

DEFENSE ADVISORY COMMITTEE ON INVESTIGATION,
PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN
THE ARMED FORCES (DAC-IPAD)

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34TH PUBLIC MEETING

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TUESDAY
MARCH 12, 2024

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The Committee met in the Blue & Silver Club at Falcon Stadium, 4900 Stadium Boulevard, Air Force Academy, Colorado, at 9:25 a.m., Hon. Karla N. Smith, Chair, presiding.

PRESENT

Hon. Karla N. Smith, Chair
MG (R) Marcia Anderson
Ms. Martha Bashford
Mr. William E. Cassara
Ms. Margaret Garvin
Ms. Suzanne Goldberg
Hon. Paul W. Grimm
Mr. A.J. Kramer
Ms. Jennifer Gentile Long
Ms. Jennifer O'Connor
BG (R) James W. Schwenk
Dr. Cassia Spohn
Ms. Meghan Tokash

DAC-PAD STAFF

Mr. Pete Yob, Executive Director
Mr. Dwight Sullivan, Designated Federal Officer
Ms. Theresa Gallagher, Attorney Advisor
Ms. Nalini Gupta, Attorney Advisor*
Ms. Terri A. Saunders, Attorney Advisor
Ms. Kate Tagert, Attorney Advisor
Ms. Eleanor Magers Vuono, Attorney Advisor
Ms. Meghan Peters, Attorney Advisor
Ms. Jennifer Campbell, Chief of Staff
Mr. Michael Libretto, Attorney Advisor
Mr. Chuck Mason, Attorney Advisor *
Ms. Marguerite McKinney, Management and Program
Analyst
Ms. Amanda Hagy, Senior Paralegal
Ms. Stacy Boggess, Senior Paralegal
Ms. Stayce Rozell, Senior Paralegal
Ms. Alice Falk, Technical Writer-Editor *
Mr. Blake Morris, Paralegal *
Ms. Janelle McLaughlin-Ali, Paralegal *
Mr. Connor Wasik, Intern

ALSO PRESENT:

Mr. Dwight Sullivan, Designated Federal Officer

SPECIAL VICTIMS' COUNSEL

Capt Ryan Speray, U.S. Army

CMDR Sara de Groot, U.S. Navy

LtCol Stacy Allen, U.S. Marine Corps

Maj Alexandra McCrary-Dennis, U.S. Air Force

CMDR Rebecca Shults, U.S. Coast Guard

SENIOR DEFENSE COUNSEL

Capt Hayes Larson, U.S. Navy

LtCol Cory Carver, U.S. Marine Corps

Maj Ira Gallagher, U.S. Army

Maj Matthew Leal, U.S. Air Force

LCDR David Rehfuss, U.S. Coast Guard

SPECIAL TRIAL COUNSEL

Maj Alex Altimas, U.S. Army

Capt R.J. Stormer, U.S. Navy

LtCol Nicholas Henry, U.S. Marine Corps

Maj Alexis Brown, U.S. Air Force

LCDR Case Colaw, U.S. Coast Guard

*Attended virtually.

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Adjourn Day 1

1 P-R-O-C-E-E-D-I-N-G-S

2 9:25 a.m.

3 MR. SULLIVAN: Good morning, I'm
4 Dwight Sullivan, the designated federal officer
5 of the Defense Advisory Committee on
6 Investigation, Prosecution, and Defense of Sexual
7 Assault in the Armed Forces, better known as the
8 DAC-IPAD.

9 This meeting is officially opened.
10 Judge Smith, you have the con.

11 CHAIR SMITH: Thank you, Mr. Sullivan,
12 and good morning. I would like to welcome the
13 members of the DAC-IPAD and everyone in
14 attendance today to the 34th public meeting of
15 the Defense Advisory Committee on Investigation,
16 Prosecution, and Defense of Sexual Assault in the
17 Armed Forces; or DAC-IPAD.

18 The DAC-IPAD would like to thank the
19 United States Air Force Academy for hosting the
20 DAC-IPAD's two-day public meeting.

21 It is a tremendous honor to have the
22 opportunity to hold the committee meeting at this

1 beautiful campus, and we recognize and appreciate
2 the Academy leadership and staff who have
3 graciously supported the DAC-IPAD's visit.

4 Today's meeting will be in person with
5 video conference via Zoom, also available for
6 members, presenters, and other attendees.

7 The DAC-IPAD was created by the
8 Secretary of Defense in 2016 in accordance with
9 the National Defense Authorization Act for fiscal
10 year 2015, as amended, for a 10-year term.

11 Our mandate is to advise the Secretary
12 of the Defense on the investigation, prosecution,
13 and defense of allegations of sexual assault and
14 other sexual misconduct involving members of the
15 Armed Forces.

16 I'd like to acknowledge with gratitude
17 the military justice experts from each of the
18 military services, criminal law divisions, who
19 generously serve as the DAC-IPAD's service
20 representatives who have joined us for the
21 meeting today. Welcome, and thank you.

22 To summarize our two-day agenda, at

1 today's meeting we will hear from three panels
2 who will share their perspectives on Military
3 Rule of Evidence 513; Article 6(b) victims'
4 rights litigations; judicial practice in military
5 sexual offense cases; and, investigator access to
6 digital evidence on victims' personal devices.

7 The first panel we will hear from are
8 representatives from the Services Special
9 Victims' Counsel and Victims' Legal Counsel
10 programs.

11 After lunch, the committee will hear
12 from the second panel comprised of
13 representatives from the Services Senior Defense
14 Counsel, followed by the third panel of
15 representatives from the Services Special Trial
16 Counsel.

17 Tomorrow, the committee will
18 deliberate on the previous day's panel
19 discussions, and then a panel of civilian
20 practitioners for the El Paso County, Colorado,
21 Public Defender's Office, and the District
22 Attorney's Office, Special Victims Unit, will

1 provide their perspectives on issues of interest
2 to the DAC-IPAD.

3 After briefings from DAC-IPAD Policy,
4 Case Review, and Special Projects subcommittees,
5 the committee will receive public comment from
6 four individuals prior to concluding the two-day
7 meeting.

8 The committee will deliberate the
9 DAC-IPAD letter on amending Article 34, UCMJ.

10 Now, for a few housekeeping items. To
11 those joining by video, I ask that you please
12 mute your device's microphones when not speaking.

13 If any technical difficulties should
14 occur with the video, we will break for 10
15 minutes, move to a teleconference line, and send
16 the dial-in instructions by email.

17 Today's meeting is being recorded and
18 transcribed, and the complete written transcript
19 will be posted on the DAC-IPAD website.

20 Thank you for all being here today and
21 I will now turn the meeting over to the DAC-IPAD
22 director, Mr. Pete Yob.

1 MR. YOB: Thank you, Chair Smith. It
2 is my pleasure to turn this session over to staff
3 attorney Terri Saunders, who will talk us through
4 the session which we'll hear from members of the
5 Services Special Victims' Counsel/Victims' Legal
6 Counsel programs.

7 Terri?

8 MS. SAUNDERS: Thank you.

9 I'll point you that you have the
10 members, the panelists' bios, as well as a list
11 of topics and questions in your red folders.

12 I'd like to introduce our panelists
13 for today, and we thank them so much for
14 appearing before us.

15 From the Army, we have Captain Ryan
16 Speray, who serves as the Regional Manager for
17 the 2nd Circuit of the Army's Special Victims'
18 Counsel Program.

19 He's stationed at Fort Liberty in
20 North Carolina, with the 18th Airborne Corps.

21 From the Navy, Commander Sara de
22 Groot, who serves as the Operations Officer for

1 the Navy's Victim Legal Counsel Program.

2 From the Marine Corps, Lieutenant
3 Colonel Stacy Allen, who serves as the Deputy of
4 the Marine Corps' Victim Legal Counsel
5 Organization.

6 From the Air Force, Major Alexandra
7 McCrary-Dennis, who serves as the Chief Victims'
8 Counsel at the Victims' Counsel Divisions for
9 Divisions 3 and 4, at Joint Base San
10 Antonio-Randolph, Texas.

11 And, for the Coast Guard, Commander
12 Rebecca Shults, who serves as the Deputy Chief of
13 the Coast Guard's Office of Member Advocacy,
14 where she supervises the Coast Guard's Special
15 Victims' Counsel and Physical Disability
16 attorneys.

17 Judge Smith, I'll turn it over to you
18 to start the questions.

19 CHAIR SMITH: All right, good morning
20 everyone. Thank you for being here.

21 What has been the overall impact of
22 the CAAF's decision in U.S. v. Mellette on trial

1 practice in sexual offense cases?

2 Perhaps we can start with the Army,
3 and then just go down the line?

4 CAPT SPERAY: Ma'am, I'll preface this
5 by saying that every case is different. Every
6 case is going to stand on its own, it's specific
7 facts and merits.

8 Your Honor, the case in Mellette is
9 still sufficiently fresh so I feel like most
10 practitioners, all stakeholders, whether it's
11 defense, prosecution, or our victims' counsel,
12 are still working through the implications and
13 the nuances of that, that particular decision.

14 On the Army's side, we've been
15 following a fairly similar framework for
16 analyzing MRE 513 issues.

17 So, perhaps I would say the direct
18 impact on the ground has been relatively minimal.
19 And there's still been a degree of continuity
20 between how historically 513 issues have been
21 addressed in military -- in Army practice and in
22 the post-Mellette world.

1 Now, I say that also with the
2 understanding that defense has historically been
3 submitting discovery requests that still ask for
4 treatment, diagnoses, which would be outside the
5 scope of 513 under Mellette.

6 So on the ground, in the field, at
7 least on the Army's side, in a post-Mellette
8 world -- one, we're still working through the
9 implications and the fallout from that case.

10 And the change in day-to-day practice
11 really has not been as significant as perhaps
12 might be thought.

13 Thank you, Your Honor.

14 CMDR DE GROOT: A little different in
15 the Navy, ma'am.

16 Confusion and consistent piercing of
17 the MRE 513 privilege is occurring in our
18 courtrooms.

19 You can see in re: B.M., the case that
20 went up to CAAF, that using discovery, MRE 701
21 and 703, defense counsel are consistently going
22 outside the loophole of MRE 513; and our judges

1 are allowing it, and not going back and doing the
2 MRE 513 exceptions to the privilege before doing
3 in-camera review.

4 You also see it in the most recent
5 NMCCA DuBay case, U.S. v. Jacinto, where NMCCA,
6 despite victim the victim claiming her privilege,
7 reviewed her mental health records to come to a
8 decision.

9 So, it is consistent. It is a
10 loophole. It's a loophole that needs to be
11 closed and our judges, until CAAF comes down with
12 a decision in in re: B.M. and takes away the
13 constitutional exception, I think defense counsel
14 is well within their rights to use 701 and 703.

15 But it does leave the privilege not
16 really a privilege, and really just a discovery
17 request.

18 LTCOL ALLEN: I would echo and amplify
19 everything that Commander de Groot just said.
20 What we've seen in the Marine Corps is that the
21 overall impact of U.S. v. Mellette on trial
22 practice in sexual defense cases, has led to an

1 inconsistent and ad hoc approach to litigation.

2 In every region, our defense counsel
3 are now including a Mellette provision where they
4 are seeking information pertaining to diagnosis,
5 treatment, and medication in every case.

6 Military judges are now ordering
7 production of victim mental health records in
8 nearly every proceeding, for purposes of
9 obtaining Mellette material.

10 And then discerning whether there are
11 any records or communications that should also be
12 disclosed as relevant and necessary, through an
13 in-camera review process.

14 Prosecutors and defense counsel have
15 become much more cavalier in the way that they
16 approach obtaining mental health records.

17 Defense counsel perceives that they
18 should be entitled to them in almost every case.
19 Trial counsel, for the most part, are becoming
20 willfully ignorant of the existence of mental
21 health records.

22 And that's not efficient for the

1 process.

2 Finally, our VLCs have essentially had
3 to change the manner in which they advise clients
4 to a position that it's not if records and
5 communications are coming in, but what types of
6 records and communications can still presumably
7 be shielded.

8 Even then, it's difficult to advise in
9 this context because our military judges are all
10 over the board as far as how they are ruling on
11 these issues.

12 VLCs have noted almost universally
13 that this has had a chilling effect on victim
14 clients seeking mental health services. And,
15 especially in the military context.

16 MAJ MCCRARY-DENNIS: Good morning. I
17 too would like to concur and amplify with that of
18 Commander de Groot and Lieutenant Colonel Allen.

19 In the Air Force, it has had a
20 significantly confusing effect in the piercing of
21 the privilege between patients and their
22 psychotherapists.

1 We've seen instances where judges have
2 as an in re: R.W. -- judges are asking for
3 unrelated attorneys to review mental health
4 records to try to discern where Mellette records
5 start, and 701 records start in discovery.

6 Judges are being placed in an
7 untenable position where they do try to comply
8 with the constitutional requirements, while also
9 trying to get enough information necessary to
10 even proceed with the 513 information.

11 In short, uniform wearers have less
12 privacy in their own records by going to mental
13 health treatment facilities, than they would if
14 they go off the installation for mental health
15 care.

16 That puts the clients themselves, the
17 patients themselves, in a untenable position
18 where they are now either having to pay
19 out-of-pocket or as Colonel Allen said, we're
20 having to advise them that you frankly just
21 cannot be as forthcoming with your mental health
22 providers.

1 Or you need to be aware that if this
2 were to proceed to trial, there is a distinct
3 possibility that your diagnosis, treatment,
4 prescriptions and frankly, as a result of
5 spillage, other otherwise privileged information
6 could become available to the public as part of
7 the trial process.

8 CMDR SHULTS: And the Coast Guard too,
9 echoes what Commander de Groot said on behalf of
10 the Navy.

11 Perhaps we haven't seen the systematic
12 consequences that the Marine Corps mentioned; but
13 overall, Mellette has not reduced any confusion
14 as to what is privileged information and has
15 increased the likelihood that there's inadvertent
16 spillage.

17 Defense counsel can now submit overly
18 broad requests for purportedly non-privileged
19 information under 701 and 703.

20 And, in the Coast Guard, SVC would not
21 necessarily get notice and certainly wouldn't get
22 standing to argue for that. Or against that.

1 CHAIR SMITH: So let me ask a follow
2 up question. I think it was Lieutenant Colonel
3 Allen who said that the prosecutors seem to be
4 just kind of letting it go in some ways.

5 Are other folks finding that that also
6 is an issue? In other words, what's happening
7 with the prosecution? Are they still trying to
8 keep the records out? Are they folding? How are
9 they addressing it?

10 MAJ MCCRARY-DENNIS: Ma'am, and I'll
11 speak from my position as the Districts 3 and 4
12 and not for the entire Air Force judiciary, but
13 only for the Air Force trial counsels.

14 But unfortunately, they are in the
15 position where when defense requests them
16 pursuant to a discovery request, they have an
17 obligation to -- I think some are trying to say
18 defense counsel at least meet that 701 burden.

19 Tell us why it's relevant. Tell us if
20 you even know the records even exist. But as we
21 know, when clients are in positions where they've
22 been assaulted, they talk to people.

1 That means that so long as they have
2 told someone that I've gone to mental health, or
3 even I have a diagnosis, and defense counsel at
4 least has the foundation to say, we request these
5 records; we know that there is a possibility of a
6 diagnosis, treatment, and prescriptions.

7 And so now, the trial counsels are in
8 a position where they have to, under Brady and
9 Giglio, at least request the records.

10 And then once you have them, now who
11 is going to do the review? That's especially in
12 the Air Force now.

13 Judges, we're still waiting on B.M.,
14 but if judges are not going to do the in-camera
15 review because technically some of these records
16 are not 513, then who is left to do them?

17 And so, it's -- I think some are
18 trying, but unfortunately their hands are tied
19 with the discovery obligations.

20 CMDR DE GROOT: So I'd like to concur.
21 It is very trial counsel specific. So I hate to
22 just push it on every single trial counsel, but I

1 have found in practice a lot of trial counsel
2 leave MRE 513, and some even 412 arguments to the
3 VLC and the SVC to make.

4 And expect us to carry the water
5 because it is our client's privilege. And,
6 they're just waiting for whatever the judge
7 decides.

8 So they're not as vociferous and let
9 us take -- handle the water for all of that. But
10 they are always -- they're doing what they see
11 the judges are asking for.

12 They know these records are going to
13 come in so they do even when -- even over VLC
14 objection or victim objection, they will obtain
15 the records and then just wait for what the judge
16 says.

17 So it is up to the VLC to argue
18 privilege and MRE 513.

19 CMDR SHULTS: I just want to add on
20 for the Coast Guard.

21 I think we might be in a unique
22 position in that our court has ruled that victims

1 don't have standing at the initial motions
2 hearing for production of non-privileged mental
3 health records.

4 Which leaves us entirely relying on
5 trial counsel for notice and argument at the
6 initial discovery hearing.

7 So generally and fortunately, SVC and
8 trial counsel have been aligned in their
9 positions with regard to that evidence.

10 I think on the whole, SVC might prefer
11 a more fulsome redaction; but it's imperative for
12 us because of those rulings that we work with
13 trial counsel too, because they're our whole
14 voice in the process.

15 MS. LONG: Hi, thank you all for being
16 here. I have a similar question to Chair Smith
17 by -- for Lieutenant Colonel Allen.

18 Because I think you used the word
19 wilfully ignorant of mental health records.

20 LTCOL ALLEN: Uh huh.

21 MS. LONG: And, I wanted you to
22 explain what you meant by that?

1 LTCOL ALLEN: Sure. Sorry.

2 So what we are seeing is previously
3 where there used to be maybe more of a dialogue
4 between VLCs and trial counsel about the
5 existence of mental health records, that dialogue
6 is no longer occurring.

7 I'm not going to say that's in every
8 case, but we are certainly seeing what I would
9 classify as a sort of, for lack of a better word,
10 fear of learning of the existence of those
11 records.

12 Again, we're to a point where we know
13 that the request is going to be made because the
14 defense counsel are making it in every case.

15 But the prosecutors are not seeking
16 out the VLCs like they used to, and learning of
17 the existence of the records before these
18 requests are coming in.

19 MS. LONG: Can you talk a little bit
20 about how that's impacting your representation of
21 victims?

22 LTCOL ALLEN: I think it has had, in

1 my opinion, it has had an impact on the
2 relationship between the trial counsels and the
3 VLCs.

4 Again, I'm not going to say that our
5 interests are always aligned. They are not. But
6 I think that we are seeing that having a sort of
7 chilling effect on the relationship in some ways,
8 between those two parties.

9 I would also argue that it's
10 inefficient in a lot of ways. Again where
11 something like this could become known earlier in
12 the process and perhaps there could have been
13 more preparation for litigation, we're not seeing
14 that as much.

15 Again, we see it when the discovery
16 requests come in, and when those records are
17 inevitably produced at this point because again,
18 our judges are ordering them to be produced for
19 that in-camera review.

20 But again, I would argue that it's
21 injected somewhat of an inefficiency into the
22 system, and it's certainly impacted the dialogue

1 between parties.

2 MS. LONG: I don't know if others had
3 something to say. I wanted to invite that, as
4 well.

5 CMDR DE GROOT: No, we're not
6 necessarily seeing that as a pattern. But I'll
7 continue to echo. OSTC just came about. I don't
8 know if all that's trickled down to individual
9 TCs.

10 Really it went from a prior trial
11 department. Same people just moved over to OSTC,
12 so I think they do have their work cut out for
13 them to attempt policy.

14 CAPT SPERAY: And ma'am, in the Army,
15 I would not suggest that we've seen trial
16 counsel, or government counsel, sort of
17 abdicating their standing to address 513, or MRE
18 412 issues for that matter.

19 Certainly when 513 matters arise, the
20 government counsel has an obligation to reach out
21 to the victim and their counsel.

22 And for the most part, that is

1 happening. And in the event that government
2 counsel and the victim's position on 513 do not
3 align, that has to be taken up and addressed on a
4 case-by-case basis.

5 CHAIR SMITH: Yes.

6 MS. GARVIN: Thank you all for being
7 here. I have a question that bounces off of what
8 we've been talking about. And some of you have
9 hinted at future resolution of these issues.

10 But future resolution of these issues
11 might include trying to have CAAF speak on the
12 issues.

13 But in the B.M. case -- correct, right
14 -- you can't as VLC/SVC/VCS directly get to CAAF
15 because -- you -- they've said you don't have --
16 they don't have jurisdiction over your petition.

17 So resolution of this issue around
18 what is and isn't privileged and confidential is
19 ultimately going to -- could exclude the voice of
20 the victims whose issues are being litigated.

21 So I'm curious what you think the
22 resolution is. Is it Congress fixing things?

1 What's the resolution, if you think there needs
2 to be one, for victim's counsel and victims being
3 able to secure relief in CAAF?

4 CMDR DE GROOT: Yes, there should be
5 a change, and, in my opinion, it should come from
6 Congress.

7 CAAF has said it is not written;
8 therefore, they have no jurisdiction, so it
9 should be written.

10 It should be clear to NMCCA and all
11 the CCAs that they should fall in line with the
12 CVRA, and Article 6(b) should be changed to
13 ordinary review of writs, as opposed to the
14 current extraordinary review.

15 Further, I believe Article 6 should be
16 changed to also require trial courts to hear
17 violations of Article 6(b), and make
18 recommendations -- and make rulings I should say,
19 of those violations that allow victims to go and
20 use the appellate court in the right way to
21 clarify the law for them, as they choose to
22 participate in our military justice system.

1 I think I was part of the in re: B.M.
2 along with Lieutenant Colonel Allen, and trying
3 to get this certified.

4 M.W. came down in the middle of that
5 certification period. We had a lot of
6 resistance. But for Admiral Crandall taking up
7 the certification on behalf of VLC in the Navy
8 and the Marine Corps, we would not have gotten in
9 re: B.M. in front of CAAF.

10 And, that is not a good look for
11 victims who are looking for transparency and
12 clarity in the military justice system; that we
13 have to depend on the graces of whoever is the
14 JAG at the time.

15 LTCOL ALLEN: I wholeheartedly echo
16 those comments. I have nothing more to add.

17 CHAIR SMITH: Thank you.

18 Do you have a question? Oh, yes, go
19 ahead.

20 MR. CASSARA: Good morning. I'm going
21 to preface this in a couple of ways. First off,
22 thank you all very much for being here. And, I

1 echo Meg Garvin's comment in that regard.

2 I would also, just to sort of give you
3 a little bit of background -- you have a wide
4 variety of people on this committee, and we
5 approach this issue from very different ways.

6 Meg is a life-long victims counsel and
7 I am a life-long defense counsel. So when I hear
8 things like, we need to close the constitutional
9 loophole, I am gravely concerned.

10 My question is, what is -- from the --
11 from your all's perspectives, and this is a
12 non-attribution forum, okay? I don't want any of
13 you all to think, Oh if I say this, this is going
14 to go, you know. Please, speak freely.

15 (Off microphone comment made.)

16 (Laughter.)

17 MR. CASSARA: Okay, well, but I mean
18 you know what, I mean, if you want to give me
19 your personal opinion.

20 CHAIR SMITH: You know that we're on
21 the record?

22 MR. CASSARA: Yes, yes, yes, I know

1 we're on the record but I really do want to know
2 from y'all's perspective, what is the perfect
3 solution?

4 Because I look at it from a defense
5 lawyer's perspective, who's spent 20 years
6 litigating court martials and now does appellate
7 work.

8 And I think, how do I know what I
9 don't know? How do I, if an alleged victim has
10 made a complaint against my client, how do I know
11 what I don't know in terms of whether or not that
12 person suffers from some form of a mental
13 disability that could impact their ability to
14 perceive and convey events?

15 Right, this is my closing argument in
16 100 cases that I've given.

17 On the other hand, Meg would rightly
18 say, that you don't get to just throw in a net
19 and pick up anything that my client may have gone
20 through in their entire life.

21 I had a good conversation with my
22 colleague Meghan, who works in the U.S.

1 Attorney's arena, and they have the masters who
2 screen the records, or a judge who can look
3 through the records.

4 But how, from y'all's perspective -- I
5 assume some of you have been defense counsel in
6 the past. If you were to wear both of those
7 hats, how do you -- well, what is your
8 recommendation in terms of how we reconcile those
9 two?

10 LTCOL ALLEN: So thank you for that
11 question, sir. I am just coming from a senior
12 defense counsel billet into this billet, so.

13 MR. CASSARA: I knew that.

14 LTCOL ALLEN: I appreciate that
15 question.

16 (Laughter.)

17 LTCOL ALLEN: No, I think -- so here's
18 what's concerning from my personal perspective in
19 this process, right?

20 So, we are talking about a privilege.
21 513 is a rule of privilege. It is incredibly
22 striking to me that one of our clients can have a

1 sexual assault occur; they can go tell their
2 pastor or their priest; they can go tell their
3 attorney; and, they can go tell their mental
4 health therapist the same thing in the wake of
5 that assault.

6 But the only records that they have to
7 worry about being disclosed are those mental
8 health records.

9 Nobody's going to go after their
10 attorney-client privilege. Nobody's going to go
11 after their priest-penitent privilege.

12 But everybody is going after their
13 mental health privilege. And, that's very
14 striking in this context.

15 What I think needs to happen in an
16 ideal world, both having been a defense counsel
17 and as a victim's counsel, is I think that the
18 rules need to be followed.

19 And what is happening right now is the
20 rules are not being followed. And frankly, the
21 rules are not clear in the wake of Mellette, and
22 in the wake of in re: B.M.

1 I think what should happen is, and
2 there's a question that came to this. It asks
3 about the Florida statute basically, and bringing
4 the diagnosis and treatment under the ambit of
5 513.

6 I think that that should happen, and
7 I think that we should go back to a process where
8 again, it's not what is being disclosed, but if
9 things need to be closed. If there is a
10 relevance and necessity.

11 But that 513(e) analysis needs to be
12 undergone. The judges need to be doing the
13 in-camera review, and the judges need to be
14 weighing the victim privileges with the accused's
15 right to have this information.

16 MR. CASSARA: And so if I may follow
17 with that, from what I'm hearing and I'm thinking
18 to myself I probably agree with you, is not
19 necessarily that the defense counsel will never
20 get this material, but that there needs to be a
21 filtering process to determine relevance and
22 necessity.

1 And because I think about a Navy case
2 I had where literally a week before trial, mental
3 health records were disclosed that exculpated my
4 client.

5 And I think can we ever get, God
6 forbid, we get to a place where that information
7 would have never come to the defense's attention.

8 LTCOL ALLEN: Yes, I agree with that.

9 CMDR DE GROOT: I also think at least
10 I can only speak to the Navy. The defense
11 practice has changed a lot. They get their own
12 investigators. They have a lot more of their own
13 money to do a lot of the legwork that when I was
14 defense counsel, I did it all with my legal men.

15 And I think that has changed a lot.
16 And I think I wholeheartedly agree with
17 Lieutenant Colonel Allen, it's not closing a
18 constitutional loophole. The constitution
19 exception was removed from MRE 513.

20 But there are still ways for the
21 defense counsels to get relevant mental health
22 records, if they meet the exceptions under MRE

1 513(e).

2 JUDGE GRIMM: Let me ask a question
3 about the review that would be necessary to
4 determine whether or not information contained
5 within the mental health records would constitute
6 information for which there was a confrontation
7 clause, Brady, or Giglio obligation to disclose.

8 So, we understand that there's sort of
9 a catch-22 that the victim is rightfully
10 concerned about probably the most sensitive type
11 of privileged information that can possibly
12 disclose getting out.

13 And the possibility that there will be
14 over disclosure, beyond simply what might be
15 constitutionally required.

16 Good luck with trying to constitution
17 to try to statutorily override a constitutional
18 right. That's not going to be a long-term
19 success.

20 So, how are we going to adopt a
21 process that would allow the proper evaluation of
22 what is or is not within whatever the scope of

1 the constitutional obligation for disclosure
2 would be?

3 What do we have? We have some
4 opportunities. The trial judge can take a look
5 at it and then determine whether or not there are
6 portions that are constitutionally required to be
7 disclosed.

8 Or we've heard from others that some
9 judges have tried to appoint someone else to take
10 a look at that, and there's been some doubt cast
11 as to whether or not that process is
12 constitutionally permissible.

13 If the decision is, it comes out to it
14 that there will still be some records within the
15 umbrella of records contained within a victim's
16 psychological evaluations that might constitute
17 the type of diagnosis, treatment, prescription
18 that might be considered to be constitutionally
19 disclosable, what recommendation would you have
20 us consider for the way in which to do it?

21 Should we amend the court martial
22 regulation, or the Rules for Courts-Martial to

1 allow the appointment of someone to take a look
2 at this?

3 Or should this be something done by
4 the trial judge? And if you think the trial
5 judge should not do that, why? Judges all the
6 time make determinations regarding privilege.
7 That's what happens in every court in the United
8 States.

9 And what, is there anything in
10 particular about military judges doing this in
11 these cases, that would cause you to think that
12 it should be someone other than the military
13 judge assigned to the case?

14 MAJ MCCRARY-DENNIS: Sir, if I may ask
15 a clarifying question? Back to -- so in a
16 post-Mellette world where we still have this
17 separation between diagnosis treatment, and
18 otherwise mental health records, I think there is
19 a fundamental -- I don't want to say
20 misunderstanding, but a -- at least some
21 confusion as to how records, at least Military
22 medical records, to include mental health

1 records, are produced. And I think that's where
2 we start.

3 I don't, you know, obviously haven't
4 had the conversations with the court and
5 Mellette, but understanding, when you're trying
6 to separate out diagnosis treatments and
7 prescriptions, you are fundamentally creating an
8 issue where, "How do you do that?". I mean,
9 asking whether the Judges do it or somebody else
10 do it.

11 I think that's the first problem, is
12 that has -- that must be changed. That has to go
13 back to pre-Mellette where it's all five, where a
14 psycho -- mental health records should all fall
15 under 513. And there should not be the
16 separation between prescriptions, diagnosis, and
17 treatment. Because trying to discern the
18 difference between those is -- I don't want to
19 say fundamentally impossible, but it's very
20 difficult.

21 I mean, I would speak only for myself
22 because I can see my own records. If you pull

1 MHS Genesis right now there is no realistic way
2 to just pull down those things. You have to pull
3 down the whole record.

4 JUDGE GRIMM: Well I think that, I
5 don't dispute for a moment that it's difficult,
6 but having spent 26 years looking at privileged
7 claims and having to decide them, with the least
8 amount of information about the case and any of
9 the others because I don't get to look at any
10 that's not part of the record, I can tell you
11 that it happens all the time and there is no
12 issue with that.

13 So if the issue is -- if the question
14 is that that decision has to be made -- I get the
15 fact that you think that it's hard, and I get the
16 fact that you think that perhaps you wish that it
17 shouldn't be made, but assume for a moment that
18 that's the decision that has to be complied with
19 -- then who should be making those
20 interpretations? And should it be the Military
21 Judge and is there any problem with the Military
22 Judge having the ability to do that since judges,

1 in all capacities in the civil system do it all
2 the time, in both civil and criminal cases.

3 You know, there are common law
4 privileges, there's statutory privileges; and
5 that is common for judges to have to wrestle with
6 however difficult it may be.

7 Or should it be someone authorized
8 under amendments to the court-martial rules to
9 appoint someone to serve as a special master or
10 someone who can review it. Which if authorized by
11 the law could not be a violation of the privilege
12 because initial officers were, adjunct judicial
13 officers, have always been allowed to determine
14 whether a privilege is appropriately invoked.

15 Were that not the case then the very function of
16 privileges being narrow exceptions to the ability
17 of the litigants to have all relevant information
18 to resolve the case would be abused.

19 And so you have to have someone who
20 can determine whether the privilege is properly
21 invoked in the first instance. And if there is
22 privileged information protected, if there is not

1 privileged information and it is otherwise
2 constitutionally required by rule or by discovery
3 order provided, and if there is blended that they
4 be redacted. And so, faced with that
5 possibility, how is that decision best made?

6 CMDR SHULTS: Sir, I can provide my
7 personal opinion from the Coast Guard's
8 perspective. I think it has to be a Military
9 judge. I think outside of, even one specifically
10 authorized from an SVC's perspective, I'd be very
11 careful about transmitting medical records,
12 mental health records, to any unnecessary
13 individual.

14 And then from the Coast Guard's
15 perspective, we're not operating with a deep
16 bench. I would question who was being appointed
17 and their experience level. And we just don't,
18 we don't have a ton of people that I would trust
19 to make that determination outside of someone
20 qualified as the Military judge.

21 LTCOL ALLEN: I have one amplifying
22 point to Commander Shults' point as well. I

1 think a special master is not appropriate as
2 well, it should be the Military judge. And the
3 reason for that, in addition to everything
4 Commander Shults has just said, is because I
5 think it just introduces another inefficiency
6 into the process and the system.

7 So ultimately the Military judge is
8 the one issuing the ruling. So the Military
9 judge is going to have to go through these
10 records and communications anyways. Having a
11 special master do that doesn't substitute the
12 judgment of the Military judge. So again, it's
13 just a redundancy in the process.

14 CMDR DE GROOT: And I would concur;
15 however, I would say first, the defense counsel
16 has to meet the exceptions of MRE 513(e) before
17 we even get there. But if they have met those
18 exceptions, and even to look for diagnoses and
19 pull those out, I think there are ways to get
20 around that to make mental health providers make
21 it easier for them to get the non-privileged
22 information instead of just turning over all the

1 mental health records. Whether it's through
2 interrogatories or other ways to simply get those
3 non-privileged information.

4 But if MRE 513(e) has been met, then
5 absolutely, it should be the Military judge.

6 Currently the Navy uses teams, which consists of
7 staff judge advocates, first tours, people who
8 have been a lawyer for like a minute and haven't
9 actually experienced what privileged is or even
10 argued it. And I think that is the wrong
11 approach.

12 CAPT SPERAY: Sir, I certainly see no
13 objections to having a Military judge perform
14 that function. That function has been performed
15 in different ways, different places. Whether
16 it's delegating to an SVC to do the redactions or
17 delegating it to another judge advocate to do
18 those redactions.

19 Perhaps the Military judge is best
20 positioned to make those decisions. Recognizing
21 of course it's already been reiterated the
22 proponents still needs to comply with the minimal

1 standards in 513(e) before we even get to that
2 stage of doing an in-camera review, doing
3 redactions. As long as we're following the
4 procedural rules, I also concur that the military
5 judge is likely the appropriate person to perform
6 that function.

7 JUDGE GRIMM: It strikes me that your
8 thoughts are sound. I mean, the military judge
9 is the one that is required to rule on every
10 other motion associated with that case and make
11 those rulings. Presumably they're not being
12 assigned to that billet without the skill and the
13 judgment and the experience to be able to
14 exercise it.

15 Certainly one would think that if that
16 is what the process is, that the courses that the
17 Military judges take for their continuing
18 education could focus on privilege review and how
19 that is to be done. And then in the event that
20 for some reason the burden associated with doing
21 so became a problem, for some reason it could be
22 documented, then you could go back and see

1 whether or not there should be authority for the
2 appointment of someone who could act as a special
3 master.

4 But I think you're right. Is to start
5 with that as one more individual there. And who
6 is that going to be? You can't possibly expect
7 to have someone without the legal training to be
8 able to understand what a privilege is to do
9 that. So that lets out anyone who might have any
10 training other than legal training.

11 And I'm not sure that you would want
12 a Legal Assistance officer or an Administrative
13 Law officer, with no disrespect meant for them in
14 the complexity of their responsibilities -- but
15 you want someone who has that ability, and
16 ultimate responsibility.

17 And in those, do you have any sense --
18 and I'll yield to Mike and one of my other
19 colleagues. But do you have a sense as to -- has
20 there been reluctance on the part of the Military
21 judges and your services when the issue has been
22 squarely presented to them to make that call; and

1 if so, what are they saying as to justification
2 to that?

3 MAJ MCCRARY-DENNIS: Sir, what I'll
4 say is that there is a difference of opinion
5 within the judiciary, at least within the
6 district where I sit, as to how much to get
7 involved in the discovery process. You know,
8 understanding that Mellette says that diagnosis,
9 treatment, and prescriptions that fall within 513
10 still go within the 513 provisions.

11 However, the way that the records are
12 being produced doesn't go directly from the MTFs
13 to the judges; it's through various other means
14 that we've seen. Whether that has sometimes been
15 filter attorneys or appointment of some other
16 attorney.

17 And so there is a discrepancy amongst
18 the judiciary as to how much to get involved in
19 the initial discovery request. Once -- clearly
20 513 I have not seen any issue, but before we even
21 get there, sir, there is discrepancy amongst
22 judges as to how do I -- how do I even get the

1 record?

2 Some have ordered the production
3 directly to trial counsel to do that initial
4 discovery request and determine what is -- what
5 is to be produced under 701, what is otherwise
6 513, and then going from there. But it has
7 created a situation where the judiciary -- there
8 is no -- there is no one way the judiciary is
9 doing it, sir.

10 JUDGE GRIMM: Objection?

11 CAPT SPERAY: I would say, sir, there
12 is not a reluctance on the part of the trial
13 judiciary to perform that function that I have
14 observed. But if anything there is an openness
15 or a receptiveness to other possible methods of
16 performing that important work. So not a
17 reluctance.

18 And our trial judiciary certainly can
19 and have done that. But they are, at least
20 anecdotally, open to do other methods of
21 performing that work.

22 JUDGE GRIMM: So I'll conclude with

1 one final thought to you. I have been thinking
2 about this, is how could we probably try to
3 square the circle and come up with a way, to the
4 extent that the information that has been thus
5 far by the Military appellate courts; the
6 diagnosis, treatment, and prescription, been
7 something that was not within the scope of the
8 privilege and had to be disclosed. How could that
9 be done in a way that would simplify the
10 procedure and prevent the kinds of concerns that
11 you all have raised, which are justifiable
12 concerns from all of the stakeholders implied.

13 And I wonder whether or not the mental
14 health providers, if they knew that this
15 information was potentially discoverable. They
16 have a single document that just says,
17 "Diagnosis, treatment, and prescriptions." And
18 they would then, based upon their work, complete
19 that. And that's the document. That's what has
20 it.

21 You got the information. You can
22 develop it however you want for the purposes that

1 are appropriate for litigation. But all of the
2 other stuff doesn't have to be disclosed because
3 that's what perception is.

4 The worry I have, having dealt with
5 healthcare professionals, is they hate the idea
6 of anything that they have done in any way
7 because to them they believe that's all part and
8 parcel of the medical records. And so as a
9 result of that there could be push back.

10 But I am wondering if you all have any
11 thoughts. If there was a way that this
12 information had to be disclosed it could be
13 synthesized by the healthcare professional who
14 has made the diagnosis, prescribed it, and made
15 the treatment plan for that particular part?

16 And I'm thinking of prosecutors who
17 are looking at medical records where at the very
18 end it says, "Diagnosis, treatment plan, and then
19 if there is a prescription," so that that part
20 was available, is that something that could help?
21 And do you see any effective way of implementing
22 that since I guess there is no -- I mean, does

1 the Military have in-house healthcare
2 professionals or are these contracted civilians
3 that are doing this and everyone is going to,
4 depending upon where their licensed, have their
5 own concerns about what they can disclose?

6 LTCOL ALLEN: So, I apologize. So
7 something that Marine Corps has started doing to
8 somewhat great affect is, in these cases where
9 this is coming up, the Marine Corps is issuing --
10 is having the Military judge -- the VLC is asking
11 the Military judge to issue interrogatories to
12 the Military treatment facility, and specifically
13 to the treating physician.

14 And they are specifically asking three
15 questions. And those three questions are,
16 medication, diagnosis, treatment.

17 And at that point that is creating --
18 well, it's protecting the privilege, for lack of
19 a better phrase, because at that point it's
20 incumbent on the defense counsel to show the
21 relevance and necessity of anything beyond that.
22 So by issuing those interrogatories it is

1 protecting our clients rights. And we have seen
2 success with that in the Marine Corps.

3 MAJ MCCRARY-DENNIS: Procedurally,
4 sir, the only -- for records post an assault
5 where a client is currently undergoing treatment,
6 I think that that will be potentially a little
7 easier to navigate. However, when the requested
8 records proceed the assault by sometimes years,
9 that treating physician could literally be
10 halfway around the world. No longer in the Air
11 Force.

12 And so it would then be someone else,
13 possibly the current treating physician, that is
14 looking back and potentially, you know, making
15 educated guesses based on their medical
16 experience; but making educated guesses as to
17 what that treating physician may have thought and
18 understood at the time. So just from a
19 procedural standpoint that would just be one
20 potential issue I would raise.

21 JUDGE GRIMM: That's a fair point.

22 CMDR DE GROOT: And I just wanted to

1 note, where taint teams come into effect is when
2 defense used the need for discovery. Is
3 requesting discovery. That's where I find some
4 military judges are -- MRE 513(e) has not been
5 met, so I can't review them. So that's why I'm
6 going to give it to somebody else to review.

7 MR. CASSARA: So I'm just looking at
8 the Army docket. I wasn't checking Facebook in
9 case anybody was thinking I was ignoring you, you
10 know.

11 (Laughter.)

12 MR. CASSARA: Twelve trials today
13 Army-wide. I suspect Camp Pendleton probably
14 has, you know, just as many on a given date.

15 But how much of the inability to
16 filter these records is simply a staffing issue?
17 Both from your perspectives and from the trial
18 judiciary.

19 You know, because I know some of the
20 Army judges and, you know, it's one case after
21 the next. I mean, you know, if you're at Fort
22 Bragg or if you're at -- I'm sorry. If you --

1 (Simultaneously Speaking.)

2 MR. CASSARA: I'm sorry I rarely hear
3 that so thank you. If you're at Fort Bragg or if
4 you're at Camp Pendleton and you're a trial
5 judge, you're probably in trial every week. So
6 how much of it is a staffing issue, and is it
7 realistic to ask a Military judge who may be
8 trying cases every week, you know, to do that?
9 To go through those records.

10 CAPT SPERAY: I would say, sir, I
11 cannot speak to whether it is a staffing issue.
12 I have not been made aware of anything that would
13 suggest that is an issue or that it's overly
14 burdensome on trial judiciary or overly
15 burdensome on any other stakeholder. I would
16 imagine that in the event of inappropriate case
17 the time it needs to be taken to address the
18 issue will be taken.

19 And, you know, to answer your point to
20 question, sir, no, I have not been -- I have seen
21 nothing indicating that staffing would be a
22 material dilemma. Of course, that said, you can

1 always use more staff across the board. Not
2 saying that isn't a consideration, I do not think
3 it is quite a material dilemma to suggest any
4 divergence from our current discussion.

5 CMDR DE GROOT: So in the Navy we do
6 not have as many court-martials. And in fact we
7 expect a decrease in court-martials and an
8 increase in administrative hearings of which
9 nothing we do here will affect administrative
10 hearings. But where victim's rights, we're still
11 fighting for in that avenue. But I think our
12 judges will have plenty of time as the
13 court-martial numbers decrease for us.

14 (Off microphone comment.)

15 (Laughter.)

16 MAJ MCCRARY-DENNIS: In the Air Force
17 it's become fairly common practice to do
18 bifurcated hearings where there is a motions
19 hearing and then the trial at a subsequent date.
20 And so because of that there doesn't seem, not
21 speaking for the judiciary, but there seems to be
22 time allocated specifically to taking up those

1 type of issues that don't seem to affect the
2 processing of trial. Getting records takes a
3 while, but not the actual processing of it on the
4 trial side.

5 MR. CASSARA: Thank you.

6 (Off microphone comment.)

7 MS. LONG: Hi. Thank you again. And
8 this is going a little bit backwards by, to some
9 of the testimony that I think, again, Lieutenant
10 Colonel Allen made about the difference between
11 the privileges, which I think was a very good
12 point.

13 Like my colleagues, you know,
14 mentioned before, we all come at this
15 differently. I do come at this from a
16 prosecution perspective, but I think sometimes we
17 also share this belief that there is some
18 privilege light on behalf of the victim, and
19 other privileges that are seen as a little bit
20 more true privilege.

21 Which I obviously stand behind
22 constitutional and a defense -- defendants right

1 to due process, but also stand behind that
2 Supreme Court, you know, though justice due to
3 the accused, it's due to the accuser as well. We
4 have to keep the balance true.

5 So with that, I'm just wondering, do
6 you, in your experience -- are you seeing
7 attempts to pierce other privileges? Like
8 attorney-clients or clergy-penitent in your
9 practice?

10 And I would say, going back to defense
11 or prosecution, is it your experience that those
12 privileges are up for piercing at the same rate?

13 LTCOL ALLEN: In my experience, no, it
14 is not the same. You almost always see 513
15 litigation in the sexual assault offense cases.
16 You almost never see any other privilege come in.
17 The only other privilege I think I have
18 personally seen is 514. So the victim, victim
19 advocate privilege.

20 But outside of that, every once and a
21 while there will be spousal communication
22 privileges. But again, it's very rare compared

1 to 513. At least in my experience as a trial
2 defense counsel in VLC.

3 CAPT SPERAY: Ma'am, to put it
4 distinctly, no. And that did raise an
5 interesting point. The only ambit of privilege I
6 have seen can be at issue in most of our cases
7 has been spousal privilege. And typically that's
8 the accused attempting to invoke it, you know,
9 versus the accused attempting to pierce it as you
10 usually see in 513.

11 So no, ma'am, I do not think that is,
12 aside from a MRE 513 discussion, their privileges
13 are somehow on the chopping block or otherwise
14 unnegotiable.

15 CMDR DE GROOT: Concur.

16 MAJ MCCRARY-DENNIS: Concur for the
17 Air Force as well.

18 MS. TOKASH: Okay, good morning. I'm
19 Meghan Tokash. I have a question that is not
20 about 513.

21 (Laughter.)

22 MS. TOKASH: So our committee is also

1 looking forward to hearing your perspectives
2 about pretrial motions' practice. So I have a
3 two-part question. First, if you could just
4 speak generally as to your experience with
5 respect to pretrial motions' practice?

6 How is that working? What is going
7 well? What is not going well? What things could
8 be improved?

9 And then the second part is, if you
10 could comment on whether it would be important
11 for you, as special victim's counsel, to be able
12 to litigate the issues of pretrial restraint and
13 Military protective orders in front of a Military
14 judge? Thank you.

15 CAPT SPERAY: Ma'am, I would suggest
16 that pretrial evidentiary litigation is extremely
17 important and comes up in the vast majority of
18 our cases.

19 For example, MRE 412 litigation comes
20 up in the vast majority of sexual assault cases
21 that are litigated, and the resolution of these
22 evidentiary matters through motions in limine

1 pretrial can be very beneficial for all
2 stakeholders, the victim, the accused, and the
3 government.

4 Having some clarity on the lay of the
5 land, what evidence is going to come in at trial
6 can be essential for both trial preparation and
7 potential alternative dispositions, you know,
8 pretrial.

9 And I would say, ma'am, to answer kind
10 of the call of your question, for the issues for
11 which victims have standing, our Army SVCs have
12 done a great job in making their clients'
13 positions known, whether they do or do not
14 diverge from those of the government. 412 is
15 essential and SVCs have extensive training and
16 are well-prepared to advocate for their client's
17 position in 412 litigation.

18 To answer the second part of your
19 question, ma'am, as it pertains to pretrial
20 confinement, our RCMs do allow explicitly for
21 victim notification and input in PTC hearings,
22 typically before a military magistrate.

1 I would be potentially leery of
2 revisions to other RCMs that could produce
3 greater standing for a victim in further pretrial
4 confinement motions before a military judge, but
5 under the current RCMs, the victim does have
6 standing and has the ability to make their
7 position known on the question of PTC and whether
8 an accused should remain in PTC.

9 MS. TOKASH: Could you say why you
10 would be leery of having those, the pretrial
11 confinement issue litigated before a military
12 judge?

13 CAPT SPERAY: I would say, ma'am,
14 simply the fact that we've had so many recent
15 revisions to the RCMs and military justice
16 practice that that could result in further
17 minimizing continuity from one year to another.

18 LTCOL ALLEN: So, ma'am, for me, I
19 would argue that right now VLC have very limited
20 pretrial motion practice, mostly 513 and 412.
21 Now, I, of course, think we should have more.

22 We don't get the ROI, so we don't know

1 what else is out there; how we can even help the
2 trial counsel to better their pretrial motions'
3 practice because we don't know what's out there.
4 We have to go to motions' practice in order to
5 find out the information of what we can do to --
6 things that we didn't know were relevant suddenly
7 are relevant because it's in a motions' practice.

8 We also don't get all of the motions.
9 We only get the motions that the trial counsel
10 believe are important to VLC and to victims. So,
11 I hesitate. I don't know what happens to victims
12 who are not represented, if they get these
13 motions or even know what's relevant to them.

14 And lastly, I would argue for standing
15 to argue some of these motions that do effect
16 whether immigration records, for example, to
17 protect our clients' privacy, or other records
18 that trial counsel might not see the relevancy,
19 but could definitely hamper a victim's desire to
20 participate in the military justice system,
21 allowing VLC to be able to argue on behalf of
22 their clients.

1 So, my experience is that we are
2 limited, but we could be doing more, and
3 especially more to help the government perfect
4 their case in pretrial motion if we get the ROI
5 in cases like that.

6 MS. TOKASH: And Sara, just because
7 you raised it -- pardon me, ladies, I'm anxious
8 to get to your perspectives -- but would having
9 some sort of a public filing system, even if it's
10 a website, be helpful to you as special victims'
11 counsel to be able to see not just motions that
12 the trial counsel believe are relevant, but all
13 of the motions and filings?

14 CMDR DE GROOT: Yes, yes, absolutely.
15 Currently, the Navy and the Marine Corps are
16 doing NCORS. I don't know what it stands for.
17 It's our case management. I speak in acronyms,
18 but I don't always remember exactly what they
19 stand for. And right now, we are fighting the
20 fight to be able to have access to all of the
21 motions and not have them filtered through OSTC
22 right now.

1 So, that's going to be decided above
2 our station, above my rank, whether or not we get
3 those. So, yes, I think it would be ultimately
4 very important. Most importantly, it also helps
5 us manage our clients' expectations and it
6 furthers transparency with the military justice
7 practice as a whole.

8 And I think it -- I feel like there's
9 a fallacy to think that victims just want a
10 conviction and that's all they want. What they
11 want is to be heard, and when they feel they
12 cannot be heard because they don't know what's
13 out there, they lack trust. I was a prosecutor.
14 We lost lots of sexual assault cases because
15 members just didn't come down our way, but I
16 always got a thank you.

17 I always -- my clients always, who had
18 their cases heard at court-martial, recovered
19 much faster, and have stayed in the Navy to
20 continue to serve their country. So, giving us
21 access won't hamper the government. It will
22 enhance their ability to reach justice and to

1 reach a fair decision.

2 LTCOL ALLEN: So, I agree with
3 everything that Commander de Groot just said.
4 This is a, I would say, a big problem in the Navy
5 and the Marine Corps in particular. I think the
6 Air Force and the Coast Guard do not have this
7 problem, but we do have a problem with access to
8 information and access to pleadings in the Navy
9 and the Marine Corps.

10 There was a question from this panel
11 about 6(b) notifications to victims, and who
12 should make them, and things like that. It was
13 my opinion for that question that the VLC should
14 absolutely make them, but here's the problem that
15 we have, is the VLCs are constantly chasing down
16 information from the most minute of things,
17 whether it's scheduling, or discovery that we are
18 entitled to right now under our regulations and
19 rules, or, you know, just what's going on in a
20 case.

21 I am very concerned for cases where
22 there are not VLC assigned, because I can't

1 imagine what that is like. Across the VLC
2 generally, the practice is inconsistent and the
3 information is inconsistent from prosecutors.

4 I think it would be greatly helpful to
5 have a system where VLCs have access to all of
6 the court filings; so scheduling documents,
7 motions, pleadings, rulings. That would be
8 extremely helpful because we are the ones
9 representing the clients, not the prosecution,
10 but we are reliant on the prosecution for that
11 information and that is wholly problematic when
12 it does not come to us consistently, regularly,
13 or with any semblance of reliability.

14 CHAIR SMITH: Why is it you have to
15 rely on the prosecution? That might seem like a
16 silly question, but why is it that you don't have
17 access to all of the information?

18 CMDR DE GROOT: We are still in the
19 age of emailing motions, and so if a defense
20 counsel doesn't add us, or the judge doesn't add
21 us to an email, or the trial counsel doesn't add
22 us, then we don't get it. Hopefully NCORS will

1 change that.

2 LTCOL ALLEN: We recently had a case
3 in the Marine Corps where a VLC showed up to a
4 motions' session prepared to argue two motions
5 and thought that she was going to be there for
6 half a day. There were nine motions in that case
7 that the VLC was on. She was unaware of seven of
8 them and was completely caught flat-footed in
9 that case.

10 Now, whether or not her client's
11 rights were implicated in those other seven
12 motions, who knows, but how could the VLC make
13 that assessment when she shows up to court and is
14 sitting there listening to these motions that she
15 had no idea existed because the prosecution, the
16 defense counsel, nor the judge CC'd her on those
17 emails?

18 JUDGE GRIMM: Could I ask a question
19 to that effect? Could you give us a sense of
20 what -- you know, Colonel, you were talking about
21 how would a victim without a VLC even begin to
22 come to grips with these issues? That sounds to

1 me like a very good question to ask. Do you have
2 a sense of what percentage of victims in these
3 cases are not -- do not have a VLC, so we have a
4 sense of how significant it is? I mean --

5 LTCOL ALLEN: I do not have a good
6 sense of that number. I can tell you there have
7 been a number of instances where victims have
8 come to these motion sessions when they are
9 notified, and frankly, there are a number of
10 times where they are not notified and they don't
11 come to proceedings because they're not aware of
12 them when the onus is on the government.
13 However, when the victims do come and they don't
14 have VLCs, we have had some victims leave the
15 courtroom and go right to the VLC office because
16 they are concerned that their rights were not
17 protected in those motions' hearings.

18 JUDGE GRIMM: To the extent that we're
19 talking about the involvement of the VLCs, so
20 let's assume we do have a VLC, and even existing
21 in an email environment without a direct
22 electronic filing, in the federal system, I

1 assume in the state system, there is a
2 requirement of a certificate of service; that the
3 filing party at the end of it say, I hereby
4 certify that I have sent a copy of this via, and
5 however they did it, to, and then they list the
6 interested parties.

7 Could it not be required that the
8 trial counsel and the defense counsel, as the
9 primary combatants in the process, that they
10 identify all parties that are interested parties
11 that need to be noticed, to include the VLC, when
12 there is a VLC, or even the individual victim --

13 CMDR DE GROOT: Absolutely.

14 JUDGE GRIMM: -- and require a
15 certificate of service that would obligation them
16 to do that.

17 CMDR DE GROOT: Absolutely, but then
18 it comes to the gatekeeping function, right? If
19 defense counsel doesn't want VLC arguing, they're
20 going to say I didn't serve the VLC or I didn't
21 put them on the certificate of service because I
22 didn't think it impacted victims, and they have

1 no standing.

2 JUDGE GRIMM: But if they were
3 required to do that, you know, with all due
4 respect --

5 CMDR DE GROOT: In all motions?

6 JUDGE GRIMM: -- which under the
7 circumstances might mean --

8 CMDR DE GROOT: Oh, yes.

9 JUDGE GRIMM: -- no respect
10 whatsoever, it's not up to you to decide.

11 (Laughter.)

12 JUDGE GRIMM: It is up to the, you
13 know, it is up to -- you can object and you can
14 have the judge make that call, but you don't get
15 to --

16 CMDR DE GROOT: Then yes.

17 JUDGE GRIMM: -- filter it through
18 your eyes.

19 CMDR DE GROOT: Then, yes, I would
20 concur.

21 MAJ McCRARY-DENNIS: So, the Air
22 Force, and I just -- the Air Force actually does

1 have an electronic filing system, and so that is
2 one thing that we are thankful for in our
3 practice is that we do generally know what
4 motions are.

5 Whether or not we have standing to
6 argue them is a separate completely issue, but I
7 would concur that it is absolutely essential if
8 only to provide that information to clients so
9 that they are able to be heard, and it does
10 affect other motions.

11 And, ma'am, just to go to your
12 question really quickly about, you know, things
13 like pretrial confinement, yes, we do have an
14 initial right to argue on behalf of clients as
15 far as pretrial confinement, but if there is any
16 questions as to whether or not that was decided
17 correctly, for example, judges have found that
18 victims' counsel do not have standing to argue as
19 to whether or not that initial decision was
20 correct.

21 So, I think making it more blanket --
22 I'm all in favor of allowing victims' counsel to

1 have more clear boundaries as to what our
2 standing are and have it be as inclusive as
3 possible.

4 CMDR DE GROOT: And I forgot to answer
5 that PO. I'm sorry, Rebecca.

6 CMDR SHULTS: That's okay. Commander
7 de Groot, do you want to go first?

8 CMDR DE GROOT: Let me just answer
9 that question --

10 CMDR SHULTS: Sure.

11 CMDR DE GROOT: -- if that's okay with
12 you. So, I do think for pretrial confinement,
13 absolutely, victims, VLC on behalf of victims
14 should have a right to argue. In my small
15 perspective, I would leave MPOs with the command.

16
17 I think it's very important on the
18 ground, immediate, where a victim needs to be
19 protected before a CPO can get resolved, or a
20 temporary or permanent, to have the MPO in place,
21 especially since we recently had a case out of
22 the southeast where an alleged perpetrator had

1 come back from Italy and went to go buy a gun to
2 presumably commit violence on his spouse and
3 child, and the MPO prevented that, having -- his
4 record was flagged. So, I do think having an MPO
5 in place, allowing commanders to have that
6 ability is still very important.

7 CMDR SHULTS: And then I just wanted
8 to follow-up on a couple of points that I haven't
9 weighed in on because I haven't wanted to
10 interrupt the discourse here, but the Marine
11 Corps had referenced it. The Coast Guard has
12 access to the ROI. We do not yet in policy, and
13 I will believe it when I see it in policy, but we
14 are making headway towards that, which I do think
15 will be largely beneficial to our clients.

16 The -- I would like to foot stomp the
17 necessity or my desire for public access or some
18 sort of access to filed motions. Whether or not
19 someone else determines that our clients have an
20 interest in them, let's face it, our clients have
21 an interest in all of them. We might not have
22 standing, but it is very relevant to our

1 representation.

2 And I've had the opportunity to sit in
3 on motions' hearings that I would not have gotten
4 any notice were occurring, but happened to be
5 there, and learned so much about the case. That
6 is, otherwise would have been a public hearing;
7 we wouldn't have gotten any notice about it.
8 It's kind of astounding really.

9 I'm sure many of us have practiced in
10 other jurisdictions where there is a public
11 docket, and if we had something like that, our
12 SVC could go in and check the docket each day,
13 find out what's been scheduled, and find out
14 what's been filed; but right now we're severely
15 limited and reliant upon a trial counsel who
16 might forget to CC us or might determine and
17 gatekeep that we don't have an interest, and it's
18 just another scheduling challenge.

19 Certainly, our judiciary feels that
20 way, that we are not parties and we -- our
21 judiciary will never consciously CC us if we've
22 been left off of an email.

1 And then I just wanted to bring up the
2 victims' standing for pretrial restraint. As we,
3 in the Coast Guard, as we are taking on more
4 domestic violence cases, we are starting to see
5 circumstances where our clients' interests or our
6 clients' desires don't neatly align with those of
7 trial counsel and might not be driving towards an
8 overall conviction. So, from my perspective, and
9 I haven't given it a great deal of thought,
10 having an opportunity to advocate for your client
11 would be beneficial independently of trial
12 counsel.

13 JUDGE GRIMM: Would you all agree that
14 if these additional steps were taken, notice and
15 the ability for special victims' counsel to
16 advocate on those issues that Ms. Tokash was
17 talking about, that it would enhance the victims'
18 confidence in the fairness of the system, and
19 that their -- that qualitatively they were
20 getting the information that recognized the
21 importance of this to them, would that bolster
22 their confidence given the fairness of the

1 system?

2 MAJ McCRARY-DENNIS: Sir, I would say
3 unequivocally, yes. Part of our jobs as victims'
4 counsel is not just to advocate, but it's to
5 empower; and part of that empowerment of our
6 victims is to make sure that they understand the
7 process, and there's no way for them to
8 understand the process without being fully
9 informed as to what's going on.

10 And, you know, as we're talking about
11 513 and 412, you know, that's one aspect, but,
12 you know, even just talking about a motion in
13 limine to suppress evidence, they're going to
14 want to know, Hey, there is a possibility that
15 this thing that we thought we had as a great
16 piece of evidence, that the judge may not rule in
17 our favor and rule in favor of the trial counsel,
18 and so it may -- but if it was in the Air Force,
19 we are very fortunate.

20 We would know that that happened, but
21 my colleagues, for a victim to find that out and
22 not even have an opportunity to know that it

1 happened until it was done, that -- I can only
2 imagine just how crushing that would be for a
3 victim. So, absolutely, I would say
4 unequivocally, yes.

5 PARTICIPANT: I would say, sir, also
6 confidently, yes. Part of our role as attorneys
7 is also counseling our clients, and you can't
8 counsel a client without having a full
9 comprehensive understanding of a given matter.

10 Certainly, the roles or the issues for
11 which victims and SVCs have standing are
12 generally fairly narrow. We've talked at great
13 length about 513 and 412 has been reiterated
14 multiple times, but I could very easily imagine a
15 scenario where a 412 motion in limine is also
16 closely interconnected or interwoven with a
17 motion to compel production of a witness.

18 And while strictly speaking, the
19 victim does not have standing to address a motion
20 to compel production of a witness, if the given
21 issues and facts are closely intertwined, that is
22 something that I would argue a victim should be

1 given situational awareness of in order to allow
2 him or her to feel that they're being counseled,
3 empowered, and for their attorney to effectively
4 represent them.

5 JUDGE GRIMM: A quick question if you
6 don't mind. In the Federal Rules of Evidence
7 412(b)(1) that addresses when the information
8 under 412(a), prior sexual behavior and
9 predisposition, which is ordinarily privileged,
10 that's the purpose of the rape shield protection,
11 can nonetheless be overcome in a criminal case in
12 three instances: first, to identify the
13 assailant; second, if it's to show consent with
14 that particular one; and third, the doubling
15 constitutional, if it's otherwise required by the
16 Constitution. Congratulations trying to figure
17 that out. Is that the same in the military?

18 PARTICIPANT: Yes, sir.

19 JUDGE GRIMM: And so, it seems to me
20 that in those circumstances, consent obviously is
21 something that can come up a lot, as well as
22 identification, the notion that whatever injuries

1 might be there were from some other partner.

2 And so, without the ability of the
3 victim through special victims' counsel to have
4 insight as to those things and to leave it to the
5 others to do, it seems to be -- could be a
6 jeopardy to the fulfillment of the promise of the
7 first part of Rule 412, which is to protect you
8 so you will come forward in the first instance.

9 MAJ McCRARY-DENNIS: 412 is one of the
10 two. So, 412 and 513 are the ones in which we
11 specifically are being allowed standing or being
12 allowed to argue. I don't think anybody would
13 disagree with that, but I would say, you know,
14 other, there are other issues, as my colleagues
15 have brought up, but yes, sir, I just wanted to
16 say 412, we do squarely have standing to argue
17 that.

18 If I could -- oh, I'm sorry. I just
19 wanted to go just back to one point that
20 Commander de Groot talked about, that there seems
21 to sometimes be an idea that the only thing
22 victims want is a guilty verdict. They

1 definitely want to be heard. Sometimes an
2 alternate disposition is actually in their best
3 interest.

4 And when those conversations come up,
5 and in the Air Force we call it Chapter 6 where
6 you're discharged in lieu of the court-martial,
7 knowing the evidence that is present in the trial
8 empowers them to be able to actually make those
9 informed decisions as to whether or not this
10 alternative disposition is something that is in
11 their best interest; so I just wanted to go back
12 to that.

13 LTCOL ALLEN: I know we have talked
14 about how more information would -- and I
15 unequivocally agree as well that more information
16 and more notice would absolutely make our clients
17 feel more empowered in this process.

18 I am equally concerned for our counsel
19 from a competency perspective. And again, the
20 Air Force at least -- I apologize. I know the
21 Coast Guard is looking at moving towards that
22 model as well. I got ahead of myself.

1 But I am concerned that by hindering
2 our counsels' access to this information and
3 access to evidence, I am not clear as a
4 supervisory counsel with counsel, you know,
5 practicing worldwide, that our counsel can be
6 fully competent to advise and represent their
7 clients.

8 CMDR DE GROOT: I absolutely concur.
9 I just want to throw one other log onto this
10 fire. We also have some judges who, despite
11 setting up the docket, have severed the
12 attorney-client relationship between a VLC and
13 their clients by not considering VLCs' trial
14 schedule when scheduling trials.

15 And so, thankfully, victims have
16 agreed to change VLC mid-case, but we have found
17 -- and it's not across the judiciary, but there
18 are several judges who just tell the VLC they're
19 out of luck. They have to pick which client
20 they're going to represent and find another VLC
21 if the victim wants to be represented. So, we
22 are still not considered valued members of the

1 military justice system.

2 MR. KRAMER: Thank you, all, for being
3 here, appreciate it. So, I have a quick
4 question, which is a follow-up on Ms. Tokash's
5 question. It seems to be ECF, electronic case
6 filing, would solve all of those issues very
7 easily and very quickly. So, I'm curious why the
8 Air Force has it, but nobody else does?

9 CMDR DE GROOT: We'd like to know,
10 sir, as well. I believe OSTC will be coming up
11 and maybe they'll have an answer for it, but I --
12 they have their reasons for it and we might not
13 necessarily agree.

14 I think -- I remember a time -- I've
15 been doing this for a long time. I'm on the
16 military justice track. We still have a lot of
17 people who remember the old days and I think
18 struggle with seeing a real place for VLC in
19 reaching a fair conclusion for the accused and
20 the government and our role in it.

21 So, maybe in the future, it will be
22 easier, but we have often pointed to the Air

1 Force and the disparity between how victims are
2 treated in the different branches, but it has not
3 held sway yet.

4 MAJ McCRARY-DENNIS: No, ma'am, I
5 can't comment onto the why, but just, we have
6 wonderful leadership and I thank them every day.

7 (Laughter.)

8 MS. BASHFORD: I have a question about
9 social media, cell phones. Would you all agree
10 that communications between a complainant and a
11 suspect before and after an incident should be
12 available to investigators, trial counsel, and
13 defense counsel; plus any narratives that a
14 complainant has made about an incident to other
15 people? If you agree it should be available,
16 what do you think is the best way to get that
17 material off of a cell phone and into the hands
18 of the parties who need to have it?

19 CMDR DE GROOT: So, absolutely, that
20 is very important. It is very important and we
21 do discuss with our victims that you can't
22 prosecute a case and your voice won't be heard

1 without evidence, and anything that helps
2 corroborate what happened or create a clear
3 picture is really important for them to turn
4 over.

5 The problem is, from our
6 understanding, and we get briefed by NCIS every
7 year, they cannot pick out just the conversation
8 between the accused and the victim. They have to
9 download the entire phone; and once the entire
10 phone is downloaded, it is within the hands of
11 the government, and defense counsel will have
12 access to all of it, and that is our client's
13 biggest fear.

14 So, what we advise and what we do, and
15 have been doing for ten years, is we allow the
16 NCIS agent to review the text messages during the
17 interview, and then we'll either screenshot the
18 ones -- they're like we want all of these from
19 here to here.

20 We'll screenshot it, or I think best
21 practice is for them to take pictures of the
22 social media posts because they can review it

1 with the victim during the interview, and the
2 text messages, and take pictures of them. We are
3 waiting for the day where they can just pinpoint
4 those things so that all of the victims' privacy,
5 their contact information, all of that stuff
6 isn't just turned over to defense.

7 LTCOL ALLEN: I think to another point
8 too, there are other means. And I absolutely
9 agree with everything Commander de Groot said.
10 We do do that with clients, but there are other
11 means of getting this evidence as well.

12 The accused also has a cell phone,
13 right, that can be seized if there's probable
14 cause and if there's a command authorization for
15 a search and seizure. We don't often see that in
16 our cases, which is kind of interesting to me
17 where that happens.

18 Another thing is the government can go
19 get call logs and text logs that corroborate the
20 screenshots that our clients are providing.
21 Again, we see that more frequently, I think, but
22 it's not -- the onus shouldn't necessarily be

1 just on our clients to produce that evidence.
2 The government has a responsibility and a role
3 here too. They are the ones prosecuting the
4 case.

5 Certainly, we will help facilitate it
6 when and where we can, but to Commander de
7 Groot's point, our clients don't like the thought
8 of having their entire phones dumped and
9 available for government perusal and then getting
10 turned over to the defense counsel.

11 CHAIR SMITH: Did you say that the
12 government doesn't seize the accused's phone?
13 It's uncommon?

14 PARTICIPANT: Very.

15 LTCOL ALLEN: It's uncommon.

16 PARTICIPANT: Very.

17 CHAIR SMITH: Really?

18 PARTICIPANT: Very.

19 LTCOL ALLEN: Yes.

20 CAPT SPERAY: Ma'am, to your point, I
21 would certainly agree as a very general
22 proposition that communications between an

1 alleged victim and an accused close in time to
2 the incident can be relevant and material.

3 However, I'll also echo what my
4 colleagues said. This is a very case by case
5 determination, and the role of the SVC is to
6 counsel their client on the implications of
7 proceeding one way or another; whether it's
8 consenting to a full file extraction or pursuing
9 another alternative method, whether it's
10 screenshots or photographs.

11 CID, as we understand on the Army
12 side, also has similar technological limitations
13 as far as the ability to do narrow extractions.
14 That simply is not possible. And what we risk in
15 that situation in the event a client consents to
16 a full file extraction is the possibility that
17 the entirety of their cell phone could be
18 disclosed to a defense counsel in the course of
19 litigation.

20 So, the SVC, in discussion with their
21 client, needs to be able to have a fully informed
22 conversation one way or another advising on the

1 risks, potential benefits of either course of
2 action, and then ultimately allowing the client
3 to proceed however they are comfortable under the
4 circumstances in a particular case.

5 CMDR SHULTS: And while I personally
6 haven't used any alternative file sharing
7 mechanisms, I do know that some of our SVC have
8 used things akin to Dropbox to help get that
9 metadata of whatever they're sharing over to
10 trial counsel or CGIS, which alleviates some of
11 the authenticity issues, but other than that, I
12 echo what everyone else has said.

13 JUDGE GRIMM: Yeah, I did -- this
14 pertains to that one thing. Is there a concern
15 that you have on this topic of turning over
16 content of a cell phone beyond the privacy issues
17 of collateral misconduct where the government now
18 has that?

19 I think in the civilian community when
20 law enforcement is trying to move forward on a
21 very serious offense such as this, that if they
22 were to find, you know, underage drinking, or

1 some, you know, other comment that might be a
2 criminal offense, that it was unlikely to --

3 I mean, they might consider that in
4 terms of what they think about the credibility of
5 the victim, but the chances of, No, we're going
6 to charge you with this as well, would not play
7 as broadly as -- I wonder if that might not be
8 playing in the decision to turn over these
9 materials.

10 CMDR SHULTS: Absolutely, and I'll
11 just parse the term collateral misconduct,
12 because as it's defined -- we see a significant
13 amount of what I call adjacent misconduct in that
14 our administrative policy that might shield, that
15 was well-intentioned and might shield clients
16 from punitive actions for collateral misconduct,
17 is not shielded from adjacent misconduct which
18 otherwise would not have come up but for this
19 investigation.

20 And I'm thinking of one case
21 specifically where there was just an astounding
22 result on that exact issue. There was a bit of a

1 side investigation and the whole thing left me
2 with a lot of questions and certainly a lot of
3 things I would do differently, but as it relates
4 to digital evidence, yes, absolutely.

5 CMDR DE GROOT: I don't think it's as
6 rampant or a fear as it was ten years ago when
7 all of this started ramping up. I think underage
8 drinking, if it's part and parcel, most clients
9 are willing to just cop to it and say, Yeah, this
10 happened, or I was out past curfew, and it's just
11 part of the, what happened.

12 GENERAL SCHWENK: Where are things
13 with the Safe-To-Report policy, whatever that is?

14 MAJ McCRARY-DENNIS: So, sir, when you
15 say where are we, because we do have that policy,
16 but, I mean, from what I see from my perspective?

17 (Simultaneous speaking.)

18 GENERAL SCHWENK: -- collateral
19 misconduct?

20 MAJ McCRARY-DENNIS: Not all, but
21 some. Yes, sir. I mean, I like the term adjacent
22 misconduct, but underage drinking, for example,

1 that's something that fits squarely within the
2 Safe-To-Report policy. You know, more egregious
3 offenses may not if there is not a nexus to, and
4 then there's a question as to when does that
5 nexus start and stop?

6 There's questions, but what I would
7 say is that from my perspective, it seems that
8 commanders are willing to minimally listen to
9 victims' counsel. Because, I mean, we've been
10 talking about trial, but I would say a fair
11 amount of the victims' counsels I supervise, and
12 even myself within the limited clients that I
13 have, are talking to commanders probably even
14 more than we are in trial.

15 And so, I would say commanders are
16 definitely willing to listen prior to making
17 decisions as to taking military justice action
18 against a victim under that Safe-To-Report
19 policy. I don't know if that answers your
20 question specifically, sir, or --

21 GENERAL SCHWENK: Yeah, that's good.
22 You know, one of the thoughts I have in listening

1 to all of this is, we're going at defining what
2 your role is piece by piece.

3 We don't have, apparently the
4 Department does not have, and Department of
5 Homeland Security does not have a comprehensive
6 this is the role of the victim legal counsel,
7 because if there were that document, you all
8 would be citing it and saying judges are refusing
9 to do Paragraph 6(e).

10 So, my thought is, I wonder if there
11 should be one that is definitive like we do for
12 most everything else where it defines things ad
13 nauseam of what you're supposed to do and what
14 your role is, and I wonder what your thoughts are
15 on if there were such a document? And I know if
16 we make a DoD document, you'll all be retired.

17 (Laughter.)

18 GENERAL SCHWENK: But for your
19 predecessors, it might be helpful, and help
20 during the staffing process resolve what the heck
21 is a VLC.

22 Because remember when Congress was

1 first deciding whether to take the Air Force
2 program, the whole idea was to hold hands and
3 explain. There was no thought of ever advocating
4 on behalf of. It was be there as the legal --
5 wasn't it under legal assistance?

6 MAJ McCRARY-DENNIS: It was, sir.

7 GENERAL SCHWENK: That's where it was
8 statutorily. That was the whole idea, but it's
9 like anything else that you grow. Once you give
10 it a position, it wants to expand and do a better
11 job, and we are where we are. So, what are your
12 thoughts on whether there should be such a thing?

13 LTCOL ALLEN: So, I think it's a good
14 idea in theory. My concern with something like
15 that, sir, is once you start kind of definitively
16 spelling out roles, and putting things in lists,
17 and things like that, it becomes very hard to go
18 beyond that as well.

19 So, part of the problem I think we
20 have now as VLCs is we try to make these lists
21 and these rules, like we have 10 USC 806(b) and
22 things like that, but if it is not strictly

1 spelled out in that rule, we cannot be heard on
2 it. We don't get standing. So, I just become a
3 little concerned that when we start spelling
4 things out, we lose an ability to be able to
5 negotiate the courtroom in the manner that I
6 think we sometimes need to.

7 CAPT SPERAY: And, sir, I think that's
8 certainly a valid concern. I don't want to say
9 that I think that is a bad idea, and as it
10 stands, the roles of the SVC are defined in
11 statute, and then issues for which they're
12 standing are sprinkled throughout the RCMs, the
13 rules for practice before Army courts-martial and
14 other authorities.

15 I would suggest though that I think
16 given that the SVC program is still relatively
17 new, as we get more and more senior leaders in
18 military justice who have grown up with the SVC
19 program or the VLC program in more senior
20 positions, there will be more inherent comfort
21 with the idea of an SVC being an equal partner or
22 close to an equal partner in military justice

1 practice.

2 And so, I would hope that as the
3 program evolves and we get more folks in those
4 positions who have been SVCs or have worked with
5 SVCs, that there will be more comfort, which will
6 minimize or mitigate some of the concerns I think
7 your proposal gets after there, sir.

8 CMDR DE GROOT: I absolutely concur.
9 I mean, we see it with CAF right now saying they
10 don't have jurisdiction over our petitions
11 because it's not explicit. So, that would be my
12 fear is if you make it too explicit, then we
13 wouldn't be able to do much else.

14 GENERAL SCHWENK: Whatever your job
15 is.

16 CMDR DE GROOT: Well --

17 PARTICIPANT: That's true.

18 CMDR DE GROOT: And to be honest, when
19 I was a -- I started off as a VLC ten years ago,
20 I wasn't even allowed to argue a 412 motion. All
21 I could do was my written motion, and now we can
22 argue. I, at my last 412 motion, I was allowed

1 to actually direct my client because the judge
2 was a reserve judge in the civilian world and
3 came in, and she allowed me to do that.

4 Now, the next step would be to
5 actually present facts that support my motion
6 would be my next step. But we're taking steps.
7 But if you define it directly, there's going to
8 be some smart lawyer out there that says, Well,
9 if it's not in the rules, you can't do it.

10 MS. GARVIN: Thank you, and just, I
11 want to honor the Air Force's history before the
12 rest of the branches came on, which was the
13 original idea in Air Force was holistic
14 representation.

15 When General Harding stood up the SVC
16 program in the Air Force, it was actually a
17 broad, you're the lawyer for the victim and all
18 of their rights. 412 was the first case that got
19 litigated, but that there was a robust history in
20 the Air Force prior to the expansion and I just
21 want to honor that history a little bit.

22 But I do have a question, and I think

1 it might come down to this. Is it written, is it
2 explicit, is it not? Because we've heard all of
3 you mention some aspect of limited standing, and
4 then we heard a specific reference I think from
5 two of you about a lack of a clear role in
6 administrative spaces.

7 And it seems to me that a lot of these
8 -- a lot of victims are having to navigate
9 administrative spaces and maybe their rights
10 aren't attaching there and you don't have a role
11 there.

12 So, I'd just like to understand, what
13 is the status or your understanding of your role
14 as victim counsel, victim legal counsel, SVC, in
15 those proceedings, and what is your understanding
16 of your judiciary's understanding of the rights
17 in those proceedings?

18 MAJ McCRARY-DENNIS: So, ma'am, in the
19 Air Force, victims' counsels are -- and when I
20 hear administrative proceedings, I'm thinking
21 discharge boards. Are we on the same page,
22 ma'am?

1 MS. GARVIN: Yes.

2 MAJ McCRARY-DENNIS: And so, victims'
3 counsels are allowed in those proceedings, are
4 able to advocate to the extent that 412 and 513
5 are present. In the Air Force, military rules of
6 evidence do not apply except for 412 and 513 in
7 some capacities.

8 So, we are allowed to be present and
9 are allowed to advocate in those spaces, you
10 know, explaining to the clients the substantive
11 differences and why there may be things that you
12 absolutely would not hear in a court that you may
13 hear in a board because hearsay does not apply,
14 for example. Those are the things that we
15 explain to the clients, but --

16 MS. GARVIN: Quick follow-up, ma'am.

17 MAJ McCRARY-DENNIS: Yes, ma'am.

18 MS. GARVIN: The other Article 6(b)
19 rights that, the dignity right for instance, is
20 that at play if you have standing in those
21 proceedings around that right?

22 (Laughter.)

1 MAJ McCRARY-DENNIS: It depends. I'm
2 sorry, go ahead, ma'am.

3 CMDR SHULTS: Well, I have specific
4 experience on at least discussion as to whether
5 that should be included in Coast Guard policy.
6 The Coast Guard has been in some public scrutiny
7 recently, which has led to our commandant to
8 commit to take specific actions in this arena.
9 One of those was to articulate the rights of
10 victims at administrative separation boards.

11 And while I haven't seen the published
12 policy, I have seen the final draft, and was --
13 and contributed to the conversation as to what
14 that should look like, and there was dialogue
15 about dignity and what that meant. Ultimately,
16 there is not an articulated right to dignity or
17 dignity within the proceedings.

18 And I think, while I'm happy with the
19 results, I think that starting with the basics of
20 notice, presence, and right to be heard in some
21 capacity were accomplished and will be put into
22 policy.

1 Because as all of us, I believe, know
2 here, most of our cases do end up in the
3 administrative realm vice the military justice
4 process, and so we do a lot of advocacy in that
5 realm; and prior to having anything in policy, it
6 really was dependent on who you were asking and
7 how the case got there as to whether you were
8 even notified that it was going on.

9 LTCOL ALLEN: So, in the Marine Corps,
10 we do not have what I would consider a defined
11 policy. So, the Marine Corps separations'
12 manual, which is what governs our administrative
13 proceedings, at least for enlisted Marines and
14 then we have a separate instruction for officers,
15 but the Marine Corps separations' manual
16 references victims I believe three times in that
17 manual, and it's a very voluminous manual. It's
18 like 180, 200 pages.

19 The only operative paragraph in that
20 manual, I would say, is there is a paragraph that
21 speaks to kind of the dignity issues that you're
22 talking about, ma'am; as far as like, you know,

1 not harassing or degrading victims during the
2 process. But outside of that, there is no
3 uniformity in how Marine VLCs at least can
4 represent clients in these forums.

5 It's kind of like the wild, wild west
6 where you just try to stand up and be heard or
7 make a point, but again, it's a relatively -- I
8 mean, there is structure to the procedure, but
9 it's relatively unstructured as far as victims'
10 legal counsel and their role is concerned.

11 CMDR DE GROOT: In the Navy, we have
12 to fight admin board by admin board to be allowed
13 to be on the appointing order, and that is very
14 much up to the commanding officer who convenes
15 the board whether or not we're going to be on
16 that convening order.

17 I will say, however, Navy leadership
18 has allowed us and wants to hear our changes to
19 the MILPERSMAN, which governs our administrative
20 separation boards. They're open to it, but with
21 regards to Article 6(b), and I would love to
22 bring that into our MILPERSMAN, but there's no

1 teeth for violations of Article 6(b) at the
2 court-martial level, so I'm not sure what we can
3 expect at the administrative boards level when
4 there's no remedy for us.

5 MAJ McCRARY-DENNIS: And the one thing
6 that I would say, ma'am, for the Air Force, while
7 -- we talked about the discrepancy amongst the
8 judiciary. Amongst legal advisors, it's even
9 more so. I mean, we, I -- so it does, it can
10 become an issue, and even understanding --

11 Because, you know, sometimes the
12 persons that are legal advisors are not full-time
13 litigator practitioners, and understanding the
14 unique aspects of litigation in a sexual assault
15 context and why that's different than a drug
16 case, right. It's just fundamentally different in
17 sometimes the evidence that is even presented.
18 You have a drug test. You're not going to likely
19 have a video that says this is what happened, and
20 how do you make those --

21 There were even cases where, few and
22 far between, where even what constitutes

1 substantive evidence -- if a victim chooses not
2 to participate, but you do have an OSI statement
3 because military rules of evidence don't apply.
4 Individual legal advisors have found, Well, I
5 don't find that to be substantive. And so, it can
6 be a bit, as Colonel de Groot said -- I'm sorry,
7 Commander de Groot said, you know, the wild,
8 wild, west, and so; but at least we are present.

9 LTCOL ALLEN: I do have one other
10 concern about this too that we've kind of hinted
11 around at the edges, and that is with the advent
12 of the OSTC, I do believe that most of these
13 cases are going to end up in an administrative
14 forum, and with such ill-defined rights and
15 remedies there, I am concerned from a client
16 perspective what that looks like. And if we
17 think that the military justice process is
18 inconsistent, it is even worse at the
19 administrative level.

20 CHAIR SMITH: All right, I don't see
21 any more questions, so I'm going to turn it over
22 to Mr. Yob.

1 MR. YOB: Thank you, Chair Smith. I
2 want to sincerely thank the panelists for sharing
3 their information and opinions with us today.
4 It's very, very, very helpful. I want to put on
5 the record that throughout this morning's
6 session, we've had a quorum with the Chair and 11
7 other committee members present whose names will
8 be included in the transcribed record.

9 I just want to make a note that the
10 bus is outside, so when we conclude this session,
11 we'll take a couple of minutes, but we'll catch
12 the bus as all of the committee members and the
13 staff members involved to go over for a site
14 visit. When that is done, we'll reconvene this
15 meeting at 1:30.

16 I want to remind the committee members
17 that it would be a good idea to bring your site
18 visit materials that you've been provided. If
19 you have those here today with you, bring those
20 along with you, and Chair? Oh, I will say too
21 that you're able to leave all of your other items
22 here. They'll be secure now and at the end of

1 the day for tomorrow as well. So, Chair Smith,
2 I'll turn it back over to you and then we'll turn
3 it over to Mr. Sullivan.

4 CHAIR SMITH: On behalf of the
5 committee, thank you so much. Your comments were
6 very valuable and we appreciate you being here.

7 MR. SULLIVAN: This morning session is
8 closed.

9 (Whereupon, the above-entitled matter
10 went off the record at 11:06 a.m. and resumed at
11 1:31 p.m.)

12 MR. SULLIVAN: This afternoon's
13 session is open. Judge Smith?

14 CHAIR SMITH: Good afternoon,
15 everyone. Thank you for returning. Thank you
16 for being here.

17 Mr. Yob.

18 MR. YOB: Thank you, Chair Smith.

19 Just a couple of quick notes. One is,
20 for the record, we have a quorum of the Committee
21 members. That's composed of you, the Chair, plus
22 12 other Committee members are with us at this

1 time.

2 One other quick announcement I'll make
3 is just that it seems like the microphones that
4 are up for the speakers are carrying very well,
5 so you guys can use those mics, and they've shown
6 you how. But for the Committee members, please,
7 it's not carrying quite as well, so just try to -
8 - when you're making comments or questions, just
9 try to speak as loudly as you can, so that the
10 folks in the room can hear you. But still use
11 the microphones, but it's just not carrying
12 perfectly.

13 With that said, I'm going to throw it
14 over to our staff attorney, Mike Libretto, who is
15 going to be the staff lead for this session.
16 Mike?

17 MR. LIBRETTO: Thank you, Mr. Yob.
18 And good afternoon, everyone. For this panel, we
19 have pulled together an impressive set of
20 representatives from each of the services'
21 defense service organizations to provide their
22 perspectives, opinions, and recommendations on a

1 number of topics that are of particular interest
2 to you.

3 You have been provided a copy of each
4 of their official biographies. Joining us from
5 the Navy is Captain Hayes Larsen, the Commanding
6 Officer of the Navy Defense Services West. From
7 the Marine Corps, we have Lieutenant Colonel Cory
8 Carver, the Eastern Regional Defense Counsel for
9 the Marine Corps Defense Services Organization.
10 From the Army, we have Major Ira Gallagher, the
11 Senior Defense Counsel out of Fort Carson,
12 Colorado. From the Air Force, we have Major
13 Matthew Leal, the Deputy Chief District Defense
14 Counsel for the Air Force Districts 3 and 4. And
15 from the Coast Guard, we have Lieutenant
16 Commander David Rehfuss, who is the Defense
17 Counsel for the Coast Guard Defense Services
18 Office Southeast.

19 They have been provided the draft
20 questions, and at this time I'll turn it over to
21 Chair Smith.

22 CHAIR SMITH: All right. Good

1 afternoon, everyone. So I'm going to start with
2 a question. And if you just want to kind of go
3 down the line, we would appreciate it.

4 So let's first start with the impact
5 that the Mellette case has had on trial practice
6 in sex offense cases.

7 MR. LIBRETTO: And, gentlemen, if we
8 could start with Major Gallagher, and we'll just
9 work our way down for each of the questions.

10 MAJ GALLAGHER: Yes, ma'am. So from
11 the Army perspective, in my opinion, Mellette has
12 opened access to information that is largely
13 relevant and necessary to the defense. It has
14 created situations where we have gained access to
15 information with less litigation than was
16 previously necessary.

17 From my perspective, in the
18 jurisdiction where I practice, we have not had
19 many of the issues that I know the Committee is
20 inquiring into. So Mellette has been applied
21 across the board and has not created unnecessary
22 litigation. And my view from where I sit is that

1 it is -- it has come into an ordinary part of our
2 practice and has been a positive event for the
3 defense.

4 CAPTAIN LARSEN: Well said. I think
5 from the Navy's perspective, we wholeheartedly
6 concur with what Major Gallagher has just
7 mentioned. It has been an overall net positive
8 for the Navy defense bar. We have had access to
9 what I would deem oftentimes constitutionally
10 required information regarding complaining
11 witnesses.

12 So, overall, I don't want to add much
13 more than what he said. I think it has been a
14 good thing for the United States Navy's defense.

15 LTCOL CARVER: And, ma'am, Committee,
16 so I agree from the Marine Corps' perspective as
17 well. I would just add that early identification
18 of the Mellette-type issues or information avoids
19 unnecessary delays.

20 So, from my perspective, Marine Corps
21 perspective, early access allows defense to
22 properly file MRE 513-type motions, as well as

1 avoiding delays with continuances, et cetera, so
2 that we can investigate further to try to obtain
3 that information that we should be getting via
4 Mellette.

5 MAJ LEAL: Yes, ma'am. Yes, ma'am.
6 I would echo what the other folks have said as
7 well. Overall, from my perspective, it has been
8 a net positive in my defense of airmen and
9 guardians.

10 CDR REHFUSS: I concur with everybody
11 that it has been a net positive for litigation;
12 specifically, that it has increased efficiency.
13 Having more information up front, more
14 information that is -- that requires less
15 fighting, less adversarial litigation, increases
16 efficiency and makes it smoother for all parties
17 involved, to include victims' counsel and trial
18 counsel.

19 DR. SPOHN: Thank you for being here.
20 How often do you find yourself and prosecutors on
21 opposite sides regarding the admissibility of
22 mental health -- victims' mental health records?

1 MAJ LEAL: So, ma'am, if I understand,
2 your question is, how often do we find ourselves
3 on opposites ides of admissibility?

4 DR. SPOHN: Yes.

5 MAJ LEAL: I would say in my practice
6 very rarely is mental -- is what I would say
7 non-Mellette 513 records actually being
8 admissible or obtainable in pretrial litigation.
9 So it comes up very, very rarely.

10 In the context of the carveout of
11 Mellette, I would say that --

12 DR. SPOHN: That's the question.

13 MAJ LEAL: Okay. Understood. I would
14 say that trial counsel very much understand the
15 Mellette ruling, and I think are very willing
16 once they see a showing from me, whether it's
17 under RCM 701 or 703, whether they see a showing
18 and a nexus -- willing to go and obtain those
19 records.

20 LTCOL CARVER: I would agree from the
21 Marine Corps perspective as well. Early on in
22 the Mellette, obviously, it was a little bit -- a

1 little bit more difficult, but now the
2 prosecutors, the trial counsel, understand
3 Mellette, and they will go and seek that out.

4 DR. SPOHN: Thank you.

5 MR. KRAMER: Thank you for being here.
6 We appreciate it. How specific are the Mellette
7 requests that you make, because we've heard
8 something about they are just a form request for
9 the information? How specific do you make these
10 requests?

11 CDR REHFUSS: I'm often pulling
12 language from Mellette, and I'm -- I'm
13 specifically asking for prescriptions, diagnoses,
14 and I'm using the language from Mellette to craft
15 the response; specifically so if and when we have
16 to litigation a motion to compel, I can point to
17 the -- the Court directly to the Mellette
18 verbiage.

19 MAJ GALLAGHER: Yes, sir. I would
20 agree with that. So I think it's the starting
21 point. It has made its way into form discovery
22 requests that are filed early on in the

1 proceedings, unless, you know, during pretrial
2 investigation some specific facts come up that
3 lead counsel to believe that a more specific
4 request needs to be filed. And then I'd echo
5 what everybody else has said, that generally the
6 kind of understanding of what this information is
7 is well-known across the -- both sides of the
8 bar, and the access to that information is
9 relatively uncontested and easy.

10 MR. KRAMER: I guess that was a follow
11 -- is there much litigation? It sounds like
12 you're saying there's not very much litigation
13 about it.

14 LTCOL CARVER: Yeah. I would say --
15 I would say from the Mellette's perspective only,
16 that information not so much, other than us
17 trying to make a showing for the government to be
18 able to go and seek that.

19 So oftentimes in the early discovery
20 we make that blanket discovery request, and then
21 there's more specificity as we do our
22 investigations because we do speak to a lot of

1 witnesses, obtain information, understand that
2 she is probably -- we hear that she is on
3 medication, or something like that, that could
4 affect her memory. So then we're making a more
5 specific request, discovery request, to be able
6 to obtain that information.

7 And oftentimes the only issue that the
8 government pushes back on is that they are not
9 sure where to actually go and look. It's not
10 that they're saying it's not relevant or
11 necessary. They're saying that they just don't
12 know what they don't know, nor do we. So through
13 our investigation we -- we often can have those
14 specific discovery requests with the specific
15 information, and then there is really no pushback
16 on the Mellette side.

17 Certainly, the 513 evidence, yes,
18 that's highly litigated, but the other
19 information, Mellette, not so much.

20 JUDGE GRIMM: So a question on the
21 litigation. When you do have a dispute, whether
22 -- I suppose what I'm taking from you is the

1 issue of diagnosis, prescriptions, and treatment
2 is not so much disputed when there is evidence
3 that that is there based upon the exception that
4 they've talked about.

5 But when you are, in general, fighting
6 about the 513 privilege as it applies to other
7 records, and that's contested, have you had
8 experience where the military judge is the one
9 required to look at the records and determine
10 whether they are privileged? And, if so, the
11 extent to which they are privileged, whether it
12 has been waived or whether some portions are
13 privileged and others are not, and how to redact
14 it? Have you had experience with the role of the
15 military judge in -- in determining from the
16 records that are potentially the source of what
17 the defense wants to have access to, but the
18 government is objecting to whether they are
19 subject to the privilege or an exception?

20 CAPTAIN LARSEN: What I have seen from
21 that, though, is the difficulty in trying to
22 distinguish between what is 701 and what is 513.

1 And so when there is the dispute about what is
2 701, I think the military judge can and should
3 get involved. When it's a dispute on what is
4 513, though, I don't think that's appropriate, at
5 least from our -- our understanding from what we
6 practice for the military judge to get involved
7 just yet because the defense hasn't made its
8 showing at -- at that point.

9 So, for us, the fight really becomes
10 when there is a dispute of what is the 701
11 material that Mellette is supposed to cover.

12 JUDGE GRIMM: And when you're saying
13 701, are you talking about Brady/Giglio, that
14 type of --

15 CAPTAIN LARSEN: Correct. And just
16 standard discovery. From my perspective, if it's
17 just standard discovery, a military judge should
18 not be involved.

19 JUDGE GRIMM: Unless it's not being
20 provided.

21 CAPTAIN LARSEN: Correct.

22 LTCOL CARVER: And then, if there is

1 a dispute on the 513, other information, right,
2 that's not 701, then, yes, we would -- we would
3 file -- we would file a motion, make a showing,
4 with whatever evidence that we actually have.

5 Based upon that, if -- if the military
6 judge grants the motion, then, at least in the
7 Marine Corps, and I think it's different amongst
8 services, the military judge would obtain those
9 records to do an in-camera review. That's
10 hopefully answering your question as well. It
11 sounded like that's where you were going with the
12 question.

13 To do an in-camera review as to what
14 is constitutionally required or -- or whatever
15 exception is -- is coming to us as far as defense
16 counsel and redacting the rest. Or, if it's not
17 and he does an in-camera review -- he or she does
18 an in-camera review and discovers that there is
19 no relevant evidence that needs to be provided to
20 us, then that's also within the military judge's
21 purview and power.

22 JUDGE GRIMM: Colonel, have you seen

1 any -- any instances in which the military judge
2 is either reluctant to do that in-camera review
3 or expresses a lack of time in order to be able
4 to do it? Or do they seem like once you get to
5 that point where it's going to have to happen,
6 they acknowledge it and do it and it goes on from
7 there?

8 LTCOL CARVER: So, from the Marine
9 Corps' perspective, and my background, no. Once
10 we make a showing, and if the motion is granted
11 -- of course, the defense has to make that
12 showing. Once it's granted, then the -- then the
13 military judge will do that in-camera review. I
14 have not seen an issue with that. Maybe there
15 has been, but I -- I don't believe there has.

16 CAPTAIN LARSEN: I would agree.

17 JUDGE GRIMM: Thank you.

18 MR. KRAMER: So I guess, you know,
19 Mellette is a little controversial, and that
20 there are some people who think it should be
21 amended to do away -- to essentially overrule the
22 decision by rule. What's your view on that? It

1 -- when you first said -- you seem to say it has
2 helped in getting material for the defense that
3 is -- that is relevant and necessary.

4 And what's your view on whether 513
5 should be amended to -- and if you've had other
6 hats of prosecutorial -- being a prosecutor or an
7 SVC, try to look at it through all these lenses,
8 if you can, but I'd rather hear from you as a
9 defense counsel.

10 (Laughter.)

11 MR. KRAMER: She told me to say that,
12 but -- and she's the Chair, so I listened to her.

13 But if you could just tell us what you
14 think about the proposals to amend it.

15 CAPTAIN LARSEN: So, Mr. Kramer, if --
16 if we would amend it to now except out the
17 Mellette material, then we have to be comfortable
18 with Constitution-required information relevant
19 to the defense to be deprived of them in the
20 interest of privacy of the complaining witness,
21 which I think is an intolerable strain on the
22 military justice system, if we were to do that.

1 LTCOL CARVER: I will reiterate, I do
2 think that this will delay proceedings if -- if
3 it is, because as a defense counsel, I know that
4 oftentimes medication, alcohol, is involved in
5 most of the sexual assault-type cases. Because
6 of that, memory becomes a crucial issue; what she
7 remembers, what other people remember, and I say
8 "she" as -- as the victim, but obviously there is
9 male and female victims in the Marine Corps, in
10 the services.

11 It will require me, as the defense
12 counsel, when I'm zealously representing my
13 client, to get my investigator to go out there
14 and try to find the medication that she is on,
15 independent of the government seeking it out via
16 the proper means. And by that I mean go and
17 interviewing all of her friends, everybody that
18 she has talked to.

19 Remember, privileges don't apply if
20 she's talking about her medication to other
21 people. And so my investigator will have to go
22 out there. As far as resources, it will strain

1 our resources, but it will also delay the
2 proceedings; because I'm going to ask for those
3 continuances required because if I have an
4 indication that there was some medication
5 involved during the -- during the allegation, the
6 timing of the allegation, then I have a
7 constitutional obligation under my PR rules as
8 well to be able to go seek that out.

9 So it will delay the -- it will delay
10 the proceedings, because I'm going to need the
11 time to be able to explore that.

12 CDR REHFUSS: I'll also add that,
13 obviously, you have five defense counsel here
14 saying that Mellette is a net positive. But you
15 have five defense counsel up here who have
16 tangible results from non-privileged material,
17 which means, like Captain Larsen said, it would
18 otherwise put a strain on the military justice
19 system.

20 The fact that the defense is getting
21 information, and there are still convictions,
22 means it's protecting the record for both sides,

1 and that's beneficial to both sides, is -- is
2 that these issues are litigated, they're fleshed
3 out, and that makes a conviction, should it
4 happen, that much stronger, because there is
5 nothing -- there is no concerns with the
6 defendant's constitutional rights.

7 MR. KRAMER: Can you help me
8 understand better what you mean by "this would
9 put an unacceptable strain on the military
10 justice system"?

11 CDR REHFUSS: I think it leads to
12 additional litigation. I think it leads to
13 continuance motions. Like Major Carver said, the
14 timeliness of defense who investigates this case
15 on their own and may tangentially be aware of
16 mental health issues, medications, things like
17 that, and trying to circumvent through proper
18 litigation, trying to creatively find ways to get
19 answers to questions that they don't know the
20 answer to.

21 Mellette means that they don't have to
22 know the answer, because in the scenario where

1 Mellette doesn't exist, we have to know the
2 answer to the question before we can ask the
3 question.

4 MAJ LEAL: Thank you. You know, I
5 think an example might help a little bit. So I
6 talked with about six or seven Air Force senior
7 defense counsel leading up to this seeking data
8 and input from the field. One of my colleagues
9 told me about a case that happened in the last
10 two months that resulted in acquittal.

11 And essentially what had happened is
12 during the pretrial investigation the senior
13 defense counsel interviewed the alleged victim's
14 boyfriend, understood that there was some -- some
15 mental health things going on, consulted with his
16 team, consulted with a forensic psych, and
17 ultimately went to the victim's counsel and asked
18 if there were Mellette records that -- that the
19 person would consent to turning over.

20 The victim's counsel went and talked
21 to their client, came back, and said, Hey, the
22 only thing that -- that exists is this person has

1 been diagnosed with anxiety stemming from the
2 offense themselves.

3 So the pretrial investigation
4 continued. Ultimately, the defense team wasn't
5 satisfied that -- that that answer made sense
6 from what they were seeing, in consultation with
7 the forensic psych, went to the trial counsel and
8 made an actual discovery request for Mellette
9 records.

10 The records that came back in that
11 case showed that the alleged victim in the case
12 had had a history of mental illness, including a
13 diagnosis for severe depression with psychosis.
14 It ultimately when it -- that stemmed years
15 before the -- the charge timeframe. And so what
16 ended up happening in that -- in that case is
17 that the forensic psychologist ended up
18 testifying and educating the finder of fact on
19 what "psychosis" means and how that impacts
20 someone's ability to perceive and recall events,
21 and that this psychosis, you know, it's possible
22 would have been present during the charge

1 timeframe.

2 None of that information, if -- if
3 Mellette is eviscerated and rewritten and written
4 out, none of that information would have been
5 available, because under the traditional 513
6 analysis, you almost have to know exactly what
7 you want before you go get it.

8 And so for defense counsel it really
9 is a little bit of a catch-22. And so that
10 defense team would not have been able to
11 successfully overcome the 513 showing and getting
12 that information. So that's an example when some
13 of my colleagues are saying information would be
14 lost, and you have to be comfortable in the
15 balancing to say, Hey, the privacy interest in
16 this information outweighs the truth-seeking
17 function of the tribunal. That's the kind of
18 thing that -- that we're talking about.

19 MAJ GALLAGHER: So I agree with what
20 Major Leal said. I'll accept the invitation to
21 put on my past hat and view this through the lens
22 of some of my time as a prosecutor, and then put

1 on a hypothetical hat as a -- as a victim's
2 counsel.

3 So, first, I agree wholeheartedly with
4 the words "the truth-finding function of the
5 tribunal." And I see that as the importance of
6 this information is that, as Captain Larsen said,
7 sometimes it is of constitutional implications.

8 So I see Mellette, as a -- as a
9 defense attorney, and just as a military justice
10 practitioner as a whole, as being a great
11 compromise because it allows the government to
12 turn over information that frequently they --
13 they already have. They don't have to go seek
14 it. Oftentimes, in these types of cases an
15 alleged victim's health records, medical records,
16 are already in the possession of the government.
17 They're already there. They're already being
18 combed through. There is otherwise relevant
19 information in them.

20 So these diagnoses and medications are
21 already there. They arm the defense with, most
22 of the time, enough information to either do

1 additional investigation or style our cross
2 examination questions in a way that is -- is
3 beneficial and favorable and most of the time
4 enough to -- to suggest some doubt, insert the
5 defense theory, and allow the defense counsel to
6 do their job in representing their client.

7 From the prosecution side, I didn't
8 actually -- I didn't practice after Mellette as a
9 prosecutor, so I don't have any -- any firsthand
10 knowledge of how the prosecution is involved.

11 But, to me, it looks like, right, this statement
12 about like unless -- unless we know exactly what
13 we're looking for in 513 litigation, it's very,
14 very hard to pierce that veil and get inside that
15 privileged information anyway.

16 So it allows for the government,
17 again, to turn over information that is in some
18 cases constitutionally required, in my opinion,
19 without having to go through and kind of get to
20 some of the Committee's next questions about a
21 taint team or going and doing an in-camera review
22 of otherwise privileged information that gets at

1 a victim's privacy interests.

2 And it is, I think, a very acceptable
3 compromise that expedites litigation, gets to
4 good results one way or the other, and does not
5 further invade into a victim's privacy right
6 without stepping on an accused's constitutional
7 right to obtain relevant and necessary
8 information.

9 MS. GARVIN: So, Chair, mine is a
10 little off of this. Is that okay? That's what I
11 thought. Okay.

12 CHAIR SMITH: How are you receiving
13 the Mellette information? Are you receiving, you
14 know, a piece of discovery that just has those
15 three pieces of information on it? Or how is it
16 coming to you from the government?

17 MAJ LEAL: So, ma'am, essentially,
18 we're receiving records that have lots of times a
19 lot of things redacted from them, other than, you
20 know, lines that -- that will say diagnoses or
21 lines that will have prescription histories.

22 CAPTAIN LARSEN: The issue, really, is

1 that when it comes to us as the defense counsel,
2 by the time it comes to us as defense counsel,
3 it's been vetted by the prosecution and the
4 victim's legal counsel.

5 The issue is on the front end of how
6 the victim's legal -- or how the government
7 receives that information, whether or not that's
8 in a data dump that's accidentally given by the
9 mental health -- the hospital, or otherwise.

10 MS. O'CONNOR: And so is it not -- do
11 you not end up with things that are not redacted
12 that maybe should be redacted? Is it -- do you
13 really just get the three bits of information and
14 not conversations and discussion and detail?

15 CAPTAIN LARSEN: By the time it comes
16 to us, all we are receiving is the Mellette
17 material. At least that's my -- my practice.

18 CDR REHFUSS: Agreed.

19 MAJ LEAL: Agreed.

20 MS. GARVIN: So --

21 MR. KRAMER: Can I follow up on this
22 topic for one second?

1 MS. GARVIN: Yeah.

2 MR. KRAMER: Sorry.

3 MS. GARVIN: And then I'm after you
4 because --

5 MR. KRAMER: Yes.

6 MS. GARVIN: -- it is related.

7 MR. KRAMER: Oh. Well, if it's
8 related, go, go, go.

9 MS. O'CONNOR: No, no. I'll go after
10 you.

11 MR. KRAMER: So if Mellette did not
12 exist, and you're getting this, how -- you talked
13 about an investigation somebody did. How readily
14 available are investigative resources, and how
15 easy are they for you to obtain, to try to get --
16 if Mellette was -- or even with Mellette, but if
17 it was -- especially if it was done away with,
18 how easy would it be?

19 MAJ LEAL: So the Air Force has eight
20 defense investigators right now. In the past 14
21 days, I was -- I was covering for my boss as the
22 detailing authority for my districts, and the

1 amount of requests that came in for defense
2 investigators was -- was quite high.

3 And so these folks are people who are
4 civilians, they're previous law enforcement, by
5 and large, but they're going TDY a lot. They're
6 very busy. Hopefully, the Air Force gets more,
7 because they have been a great asset for us.

8 But I think to answer your question
9 directly, there is only so much that a defense
10 investigator can do to -- to learn that sort of
11 information, that 513 information, with enough
12 specificity to be able to pierce that veil. And
13 so I think that for most of it there is not going
14 to be a way to do that.

15 And to be quite frank, in my defense
16 practice, we're not trying to do that. Almost
17 never. So the Mellette records help in that we
18 understand, you know, Hey, does this person have
19 a defect, an inability to perceive and recall?
20 Yes or no. And if they do, okay, let me talk
21 with an expert to be able to understand whether
22 that's relevant to the charge timeframe and to

1 the information.

2 But, by and large, the underlying
3 information to that is not something we're ever
4 even pursuing. So I -- I hope that answers your
5 question.

6 CDR REHFUSS: I'll say, separate from
7 the investigative resources, without Mellette it
8 would be very difficult, because a lot of our
9 investigation would be based on conjecture. It
10 would be an expert, a forensic psychologist or
11 psychiatrist, reviewing the information and
12 saying it seems like this person may have
13 displayed these characteristics or endorsed
14 something that could be this diagnosis.

15 Or maybe your client has a
16 relationship or had a prior relationship with the
17 accuser and has heard through the grapevine that
18 they have mental health issues. It would be near
19 impossible without Mellette to -- regardless of
20 the investigative resources, to get enough
21 information to come in front of the court and say
22 that we have reason to believe that this exists.

1 LTCOL CARVER: And I would just add
2 that -- that based upon an investigation -- so
3 the Marine Corps has only four investigators.
4 They are very strained and limited, just because
5 we only have four, with all of our defense
6 counsel. I think that's probably the least
7 amount of all services as far as per defense
8 counsel how many investigators do we have.

9 I will say that it will delay, because
10 I will, as a defense counsel, ensure that I go
11 and interview and make sure that I interview all
12 of the people that know her or him, the victim,
13 the alleged victim, to try to develop what's out
14 there, just to ensure that I have covered my
15 bases as the defense counsel and understand if
16 she was on medication or not on medication,
17 because I have an obligation to my client.

18 It will make it harder, Yes. Will we
19 get the medical records themselves with the --
20 with the medication on them? No. But we could
21 have -- we could have to pull in other witnesses
22 in a -- in a quasi-513-type motion, saying that,

1 yes, I know she's on this medication -- yes, I
2 know she's on this medication.

3 And going back to what I've repeated,
4 this will delay -- because I have an obligation
5 to my client, this will delay proceedings because
6 I will absolutely go and try to find that
7 information. And maybe there is -- there isn't
8 any information out there, but I -- I need to
9 over -- you know, turn over those stones to make
10 sure that there isn't information.

11 But if I just request under 701 to the
12 -- to the government, and they turn that over to
13 me, or they say it doesn't exist, then I can be
14 satisfied, okay, I -- at least I covered that.
15 My constitutional obligations, my PR obligations,
16 to my client have been satisfied. Let's move on
17 to something else.

18 MAJ GALLAGHER: And just to segue into
19 the defense investigator question, so, first, I
20 feel very lucky. I think from the service
21 perspective, I think the Army is -- has the most
22 developed defense investigator program, and it is

1 continuing to grow, and there are a number of
2 success stories about implementation of defense
3 investigators.

4 However, to the best of my knowledge,
5 none of those involve 513 issues, or at least the
6 ones that we're talking about. So the only time
7 where an investigator has uncovered issues that
8 result in 513 litigation is when it comes to
9 issues of waiver.

10 So that was I think brought up by --
11 by somebody earlier on is when a defense
12 investigator, or even one of my defense counsel
13 was going out and interviewing witnesses, and
14 they say, "Oh, you know, the alleged victim said
15 that," you know, whatever, disclosed something
16 that would have otherwise been privileged, now
17 I've got a waiver issue that we're going to
18 litigate.

19 And then, in my perspective, just
20 speaking from personal experience, that is the
21 only type of 513 litigation that we have engaged
22 in in recent memory, because to their credit,

1 behavioral health professionals are very good at
2 their -- at their own ethical obligations of not
3 disclosing otherwise privileged communications.

4 And so it is incredibly hard to even
5 uncover enough to -- to draft a competent motion
6 to get into the 513 space. And, I mean, so that
7 has been at least my perspective, and I think the
8 Army's position.

9 JUDGE GRIMM: Could I ask a question
10 on the waiver issue? Also -- go ahead. You can
11 go first.

12 MS. GARVIN: I'm jumping in, Judge.

13 So, actually, I have two questions,
14 but they're related. And the first one is I
15 think just for the two of you on the left, the
16 Army and the Navy representatives, I think you
17 both mentioned that you think that the
18 information you're getting through Mellette might
19 be constitutionally required anyhow. Did I hear
20 that correctly?

21 And so when CAAF did a head nod to
22 Florida's privilege statute, that included

1 records and said we're different because -- do
2 you think, then, the Florida privilege provision
3 is constitutionally infirm? And if -- if 513 was
4 amended to look like the Florida provision, you
5 would argue that's constitutionally infirm?

6 CAPTAIN LARSEN: I can't go to the
7 Florida in my head, exactly what that -- what
8 CAAF was referencing there. When I make that
9 comment -- I believe it was what Major Leal said
10 as well -- is that oftentimes this material that
11 we're getting directly goes to the victim's
12 ability to recall, recollect, or perceive events.

13 And that information, if the
14 prosecution has that independent of Mellette,
15 they have to turn that over to the defense. And
16 so that's my -- that -- when I -- when I'm saying
17 that, a lot of material that we're seeing
18 directly affects the abilities -- the victim's
19 ability to perceive, recall, recollect, as well
20 as medication.

21 Most of our cases that we're dealing
22 with are alcohol-facilitated sexual assaults, and

1 how medicine interacts with that. Again, if the
2 government had that independent of any Mellette
3 material, they would have an obligation under
4 Brady/Giglio to turn that over to us.

5 MS. GARVIN: So thank you. That
6 clarifies quite a bit, and I appreciate that.

7 So a quick follow up on that. So,
8 then, is it your position that trial counsel
9 should always be looking at the records
10 themselves and have it, or is it only if they
11 already have it that you're saying Brady
12 attaches, would be equivalent here?

13 CAPTAIN LARSEN: I think that's the
14 rub, right? I mean, I have prosecutors who are
15 happy to put their -- sorry, Major -- Colonel
16 Henry in the back, and other prosecutors here --
17 aren't actively seeking that out because it's
18 kind of like the Stalato issue that we have in
19 our CAAF opinion --

20 MS. GARVIN: Right.

21 CAPTAIN LARSEN: -- where if it's not
22 in my possession, it's not in my possession, I

1 don't have to turn it over. And so is there an
2 obligation for them to go out and actively seek
3 that? Absent Mellette, I don't think that they
4 would. And then, again, we would just by
5 happenstance stumble upon this information
6 otherwise.

7 MS. GARVIN: Thank you.

8 MAJ GALLAGHER: And, ma'am, I will
9 take the -- I think the controversial opinion,
10 and this is -- this is not the Army's opinion,
11 this is Major Ira Gallagher's opinion, that
12 undoing a constitutional exception to 513 at all
13 was the wrong -- like moving the needle in the
14 in the wrong direction, because if there is
15 information that exists that is -- is necessary
16 for a fulsome cross-examination of a witness, no
17 matter the nature of that information, I believe
18 that it is constitutionally required. And to
19 exclude it from a judicial proceeding is the
20 wrong answer.

21 And so I -- I recognize, as Captain
22 Larsen was saying, that the issue there becomes,

1 right, if this privilege is absolute, the
2 government can't touch it, then, I mean, we don't
3 run into the Brady and Giglio issues. We don't
4 run into prosecutorial misconduct issues. But,
5 again, I think that the truth-finding function of
6 our system is the paramount concern.

7 And when we -- we look at the fact
8 that information of this type being excluded from
9 our courts is potentially placing accused
10 individuals' constitutional rights to cross
11 examination into peril, I think that that is the
12 wrong way to go.

13 MS. GARVIN: Okay. And I -- just a
14 quick -- it's still on this topic. A quick
15 follow up for all of you. And thank you. That
16 clarified quite a bit.

17 I want to just have you put on a
18 hypothetical hat for a second, not a full hypo,
19 not a lot of facts, I promise, or anything. So,
20 right, privileges came into being with a
21 recognition that they interfere with the truth
22 seeking function, right? That's the history of

1 privileges across the country, both in the
2 military and outside the military.

3 And the policy decisions were that
4 there is a benefit to the privilege, right?
5 There's a benefit, and that was the cost-benefit
6 of when privileges came in, attorney-client,
7 clergy-penitent, all of that.

8 So on the mental health, the 513, if
9 you have a client right now, let's say, not --
10 you're not in your defense, you just know -- even
11 if you just know someone, they're not your client
12 -- no, they're your client -- and they are
13 contemplating seeking mental health for
14 something, maybe related to an incident, maybe
15 sexual violence, maybe not, maybe sexual
16 perpetration, whatever, for whatever reason, does
17 -- does the narrowing of 513 or the appropriate
18 interpretation of 513 under your reviews, does
19 that impact your counseling of anyone when --
20 with regard to, should they seek mental health
21 treatment?

22 MAJ GALLAGHER: So, ma'am, for me it

1 doesn't. And so I acknowledge the important
2 policy implications, especially in today's day
3 and age and the current state of -- especially in
4 the military.

5 I won't talk about society at large,
6 but in the military, of encouraging individuals
7 to seek behavioral health treatment. And I think
8 that is incredibly important.

9 Again, this goes back to why I think
10 I think the Mellette holding is an appropriate
11 compromise because it allows for the disclosure
12 of information that I think is in most cases
13 sufficient to carry out the functions that our
14 courts-martial are carrying out without, again,
15 piercing that veil and getting into the actual
16 conversations between a provider and a patient.

17 My personal opinion is, if a -- if an
18 individual is going to go into a behavioral
19 health provider and say, "Hey, I made a false
20 allegation against somebody," I don't believe
21 that that should be privileged at all. However,
22 again, I acknowledge the importance of the

1 privilege and its place in society. So I think
2 that Mellette is a good compromise.

3 MAJ LEAL: So, ma'am, what I was going
4 to say is, even before Mellette, as I was
5 advising clients who wanted to understand what
6 their resources were and what help they could
7 seek, I would explain all of the privileges to
8 them, and I would say, "Hey, you know, if you
9 need to talk to somebody, if you need to vent,
10 the safest place for you to go is to the
11 chaplain." The absolutely safest place for you
12 to go is to the chaplain.

13 If you need professional mental health
14 services, then there are some anonymous services
15 out there that you can call into. If you need to
16 see someone on a regular basis, potentially I can
17 work with the mental health clinic on base to get
18 you a referral to go see a private individual.

19 And then essentially what I would say
20 is if you go seek mental health services on base,
21 and you need to talk about what you're
22 experiencing, my advice to you would be to talk

1 about how that's impacting you and your feelings,
2 and not talk about the factual predicate for the
3 event.

4 LTCOL CARVER: I would just add to
5 that, I agree. There is a timing issue there,
6 right? So I would say 90 percent, certainly
7 Mellette, maybe even more than 90 percent of what
8 we're seeking, is happening prior to any type of
9 alleged incident, alleged rape, or sexual
10 assault.

11 So to say that because that happens
12 they will be somehow in the past more unwilling
13 to seek mental health counseling, because of some
14 future event that they can't even contemplate
15 will happen, I think that's a mistake to look at
16 it that way. I don't -- I don't think it will --
17 it will prevent or discourage a young woman or a
18 young man seeking mental health providers pre an
19 allegation.

20 I can understand post-allegation there
21 may be some pushback based upon what we've been
22 talking about as far as, hey, that might be

1 turned over; but, again, 90-plus percent --
2 certainly Mellette 99 percent we're looking for
3 medication that she was taking preceding the
4 alleged incident.

5 And so the Mellette information is not
6 -- I think that's a non-issue I guess is -- is my
7 point. Post, obviously what Major Gallagher was
8 talking about, was 513-specific anyway where she
9 goes in and actually says, "I just made a false
10 allegation." We would have to have a showing in
11 the first place, and 513 is already privileged
12 information. So we'd have to pierce that veil to
13 be able to get after that information.

14 So I don't think that that should be
15 a consideration because most of what we're after
16 is leading up to and at the -- at the night of
17 the alleged incident.

18 JUDGE GRIMM: I want -- I wanted to
19 ask about waiver of the privilege. Is that --
20 so, Major Gallagher, you talked about if you have
21 evidence, and I think, Colonel, you did as well,
22 about developed evidence, if they talked about it

1 with someone else, that there would be a waiver
2 motion.

3 Now, in the Federal Rules, 501 --
4 Evidence Rule 501 says the law of privilege is a
5 common law of the United States as interpreted by
6 the courts with reasoned experience. Each state
7 has their own privilege exceptions as part of the
8 common law.

9 And as part of that, they have their
10 own standards and criteria and scope of waiver.
11 In some instances, it's subject matter waiver.
12 So if you talk about a specific event that was
13 part of a series of events that were related, you
14 waived it as to that one particular thing you
15 discussed.

16 Others say if you waive it as to the
17 tiniest amount -- Major Gallagher, goes to your
18 point about the truth-finding process, you
19 haven't -- you have not treated it as entirely
20 confidential, you've waived it as to everything,
21 a subject matter waiver.

22 Within the military, what's the scope

1 of the waiver when waiver exists? Is it the
2 waiver as to the subset of information that this
3 person disclosed to a third party that was not
4 covered by the protection, or is it everything
5 related to that which is subject matter waiver?

6 MAJ GALLAGHER: Your Honor, so I'll
7 preface this with in the almost two years that
8 I've been on the defense bar, we have not yet
9 successfully litigated -- and I say successfully
10 from a defense position -- a waiver motion like
11 this. But we tend to argue that it is a subject
12 matter waiver.

13 But, again, we have -- we have not had
14 any information, at least in my practice,
15 released subject to one of those motions.

16 MS. GOLDBERG: I was pushing the wrong
17 button. Let me start that one again. Thank you
18 very much for what you've shared so far. I have
19 a basic question, and then I have a follow-up
20 stepped back to question.

21 The basic question, if a -- if a
22 defendant testifies, is the defense required to

1 turn over mental health records that -- of
2 medication or diagnoses that may bear on a
3 possible defect in the defendant's ability to
4 perceive and reflect reality?

5 CAPTAIN LARSEN: There's no rule that
6 I can think of that would require that reciprocal
7 discovery if the defense -- the defense is mental
8 health. However, the government would have
9 access to that under the Mellette rubric if they
10 wanted to, and often do. I receive mental health
11 records of clients all the time.

12 MS. GOLDBERG: Including mental health
13 --

14 CAPTAIN LARSEN: Yes.

15 MS. GOLDBERG: -- in a prosecutor
16 capacity.

17 CAPTAIN LARSEN: Correct. I've had to
18 -- I've actually disqualified a trial team
19 because they saw my client's communications.

20 MS. GOLDBERG: And just to clarify one
21 step further, including mental health records of
22 mental health services sought off base?

1 Following up on Major Leal's point.

2 MAJ LEAL: So I think the best way
3 that I can answer your question is that 513 and
4 Mellette, in my view, apply equally to my client
5 as they -- as they would to an alleged victim.
6 So if a -- if a prosecutor went to seek that
7 information because they learned it through their
8 investigation, I think we would be similarly
9 situated on the other side of the -- on the coin.

10 MS. GOLDBERG: Maybe one follow up to
11 that. In your experience, do prosecutors
12 typically ask for this 513 Mellette information?

13 MAJ LEAL: No, ma'am.

14 MS. GOLDBERG: Why do you think they
15 don't?

16 MAJ LEAL: I think you have them next,
17 and you can ask them. I don't know.

18 (Laughter.)

19 MS. GOLDBERG: This is a preview, but
20 I just thought I would understand this from your
21 perspective.

22 MAJ LEAL: I have seen it before. I

1 have -- again, I have seen it before from some
2 clients where I have received their mental health
3 records in advance of charges. But it's not a
4 common practice that we are used to.

5 LTCOL CARVER: I would throw this out,
6 ma'am. So related, but unrelated at the same
7 time, so when you're talking about voluntary
8 intoxication, voluntary intoxication is not a
9 defense to sexual assault.

10 So, similarly, whether our client can
11 recall the night of -- the night of the alleged
12 offense or not is not going to prevent a
13 prosecutor from seeking -- you know, prosecuting
14 our client in that -- in that moment, because the
15 elements themselves don't require a showing that
16 he or she understood what was going on at the
17 moment, unless it's a specific intent crime.

18 So if you're talking about a sexual
19 assault type offense, I don't see it as a
20 prosecutor, and I'm putting my prosecutor hat on.
21 I was a prosecutor for a few years, and I did
22 appellate government, so represented the

1 government on appeal for four years.

2 So I don't -- I don't see how that
3 would be necessarily relevant unless the defense
4 is trying to bring up some sort of defense,
5 affirmative defense of lack of mental
6 responsibility, or something like that.

7 Other than that, I'm only prosecuting
8 him based upon the elements of the crime, and
9 that likely doesn't apply to that. And,
10 therefore, I'm not seeking those -- that
11 information.

12 MS. GOLDBERG: So just to share a
13 thought, but then I'd actually like to ask my
14 broader question, which is -- the thought is if
15 the defendant is testifying as to facts that
16 allegedly occurred, let's say that it was the
17 night of the incident, they would be offering
18 facts in evidence.

19 So, in that sense, at least as I hear
20 your description of the defect and the ability to
21 perceive or reflect reality, it strikes me that
22 it would be relevant, but --

1 LTCOL CARVER: Yes. If they are
2 testifying, ma'am, I would 100 percent agree with
3 you as far as cross-examination and impeachment
4 type of evidence, to be able to challenge their
5 memory. Yes. In those one out of 100 where our
6 client will actually testify, that would apply,
7 but that's not happening whereas on the flip side
8 of that, you think, the alleged victim is
9 testifying 100 percent of the time.

10 MS. GOLDBERG: Thank you. And I see
11 nods from others, so I'll just go to my general
12 question, which is, To what extent, in your
13 experience and observation, does a pre-existing
14 -- a pre-incident diagnosis of the -- of the
15 victim with depression, anxiety, or PTSD, and/or
16 medication for that condition -- that diagnosis,
17 to what extent does that typically affect the
18 likelihood of acquittal of a defendant?

19 To what extent -- I mean, you're
20 seeking information. You're trying to establish
21 doubt. In your experience, is that an
22 understanding that every case is different? But

1 as a whole, to what extent -- how much does that
2 actually, do you think, affect the likelihood of
3 an acquittal in your experience?

4 It's obviously important evidence.
5 You want to get it. You want to introduce it.
6 I'm trying to understand how much it matters from
7 your perspective.

8 MAJ LEAL: Yes, ma'am. I think it's
9 important to distinguish that as part of
10 discovery us wanting the information to
11 understand the data points versus whether that
12 information is going to actually be admissible,
13 and that on a case-by-case basis how I might use
14 that would absolutely be fact dependent.

15 So, for example, if there is
16 prescription medication, what is that
17 prescription medication? If it's something like
18 -- I'm going to butcher this, but like a
19 benzodiazepine, and there are -- there's alcohol
20 involved, and we have a case where we are in a
21 situation where an alleged victim says they don't
22 remember the sexual acts; but we're asserting a

1 defense that they were consensual, but that the
2 individual just doesn't remember. All of a sudden
3 that medication would become vastly important.
4 And the effects and the amplification alcohol
5 would have on the benzodiazepine would become
6 absolutely important.

7 In another case where we got
8 prescription records, that had nothing to do with
9 the facts themselves. I've had cases where
10 prescription records for, you , skin rashes and
11 just other things like that that are unrelated,
12 and sort of getting both medical records and
13 mental health records that are just totally
14 unrelated to the facts of the case, and they
15 never end up in trial. We never end up bringing
16 them up because they're just not relevant to the
17 defense.

18 MS. GOLDBERG: Thank you for that, and
19 I -- I'm not expert in the distinctions between
20 -- in what falls into the benzodiazepine category
21 and what doesn't.

22 So I'll skate out a little further on

1 thin ice and ask this follow up, and then I'm
2 sure other colleagues have questions. But the
3 question I have is where somebody is -- let's
4 just say somebody is taking an anti-depressant
5 that -- you know, a standard issue
6 anti-depressant. Is that a benzodiazepine
7 usually or not? I'm looking at my colleagues who
8 -- Prozac? You know, something like that, is
9 that -- yeah? It is?

10 So then the -- I mean, so if somebody
11 was taking Prozac, or another kind of standard
12 issue anti-depressant, and also had some alcohol,
13 would you say you would typically be challenging
14 that person's ability to recollect incidents --
15 an incident accurately or the facts associated
16 with an incident accurately because you have that
17 evidence available to you?

18 And understanding that this is not
19 every case, I'm asking you to just speak across
20 the range of cases --

21 LTCOL CARVER: So --

22 MS. GOLDBERG: -- you've dealt with.

1 LTCOL CARVER: Yeah. There are
2 certain medications that affect memory, and
3 that's why, as defense counsel, we always seek
4 experts, because we aren't psychologists or
5 psychiatrists. So we're always going to be
6 speaking to our psychiatrist expert consultant to
7 be able to understand how those particular
8 medications that you've mentioned, if they would
9 or would not.

10 Oftentimes, the -- our expert
11 consultants will indicate that, yeah, they might,
12 but it's not -- you know, maybe not so much, so
13 then we're not even going down that -- down that
14 track to be able to cross-examine the alleged
15 victim on that particular area because that
16 medication mixed with alcohol really doesn't do
17 much at all.

18 And if the medication is associated
19 with some sort of diagnosis that's unrelated to
20 anything that could affect, then, again, we're
21 seeking out that expert consultant to be able to
22 advise us as to, Okay, this medication, based

1 upon a diagnosis here, might affect this and the
2 memory, or whatever it is. So we're -- it is
3 case dependent.

4 I will give you an example. So I --
5 from the waiver perspective, this is a very --
6 very recent. There was a case where the alleged
7 victim, and I'm not giving names of course, but
8 the alleged victim had been diagnosed -- had all
9 this medication that she was plastering out there
10 on social media. So we used that as a hook to be
11 able to argue 513, that we needed this
12 medication.

13 A lot of that medication she was just
14 saying that she was on and she wasn't actually
15 on, but we did get -- we won the 513 motion
16 because she was talking about her diagnoses
17 online to other people.

18 Based upon that, we saw that she had
19 been diagnosed as dissociative identity disorder
20 based upon a past very similar event. And,
21 again, this had a lot of consensual acts as well
22 as non-consensual acts, so we actually did use

1 that because it affected her memory.

2 But also, the triggering events and
3 the dissociation that potentially could have
4 taken place, we called an expert in that -- in
5 that regard. So that became extremely important
6 in that case. But other cases it might not be
7 important at all, just depends on what type of
8 medication and what our expert consultant tells
9 us.

10 MS. GOLDBERG: I'll just note to my
11 colleagues it's an area probably of interest for
12 further exploration, but I've asked many
13 questions, so turn it back to the group.

14 Oh. Thank you. Thank you.

15 MAJ GALLAGHER: So just to add -- to
16 answer the question directly, I don't know, based
17 on my experience, if there is any direct result
18 towards the introduction of that evidence and an
19 acquittal versus a conviction. I know that it is
20 helpful information, and I think the more
21 important part, like Lieutenant Colonel Carver
22 was going at, is the part that it plays in the

1 process.

2 So none of us are forensic experts of
3 any type. Having that information, having access
4 to that information, then allows us to develop a
5 strategy that makes us effective as defense
6 attorneys in filing a motion to get the proper
7 expert, consult with that expert, and then,
8 again, further develop the defense theory.

9 And I'm sure that across the forensic
10 expert bar opinions may differ on whether or not
11 that's relevant or not relevant, but it's another
12 tool in our toolkit that if the -- kind of the
13 513 or the Mellette evidence were to go away,
14 that we would be foreclosed from even exploring.

15 CAPTAIN LARSEN: There's a stark
16 difference with relevance of discovery versus
17 admissibility at trial, which I think Major Leal
18 as pointed out and --

19 MS. GOLDBERG: Understood. Thank you
20 very much.

21 MR. LIBRETTO: Chair smith, I'll just
22 note that we have a half-hour left with this

1 panel and a couple of other topics to get to.

2 CHAIR SMITH: Okay.

3 MR. LIBRETTO: Did you have something?

4 MR. KRAMER: So that leads me to a
5 three-part follow up.

6 (Laughter.)

7 MR. KRAMER: But two of them are
8 pretty simple, or three of them are. How easy it
9 is -- how easy is it for you to get psychological
10 or psychiatric experts to help you? Is it no
11 problem? Is it about -- how hard is that? And
12 is the government involved in that process, the
13 prosecution involved in that process?

14 Then, the second and third are just,
15 how often, roughly, do you get Mellette evidence?
16 And how often -- and the second part of that one
17 is, how often does it actually get introduced at
18 trial?

19 CAPTAIN LARSEN: The first two are
20 quite easy. I mean, access to forensic
21 psychologists, yes, they -- they're out there.
22 Now the Navy actually -- we have independent

1 funding that we can use on the defense bar, and
2 we can fund them ourselves, and we don't have to
3 disclose to the government what we're doing.

4 So it depends on the scenario and when
5 we will use our own funding to get our experts
6 kind of on the sly versus when we would implore
7 the government to do it. So the government would
8 be involved.

9 I would say to your final question
10 it's quite low, not --

11 MR. KRAMER: Well, that's -- how often
12 do you get -- how often do you get Mellette
13 evidence? And how often -- and, second of all,
14 how often is it introduced?

15 CAPTAIN LARSEN: Anecdotally, only I
16 would say in less than a third of the cases do we
17 get the Mellette material, and then probably less
18 than a third of those it would actually be
19 introduced at trial. But that's, again,
20 anecdotal.

21 MAJ GALLAGHER: And so I concur from
22 the Army's perspective on that one. So the

1 direct answer to how hard it is to get an expert
2 is very fact-specific and dependent. Currently,
3 the process is greatly involved with the
4 government. We first request for the government
5 if we -- that if they disapprove, and we would
6 like one compelled, we go to the court.

7 Like the Navy, the Army is
8 establishing a fund for independent expert
9 funding. So I anticipate in the future
10 litigation in that vein will be less.

11 I would say in recent cases we are
12 receiving Mellette evidence very often. And then
13 to the final, I would agree it's actually
14 relatively rare that it is -- it's coming in
15 because, again, it depends on the facts of the
16 case and depends on the advice that we receive
17 from our forensic consultants.

18 MAJ LEAL: I was just going to say
19 that the Air Force recently launched its program
20 for being able to get experts through the defense
21 bar.

22 And what we've actually seen is that

1 the rate of approval for experts has actually
2 gone down when you have -- when you have very
3 experienced defense counsel asking other defense
4 counsel, why do you need this expert? So just
5 just wanted to put that out there.

6 MS. BASHFORD: A prior panel of victim
7 counsel, when asked about exchanges on social
8 media, iPhones, between accused and a
9 complainant, said it was rare for the defendant's
10 phone to be examined. That struck a number of us
11 as strange.

12 If you don't get possession of the
13 defendant's phone, and you do a search warrant on
14 the cloud, like are -- is that your experience,
15 that trial counsel are not getting stuff from
16 defendants' phones?

17 LTCOL CARVER: That will be the
18 easiest question to answer today, which is they
19 absolutely get the phone. The majority or 100
20 percent of the time, 99 percent of the time, they
21 are taking our client's phone.

22 CHAIR SMITH: Great. Is that --

1 (Laughter.)

2 MS. TOKASH: This is Meghan Tokash.
3 Thanks for coming. I have a question about
4 pretrial litigation and motions practice. Could
5 you give the panel an understanding about what
6 that looks like today. And if you're able to
7 comment on -- I know we're only two-and-a-half
8 months into the OSTC coming out, but are you
9 finding that military judges are giving you an
10 adequate scheduling order?

11 Are they using scheduling orders to
12 tell both parties when Brady, Giglio, Jenks,
13 404(b), witnesses, experts, dispositive, non
14 dispositive motions, are you getting robust
15 scheduling orders so that everybody knows when
16 things are due? And how does that affect
17 pretrial motions practice? Are you finding that
18 the motions are being decided far enough in
19 advance of trial so that you can adequately
20 prepare things like opening statement and
21 examinations of witnesses?

22 CDR REHFUSS: Trial management orders

1 that all parties agree to and then are signed by
2 the judge often effectuate efficient litigation.
3 Having a plan beforehand is often different when
4 the rubber meets the road; but having both
5 parties come to the table and propose often what
6 is, a majority of the time, a joint proposal for
7 dates for motions hearings and for trial
8 minimizes some of those issues.

9 You can't anticipate all of the
10 evidentiary issues related to a case beforehand,
11 so there is always last-minute litigation.
12 There's often discovery on the eve of trial
13 unrelated to the trial management order. But the
14 trial management order does eliminate a lot of
15 the extraneous litigation that would otherwise
16 occur, in my experience.

17 MAJ GALLAGHER: I'd echo that from the
18 Army perspective. So the pretrial orders are
19 being issued normally a day or two after
20 arraignment, creating the guardrails, the
21 schedule; again, agreed upon by both parties and
22 signed by the military judge. The enforcement of

1 those orders vary, based on the military judge.
2 So, you know, experiences may vary based on the
3 individual on the bench.

4 And I echo the sentiment that, I
5 think, the biggest issue that creates unnecessary
6 intertrial litigation or, like, on the eve of
7 trial litigation is discovery practice; which,
8 again, I think we are too soon in its infancy to
9 tell but I anticipate that discovery practice
10 across the board will improve with the kind of
11 professionalized prosecutorial bar that has been
12 created and some of those issues will go away.
13 But that's at least been my experience.

14 LTCOL CARVER: I would just add that
15 the trial management orders that we have right
16 now, based upon conversations that I've had with
17 others, potentially even in this room, that I've
18 thought about it do not contemplate enough motion
19 sessions. They typically contemplate maybe one
20 or two motion sessions. And the complexity of
21 cases over the last 15 - 20 years has increased
22 exponentially, especially in the sexual assault

1 context.

2 And so I think the trial management
3 order, because it only contemplates the two
4 potentially motion sessions, motions come up
5 after that, and so we file motions because we're
6 required to. And we didn't anticipate being able
7 to file the motion until after the motion
8 sessions have concluded, which causes delay,
9 which also pushes out trial motions to continue
10 because we need more motion sessions -- often
11 happens. Often, those motion sessions, based
12 upon previous practices -- again, I am hopeful,
13 same as Major Gallagher over here, that OSTC --
14 that's going to be fixed as far as the
15 professionalism and turning over discovery to us
16 earlier so that we can file those motions.

17 But oftentimes, in the past,
18 historically, across the Marine Corps, not every
19 single shop, but most shops, they are turning
20 over discovery literally the night before trial,
21 significant discovery that requires us to
22 investigate, requires us to go down different

1 areas and avenues of motions practices. And so
2 our only recourse is to push this out, and, by
3 pushing it out the eve before trial, the military
4 judge and everybody has to be available. So
5 that's probably pushing it out at least -- it's
6 not like you're continuing it for a week because
7 you have another court-martial the next week or
8 something. You're pushing that out two - three
9 months because of the late discovery and the
10 inability for us to be able to get that
11 information to be able to have an adequate
12 motions practice.

13 So I will throw that out there that I
14 am hopeful that OSTC is going to change that, and
15 I think they have, I think they are.

16 MS. TOKASH: So two follow-ups to
17 that, very brief. Is the prosecution being
18 sanctioned for discovery, late disclosure of
19 discovery? And if so, what does that look like?
20 Is it precluding evidence? Is it just, you
21 should know better and should have turned it
22 over?

1 And I guess I should have asked this
2 first: Isn't part of the scheduling order,
3 doesn't it contemplate turning over discovery?

4 LTCOL CARVER: Yes, it does
5 contemplate that. Under the rules, some of the
6 evidence that they turn over, trial counsel,
7 historically at least, has read that to be after
8 the witness testifies is when they have to turn
9 that information over because the rule states as
10 such. Obviously, the Brady and Giglio does not
11 state that. However, that's what's happening.

12 So are they, yes. Last week, in the
13 Marine Corps, two GCMs, general courts-martial --
14 I'm sorry -- one special court-martial and one
15 general court-martial, based upon these discovery
16 violations by trial counsel, were dismissed with
17 prejudice just last week, last Monday and
18 Tuesday, and one out of my region and one out of
19 the West Coast, because of the inability of the
20 prosecutors to turn over evidence.

21 MS. TOKASH: So it's interesting that
22 at least the three of you who spoke so far all

1 commented on discovery violations being kind of
2 the precursor to even pretrial litigation
3 motions. And I can't remember, but is there
4 anything equivalent to, like, a Rule 16.1 on the
5 federal civilian side in the military right now
6 that contemplates where the parties have to
7 actually sit down and confer and have a
8 face-to-face discussion regarding all the
9 discovery in the case, like, right after
10 arraignment?

11 LTCOL CARVER: No. Go ahead.

12 MAJ GALLAGHER: So in the form, I
13 don't actually know there's a form PTO, but,
14 across my practice on both sides of the aisle,
15 there is usually a time and date for a pretrial
16 conference between the government and the defense
17 that contemplates just that.

18 In practice, there is no judicial
19 enforcement of that, so it is kind of driven by
20 the attorneys on the case whether or not those
21 pretrial conferences even occur. But at least on
22 the Army side, that's normally a date point in

1 the pretrial order.

2 MS. TOKASH: But are you all, as
3 defense counsel, filing motions with the judge
4 seeking relief because the prosecution is not
5 sitting at the table with you meeting that
6 discovery obligation that the court pushed out?
7 I mean, I would think, as the judge, I would be
8 interested in knowing that, whether the parties
9 are following -- I mean, I think what I'm hearing
10 you say, it's a Court order, right? Am I missing
11 something?

12 MAJ LEAL: I can only talk about my
13 experience in the Air Force, but, essentially,
14 what we get asked from judges is how much more
15 time do you need. So that's the remedy.

16 MR. CASSARA: Hi. My name is Bill
17 Cassara, a long-time defense hack. With the
18 advent of OSTC, any concerns on yall's part about
19 whether the defense bar is being adequately
20 funded? Is there an OSDC that you see in your
21 future, or is it, and I hate to put it this way,
22 but, you know, as supervisory attorneys, is there

1 a concern on your part that I've got a bunch of
2 0-3s defense counsel going up against a bunch of
3 0-5, 0-6 trial counsels, and they're going to get
4 their butts kicked?

5 CAPTAIN LARSEN: That is an excellent
6 question, sir.

7 MR. CASSARA: They don't have me here
8 for my looks.

9 CAPTAIN LARSEN: One-hundred percent,
10 yes. While I trust our OSTC and what they're
11 setting up and everything that they are doing,
12 they are clearly the shiny new toy and they are
13 getting all the resources that they need.

14 Now, we had a recent incident where
15 there was a hearing and the government was
16 represented by an 0-6, an 0-5, and an 0-4; and
17 the defense was represented by two 0-3s. And if
18 I'm the accused, I'm looking at this like what is
19 going on here? We've actually have started doing
20 studies now in the Navy to look at how many
21 people in the defense bar have four years or more
22 experience versus how many people on the

1 government side have more than four years of
2 experience, and it's quite low on the defense
3 bar. And, oftentimes, when we train our
4 attorneys, we become, like, the training ground,
5 and then they go off to OSTC as 0-4s.

6 So, correct, they have a one-star
7 admiral in the Navy. We do not have the
8 equivalent on the defense bar. They have the
9 ability to have 0-6, 0-5s in the courtroom, while
10 I'm an 0-6, as a defense counsel, I can't just
11 hop on a case and hop off the case. Once I'm
12 detailed to a counsel, that is my case and I have
13 to focus on that.

14 And most of the 0-6s and 0-5s on the
15 defense bar are stuck doing admin. We're focused
16 on running the command, running things, and more
17 of a supervisory role and not in the trenches as
18 the litigants. And even if we were, we're also
19 taking food away from our junior litigators to
20 get that experience.

21 So it's something that we are
22 conscious of and we're looking at and we're

1 trying to advocate with our own judge advocate
2 general, just making sure that there's parity on
3 both sides. Right now, we don't see it, but
4 we're hoping that in the future that there would
5 be an OSDC equivalent in all the branches.

6 CDR REHFUSS: And it sounds like
7 that's how it's happening in practice with the
8 Navy. It's actually happening in policy with the
9 Coast Guard where the Coast Guard special
10 prosecutors are required to have so many
11 contested trials. They're required to have so
12 many years of litigation experience in their
13 specific requirements.

14 Up until very recently, there were no
15 requirements for defense counsel. Very recently,
16 they're now required to have two years of legal
17 experience. That could be operational law, that
18 could be any experience. So there's a disparity
19 just on paper, in addition to in practice.

20 LTCOL CARVER: I'll chime in from the
21 Marine Corps perspective. So there's absolutely
22 no parity. There's been eight special defense

1 counsel billets formed, and one has been filled.

2 And we were promised that others would be filled
3 this summer, and that is not going to happen.

4 So I will say, in my region
5 specifically -- and there's only four regions,
6 and I know all the other regions are very similar
7 to my region because I know all of the defense
8 counsel in the Marine Corps -- that 10 of the 12
9 of us are first-tour defense counsel and 9 out of
10 those are less than a year of experience.

11 And I will throw out an example very
12 similar to my Navy counterpart here that just
13 came out of the Eastern Region on a homicide case
14 that just happened. I wish somebody would have
15 snapped a photograph because that would have said
16 everything that you'd need to know about the
17 non-parity that's happening in the Marine Corps.
18 We had a first-tour judge advocate defense
19 counsel standing there alone with his client on a
20 homicide case, and on the other side of the
21 aisle, other side on the prosecution's desk we
22 had an 0-6, an 0-5, an 0-4, all of his admin

1 staff, and then, of course, an 0-5 was
2 representing the victim. And that says
3 everything you need to know about the Marine
4 Corps and the inability for us to have anybody
5 that has any type of experience being able to
6 defend these Marines. And if we impose the same
7 requirement that OSTC has as far as the two-year
8 requirement to be part of the OSTC in the Marine
9 Corps, there would be maybe six of us in the
10 Marine Corps that could defend, maybe seven, that
11 could defend these special victim type cases, and
12 that's what we're left with.

13 And so, I mean, yes, the defense does
14 a great job. Yes, my defense counsel that work
15 for me are fantastic, but they are first tour and
16 they don't know what they don't know. And so it
17 requires a lot of supervision and a lot of -- we
18 don't even have an attorney advisor, for example,
19 in the National Capital Region, my region. And
20 we're hiring, but we can't seem to get the people
21 that we need to be able to advise and to
22 represent these particular clients.

1 JUDGE GRIMM: So could I ask a
2 question related to what all of you have said?
3 We've had information from a number of sources
4 that there are significant shortages of JAGs
5 across the military services. It's just hard to
6 get enough people to come to the JAG Corps in any
7 capacity and that this has resulted in enormous
8 workloads and a stress to the system in order to
9 be able to allow any functioning in any of the
10 various roles we've been talking about here,
11 whether it's SVC or OSTC or defense. And is that
12 something that all of the services are
13 experiencing, and is this a recent issue or is
14 this more systemic? Is it pay discrepancies
15 between the civilian community, if we're trying
16 to figure out how do we give incentives to bring
17 more people into the JAG Corps so we had people
18 in the pipeline that could have that experience?
19 Do you have any thoughts that would be helpful on
20 that?

21 CAPTAIN LARSEN: I think the big issue
22 is at the 0-4 level, and I'd like the 0-4s to

1 speak to this is, with the new blended retirement
2 system, there is no incentive now to go beyond
3 the ten years because, at the ten-year mark, you
4 have the public service loan forgiveness. And so
5 a lot of my colleagues, at ten years, their loans
6 are forgiven; there's no 20-year retirement
7 anymore with a full pension, it's more of a
8 401(k); and so we have trained them quite well.
9 And they're 33 to 35 years old with a lot of
10 great experience and they look great on paper,
11 and they go out to the civilian sector. But I'd
12 like the O-4s to speak to that.

13 MAJ LEAL: Yes, I can because I think,
14 personally, I'm sort of exactly what you're
15 describing, is that I'm hitting the ten-year mark
16 very soon. My student loans will be forgiven
17 very soon. A lot of my colleagues are in the
18 same boat. And I'm kind of unique in that a lot
19 of my colleagues are looking to separate from the
20 military, go into civilian jobs that pay
21 significantly more, and can focus on litigation
22 and being rewarded for being superior litigators

1 versus a perception that there is a ceiling on
2 promotability if they focus on being litigators
3 within the Air Force.

4 MAJ GALLAGHER: I guess I'll be the
5 dissenting voice on both accounts. So, first, to
6 get to the parity issue. So the Army has done a
7 good job of implementing the OSTC and attempting
8 defense bar growth; and I say attempting because,
9 on paper, the growth is there -- it's parity.
10 Some of the issues comes to the manning question.
11 For instance, in my region, we're supposed to
12 have what they've styled as a defense complex
13 litigation attorney, which was an attempt to
14 create a defense counsel who is basically the SVP
15 of old that would be a subject matter expert,
16 potentially capital litigation-focused, who is
17 going to move across.

18 In the Fourth Circuit, we were slated
19 to get an 0-4 at Fort Carson. So, in my office,
20 there would be two 0-4s to handle the litigation.
21 That never happened. Apparently, it may happen
22 sometime in the future. The region ended up

1 getting a very qualified Captain to fill that
2 billet for the region; but, again, that's on
3 paper. The Army has created the positions. We
4 just don't have the bodies to fill them.

5 But where I do have a good news story
6 is, across the bar, like, I have not seen this
7 lopsided prosecution v. defense. Typically, in
8 the serious cases, there is a detailed O-4 and an
9 O-3 representing a client, and on the other side
10 it is either the same or tends to be two O-3s
11 representing the government. So on the Army
12 side, the implementation of OSTC has kind of
13 gone, I think, as a closer stair-stepping.

14 I don't know that there's a good
15 answer to the manning question, sir. At the
16 field grade officer level in the Army, I mean,
17 that's part of the problem, right. We get to a
18 point where, oftentimes, officers are at the end
19 of a career obligation, and so life comes into
20 the picture. Is it more enticing to be on the
21 civilian side? Is it more enticing to be on the
22 military side?

1 So unlike Major Leal, I'm at 15 years,
2 and I'm not going anywhere. That's also because
3 I'm contractually obligated to the Army a little
4 while longer, but I don't know, right. If you
5 ask a pool of my peers this question, you will
6 get answers that are all over the place.

7 One of them that consistently comes
8 back, to get to your question about would a
9 financial incentive fix it, I don't know. The
10 Army used to have pro pay for attorneys; they did
11 away with that. And I think there was a study
12 that said that actually wasn't a driving factor
13 toward retention versus release. I mean, I know
14 that a little more money is not going to hurt
15 anybody's opinion of staying in the service.

16 I think, on the Army side, a big
17 complaint was burnout, and you've probably heard
18 that word a lot. And so I think that, again, on
19 the Army side, the senior leaders in the Army JAG
20 Corps have been trying very hard to implement
21 holistic health and fitness initiatives, trying
22 to empower leaders. So at my level, at my field

1 office, I'm completely empowered. If I want to
2 shut my office down for a day and say, "Hey,
3 don't come to work; we're going to go take a
4 mental health day," I am empowered to do that,
5 which I think has been effective. And I think if
6 you polled the attorneys in my office, they don't
7 have any desire to go anywhere right now because
8 they enjoy the practice environment. And I think
9 that that is a bigger issue, and I don't know how
10 to fix it, is how do we make the practice of
11 military justice more palatable for
12 practitioners? So instead of this, Hey, we've
13 got more work than we know what to do with, we
14 don't have the manning, so we're going to work
15 until the work is done, but the work is never
16 done; and that creates these burnout situations
17 where people are coming in on weekends, they're
18 coming -- you know, they're going back-to-back
19 trial. And, not to mention, in the military, we
20 have additional obligations. So, I have priority
21 2 portfolios, so administrative separation
22 actions that are, in the last two years, Fort

1 Carson, Colorado did 195 administrative
2 separation board. Each one of those is a
3 detailed counsel to a matter, and, arguably, they
4 take more of the counsel's time and moves their
5 focus away from the priority 1 litigation. So
6 most of our litigation is general courts-martial
7 felony-level litigation, which then creates a
8 phenomenal amount of stress on these 23-, 24-,
9 25-year-old captains going, "Hey, I'm walking
10 into court and I've got somebody's literal life
11 on my hands, and last night I was at a board
12 until 10:00."

13 And so I think that those are some of
14 the issues that I see. The other one, and I'll
15 just put a plug in for it, is paralegal
16 resources, because the Army Office of the Chief
17 of TDS did a paralegal manpower study over the
18 last couple of years, and I think, I don't know
19 the results off the top of my head, but it was
20 something like, system-wide, we need at least 50
21 more paralegals. And then I think the Army had
22 RAND do a study that ended up saying, Oh, no, no,

1 no, actually, that number is more like 100
2 system-wide. And, again, just speaking from my
3 current position, right, so, on paper, I'm
4 supposed to have three paralegals. I have been
5 fighting with one at times, and that's to handle
6 everything, not just litigation.

7 So although I think the Army is doing
8 the manning better, it's a national-level
9 problem. The Army is not recruiting the new
10 manpower at the rate that it needs, and then the
11 specialized MOSs, you know, the legally-trained
12 attorneys and paralegals who want to come in and
13 do this work, I don't know what the answer is,
14 sir.

15 MS. GOLDBERG: Thank you for sharing
16 that and also appreciate your passion for
17 defending the clients and the challenge of, as
18 you've described, insufficient resources, which I
19 think some of the challenges you are describing
20 could fairly describe every legal aid, legal
21 services office in the country actually.

22 But just a quick question thinking

1 about what you described, especially -- shoot, I
2 lost my proper title for you -- Lieutenant
3 Colonel Carver. I guess two things. One,
4 earlier, you said cases are much more complicated
5 now. And I just want to keep focused on sexual
6 assault and related sexual misconduct cases, and
7 I wonder if you could just expand on that a
8 little bit and see if your colleagues agree.

9 But the second is I think we have this
10 information, but if you're each able to share
11 quickly sort of what the typical caseload is,
12 what the overall conviction or acquittal rate is.
13 And part of what I was thinking as you were
14 talking about the kind of differential and who's
15 on which side is whether you know what
16 prosecutors would say in response and whether
17 they might say that, actually, because of the
18 burden they bear -- understanding everybody bears
19 a burden, but, because of the burden they bear -
20 - there's a different kind of expertise or level
21 of experience that is appropriate or necessary to
22 do an adequate job as a prosecutor, as compared

1 to a defense attorney. I'm not saying that they
2 would say that, I'm not saying that I necessarily
3 agree with that, but I'm trying to imagine what
4 somebody might say in response to try to, you
5 know, sort of suggest that the system,
6 notwithstanding the inadequacies, is still,
7 generally speaking, fair or whether we could take
8 from that -- actually, no, your position need is
9 completely unfair.

10 LTCOL CARVER: Yes, ma'am. So I do
11 disagree with that. However, just going back
12 with my time as a government counsel, trial
13 counsel, there were a few different times where I
14 was prosecuting somebody that had a defense
15 counsel on the other side that I could see that
16 was completely ill-prepared and/or just
17 inexperienced, and that was very problematic for
18 me as a prosecutor, not only because in the
19 Marine Corps or, rather, the NMCCA and all the
20 CCAs, I see ineffective assistance of counsel is
21 a tool that our appellate courts use all the
22 time.

1 And so as a prosecutor, I had just
2 come from four years at the appellate court, as
3 appellate government counsel I should say, not
4 the court but appellate government counsel, so I
5 was very much aware of how I see an ineffective
6 assistance of counsel will affect cases and flip
7 cases. So as a prosecutor, when I saw those
8 ill-prepared and inexperienced defense counsel
9 that weren't filing the proper motions, weren't
10 even aware that the motions should be filed, I
11 would take it upon myself to file a motion to
12 admit just to kind of indicate to the defense
13 counsel, Hey, defense counsel, maybe you should
14 argue that this, you know, confession or these
15 admissions should be inadmissible; and I would go
16 talk to their leadership and talk to them in that
17 capacity, because I knew, as a prosecutor, I
18 needed -- it was about the process. It was about
19 justice and the process. It wasn't about the
20 outcome. It was about the process, and if the
21 process -- and I had a defense counsel on the
22 other side that didn't know what he or she was

1 doing, that destroyed the process.

2 So if I were OSTC, I would absolutely
3 want experienced on the other side. I'm very
4 excited to have OSTC with the experience because
5 they won't commit prosecutorial misconduct. They
6 will turn over the discovery is my hope, and I
7 think that they will because, at least from the
8 Marine Corps perspective, who is in those
9 positions are fantastic prosecutors.

10 So I absolutely want professionals on
11 both sides of the aisle, regardless of what side
12 I'm on, because it will avoid all these issues,
13 including the appellate issues. And I know OSTC
14 has been 100 percent, and I get, from that
15 previous question, you know, the Marine Corps is
16 only about, I can't remember, it's a little over
17 50 percent in the 0-4, as far as how many 0-4s we
18 have versus billets we have, so I can understand
19 some of the gaps that we have. But OSTC is 100
20 percent, and we're not there.

21 So if I was OSTC, I would be
22 irritated, as well, or I would be -- maybe that's

1 not the right word. I would be disappointed that
2 the other side needs all these delays because
3 they don't have the proper people on the other
4 side to be able to raise the proper motions and
5 argue those proper motions and argue them
6 effectively. So that's just from my perspective,
7 when I was a prosecutor, from the appellate
8 perspective that I've had for four years, and now
9 as a defense attorney. That's my perspective
10 moving forward.

11 I hope I answered your question. I
12 apologize. All right. Thanks.

13 CAPTAIN LARSEN: I think OSTC is
14 working incredibly hard. I mean, the cases we
15 see is a fraction of what they're dealing with on
16 a daily basis. And now that they've even added
17 the sexual harassment and domestic violence,
18 they're going to be overwhelmed soon with all the
19 pretrial, before we even see cases.

20 But I still come back to where do we
21 want to bear the risk of failure. I've been
22 doing military justice for 21 years. I've done

1 it as a prosecutor, as a judge, now as a defense
2 counsel. Cases are not determined, from my
3 perspective, because of the magnificence of the
4 litigators. It's the facts. And so then I come
5 back to the question of where do we want to bear
6 the risk? Do we want to bear the risk of
7 prosecutions having the best and the brightest or
8 the defense counsel who have to stand there next
9 to their clients and represent them with their
10 ethical bar duties on the line or do we want to
11 leave it with them.

12 And so that's why, when we talk about
13 parity, it's just making sure that it's on the
14 right, that we have balanced the scales somewhat.

15 LTCOL CARVER: Can I just add one more
16 thing? Parity doesn't mean equal, so the
17 administrative burden from the OSTC, of course
18 they're going to have more resources, more admin,
19 because they have those administrative burdens.
20 We're just talking about parity, lesser, I mean,
21 in the Marine Corps, they have a general officer,
22 we have an 0-6. I mean, that's, by looks of it,

1 isn't parity, but I'm not making that complaint.
2 What I am saying is what they've actually given
3 us, we don't have those bodies in those seats.
4 That's what I'm talking about. They have a lot
5 more than eight. We only have eight special
6 defense counsel, and we only have one of those
7 people in that billet. And I get that it's
8 because of resources we don't have the O-4s, but
9 they've got all of the resources they needed
10 because Congress told them that they were going
11 to do that. And we don't even have a fraction of
12 that.

13 MAJ GALLAGHER: And just to pin it
14 back to, I think, the first part of the question
15 that you just asked about, how trials have gotten
16 more complex, and it may tie in with another
17 issue that the committee wants to talk about in
18 the few remaining moments.

19 So one way that I have seen trials get
20 more complex, even over my short time dealing
21 with military court-martials, is the amount and
22 complexity of digital evidence in all cases, but

1 especially in sexual assault cases in kind of the
2 ways that the case law and the rules surrounding
3 the nuances and complexities of digital evidence
4 has created a framework where, I mean, it creates
5 the need for expert litigation. It creates the
6 need for experts in almost every case, and it
7 creates just a much more complex litigation
8 environment where evidence may be hiding in a
9 place that counsel who aren't versed in digital
10 evidence, don't even know that they have
11 something in their possession that they are,
12 otherwise, compelled to turn over. And so that
13 just kind of segues into, I think --

14 CHAIR SMITH: We have one last
15 question.

16 JUDGE GRIMM: I have a question about
17 the experts, Major Carver, if you wouldn't mind,
18 and from the other panelists, as well. This is a
19 perpetual problem. We have the same problem in
20 the federal system, as well, where if you are the
21 government, your investigators have the expertise
22 to be able to get you the evidence that you need

1 or; at least in theory they do. So they'll have
2 the digital forensic folks who will go in there
3 and, you know, CID or Navy investigators, and
4 they'll get the download if they get the order
5 and they have the authority to get it.

6 The defense comes in and says, all
7 right, we want a digital expert for trial. You
8 don't have funds, do you, to be able to go out
9 and hire your expert? Where do you get it? Do
10 you make a request? If you make a request, who
11 is the one that has to approve that request? And
12 have you found a situation where defense counsel
13 go into trial and they've been denied an expert
14 and the government calls an expert in that same
15 subject matter and the defense has the inability
16 to be able to do anything other than just hope
17 that their cross-examination can raise the issues
18 that they want to present?

19 MAJ GALLAGHER: So I'll start from the
20 last question and work my way backwards. So,
21 yes, there have been situations where the defense
22 has raised an issue where they believe they need

1 a digital expert. Through the process that I'll
2 talk about in kind of the first part of your
3 question, they've been denied an expert and, at
4 that point, did not have independent funding to
5 procure one. So, unless the client wants to come
6 out of pocket a couple thousand dollars to get an
7 expert, they don't have the aid of an expert.
8 And then it presents an issue that I think we can
9 all appreciate at trial.

10 The current process is, when the
11 defense identifies an expert, they submit a
12 request to the general court-martial convening
13 authority saying this is -- the nuance on whether
14 or not it's an expert consultant or an expert
15 witness we won't get into -- says I would like an
16 expert, either a specific or just a general
17 subject matter because it is necessary and --
18 relevant and necessary to the defense preparation
19 of the case. The GCMCA, under advice of their
20 legal representatives, either approves and then
21 contracts for that individual or denies it. If
22 it is denied, then there is a motion to compel to

1 the military judge. The same process, the same
2 standard applies. And then if the judge denies
3 it, then we don't get the expert unless the
4 client wants to go out of pocket.

5 And I think we've all kind of briefly
6 talked about the newly-implemented or
7 implementing process for defense contracting for
8 expert witnesses on our own. It sounds really
9 great. It hasn't come into existence for the
10 Army quite yet, so I don't know how it's going to
11 work in practice.

12 CAPTAIN LARSEN: We just used it last
13 week. For the same exact scenario, we asked for
14 a digital expert. The judge said no. We funded
15 it ourselves, and we got a full acquittal last
16 week on it.

17 LTCOL CARVER: And I believe the
18 Marine Corps is the only service that we cannot
19 fund through the defense witnesses, so expert
20 witnesses. We can get expert consultants but not
21 witnesses.

22 JUDGE GRIMM: Have you had situations,

1 Colonel, you're aware of where you sought the
2 expert, the government, you believed, was going
3 to have an expert and, in fact, had an expert at
4 trial. You didn't. You didn't have the funds to
5 contract yourself, so you were in a battle of
6 wits unarmed because they had the expert and you
7 didn't. And the judge denies it but didn't say,
8 "All right, there will be no experts in this
9 case," "The government doesn't have an expert,"
10 "You don't have an expert," "We'll just wing it."
11 But that disparity sounds, to me, frankly,
12 astonishing.

13 LTCOL CARVER: Yes, all the time. I
14 would say, in practice, especially historically
15 when we had to seek even the expert consultant
16 from the convening authority, often, we couldn't
17 even get enough information in front of the judge
18 to prove or establish that we needed that expert
19 consultant; and, therefore, it was denied. But
20 then one of the main questions the military judge
21 would ask in those particular cases was We'll
22 have you talk to the government's witness first.

1 So we needed to go to their witness to be able to
2 delve into and, I guess, interview them or try to
3 get our theory out through their witness, that's
4 the government expert witness, before the judge
5 would even entertain the possibility of us having
6 an expert witness.

7 And we're still in that situation
8 where we have to request it, move the court --
9 well, we have to request it but then move the
10 court to try to order the expert witness. But,
11 now, at least we have the funds to be able to get
12 the expert consultant, so, with the expert
13 consultant, we can put together enough
14 information to make a showing to the judge that
15 we need this particular witness, not relying upon
16 cross-examination of the government's witness.

17 And, again, there are exceptions to
18 that historically, of course. You know, some
19 judges would provide us with those expert
20 witnesses. But from my experience, that's very,
21 very rare.

22 MAJ LEAL: And I mentioned this

1 before; but just to answer your question, we're
2 not seeing that in the Air Force. So we have the
3 ability to fund our own experts. We do fund our
4 own experts. We still have the ability to go to
5 the convening authority if we want to. We have
6 the ability now to go ex parte to the judge.
7 I've never heard of -- never seen a situation
8 where the prosecutor had an expert and the
9 defense counsel didn't.

10 CHAIR SMITH: Thank you very much for
11 your time today. It was very helpful. Mr. Yob.

12 MR. YOB: It is currently 3:04, so I
13 say we come back at 3:20 and get started again.

14 (Whereupon, the above-entitled matter
15 went off the record at 3:04 p.m. and resumed at
16 3:21 p.m.)

17 CHAIR SMITH: Good afternoon, we're
18 ready to get started. Thank you for being here,
19 and Ms. Saunders?

20 MS. SAUNDERS: Thank you, Judge Smith.
21 So, our final panel of the day will be the
22 special trial counsel from each of the military

1 services. You have their bios, as well as some
2 questions and topics in your red folders; so I'll
3 briefly introduce our panelists. From the Army
4 it's Major Alex Altimas, who serves as the field
5 office Special Trial Counsel for the Fourth
6 Infantry Division in Fort Carson on Fort Carson,
7 Colorado.

8 From the Navy, Captain R.J. Stormer,
9 who serves as the region Special Trial Counsel,
10 West at the Office of Special Trial Counsel in
11 San Diego, California. From the Marine Corps,
12 Lieutenant Colonel Nicholas Henry, who serves as
13 the regional Special Trial Counsel, East at Camp
14 Lejeune, North Carolina. From the Air Force,
15 Major Alexis Brown, who serves as the special
16 trial counsel for District three at Joint Base
17 San Antonio-Randolph, Texas.

18 And from the Coast Guard, Lieutenant
19 Commander Case Colaw, who serves as a Special
20 Trial Counsel at the Office of Chief Prosecutor
21 in Alameda, California. Judge Smith, over to you
22 for the questions.

1 CHAIR SMITH: All right. So, we'll
2 start with a question related to the Mellette
3 case. If you would just discuss the impact it's
4 had on trial practice in sex offense cases.

5 MAJ ALTIMAS: Ma'am, in my experience,
6 it hasn't impacted the way that we litigate these
7 kind of issues. If anything, it's just raised a
8 higher 701, 703 litigation; but it hasn't
9 necessarily changed any of the -- obviously it's
10 not 513, so it's not going into that. I think
11 it's a welcome change from the split that had
12 occurred for a few years where Kitchens and
13 Rodriguez existed, and there was kind of this
14 split in the forces of what was 513 and what
15 wasn't.

16 So, it's a welcome kind of guidelines
17 that we have; and if anything now, we're just
18 litigating those issues under a 703 or 701
19 analysis versus a 513.

20 CAPT STORMER: Good afternoon, I would
21 also concur. I would say it's given us some
22 guideposts. So it's good to have some clarity as

1 far as what potentially is protected, and what is
2 privileged, and what is not. But I would say
3 litigation is still happening in the majority of
4 these cases where it comes up. We are still
5 litigating this issue.

6 It also sometimes comes into play --
7 the scope. So, the scope of Mellette, so how far
8 should that go back? Should it go
9 pre-allegation, day of allegation, post
10 allegation? That's come up. And I would say
11 that's probably a lot of times the majority of
12 our litigation is everyone recognizes that it's
13 potentially a 701, 703 analysis.

14 But then the question, what ultimately
15 comes up in litigation is, Okay, but what time
16 frame? What is the actual relevant scope of this
17 particular material? So, I think that's where
18 I've seen it really have an impact, is that we
19 are still litigating this issue; it's just maybe
20 a different frame of that.

21 LTCOL HENRY: Ma'am, panel, I would
22 concur that it's all about the litigation and how

1 you react to the case. So, the case did -- I
2 think guidepost is the right place. It told us
3 now we have kind of left and right lateral
4 limits, to use the Marine Corps term, and we can
5 operate within that, with kind of knowing, and
6 intelligent steps forward.

7 The 701, 703 litigation is important,
8 but it's also important to force a discussion
9 between what's the difference between discovery
10 and production; and I think it's a nuance that's
11 sometimes lost, and even lost on military judges.
12 I get to say that because I was just one in my
13 last tour, so I can't get yelled at too much.

14 But the 701, 703 is very big, because
15 to me the differentiation is understanding that
16 something exists is discovery. Producing it is a
17 whole different story, and that's the litigation
18 that's important. Because the defense panel
19 rightly talked about, How do we know what to ask
20 for if we don't know what the world and the
21 universe is that exists out there.

22 And that's fine, but what we run into

1 is the litigation of how do we produce that? And
2 that's where we talk about all these teams, and
3 the special magistrates, and the redactions. Who
4 is doing the redactions? It may not be
5 necessary. This morning's question about a
6 singular piece of paper that the provider can
7 fill out is one of the many different ways that
8 that production could be handled to facilitate
9 later on litigation under additional 703, or
10 under MRE 513; and that's kind of what the
11 litigation we see right now is.

12 For the OSTC and the Marine Corps, one
13 of the standards we've been working towards is
14 standardizing that practice, and those responses
15 to discovery, because in the past, different
16 prosecution offices, different regions who are
17 run by different individuals, had different ways
18 of addressing things. And the results that
19 Lieutenant Colonel Carver pointed out can happen
20 if there's not that standardization.

21 And so, the standardization when the
22 OSTC came into place for the Marine Corps was

1 that we're going to operate so that the discovery
2 practice on the east coast is the discovery
3 practice on the west coast; and I will tell you
4 from our standpoint, is discovery is early and
5 often, and I want to be providing discovery at
6 the preferral of charges when we go forward to
7 the Article 32.

8 Because what the defense needs to make
9 knowledgeable decisions, and whether or not to
10 ask for those things, whether or not to litigate
11 those things is important to have early on; and
12 so that's why that's an important piece of our
13 practice.

14 MAJ BROWN: So, I have two points on
15 how it's impacted my practice in the Air Force,
16 and after conferring with some of my colleagues
17 as well, and Air Force OSTC, the first being its
18 impact on our victims. And one thing that I
19 noted from the earlier session is that when -- I
20 think there was a discussion about balancing the
21 victim's privacy interest in the defense counsel
22 panel.

1 Our victims aren't just asserting
2 privacy interest over what's privileged, they're
3 asserting privacy interest over their entire
4 record being filtered through by somebody who is
5 not their provider. And so, we have seen, in the
6 Air Force, in some of our cases, that because of
7 this decision, a discussion with the victim's
8 counsel, and even an STC, that there is a
9 hesitancy of some victims to want to go forward
10 or continue to participate.

11 Knowing that their records are going
12 to be spun up in this web while we figure out the
13 right way to produce it; and who the right person
14 is to look at it, and that's certainly
15 concerning. Another aspect of it is we are
16 having to delve through medical records, and
17 certainly the communications with a
18 psychotherapist, that's pretty straight forward.

19 But a lot of the treatment, the
20 precipice for the treatment or the diagnosis is
21 based on communications with that provider.
22 These are things that are intertwined in not such

1 a clear way, and so those are things that victims
2 are concerned about. And there are things that
3 us as trial counsel, we have to balance our
4 interest in seeking justice, and also ensuring
5 that we have a case that we can prosecute with a
6 participating victim.

7 So, that's one aspect of how it has
8 impacted us in the Air Force. The other aspect
9 is what I'm seeing as the requests for records
10 under Mellette is now standard. It's built into
11 the form discovery request that defense counsel
12 sends out, and that is honestly regardless of
13 whether or not there is any mention in the report
14 of investigation that the victim has a mental
15 health condition or was on medication.

16 Now, certainly there are cases where
17 it is clear from the report of investigation,
18 from interviews, that there might be a condition,
19 there might be a medication at play, but what I
20 think has happened is as a catch all to ensure
21 that defense counsel are making that request,
22 they are putting that into their standard

1 request.

2 And how much they fight after we deny
3 it is dependent on what they can get from that
4 point on. And so, there's certainly additional
5 dialogue going on under 701 and 703. Another
6 thing that I want the panel to consider is we
7 spent a lot of time talking today about records
8 that we're getting from military treatment
9 facilities.

10 But in the vast majority of my cases,
11 my victims aren't even military, they're civilian
12 victims who are seeking treatment off base, and
13 we're dealing with records custodians who are not
14 -- who are treatment providers on base. And so,
15 there's additional steps that we have to take in
16 order to try to discover that evidence that has
17 essentially resulted in increased delays in being
18 able to comply with discovery by the deadline set
19 by the judge.

20 We're continuing to ask for extensions
21 from the judge to fully comply with discovery,
22 and running into more administrative issues on

1 being able to even get those records in those off
2 base situations. And situations where we are
3 agreeing that we should go get them.

4 LCDR COLAW: To carry on with what
5 Major Brown just said, we are seeing in every
6 standard discovery request by defense counsel
7 requests for Mellette records. I think
8 Lieutenant Commander Rehfuss from the Coast Guard
9 talked earlier about we're seeing the standard
10 language, or a similar language that's taken
11 right out of Mellette.

12 In practice, it has been very
13 difficult to try and produce records that do not
14 seem to have privilege intertwined. I think in
15 the morning session talked about by some of the
16 SVCs, it talked about how an entire medical
17 record is produced. We've seen issues with
18 orders from judges for records that would be
19 coming under 703, that would be civilian
20 providers, where the military judge seems to try
21 and tailor an order on the language of Mellette,
22 the provider provides everything. It goes to the

1 military judge, and they try to perform an in-
2 camera review just to determine what is
3 non-privileged, but even that results in
4 substantial leakage.

5 And then later on when the SVCs are
6 trying to reassert their privilege at trial when
7 it comes to another session on admissibility,
8 it's been varied results. Sometimes the military
9 judges are fashioning orders saying that this
10 wasn't raised earlier, and so your privilege has
11 been waived.

12 Sometimes it leads to further
13 litigation on issues that frankly shouldn't have
14 come up because there was leakage. I know from
15 Mellette on paper, and echoing what Lieutenant
16 Colonel Carver talked about actually on behalf of
17 the defense, I come up here today and say it's
18 really troubling, and I really am concerned about
19 the process.

20 In fact my most recent Article 39(a),
21 I expressed to the military judge that I did
22 think we've been doing it wrong by just having

1 trial counsel go get records, and then supposedly
2 look through them to try and find -- because
3 invariably we find material that I think, and we
4 think is privileged. And so, under Mellette, and
5 I'm reading from my phone just because I didn't
6 bring up my laptop, but it is, the critical
7 question in the case is whether other evidence
8 that does not qualify as a communication between
9 patient and psychotherapist, such as a patient's
10 routine medical records are also protected by the
11 rule. Understand on paper that seems clear, it
12 has been anything but in practice.

13 So, I will say that the Coast Guard in
14 that regard, and talking to Lieutenant Commander
15 Rehfuss who didn't get a chance to maybe express
16 that, in the last six months to a year, we have
17 been telling defense counsel we are going to
18 litigate this issue in front of the judge, we are
19 going to find the contours of this.

20 We're telling them that we're going to
21 fight it, we've been denying their requests.
22 Because every time in the more recent past since

1 Mellette, we've been trying to go find that
2 information, or there has been an order after a
3 513 hearing to try and find the non-privileged,
4 what we've been calling Mellette records, it has
5 resulted in leakage.

6 LTCOL HENRY: Ma'am, if I could jump
7 in on that, the 513 issue as it relates to the
8 701, 703 discovery requests that have become the
9 kind of standardized request, using the language
10 from Mellette is not what RCM 701 articulates as
11 to what the specificity of the request should be.
12 Yes, you're using specific language from a case,
13 but discovery and production is based around the
14 facts of this case.

15 So, with specificity, where are these
16 records that you believe exist? What do these
17 records show? And even a general proposition,
18 why are they relevant and necessary to your
19 defense of this client in this case? And that's
20 the difference between a stock general request
21 under 701, which the case law might call a
22 fishing expedition, and an actual request that

1 says under the ROI in the interview of the
2 victim, the victim articulated that she was on
3 medication.

4 We're unsure what that medication is,
5 but it makes us believe that there is a treatment
6 record, or medication at a military treatment
7 facility somewhere on base. That actually points
8 us in a direction that if we were under 701, go
9 get that. And so, that's the difference between
10 what a specified request is under the rule, and
11 simply pulling words from a case saying I
12 generally want these in all cases.

13 I think that's a nuance but important
14 distinction when we're talking about what a
15 request looks like, and what we can answer.
16 Because to all of my colleagues' points, our
17 answer shouldn't also just be denied. I like to
18 answer with questions when they're unspecific.
19 You asked for these things, do you believe they
20 exist somewhere?

21 Is there a place in which you believe
22 I should go look for them? Is there a relevance

1 to this and that? And by asking those questions,
2 we've built the record, so when we get in that
3 39(a) session in front of the judge, we can put
4 evidence in front of the military judge that
5 says, We've tried to ask for this specificity,
6 and we haven't yet been provided it.

7 There's no requirement on the defense
8 to answer my questions, and I get that, and I
9 rarely get answers. But when I do, it's helpful,
10 and when I don't, it's also helpful because we
11 can go in front of the military judge and say,
12 Your Honor, sir/ma'am, outside of your courtroom,
13 we're asking/we're talking/we're trying to work
14 through these things.

15 It's now come to a decision point for
16 you, and that's where we're at the point of the
17 specificity of the request becomes important for
18 us under 701. I do think I had the privilege to
19 sit on a joint subcommittee panel on 513, and one
20 of the requests -- and we can talk more about
21 expanding the privilege, that was not the
22 direction we went -- but with 701, the importance

1 is actually pooling these things in a statutory
2 stance to take them out of 701, specifically.

3 And we've already done that in other
4 instances, so RCM 102 talks about how these rules
5 should be read for fairness and simplicity, to be
6 read together. I use the word harmony, it's not
7 in there, but that's what it feels like a lot of
8 times. And if we're reading it that way, and I
9 wrote it down so I wouldn't forget it, RCM
10 703(g)(3)(C)(ii) talks about the confidential
11 records when you're going to subpoena those of a
12 victim, the victim has a right to notice.

13 The victim has a right to be heard,
14 and generally if it's denied, then that goes in
15 front of a military judge. By taking these
16 discovery obligations of going out and gathering
17 those information, and moving them to 703, it
18 could curtail a lot of this frustration and over
19 disclosure, because we can now address what kind
20 of orders a military judge -- we would recommend
21 to them.

22 And how those medical treatment

1 facilities could be providing information in
2 discovery outside of simply turning over records.
3 Because it's the communications that are
4 privileged, the records are not. And I
5 understand that's the Florida statute that was
6 discussed earlier. The records are kind of
7 inconsequential.

8 Discovery is about information so that
9 other questions can be asked, and I think that's
10 an important piece to remember. I apologize, not
11 surprising anyone here, I talk a lot. So, I
12 apologize, thank you, ma'am.

13 MS. LONG: Hi, thank you for being
14 here. And I don't want to mischaracterize the
15 defense, but when I was listening to them, it
16 seemed suggested to me that maybe -- I think
17 maybe their function as zealous representation --
18 they weren't really speaking to that as much, and
19 sort of speaking to truth seeking.

20 And when I was listening to them, it
21 seemed like there was an implication that the
22 trial counsel, if you had information that was

1 germane to the truth, that you may not readily
2 give that over in discovery if there wasn't this
3 decision in Mellette. And I don't know, and
4 maybe I mischaracterized that -- I don't know
5 that I agreed with that.

6 So, I wanted to give you an
7 opportunity to talk about maybe what your process
8 is when you come across information in your
9 investigation that you believe could be
10 privileged, it's relevant to mental health, how
11 you dealt with that pre-Mellette, in terms of
12 trying to balance the privacy interests, and
13 trying to adhere to due process. What were you
14 doing, and how -- yeah, what were you doing, I
15 guess?

16 CAPT STORMER: Thanks, ma'am. I guess
17 what I would say first is what exactly is the
18 issue we're talking about with mental health
19 records? Because I think the first step as a
20 prosecutor is to realize it's not our privilege,
21 it's the victim's privilege. So, that privilege
22 applies to me as the prosecutor, as well as it

1 does to defense counsel, as it does to pretty
2 much anybody outside of that particular
3 privilege.

4 So, pre-Mellette, I would say my
5 obligation was to, if I saw within the
6 investigation there was mental health records,
7 they existed, the one thing we could do was
8 determine okay, do these records even exist?
9 That's pretty much it at that point. I am not
10 going to, and I would instruct my investigators
11 to not go grab a victim's mental health records.

12 And then whether it's a taint team or
13 not, I don't think at that point it's appropriate
14 for us, given the privilege, to go do that. I
15 think my obligation is to identify if those
16 records exist, if I think that is something that
17 could potentially be relevant to the defense.
18 Because I agree with the defense, right?

19 At the end of the day my job as a
20 prosecutor is justice, and that may mean a wide
21 range of different things; but our particular
22 team, we do not play games when it comes to

1 discovery, we turn over things that we think are
2 relevant to the preparation of the defense, and
3 we take that obligation very serious.

4 And so, I think with that in mind
5 though, we also take the privilege itself very
6 serious; and that's part of, I think, the
7 post-Mellette issue that, I think, some of my
8 colleagues have been talking about, is we're in
9 this position now where some military judges will
10 order the prosecution team to do a taint team
11 review of records.

12 So, the hospital will send us 500-600
13 pages of records, and we'll have a taint team
14 review that, identify materials that may or may
15 not be privileged, and then it comes back to us.
16 And I would argue even that is maybe infringing
17 on what the whole purpose of the privilege is.
18 Because now we have another subgroup of people
19 who have reviewed that record, they're part of
20 the prosecution team.

21 And while we have not reviewed it yet,
22 that's just another person that's looked at these

1 records, and it kind of goes against what the
2 whole point of the privilege is. And so, that
3 has been another issue, I guess, post-Mellette.
4 And so again, part of, I guess, my response to
5 that is I would agree part of discovery sometimes
6 is not always say getting the material.

7 But letting the defense know we know
8 this material is out there, we don't believe it's
9 discoverable, but we want you to know that this
10 issue exists so that you can raise it with the
11 military judge and we can litigate this issue.
12 Because I also agree that the correct issue is
13 not to just stick our head in the sand and not do
14 that, that is not okay either. And so, I think
15 that would be my answer to your question.

16 MAJ BROWN: From the Air Force's
17 perspective, I think there was a question earlier
18 about what deadlines we have for our Brady Giglio
19 obligations. Our practice in the Air Force is
20 that as soon as we learn of something that is
21 relevant to defense preparation, a germane fact
22 as you mentioned, we are drafting that Brady

1 notice and we're sending it to defense counsel
2 right away to allow them to factor that into
3 their preparation.

4 And so, as far as, certainly defense
5 has a truth seeking function, and so does the
6 government, so does OCC, and so we certainly take
7 that obligation very seriously. With respect to
8 what we would do if Mellette was not decided, or
9 if it was overturned, or however it may be, the
10 way this practically works out is we are
11 interviewing our witnesses, follow up interviews
12 with the victim, we're getting ready for notices,
13 motions, things of that nature.

14 If we come across a portion of the
15 interview where there is a discussion of a
16 condition, or a medication, or another witness
17 brings it up, that's being turned over to defense
18 because it bears on credibility. So, I'm not as
19 concerned that without Mellette that this
20 information would never make it to defense.

21 I think certainly as the defense
22 counsel spoke about, there's situations where

1 that could happen, and it's certainly something
2 that -- it's a great thing that they were able to
3 ferret that out before trial to have a good
4 result for their client, but there are other
5 protections already within our rules, within our
6 case law to allow us to -- that obligate us to
7 turn that over, to ferret that out and turn that
8 over. So, that's our practice, at least in the
9 Air Force, is right away we turn that over.

10 MAJ ALTIMAS: Ma'am, I would say in
11 listening to the SVCs and defense, I think for
12 me, pre and post-Mellette, was communication with
13 the victim. I think there should be a constant
14 communication, and letting them know
15 expectations. Like if there's something in the
16 case file that is alerting me to either a
17 diagnosis, or prescriptions, pre or
18 post-Mellette, that's going to anticipate some
19 litigation.

20 That's going to come either under the
21 513 pre, or under potential 701, 703. So, I
22 think it's the constant communication. I know

1 that the SVCs raised some concerns if they
2 weren't represented by someone, and that is
3 direct communication by me to that victim to let
4 them know this is what's happening, these are
5 your rights under 513. Even if it's
6 post-Mellette, and it doesn't qualify under that,
7 I still explain it to them, and how we intend on
8 fighting for that.

9 I think there was some concern that
10 trial counsel is just giving over everything
11 because Mellette says we have to. I don't think
12 that's my experience. That's not how I practice.
13 And I think even if I'm arguing under a 703 and
14 701, if the judge rules against me in a motion to
15 compel, we're asking for that very tight order.

16 We're asking for an in-camera review
17 by that judge to do it; and if there's an SVC, or
18 the victim is present, they're seeing that we are
19 appreciating their right, we respect their right,
20 respect their privileges. But I want to let them
21 know too that sometimes these things can come out
22 in trial, and give it to them early, rather than

1 waiting until we're a week before, and letting
2 them know that the defense has all these things.
3 And so, I think for me, if I notice anything,
4 it's direct communication, and directly over to
5 defense to allow them to file the motion that
6 they think they need to based on whatever we've
7 given them.

8 LTCOL HENRY: The connection between
9 law enforcement and the medical facilities is
10 also critically important in this situation. One
11 of, I think, the best parts of the OSTC mission
12 statement is to be involved in the investigation
13 and prosecution. Because being on the ground
14 early, we can get ahead of some of these issues;
15 specifically, things like this, where there are
16 records where it is a -- I don't want to say too
17 easy.

18 But it seems to be an easy
19 administrative step on the process of an
20 investigation for an agent to walk into a medical
21 treatment facility and say I am investigating a
22 crime, and I need the records of this individual.

1 And that's where 600 pages come from, with no
2 vetting, with no judge, with no motion, with no
3 request.

4 It's just that's now part of the ROI;
5 and that was concerning to me in 2016, long
6 before Mellette, when I said if you have to do
7 that, please put them in a manila envelope, sign
8 your name across the top, and put it in your IA
9 that you didn't review them. It's one step
10 better than, Well, we've got them, so we'll have
11 to go through them.

12 But we're making, I think much better
13 strides now. In that panel, the subcommittee, we
14 also talked with the Defense Health Agency. And
15 that was a big part of the doctors, and the
16 custodians of records from the health agency,
17 understanding as judges we can think we wrote the
18 best order with the most specific, clear, crystal
19 order, and it's going to go to somebody who is
20 not a judge, who is not a lawyer, who is going to
21 look at it and go that's a lot of legalese.

22 I have an EDI/PDI, and I have a

1 number, hit print, there you go, I'm in
2 compliance with the court order. It's another
3 reason we get 600 pages of information. So, I
4 think that all circles around to being involved
5 in the investigation. Direct communication with
6 the victims is incredibly important, but also
7 with the military treatment facilities that we're
8 walking over and saying these are the things
9 we're looking for.

10 MHS Genesis is a great thing for
11 treatment, it's not so great for litigation
12 because everything is a holistic approach. And
13 that's what I learned, and I didn't know that
14 until six months ago, and maybe that's just me.
15 But it was really difficult, because a provider
16 who you go to see in the ER needs to know if
17 you're on those medications, but that's another
18 person that has access to those records.

19 So, it becomes very convoluted in how
20 you get to a point if the word records is what
21 we're worried about, and that's why I've always
22 tried to move investigators towards information.

1 But if we can find a way for this information
2 that's necessary and relevant, not in the form of
3 "records", we may be having two wins there to
4 ensure the constitutional due process of the
5 accused.

6 But also to the greatest extent
7 possible preserving the privacy rights and
8 privacy interests of the victim moving forward.

9 MR. CASSARA: What is an EDI/PDI?

10 LTCOL HENRY: Sorry, the DOD ID
11 numbers, I couldn't tell -- I'm going to go with
12 Commander de Groot earlier, I can't remember what
13 that acronym is, but it's the number that you put
14 in -- it is an ID number, yes, sir.

15 MR. CASSARA: And what is MHS Genesis?

16 LTCOL HENRY: MHS Genesis, is that a
17 Navy, Marine Corps health system?

18 CAPT STORMER: It's the new electronic
19 for medical records that the military, I think
20 DHA does it. So, every service member has the
21 ability to access their medical record online,
22 and request appointments, and things like that.

1 LTCOL HENRY: Got it.

2 LCDR COLAW: And just go to the
3 Captain's point, Coast Guard uses it too. There
4 is absolutely a place that you can message your
5 provider, you can request specific things. And
6 we have gotten in the past, not in every case,
7 this doesn't happen every -- I don't want to make
8 the most extreme circumstances sound like the
9 norm, but where someone hits print, and there are
10 messages and notes from talking with a mental
11 health provider.

12 Or someone assisting, under the rule,
13 a mental health provider, and that comes forward
14 in the records that we receive, or frankly, they
15 go to defense counsel.

16 MR. CASSARA: So, two questions,
17 besides those two. What percentage cases would
18 you say that you are dealing with a non-MTC, or
19 not a military hospital? You've got a civilian
20 alleged victim, and part of that is what is the
21 difference in how you get those records, as
22 opposed to when you have a military victim?

1 Sorry, I'm a defense lawyer, alleged victim.

2 MAJ BROWN: Sir, I would say right
3 now, looking at the cases that I'm tracking in
4 that investigation phase, as Colonel Henry
5 mentioned, the majority of my victims are
6 civilian victims. And we're not just talking
7 sexual assault cases, we're talking about
8 domestic violence as well.

9 MR. CASSARA: Where's your base?

10 MAJ BROWN: Joint base San Antonio,
11 but I cover Global Strike, Space Force, USAFA --
12 obviously at USAFA they're military victims, but
13 sometimes not. And what we have to do, if it's
14 before preferral, we have to get a search warrant
15 with a judge. The law enforcement can try to go
16 in with a law enforcement request, and it varies.
17 Sometimes the civilian facilities say no, we're
18 not going to turn it over without a judge's
19 order.

20 And so, if we're trying to be
21 proactive during the investigative stage, and we
22 agree that those records are relevant -- and it's

1 not even just limited to mental health records,
2 honestly, it's even for domestic violence when
3 we're looking at treatment records for the
4 assault. We have to try to go in with a search
5 warrant, which delays the course of our
6 investigation.

7 If we're past that point, if we're
8 talking about mental health records that are
9 actually relevant to the case for both parties,
10 and we're trying to do that after referral, when
11 we have our assigned judge and we have scheduling
12 orders, we don't have as much control over when
13 that off base facility complies with our search
14 warrant, or subpoena, and what they require. So,
15 at least based on what I'm looking at, it's a
16 majority of my cases.

17 MAJ ALTIMAS: And my experience is
18 it's probably about 50/50, and I'm here at Fort
19 Carson. And we haven't had success with getting
20 them without a court order; and so we have
21 brought them to a judge if they're off post,
22 where they do their very best, as Colonel Henry

1 said, to make it as tight as possible, and they
2 put a deadline on it, and the records go right to
3 the military judge where they then conduct the
4 in-camera review.

5 LCDR COLAW: I concur, 50/50. So, I'm
6 on the west coast, but I handle cases out of
7 Hawaii, Alaska, and frankly the whole west of the
8 Mississippi. And I'd say it is 50/50 for where
9 the records are under 701, 703. Either we're
10 going out to a non-MTF -- I believe you described
11 it, Mr. Cassara. It's interesting for the Coast
12 Guard, sometimes we are going to a DOD facility;
13 and literally in the last six months, we've had
14 it where investigators would go, and ask, and
15 receive records probably that were too much. And
16 since then we've gone back to the same facility;
17 and then we have a JAG usually, or a civilian
18 attorney that's working for a DOD service, who
19 has then said, Understand we received your
20 request, it's going to be 10 to 12 days, and we
21 would like a court order. So, it now looks
22 almost like a de facto 703 request, and there is

1 a provision in 703 to go get records that are not
2 held by the standard -- in the possession of
3 military authorities, which I think goes to the
4 question brought up earlier a little bit.

5 I don't think we are ever sitting on
6 records -- talked about with the defense counsel,
7 I know there are cases, and I've heard of cases
8 within the Coast Guard where questions weren't
9 asked that probably should have been, or there
10 may have been records on file within the
11 possession of prosecutors that probably should
12 have led to other discovery.

13 But I think what we're talking about
14 is, and the difference is, even if it's held by a
15 military health facility, it's still not in the
16 prosecutor's possession. We may have some
17 information that is going -- but many of these
18 are civilian dependent spouse victims, especially
19 in our domestic violence cases that have a lot of
20 sexual assault intertwined in between.

21 And it takes more than scratching just
22 the service, or even asking and getting the trust

1 of our victims there, to get these records and
2 know where they are. And then we discover them
3 later on in the process, usually, is when it's
4 not going as it's planned.

5 MS. GOLDBERG: Thank you so much. I'd
6 like to go back to some of my questions to the
7 other panel, which I expect you heard. So, I'll
8 focus on, I guess two of them. I know you spoke
9 to this a little bit already, some of you. How
10 often do you ask for defendant's mental health
11 records, and why or why not?

12 And second is the question I had asked
13 the prior panel, your view of the effect on
14 likely acquittal of the victim having had a
15 pre-incident diagnosis of depression, anxiety, or
16 PTSD with or without medication? And when I
17 frame the question that way, I'm very
18 specifically excluding a diagnosis of psychosis.

19 MAJ ALTIMAS: Ma'am, I've never asked
20 for the defendant's or the accused mental health
21 records. We do a reciprocal discovery request.
22 So, if it's something that the defense intends on

1 using in court, if they are filing some sort of
2 partial mental responsibility, we would get that.
3 But I've never personally asked for them.

4 There has been instances when we've
5 gotten their medical records depending on what
6 the case was, but never mental health. And for
7 diagnoses and things like that, in my experience
8 I think very rarely are they used while in court.
9 I think there's some cross examining, some
10 questions of your victim that you can prep with
11 for how they would answer those perception
12 questions or poor memory kind of questions.

13 But I've not really seen it where an
14 expert for the defense gets up and talks about
15 this medication therefore means that they can't
16 know what they are testifying to. So, I can't
17 say about acquittals, but I don't -- when they
18 have come up, there are a few questions on cross
19 examination of the alleged victim, but I don't
20 see it getting much farther past that, where I
21 don't think there's a lot of results coming from
22 that in terms of whether or not it's guilt or not

1 guilty.

2 MS. GOLDBERG: Thank you. And can I
3 just ask for clarification, on the response
4 related to the defendant's mental health records;
5 so is there reason you don't -- if you know or
6 anticipate that the defendant might testify, the
7 reason you wouldn't ask for those records to the
8 extent they might be used to address the alleged,
9 or the accused's sort of memory of the incident,
10 or recounting of facts related to the incident?

11 MAJ ALTIMAS: I guess my question
12 would be are we asking the defense for them?

13 MS. GOLDBERG: That's what I was
14 asking you, sorry. If not, why not, given that
15 they might arguably bear on the person's ability
16 to recount facts related to what happened, sorry.

17 MAJ ALTIMAS: As a former defense
18 counsel, unless I intend on using it in trial
19 then I don't have to necessarily give over
20 evidence that I have, and I think if they were
21 making a sort of partial mental responsibility,
22 that's early, and that's one of the defense they

1 would have to provide notice of, which we would
2 get certain things based on that.

3 And also I have no idea if they're
4 going to testify, to ask defense for it. So, I
5 think if he testified, and he talked about his
6 perception, or things -- or something was raised
7 that they're using something we don't have in
8 their case-in-chief, then there would be an
9 obligation for them to pass it over. But prior
10 to that, they don't have an obligation to give us
11 any information.

12 CAPT STORMER: And I guess to comment
13 on that further, a lot of the accused are in the
14 military, so we have access to those records.
15 So, I think the things like the Mellette
16 material, we have access to that, and we
17 certainly could do that in a scenario where the
18 defendant -- or the accused takes the stand, and
19 it's a perception issue.

20 And if we've looked at the ROI, and
21 we've seen -- say he or she's given a statement,
22 or we see there's been an intoxication level,

1 those are things we can get from the medical
2 record. And I've seen issues in the past where
3 again, this is several years ago, and I'm dating
4 myself, where investigators would go and grab an
5 accused mental health records, and now we're back
6 into the 513 privilege.

7 And the constitutional exception
8 that's not there but still applies to court, that
9 doesn't necessarily to the accused records, so
10 the exception to the mental health 513 is
11 actually even stricter for the accused mental
12 health record. And so, as a prosecutor, I mean,
13 unless I have a specific reason to go into mental
14 health records for mental responsibility, even
15 then I'm probably still setting up initially some
16 kind of taint team to analyze that.

17 But the Mellette material, perception
18 things, those are things that I typically could
19 get from an accused medical record, which since
20 I'm in the government, they're government
21 records, I can access those. But I agree, I
22 would also -- and I tell my special trial counsel

1 to file the reciprocal discovery obligations.

2 And I would say the general practice
3 in the military is even if we try to force the
4 issue with a military judge, our judges for the
5 most part don't make defense turn over anything
6 until the last minute. Now, they'll give us
7 time, right? So, experts is another issue
8 sometimes that comes up, and the new change to
9 the rule that enables them to give us at least a
10 summary or synopsis of expected testimony.

11 But I've even had judges say, We will
12 make the defense give you an expected synopsis or
13 testimony should that person be a witness, but
14 you can't interview that person before trial.
15 And so, there is definitely a limited scope, I
16 think, in our system, as far as what defense has
17 to give us. So, that is I would say the
18 limitation.

19 And then to the second part of your
20 question, I would say the diagnosis itself, and
21 the medication itself in my opinion -- and I was
22 a judge for four years before kind of coming into

1 this position as well -- I don't think that in
2 and of itself, in my opinion, results in either
3 way, it goes back to perception.

4 And so, if you've got a witness that
5 has been drinking, which we see a lot, and then
6 you have medication that maybe enhances the
7 ability to perceive, I think that's when it comes
8 into play. And then there are situations though,
9 where -- and there's also sometimes defense will
10 bring up, let's say a defense of confabulation,
11 that sometimes comes into play, and that may
12 bring up -- I haven't personally seen those
13 defense work very often, I just haven't.

14 And so, I don't know how effective
15 those defenses are, but that's another aspect
16 that that would come up. But I think when we're
17 talking about medication, it's really about is
18 there say alcohol, or other kind of drugs
19 involved, and did that effect that victim in her
20 capacity or his capacity as a witness, the
21 ability to perceive.

22 And then the other inconsistencies

1 that we see in that testimony. And so I think
2 that's the context where I've seen it affect the
3 ultimate say acquittal or guilt in a case.

4 MS. GOLDBERG: So, thank you for that.
5 Just so I understand, if my limited medical
6 knowledge is right, somebody taking an
7 anti-depressant, the defense could bring in an
8 expert that says there's an interaction between
9 this anti-depressant and alcohol, your thought is
10 that -- and the alleged victim was drinking, your
11 thought is that that could be an effective
12 argument by the defense, or your experience is
13 that?

14 CAPT STORMER: I think it is, and it
15 can be very effective. And going back -- I think
16 the defense counsel comment on this -- I think
17 most of our cases, if there's alcohol or any kind
18 of medication involved, it's almost standards now
19 that both sides either have a forensic
20 toxicologist, a forensic psychiatrist; it's
21 pretty standard in most of our cases.

22 And I would say from being in the

1 government, and having a military judge, and I
2 was the CO of a defense command before this job,
3 and all of my jobs, it's pretty standard that
4 everybody is going to have that kind of expert.
5 And in those cases, I would say yes, the expert
6 will get up, and he or she will talk about the
7 effects of memory, and alcohol, and this
8 particular medication, and how it all affects
9 this persons' ability to perceive what actually
10 happens.

11 And then when you combine that with
12 possible inconsistent statements the defense will
13 bring out on cross examination, it just leads to
14 their argument in the end.

15 LTCOL HENRY: I would just say that it
16 depends, as it should, I think, is the facts of
17 each individual case as well. And I know there's
18 a long discussion about this, but those experts -
19 - the government's job is to hold the defense to
20 theirs when asking for that witness, for the
21 simple fact that generally we don't have -- I
22 don't know if the government always has a

1 forensic toxicologist or psychologist to start
2 with.

3 Because it's usually in response to a
4 defense request to address something like this,
5 and the government's point of view should, I
6 guess, I think it's recently been, we need to
7 hold the defense to the standard. So, the judge
8 holds the standard of it depends on the facts of
9 this case.

10 The fact that someone could be
11 affected by drinking and having this medication
12 is part of it, that is the major premise. The
13 minor premise of this is what I see in this
14 particular case is something that I think is also
15 important. So, that's where the medication and
16 the diagnosis don't necessarily lead directly to
17 an expert, but it gives the information to be
18 able to foster that, or flesh that out so to
19 speak, through litigation on the issue.

20 Has the burden been met by whatever
21 side is asking for that expert? And that's why
22 the facts are so critically important; as well

1 as, going back to the investigation, is all the
2 things that aren't the medication, and that
3 aren't the perception, because in those cases the
4 other forensic evidence is incredibly important.
5 Getting to those witnesses early on that may have
6 been bystanders -- everybody has a cell phone,
7 right?

8 So, even if it's a five second clip
9 that somebody might think is inconsequential, it
10 might give us a glimpse into that night very
11 shortly before or very shortly after. That goes
12 back to if the argument is going to be they were
13 consenting, but they don't remember they were
14 consenting, all the surrounding circumstances are
15 just as important as that medication.

16 So, I think to your point, sir, it's
17 apt that it's not the medication or the diagnosis
18 that is the potential link to the acquittal, it's
19 the application to the other surrounding facts.
20 And the better the investigation, the more that
21 will either impact it or not, because there are
22 other facts supporting it.

1 MAJ BROWN: Just one specific example
2 to answer your second question. I did have a
3 case as a prosecutor where the victim had
4 borderline personality disorder without
5 psychosis, and essentially the facts of the case
6 were, there were -- she couldn't remember how she
7 got from being completely dressed, not on the
8 bed, to undressed on the bed, and then the
9 assault occurring.

10 And so, part of the defense theory was
11 because of the symptoms of her condition, there
12 is a tendency to kind of recreate what could have
13 happened in that moment. And so, that was
14 reasonable doubt for the defense to argue that in
15 that moment she certainly could have consented,
16 and she's kind of rewriting her memories, and
17 that was an acquittal.

18 So, that's one example of how that was
19 a pre-assault diagnosis that came into play
20 during the trial, and ultimately resulted in an
21 acquittal.

22 LCDR COLAW: Very similar, first case

1 I ever handled was a confabulation case with
2 depression, medication, and alcohol. And the
3 defense theory was that this victim was
4 confabulating a previous sex assault with the
5 current case, it was used very effectively with
6 the defense expert, and it ended up in acquittal.

7 To your very first question about
8 seeking mental health records of the accused,
9 there is -- I have one time used MRE 513(d)(7),
10 one of the exceptions, and that is when an
11 accused offers statements or other evidence
12 concerning his mental health condition in
13 defense, extenuation, or mitigation. That case
14 did not get to defense extenuation or mitigation
15 because it was an acquittal.

16 So, we did not get the records. The
17 judge though, did say that they would rule on it
18 when it came to sentencing; and I expect other
19 judges would do the same, at least in the Coast
20 Guard.

21 LTCOL HENRY: Reciprocal discovery is
22 a big piece of that, and it's a whole separate

1 discussion that in the East we're fighting pretty
2 heavily. Federal Rule of Criminal Procedure 16
3 has awesome language into reciprocal discovery,
4 especially when it comes to experts. Our
5 reciprocal discovery rule doesn't go quite as
6 far, but we're trying to get it written into a
7 lot of TMOs for deadlines to push that
8 information, so that we aren't creating last
9 minute continuances, or the government being
10 ambushed.

11 We're sitting there saying this expert
12 was here, and they decided to call them, as the
13 defense can do. And then the government can
14 either stand up and ask for a couple weeks
15 continuance, which doesn't seem to serve most
16 people, or the efficient administration of
17 justice -- or we can go with what we've been
18 trying to be prepared for, what we think the
19 defense might be.

20 I think the federal rules, which are
21 military rules of evidence and procedure we adopt
22 in large part from, are very clear that the judge

1 should set a deadline for that expected testimony
2 of any expert, whether they're going to testify
3 or not. If you think you might call them, you
4 provide that reciprocal discovery up front, and
5 that way both sides are ready to meet it.

6 Varied success, but we will continue
7 to fight the fight. Because sometimes you have
8 to lose a few battles to win the war on what's
9 important for reciprocal discovery and other
10 rules, and that's just making sure that we're
11 creating the record in each individual case. So,
12 that goes to, I think, all of those records, and
13 your question specifically about the accused
14 records.

15 I would personally not want to go just
16 get that information. I would want to request it
17 through the defense, and have them be able to
18 make an argument to the military judge. And make
19 the argument, because I think to Lieutenant
20 Colonel Carver's parity point, I know that was
21 about people, but I think about the process is
22 important as well.

1 Is that if we're going to expect them
2 to do that for the victims records on 703, then
3 we're going to do that on the government's side;
4 because we're going to articulate to the military
5 judge why this is relevant, why this is necessary
6 -- and it may or may not meet, again, with varied
7 success, we'll see. But if we were going to do
8 that, I think that would be the right way to go,
9 just to set that parity bar as well.

10 MR. KRAMER: Thank you all for coming
11 here, appreciate it. You can go -- I have a
12 bunch of questions, I'll go until somebody else
13 wants one, so why don't you go ahead?

14 MS. GARVIN: So, I'm pivoting to the
15 digital evidence, because one of you mentioned
16 actually the five second recording on a phone
17 potentially; so that made my brain jump issues,
18 which maybe was your goal. But I am -- could you
19 all hear me as I started? Okay, so for
20 background, I am a victims counsel in the
21 civilian world, so that's a little contextual
22 moment.

1 And if someone is asking for the
2 victim's cell phone, we've heard from victim
3 counsel earlier, all their concerns, and I would
4 say those are completely the same concerns in the
5 civilian world, with regard to turning over an
6 entire cell phone, as well as the technological
7 complications of pulling specific data.

8 And so, I'm just curious, your broad
9 experience with that, and your thoughts on how it
10 should be approached from an investigative
11 standpoint.

12 MAJ ALTIMAS: Ma'am, we talk about
13 this a lot, and I don't have what I think would
14 be the perfect answer, because I understand I
15 wouldn't want someone going through my entire
16 phone. And I think -- I get that, but I also
17 have seen where we have the screen shots, which
18 is the best that we can do. And even if we get
19 the total records that says a text was here to
20 here, it doesn't show that that's what the text
21 message was, or what the words were.

22 And so, I don't know what the correct

1 answer is. We've argued it goes to weight, not
2 admissibility. We've argued that we have the
3 screen shots. This is what he said, and the
4 defense argues the alternative, right? And so, I
5 do think in the recent years it's been a lot more
6 litigation of the victim's phone, the victim's
7 phone, the victim's phone.

8 And I don't know what the right answer
9 is. Hopefully technology can catch up, and we can
10 just get that little bit of detail. Or CID
11 pulling the whole thing, and only providing --
12 because we do that with the accused's phone,
13 right? If we have a search authorization, all
14 we're allowed to look at is what the magistrate
15 authorization says we can look at.

16 And so I think that could be -- we've
17 argued that in courts, but because the government
18 has the entire phone, defense is able to look
19 through it. And I've spent many motion hearings
20 arguing about memes that she saved, and how this
21 is what her state of mind is. And it doesn't win,
22 but it is a lot of time, and the victims feel,

1 even more than they already do, that it's them
2 against the accused, right?

3 And so, I don't know what the right
4 answer is, but I understand all sides, and I
5 think we're doing -- I'm fighting the good fight,
6 that this goes to weight, not admissibility, and
7 we can get it in. But I think in our most recent
8 case, defense was able to present evidence of
9 spoofing. Not necessarily theirs, but that you
10 can spoof a message, and they showed how you did
11 it, and that was a not guilty on that offense.

12 And so, I do think that that can be
13 effective, but I don't know that I would -- I'm
14 not asking for the victim's phone, because I
15 understand if they have concerns why those
16 concerns exist.

17 MAJ BROWN: So, I'm by no means a
18 digital forensic expert, but I had observed one
19 of our investigative agents pull a phone for a
20 client of mine when I was a defense counsel, and
21 I think that the technology is evolving where you
22 can be a little bit more specific about what's

1 being pulled, for instance just pulling messages,
2 and not the entire photo gallery, things of that
3 nature.

4 And so, I'm confident that maybe as
5 things progress, maybe this isn't a huge issue.
6 But one thing I did want to highlight that was
7 brought up in one of the earlier sessions is,
8 Yes, absolutely, if we're talking about
9 conversations between the accused and the victim,
10 certainly we can seize the accused's phone. But
11 the real world issue with that is that we can't
12 always unlock the accused's phone.

13 Even our best forensics experts,
14 depending on whether there's a four digit pass
15 code, or a six digit pass code, that could take
16 years. And so, it is more efficient from an
17 investigative and prosecutive standpoint to get
18 the victim's consent to take screen shots, to do
19 it that way. Or if we're going to have this
20 argument about meta data of the messages, to
21 potentially try to do a limited pull.

22 I haven't personally had extensive

1 arguments with defense counsel where they are
2 trying to get the entire rip of a victim's phone,
3 probably because it's really not common practice
4 for our Air Force investigators to do it.
5 There's very, very limited cases where I've even
6 heard of that happening.

7 But logistically speaking, we just
8 can't get that same guarantee that we're going to
9 get that evidence from the accused's phone. So,
10 I think that's why it's turning towards if we can
11 get it from the victim, and ensure that we have
12 it, and maybe we can talk with them about getting
13 meta data.

14 Like one thing is swiping it over,
15 looking at the times; there's things that we can
16 do to potentially make the screen shots more
17 robust. That has been the way to go in our
18 investigative process so far.

19 LTCOL HENRY: I would never want it
20 done in my investigations. I think the screen
21 shots -- I've seen the videos where you scroll
22 through the times, go through with the victim,

1 take the time with the VLC, with the victim
2 advocates there, to get the information that they
3 believe is relevant and necessary to the
4 investigation, capture that, save it, prepare it
5 for discovery, use it for the charging process.

6 But if an agent comes to me and asks
7 should we dump the phone of the victim, you
8 better have a really good reason why, because my
9 recommendation is going to be no. Because that's
10 just, there's no reason why that stuff is
11 relevant or necessary. And this is great, with
12 the VLC, you can have the conversation about the
13 duty to preserve that evidence, right?

14 You've said this is what's relevant
15 and necessary, there's likely going to be a
16 question, is there more things out there? So,
17 there is a preservation issue there, and that's
18 an inherited risk in that situation. If
19 something disappears, or the phone is broken for
20 whatever reasons.

21 But it opens up again, it goes back to
22 the discovery piece, is that if we are in

1 possession, the prosecution arm of the military
2 is in possession of that entirety of the phone, I
3 can make the relevance and necessity argument
4 with the military judge, and the whole phone is
5 going to the defense almost 100 times out of 100,
6 just that's the practicality of it.

7 So, if we're gathering the evidence we
8 need, I think that's sufficient. But again,
9 that's the eastern region of the Marine Corps
10 OSTC, I won't speak for anyone else. But that's
11 my preference, is to capture that. And a lot of
12 times I just think it's a time issue, right?

13 It's easy to put it on during the interview, and
14 you walk away with the forensic dump of a phone.

15 That's a lot easier than taking the
16 time to make sure the camera's focused, get each
17 text, make sure that the text before it starts in
18 the middle of the text below it to ensure that we
19 capture all of it, because the challenge is going
20 to be where has that information gone? There's a
21 gap here, and I can see there's a text bubble. I
22 don't know if that's this text bubble or that

1 text bubble. None of it should come in, your
2 Honor.

3 That's the argument we're facing, so
4 it takes a lot of time, meticulous going through
5 that. And I understand the agents are busy,
6 we're busy being at the interviews, but that's
7 the way I think to best preserve that evidence
8 without unduly gathering so much stuff. And
9 again, it goes back to the parity, the
10 non-fishing expedition.

11 MR. KRAMER: So, my first question
12 relates to the evidence -- thank you all for
13 being here by the way, appreciate it very much.
14 This morning we heard from special victims
15 counsel that both the defense and the prosecution
16 were -- I think the words used was cavalier
17 towards the Mellette evidence, and that you
18 particularly did not ask the special victims
19 counsel if there was any such evidence,
20 purposefully, evidently.

21 It doesn't sound like you agree with
22 that to me, but the question is do you?

1 MAJ BROWN: I'll start. I certainly
2 do not agree with that position, and I think that
3 there's two different scenarios here, and I
4 mentioned this when I commented earlier. There's
5 the scenario where the request is being made, and
6 there is not even an iota of evidence from the
7 ROI that there is a mental health condition even
8 at play here.

9 And we're getting that request, and
10 I'm saying I'm not asking the victim's counsel in
11 that case about it. Because there's no reason
12 to. There's a different case where it's clear
13 that there is a condition, or medications that
14 are at play based on the investigation, and then
15 absolutely I'm asking that question.

16 So, I think we were talking about it
17 earlier, there was a comparison made to Stellato.
18 This is a completely different situation than
19 Stellato, and in that case the prosecutors knew
20 that a box existed, that there is relevant
21 evidence in that box, and they chose not to look
22 at it. When we're talking about Mellette

1 records, when we're talking about 513, in the
2 first scenario that I mentioned, we don't even
3 know if there's a box.

4 And if there is a box, we don't know
5 what's in it. And if we don't know what's in it,
6 then defense certainly can't meet their showing
7 under 701 or 703 for us to either have it and go
8 get it, or go get it. And so our approach in the
9 Air Force is certainly not cavalier. It's a
10 balance of ensuring that we are not
11 disenfranchising our victims of this process, but
12 also honoring our discovery obligations.

13 And so, in any instance where I'm not
14 asking the victim's counsel, it's because I have
15 no cause to. And I'm not just going to ask just
16 because a request is made.

17 CAPT STORMER: And just to highlight,
18 I would concur with Major Brown. I would say in
19 the Navy, the other piece to that is, even in the
20 cases where we determine they're both, there's
21 very likely Mellette material.

22 And when we get the record, I -- we

1 don't look at them. We actually give VLC an
2 opportunity to even look at those records first.

3 So that particular VLC in the Navy, he
4 or she will have an opportunity to review their
5 client's records that the hospital has sent us.
6 And then, they get an opportunity to exert their
7 513 privilege over something.

8 And then, ultimately, then we actually
9 even have a taint team. So there's multiple
10 layers within our current system at OSTC West.

11 And then, we -- how this is played out
12 in court, is we then go to the judge. And we
13 proposition to the judge that we have a taint
14 team.

15 The taint team is identified,
16 diagnosis and medication, we prosecutors sitting
17 here in court haven't reviewed that because the
18 VLC have exerted their 513 client's privilege
19 over that. We're asking the judge to make a
20 ruling on this before we even look at this
21 material. So I think to me that's been a built
22 in filter to make sure that we're not being

1 cavalier. I would strongly, strongly disagree
2 with that sentiment from the Navy. That's just
3 not how we're operating. So that's how we've
4 kind of built in the system on top of Mellette is
5 we still give the VLC that opportunity to review
6 their client's records and make their assertions
7 to the court. And then the court will make its
8 ruling, and then we have the records and then we
9 can easily then turn over the stuff that the
10 court tells us to do without hopefully slowing
11 down the process, and that's why we try to build
12 in 39(a) sessions well ahead of time to handle
13 these initial issues up-front if we deem they're
14 going to be one.

15 COMMANDER COLAW: Yes, and just to
16 echo I think what Major Brown and Captain Stormer
17 said, I think in our position too and when I talk
18 about the Coast Guard, if there is reason,
19 questions have been asked by investigators or
20 even frankly other witnesses or a victim that has
21 brought that up, we will handle that differently
22 than the rote kind of standardized request for

1 Mellete like records that's in a discovery
2 request, that doesn't really have any factual
3 basis we believe to go look for those records.
4 Even in the cases where that's on there, I have
5 utilized in the past have gone to SVC and the
6 victim and said, you know, "Here's the discovery
7 request from defense counsel," "are you going to
8 search your privilege first off?", "Yes," "Do we
9 have anything to even talk about?". When they say
10 no, I've done a declaration in the past, just a
11 quick one, for the victim to then give it to
12 defense and be like, "Do you need anything else
13 here?". So that's something else along with the
14 steps that have already been talked about.

15 COLONEL HENRY: I agree I would
16 strongly disagree with the cavalier -- OSTC why
17 in the Marine Corps I can speak for, is the
18 importance of communicating with the victim, both
19 represented and unrepresented, throughout the
20 process from the original 2701, the initial
21 interactions, all the way through the steps that
22 are not included in those but are -- but our

1 office does where we're going to talk to the
2 victim before we prefer charges. Because for me
3 when I was a prosecutor before, before we were in
4 the OSTC, that's important, that's a big step.
5 When we prefer charges a whole bunch of discovery
6 happens, a whole bunch of rights upon the defense
7 start to kick in when they can start asking for
8 things, and so that's incredibly important. I
9 think it also, sir, goes to the TMOs. I
10 wholeheartedly agree with Lieutenant Colonel
11 Carver and the wonderful prosecutors he was
12 talking about that. I had the option to work
13 with him in the past, but one of the things that--
14 --

15 MR. KRAMER: I think you said
16 fantastic.

17 COLONEL HENRY: I appreciate that you
18 captured that, sir. The biggest piece when I was
19 a military judge at Lejeune, I implemented
20 because I was sick of getting 701 disclosures
21 that led to continuance requests the week before
22 trial. So I implemented a discovery 39(a)'s in

1 our TMO. I think our standard TMO is a bit
2 antiquated, thinking that we can handle
3 everything in a 24 hour motion session, from
4 discovery to expert witnesses in 139(a). It's
5 just -- it's impossible given the complexity and
6 it may not have been possible in the past, but we
7 made it work because that's what we do. We
8 implemented discovery 39(a) two weeks after
9 arraignment, which meant discovery requests were
10 due, answers were due, motions to be filed about
11 specific things, not just generalized things that
12 they wanted as a category. And then we would
13 litigate that in front of the military judge.
14 The foot note on that TMO articulated the only
15 way that discovery 39(a) session could be
16 cancelled is if both the trial and the defense
17 came to the military judge in writing and
18 articulated they were in possession of all the
19 discovery at that point in time. You can imagine
20 how many times that took place, two weeks after
21 arraignment. So we spent a lot of time. And it
22 goes back to the question earlier about the

1 federal rule of criminal procedure that talks
2 about the sit down between the parties to ensure
3 discovery, this was the only way that I could
4 figure out making it happen. So we implemented
5 that, we've started to ask for TMOs in the East,
6 we have four or five 39(a) built in. One, yes,
7 right before trial for motions in limine but
8 pushing all of -- if we have discovery way up
9 front, we can talk about expert consultation and
10 we can talk about expert witnesses, because
11 that's where a lot of the delays anecdotally have
12 been built in, is when an expert witness has been
13 ordered but now an expert witness that provided
14 the consultation isn't available for six months
15 because they have six months of a calendar delay.
16 That's an incredibly big built in delay. So if we
17 can talk about when an expert needs to be
18 articulated and when an expert witness can be
19 litigated, the earlier on in the process, the
20 better. We can deal with evidentiary stuff as we
21 move and progress towards trial. So to that TMO
22 piece, is -- I think that's an important piece

1 for all of us moving forward is ensuring that we
2 get on the record. Because we can always cancel
3 a 39(a).

4 But to the defense's point about the
5 parity in counsel, scheduling is difficult,
6 because the defense anecdotally has started
7 detailing two counsel to each case. And you have
8 two counsel on the government side.

9 And you have a victim's legal counsel.
10 And in cases where you have multiple victims, you
11 have multiple victims' legal counsel from across
12 the globe.

13 And so those 39(a) dates being on a
14 TMO, are incredibly important. So everybody
15 knows when this is ordered, either I'm going to
16 need to bring up this date with the military
17 judge now; or if I schedule something later on, I
18 need to make sure they're aware that I have to be
19 in this location.

20 So that's one of those important
21 pieces of getting those on the record, because
22 you can always cancel them. But if you have them

1 early on, I think, it facilitates a lot of the
2 discussions that we've talked about moving
3 forward.

4 MAJ BROWN: Something different that
5 the Air Force does, we have our judges who issue
6 the initial scheduling order with much of the
7 deadlines. And then, they require joint status
8 updates.

9 So depending on how far out the trial
10 date is, that they're either biweekly or weekly.
11 And there's certain topics that we're required to
12 report back on.

13 Discovery is always number one. And
14 so that requires us as trial counsel and defense
15 counsel to talk on a weekly basis about the
16 status of discovery.

17 And if there's any issues, to report
18 it to the judge and so the judge then has some
19 situational awareness of what's going on and if
20 there's anything that needs to be resolved.

21 And we do this communication via
22 email. And the way that we capture that later

1 for the record, is once we do make it to trial,
2 if there is -- the judge will bring up that we've
3 had those communications and ask if counsel wants
4 to put any of those communications on the record
5 during the 39(a).

6 And sometimes we do, sometimes we
7 don't. And so that's a more, I guess, less
8 formal, less restrictive on your schedule way for
9 us to ensure that we are all on the same page
10 when it comes to all the judges filing deadlines
11 include discovery, expert requests, witness
12 issues and things of that nature.

13 MS. GARVIN: So semi-related, but also
14 not at all, so hand -- you were just talking
15 about email practice.

16 And we were hearing earlier from the
17 victim counsel, about emails and pleadings.
18 Being attached to pleadings and that there isn't
19 a docket that they can readily access to know all
20 the motion practice that's happening.

21 So my question to you is, what -- what
22 don't you copy as the DC and VLC on, and why?

1 MAJ ALTIMAS: So for in my experience,
2 we don't put them on emails to the Court. But I
3 send separate emails letting them know what has
4 been filed, particularly and obviously under a
5 412 or 513.

6 Again, but this goes back to my
7 communication, all of our SVCs most of the time
8 are in the same office as I am and they're
9 constantly up and I'm constantly down talking to
10 them, letting them know what's been filed, what
11 we filed to see if they want to add anything, or
12 their position is different.

13 We'll talk to them about what's been
14 filed that we don't think necessarily triggers
15 any of their client's rights, but give them the
16 opportunity to know it.

17 So I think it just goes to the
18 communication. But we don't have them on the
19 emails to the court. That is only court
20 reporters, defense counsel, government counsel.

21 But then, that's on me. That's on my
22 job. And at least at Fort Carson, what we do is

1 we alert them of really anything that's happening
2 in the case.

3 But what -- in my experience, they're
4 mostly concerned on 412 and 513. And if
5 something else is kind of triggering that, I'll
6 kind of explain, Hey, it's a discovery motion,
7 nothing about, you know, whatever it maybe.

8 And if they want to read it, they're
9 welcome to kind of read through that. But
10 normally it's all communications from me down.

11 LT. COLONEL SHAW: Mine's quick. I
12 believe the Coast Guard Court rules, I include
13 them on all pleadings. It's just that simple.

14 Emails to and from the Court and with
15 defense on certain issues, I agree with the Major
16 that sometimes I don't. And I'll let the SVCs
17 know what happened, especially on emails that are
18 from defense counsel.

19 And sometimes I don't think it's
20 malicious, I just don't think they include SVCs
21 where they include government and obviously to
22 the Court.

1 I wholeheartedly agree, 100 percent,
2 with adding a public filing system. I believe,
3 the Coast Guard is getting to the point of using
4 the NCORS system that you heard earlier.

5 My understanding is that will include
6 like a place that everyone can have their filings
7 and access them. I think that's particularly
8 helpful for civilian defense counsel, who in the
9 past have expressed some problems with accessing
10 just the various emails kind of bouncing back and
11 forth to the Coast Guard firewalls and service
12 firewalls.

13 But to answer your question.

14 MAJ BROWN: So any email that I'm
15 sending to the judge and defense counsel, I also
16 copy our victim's counsel on. And then, as Major
17 McCrary-Dennis mentioned, we do have our e-
18 filings, so some that our victims' counsel are
19 on.

20 With regard to the victims who aren't
21 represented, we have victim/witness assistance
22 program coordinators at each base, whose job is

1 to communicate with the victim in the case.

2 And they can provide the pleadings if
3 we don't have a victim's counsel. And also
4 communicate with them about, you know, deadlines,
5 scheduling things, interviews, anything that
6 concerns, you know, keeping them apprised of
7 what's going on in the case.

8 The only things that maybe I wouldn't
9 include victims' counsel on are things like, when
10 we're talking about discovery that doesn't
11 concern the victim.

12 But I think that's a practice that is
13 mostly fairly generous and in the Air Force where
14 we're mostly copying them on new things.

15 The one thing that would be, you know,
16 similar to the database that's been spoken about,
17 I mean, we do have that SharePoint site where
18 victims' counsel can access the pleadings. But
19 for our unrepresented victims, they don't have
20 that.

21 And it would certainly make our, we
22 call them VWAP, the victim/witness assistance

1 program, it would make our VWAP's life easier if
2 we had a way to add non-military affiliated
3 people to a database so they could see it.

4 I mean, technically, our filings are
5 public filings. We haven't created that yet.

6 But that is something that would certainly assist
7 in ensuring that victims have access to filings.

8 MS. TOKASH: Hello. I'm Meghan
9 Tokash. I have a question about staffing and
10 morale for the OSTCs.

11 So, first, I'd be really interested in
12 hearing your experiences in the first two and a
13 half months, understanding you've been, you know,
14 ramping up longer than that for your offices to
15 roll out, but since the effective date, the
16 statutorily affective date.

17 So are your trials, or will your
18 trials be supported by a second chair, non-OSTC
19 trial counsel?

20 And how is that looking? Or, how will
21 that work? Because I understand, your dockets
22 are probably very heavy, very large. And there

1 are probably more cases than there are of you as
2 special trial counsel.

3 So could you give us an overview of
4 what that is looking like so far?

5 CAPT STORMER: I'll speak for the
6 Navy. So we started standing up in August. And
7 then, at the end of September, the Navy actually
8 made a decision to where OSTC would take on all
9 covered offenses.

10 So we've actually been trying cases
11 since the beginning of October. We are not fully
12 staffed yet.

13 But the way the Navy is ultimately
14 going to break it down, is we are not delineating
15 between OSTC and non-OSTC. We're delineating it
16 between certified special trial counsel and non-
17 certified special trial counsel.

18 And to get the certified special trial
19 counsel, you have to have at least two years of
20 prosecution experience. You have to have gone
21 through our training. And you have to be on our
22 military justice litigation track, which we have

1 in the Navy.

2 So once an individual has those, he or
3 she will then be a certified special trial
4 counsel, meaning they can sit first chair.

5 Our non-certified special trial
6 counsel are still part of OSTC and they can still
7 go into the courtroom as long as they have two
8 years of litigation. And they can sit second
9 seat.

10 So that's kind of how we're building
11 into the process, because one of the biggest
12 issues we're seeing is that historically in the
13 Navy our caseload continues to go down. Which
14 means less reps and sets for our junior people,
15 which means even less misdemeanor-like offenses.

16 I mean, they're just -- our folks are
17 just not getting like, for instance, me, they
18 didn't -- they're not getting the stand up in
19 court, litigate lower stakes type of cases.
20 Right?

21 I mean, a lot of times our counsel,
22 they're in general courts-martial cases where

1 you've got sex offender registration, you've got
2 long-term consequences. You've got lots of
3 things on the table.

4 So we've tried to figure out, what's
5 the best way to kind of address this lack of
6 opportunities for people, but still recognizing
7 we have to train people.

8 So that's how we've decided to do it
9 in our offices. Is we want to make sure that in
10 every covered offense case, and this is every
11 case, whether it goes forward or whether it --
12 whether we defer it or whether we ultimately
13 prefer and refer a certified special trial
14 counsel, which we don't have, you know, when you
15 look at about 50 percent of our organization, is
16 that one of those individuals will be on every
17 case.

18 And the idea being the non -- the
19 junior person, the non-certified person, will be
20 this second chair to get that experience to start
21 building up the reps and sets to then become --
22 get on the military justice litigation track, and

1 then become certified special trial counsel.

2 So that's how we've done it in the
3 Navy. And I think so far it's working out well.
4 I think manning-wise, for cases that actually go
5 to trial, I think we're actually pretty good.

6 But it's the pretrial stuff that I
7 think where the cases where we're deferring. And
8 then, the increase in the substantiated sexual
9 harassment mission that we will take on in
10 January, I -- that's something we are working
11 with our leadership, because we will need more
12 people for that.

13 And ultimately, what is that
14 substantial sexual harassment, what's that going
15 to look like? And what's the case number?

16 The one big influx, I think, in the
17 Navy that in our original manning, what we didn't
18 account for, was domestic violence.

19 A lot of, though, what I would say the
20 lower -- not to minimize it, but to say the
21 lower, the non-strangulation, the non-life-
22 threatening domestic violence; a lot of times we,

1 the prosecutors, may not even have heard of those
2 cases if they didn't trickle up from the unit.

3 Well, those are all covered offenses
4 now. And we've seen an up-tick in cases that we
5 are now -- which is a good thing.

6 It's a good thing that we're learning
7 about these cases. But I think in January, for
8 instance, in one particular location, we had
9 probably in excess of like 18 newer cases of
10 these type of domestic violence cases.

11 So that's another thing that we're
12 working with our leadership, is that we want to
13 make sure we have enough staffing that we are
14 appropriately able to review all these domestic
15 violence cases, because they're all covered
16 offenses.

17 They all merit their own review. And
18 so that's a big change, I think, in the Navy as
19 well. Thanks.

20 MAJ ALTIMAS: Ma'am, as you know, we
21 have the special victim prosecutors. So I think
22 the Army, we've been kind of doing a little bit

1 of this model for a long time.

2 So I was a special victim prosecutor
3 at Fort Carson. And so my role was to prosecute,
4 but also to train up the TCs.

5 I sat on most of the, what are now
6 covered offenses that were before not, the
7 special victim cases. And I would bring a TC up
8 with me to get them the reps.

9 And in my second year, was sitting
10 behind the bar to kind of, before OSTC stood up.
11 And so now, with OSTC stood up, I am a certified
12 special trial counsel. And I will sit and I have
13 a second who's a Captain under me that's also a
14 certified special trial counsel.

15 And we will use the unit TCs. We will
16 continue to use them as second chair. We will
17 divide and conquer to sit on the cases, one of us
18 on every case.

19 But it's, for me, my role hasn't
20 necessarily changed. I was doing this as a
21 special victim prosecutor, where I was the
22 knowledge in the room. And was building them up

1 to eventually sit behind and advise. And then,
2 they could become the future bench builders.

3 So for the Army, I think, we've been
4 doing this for a long time. And so it's not much
5 of a change. I think with the addition of sexual
6 harassment coming up, I do think we'll need more
7 STCs.

8 But right now, the two of us are able
9 to cover, to sit on the case as first chair and
10 to bring up the TCs to hopefully get them into
11 the military justice track and then become their
12 own certified. Thank you.

13 LTCOL HENRY: Yes. Currently we have
14 the ITOs, or the TSO, the trial services office,
15 and each installation trial office. So I got my
16 acronyms all the way through.

17 Is that with two separate prosecution
18 organizations, one covered offense, one non-
19 covered offense, with the regional trial counsels
20 and a senior trial counsels have a conversation
21 back and forth if there are cases that are
22 appropriate, to bring a non-certified special

1 trial counsel -- sorry, to bring a trial counsel
2 on as a second chair with a special trial counsel
3 on a particular case.

4 In my region, it's been a little more
5 discerning in those cases, because, one, they
6 make sure our processes are up and running. And
7 that we're doing all the things that we want to
8 do, because we are sometimes building the plane
9 as we fly it.

10 And each case is its own thing. But
11 each case has a victim, and it has an accused,
12 and has a command that all have interests in it.
13 And so we want to make sure that that's what's
14 most important. And that's our focus.

15 So I have two cases right now that I
16 have two special trial counsel on. And I made
17 that distinction. It eats up my manpower. But
18 that's important, right?

19 Because those are the cases that I see
20 the complexity and that's important. But for the
21 other cases, there is an ability to share counsel
22 with the installation trial offices.

1 And that's from the highest levels of
2 both prosecution organizations, that there will
3 be a utilization back and forth to ensure that
4 sets and reps do take place.

5 And that, you know, those are the
6 special trial counsel in the next two or three
7 years, because we're going to rotate as we do in
8 military orders. And it also builds the bench as
9 the defense pointed out, to fill those special
10 defense counsel billets.

11 Because at least sort of from our
12 leadership pretty routinely, is that the most
13 important thing that is out there for the office
14 of special trial counsel to obtain and sustain
15 convictions, is a well-armed, and well-balanced,
16 and well-trained defense bar. Because that's
17 important. Right?

18 Due process is a process that is an
19 adversarial process for a reason. Because that
20 ferrets out the truth-seeking function of the
21 Marine Corps.

22 And so if we can build -- they're not

1 there yet. But if we can build those special
2 defense counsel to fill the defense counsel's
3 requests, that's part of growing that number.

4 MS. BASHFORD: Colonel Stormer, the
5 second time -- oh, I'm sorry.

6 MAJ BROWN: No, that's okay.

7 MS. BASHFORD: Yes, go ahead.

8 MAJ BROWN: No worries. Yes. I just
9 wanted to mention that at least like for the Air
10 Force OSTC, that one of our primary goals is to
11 integrate to our legal offices.

12 Our districts are set up in such a way
13 that we have a number of bases assigned to us.
14 So we necessarily depend on our local trial
15 counsel to help us prepare the case before trial,
16 and then, to serve as our second chairs.

17 And so every case will have a local
18 counsel who will be working with an STC for
19 mentorship, and then for reps, and then also,
20 just for support at the local level.

21 And only our very complex cases would
22 have two STCs. But we always will have a local

1 counsel as well in order to make sure that we
2 are, you know, ensuring that we can do all the
3 things that my colleagues have said, build up
4 that bar and make sure that we're spreading that
5 experience around.

6 We do have -- so my predecessor
7 organization, our trial and appellate operations,
8 that's where we use to live before we went to
9 OSTC. So now, we still have attorneys there that
10 are just district trial counsel who do all the
11 non-covered offense cases.

12 And so that is another stepping stone
13 that we have to develop litigators within the Air
14 Force. Those folks are now, coming this May, to
15 our STC qualification course to take, sit, and be
16 qualified in special trial counsel as well.

17 So we have that ability to kind of
18 continue to progress as litigators from base
19 level, then the district level, and then to our
20 special trial counsel.

21 LT. COLONEL SHAW: For the Coast
22 Guard, we are both very small in our docket. But

1 our docket is large enough compared to how many
2 prosecutors that we have that we're not fully
3 staffed up to speed yet.

4 But we are getting there. Morale is
5 pretty high. And that we have an organization
6 that's like a professional trial branch.

7 There have been kind of two regional
8 offices as the Coast Guard. There's been a lot
9 of experimenting with organization.

10 Now, we have an Office of the Chief
11 Prosecutor. And for the process of getting
12 people certified, is very much similar to what
13 Captain Stormer has talked about with the Navy.

14 We've taken on all offenses since we
15 were stood up in, around August of last year as
16 well. Ours is different, as we do not have like
17 regional trial counsel that are not within the
18 OCP as our OSTC, not within the OCP.

19 Right now, all OCP attorneys are
20 taking all offenses, even non-covered offenses.
21 There is some debate to see if maybe some of our
22 district legal offices would take some.

1 But right now, we need the sets and
2 reps so that we are taking literally, my
3 understanding, all courts-martial in the Coast
4 Guard.

5 They will not all have a certified
6 special trial counsel on them. But they will
7 always be supported by an OCT attorney.

8 MS. BASHFORD: Captain Stormer, I
9 think that's twice today we've heard that in the
10 Navy sexual assaults are declining.

11 I think the earlier comment was that
12 the sexual assault courts-martial are
13 diminishing. And both times it was with respect
14 to opportunities for increased experience.

15 When I hear things like that are
16 declining, my first thought is that something is
17 going on with reporting environments. But with
18 respect to the courts-martial, are cases being
19 diverted away for other disposition?

20 Do you think it's a reporting issue?
21 Or, has the Navy found like the golden key to
22 reducing sexual assault?

1 And if you have, could you share it
2 with the other services?

3 CAPT STORMER: Well, when I said
4 cases, I mean cases as a whole. I didn't mean
5 specifically sexual assaults.

6 So it's not a declination in sexual
7 assault cases. And it's -- I mean cases where
8 we've -- we preferred, and we've gone to verdict
9 and to sentencing if there is one.

10 That's what I mean. So I'm talking
11 about every case wide. Like if you looked at a
12 snapshot of the number of cases that have gone
13 through our military justice system, it's been on
14 a decline.

15 I think some of that is, if you look
16 at the COVID -- so when COVID happened I think I
17 was a military judge at that particular time, and
18 I think the way dockets slowed down a little bit.

19 And so I think maybe that has
20 something to do with it. And so to answer your
21 question, I really don't know what the answer is.

22 I mean, maybe things are being handled

1 in the alternate disposition. I think if you
2 look in our numbers, and I don't have them off.
3 But the general courts-martial, at least over the
4 last couple of years, have remained pretty
5 consistent.

6 And I think it's more of the special
7 courts-martial. So your lower-level type
8 offenses. That could be a wide range of -- for
9 instance a 112(a) drug use in the past, when I
10 first came in, a lot of those cases went to a
11 special courts-martial. Those cases are now
12 handled in an administrative separation.

13 So I think some of that, there's a lot
14 of variables, I think, to answer that question.
15 So just to be clear, it's not -- that was not a
16 sexual assault specific comment.

17 It was more just generally speaking,
18 the cases that are actually going into court for
19 all offenses have kind of been in a downward
20 trend, certainly over my career. Where my first
21 tour as a prosecutor, I mean, I was handling
22 cases, I was in court all the time.

1 But it was for the majority of them
2 were special courts-martial. Very lower-level
3 offenses. And we just aren't seeing the numbers
4 that we saw, you know, 20 years ago.

5 CHAIR SMITH: So I'm noting the time.
6 Do we have time for one more question? Ms.
7 Goldberg had a question. Okay.

8 MS. GOLDBERG: We can do a lightening
9 round question, with subparts. I know, sorry.
10 But no, I'll ask quickly. And feel free to just
11 be top line in your responses and then add more
12 subsequently if you'd like.

13 And prior to OSTC, we had heard for,
14 I will say, I had heard from victims' counsel
15 that there were some real challenges in the
16 relationships that they had with prosecutors.

17 From what you've described, it sounds
18 like that's much better. Much, much better. And
19 my question is, are there -- do you think from
20 their perspective, in their interactions with
21 you, are there outstanding issues that you would
22 flag for the DAC-IPAD to think about?

1 Quick question two, many victims are
2 unrepresented, as you pointed out. I guess there
3 are some victim/witness coordinator staffing. I
4 don't know if it's across the services.

5 Are there things that you would
6 recommend the DAC-IPAD look into with respect to
7 unrepresented victims?

8 And then three, which is, I think
9 you've addressed a little bit. But we heard from
10 the defense lawyers that there was a concern, at
11 least from some, of the lack of parity that in
12 the sort of skills qualifications experience led
13 to really, possibly unfair proceedings.

14 And I'm wondering if you share that
15 view? And I know that's more than you can
16 respond to in three minutes.

17 So I wanted to put the questions on
18 the record. And feel free to pick one and keep
19 moving. And we'll note them for a future
20 discussion.

21 MAJ ALTIMAS: Ma'am, I think I can
22 answer them for you. For the first one, for the

1 SVC, I think that we have, with OSTC comes more
2 experience, and comes having worked with SVCs
3 through both govern -- prosecution time and
4 defense time. So I do think the communications
5 are better, because OSTC personnel know how to
6 work with SVCs maybe better than the new trial
7 counsel who, unintentionally may just forget how
8 important that relationship is.

9 For two, --

10 MS. GOLDBERG: The unrepresented
11 victim.

12 MAJ ALTIMAS: Oh, yes. Okay. So we
13 do have an SVL. So we have a special
14 victim/witness liaison that works in all of our
15 offices across OSTC in the Army.

16 And she is my direct communication
17 with those victims that are not represented. And
18 as well as the VAs down at the unit, depending on
19 how they reported.

20 So we do have that constant
21 communication. I do think that's a lot for one.
22 I think in terms of the Army, our SVCs are to the

1 brim with how many clients they can see.

2 And so we do have a lot of
3 unrepresented clients, a lot of unrepresented
4 victims. And I do think the SVWL does a great
5 job in communicating.

6 And I like to use her. I don't ever
7 want to just be cold-calling victims as the
8 prosecutor. But I do think that's a -- that's a
9 big job without a lot of potential support.

10 And then, for three, for the parity,
11 I do not see that. I was a defense counsel for
12 three years at Fort Liberty.

13 There was usually an SVP or the SVP
14 OSTC version against us. And we were just two
15 Captains, kind of against the world. I didn't
16 see that.

17 And for me and for our installation,
18 I'm the highest ranking one that sits on cases,
19 either first or second chair. But with my TC
20 doing as much as possible.

21 So I speak in Major Gallagher's set,
22 and we go against each other all the time. I

1 don't see that in my practice.

2 MS. GOLDBERG: And if others agree
3 with, you know, essentially with the Army, then
4 it would fine to just say so.

5 CAPT STORMER: I would concur with the
6 Army with the VLC. I think we have a really good
7 relationship.

8 But there are obviously going to be
9 bumps in the road. And I'll just say from my,
10 from the OSTC level to my Admiral, we are in
11 constant communication with the VLC leadership.

12 So we meet with them once a month just
13 to figure out if there's enterprise-wide issues
14 that we can address. And I think that's been
15 really good.

16 I know a lot of the VLC leadership,
17 I've been in the Navy with them for years. So I
18 think we have a pretty good working relationship.

19 For the VWAP, and the way the Navy has
20 structured it, so we have an East and a West.
21 And at each office, the headquarters for those,
22 we have a VWAP coordinator.

1 And those two individuals are more
2 like a policy. They've been invaluable. I can
3 say that.

4 Our particular VWAP, who I work with
5 in the West, she was a SARC. And she has all
6 these -- she has a lifetime, a career of dealing
7 with victims.

8 And she's been absolutely invaluable
9 in bringing just a new perspective to how we
10 handle our VWAP program.

11 And the one thing that, I think, we're
12 going to push for that I think would be an
13 unbelievable recommendation, is that -- and a
14 recommendation from this committee -- would be
15 putting VWAP, victim assistance people, within
16 OSTC, kind of like the U.S. Attorney's office
17 has.

18 That would do one of two things. One,
19 it puts professionals within there, helping us
20 deal with and making sure victims are getting all
21 of their notification.

22 And it would also alleviate a lot of

1 time for our prosecutors. Our prosecutors spend
2 a lot of time, they're highly involved in the
3 VWAP process.

4 And so, and I think it also helps
5 build trust with victims, if they can have that
6 point person. Because our particular VWAP
7 coordinator, she doesn't do every case. But we
8 involve her in our higher visibility, more
9 complex cases involving children.

10 And her just being involved from the
11 beginning, builds a level of trust with the
12 victim in the process that is invaluable.

13 So I think that's something in the
14 Navy, I know, we're pushing to get. So to me
15 that would be an incredible addition to the OSTC
16 organization.

17 And then, the last piece, the parity
18 piece, I was the commanding officer for DSO. I
19 was up until this past August and then I was a
20 military judge for the last four years.

21 So I feel pretty good about commenting
22 on this. So I think parity-wise, if you look at

1 it on paper, to go to the points that were made,
2 I think yes, objectively looking at it when you
3 look at the ranks of the people involved in the
4 two organizations, a person from the outside
5 could perceive that as a parity issue.

6 So I would acknowledge that. I think
7 it speaks for itself. But what I would say, is
8 that the litigation, the practice in the
9 courtroom, I have just not seen it.

10 I disagree with, I don't know which
11 panelist mentioned about the issues with the
12 defense counsel. That's just to me, as a judge,
13 as a commanding officer for the DSO, I have not
14 seen that in the courtroom.

15 In the Navy it is standard practice
16 that every case will have at least two defense
17 counsel assigned and detailed to that, if not
18 more. Leadership is highly involved.

19 And it would be very rare for me to
20 see what I heard was being described up here.
21 But I can't remember which particular service. I
22 just haven't seen that.

1 I'm not saying it doesn't happen. And
2 so I, you know, my last job, I would put all
3 those defense counsel that were working in that
4 particular organization up against any prosecutor
5 there is.

6 I mean, they are good. And they work
7 hard. And they care. And the only particular
8 issue sometimes is ex -- goes back to experience
9 and having the opportunity to get into court.

10 And so that would be my comment on
11 parity.

12 MS. GOLDBERG: Thank you.

13 LTCOL HENRY: I agree with all of
14 that. As I often do with Captain Stormer. So I
15 feel like I'm on the right side of that.

16 The biggest piece on the parity for me
17 is, I'll go back to the pre-preferral stuff. The
18 investigation, the administration, anecdotally,
19 it's about 30 percent of what we do, the defense
20 sees.

21 And there's a whole bunch of other
22 stuff that happens before then on all the other

1 cases where the investigation is being run.

2 We're at witness interviews. We're at victim
3 interviews.

4 We're at the accused interrogation.

5 We're working through CASSs for cell phones.

6 We're doing a lot of those things. And on each
7 individual case.

8 And if only a third of those are going
9 to the defense, I understand, they do need that
10 experience. They do need those individuals.

11 But the objective piece of that as
12 numbers, is that is what has to be taken into
13 account in the numbers. Because at preferral of
14 charges or imposition of pretrial confinement,
15 that's when they're getting a detailed defense
16 counsel, not the other 70 percent of what we're
17 doing.

18 So that is a consideration, I think,
19 to your point, sir. Is that you can look at it
20 from the outside, but if you dig into that a
21 little bit, I understand the concern.

22 And, again, I -- nothing but advocate

1 for a well-trained, well-stocked defense bar.
2 But as it goes right now, the same thing, sitting
3 as a military judge, the defense counsel, we're
4 in no way wanting for skill, for leadership, for
5 knowledge, from the newest 03 to the seasoned 04,
6 05 that were in there litigating those cases.

7 And I hope that that continues. I
8 think it will, given their leadership, and the
9 training, and how that works, so.

10 MAJ BROWN: So for victim engagement,
11 one thing that we did in the Air Force with our
12 OSTC standard operating procedures, is we wrote
13 in victim engagement throughout the entire
14 process, from investigation all the way up until
15 trial.

16 So I think that's something that we
17 did to really ensure that we were communicating
18 with the victim and then showing that they were -
19 - that relationship was garnered in a very
20 engaging fashion.

21 We basically wrote in, that was in
22 five days of our covered defense investigation

1 standing up. We're making contact and then we
2 have follow on discussions as necessary.

3 And so that's one way that we ensure
4 that we are remedying any shortcomings in victim
5 engagement throughout the process.

6 Major Leal had commented on our
7 behalf, but I totally agree, we don't have that
8 disparity issue.

9 But you'll see it for most of our
10 general courts-martial, is we typically do have
11 two local trial counsel. And that's simply
12 because they need the experience and they need to
13 divvy up the workload on top of all the other
14 obligations at the legal office.

15 And then, I'll be the only STC on
16 that. For bigger cases, higher ranking accused,
17 things of that nature, we may have two STCs.

18 But like I said earlier, we always
19 have one local STC. On the other side, we're
20 routinely seeing two defense counsel, a senior
21 defense counsel and then an area defense counsel.

22 Sometimes we even have it whereby the

1 time the case goes to court, the area defense
2 counsel is now also a senior defense counsel. So
3 we have two.

4 And so I certainly don't think that we
5 have that disparity issue in the Air Force.

6 LT. COLONEL SHAW: Everything that I
7 would say has been covered so far by the other
8 services, except for the one thing is that in the
9 Coast Guard right now for OCP, we do not have,
10 and kind of Coast Guard-wide, we do not have the
11 VWAP services.

12 It is the prosecutors working with the
13 SVCs at time, or just one their own, sometimes
14 with SARCs. But doing all the VWAP
15 notifications.

16 And similar to what Major Brown said,
17 we've kind of written it in now to our manual and
18 our processes about a time frame. It's not five
19 days, but I think it's within 10 to 14 days,
20 we're letting the victim know and before a
21 decision is made, asking for their input.

22 MS. GOLDBERG: Thank you so much.

1 CHAIR SMITH: All right. Thank you
2 very much. Your comments were extremely helpful
3 to the committee. We appreciate your being here.

4 Mr. Yob?

5 MR. YOB: Yes. Thank you all,
6 especially to you all. Just a few comments and
7 then we'll conclude the meeting.

8 Chair Smith, for the record, we're
9 ending this session with the same 13 committee
10 members that we had the entire afternoon.

11 I think that it was a great -- great
12 information was received today. Tomorrow, the
13 administrative session will begin at 0830.

14 The public will be welcome to attend
15 starting at 0915. We'll have the public session
16 beginning then. We will conclude tomorrow's
17 public meeting at 1230 tomorrow.

18 From that point, you know, those who
19 are here will move onto the Air Force Academy
20 academic area for site visits. We hope to
21 continue those on Thursday, weather permitting
22 and personnel permitting.

1 So we're looking to adjust the
2 schedule slightly. But we'll talk about that on
3 the bus ride back, talk about some information
4 for you on that.

5 So those are the comments that I have.
6 And I will throw it back to you, Chair Smith.

7 CHAIR SMITH: All right. I think that
8 concludes our meeting. Mr. Sullivan?

9 MR. SULLIVAN: This meeting is closed.

10 (Whereupon, the above-entitled matter
11 went off the record at 4:58 p.m.)

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In the matter of: Public Meeting

Before: DAC-IPAD

Date: 03-12-24

Place: Air Force Academy, CO

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate complete record of the proceedings.



Court Reporter

NEAL R. GROSS

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