Discovery for Three at a Table Set for Two:
An Alteration of Rule for Courts-Martial 701 to Accommodate the Practical and Philosophical Realities of the Victim as a Limited Third Party

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Special victim counsel (SVC): Your honor, Captain Ben Stafford, counsel for the victim named in the specification of the charge, Private First Class Elizabeth Kerr, I wish to be heard on her behalf on this issue before the court under Military Rule of Evidence 514.

Military judge (MJ): Very well, do you have a motion?

SVC: I do your honor; the victim, Private First Class Kerr, moves this court to deny production of her victim advocate's notes as they are protected communications. Not only are they privileged under the rule, but they are neither relevant to the events in question, nor material to the defense.

MJ: Thank you counsel, let's take up the question of relevance first. You may present evidence.

SVC: Sir, unfortunately, I have not been provided with any discovery from which to glean potential case theories of either the prosecution or defense. Therefore, I am unable to present evidence on the question of relevance.

MJ: Counsel, without evidence to convince the court why your client's conversations with her victim advocate are neither relevant nor material, I cannot consider your motion. Your motion is denied.

I. Hollow Is The Right to Be Heard Without A Foundation From Which to Speak.

Private First Class Elizabeth Kerr, having just received some very disturbing news, seeks out her counsel for advice. She walks in his office, closes the door, and sits down. The color drains from her face, and her body language screams nervousness and apprehension as she looks to her counsel. With her face in her hands, and her eyes full of tears she says, "The prosecutor told me the defense wants to see all the notes my victim advocate took when we spoke. I thought they were confidential. He told me generally they are, but the judge may determine otherwise. Is that true? I told her some things that cannot come out."

In reality, "I don't know," is the only reasonable answer her lawyer can give her because he cannot possibly know if that information will be relevant without knowing the evidence likely to be presented. Yet, under the current state of the law[1] he must walk into court blindly, hoping to somehow save his client from a re-victimization that has driven so many victims to distrust and abandonment of the system.[2] How frustrating to assert the rights of a victim without any ammunition with which to make the fight. While lady justice must certainly don the blindfold for the system to work, the litigants cannot.

In 2013, in the military justice system, Congress codified and mandated the process of providing victims with their own attorneys charged with counseling clients on their rights, guiding them through the often opaque criminal justice process, and, when needed, advocating on their behalf.[3] In so doing, the familiar two-party adversarial system transformed into an ungainly and awkward triangle. The problem is in its current form, Rule for Courts-Martial (herein after R.C.M.) 701 does not provide disclosure of any

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[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701 (2012) [hereinafter MCM]. Rule for Courts-Martial (R.C.M.) 701 currently contemplates two parties, the prosecution and defense, as defined in R.C.M. 103(16). *Id.* Therefore, as there are no express disclosure requirements flowing from either of these parties to the victim and her counsel, the only the way the victim can get any discovery is through the often calculated generosity of either the defense or prosecution.

[2] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT vi-viii, 1-15 (1982) (summarizing the introductory statement given by Lois Haight Herrington of the chairman preceding the task force); IRVIN WALLER, RIGHTS FOR THE VICTIMS OF CRIME; REBALANCING JUSTICE 1-11 (2011); *see also* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1321-22 (2002).

[3] *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 701, 1704, 1706, 1716, 1747, 127 Stat. 672 (2013). The Court of Criminal Appeals for the Armed Forces (CAAF) legitimized this change in *Kastenberg*, L.R.M. v. Kastenberg, 72 M.J. 364, 368-69 (C.A.A.F. 2013).

discovery for the victim. This notable absence essentially denies the right to be heard because, absent disclosure outside of this rule, the victim's counsel has virtually nothing upon which to anchor that right. When the United States Court of Appeals of the Armed Forces (CAAF) conferred limited party status on the victim in *Kastenberg*, it gave the victim standing and the right to be heard factually as well as legally.[4]

If the victim has the right to be heard, then the victim must have the right to present evidence. And, if the victim has the right to present evidence, then the victim must have a right to receive and compel discovery from which to derive the evidence to present.[5] Therefore, R.C.M. 701 must be revised in a way that provides meaningful and needed discovery for the victim. Nowhere are the effects of these monumental changes more glaring and onerous than in the practice of pretrial preparations and discovery. When parties use discovery in preparation for trial—more often than not—discovery shapes the field of litigation upon which the trial will unfold.

After a brief background of discovery and the victim's role in the criminal justice process, this article will propose changes to R.C.M. 701. These changes will ensure the victim's counsel has access to the evidence required to advocate on his client's behalf while simultaneously limiting the victim's power. This will insulate the constitutional concerns of the accused and account for the practical realities of interest alignment.

II. Understanding Competing Perspectives through Historical Context

Today, the due process model of criminal justice encompasses what most criminal attorneys perceive to be the bedrock principle of their just and noble profession.[6] However, the due process model is just one recent perspective of several through which society has viewed the criminal justice process.[7] For example, many modern practioners may be shocked to discover that the presumption of guilt and not that of innocence played a much larger role in American prosecutions.[8] These perspectives—due process, crime control, and victim participation[9]—form the basis for the rules at play in cases and compete to form a balance protecting the interests of the parties.[10] However, as this new limited party will inevitably upset that delicate balance, one must understand the various perspectives and their historical context in order to revise the rules in a way that accommodates the new party and maintains the balance.

A. Discovery in a Criminal Case

Discovery rules bear clues and allusions to perspectives they support—both current and bygone. According to Justice Brennen, under the due process model, providing pretrial discovery to the accused enhances the truth-finding process and minimizes the danger that an innocent defendant will be convicted.[11] If a fair trial for the accused is the ideal, then the myriad of narrow and exceedingly limited disclosure rules would seem to be out of place.[12] However, when considered against a fear-of-the-accused perspective—that criminal defendants would hijack the trial with perjured testimony and witness intimidation in order to subvert the evidence—those narrow and limited rules make perfect sense.[13] This perspective, along with the rules that support it, represents the antithesis of the principle of presumed innocence.[14] Despite such cases as *Brady*[15] and *Giglio*,[16] even the Supreme Court has affirmed that a criminal defendant has no constitutional right to discovery generally.[17]

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[4] *Kastenberg*, 72 M.J. at 369-70.

[5] *See* United States v. Aycock, 35 C.M.R. 130, 132 (C.M.A. 1964) (quoting Commonwealth v. O'Keefe, 148 A. 73, 74 (Pa. 1929), "It is vain to give the accused a day in court, with no opportunity to prepare for it . . . . [T]he principle is equally valid when applied to [discovery]."); *see also* United States v. Enloe, 35 C.M.R. 228, 233 (C.M.A. 1956) (providing the perfect parallel when it quotes Bobo v. Commonwealth, 48 S.E. 2d 213, 215 (Va. 1948), stating that "an accused has the unqualified right to 'call for evidence in his favor.' This includes the right to prepare for trial which, in turn, includes the right to interview material witnesses and to ascertain the truth.").

[6] Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (1999); Larry C. Wilson, *Independent Legal Representation for Victims of Sexual Assault: A Model for Delivery of Legal Services*, 23 WINDSOR Y.B. ACCESS JUST. PERSP. ON L. REFORM 249, 274-75 (2005).

[7] *Id.*

[8] Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 582-83 (2006) (quoting Judge Learned Hand in United States v. Garsson 291 F. 646, 649 (S.D.N.Y. 1923), who stated "Our [p]rocedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."); *see also* William F. Fox Jr., *The "Presumption of Innocence" as Constitutional Doctrine*, 28 CATH. U. L. REV. 253 (1979).

[9] Beloof, *supra* note 6, at 292.

[10] *Id.*

[11] William J. Brennan Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U.L.Q. 1 (1990).

[12] *See* FED. R. CRIM. P. 12.4, 15-17; *Cf.* FED. R. CIV. P. 26-37.

[13] Brennan, *supra* note 11, at 5-8.

[14] *Cf.* Fox, *supra* note 8; *See also* Brady v. Maryland, 373 U.S. 83, 87 (1963).

[15] *See generally Brady*, 373 U.S. at 83.

[16] Giglio v. United States, 405 U.S. 150 (1972).

[17] Kaley v. United States, 134 S. Ct. 1090, 1101 (2014); Weatherford v. Bursey, 429 U.S. 545, 559-61 (1977) (ruling that Brady v. Maryland did not create a constitutional right to discovery stating, "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."); *see also* Prosser, *supra* note 8, at 560-61; Brennan, *supra* note 11, at 8-9.

The Military by contrast has a tradition of open and liberal discovery.

> Military discovery practice has been quite liberal . . . . Providing broad discovery at an early stage reduces pretrial motions practice and surprise and delay at trial. It leads to better informed judgment about the merits of the case and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. In short, experience has shown that broad discovery contributes substantially to the truth-finding process and to the efficiency with which it functions.[18]

This language explains the reasoning behind R.C.M. 701, under which the prosecutor must maintain an open file from which he must make active disclosures and permit inspection.[19]

Article 46 of the Uniform Code of Military Justice (UCMJ) embodies this philosophy, granting equal access to witnesses and other evidence as the President may provide. "[A]lthough [the prosecutor's] primary duty is to prosecute, any act inconsistent with a genuine desire to have the whole truth revealed is prohibited."[20] Synthesizing this collective guidance demonstrates that the military justice system embraces the due process model in which the revelation of the truth comes from the empowerment of the accused through full and open discovery.[21] If full and open discovery enables the accused's preparation, then similar discovery provisions would likewise aid the victim. With that empowerment, the victim will be able to resume her once prominent and primary role as prosecutrix.

B. The Return of the Prosecutrix—the Victim's Historical Role in and Subsequent Ouster from the Criminal Justice System.

Most criminal justice practioners are accustomed to viewing the victim as little more than a witness.[22] When a prosecutor empowers, supports, and even sincerely empathizes with the victim, he does so primarily in an effort to enhance the direct examination of that victim.[23] This is not meant to imply that the prosecutor does not care about the victim, but rather that his focus is primarily on justice and conviction. Be that as it may, historically speaking, this model is both revolutionary and, more surprisingly, recent. "Contrary to popular view, 'victim participation was the paradigm of the adversarial trial and has been for close to one thousand years.'"[24]

At the time when the founding fathers gathered in Philadelphia to hash out the foundation and fabric of American law, the victim was the primary player in criminal trials.[25] Private prosecutors passed the bar to argue the guilt of the accused.[26] At a time when crime control was not generally considered a responsibility of the state, the English settlers brought the legal tradition of private prosecution with them and continued its use into the nineteenth century.[27] In that model, victims would often make an arrest and hire a private attorney who would then conduct the prosecution against the perpetrator; furthermore, the state's role, if any, was to help facilitate the process for a fee.[28] Intuitively, the victim neither cared for nor adhered to the presumption of innocence much less the due process rights of the accused. Rather, the victim utilized the court system as a civilized means of retribution against an assailant whom she knew to be guilty.

Beginning in the late eighteenth century, this paradigm slowly shifted toward the public prosecutor model, which became the primary method of prosecution by the turn of the twentieth century.[29] Though there are many reasons for this shift, the system relegated the victim to the sidelines as

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[18] MCM *supra* note 1, at R.C.M. 701 analysis para. A21-33-34 (2012); *see also* United States v. Enloe, 35 C.M.R. 228, 230-31 (C.M.A. 1956).

[19] *But cf.* FED R. CRIM. P. 16. In stark contrast to the military prosecutor, a federal prosecutor must only disclose that which he plans to present at trial rather than anything material to the preparation of the defense. *Id.*

[20] *Id*. at 4; MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 115, 44g-h (1951); MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 115, 44g-h (1969).

[21] *See generally* Major Paul A. Wilbur, Generosity of Discovery in Military Law: Too Much of a Good Thing? Apr. 3, 1986 (unpublished thesis, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army) (on file with The Judge Advocate Gen.'s Legal Ctr. & Sch. Libr.); *cf.* Brennan, *supra* note 11.

[22] This assertion is based on the author's recent professional experiences as a special victim prosecutor, defense counsel, and trial counsel [hereinafter Professional Experience].

[23] *Id*.

[24] Wilson, *supra* note 6, at 261; *see also* DOUGLAS E. BELOOF, VICTIMS' RIGHTS: A DOCUMENTARY AND REFERENCE GUIDE 5-8 (2012).

[25] William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, VICTIMS' RIGHTS: A DOCUMENTARY AND REFERENCE GUIDE, 12-15 (Douglas E. Beloof, 2012).

[26] *Id.*; Karen L. Kennard, *The Victim's Vet: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL L. REV. 417, 417-19 (citing Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 387-88 (1986)).

[27] Ramsey, *supra* note 2, at 1322, 1328; Michael T. McCormack, *The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law*, 37 SUFFOLK U.L. REV. 497, 499-502 (2004).

[28] McDonald, *supra* note 25; *see also*, Karen L. Kennard, *supra* note 26, at 419-20.

[29] Karen L. Kennard, *supra* note 26, at 419-20.

nothing more than the complaining witness. "When public prosecution supplanted primary justice, it also destroyed the victim's status as a party to the case and silenced her voice in court without adding constitutional protections for victim's rights."[30] The victim's loss of party status triggered the inevitable loss of victim specific remedies such as restitution—replaced by incarceration and the ideology of rehabilitation—and the conversion of the collective perspective from crime as a private affront to a public injury.[31]

As a result, victims have come to feel disassociated from, if not scared of and even disgusted with, the system responsible for holding their attackers accountable.[32] What is worse, until fairly recently, victims had no real means of redress when the system simply ignored their wishes or blocked them from the process altogether.[33] Now, with *Kastenberg* re-establishing party status for victims, the challenge inevitably becomes the creation of a hybrid model combining the retribution-seeking victim with the public justice-seeking prosecutor, who is responsible for protecting all the rights granted to the accused by the Constitution.[34] Because discovery plays such a prominent role, the rules must appropriately balance these competing interests and philosophies to successfully create such a hybrid.[35]

III. Irreconcilable Differences—Exposing the Significant Conflicts Resulting from the Addition of a Third Litigant, and Determining a Solution

The question posed in this article—how to provide a victim with the discovery needed to adequately assert her rights—seems simple and straight-forward at first; however, upon closer scrutiny, the solution must negotiate and avoid the serious and ostensibly irreconcilable conflicts that arise out of such disclosure. These conflicts call into question and even threaten the most bedrock principles of the criminal justice process. In the end, a universally acceptable solution is not possible, leaving a very difficult choice that will touch upon the core values of the criminal justice system.

Most military justice practitioners first viewed the concept of a legal representative for victims as foolhardy as it was foreign—the primary source of that frustration being one of philosophy and perspective.[36] Most prosecutors play the role of public servants seeking justice within the due process model.[37] In this model, justice equals litigation, analysis, and scrutiny of facts with a careful balance of society's need for retribution, rehabilitation, deterrence, and protection, against the accused's all-important right to a fair trial.[38]

While trial counsel and defense counsel may take the principle of the presumption of innocence as gospel, intuitively, the victim most likely does not. More accurately, with the exception of the rare case in which the perpetrator is unknown to the victim, the victim not only presumes guilt, she is sure of it. She prefers the victims' participation model in which the prosecution is nothing more than the means through which society balances the scales and punishes her assailant.[39] She has no incentive to aid the accused at all—not by submitting to interviews, and certainly not by providing him with information that may help him discredit her or worse, be acquitted.

Conversely, our society now embraces the due process model of criminal justice in which the accused is innocent until proven guilty and has constitutional rights designed to ensure a fair trial.[40] As currently defined and practiced, due process is incompatible with the victim participation model because, while the latter assumes the veracity of the victim's allegation as a baseline, the former is skeptical of the

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[30] Ramsey, *supra* note 2, at 1321-22, 1328. Factors that influenced the shift towards the public prosecutor model include: the public's desire for its government to engage in crime control, the influence of the Enlightenment on the perspective of protecting the accused, financial benefit for the state, and the belief that the private prosecutorial model was elitist and potentially vindictive. *Id.*; Miranda v. Arizona, 384 U.S. 436, 491 (1966).

[31] *See* McDonald, *supra* note 25; Kennard, *supra* note 26, at 419-20. The obvious counterpoint here is the victim's ability to file suit against her assailant in civil court; however, this alternative is far more problematic than it would seem. First, the victim must have the financial means to file suit and hire an attorney. McDonald, *supra* note 25. Second, she is not likely to find an attorney to take her case as most attorneys will not find such a case profitable. *Id.* Lastly, a civil remedy cannot deter the wrongdoer and protect society in the way that criminal remedies can. *Id.*

[32] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 2; WALLER, *supra* note 2.

[33] 18 U.S.C. § 3771 (2004); 10 U.S.C.A. § 806 (2013).

[34] *Kastenberg*, 72 M.J. at 368-69; *see also* Beloof, *supra* note 6.

[35] The great irony here is that the constitutional protections of the accused were created and continue to be vehemently defended in order to protect against the government prosecutor who in pursuit of "justice" generally strives to protect those constitutional protections as much as the defense counsel. By contrast, there generally is no such fear applied to the private prosecutor who represented a far more biased client. While an accused may have more protection to guard against a tyrannical state in principle, common sense dictates that he has far more to fear from the biased victim.

[36] *On Oversight: Sexual Assaults in the Military, Hearing Before the U.S. Senate Committee on Armed Services, Subcommittee on Military Personnel*, 113th Cong. 14-15 (2013) (statement of Lieutenant General Dana K. Chipman, The Judge Advocate General, United States Army).

[37] Aggregate responses to general survey of current and former military justice practioners on their practical experience with the special victim counsel (SVC), on file with author; Professional Experience, *supra* note 22.

[38] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES BENCHBOOK para. 2-5-21 (1 Jan. 2010) [hereinafter DA PAM. 27-9]. Note that this paradigm is so ingrained in the collective conscious that defense counsel expect nothing less from the prosecutors with whom they tangle, often expressing shock, disappointment, and moral outrage at anything less. Professional Experience, *supra* note 22.

[39] *See* Beloof, *supra* note 6; *see also* Wilson, *supra* note 6, at 274-75.

[40] Wilson, *supra* note 6, at 274-75.

allegation and provides the accused with every opportunity to prove it false.[41] Now that *Kastenberg* has juxtaposed these two antithetical models, practitioners must consider the increased potential for serious conflict.

For example, now that the victim is an active participant in the litigation, should she have disclosure obligations towards the other two—i.e. *Brady* material? Those with a protect-the-accused, due process model perspective would likely favor victim disclosure requirements quite strongly. However, those more amenable to a victim-focused perspective would likely see such requirements as unfairly favoring the victim's assailant. If the answer is yes, and the victim must disclose, then the law effectively pierces attorney-client privilege and punishes the victim for asserting her right to be heard. On the other hand, if the answer is no, and the law protects the sanctity of the victim's privilege, then the accused's right to a fair trial will have been dealt a severe blow. Consider Military Rule of Evidence (MRE) 502(a)(3) in which the attorney-client privilege survives disclosures between separate parties on matters of common interest.[42] If the attorney-client privilege prevails over *Brady*, then under that rule, provided conviction qualifies as a common interest, the victim would be able to prevent the prosecutor from disclosing exculpatory information to the accused.[43] Under this construction, the victim could moot the most significant fair trial protection the accused has ever achieved and potentially hijack the entire trial.

Stated another way, if the due process model endures, policy makers must confront the issue of whether the victim counsel is a party with responsibilities to the court or purely the victim's attorney with ethical constraints of confidentiality precluding any act that may damage the victim's position.[44] With no clear answer, the accused-defense attorney relationship is illuminating. This example provides some guidance as even defense counsel have disclosure obligations contrary to their client's interests.[45] The only justification for such disclosures is the truth-finding goal of the trial.[46] Therefore, if the accused must disclose information contrary to interest in order to promote the truth-finding function of the trial, then the victim and her counsel should face similar disclosure requirements.

Given these conflicts, in order to once again make room for the victim as a party to the case in a hybrid system of discovery, the rules must choose one philosophy as dominant while accommodating the other wherever possible. Given the constitutional guarantees for criminal defendants and the vast and comprehensive jurisprudence in support of those guarantees, the rules proposed herein operate within the due process model.

IV. Rewriting R.C.M. 701 to Account for and Empower the New Reality[47]

As the victim's counsel programs are likely here to stay, the system must adapt in order to accommodate third parties.[48] And, it must do so in such a way that the traditional checks, balances, and constitutional protections of the due process model are maintained.[49] Nowhere is that more important than in the practice of discovery because it sets the stage for everything that follows.

While the victim's counsel may have little difficulty being heard by the trial judge and the convening authority, without access to adequate information and evidence through discovery, he will likely have little if anything to say. Imagine a situation in which the trial counsel concedes a motion under MRE 412 in order to strengthen a non-intuitive theory and gain a tactical advantage over the defense in an effort to convict the accused of sexually assaulting the victim—an outcome the victim ultimately supports. Now imagine that the victim's counsel has entered an appearance, and is sitting in court when he hears the trial counsel concede the motion. If the victim's counsel has neither seen nor analyzed the evidence and has therefore failed to anticipate trial counsel's theory, he will likely move the court to suppress the evidence out of consideration of his client's privacy. The victim's counsel may have just done his client a grave disservice. In winning the battle, he may have cost the trial counsel, and ultimately his client, the war. Absent ineffective assistance, providing discovery to the victim likely eliminates this issue.[50]

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[41] *See, e.g.*, Olden v. Kentucky, 488 U.S. 227 (1988).

[42] MCM, *supra* note 1, Military Rule of Evidence (MRE) 502(a)(3).

[43] *See id.*

[44] *See* U.S. DEP'T OF ARMY, Reg. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Appendix B, Rule 1.6 (1 Jun. 1992) [hereinafter AR 27-26]; *But see* AR 27-26, Rule 3.3 and 3.4. Within the context of discovery, in many ways these rules pull the SVC in completely opposite directions. Without proper guidance, these attorneys must decide whether they should reveal confidential privileged information or disobey the court requiring candor and fairness to opposing counsel. Either way, the attorney will likely run afoul of one ethical rule or another. Articulating clear disclosure requirements will remove ambiguity and guess work.

[45] MCM, *supra* note 1, at R.C.M. 701(b)(3).

[46] Brennan, *supra* note 9, at 2.

[47] The complete proposal for R.C.M. 701 can be found in *infra* Appendix A, Proposed Revision of R.C.M. 701, and *infra* Appendix B, Proposed Revisions to R.C.M. 701 (Graphic Representation). For comparison, R.C.M. 701 in its current form can be found in *infra* Appendix C.

[48] *See, e.g.*, Phil Cave, *Lest you be Confused*, CAAFLOG (May 5, 2014), http://www.caaflog.com/2014/05/05/lest-you-be-confused/; *see also* Phil Cave, *NDAA Chairman's markup*, CAAFLOG (May 7, 2014), http://www.caaflog.com/2014/05/07/ndaa-chairmans-markup/ (discussing the current political atmosphere of scrutiny on the Military's ability to and future in preventing/prosecution sexual assaults).

[49] Wilson, *supra* note 6, at 274-75.

[50] While the victim may insist on opposing the motion—regardless of the broader implications on the trial—she would do so after receiving legal advice.

A. Discovery for the Victim

The current definition of "party" found in R.C.M. 103(16) does not currently include the victim or any other potentially limited party.[51] However, in *Kastenberg*, the court held that the rule as written does not preclude the inclusion of a limited third party therein.[52] Given the absence of an express recognition of the third party, the simple solution is the addition of subparagraph (C) as follows: "Any limited party, to include victims, having the right to be heard on specific questions of law." This change will fundamentally alter the perception and feel of the process, and pave the way for the requisite changes to R.C.M. 701.

1. New Disclosure Requirements of the Government

Currently, R.C.M. 701(a) outlines what and how the trial counsel must make disclosures to the defense.[53] However, once policy makers alter R.C.M. 103(16) to reflect *Kastenberg*,[54] a rewritten 701 will expand the trial counsel's disclosure obligations to all parties.[55] This change would put the victim and her counsel on an equal, albeit proportional, footing. With the charge sheet, convening orders, Article 34 advice, and all statements in hand, the victim's counsel would grasp the factual realities of the case that had eluded him previously. With this information, the victim's counsel will be more effective and accurate in his advice and in advocating his client's interests in court. That said, if the object is to reincorporate the victim-prosecutorial perspective, the law must go beyond charge sheets and statements.

Rule for Courts-Martial (R.C.M.)701(a)(2) should also be altered to allow for inspection by any party desiring to do so. Like the revisions to subparagraph (a) and (a)(1), the rule should be rewritten to reflect the new triangular matrix, without granting access beyond the limits of the victim's newly-minted limited standing.[56] Currently, the rule only compels the government to open its file for an inspection of evidence material to the preparation of the defense or that the prosecution intends for use in its case in chief.[57] Presumably, the victim's counsel would similarly need access to information material to his own preparations. To accomplish this task, the rule must allow the victim's counsel the same inspection right as the defense; however, that right must be limited to only that which the victim needs. Anything more invites inequity which threatens the equilibrium of the process.

The biggest danger in adding a new player to the court martial and overhauling the system is upsetting the delicate balance between the parties. The tools a victim receives to assert her rights must be limited in scope. Given too much, the victim may have the ability to hijack the entire process and significantly infringe upon the accused's right to a fair trial.[58] As *Kastenberg* expressly limited the standing of the victim to questions arising under MRE 412, 513, and 514, the victim needs only that evidence relevant to the matters in which she has a right to participate.[59] Therefore, the rule should empower the victim as intended by Congress and *Kastenberg* without sacrificing the balance and superior status of the prosecution and defense.[60] Regardless of the more significant and active role of the victim, it must always be secondary to the determination of the accused's guilt or lack thereof. Equating the victim's position to the defense in this context raises the question of whether the prosecution should receive reciprocal discovery in the same manner currently mandated in R.C.M. 701(b)(3).[61]

Even in its current form, discovery is not a one-way street.[62] Should the defense want to examine the government's file beyond the basic disclosures required by R.C.M. 701(a)(1), it must permit the government the appropriate quid pro quo.[63] Should the defense counsel choose to hold his evidentiary cards close to the vest, he may do so, but only by allowing the prosecutor to do the same.[64]

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[51] MCM, *supra* note 1, at R.C.M. 103(16).

[52] *Kastenberg*, 72 M.J. at 268. Despite the court's clear inference to the contrary, for the opinion and the new expansion in the law to stand at all, the premise of a limited third party is a mandatory foundation. *Id.*

[53] MCM, *supra* note 1, at R.C.M. 701(a).

[54] *Kastenberg*, 72 M.J. at 268.

[55] *See infra* Appendix A, Proposed Revision of R.C.M. 701.

[56] *See generally Kastenberg*, 72 M.J. at 364; *see also* 10 U.S.C.A. § 806b (2013).

[57] MCM, *supra* note 1, at R.C.M. 701(a)(2).

[58] Imagine a scenario in which the accused's Sexual Assault Forensic Examination (SAFE) notes several lacerations on his arms sustained the day before the assault and of which the victim was unaware at the time of the assault. If the victim were to gain those documents in discovery, she may be tempted to alter her testimony in order to enhance her claim that she fought back. While this is the same fear Justice Brennen denounces as applied to defendants, the victim's situation is distinct as she has no countervailing need to know. Brennan, *supra* note 9. Therefore, while one would hope that the victim—and especially her counsel—would be candid and truthful before the court, safeguards can be put in place without harming the victim's limited status and various rights to be heard.

[59] *See generally Kastenberg*, 72 M.J. at 364.

[60] *See generally id*; *see also* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 701, 1704, 1706, 1716, 1747, 127 Stat. 672 (2013).

[61] MCM, *supra* note 1, at R.C.M. 701(b)(3).

[62] If the defense requests to inspect the government's file under R.C.M. 701(a)(2), upon request the defense must make available that which it intends to use in its case in chief as well. MCM, *supra* note 1, at R.C.M. 701(b)(3).

[63] MCM, *supra* note 1, at R.C.M. 701(b)(3).

[64] *Id*.

Similarly, circumstances may arise in which revealing very little if anything to the prosecutor best serves the victim's interests. For example, one can imagine that a victim opposing a domestic violence prosecution may not want her attorney to disclose evidence of her husband's additional misconduct to the prosecutor. Similarly, if possible, the victim may wish to conceal her own misconduct behind the wall of privilege. Much as they do for the defense, the rules must allow for this tactical decision—but not at the expense of creating an unfair disadvantage to the prosecution's interest in holding an offender accountable.[65] The alternative creates a reality in which the prosecution must open its files to the victim without gaining any insight as to how the victim may use that information. As a result, the victim could potentially derail the government's case.[66] Therefore, the same R.C.M. 701(b)(3) quid pro quo obligation on the defense must likewise apply to the victim.[67] While the prosecution may have the lion's share of useful information, it is not the only source.

2. Changes in the Disclosure Requirements of the Defense

In practice, much of the litigation adverse to the victim's interest will originate with the defense. If the goal is to effectively advise the victim and ensure her counsel can effectively litigate her interests in court, there should likewise be an exchange between the victim and the defense. But, as was the case above, the rules should compel only that which the victim needs. Therefore, the rule should be expanded as follows:

> Before presenting an interlocutory question directly or indirectly controlled by MRE 412, 513, and 514 to the court, the defense shall notify the victim of the names and addresses of all witnesses other than the accused, whom the defense intends to call during litigation on that interlocutory question, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the interlocutory question.

This revision would go a long way in accomplishing this aim by giving the victim and her counsel the tools needed to effectively assert her right to be heard. A requirement to notify the victim of such a defense would complete the goal.

Under the current law, R.C.M. 701(b)(2) requires the defense to notify the prosecution of its intent to assert certain defenses.[68] For the victim's right to be heard to be meaningful, this rule must be expanded. The best solution is as follows: "In a case in which the accused is charged with Art. 120, 120a, 120b, 120c, 125, or a sexual offense alleged under Art. 134, the defense shall notify the trial counsel and the victim's counsel before the beginning of trial on the merits of its intent to offer the defenses of consent, reasonable mistake of fact as to consent, or both." Despite its offense-based limitations, this revision will no doubt be controversial because under the current law the defense has been able to keep its theory hidden until the last minute.[69] The defense's ability to shroud its theory of the case puts both the prosecution and the victim litigant at a disadvantage.

Imagine the defense brings an MRE 412 motion in an effort to admit evidence of a sexual encounter with a third party several nights prior to the event in question. In this case, the defense could potentially go with a theory of never-happened, consent, or reasonable mistake of fact as to consent. Depending on which theory the defense chooses, the evidence could be completely irrelevant or constitutionally required. Without prior notification, not only does the victim's counsel lack the ability to counsel his client and prepare his response and representation, but the victim will have to answer for it regardless. With this revision, the victim and her counsel will be able to prepare and potentially preclude needlessly embarrassing litigation. Fundamentally, this requirement is no different than notifying the prosecutor of the intent to employ an alibi defense—it allows the opposition to investigate, prepare, and prevent the deception of the fact finder. Although this informational empowerment allows the victim to effectively assert her rights, granting the victim too much information beyond her needs creates the danger that the victim can use that information to sway the trial and upset the delicate balance. Therefore, because of that danger and the limited party status granted in *Kastenberg*, the revisions must limit the discovery to the victim to only that which she needs to assert her rights.[70]

Similar to the prosecutor, it is equally important that the defense disclose to the victim only that which she needs to assert her rights. Limiting defense disclosure obligations will maintain the appropriate balance between the accused and the limited party victim. While it is true that the defense must disclose its merits witnesses per R.C.M. 701(b)(1),[71]

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[65] *Id.*

[66] Imagine for example a situation in which the defense does not request discovery for fear of having to provide reciprocal discovery. In that situation, if the victim and accused's interests are aligned, the accused could use the victim as a proxy through which to gain an insight into the prosecution's case while avoiding the required reciprocation and thereby gaining an unfair advantage.

[67] *See infra* Appendix A, Proposed Rewrite of R.C.M. 701(c)(2).

[68] MCM, *supra* note 1, at R.C.M. 701(b)(2).

[69] *See* MCM, *supra* note 1, at R.C.M. 701(b)(3).

[70] *Kastenberg*, 72 M.J. at 368-69.

[71] MCM, *supra* note 1, at R.C.M. 701(b)(1).

over-disclosure to the victim has the potential to be particularly dangerous given the victim's potentially intimate knowledge of the facts and players involved. While a victim and prosecution alignment may render this point moot, circumstances may be such that an overly-informed victim presents too great a risk to the accused's ability to mount a defense.[72]

Some may believe that these revisions do not go far enough, that the victim is entitled to even more. For instance, an argument can be made that the defense should be forced to disclose any evidence that may be used to sully the victim's character. However, once again, that takes the victim and her counsel beyond the status carved out by *Kastenberg*.[73] While it seems intuitive for the victim to be informed of when and how her character may be attacked, she does not have a need to know because she lacks standing to actively rebut that evidence at trial. That aspect of the trial, as unsavory as it may be for her, goes beyond the boundaries of her participation in the case.

Thus far, these proposed revisions have provided the victim and her counsel with the information needed to assert the victim's rights. True balance cannot be achieved until the victim and her counsel face disclosure requirements of their own. In what will amount to one of the trickiest and most delicate necessities of these revisions, R.C.M. 701 must strike an appropriate equilibrium between the accused's right to be informed of exculpatory evidence under *Brady v. Maryland*[74] and the confidentiality between the victim and her counsel.[75]

B. Disclosure by the Victim

For every persuasive argument proponents of disclosure may make, proponents of strict confidentiality between the victim and her counsel likely have an equally valid response. In fact, these rule changes that provide a benefit to the victim would seem to put the victim in a worse position than prior to the changes because previously a victim could keep information private, but now she may be compelled to disclose. However, any revisions to the rules must continue to reflect that the accused's constitutional right to a fair trial is paramount.[76] This is one of the primary flash points in the conflict of competing perspectives. On one hand, the victim should not be punished for retaining counsel by losing the protection of her attorney-client privilege. On the other, once the victim becomes an active participant, she should be subject to the same rules as the other litigants in order to maintain the delicate equilibrium vital to the due process model. Therefore, if the victim chooses to insert herself into the process beyond the role of complaining witness, then she must abide by rules designed to maintain balance and ensure the accused receives his fair trial. Though not direct, this allows the victim to retain some control over whether or not she must disclose.

Brady holds that, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[77] Even more important is the rationale behind the rule.

> The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.[78]

The rationale here is important because it illuminates the perspective of the rule, and ultimately the goal of a criminal trial—a fair trial for the accused.

The biggest danger in adding a third player is the extent to which the third party may possess such *Brady*-like exculpatory evidence and shield it from the accused. Without a rule requiring disclosures, hiding exculpatory evidence from one's attacker may be the best reason for victims to retain counsel at all. Such a paradigm would ultimately shift the focus and power toward the protection of the dignity and sensibilities of the victim and thus away from the accused's right to a fair trial. While protecting a victim's dignity during the potentially traumatic trial is important, it cannot trump the accused's right to a fair trial.[79]

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[72] Imagine, for example, that the defense counsel is preparing a defense based primarily on character evidence—negative toward the victim and positive regarding the accused. If the victim and her counsel have unfettered access to the defense's witness list, the victim may take on a far more active role in the prosecution by actively identifying, vetting, and suggesting witnesses capable of derailing the defense's case thus forcing the accused to defend against two adversaries rather than just one. While that may be appropriate on questions that directly affect the rights of the victim, it is highly inappropriate for the case in chief.

[73] *See generally* L.R.M. v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013).

[74] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[75] *See* U.S. CONST. amend. VI; Maine v. Moulton, 474 U.S. 159 (1985); United States v. Turley, 24 C.M.R. 72 (C.M.A. 1957); United States v. Fair, 10 C.M.R. 19, 25-26 (C.M.A. 1953) (noting that the principle of confidentiality was designed to encourage full and unrestrained communication between client and attorney).

[76] Compare the chilling effect on the victim's candor with her counsel to the spirit of *Brady*. If the victim is afraid to admit certain things to her lawyer for fear of having that information turned over to the accused, then the relationship will be strained. Brady v. Maryland, 373 U.S. 83, 87 (1963).

[77] *Id*.

[78] *Id*. at 87-88.

[79] *See* U.S. v. Stellato, No. 15-0315 (C.A.A.F. Aug. 20, 2015); *see also infra* Appendix D, discussion of *U.S. v. Stillato*, for a more in-depth discussion of this case as it applies to the concept of victim disclosure.

One can foresee an obvious example upon inspection of MRE 412(b)(1)(c).[80] Imagine a victim in a sexual assault case comes to her attorney with the following confession:

> After he raped me, we started talking again. One thing led to another and we ended up exchanging dirty texts and I sent him a few racy photos. I have since gotten a new phone, but I still have the old one with all of that on there. I want him to pay for what he did to me, but I'm afraid if this stuff were to come out, no one would believe me.

Now imagine that the accused deleted that content. A savvy attorney would tell the victim not to speak of the phone, texts, or images unless asked specifically about them.[81] Furthermore, that counsel would sit in on every interview and instruct her client not to answer questions that may reveal that information.[82] Being none the wiser, the accused proceeds to trial without being able to raise what could potentially be reasonable doubt in the case. While that counsel has successfully shielded his client from embarrassment in court and helped bring about the desired conviction, he did so at the expense of the accused's right to a fair trial.[83] Policy makers must decide which is more important; *Brady* and its progeny would clearly favor the accused's right to a fair trial.[84]

Any revisions within the discovery rules need to compel the victim and her counsel to disclose exculpatory evidence once she inserts herself into the trial. In the example above, the bad facts associated with the phone are not dispositive of whether or not the accused actually committed the offense. But without that information that same accused would be deprived of a fair trial. Without a compulsion to disclose, the victim would effectively wield the power to shade, alter, or even mislead the trial. While requiring disclosures may have a chilling effect on the attorney-client relationship between the victim and her counsel, the alternative has the potential to undermine the entire process. Therefore, should the victim choose to take on a participatory role greater than that of mere witness, the victim, as a limited party, must adhere to the due process perspective.

The rules should compel these victim disclosures to the prosecution as well. Imagine once more the hypothetical case above. Under the current construct, if the defense learned of the existence of the phone, under a *Brady*[85] analysis, the prosecutor could be accused of failing to disclose exculpatory evidence—evidence from which the prosecutor was effectively sealed off by and through the victim's counsel.[86] The changes proposed herein, while extensive, address these holes and concerns in an intuitive and practical manner.

Including the prosecutor as a recipient of exculpatory evidence from the victim solves several discovery inequities created by the new paradigm.[87] First and foremost, such a rule would create a redundancy in disclosure to the defense as the prosecutor remains bound by the requirement to disclose all qualifying evidence within his care and control.[88] Second, this rule change would somewhat relieve the prosecutor from an ethical duty to disclose that which he may not know. Lastly, with the exception of evidence held exclusively by the accused, all parties to the trial would start on an equal informational footing. This is significant to the

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[80] MCM, *supra* note 1, at MRE 412(b)(1)(c).

[81] *Compare* AR 27-26, *supra* note 44, para. 1.2, *with* AR 27-26, *supra* note 44, para. 3.3, 3.4(1)(a), and (1)(f)(2). Rule 1.1 requires the Judge Advocate—in this case the SVC—to do that which is in his client's best interests; however, rule 3.4(a)(1) prohibits unlawful obstruction to relevant information. AR 27-26, *supra* note 44, para 1.2; AR 27-26, *supra* note 44, para. 3.4(1)(a). Depending on the meaning or interpretation of "unlawful" in rule 3.4(a)(1), these two rules may be irreconcilable. As of now there is no guidance as to which rule trumps or how the SVC may make that determination.

[82] Professional Experience, *supra* note 22. Much of the dynamic between the victim's counsel and either defense or government counsel is personality driven. Outside of the solicitation of incriminating evidence by the prosecutor, the victim in her role as a witness has no legal authority to refuse to answer the questions of the other parties; however, an overzealous victim's counsel may nevertheless instruct her client not to answer certain questions. Regardless of her authority to give that advice, if her client follows it, the victim's counsel has effectively walled off potentially relevant evidence. *Id.*

[83] *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963). Once again this will depend on one's particular perspective. From that of the victim, the accused is guilty, and needs only to be convicted and sentenced to satisfy her desire for retribution. Professional Experience, *supra* note 22. Therefore, disclosing evidence that confuses or obscures that guilt will only frustrate the victim's reasonable goal. Conversely, from a presumption of innocence perspective, the accused's inability to learn of and present such evidence would irreparably harm his ability to prove his innocence.

[84] The obvious counter point is that even now a savvy victim is able to conceal *Brady* material from the prosecutor thereby ensuring the defense is never the wiser. Therefore, why punish the victim and make her turn over evidence—effectively piercing her own privilege against her interest—just because she has retained counsel and chosen to assert her rights? However, because the victim is now an active participant in the litigation, she has the ability to manipulate the proceedings more than ever before—not to mention her attorney's ethical duties to the court.

[85] *Brady*, 373 U.S. at 87.

[86] *See* U.S. v. Stellato, No. 15-0315, 34-35 (C.A.A.F. Aug. 20, 2015) (distinguishing its decision to hold the trial counsel responsible for failure to investigate and make disclosures from evidence held by a cooperating witness from significant opposing case law based on the trial counsel's "willful blindness" and ability to review that evidence); *Brady*, 373 U.S. at 87 (1963) (holding that the intent is not to punish the state, but rather to ensure the accused receives a fair trial).

[87] An unconstitutional taking is the obvious counterpoint. U.S. CONST. amend. V. It is not difficult to imagine a scenario in which the prosecution would try to force the victim to hand over personal property in order to comply with *Brady*—a clear taking. However, the fairly simple solution would be to expressly deny the government the power to deprive the victim of her personal property outside a proper subpoena and simultaneously grant the military judge the ability to abate or dismiss the proceedings in the event the victim decides she would rather maintain her privacy than allow the trial to go forward. With such a rule, the accused could not be forced into a trial without knowledge of constitutionally-required evidence and the victim could not be forced to surrender her property.

[88] MCM, *supra* note 1, at R.C.M. 701(a)(6); *but see* MCM, *supra* note 1, at MRE 502(a)(3).

prosecutor because beyond the concerns of how the evidence will play at trial, that evidence may also influence the decision to go to trial in the first place. Without the duty to disclose to the government, it is entirely possible that the victim and her counsel could effectively drive a case into court that had no business being tried in the first place.

Once it is determined that the victim must disclose, one must decide when she must disclose. The point of retention of counsel is too early, as that would effectively stifle the motivation to seek counsel and fatally weaken the attorney-client privilege, as that would force her to disclose information before knowing if she even wants to be heard. Arguably, this creates an inequity in favor of the victim because she would likely receive discovery prior to becoming a party and incurring her own disclosure obligations. This may seem concerning at first glance, but the alternative once again forces the victim to litigate blind.[89] In reality, this will not be as harmful to the accused as it may seem. If she does not file a motion, the accused is no worse off than he was prior to disclosure. If she does file, she has a reciprocal discovery obligation.[90] The victim's disclosure obligation should only arise when she seeks additional discovery from the prosecution—a choice triggering reciprocal discovery—or files a motion or response because these acts take her beyond her traditional witness role.

Given the practical reality of shifting and aligning interests between a now three-party system, these disclosures are the key to withholding the power of "swing vote" from the victim and maintaining the balances critical to the integrity of the system. However, privilege still poses a major obstacle to the smooth resolution of this discovery issue.

C. The Practical Alignment of Parties and the Problem of Privilege

In considering this third party, the intuitive equilateral triangle one might envision is misleading as the victim's interest will almost inevitably create a two-on-one scenario. Despite the checks on the danger of victim primacy—the victim can decide which party to support—she can potentially shift the balance of power according to her preference. In a worst case scenario, the victim could essentially predetermine the victor with her decision of which party to support. The solutions to this problem are the proposed disclosure obligations of the victim working in tandem with MRE 502(a)(3).

Practically speaking, the victim's counsel best serves his client's interests when he works with the party with whom those interests are aligned. However, one would think that MRE 510 would render that almost impossible.[91] MRE 502(a)(3) solves that problem. On matters in which parties share a common interest, their attorneys may collude behind the wall of attorney-client privilege.[92] While this legal provision initially envisioned co-defendants in criminal trials, it has been used frequently in civil practice by both co-defendants and co-plaintiffs.[93] As written, if the victim and the government share a common interest—conviction of the accused—then the victim's counsel and the prosecutor could share privileged information without triggering MRE 510. Without the disclosure requirements proposed herein, MRE 502(a)(3) would permit the victim to block prosecutorial disclosures to the defense, thus pulling the teeth out of *Brady* altogether.

Conversely, if the victim's interests align with the defense, the victim could effectively block the defense's reciprocal disclosures. Imagine the defense files its discovery request thereby granting them access to the prosecutor's files. If the defense intended to present evidence protected by the victim's attorney-client privilege in its case in chief, MRE 502(a)(3) could prevent that disclosure. Furthermore, the defense could similarly and significantly devalue the prosecutor's ability to develop testimony with the "hostile" victim by preparing the victim alongside her counsel as they discuss and incorporate the privileged information of the accused. Having done so, the defense counsel could then use attorney-client privilege under MRE 502(a)(3) to virtually silence the victim in front of the prosecutor.

In these situations, essentially the victim has merged with the party of her choice. And, by using attorney-client privilege as a sword instead of the shield, the victim can control the flow of information and thereby significantly influence the outcome of the trial. As this new paradigm matures, military justice practioners will discover this windfall and exploit it. When that inevitability comes, the truth finding function of the trial will take a back seat, and the due process model will suffer. The solution is the mandatory victim disclosures that match those of the other litigants. While unfortunately this requires the attorney-client relationship to be pierced to a degree, such is the cost of admission as the alternative is a far worse proposition and must be avoided.

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[89] If the victim does not receive discovery until she has filed a motion, then she has no discovery upon which to base that motion.

[90] The victim passing that evidence to the prosecution is the obvious counterpoint; however, the defense disclosure obligation only materializes if they intend to file. The prosecution will know about it anyway in due course.

[91] MCM, *supra* note 1, at MRE 510.

[92] MCM, *supra* note 1, at MRE 502(a)(3).

[93] *See generally* James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631 (1997); *see also* Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 50 (June 23, 2005).

V. Conclusion

With CAAF and Congress firmly entrenching the victim into the litigation as a limited party, the rules proposed in this article will accommodate this new party in her pursuit of her rights. However, these rules go further and account for the second and third order effects created by the addition of a third party. These proposed rules not only provide the victim with discovery, but do so in such a way that maintains the critical balance vital to the due process model of criminal justice. At the same time, they make significant concessions to the resurgent victim-first perspective. One way or another, the inclusion of the victim as a litigant necessarily created new conflict with the presumption of innocence precariously suspended in the middle. The result is a choice of whether to maintain allegiance to that axiom or abandon it. Though a compromise in many ways, the rules proposed in this article reflect the choice to maintain such allegiance because in a free society in which one's liberty is his greatest resource, the criminal justice system must guarantee that one cannot lose that liberty without complete due process of law.

Appendix A. Proposed Revision of R.C.M. 701

Rule 701. Discovery [Note that all proposed revisions to R.C.M. 701 are in red]

(a) *Disclosure by the trial counsel to all parties.* Except as otherwise provided in subsections (g) and (h)(2) of this rule, the trial counsel shall provide the following information or matters to the defense—

(1) *Papers accompanying charges; convening order; statements.* As soon as practicable after service of charges under R.C.M. 602, the trial counsel shall provide all parties with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit all parties to inspect:

(A) Any paper which accompanied the charges when they were referred to the court-martial, including papers sent with charges upon a rehearing or new trial;

(B) The convening order and any amending orders;

(C) Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel; and

(D) Any matters submitted by a victim to the convening authority to be considered on the question of referral by the convening authority shall be disclosed to the defense.

(E) For the purposes of paragraph (a)(1) of this rule, the victim is a party upon her counsel filing notice of representation.

(2) *Documents, tangible objects, reports.* After service of charges, upon request of either the defense or the victim, the Government shall permit the requesting party to inspect the following—for the accused, provided it is material to the preparations of the defense, for the victim, provided it is material to the preparation of litigation of interlocutory questions controlled, either directly or indirectly, by MRE 412, 513, or 514. In addition, the defense is further entitled to inspect any of the following provided it is intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, whereas the victim is limited to an inspection of the following provided it is intended for use by the trial counsel in an appropriate interlocutory question:

(A) Any books, papers, documents . . . which are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or

(i) were obtained from or belong to the accused upon a defense request to inspect;

(ii) were obtained from or belong to the victim upon a victim's request to inspect; and

(B) Any results or reports of physical or mental examinations, and of scientific tests or experiments . . . the existence of which is known or by the exercise of due diligence may become known to the trial counsel.

(3) *Witnesses*. Before the beginning of trial on the merits, the trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call:

(A) In the prosecution case-in-chief; and

(B) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when trial counsel has received timely notice under subsection (b)(1) or (2) of this rule

(4) *Prior convictions of accused offered on the merits.* Before arraignment . . . and shall permit the defense to inspect such records when they are in the trial counsel's possession

(5) *Information to be offered at sentencing*. Upon request of the defense the trial counsel shall:

(A) Permit the defense to inspect . . . .

(B) Notify the defense of the names and addresses of . . . .

(6) *Evidence favorable to the defense*.

(A) The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

(i) Negate the guilt of the accused of an offense charged;

(ii) Reduce the degree of guilt of the accused of an offense charged; or

(iii) Reduce the punishment

(B) The trial counsel shall not be required to disclose the existence of the evidence favorable to the defense as defined in subsection (6)(A) of this rule if that evidence is in the exclusive possession of the victim and therefore unknown to the trial counsel unless the trial counsel and victim's counsel share a mutual privilege under MRE 502(a)(3).

(7) *Information regarding Pre-Trial Agreements.* Should the victim retain counsel, the trial counsel shall provide offers to plead guilty, the allied documents, and the Art. 34 advice to victim's counsel no later than two days prior to referral by the GCMCA. If the victim has not retained counsel, the trial counsel shall inform the victim of offer to plea and the details of such an offer, and disclose to the victim the contents of the SJA's advice under Art. 34 of the UCMJ.

(8) *Matters submitted by the victim*. The trial counsel shall disclose to the defense any matters submitted to the convening authority by the victim regarding referral or post-trial action under Art. 60 prior to the convening authority taking action.

(b) *Disclosure by the defense*. Except as otherwise provided in subsections (g) and (h)(2) of this rule, the defense shall provide the following information to all parties of the trial—

(1) *Names of witnesses and statements*

(A) To the trial counsel:

(i) Before the beginning of trial on the merits, the defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(ii) Upon request of the trial counsel, the defense shall also:

(i) Provide the trial counsel with the names and addresses of any witnesses whom the defense intends to call at the presentencing proceedings under R.C.M. 1001(c); and

(ii) Permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.

(B) *To the victim:* Before presenting an interlocutory question directly or indirectly controlled by MRE 412, 513, or 514 to the court, if in receipt of a notice of representation by an attorney for victim, the defense shall notify the victim of the names and addresses of all witnesses other than the accused, whom the defense intends to call during litigation on the interlocutory question, and provide all statements known by the defense to have been made by such witnesses in connection with the interlocutory question.

(2) *Notice of certain defenses.*

(A) The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense, and, in the case of an innocent ingestion defense, the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substance in question, and the names and addresses of the witnesses upon whom the accused intends to rely to establish any such defenses.

(B) In a case in which the accused is charged with Art. 120, 120a, 120b, 120c, 125, or a sexual offense alleged under Art. 134, if in receipt of a notice of representation by an attorney for victim, the defense shall notify the trial counsel and the victim before the beginning of trial on the merits of its intent to offer the defenses of consent, reasonable mistake of fact as to consent, or both.

(3) *Documents and tangible objects.* If the defense requests disclosure . . . or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.

(4) *Reports of examination and tests.* If the defense requests disclosure under subsection (a)(2)(B) of this rule . . . when the results or reports relate to that witness' testimony.

(5) *Inadmissibility of withdrawn defense* . . . .

(c) *Disclosure by the victim.* Except as otherwise provided in subsections (g) and (h)(2)**,** in cases in which the victim has requested discovery under paragraph (a)(2), or filed a motion or response with the court, the victim shall provide the following information or matters to all parties:

(1) *Evidence favorable to the defense.* The victim shall, as soon as practicable following the assumption of the role of a party, disclose to all parties the existence of evidence known to the victim which reasonably tends to:

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged; or

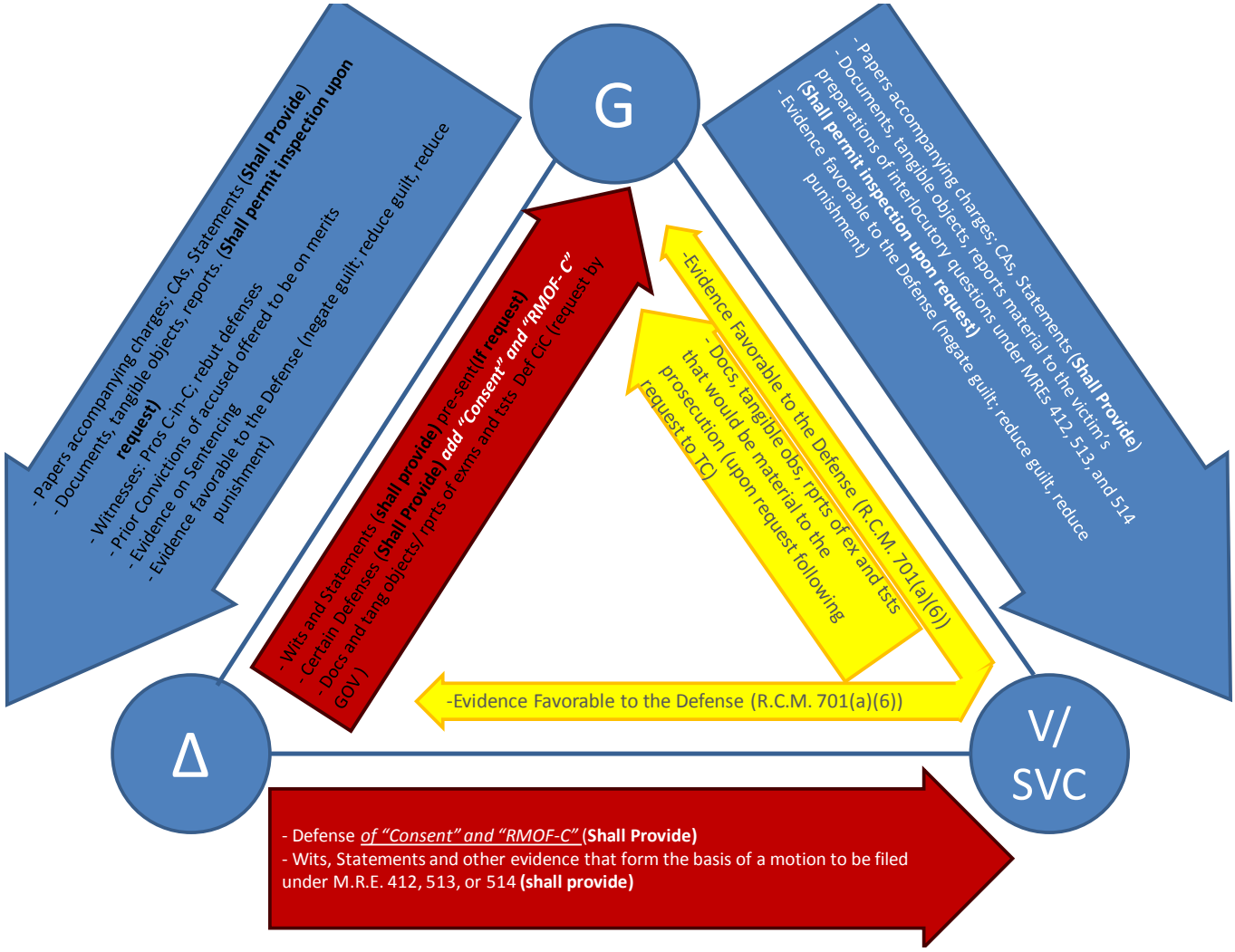
(C) Reduce the punishment.

(2) *Documents, tangible objects.* If the victim requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the Government, the victim, on request of the trial counsel, shall permit the trial counsel to inspect books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the victim to include that of the victim's counsel and which are material to the preparation of the prosecution.

(A) If the victim refuses to disclose tangible evidence under paragraph (c)(1) of this rule, the military judge may, in his discretion, abate the proceedings until such time as the victim agrees to disclose, or dismiss the case with or without prejudice. The Government may not compel the victim to disclose such tangible evidence.

(3) *Reports of examination and tests.* If the victim requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the victim, on request of the trial counsel, shall permit the trial counsel to inspect any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are within the possession, custody, or control of the victim to include that of the victim's counsel and which are material to the preparation of the prosecution.

Appendix B. Proposed Revisions to R.C.M. 701 (Graphic Representation)



Appendix C. R.C.M. 701 in its current form

Rule 701. Discovery

(a) *Disclosure by the trial counsel.* Except as otherwise provided in subsections (f) and (g)(2) of this rule, the trial counsel shall provide the following information or matters to the defense—

(1) *Papers accompanying charges; convening orders; statements.* As soon as practicable after service of charges under R.C.M. 602, the trial counsel shall provide the defense with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to inspect:

(A) Any paper which accompanied the charges when they were referred to the court-martial, including papers sent with charges upon a rehearing or new trial;

(B) The convening order and any amending orders; and

(C) Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel.

(2) *Documents, tangible objects, reports.* After service of charges, upon request of the defense, the Government shall permit the defense to inspect:

(A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and

(B) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

(3) *Witnesses.* Before the beginning of trial on the merits the trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call:

(A) In the prosecution case-in-chief; and

(B) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when trial counsel has received timely notice under subsection (b)(1) or (2) of this rule.

(4) *Prior convictions of accused offered on the merits.* Before arraignment the trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment, and shall permit the defense to inspect such records when they are in the trial counsel's possession.

(5) *Information to be offered at sentencing.* Upon request of the defense the trial counsel shall:

(A) Permit the defense to inspect such written material as will be presented by the prosecution at the presentencing proceedings; and

(B) Notify the defense of the names and addresses of the witnesses the trial counsel intends to call at the presentencing proceedings under R.C.M. 1001(b).

(6) *Evidence favorable to the defense.* The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged; or

(C) Reduce the punishment.

(b) *Disclosure by the defense.* Except as otherwise provided in subsections (f) and (g)(2) of this rule, the defense shall provide the following information to the trial counsel—

(1) *Names of witnesses and statements.*

(A) Before the beginning of trial on the merits, the defenses shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(B) Upon request of the trial counsel, the defense shall also

(i) Provide the trial counsel with the names and addresses of any witnesses whom the defense intends to call at the presentencing proceedings under R.C.M. 1001(c); and

(ii) Permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.

(2) *Notice of certain defenses.* The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense, and, in the case of an innocent ingestion defense, the place or places where, and the circumstances under which the defense claims the accused

innocently ingested the substance in question, and the names and addresses of the witnesses upon whom the accused intends to rely to establish any such defenses.

(3) *Documents and tangible objects.* If the defense requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.

(4) *Reports of examination and tests.* If the defense requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the defense, on request of trial counsel, shall (except as provided in R.C.M. 706, Mil. R. Evid. 302, and Mil. R. Evid. 513) permit the trial counsel to inspect any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are within the possession, custody, or control of the defense that the defense intends to introduce as evidence in the defense case-in-chief at trial or that were prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness' testimony.

(5) *Inadmissibility of withdrawn defense.* If an intention to rely upon a defense under subsection (b)(2) of this rule is withdrawn, evidence of such intention and disclosures by the accused or defense counsel made in connection with such intention is not, in any court-martial, admissible against the accused who gave notice of the intention.

(c) *Failure to call witness.* The fact that a witness' name is on a list of expected or intended witnesses provided to an opposing party, whether required by this rule or not, shall not be ground for comment upon a failure to call the witness.

(d) *Continuing duty to disclose.* If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material.

(e) *Access to witnesses and evidence.* Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.

(f) *Information not subject to disclosure.* Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives.

(g) *Regulation of discovery.*

(1) *Time, place, and manner.* The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.

(2) *Protective and modifying orders.* Upon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge. If the military judge grants relief after such an ex parte showing, the entire text of the party's statement shall be sealed and attached to the record of trial as an appellate exhibit. Such material may be examined by reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

(3) *Failure to comply.* If at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:

(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. This rule shall not limit the right of the accused to testify in the accused's behalf.

(h) *Inspect.* As used in this rule "inspect" includes the right to photograph and copy.

U.S. v. Stellato provides a real world warning of how a victim may manipulate evidence resulting in harm to the accused. In this child sexual abuse case, the victim's mother maintained a box of evidence that she updated and maintained presumably in anticipation of an eventual trial—information that included evidence of a potential recantation.[1] In considering the prosecution's failure and potential refusal to disclose the material to the defense, the court found that a prosecutor's due diligence discovery obligations under MRE 701 extends into the possessions of cooperating witnesses—reversing the decision[2] of the Army Court of Criminal Appeals.[3] The court differentiated *Stellato* from the standard rule that prosecutor has no duty to search for or obtain exculpatory evidence that is in the possession of cooperating witnesses[4] based on the fact that in *Stellato*, the trial counsel had "pretrial knowledge of the existence of the box of evidence[,] . . . [an] ability to review material contained in [the box,]"and was "willfully blind" to the box's contents.[5] While this distinction and resulting holding may seem reasonable under its facts, when applied in a context in which the victim is represented by counsel, this ruling becomes problematic and potentially untenable.

When one changes the facts of *Stellato* so that the victim is represented by counsel, the case creates the strong potential for disadvantage to the accused and clearly subverts the spirit and intent of *Brady*.[6] The *Stellato* court did not contemplate a victim represented by counsel when it expanded the definition of "care and control" of the government to include possession by third parties.[7] As such the court did not contemplate the ability of the victim, through counsel, to frustrate the good faith efforts of the trial counsel to discover and disclose that which the defense is entitled. For example, without a duty to disclose, had the victim in *Stellato* been represented, her counsel likely would have advised his client to share with the trial counsel only that which was in her interest to disclose, thereby concealing the exculpatory evidence. Even under the conditions imposed by the court, one can easily imagine a scenario in which a special victim counsel (SVC) could effectively block the government's disclosure obligations. By keeping that exculpatory evidence safe behind the wall of confidential representation and even privilege, a savvy victim's counsel would essentially be able to deprive the accused of potentially critical information and by extension his fair trial, thereby shifting the balance and focus away from the accused's right to a fair trial in favor of the victim's retributive goals. This proposition is all the more dangerous considering MRE 502(a)(3) as discussed in section V, subsection C, of this article. If the goal of the criminal trial is to find the truth while maintaining the presumption of innocence and protecting the due process rights of the accused, then this result is untenable.

Additionally, while it may still be reasonable to exempt the prosecutor from rummaging through the possessions of third parties or cooperating witnesses, the *Stellato* ruling makes the prosecutor's role far more precarious as one can imagine a scenario in which he is aware of potentially exculpatory evidence but is either unable to get at it or precluded from disclosing it. Following this decision, whether or not a court would give the trial counsel a pass when the SVC frustrates his discovery efforts remains to be seen.

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[1] U.S. v. Stellato, No. 15-0315, 5 (C.A.A.F. Aug. 20, 2015).

[2] U.S. v. Stellato, No. 20140453, 20-21 (A. Ct. Crim. App. Nov. 17, 2014).

[3] *Stellato*, No. 15-0315, 33-36.

[4] *Id*., at 33-34.

[5] *Id*. at 34.

[6] Brady v. Maryland, 373 U.S. 83 (1963).

[7] *Stellato*, No. 15-0315, 34. As noted above, the possession of cooperating witnesses is within the care and control of the government provided the conditions outlined by the court are met. *Id*. How liberally those conditions are interpreted going forward remains to be seen.