Simplifying Discovery and Production: Using Easy Frameworks to Evaluate the 2009 Term of Cases

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The Basics

Discovery and production rules are fairly simple—if you can distinguish one from the other, which is not always an easy task. For example, depending on where you are in the discovery rules, the word *material* can have three different meanings: it can mean a thing, matter, or information; it can mean matter that is significant to the preparation of the defense case; or it can describe a test for prejudice on appellate review. The definition of *material* that comes from the *Brady v. Maryland*[1] analysis is different than the definition of *material* as it is used in Rule for Courts-Martial (RCM) 701(a)(2).[2] Next, practitioners may have trouble understanding when to apply *material* as the test for prejudice for a discovery violation instead of *harmless beyond a reasonable doubt*. Last, practitioners may have trouble distinguishing *military* (from RCM 701(a)(2)) and *investigative agency* (from RCM 701(a)(6)[3]/*Brady* analysis).

Some rules within discovery and production appear similar and can lend themselves to confusion. Practitioners might interchange the terms *material* (from discovery) and *relevant* (from production) or they might interchange *military* (from discovery) and *government* (from production). Both the discovery and production rules have different procedures for conducting *in camera* reviews. Additionally, the definition of *necessary* in expert assistant requests (a discovery problem) is different from the definition of *necessary* in expert witness requests (a production problem). The rules often look similar, but the differences that exist are important because each set of rules is designed to solve a certain set of problems. In the simplest terms, discovery rules deal with the *preparation* phase of trial, while production rules deal with the *presentation* phase of trial. For this reason, discovery rules should not be used to resolve production issues, and production rules should not be used to resolve discovery problems.

This article provides legal practitioners with a set of tools for recognizing the differences between discovery and production rules. These tools are then applied to the 2009 term of appellate cases which focused on discovery and production issues in order to illustrate whether the parties, the military judges, and the courts used sound reasoning in dealing with these issues. At the conclusion of this article, practitioners should be able to recognize the difference between discovery and production rules, to include *in camera* reviews; distinguish expert assistants from expert witnesses; and identify the distinctions between specific defense discovery requests and RCM 701(a)(6)/*Brady* obligations. Finally, the objective of this analysis is to emphasize a simple but critical point: precision matters.

The Basic Differences Between Discovery and Production

Fundamentally, discovery rules govern how the parties will exchange information. The rules for discovery establish how each party must help the *other* party to develop the *other* party's case.[4] Discovery deals with preparation and investigation. Discovery means finding or learning something that was previously unknown and is used to "reveal facts and develop evidence."[5] A party can seek discovery and obtain information that might not be not admitted into evidence at trial. For example, the information might be used to develop other evidence that the party will eventually try to admit.

In contrast, production rules focus on presenting evidence or witnesses at trial. At that point, the party has been through discovery, gathered facts, and chosen which facts will be introduced as evidence at trial. The party now needs the help of compulsory process to bring those facts to the courtroom—typically through a witness or physical evidence.

When we look at the RCMs, we see language that reflects this fundamental difference between discovery and production. For example, look at the rule that deals with specific discovery requests from the defense, RCM 701(a)(2)(A). This rule states that when the defense requests a specific item, then the government must disclose that item if certain conditions are met.[6] One of those potential conditions is that the item must be "material to the *preparation* of the defense."[7] That language deals with

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[1] 373 U.S. 83 (1963).

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(a)(2) (2008) [hereinafter MCM].

[3] *Id.* R.C.M. 701(a)(6).

[4] BLACK'S LAW DICTIONARY 466 (6th ed. 1990). Discovery includes "the pre-trial devices that can be used by one party to obtain facts and information about the case from the other party in order to assist the party's preparation for trial." *Id.*

[5] BLACK'S LAW DICTIONARY 533 (9th ed. 2009).

[6] MCM, *supra* note 2, R.C.M. 701(a)(2)(A).

[7] *Id* (emphasis added).

preparation and investigation, not with whether that item will ultimately be introduced at trial.

Further, the word *material* in "material to the preparation of the defense" is defined in the language of preparation and investigation. *Material* means "[h]aving some logical connection with the consequential facts . . . Of such a nature that knowledge of the item would affect a person's decision-making process; significant; essential."[8] Look at the first phrase in that definition. The matter does not need to be a consequential fact itself; rather, it only needs to be logically connected to some other fact of consequence. *Material* is not an evidentiary term—it is broader. The requested item does not have to ultimately be admitted at trial, but merely contribute to case preparation. Now look at the second phrase in the definition. Note that the information does not need to be favorable. Unfavorable information may be material.[9] The defense may need to know it in order to make informed decisions like how to plead or what theory of the case has the greatest chance for success.

Look now at the production rules. These rules do deal with evidentiary terms. The parties are entitled to the production of witnesses or evidence that is necessary and relevant.[10] The definition of *necessary* is "not cumulative and . . . would contribute to a party's presentation of the evidence in some positive way on a matter in issue."[11] For the definition of *relevant*, the discussion to RCM 701(b) and (f) points to the definition found in Military Rule of Evidence (MRE) 401.[12] Military Rule of Evidence 401 defines *relevance* as having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[13] According to Black's Law Dictionary, *relevant* means "logically connected and tending to prove or disprove a matter in issue; having appreciable probative value—that is, rationally tending to persuade people of the probability or possibility of some alleged fact." Unlike the word *material*, the word *relevant* is an evidentiary term.

Another area of confusion between discovery and production rules deals with what agency has control of the item or person at issue. For specific discovery requests under RCM 701(a)(2), the trial counsel only has to disclose those items within the possession, custody, or control of *military* authorities.[14] If the item that the defense requests under RCM 701(a)(2) is not within military possession, custody, or control, the trial counsel does not have an obligation to find it for the accused. This rule is narrower than the production rules. To compare, under RCM 703, if the witness or evidence is necessary and relevant, then the government has to produce the witness or evidence, regardless of what type of person is involved or what agency or person possesses the evidence.[15]

Some of this confusion exists in the appellate cases from the 2009 term. Table 1 in the appendix is based on the discussion above and lays out the basic differences between discovery and production.

The Differences Between Discovery and Production In Camera *Reviews*

Both the discovery and production rules allow the military judge to conduct *in camera* reviews of disputed matter. Under RCM 701(g)(2), the military judge may regulate discovery by granting a party relief from a discovery obligation.[16] If one of the parties believes that complying with a discovery request would be inappropriate, the party may file a motion with the military judge requesting *in camera* review.[17] The standard for the moving party is "a sufficient showing" that "the discovery or inspection be denied, restricted, or deferred."[18]

If the party has made a sufficient showing, the military judge reviews the questionable matter. The military judge then decides whether the matter is protected or confidential. If not, the military judge ends the *in camera* review. If it is protected, the military judge determines whether the matter is material to the preparation of the defense.[19] The military judge may (and probably should) allow the parties to review the documents while still respecting the protected or confidential nature of the documents so that the parties can make informed arguments on whether the matter is material. The military judge can do this by having the parties review the matter in the courtroom.[20] If the matter is not material, then the military judge may deny the party that is seeking discovery from receiving discovery, while ordering any

[8] BLACK'S LAW DICTIONARY 1066 (9th ed. 2009).

[9] United States v. Adens, 56 M.J. 724 (A. Ct. Crim. App. 2002).

[10] MCM, *supra* note 2, R.C.M. 703(b) and (f).

[11] *Id*. R.C.M. 703(b)(1) discussion.

[12] *Id*. R.C.M. 703(b) discussion, 703(f) discussion.

[13] *Id*. MIL. R. EVID. 401.

[14] *Id*. R.C.M. 701(a)(2)(A).

[15] *Id*. R.C.M. 703(e), (f).

[16] *Id*. R.C.M. 701(g)(2).

[17] *Id*.

[18] *Id*.

[19] *See generally* United States v. Abrams, 50 M.J. 361, 364 (C.A.A.F. 1999).

[20] Alderman v. United States, 394 U.S. 165, 182 (1969); *Abrams*, 50 M.J. at 364.

other terms and conditions that are just.[21] If the matter is material, then the military judge may order disclosure with a protective order.

The *in camera* review under the production rules is different. There, the government has already issued a subpoena for the evidence,[22] so the evidence has already been determined to be relevant and necessary. However, the *custodian* of the evidence—not a party to the case—is now contesting the subpoena because she believes the subpoena is unreasonable or oppressive. The military judge may still direct that the custodian provide the evidence for an *in camera* inspection. After reviewing the matter, the military judge has the option to withdraw the subpoena.[23] If the military judge does so, then the party that was denied the evidence can seek a remedy for unavailable evidence under RCM 703(f)(1).[24]

One of the cases in the 2009 term involved an *in camera* review under discovery analysis. Table 2 in the appendix outlines the differences between discovery and production in-camera reviews.

The Differences Between Expert Assistants and Expert Witnesses

When practitioners categorize "expert assistants," they often lump the topic in with the expert witness analysis that is found in RCM 703(d). Look closely, though, because RCM 703(d) does not discuss expert assistants. In reality, the analysis for expert assistance requests is much more similar to the analysis of discovery issues than production issues. Expert assistants are commonly used to help the defense evaluate scientific or technical evidence during the *preparation* phase of trial when the defense is still building its case. Expert witnesses arrive at the *presentation* phase of trial when the defense knows what it wishes to put before the fact finder.

As an illustration of the different purposes served by expert assistants and expert witnesses, the analysis for expert assistance requests differs from that for expert witnesses,[25] particularly in the definition of *necessary*. The defense is entitled to an expert assistant or other investigative help when that assistance is *necessary* for an adequate defense. The test has two parts. The defense must show that there is a reasonable probability that (1) an expert would be of assistance to the defense and (2) the denial of expert assistance would lead to a fundamentally unfair trial.[26] For the first prerequisite, the defense must show why the expert assistance is needed, what the expert would accomplish for the defense, and why the defense cannot do the work themselves.[27]

The test for the production of an expert witness is essentially the same as the test for producing any other witness: the expert's testimony must be relevant and *necessary*.[28] Here, *necessary* takes on the familiar definition found in the production rules: "not cumulative and . . . would contribute to a party's presentation of the evidence in some positive way on a matter in issue."[29] Again, the definition of *necessary* here has to do with presenting evidence at trial. In contrast, the definition of *necessary* under expert assistance analysis has more to do with trial preparation.

Two of the cases in the 2009 term dealt with expert assistance requests. See Table 3 in the appendix for an outline of the differences between expert assistance and expert witnesses.

*The Differences Between Specific Discovery Requests and RCM 701(a)(6)/*Brady *Obligations*

Within the discovery rules, there are three major topics of confusion: the test for what to disclose; where the government has to look; and the standard of review on appeal. The preceding paragraphs discussed the test for what to disclose after a specific discovery request under RCM 701(a)(2): both favorable and unfavorable matters that are material to defense preparation. This standard reflects the underlying purpose of discovery requests: case investigation and preparation. In contrast, the standard for unsolicited disclosure under RCM 701(a)(6)/*Brady* is much narrower: favorable evidence only.[30] This narrow disclosure requirement reflects the narrower purpose of the RCM 701(a)(6)/*Brady* rules:

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[21] MCM, *supra* note 2, R.C.M. 701(g). If the military judge denies the party that seeks discovery from getting discovery, then the matter needs to be attached to the record. *Id*. R.C.M. 701(g)(2).

[22] *Id*. R.C.M. 703(f)(4)(C).

[23] *Id*.

[24] United States v. Rodriguez, 57 M.J. 765 (N-M. Ct. Crim. App. 2002).

[25] The analysis for adequate substitutes is pretty much the same in both expert assistance and expert witness analysis. *Compare* United States v. Anderson, 68 M.J. 378 (C.A.A.F. 2010) (expert assistance) and United States v. Warner, 62 M.J. 114 (C.A.A.F. 2005) (expert assistance), *with* United States v. Burnette, 29 M.J. 473 (C.M.A. 1990) (expert witness) and United States v. Robinson, 43 M.J. 501 (A.F. Ct. Crim. App. 1995) (expert witness).

[26] United States v. Freeman, 65 M.J. 451 (C.A.A.F. 2006).

[27] United States v. Gonzalez, 39 M.J. 459 (C.M.A. 1991).

[28] MCM, *supra* note 2, R.C.M. 703(d).

[29] *Id*. R.C.M. 703(b)(1) discussion. When conducting "relevant and necessary" analysis, courts can consider the factors found in *United States v. Houser*. 36 M.J. 392 (C.M.A. 1990).

[30] MCM, *supra* note 2, R.C.M. 701(a)(6).

> The purpose of the *Brady* rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in preparation of his defense, but to assure that he will not be denied access to exculpatory evidence known to the government but unknown to him.[31]

For trial counsel who have to decide whether something is favorable, RCM 701(a)(6) states that the benefit of the doubt goes to the defense: the government needs to disclose the evidence if it *reasonably tends* to be favorable.[32]

Next, the rules differ on where the government has to look for such evidence. Under RCM 701(a)(2), while the government only has to search in *military* files, it has to look in *all* military files, and not just investigative files. Under RCM 701(a)(6)/*Brady*, the government has to look beyond military files, but only has to look in the government's *investigative* files, which includes the files of the trial counsel, the files of investigative agencies that were involved with the case or were closely aligned to the case, and files of the investigative agencies of unrelated or tangential investigations (if the defense provides notice of those files).[33] These files also include the personnel files of military and civilian investigators if necessary for impeachment purposes.[34]

A serious point of confusion comes from the term *material*. For example, RCM 701(a)(2) uses this term to explain what types of items require disclosure. Additionally, the term *material* also appears in the RCM 701(a)(6)/*Brady* analysis—but in this context, the term applies to an analysis of error, as to whether the government should have disclosed an item favorable to the defense but did not do so. Under RCM 701(a)(6) and Army Regulation 27-26, the government must disclose evidence that reasonably tends to be favorable to the accused.[35]

If the government fails to disclose favorable evidence, then the first question on review is whether there was a discovery request under RCM 701. If the defense made a discovery request under RCM 701 and the government failed to disclose favorable evidence, then the test on appeal is harmless beyond a reasonable doubt.[36] If the defense did not make a discovery request under RCM 701, then the failure to disclose violates due process under *Brady* if the evidence was *material*, that is, there is a reasonable probability that there would have been a different result at trial had the evidence been disclosed.[37]

Note that in the military, *material* is a retrospective term.[38] At the trial level, the test is not whether the evidence is favorable *and* material. At the trial level, the government must always disclose evidence that reasonably tends to be favorable, whether or not that evidence might later be found to be material.

Some confusion on these issues exists in the cases from the 2009 term. Table 4 in the appendix illustrates the differences between RCM 701(a)(2) specific discovery requests under and RCM 701(a)(6)/Brady obligations.

Comparing these various rules to each other raises an interesting point. Gaps exist between the areas covered by discovery rules and production rules. For example, perhaps a defense counsel believes his client suffered an adverse reaction from a new medication. The defense counsel wants to review reports made to the Food and Drug Administration to see if others have had similar reactions. Can the defense counsel get these reports under RCM 701? Probably not, as RCM 701(a)(2) does not provide a mechanism because the

[31] United States v. Ruggiero, 472 F.2d 599 (2d Cir. 1973).

[32] MCM, *supra* note 2, R.C.M. 701(a)(6).

[33] United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999); United States v. Veksler, 62 F.3d 544 (3d Cir. 1995).

[34] United States v. Green, 37 M.J. 88 (C.M.A. 1993).

[35] MCM, *supra* note 2, R.C.M. 701(a)(6); U.S. DEP'T ARMY, AR 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 3.8(d) (1 May 1992).

[36] United States v. Roberts, 59 M.J. 323 (C.A.A.F. 2004). The standard arose during a period when the wake of the 1963 *Brady* decision had not yet settled. In 1976, the Supreme Court described three situations that might each have heightened (but different) levels of materiality analysis (prosecutorial misconduct, specific defense discovery requests, and general discovery requests), but did not explain what level of analysis applied to specific discovery requests. United States v. Agurs, 427 U.S. 97 (1976). In 1985, the Supreme Court decided that general and specific discovery requests *did not* warrant any heighted materiality analysis. United States v. Bagley, 473 U.S. 667 (1985). Military appellate courts noted that the Supreme Court case law only set the constitutional minimums, and that Congress and the President can provide greater protections, and had in fact done so with Article 46 and RCM 701. United States v. Eshalomi, 23 M.J. 12 (C.M.A. 1986); United States v. Hart, 29 M.J. 407 (C.M.A. 1990); *Roberts*, 59 M.J. 323. Therefore, the military appellate courts reasoned, a heightened standard should apply to specific discovery requests to help protect "the broad nature of discovery rights granted the military accused under Article 46." *Id.* at 327. Note that this heightened standard is associated with Article 46 and RCM 701 and does not derive from *Brady*.

[37] Kyles v. Whitley, 514 U.S. 419 (1995); Cone v. Bell, 129 S. Ct. 1769 (2009).

[38] In pure *Brady* analysis, the term "material" has migrated from being a retrospective test for prejudice to part of the prospective test on whether a violation has occurred. *Bell*, 129 S. Ct. at 1782-84. However, *Brady* only represents the constitutional floor. Jurisdictions are free to adopt broader discovery obligations. The military, like many jurisdictions, has done so by adopting a "reasonably tends to negate" standard in procedural rules or ethical rules (or in the case of the military, both) that contain this broader standard. MCM, *supra* note 2, R.C.M. 701(a)(6); AR 27-26, *supra* note 35, para. 3.8(d) (1 May 1992); *see Bell*, 129 S. Ct. at 1783 n.15. Military practitioners should first analyze the failure to provide favorable information under R.C.M. 701(a)(6). Constitutional *Brady* analysis is secondary.

reports are not in the possession, custody, or control of *military* authorities. Rule for Court-Martial 701(a)(6)/*Brady* also does not provide a mechanism. Even if there were favorable matter in the reports, the trial counsel is not obligated to disclose them because the reports are not in the investigative files of a law enforcement agency that is somehow related to the case.

The defense counsel would have to rely on the production rules in RCM 703. While the files are subject to production without subpoena because they are under government control, the defense counsel may not be able to make a compelling argument about why the matter is relevant and necessary or be able to say where it is when defense counsel has not seen the matter. At this stage, the defense has no other way to obtain the matter than to request it like any member of the public. A similar issue exists in one of the cases from last term, which will be discussed in the next section.

With these distinctions in mind, we can now look at the discovery and production cases from the 2009 appellate term, review the legal issues raised by the facts of each case, and apply critical thought to the various opinions issued by the Court of Appeals for the Armed Forces (CAAF) and the Army Court of Criminal Appeals (ACCA).

Application to the 2009 Term of Cases

Discovery

In most cases, parties find out about RCM 701(a)(2) and RCM 701(a)(6)/*Brady* violations either before trial (raising the question of whether a continuance is required) or on appeal (triggering the analysis of whether the newly discovered evidence should have been disclosed and if the accused was prejudiced by nondisclosure). The case of *United States v. Trigueros*[39] is somewhat unique because it involved an analysis of potential discovery violations found during the presentencing proceeding.

Trigueros was charged with the indecent assault of the wife of a Soldier in his unit (Victim 1) and the rape of one of his wife's friends (Victim 2). The defense made a specific discovery request for both victims' mental health records. The trial counsel responded with, "[t]he Government is not aware of the existence of any such documentation."[40] The problem is that the trial counsel did not actually look, and the records did exist.

Trigueros was subsequently convicted at a bench trial. During the presentencing proceeding, Victim 2 stated that she had previously seen mental health professionals. The defense asked for a continuance to review the records. The military judge granted the continuance and ordered the trial counsel to produce the records for *in camera* review under RCM 701(g)(2).[41]

Here is a good place to look at the appendix. Looking at Table 4, two potential discovery violations occurred: a violation of RCM 701(a)(2) because the defense specifically requested this type of matter; and a violation of RCM 701(a)(6)/*Brady* because this information could reasonably tend to be favorable to the defense.

When there is a specific discovery request, note that the government must disclose certain things if those things are in the possession, custody, and control of military authorities. The first question of the analysis should therefore be, "Where were the records located?" If the records were in a civilian clinic, then there would not be a violation of RCM 701(a)(2).

We should ask the same question for a potential RCM 701(a)(6)/*Brady* violation. Looking again at Table 4, the government must disclose certain matters that are found within the prosecutor's files, related law enforcement files, or unrelated law enforcement files if the government was specifically told about those files by the defense. If these records were not in a prosecution or law enforcement file, then they were not subject to RCM 701(a)(6)/*Brady* disclosure.

However, the *Trigueros* opinion never stated where these records were located. If the files were not under military control or in an investigative file, then the analysis should have ended. There would have been no discovery violation. This goes back to a critical point: precision matters.

Now, if the records were in a civilian file, the defense counsel would still have had some options. If the defense counsel had asked Victim 2 during interviews whether she had been to a counselor and had learned that records those existed, then the defense could have sought production of those records under RCM 703. If the defense had questioned the victim on this issue, then the defense would have been able to include a sufficient description of the documents to show that they were relevant and necessary.[42] As defense counsel was surprised at trial by the existence of the victims' mental health records, it appears from the record that the defense never interviewed the victims on this point.

Turning to the military judge's analysis, the military judge reviewed the records *in camera* under RCM 701(g).

[39] 69 M.J. 604 (A. Ct. Crim. App. 2010).

[40] *Id*. at 607.

[41] *Id*. at 607–08.

[42] MCM, *supra* note 2, R.C.M. 703(f)(3).

Looking at Table 2 of the appendix and noting the unique procedural posture of the issue, the military judge generally conducted the *in camera* review consistent with RCM 701(g). The military judge stated that he did not find anything particularly relevant, but also allowed each side to review the records—a method that courts have endorsed.[43] The defense argued that these records were material to the preparation of the defense under RCM 701(a)(2) because had the defense known about this information, the defense might have sought a pretrial agreement. The military judge rejected this argument, stating that the parties were never close to an agreement. However, the military judge appears to have analyzed the problem under the *favorable* test found under RCM 701(a)(6)/*Brady* rather than the *material* test found under RCM 701(a)(2).[44]

The defense then moved for a mistrial based on *Brady*. The military judge recalled Victim 2 as a witness, took more testimony, and then made findings of fact on each issue raised by the defense. Everything that was asked while the victim was on the stand could have been obtained in a defense pretrial interview. Looking at Table 4 and the potential RCM 701(a)(6)/*Brady* violation, note the government must disclose matter that reasonably tends to be favorable and is found in the right files. Here, the military judge applied the RCM 701(a)(6)/*Brady* test and noted three pieces of evidence that might have been favorable.[45]

From that point, the military judge, with the concurrence of the parties, essentially acted as an appellate court.[46] The military judge checked for prejudice by applying the harmless beyond a reasonable doubt standard.[47] Looking at Table 4, we see that this is the correct standard for reviewing potential violations of specific discovery requests under RCM 701. The military judge found that the nondisclosure of each potentially favorable piece of evidence was harmless beyond a reasonable doubt.[48]

After conducting that review, the military judge denied the motion for a mistrial but granted other remedies available under RCM 701(g)(3). Specifically, the military judge prohibited the government from presenting victim impact evidence or any other aggravation evidence in its sentencing case-in-chief.[49]

The ACCA agreed with the military judge's reasoning. The court found that the government violated RCM 701 by not disclosing matter that was specifically requested, but concluded that the nondisclosure was harmless beyond a reasonable doubt. The court went further and found that the records were not favorable under *Brady*.[50] However, the court did not analyze whether these mental health records were in the possession, custody and control of military authorities (for a possible RCM 701(a)(2) violation) or whether the records were in an investigative file (for a possible RCM 701(a)(6)/*Brady* violation).

This case has three main lessons. First, the military judge effectively handled a potential discovery violation that arose in an unusual place: post-merits but pre-appeals. The military judge handled the *in-camera* problem fairly well by allowing the parties to review the matter so that they could refine their arguments. He also recalled the witness to build a complete record; conducted RCM 701(a)(2) and RCM 701(a)(6)/*Brady* analysis; granted a defense continuance; and crafted a meaningful remedy for any potential discovery violations.[51]

Second, this problem might have been easily resolved by an analysis of the files' location. If the files were in a civilian clinic, then the government would have been under no obligation to locate them for the defense under either RCM 701(a)(2) or RCM 701(a)(6)/*Brady*. Precision matters.

Third, when a trial counsel receives a discovery request, the trial counsel needs to act on it with due diligence. The court gave counsel this admonition:

> We take this opportunity to reiterate the government's duty with regard to the disclosure of evidence in response to specific requests by the defense . . . Though the government's response that it was "not aware of the existence" of Mrs. SCR's medical records in this case was technically true, it was only because trial counsel failed to actually ask Mrs. SCR if she had previously attended mental health counseling. Rule for Courts-Martial 701 requires the prosecution "engage in 'good faith efforts' to obtain the [requested] material." *Williams*, 50 M.J. at 441; R.C.M. 701(a)(2) . . . The government cannot intentionally remain ignorant and then claim it exercised due diligence.[52]

[43] Alderman v. United States, 394 U.S. 165, 182 (1969); United States v. Abrams, 50 M.J. 361, 364 (C.A.A.F. 1999).

[44] *Trigueros*, 69 M.J. at 608.

[45] *Id*.

[46] *Id*. at 608 n.4.

[47] *Id*. at 608.

[48] *Id*.

[49] *Id*.

[50] *Id*. at 608–11.

[51] *Id*. at 608.

[52] *Id*. at 611.

In this case, the trial counsel should have asked the victims if these records existed. If the records existed and they were in an investigative file or under the military's control, then the trial counsel should have disclosed them to defense. If the records existed but were not in one of these files, then the trial counsel could have denied the request, and the defense could have then requested production of the files under RCM 703. And, if the trial counsel believed the request was inappropriate, the trial counsel could have sought relief from the military judge under RCM 701(g)(2).

The court took their discovery admonition further, and appeared to place an obligation on the trial counsel to disclose records even if they are not located in a file covered by the rules:

> In this case and others like it where there is no dispute over the relevance of the requested material, due diligence requires trial counsel to ask each victim whether she has attended any mental health counseling sessions, investigate the existence of any medical records, and obtain them, employing a subpoena or other compulsory process where necessary.[53]

That statement is not accurate: the court confused the discovery rules with the production rules. Under the discovery rules, the trial counsel is under no obligation to obtain records that are located in files not covered by those discovery rules. If the matter is in files that are beyond the reach of discovery rules, the defense can submit a proper production request under RCM 703. The government will then have options or obligations that flow from that request.

Production of Evidence

Where *Trigueros* dealt with discovery, *United States v. Graner*[54] dealt with production. Graner was one of the Soldiers at the center of the Abu Ghraib scandal. Graner was charged with conspiracy to commit maltreatment, maltreatment of detainees, and dereliction of duty for failing to protect detainees from abuse.[55]

As part of case development, the defense counsel made a discovery request for a particular Department of Defense (DoD) report. The government denied that request.[56] The defense then made a motion to compel production of this report.[57] Note that the defense counsel did not file a motion to compel *discovery*; rather, the defense skipped over that option and filed a motion to compel *production*. Look at Table 1 and note that by doing so, the defense raised their standard from material to the preparation of the defense to the higher standard of necessary and relevant. This perhaps unintentional choice will become important later.

When litigating the production request before the military judge, the defense broadened their request to include memorandums that related to the legal status of the detainees. The defense theory was that Graner was only acting as part of a general command climate that condoned the humiliating treatment of detainees in order to make them more likely to give up intelligence. The defense argued that the documents were needed to establish that the detainees were not protected by the law of war and therefore could not be maltreated; to establish that the appellant lacked the state of mind needed to maltreat because he thought he was just following orders; and to establish that there was unlawful command influence. On appeal, Graner stated that these matters would also support a defense theory that senior government officials had authorized the type of actions that Graner committed.[58]

The military judge denied the production request, stating that the documents were not relevant, but invited the defense to raise the issue again if they could establish relevancy.[59] Looking at Table 1, the military judge applied the correct test for production: necessary and relevant. The defense did not revisit the issue during the remainder of the trial.[60]

On appeal, the CAAF did not analyze the issue with much precision. While the court mentioned RCM 701(a)(6) and *Brady*,[61] the issue of nondisclosure of favorable evidence was not raised by the parties. The court also mentioned RCM 701(a)(2),[62] but this rule was not applicable because the defense never litigated a motion to compel discovery. The defense only litigated a motion to compel production.

The court disposed of the requested memorandums by stating that the defense failed to comply with the requirements under RCM 703(f)(3).[63] The rule states that

[53] *Id*.

[54] 69 M.J. 104 (C.A.A.F. 2010).

[55] *Id.* at 105–06. Graner was also charged with various assaults and an indecent act. *Id*.

[56] *Id.* at 106.

[57] Brief for Appellee at 6–7, United States v. Graner, 69 M.J. 104 (C.A.A.F. 2010) (No. 09-0432).

[58] *Graner*, 69 M.J. at 106–08.

[59] *Id*. at 106–07.

[60] *Id*. at 107.

[61] *Id*.

[62] *Id*.

[63] *Id*.

any defense request for production of evidence shall list the items of evidence, including a description of each item sufficient to show its relevance and necessity, and say where the government can find it.

Regarding the DoD report, the court turned to the production rules and focused on whether the report was relevant under RCM 703. The court found that Graner provided no evidence that he was adversely affected by a report that he had never even seen; that he had a duty to protect detainees under his charge regardless of any views on the detainees' legal status; and that he never produced any evidence of unlawful command influence.[64] It appears that the court did not see any connection between Graner's conduct and whatever command climate may have existed. To the court, the command climate was irrelevant if Graner and the other Soldiers involved did not have actual knowledge about this command climate. Had Graner presented some evidence that he knew about a particular command climate, or was directed to do something by someone who may have been influenced by the command climate, then the matter might have been relevant.

In his concurrence in part and dissent in part, Judge Baker pointed out that the defense fell in the "gap" between the rules that was previously discussed above. Defense counsel are required to state with specificity something that they have not been allowed to see and which might even be classified.[65] However, in this case, this "gap" was of the defense's own making. Note that if the defense had litigated a motion to compel discovery, the defense would not have needed to clear that hurdle. In contrast to RCM 703(f)(3), there is no requirement under RCM 701(a)(2) to give a more precise location other than "within the possession, custody, and control of military authorities." Here, it appears that the DoD had the documents.

Further, had the defense filed a motion to compel discovery, the defense could have argued the *material* standard under RCM 701(a)(2), which is lower than the *relevant* standard under RCM 703. These documents might have met the *material* standard because they could affect the defense's decision-making process. For instance, if the defense knew that there was nothing there worth pursuing, then the defense might have sought a different trial strategy or pursued an offer to plead guilty. Finally, had the defense litigated the denied discovery request, the standard on appeal would have been harmless beyond a reasonable doubt. Precision matters.

Because of the court's lack of precision, this case contains some dicta that practitioners should approach with caution. The lead opinion, the concurring opinion, and the concurrence in part and dissent in part opinions routinely interchanged the terms *production* and *discovery*. In dicta, the court even stated that "these rules [R.C.M. 701(a)(2), R.C.M. 701(a)(6)/*Brady*, and R.C.M. 703] are themselves grounded on the fundamental concept of relevance"[66] and noted that "Professor Wigmore put it over a century ago: 'None but facts having rational probative value are admissible.'"[67] Those statements are true for production analysis and potentially for RCM 701(a)(6)/*Brady* analysis,[68] but not for RCM 701(a)(2) analysis. Recall our discussion above and look at Table 1 again. While *material* and *relevant* may appear to be synonyms, they do not mean the same thing. *Material* is a preparation term and is used to analyze specific discovery requests under RCM 701(a)(2). *Relevant* is an evidentiary term and is *not* used in RCM 701(a)(2) analysis. Precision matters.

Requests for Expert Assistance

In 2005, the CAAF decided *United States v. Warner*.[69] There, the government secured a top expert in the field (Expert B), denied the defense request for a similar, specialized expert (a different Expert B), and then appointed a generalist to the defense team (Expert A). The court found that by doing so, the government violated the letter and spirit of Article 46's guarantee of equal opportunity to obtain witnesses and other evidence.[70]

In 2010, the CAAF reviewed another case with similar facts, *United States v. Anderson*.[71] This time, the government denied the defense request for a specialized expert (Expert B), appointed the defense a generalist (Expert A), but then the government called their own specialized expert (Expert B) on rebuttal.

In 2004, Anderson, a member of the Washington State National Guard whose unit was mobilizing to go to Iraq, began exchanging emails with someone he thought was a Muslim extremist but who was actually a private American citizen devoted to gathering intelligence on terrorists. Anderson revealed his unit movements, information on members of his unit, and training information. The concerned citizen eventually notified the Federal Bureau of Investigation (FBI), and FBI agents continued the online

[64] *Id*. at 108.

[65] *Graner*, 69 M.J. at 112 (Baker, J., concurring in part and dissenting in part).

[66] *Id*. at 107.

[67] *Id*.

[68] Rule for Court-Martial 701(a)(6) uses the term "evidence," which is a trial term in the way that "relevance" is a trial term. MCM, *supra* note 2, RCM 701(a)(6).

[69] 62 M.J. 114 (C.A.A.F. 2005).

[70] *Id*. at 118.

[71] 68 M.J. 378 (C.A.A.F. 2010).

dialogue. Anderson forwarded computer disks with, among other things, classified information on the vulnerabilities of American tactical vehicles.[72]

Prior to trial, Anderson was evaluated by a sanity board and diagnosed with attention deficit disorder and an unspecified personality disorder. The defense requested a particular forensic psychologist to serve as an expert assistant (Expert B, a specialist). The convening authority and subsequently the military judge denied the request. After this denial, the defense requested and was granted a *clinical* psychologist (Expert A, a generalist). At trial, this doctor testified that the appellant had Bipolar I Disorder and an unspecified personality disorder. The government's cross-examination was limited and did not call into question the doctor's underlying assertions, but did highlight that he was not forensic psychologist. The appellant also called a psychiatrist who diagnosed the appellant with Bipolar I and Asperger's Syndrome. Both doctors testified that the accused did not satisfy the conditions necessary for a successful lack of mental responsibility defense. On rebuttal, the government called a *forensic* psychiatrist (Expert A, a specialist). This expert did not comment on the first psychologist's assertions, had some minor disagreements with the second expert, noted that the defense witnesses' assessments were reasonable, and did not otherwise attack the credentials of the defense's two doctors.[73]

The court reviewed whether the military judge erred by not appointing the first doctor that the defense requested. The court applied the test found in Table 3 for expert assistants. The court essentially found that the defense did not (and could not) explain why a specialized expert was needed because the nature of the case did not require a *forensic* psychologist or psychiatrist. No issue was raised that would require the application of psychology to law, such as lack of mental responsibility or partial mental responsibility.[74] In sum, the defense did not need a specialized Expert A—a generalist Expert B was good enough. Further, the appellant did not assert that the appointed doctor was inadequate.[75]

The court then turned to the apparent unfairness of the government appointing a generalist (clinical psychologist, Expert A) to the defense but then calling a specialist (a forensic psychiatrist, Expert B) in rebuttal. The court stated, "As a threshold matter we note that Appellant does not argue, and it is not the law, that having expert type A for Appellant and expert type B for the Government on rebuttal is *per se* unfair."[76] The court found that, in this case, nothing was unfair: the government's rebuttal witness (Expert B) only offered limited testimony that hardly prejudiced the accused, let alone beyond a reasonable doubt. Expert B did not cause an unlevel playing field.[77]

Going forward, however, the fundamental holding in *Warner* remains—the government cannot stack the deck by appointing themselves a specialist but only giving the defense a generalist, and then using that government specialist to attack the defense. If the government does this, then the court will find that the trial was unfair. If a trial counsel finds herself working with a limited pool of available assistants from which she needs to find an assistant for each side, the trial counsel should do her best to ensure each side has a specialist (an Expert B). If she only gives the defense a generalist (an Expert A, then the trial counsel should be wary in how she uses her specialist (an Expert B).

In *United States v. Lloyd*,[78] another expert assistant case, two groups of guys got in a fight in a bar. One group consisted of appellant Lloyd and James. James was the one who actually started the fight. The appellant only joined in after the fists started flying. The second group included Jance, Gee, and Soto. The five men were very close together during the fight, and no more than two or three feet apart. The bouncers broke up the fight and when Jance, Gee and Soto took off, each realized that they had been stabbed during the fight. None of the three saw a knife or knew who did the stabbing. The question was who did the stabbing—appellant or James.[79]

After hearing a news report about the fight, James came forward to the police, said that the appellant admitted stabbing the three victims, and gave the police a blood-covered shirt that the appellant wore that night. Subsequent DNA testing showed that a victim's blood was on the shirt. James said he threw out his own blood-soaked shirt. James later testified at trial that his pants were soaked with blood down to his boxer shorts—but that night, he gave a pair of pants to investigators that he said he wore during the fight which only had one spot of blood on them.[80]

The defense requested expert assistance from a blood splatter expert, which the government denied. Looking at Table 3 in the appendix, we see the test for appointing expert assistants is *necessity*—that there must be a reasonable probability that the expert would (1) be of assistance to the defense and (2) denial of expert would result in

[72] *Id*. at 380–81.

[73] *Id*. at 381–83.

[74] *Id*. at 383.

[75] *Id*.

[76] *Id*.

[77] *Id*. at 384.

[78] 69 M.J. 95 (C.A.A.F. 2010).

[79] *Id*. at 97, 101–03 (Effron, C.J., dissenting).

[80] *Id*.

fundamentally unfair trial. For the first prong, the defense needs to show why the expert is needed, what the expert would accomplish, and why the defense cannot do it themselves. In its motion before the military judge, the defense argued:

> 15. A forensic scientist is relevant and necessary because the government intends to present testing results on DNA as evidence of guilt. It is anticipated that the government's expert witness will discuss the location of the blood on the shirt and who matched the DNA contained on the shirt. DNA analysis can only confirm that genetic makeup of physical evidence, not how it came to be on the evidence seized. As a result of that presentation of evidence, the defense is free to explore theories of the case that the government may not be pursuing as it pertains to this relevant physical evidence. That would include *exploring all possibilities* as to how the blood came to be on the shirt that SrA Lloyd was wearing at the time of the altercation. There are no witnesses in this case who can testify to seeing SrA Lloyd stab anyone. The case hinges upon an alleged confession to an interested party and on blood evidence on SrA Lloyd's clothing. The consultant currently provided to the defense is not qualified to provide information or testify as to bloodstain spatters. . . .
> 16. To the extent that SrA Lloyd was apparently in the proximity of the area where the altercation occurred, the defense must understand and potentially present expert testimony on the manner in which blood spatters from a stab wound. Depending on a number of factors which the defense intends to pursue through an expert, blood may spatter a significant distance from a stab wound. For this reason, presence of an alleged victim's blood on the clothing may be far less significant than intuition, or even theories the government intends to explore, suggests. To mount an effective defense, the defense must understand the physics of bloodstain patterns to either rule out or present such a theory. This is crucial to testing the government's theory of the case and for the presentation of evidence on behalf of SrA Lloyd. Neither member of the defense has the requisite training or experience to understand this complex field without the assistance of an expert.[81]

Many practitioners might agree that this was a compelling request. While the request began by stating the wrong test, citing the necessary and relevant test from the rules for producing expert witnesses, the request did generally address the requirements for the appointment of expert assistants. However, the military judge denied the motion. The military judge stated that while the defense might have shown what the expert would accomplish and why the defense could not do it themselves, they failed to show why the expert was needed.[82]

At trial, the government called James to the stand, who testified that appellant did it, and also had victims Jance, Gee and Soto testify about what they saw. The government also introduced the lab results through a stipulation of expected testimony. The stipulation said that the results did not explain how the blood got on the appellant's shirt and that all it showed was that appellant was in proximity to a bleeding victim. The defense introduced a witness who said she saw James make a stabbing motion and introduced witnesses that testified that appellant was a peaceful person, while James was untruthful. The panel found appellant guilty and sentenced him to one year confinement and a bad conduct discharge.[83]

On appeal, the CAAF checked whether the military judge abused her discretion when she applied the tests for appointing expert assistants. Looking at prior case law, we might expect that the CAAF would have reversed. Two recent cases, *United States v. McAllister*[84] and *United States v. Warner*,[85] have suggested that such cases are appropriate for expert assistance because the rapid growth in forensic science techniques at trial may make these cases more complex than general practitioners can handle on their own. Additionally, in *United States v. Lee*,[86] the CAAF noted that the playing field is uneven when the government benefits from scientific evidence and expert testimony and the defense is denied a necessary expert to prepare for and respond to the government's expert. In *Lloyd*, the defense made a similar argument.

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[81] *Id*. at 97–98 (emphasis added).

[82] *Id*. at 98.

[83] *Id*.

[84] 55 M.J. 270, 275 (C.A.A.F. 2001).

[85] 62 M.J. 114, 118 (C.A.A.F. 2005).

[86] 64 M.J. 213 (C.A.A.F. 2006).

However, the court distinguished the *McAllister*/*Warner*/*Lee* line of cases, stating that those cases only require a reciprocal expert if the government expert's testimony is a linchpin of the government's case. Here, the court said, the government expert's testimony was not a linchpin of the case.[87]

Further, the court found that the defense did not provide the military judge with a precise enough theory for the military judge to determine whether expert assistance was needed to further that theory. While appellate defense counsel argued on appeal that the expert's analysis might have shown that James was the stabber or that appellant did not do the stabbing, defense counsel at trial did not make that explicit argument. The court focused on the language in the defense's motion, noting that the assertion "exploring all possibilities" was not good enough, and the defense must also show a reasonable probability that the expert is needed. The court implied that if the defense had made that explicit statement at trial (that James was the stabber, not the appellant), then the judge might have abused her discretion by turning down the request.[88]

In the dissent, Chief Judge Effron, joined by Judge Baker, argued that the blood spatter theory was obviously central to the defense theory of the case; the defense could not have been more explicit about the necessity for an expert assistant; and declared that the defense motion "explained the need for an expert in clear and compelling terms."[89] The DNA was key: there was no meaningful eyewitness testimony and the only other direct evidence came from James, who had a self-interest in the outcome.[90]

Arguably, the government really only had the DNA evidence—and therefore this case falls within the *McAllister*/*Warner*/*Lee* line of cases. While an expert assistant could not directly rebut the government's expert testimony that the victim's DNA was on appellant's shirt, it could help to explain to the factfinder how that blood may have gotten on that shirt. The dissenters argued:

> Who stabbed the three airmen? No one saw any stabbing. No one saw a knife. None of the victims felt any stabbing during the altercation. Was it Stafford Joseph James, the person who started the altercation, fought with two of the victims, destroyed his own blood-soaked shirt before it could be tested, whose pants did not match his previous testimony and had no blood from the altercation on him, did nothing to report the incident until he heard about the police investigation, and then immediately placed the blame on Appellant? Or was it Appellant, who belatedly entered the altercation, was identified as being in a fight with only one victim, and whose admissions were attributable to Stafford Joseph James?[91]

The dissenters concluded, "In a close case, the defense was denied the opportunity to explore the potential for expert testimony on the critical issue of guilt or innocence."[92]

Perhaps the central issue in this case was not how the blood got on the appellant's shirt, but whether the defense could put on its case without the use of an expert assistant. The military judge conceded the second and third *Gonzalez* factors to the defense—namely, what the expert would accomplish for the defense and why the defense could not do the work themselves.[93] This effectively forced the CAAF to resolve the case by looking at the first *Gonzalez* factor (why the expert assistance is necessary),[94] which appears to have been satisfied by the defense in this case. The majority may have upheld appellant's conviction because they believed the defense could argue how the blood got on the appellant's shirt without the use of expert assistance (the second *Gonzalez* factor). To support this theory, the defense counsel appeared to make the same arguments outlined by the dissent above—all without having any expert assistance. The defense did not need an expert to argue common sense: in a close-quarters fight like this, blood is likely to get everywhere. Indeed, the court-martial found that the appellant was the stabber—but James himself was also covered in blood. The defense was able to present its theory, the panel merely rejected it. The lesson learned for defense counsel is to clearly articulate your theory of the case, and to explain how the evidence sought will either advance your theory or rebut the government's theory (or both).

Conclusion

The discovery and production issues analyzed by the military appellate courts during the 2009 term are similar to the issues military legal practitioners regularly face. The key to solving these problems is to keep the rules straight and apply them with precision.

Recognize whether you are dealing with a discovery issue or a production issue. Understand that a basic

[87] *Lloyd*, 69 M.J. at 100.

[88] *Id*. at 100–01.

[89] *Id*. at 102 (Effron, C.J., dissenting).

[90] *Id*.

[91] *Id*. at 103.

[92] *Id*.

[93] *Id*. at 98; United States v. Gonzalez, 39 M.J. 459 (C.M.A. 1991).

[94] *Id*.

preliminary question in your discovery analysis is, "Where are the requested matters?" Finally, be able to distinguish between the definitions of *material* or *necessary* and understand how these definitions apply to the issues in your case. If you use the tools discussed in this article, you will be well-equipped to apply a precise analysis every time.

Appendix

Table 1. Basic Differences between Discovery and Production

	RCM 701(a)(2)	RCM 703
Timing	Pretrial preparation and investigation	Presentation of witnesses and evidence at trial
Test	*Material* to the preparation of the defense; intended for use by trial counsel in case-in-chief; or taken from or belonging to the accused	Necessary (not cumulative, positively contributes to an issue) and *relevant* (MRE 401)
Agency or Person	Possession, custody, control of *military* authorities	Military witnesses—by order; civilian witnesses—by subpoena; government-controlled evidence—notify custodian; other evidence—by subpoena

Table 2. Differences between Discovery and Production *In Camera* Reviews

	RCM 701(g)(2)	RCM 703(f)(4)(C)
Proponent	A *party*	The *custodian*
Test	Sufficient showing that disclosure would be inappropriate	Compliance with the subpoena would be unreasonable or oppressive
Timing	*Before* decision on the value of the matter in question (the value of the matter is part of the analysis)	*After* the decision on the value of the matter in question (the value of the matter has already been determined)
Relief to party that is denied the matter	The military judge may prescribe such terms and conditions as are just	The military judge can modify or withdraw the subpoena; this may trigger unavailable evidence analysis under RCM 703(f)(2)

Table 3. Differences Between Expert Assistance and Expert Witnesses

	Expert Assistance	Expert Witnesses (RCM 703(d))
Timing	Pretrial preparation and investigation	Trial testimony
Test	*Necessary*: reasonable probability that the expert would (1) be of assistance to the defense (why is expert needed, what would expert accomplish, and why the defense cannot do it themselves); and (2) denial of expert would result in fundamentally unfair trial	*Necessary* (not cumulative, positively contributes to an issue) and relevant (MRE 401)

Table 4. Differences between Specific Discovery Requests and RCM 701(a)(6)/*Brady* Obligations

	RCM 701(a)(2)	RCM 701(a)(6)/*Brady*
Test	*Material* to the preparation of the defense; intended for use by trial counsel in case-in-chief; or taken from or belonging to the accused	Evidence that reasonably tends to be *favorable*
When	Upon request	As soon as practicable
Location	Possession, custody, control of *military* authorities	*Investigative* files, including personnel files of investigators (trial counsel, investigative agencies associated with or closely aligned with the case, or unrelated cases if put on notice by the defense)
Review	Harmless beyond a reasonable doubt	*Material* (reasonable probability of a different result); if prosecutorial misconduct or a specific discovery request under RCM 701, then harmless beyond a reasonable doubt