requests any additional records of investigations, the defense may supplement this request identifying the organization or custodian of record where these records exist.

In the face of only a general request or no request at all, *Brady* and RCM 701(a)(6) predominantly define the scope of the prosecution's duty to search for evidence. For the Government, the most frequent basis of dispute and litigation, both before and after trial, is identifying the contours of this obligatory search.

The prosecutor's duty to search for favorable or relevant evidence includes the "core files" that include both the prosecution itself as well as those acting on the Government's behalf *in that particular case*, to include law enforcement.[118] The outer limit of the search is those records that are in the "actual or constructive" possession or knowledge of the prosecution.[119] Defining the scope of this obligation is particularly challenging in the military, because—as discussed above—for Service members, "the Government" is not just investigators and prosecutors—it is also responsible for their and their families' employment, housing, food, clothing, medical care, and education. Thus, "the outer parameters must be ascertained on a case-by-case basis."[120]

Here, the distinction between RCM 701(a)(2) and 701(a)(6) is important. While RCM 701(a)(2) refers to any evidence in the possession, custody, or control of "military authorities," RCM 701(a)(6) refers specifically to the trial counsel. In this sense, using "Government" as a shorthand for the trial counsel or the prosecution is faulty; "for *Brady* purposes, information under the control of the 'prosecution' is not the same as information under the control of the entire [G]overnment."[121] In *United States v. Stellato,* the Court of Appeals provided some examples of items that are in the "constructive" possession of the prosecution:

1) the prosecution has both knowledge of and access to the object;
2) the prosecution has the legal right to obtain the evidence;
3) the evidence resides in another agency but was part of a joint investigation; and
4) the prosecution inherits a case from [local law enforcement] and the [evidence] remains in the . . . [local agency's possession].[122]

Most famously, *Stellato* stands for the seemingly obvious proposition that the Gov-

ernment may not remain willfully ignorant of exculpatory evidence.[123] But, beyond the core prosecutorial and investigatory files, how much broader must the conscientious prosecutor search, especially when the case-law disclaims the need to find any "needle in the haystack"[124] and decries the "impermissible general fishing expedition"?[125]

"[T]he parameters of the review that must be undertaken outside the prosecutor's own files will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request."[126] The trial counsel is expected to learn what agencies had a hand in that particular case and search their files accordingly.[127] Beyond that, the trial counsel is required to search files of "other governmental agencies . . . when there is some reasonable prospect or notice of finding exculpatory evidence."[128] For example, an administrative investigation involving a witness in another unit about an unrelated matter is not within the actual or constructive possession of the trial counsel unless the trial counsel has some reason to know about it—perhaps because it is mentioned in the CID file or the defense discovery request for the case currently being tried[129] (providing further incentive for defense counsel to be more precise in their discovery requests).

A major source of potential RCM 701(a)(6) and *Brady* violations is not the scope of the search beyond what the trial counsel knows, but the trial counsel's failure to recognize when something in front of them is exculpatory. Evidence subject to disclosure under RCM 701(a)(6) and *Brady* includes evidence that can impeach the credibility of a Government witness or evidence.[130] One of the most fertile grounds for impeachment is the classic "prior inconsistent statement."[131] This is an exceptionally broad category of potential *Brady* material, because inconsistency "is not limited to diametrically opposed answers but may be found as well in evasive answers, inability to recall, silence, or changes of position."[132] Moreover, omissions, or a "previous failure to state a fact in circumstances in which that fact naturally would have been asserted," are also fodder for impeachment.[133] As most investigators typically begin with very broad questions like "tell me what happened," potential impeachment material arises any time a witness adds or alters details in subsequent interviews.

In practical terms, this means that *any* time a witness provides inconsistent or new relevant information, whether orally, in writing, or via tangible evidence, to prosecutors or investigators, even if the new information is not itself exculpatory for the accused, it most likely "reasonably tends" to adversely affect that witness's credibility.[134] Thus, failure to disclose is a violation of RCM 701(a)(6), if not of *Brady*.[135] With these extraordinarily high stakes, prosecutors must be diligently attentive during pretrial preparation *and* have reliable systems to identify and disclose any possible inconsistencies or omissions. As discussed in the next section, the consequences of failure are severe.

When the Judge Gets Involved

When a party avers that their opponent has committed a discovery violation, it often perceptibly raises the tension, even more so as the trial date gets closer and eventually arrives. This is likely at least in part because the discovery rules are so closely tied with the standards of professional conduct concerning duty as a prosecutor, fairness to opposing parties, candor to the tribunal, and so forth.[136] Alleging a discovery violation often feels close to leveling an ethical violation, even if there is no assertion of bad faith by any party.[137] In this regard, the first role of the military judge is sometimes just lowering the temperature and trying to dispassionately and impartially distill the facts and their significance.

But when the trial judge[138] determines that a discovery violation has occurred—which includes a violation of the deadlines set for discovery—the question becomes what to do about it. RCM 701(g)(3) lists four possible options:

(A) Order the party to permit discovery;
(B) Grant a continuance;
(C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and
(D) Enter such other order as is just under the circumstances.[139]

Option A is easiest well before trial. For example, on a motion to compel, when the judge determines certain evidence is within the scope of RCM 701(a)(2) and the Government has not provided it, the judge orders the Government to provide it to the defense or give the defense access to it.

Option B becomes more fraught the closer to trial you get. A continuance months before trial is not nearly as disruptive as a continuance on the eve of trial or even in the middle of trial. But when counsel are blindsided by new information just hours before the start of a trial for which they have prepared extensively, a continuance can be extremely frustrating—not just for the litigators, but the accused, alleged victims, the command, and others affected by the trial. At the same time, other available remedies may be more severe and unwarranted under the circumstances, so often a judge will eschew a harsher remedy and give both parties the time and space to collect themselves and reassess, even if that means a vexing delay.

Option C is more severe than the first two. It is normally reserved for situations where the violation was either significant or done in bad faith for a tactical reason. For example, a defense counsel who surprises the prosecution (and the judge) by offering an expert witness without declaring them as such before trial violates both RCM 701(b)(2) and 703(d)(3). If the judge determines that this delayed notice was deliberate to gain a tactical advantage, the defense may be prohibited from calling that witness.[140]

The final option gives the judge broad discretion to fashion a remedy appropriate for that case.[141] In deciding what is "just under the circumstances," the judge is not limited to "the least drastic remedy to cure the discovery violation."[142] Depending on the circumstances, this might include either dismissing the charges or declaring a mistrial. But at the same time, "dismissal with prejudice is a particularly severe remedy and should not be imposed lightly."[143] Likewise a mistrial is a "drastic remedy . . . granted only to prevent a manifest injustice."[144] Depending on the circumstances, lesser remedies might include an adverse inference instruction,[145] allowing a party to recall a witness for unchallenged examination,[146] or striking prior trial testimony.[147]

In other words, not every discovery violation—even a violation of RCM 701(a)(6) that might have become a *Brady* violation post-trial[148]—requires the judge to stop the

trial from going forward. Sometimes a just remedy might be "an extended weekend" to review the materials, allowing the opponent to admit complementary evidence that might otherwise be inadmissible, or a curative instruction.[149] On the other hand, cases like *Stellato* (dismissal with prejudice twice affirmed on appeal) serve as a cautionary tale that trial counsel who "take a hard stand on discovery . . . invite disaster at trial."[150]

It probably goes without saying, then, that the best way to avoid any of these consequences is for trial litigators to comply with their discovery obligations early, liberally, and in good faith.

Conclusion

To conclude, I offer a few general thoughts to make discovery smoother for everyone. First, both sides must comprehensively investigate their case early so they are not caught off-guard by major revelations weeks or even days before trial.[151] Second, discovery requests and the responses thereto are most productive when they are detailed and precise. Third, when new discoverable information comes to light, counsel liberally and rapidly disclose it as soon as possible. Fourth, and please forgive the pun, discovery should not be "discovery learning" during each court-martial; consistently meeting discovery obligations requires replicable systems and procedures, attentive supervision, and regular training for the lawyers and paralegals involved in the military justice system.

When counsel for both sides timely fulfill their obligations in good faith, the discovery and production processes usually unfold as they should, and the military judge is able to resolve whatever disputes remain with minimal disruption to the trial. Problems begin to arise when discovery is late, incomplete, or improperly withheld, even if not done so maliciously. And problems in discovery can interrupt or even invalidate all the work that goes into preparing a trial. All involved in the training, supervision, and execution of the military justice system must treat it with the significance it deserves. TAL

At the time of writing, LTC Murdough was a Military Judge in the 6th Judicial Circuit at Joint Base Lewis-McChord, Washington. He is now an Associate Judge on the Army Court of Criminal Appeals.

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Notes

1. The Rolling Stones, *You Can't Always Get What You Want,* on Let it Bleed (CD, London Records, Nov. 28, 1969).

2. Procedurally, the military divides the process by which the parties share information into "discovery" (generally, items within the possession, custody, and control of the parties or the larger "military authorities") and "production" (generally, items not in the possession, custody, or control of the military). *See* Manual for Courts-Martial, United States, R.C.M. 701, 703 (2024) [hereinafter MCM]. For the sake of brevity, this article combines both terms under the umbrella "discovery," which is how it is often referred both in practice and in applicable caselaw.

3. *See, e.g.*, United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004) (referring to military discovery practice as a "liberal mandate"); United States v. Hart, 29 M.J. 407, 410 (C.M.A. 1990) (adopting lower court's opinion that "discovery available to the accused in courts-martial is broader than the discovery rights granted to most civilian defendants").

4. MCM, *supra* note 2, R.C.M. 701 analysis, at A21-33.

5. *See, e.g.*, United States v. Dancy, 38 M.J. 1, 5 n.3 (C.A.A.F. 1993) ("Trial counsel's gamesmanship resulted in disruption and delay of the legal proceedings.").

6. *See, e.g.*, United States v. Collins, 41 M.J. 428, 429 (C.A.A.F. 1995) (referring to a prior trial at which a mistrial was declared for discovery violations).

7. *See, e.g.*, United States v. Stellato, 74 M.J. 473 (C.A.A.F. 2015).

8. *See, e.g.,* United States v. Eshalomi, 23 M.J. 12 (C.M.A. 1986); United States v. Simmons, 38 M.J. 376 (C.A.A.F. 1993); United States v. Adens, 56 M.J. 724 (A. Ct. Crim. App. 2002).

9. United States v. Lorance, ARMY 20130679, 2017 CCA Lexis 429 at *12 (A. Ct. Crim. App. June 27, 2017); *see also* United States v. Colbert, ARMY 20200259, 2023 CCA Lexis 536 (A. Ct. Crim. App. Dec. 13, 2023) ("[W]e reviewed the defense discovery request and conclude it contained only a generic request for laboratory reports. The defense discovery request did not specify the AFMES blood draw, its location, or its materiality.").

10. *See, e.g.*, United States v. Hart, 29 M.J. 407, 410 (C.M.A. 1990) ("[T]here was no intentional withholding of exculpatory evidence."); United States v. Terwilliger, No. 201900292, 2021 CCA Lexis 190 at *13 (N-M.C. Ct. Crim. App. Apr. 21, 2021) ("The Government . . . fail[ed] to provide the Defense all discovery necessary ..... The military judge found that this was not intentional or part of any bad act by the Government."); United States v. Figueroa, 55 M.J. 525, 529 (A. F. Ct. Crim. App. 2001) ("We find no indication that the trial counsel acted in bad faith."); United States v. Seton, Misc. Dkt. No. 2013-27, 2014 CCA Lexis 103 at *18 (A. F. Ct. Crim. App. Feb. 24, 2014) ("[W]e recognize the military judge found no bad faith on the part of the Government."); *But see Stellato,* 74 M.J. at 489 n.18 (describing conduct of the trial counsel as "at a minimum . . . grossly negligent"); United States v. Coleman, 72 M.J. 184, 189 (C.A.A.F. 2013) ("The conduct of the prosecution . . . was, at a minimum, negligent, and certainly violated Brady [v. Maryland, 373 U.S. 83 (1963)], [UCMJ] Article 46, and R.C.M. 701-703.").

11. U.S. Dep't. of Just., Just. Manual, § 9-5.000 (2020) (Issues Related To Discovery, Trials, And Other Proceedings).

12. *Id.* § 9-5.002 (Criminal Discovery).

13. *Id.* § 9-5.001E.

14. The Army regulation for military justice only mentions discovery obliquely, in that "the trial counsel will support the special trial counsel in meeting the Government's discovery obligations," and does not mention discovery in the training provided by either the Trial Counsel Assistance Program or the Office of Special Trial Counsel. *See* U.S. Dep't of Army, Regul. 27-10, Military Justice para. 30-7(d) (8 Jan. 2025). At least as of this writing, the Army Judge Advocate General's (JAG) Corps does not appear to have a service-wide policy on discovery. In its chapter on "Regulations Implementing and Supplementing the Manual for Courts-Martial," the Navy's *Manual of the Judge Advocate General*, or "JAGMAN," does not mention discovery in criminal procedure. *See* U.S. Dep't of Navy, JAGINST 5800.7G, Manual of the Judge Advocate General (JAGMAN) ch. 1 (1 Dec. 2023). Neither does the Coast Guard's *Military Justice Manual*. U.S. Coast Guard, Commandant Instr. Manual 5810.1H, Military Justice Manual (9 July 2021). On the other hand, the Marine Corps policy cites to, and appears to model, the U.S. Deptpartment of Justice's *Justice Manual*. *See* U.S. Marine Corps, Order 5800.16, Legal Support and Administration Manual vol.16, ch. 11 (28 Aug. 2021). The attachment to the Air Force professional responsibility instruction contains a chapter on discovery, but it is mostly a restatement of the requirements of Article 46 and applicable Rules for Courts-Martial (RCM), with additional guidelines for timing and process. *See* U.S. Dep't of Air Force, Instr. 51-110, Professional Responsibility Program, ch. 5, attach. 7 (11 Dec. 2018).

15. UCMJ art. 46 (2016).

16. MCM, *supra* note 2, R.C.M. 701, 703.

17. *See* U.S. Const. amend. VI.

18. Brady v. Maryland, 373 U.S. 83 (1963).

19. Giglio v. United States, 405 U.S. 150 (1972).

20. Kyles v. Whitley, 514 U.S. 419 (1995).

21. Berger v. United States, 295 U.S. 78, 88 (1935).

22. *See supra* Section titled "Discovery Practice and Litigation."

23. MCM, *supra* note 2, R.C.M. 308(c).

24. *See id.* R.C.M. 307(b)(2).

25. *Id.* R.C.M. 405(a) discussion.

26. *Id.* R.C.M. 405(i)(1) (incorporating by reference R.C.M. 405(l)).

27. *Id.* R.C.M. 405(m)(4).

28. Most rules, including this one, refer to either "copies" or "opportunity to inspect" when a copy is impractical. Again for brevity, this article frequently uses "disclose" and "provide" as general terms to mean facilitating the defense's equal access to the evidence, whatever that may look like for the particular material involved.

29. MCM, *supra* note 2, R.C.M. 308(c).

30. *Id.* R.C.M. 701(a)(3); *see also infra* notes 76–78 and accompanying text, discussing timelines of discovery.

31. MCM, *supra* note 2, R.C.M. 701(a)(4) (emphasis added).

32. *Id.* R.C.M. 1004(b)(2) (incorporating by reference R.C.M. 1004(c)).

33. *Id.* M.R.E. 304(d). Note that the rule is limited in scope to those statements known to the trial counsel, relevant to the case, within the control of the Armed Forces, and which the prosecution intends to offer.

34. *Id.* M.R.E. 311(d)(1).

35. *Id.* M.R.E. 321(d)(1).

36. *Id.* M.R.E. 404(b)(3). This rule was amended by operation of law in 2021 and by executive order in 2022 to require the prosecution to provide such notice without a request from the defense. *See* Fed. R. Evid. 404(b) (eff. 1 Dec. 2020); MCM, *supra* note 2, M.R.E. 1102 (providing that amendments to the Federal Rules of Evidence will by operation of law amend parallel provisions of the Military Rules of Evidence eighteen months after the effective date absent contrary action by the President); Exec. Order 14,062, 87 Fed. Reg. 4763 (Jan. 31, 2022) (amending M.R.E. 404(b) to conform to the 2020 amendment of its Federal counterpart).

37. *See generally* MCM, *supra* note 2, M.R.E. 505. Classified evidence procedures are complex and to comprehensively cover them here would detract from the focus of this article.

38. *Id.* M.R.E. 807(b).

39. *Id.* M.R.E. 902(11).

40. *Id.* M.R.E. 902(13).

41. *Id.* M.R.E. 902(14).

42. *Id.* R.C.M. 701(a)(6).

43. *See* Kyles v. Whitley, 514 U.S. 419, 433 (1995) (citations omitted).

44. *Id.* at 435 ("[O]nce a reviewing court applying [United States v. Bagley, 473 U.S. 667 (1985)] has found constitutional error there is no need for further harmless-error review.").

45. *See, e.g.,* United States v. Stellato, 74 M.J. 473, 482 n.7 (C.A.A.F. 2015).

46. *See* United States v. Lucas, 5 M.J. 167, 171 (C.M.A. 1978) ("There is no *Brady* violation when the accused or his counsel know before trial about the allegedly exculpatory information and makes no effort to obtain its production."); *see also* Rector v. Johnson, 120 F.3d 551, 558–59 (5th. Cir. 1997) ("The state has no obligation to point the defense toward potentially exculpatory evidence when that evidence is either in the possession of the defendant or can be discovered by exercising due diligence."); United States v. Wilson, 160 F.3d 732, 742 (D.C. Cir. 1998) ("[N]ew trial is rarely warranted based on a *Brady* claim where the defendants obtained the information in time to make use of it."); United States v. Kimoto, 588 F.3d 464, 474 (7th Cir. 2009) ("[A]s long as ultimate disclosure is made before it is too late for the defendants to make use of any benefits of evidence, due process is satisfied.").

47. MCM, *supra* note 2, R.C.M. 701(a)(6). This timeliness requirement is consistent with Rule 3.8 of the American Bar Association's Model Rules of Professional Conduct. *See* Model Rules of Pro. Conduct r. 3.8 (A.B.A. 2025) (requiring "timely disclosure" of exculpatory evidence).

48. United States v. Bagley, 473 U.S. 667, 682 (1985).

49. MCM, *supra* note 2, R.C.M. 701(a)(6).

50. *See Bagley,* 473 U.S. at 677 ("We do not . . . automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." (citation omitted)).

51. *Id.* at 678.

52. *See infra* Section titled "When the Judge Gets Involved" (discussing remedies for violations).

53. *See supra* Section titled "Discovery Practice and Litigation."

54. MCM, *supra* note 2, R.C.M. 701(a)(5).

55. *Id.* R.C.M. 912 (a)(1).

56. *Id.* R.C.M. 912(a)(2).

57. *See generally id.* R.C.M. 405(i), *as amended by* Exec. Order No. 14,130, 89 Fed. Red. 105343, 105348–52 (2024).

58. *Id.* R.C.M 701(a)(2), 703(f). Much of RCM 703 also deals with the production of witnesses and experts for both the Government and defense, which while related to discovery is outside the scope of this article.

59. *Id.* R.C.M 701(a)(2)(A).

60. *Id.* R.C.M. 701(a)(2)(B).

61. *Id.*

62. *Id.* R.C.M. 701(a)(2)(A). The requirement of RCM 701(a)(2)(A)(iv) to disclose, upon request, items obtained from or belonging to the accused is slightly broader than the automatic disclosure required by MRE 311, which is limited to evidence the prosecutor intends to use at trial. *See id.* M.R.E. 311.

63. *Id.* R.C.M. 703(f).

64. *See supra* Section titled "Discovery Practice and Litigation."

65. *Id.* R.C.M. 701(b)(1)(A).

66. *Id.* R.C.M. 701(b)(1)(B).

67. *Id.* R.C.M. 701(b)(3).

68. *Id.* R.C.M. 701(b)(4).

69. *See id.* M.R.E. 807, 902; *see also supra* notes 38–41 and accompanying text.

70. 18 U.S.C. § 3500 (2018).

71. MCM, *supra* note 2, R.C.M. 914(a).

72. *Id.* R.C.M. 914(a)(1).

73. *Id.* R.C.M. 914(a)(2).

74. *See, e.g.*, United States v. Muwwakkil, 74 M.J. 187 (C.A.A.F. 2015) (lost Article 32 recording amounted to RCM 914 violation); United States v. Sigrah, 82 M.J. 463 (C.A.A.F. 2022) (lost Criminal Investigation Division interview recording amounted to RCM 914 violation).

75. MCM, *supra* note 2, R.C.M. 701(a)(5).

76. *Id.* R.C.M. 701(g)(1).

77. *Id.* R.C.M. 801(a)(3).

78. United States v. Clark, ARMY 20220541, 2024 CCA Lexis 169 at *8 (A. Ct. Crim. App. Apr. 16, 2024).

79. MCM, *supra* note 2, R.C.M. 905(b)(4).

80. *See id.* R.C.M. 904.

81. *Id.* R.C.M. 905(e)(1).

82. *See* United States v. Criswell, ARMY 20150530, 2017 CCA Lexis 686 at *10 (A. Ct. Crim. App. Nov. 6, 2017) ("Our routine review of records for courts-martial reveals the practice of deferring the entry of pleas is a matter of course.").

83. *See id.* at *10–13.

84. United States v. Clark, ARMY 20220541, 2024 CCA Lexis 169 at *5–6 (A. Ct. Crim. App. Apr. 16, 2024) ("[T]he court's order, itself, is the good cause to file after pleas are entered. But should a party fail to meet the deadlines of a pretrial order after entering pleas, the party bears the burden to show good cause for the untimeliness.").

85. United States v. Givens, 82 M.J. 211, 216 (C.A.A.F. 2022) (quoting United States v. Jameson, 65 M.J. 160, 163 (C.A.A.F. 2007)).

86. *See* MCM, *supra* note 2, R.C.M. 906(b)(7); *see also id.* R.C.M. 701(g)(3)(a) (listing "ordering the party to permit discovery" as a remedy for failure to comply with the other provisions of that rule); *id.* R.C.M. 703(f), incorporating by reference R.C.M. 703(c)(2)(D) (stating that, if the trial counsel denies production, "the matter may be submitted to the military judge").

87. A useful practice, because a condition precedent to a motion to compel is to show the defense first requested the evidence from the trial counsel and was refused. *See supra* note 86 and accompanying text.

88. United States v. Ellis, 77 M.J. 671, 681 (A. Ct. Crim. App. 2018). Note that the court in *Ellis* referred to evidence that is "material" to defense preparation, using the then-existing language of RCM 701(a)(2), rather than evidence that is "relevant" to defense preparation. Though the *Ellis* opinion appears to use "material" and "relevant" interchangeably, a later opinion of the same court appears to read the change from "material" to "relevant" as broadening the scope of discoverable evidence under this rule. *See* United States v. Marin, ARMY 2021035, 2023 CCA Lexis 464 at *11–12 (A. Ct. Crim. App. Oct. 30, 2023). Regardless of the significance, if any, to that change, *Ellis* remains useful for defining the line between general and specific requests, a distinction that courts continue to recognize. *See, e.g.*, United States v. Colbert, ARMY 20200259, 2023 CCA Lexis 536 at *11 (A. Ct. Crim. App. Dec. 13, 2023) (applying the *Ellis* standard to determine whether the accused had specifically requested a particular laboratory report).

89. *Ellis*, 77 M.J. at 679–80 (quoting United States v. Green, 37 M.J. 88, 89 (C.A.A.F. 1993) (testing the nondisclosure under the *Brady* materiality standard, rather than the higher *Hart* standard for specific requests)).

90. United States v. Roberts, 59 M.J. 323, 324 (C.A.A.F. 2004)

91. *Ellis,* 77 M.J. at 681 (finding no error in failure to disclose an unrelated arrest report for a traffic collision based on this general request).

92. United States v. Coleman, 72 M.J. 184, 185 (C.A.A.F. 2013).

93. United States v. Leach, No. ACM 39563, 2020 CCA Lexis 230 at *80 n.18 (A.F. Ct. Crim. App. July 8, 2020).

94. United States v. Cano, 61 M.J. 74, 75–76 (C.A.A.F. 2005).

95. United States v. Alford, 8 M.J. 516, 517 (A. C. M. R. 1979).

96. United States v. Marin, ARMY 2021035, 2023 CCA Lexis 464 at *12 (A. Ct. Crim. App. Oct. 30, 2023).

97. United States v. Mann, ACM S30022, 2002 CCA Lexis 290 at *10 (A.F. Ct. Crim. App. Nov. 12, 2002).

98. United States v. Jackson, 59 M.J. 330, 331 (C.A.A.F. 2004).

99. United States v. Shorts, 76 M.J. 523, 535 (A. Ct. Crim. App. 2017) ("We cannot find the trial counsel erred under RC.M 701(a)(2) when he: 1) failed to produce something that was not requested; 2) had no knowledge whatsoever of its existence; and 3) exercised due diligence in responding to the defense request he did receive.").

100. United States v. Williams, 50 M.J. 436, 443 (C.A.A.F. 1999) (emphasis added).

101. *Shorts,* 76 M.J. at 531.

102. *See* United States v. Trigueros, 69 M.J. 604, 611 (A. Ct. Crim. App. 2010).

103. *Williams,* 50 M.J. at 441 (quoting Crim. Just. Discovery Standards standard 11-2.1(a), cmt. at 14 n.9 (A.B.A. 3d ed. 1995).

104. *See infra* Section titled "Government's Responsibilities—How Far Do You Need to Go?"

105. United States v. Hart, 29 M.J. 407, 410 (C.M.A. 1990).

106. United States v. Leach, No. ACM 39563, 2020 CCA Lexis 230 at *85 (A.F. Ct. Crim. App. July 8, 2020).

107. United States v. Shorts, 76 M.J. 523, 531 (A. Ct. Crim. App. 2017) (citing United States v. Augurs, 427 U.S. 97, 107 (1976)).

108. Larry S. Pozner & Roger J. Dodd, Cross Examination: Science and Techniques 32 (2d ed. 2009).

109. *Id.* at 25.

110. United States v. Franchia, 32 C.M.R. 315, 320 (C.M.A. 1962).

111. *C.f.* United States v. Clark, 62 M.J. 195, 198 (C.A.A.F. 2005).

112. *See, e.g.*, U.S. Dep't of Army, Regul. 190-45, Law Enforcement Reporting (27 Sep. 2016); U.S. Dep't of Army, Regul. 600-37, Unfavorable Information (2 Oct. 2020).

113. United States v. Simmons, 38 M.J. 376, 382 n.4 (C.A.A.F. 1993).

114. United States v. Trigueros, 69 M.J. 604, 611 (A. Ct. Crim. App. 2010).

115. *See* MCM, *supra* note 2, R.C.M. 701(g)(3)(A) (listing "order the party to permit discovery" as a remedy for failing to comply with R.C.M. 701).

116. *Id.* R.C.M.703(f).

117. *See id.* R.C.M. 703(c)(2)(D) (incorporated by reference in R.C.M. 703(f)).

118. United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999) (quoting *Simmons,* 38 M.J. at 382; Kyles v. Whitley, 514 U.S. 419, 437 (1995)).

119. United States v. Stellato, 74 M.J. 473, 487 (C.A.A.F. 2015); *accord* LK v. Acosta, 76 M.J. 611, 616 (A. Ct. Crim. App. 2017), *overruled on other grounds,* United States v. Tinsley, 81 M.J. 836 (A. Ct. Crim. App. 2021).

120. *Williams,* 50 M.J. at 441.

121. United States v. Shorts, 76 M.J. 523, 532 (A. Ct. Crim. App. 2017).

122. *Stellato,* 74 M.J. at 485. On the second of these four items, note that "legal right" is not the same as "legal process." Even though the Government may be able to obtain evidence via, for example a subpoena or warrant, that itself does not convert the evidence into possible *Brady* material (otherwise the scope of *Brady* would expand to anything subject to the compulsory process of the Federal Government). *See* United States v. Crump, No. ACM 39628, 2020 CCA Lexis 405 at *105–06 (A. F. Ct. Crim. App. Nov. 10, 2020).

123. *Stellato,* 74 M.J. at 487.

124. United States v. Simmons, 38 M.J. 376, 382 n.4 (C.A.A.F. 1993).

125. United States v. Franchia, 32 C.M.R. 315, 320 (C.M.A. 1962).

126. United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999).

127. *See* Kyles v. Whitley, 514 U.S. 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the [G]overnment's behalf *in the case .....* ") (emphasis added); *see also* *supra* note 122 and accompanying text.

128. United States v. Shorts, 76 M.J. 523, 533 (A. Ct. Crim. App. 2017) (internal citation omitted).

129. *See id.*

130. MCM, *supra* note 2, R.C.M. 701(a)(6)(D); *accord* United States v. Bagley, 473 U.S. 667, 676 (1985) ("Impeachment evidence falls within the *Brady* rule.").

131. *See generally* MCM, *supra* note 2, M.R.E. 613.

132. United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993).

133. Jenkins v. Anderson, 447 U.S. 231, 239 (1980).

134. MCM, *supra* note 2, R.C.M. 701(a)(6). Whether the difference in prior statements actually reflects on the witness's credibility is for the trier of fact to decide—that is a matter of trial advocacy, not discovery.

135. *See, e.g.,* United States v. Eshalomi, 23 M.J. 12, 21 (C.M.A. 1986); United States v. Vargas, 83 M.J. 150, 152 (C.A.A.F. 2023).

136. *C.f.,* U.S. Dep't of Army, Regul. 27-26, Rules of Professional Conduct for Lawyers app. B, r. 3.3, 3.4, 3.8 (26 Mar. 2025).

137. As alluded to in the discovery, anecdotally it seems that most discovery litigation stems from (1) a lack of understanding by one or both parties as to what the rules require, and (2) a lack of communication, to include clarity in requests and responses. Rarely does either rise to the level of an ethical violation.

138. *See supra* Section titled "The Law of Discovery" for discussion about standards of review and appropriate remedies for discovery violations on appellate review.

139. MCM, *supra* note 2, R.C.M. 701(g)(3).

140. *See id.* R.C.M. 701(g)(3) discussion.

141. MRE 304(f)(2), 311(d)(2)(B), and 312(d)(3) provide similar discretion for late disclosures of statements of the accused, evidence derived from searches and seizures, and lineup identifications, respectively. *See id.* M.R.E. 304(f)(2), 311(d)(2)(B), 312(d)(3).

142. United States v. Vargas, 83 M.J. 150, 154 (C.A.A.F. 2023).

143. *Id.* at 155 (noting that the military judge must consider "whether lesser alternative remedies are available and determine that dismissal with prejudice is just under the circumstances").

144. United States v. Rushatz, 31 M.J. 450, 456 (C.M.A. 1990); *see also* MCM, *supra* note 2, R.C.M. 915 discussion ("The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons.").

145. *See, e.g.*, United States v. Ellis, 57 M.J. 375, 380 (C.A.A.F. 2002) ("An adverse inference instruction is an appropriate curative measure for improper destruction of evidence.").

146. *See, e.g.*, United States v. Bozicevich, ARMY 20110683, 2017 CCA Lexis 403 (A. Ct. Crim. App. June 13, 2017).

147. *See, e.g.*, United States v. Dancy, 38 M.J. 1, 6 (C.A.A.F. 1993).

148. *See supra* note 49 and accompanying text.

149. *Dancy*, 38 M.J. at 6.

150. United States v. Stellato, 74 M.J. 473, 478 (C.A.A.F. 2015).

151. Investigation is an obvious necessity for the Government, which bears the burden of proof *and* the constitutional obligation to secure a fair trial, but the duty to investigate the case is also an ethical imperative for defense counsel. *See, e.g.*, United States v. Gibson, 51 M.J. 198 (C.A.A.F. 1999) (holding that failure to follow investigatory leads in law enforcement report amounted to ineffective assistance of counsel).