The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U. S. Army

The Art of Military Criminal Discovery Practice—Rules and Realities for Trial and Defense Counsel

You have had all you can take from this sanctimonious trial counsel, a former friend, now a burr in your saddle. Amazingly, he has changed since he became a trial counsel. First, he delays in providing you discovery until the very last minute (when the convening authority refers the case), and now he refuses to let you inspect the rape victim's medical and mental health records. He also inquires how you can sleep at night, calling your client bad names during your brief hallway encounters. What will this self-righteous, white-hat-wearing-lowbrow do tomorrow? Contrary to the better angels of your nature, you feel driven to seek retribution.

At the next Article 39(a) session, the military judge asks if counsel have anything further. Suddenly, every affront chafes you anew, and you announce a motion to compel discovery. You ask for *all* the victim's medical and mental health records (because there is evidence from another interview that the victim has a history of inpatient treatment for behavioral problems), the CID agent notes, and, in a parting flourish, state that your opponent has been generally uncooperative and will probably provide nothing without a judicial order.

Before the military judge can speak, trial counsel squawks that he has technically complied with discovery under Rule for Courts-Martial (R.C.M.) 701(a), which requires disclosure of charges and allied papers as soon as practicable after service of *referred* charges under R.C.M. 602. Secondly, he has an open file discovery policy. He further asserts that this defense motion is framed like the entire defense case—a veritable "chicken with its head cut-off" theory. This is the first he has heard about the defense's request, and he has no obligation to search for, much less provide, this irrelevant information. The military judge looks down from the bench and sees, not two young lawyers presenting reasoned arguments, but two equally dyspeptic and ineffectual stumblebums.

The Problem

Both of these new trial and defense counsel have much to learn about discovery practice and advocacy in general. The defense counsel has hoped that sudden inspiration will prevail, and, therefore, cannot alert the judge to any prior requests for documents that she may have made. She has habitually relied on the government to provide her with discovery without a written request, and has made all of her specific discovery requests orally. Now, for the first time, she is facing an opponent with discovery amnesia. She is so angry about this latest episode that she cannot formulate a coherent argument, much less cite case law.

The trial counsel's response, likewise, is a visceral ad hominem retort that lacks thought or substance. His personal insults do not mask his dearth of knowledge concerning his discovery obligations. In his view, providing information to the defense counsel, without a fight, is counterintuitive. Why should he do his job *and* her job? She should be able to get this information on her own.

Sadly, this incivility has potential to infect the entire trial. These counsel will cavil and bicker over objections and insignificant details. They will almost certainly make unfavorable impressions on the judge and panel members. The accused will have a zealous representative, but unfortunately for him, much of his counsel's energies will be misguided. There may have been material evidence that defense counsel never discovered that may have acquitted the accused, reduced the degree of guilt, or otherwise mitigated the sentence.[1]

Fortunately, a successful criminal discovery practice is within the grasp of each of these counsel. Successful discovery, however, requires a fundamental understanding of the purpose and the rules of discovery, a mindfulness of the need for civility, and a common-sense application of those rules to courtroom realities.

1. *See* Brady v. Maryland, 373 U.S. 83 (1963) (holding that suppression of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment). Essentially, *Brady* is based on due process, and requires the prosecution to disclose only evidence that is both favorable to the accused and material to either guilt or punishment.

Making a Proper Discovery Motion

A proper discovery motion does not rise like a phoenix from the ashes. Counsel must document, plan, and research beforehand. Counsel must not only know the rules, which are contained in case law, the *Manual for Courts Martial*[2] and the ethical rules,[3] but also must conceptualize "the big picture." Without these ingredients, discovery motions remain formless and ineffectual. Discovery issues occur throughout a trial and may become some of the most significant issues in the case. Therefore, counsel must logically frame discovery motions to make a well-reasoned, persuasive case before the judge.

Gamesmanship and ignorance of the rules and case law impede counsel's ability to see the big picture.[4] Counsel in the above scenario started a game that could result in disastrous consequences for either or both of their clients. Discovery turns into a game when counsel let things become personal, or when counsel merely go through the motions without preparing or knowing why they are doing something.

Begin with the Rules

Due Process—The Minimum Constitutional Requirement

The fundamental purpose of criminal discovery practice is simple—to ensure a fair trial. For the government this means recognizing and automatically providing the defense with favorable material evidence that negates guilt or punishment.[5] This practice keeps the government within *Brady v. Maryland*, its progeny, and R.C.M. 701(a)(6)—the military's version of the *Brady* rule.[6] *Brady* evidence can be exculpatory evidence; for example, a victim's failure to identify the accused in a photographic lineup; a statement from a co-accused professing greater responsibility for the crime; or a statement from the victim or another witness that may reduce the sentence. *Brady* material also includes impeachment evidence. Impeachment evidence can be a government witness's prior inconsistent statement; a prior Article 15 for false swearing; or a grant of immunity or some other form of leniency for a key government witness. When questioning whether evidence is material, exculpatory or impeachment evidence, government counsel should consult with peers and supervisors, rather than risk reversal.[7] When in doubt, government counsel can release the information.

Article 46, UCMJ and R.C.M. 701

In addition to Constitutional Due Process, Article 46, UCMJ, provides the military criminal bar with even broader discovery rights than its federal counterpart. Article 46 provides that the "trial counsel, defense counsel and court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the president may prescribe."[8] Both the trial and defense counsel will find Article 46 useful in discovery motions. Defense counsel can use it as an alternative basis for relief—and cite it as authority for an even broader discovery right than Constitutional due process. Rule for Courts-Martial 701 implements Article 46 and is intended to promote full discovery to the maximum extent possible.[9]

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2. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998) [hereinafter MCM].

3. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26]. Though this article does not discuss the ethical considerations of violating discovery obligations, counsel should read Rule 3.8 (Special Responsibilities of a Trial Counsel) and Rule 3.4 (Fairness to Opposing Party).

4. *See* MCM, *supra* note 2, R.C.M. 701 analysis, app. 21, at A21-30.

5. *See generally Brady*, 373 U.S. 83; *see also* MCM, *supra* note 2, R.C.M. 701(a)(6).

6. *See* MCM, *supra* note 2, R.C.M. 701(a)(6) (codifying the *Brady* rule for military practitioners).

7. Trial counsel should also be aware of the ethical pitfalls of failing to release *Brady* evidence. Rule of Professional Conduct 3.8 requires trial counsel to:

> [M]ake timely disclosure to the defense of all evidence or information known to the lawyer that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the lawyer, except when the lawyer is relieved of this responsibility by a protective order or regulation. . . .

AR 27-26, *supra* note 3, rule 3.8.

8. *See* MCM, *supra* note 2, R.C.M. 701 (discussing discovery); *see also id.* R.C.M. 703 (discussing production of witnesses and evidence).

9. *See id.* R.C.M. 701 analysis, app. 21, at A21-30. This note is not an encyclopedic discourse on every aspect of R.C.M. 701; however, *defense* counsel's discovery obligations under this rule are worth briefly reiterating. Before beginning the trial on the merits, defense must provide notice of certain defenses. *See id.* R.C.M. 701(b)(2). Defense counsel must also disclose the names of witnesses and statements in its case-in-chief. *See id.* R.C.M. 701(b)(1). Reciprocal discovery is discussed later in this note. *See id.* R.C.M. 701(b)(3), (4). Lastly, upon request of the trial counsel, the defense must provide names of sentencing witnesses and allow inspection of sentencing evidence. *See id.* R.C.M. 701(b)(1). Though the defense need not notify the government of its defenses of innocent ingestion, alibi, or mental responsibility until immediately before the trial begins, it may be advantageous to notify the trial counsel earlier so that the defense can receive the requisite notice of the government's rebuttal witnesses on these defenses. *See id.* R.C.M. 701(a)(3).

Both counsel can cite R.C.M. 701(e) when it appears that the other side is impeding access to witnesses or evidence. For example, if a civilian defense witness refuses a government interview and the trial counsel suspects the defense counsel has told the witness she need not cooperate, trial counsel should cite R.C.M. 701(e) to the military judge. This rule states that "[n]o party may unreasonably impede the access of another party to a witness or evidence."[10] Though the judge cannot compel an interview, absent ordering a deposition,[11] the rule and an irritated judge can have considerable influence over counsel's advice to the witness. Alternatively, the defense counsel can invoke the rule with equal force when she suspects that the trial counsel has acted similarly.

Other Dislosure Obligations

In addition to his discovery obligations under R.C.M. 701, the trial counsel has Section III disclosure obligations.[12] He must give notice automatically of: (1) the grant of immunity or leniency to a prosecution witness,[13] (2) the accused's written or oral statements relevant to the case (known to the trial counsel and within the control of the armed forces),[14] (3) all evidence seized from the accused that the prosecution intends to offer into evidence at trial,[15] and (4) all evidence of a prior identification of the accused at a lineup or other identification process that it intends to offer at trial.[16] Additionally, if the prosecution intends to offer evidence of similar crimes in sexual assault cases or child molestation cases, Military Rules of Evidence (MRE) 413 and 414 require the prosecution to give the defense notice at least five days before trial.[17] The defense has a similar five-day notice (and written motion) requirement when it intends to offer rape shield evidence under MRE 412.[18] Lastly, *upon request of the defense*, MRE 404(b) requires the trial counsel to provide pretrial notice of the general nature of evidence of other crimes, wrongs, or acts which he intends to introduce at trial.[19]

Apply the Rules—Trial Tips for Counsel

Put Discovery Requests in Writing

Counsel's first mistake was not putting her discovery requests in writing. Though the local Staff Judge Advocate's office in the hypothetical does not routinely use written discovery, such practice almost always works to the defense's disadvantage. A defense counsel with documentation can easily overcome a trial counsel with discovery amnesia.[20]

Likewise, trial counsel should consider waiting for a written defense discovery request for R.C.M. 701(a)(2)(A) and (B) material (books, tangible objects, reports and tests) before allowing the defense to inspect these materials. This invokes the government's right to reciprocal discovery under R.C.M. 701(b)(3) and (4).[21] Under reciprocal discovery (provided the trial counsel complies), defense counsel must permit the trial counsel to inspect any documents, tangible objects, reports and tests that it intends to introduce in its case-in-chief. Trial counsel who routinely receive written defense requests to inspect such material and who suddenly do not receive a request, or who receive a request that *omits* a request for R.C.M. 701(a)(2)(A) and (B) material, should be wary that the defense has a motive behind the omission.

Trial Counsel's Affirmative Duty to Search for Information

The *Brady* rule not only imposes an affirmative duty to disclose, it also imposes an affirmative duty to *search* for evi-

10. *See id.* R.C.M. 701(e).

11. *See id.* R.C.M. 702.

12. Known as "Section III" because it refers to Section III of the Military Rules of Evidence dealing with self-incrimination, search and seizure and eyewitness identification. *See id.* Mil. R. Evid. 301-321.

13. *See id.* Mil. R. Evid. 301(c)(2) (requiring notice before arraignment or within a reasonable time before the witness testifies).

14. *See id.* Mil. R. Evid. 304(d)(1) (requiring notice before arraignment).

15. *See id.* Mil. R. Evid. 311(d)(1) (requiring notice before arraignment).

16. *See id.* Mil. R. Evid. 321(c)(1) (requiring notice before arraignment).

17. *See id.* Mil. R. Evid. 413(b), 414(b) (discussing evidence of similar crimes in sexual assault cases and child molestation cases).

18. *See id.* Mil. R. Evid. 412(c).

19. *See id.* Mil. R. Evid. 404(b) ("[counsel] shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.").

20. In some cases, the defense may find it desirable to have the trial counsel sign and date the discovery request upon receipt.

21. *See* MCM, *supra* note 2, R.C.M. 701(b)(3), (4).

dence. In recent years, courts have held that a prosecutor's office cannot get around the *Brady* rule by keeping itself ignorant and chanting "open file discovery."[22] Simply because the prosecutor literally does not have the information in his own file does not absolve him of his obligation to search other files within his own office,[23] or even files outside of his office. In some cases, for example, trial counsel may be required to seek out evidence contained within the files of the police or a drug testing laboratory.[24]

In addition to *Brady*, R.C.M. 701(a)(2)(B) places a similar affirmative duty on trial counsel to make available to the defense any government documents or reports that are *material to the preparation of the defense* which "may become known" to trial counsel "by the exercise of due diligence."[25]

A defense counsel can trigger this affirmative duty by making individualized, specific discovery requests. The more specific the request, the greater the duty of the trial counsel to obtain the "outside" information, provided it is relevant and necessary. If a trial counsel is on notice of specifically requested material and fails to obtain that information, he may have violated 701(a)(2)(B), as well as the *Brady* rule (R.C.M. 701(a)(6)). Lastly, a trial counsel who responds negatively or incompletely to a specific discovery request, without having all of the facts, runs the risk of reversal. In *United States v. Bagley* the court stated:

> An incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it would otherwise have pursued.[26]

Military courts have applied an even stricter standard in determining whether the evidence is material when a trial counsel ignores or fails to respond to a specific discovery request. When the government does not disclose information pursuant to a specific defense request or where prosecutorial misconduct is present, the court will consider the evidence material unless the government can demonstrate, beyond a reasonable doubt, that its failure to disclose was harmless.[27]

Organize in Advance

Defense counsel made her second mistake by failing to prepare. She does not know the rules, she has given no notice of her motion (per requirements of the local rules of court), and she has failed to articulate the relevance of the requested records. Advance preparation allows time for research and organization and greatly increases counsel's chances of obtaining relief and avoiding judicial wrath.

Counsel should: (1) specify the requested documents, (2) explain why the request is reasonable, and (3) explain why the undisclosed documents are relevant and necessary.[28] This means articulating what evidence is "expected to be exculpatory, or how any unreleased portion of the medical records could possibly lead to potentially relevant evidence."[29] For example, the defense believes there may be exculpatory or impeachment evidence within the records because it learned in the victim's pretrial interview that she has made a previous allegation of rape and has spent time in a psychiatric ward. Even if the defense loses the motion at trial, a well-presented motion

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22. *See* Carey v. Duckworth, 738 F.2d 875 (7th Cir. 1994). Although R.C.M. 701(a)(6) provides that trial counsel has a duty to disclose only "known" evidence, the Court of Appeals for the Armed Forces has interpreted this to impose the same affirmative duty to discover evidence through due diligence as that imposed explicitly in R.C.M. 701(a)(2)(B). *See* MCM, *supra* note 2, R.C.M. 701(a)(6), 701(a)(2)(B); *see also* United States v. Simmons, 38 M.J. 376 (C.M.A. 1993).

23. *See generally* United States v. Giglio, 405 U.S. 150 (1972); United States v. Romano, 46 M.J. 269 (1997); *but see* United States v. Williams, 47 M.J. 621 (Army Ct. Crim. App. 1997).

24. *See generally Simmons*, 38 M.J. 386; United States v. Sebring, 44 M.J. 805 (N.M. Ct. Crim. App. 1996); Smith v. New Mexico Department of Corrections, 50 F.3d 801 (D.C. Cir. 1995).

25. Interestingly, this language was missing from the 1995 MCM, and has since been replaced in the 1998 MCM. *See* MCM, *supra* note 2, R.C.M. 701(a)(2)(B). *See also* United States v. Simmons, 38 M.J. 376 (C.M.A. 1993). This rule does not require trial counsel to search for the proverbial needle in a haystack. "He need only exercise due diligence in searching his own files *and those police files readily available to him." Id.* at 382 (emphasis added). In the *Brady* arena, in *Kyles v. Whitley* the Supreme Court held that the "individual prosecutor has a duty to learn of any favorable evidence known to the others actin g on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419 (1995).

26. *See* United States v. Bagley, 473 U.S. 667, 682 (1985).

27. *See* United States v. Hart, 29 M.J. 407 (C.M.A. 1990); United States v. Eshalomi, 23 M.J. 12 (C.M.A. 1986). In the military, where there is no request or a general request by defense, the evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense the result of the proceeding would have been different. *Hart*, 29 M.J. at 410.

28. *See* MCM, *supra* note 2, R.C.M. 703(f)(1), (f)(4)(c).

29. United States v. Briggs, 48 M.J. 143, 144 (1998).

has a much greater chance of clarifying the issue—and perhaps prevailing—at the appellate level.

In a motion to compel discovery, the key argument that trial counsel will make is that the requested information is not relevant and necessary (the defense "fishing expedition" argument). To retain credibility with the judge and the opposition, however, trial counsel should comply as soon as possible with reasonable defense discovery requests. The military rules of evidence establish a low threshold of relevance and "any evidence 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" is relevant.[30]

In Camera Inspections

If there is a dispute over relevance of highly sensitive material (such as a victim's *entire* medical record), either the trial counsel or the defense counsel can request that the military judge conduct an *in camera* inspection. *In camera* inspections avoid needless appellate litigation and often pose a middle-ground solution for both trial and defense counsel.[31] As the Court of Appeals for the Armed Forces recently explained in *United States v. Briggs*, "[t]he preferred practice is for the military judge to inspect the medical records *in camera* to determine whether any exculpatory evidence was contained in the file prior to any government or defense access."[32]

Rule for Courts-Martial 701(g)[33] specifically authorizes *in camera* inspections. Trial counsel should call the records custodian to bring a sealed copy of the record for the *in camera* inspection. The judge should then review the record and make a ruling allowing access "or denying access and resealing the records as an exhibit for appellate review."[34]

Rule for Courts-Martial 701(g) also gives the military judge wide discretion in the conduct of the *in camera* inspection. Defense counsel who are reluctant to disclose the defense theory should request an *ex parte* hearing to explain the information sought. An *ex parte* hearing avoids unnecessary disclosure of the defense theory, and is also allowed under R.C.M. 701(g). The defense is in the best position to recognize relevant, necessary material—and sometimes even the defense does not know it until it literally sees the information.

Remedies

For discovery violations that arise *during* trial, counsel should be aware of the considerable remedies available to the judge under R.C.M. 701(g).[35] If there is evidence the trial counsel *willfully* violated discovery obligations, the judge has many options, to include: dismissal, mistrial, and preclusion of evidence. For discovery infractions that do not involve culpable negligence or willfulness, less drastic remedies, such as a continuance or an instruction, will probably suffice. The judge can also preclude defense evidence if it violates a discovery obligation; however, this should be done only if the judge finds that the defense counsel's:

> [Failure] to comply with [the] rule was willful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony. Moreover, the sanction of excluding the testimony of a defense witness should only be used if alternative sanctions could not have minimized the prejudice to the government.[36]

Conclusion

Discovery is a rule-based area of the law; however, counsel must apply the rules with an overarching concern for the *purpose* of those rules. Trial counsel's big picture should include providing due process to the accused, which in many instances means fighting the urge to hold the cards to his chest. Both trial and defense counsel must realize that the case and client are ultimately more important than one counsel's personal distaste for the accused or the opposing counsel. Incivility will get your client nowhere. Knowledge of the rules, their purpose, and thorough preparation are the keys to successful discovery practice. Major Moran.

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30. *See* MCM, *supra* note 2, Mil. R. Evid. 401. *See also* United States v. Tomlinson, 20 M.J. 897 (A.C.M.R. 1985).

31. *See generally* United States v. Briggs, 48 M.J. 143 (C.M.A. 1998); United States v. Reece, 25 M.J. 93 (C.M.A. 1987).

32. *Briggs*, 48 M.J. at 145.

33. *See* MCM, *supra* note 2, R.C.M. 701(g).

34. *Briggs*, 48 M.J. at 145.

35. *See* MCM, *supra* note 2, R.C.M. 701(g).

36. *See id.* R.C.M. 701(g)(3) discussion. If defense counsel's behavior is so egregious as to cause the judge to preclude defense evidence, it is highly likely that the appellate court will be concerned about whether the accused received effective assistance of counsel. *See* U.S. CONST. amend. VI.