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*1 MILITARY RULE OF EVIDENCE (MRE) 513: A SHIELD TO PROTECT COMMUNICATIONS OF VICTIMS AND WITNESSES TO PSYCHOTHERAPISTS

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"*Although MRE 513 provides little protection to statements made by the accused, it can provide substantial protections to statements made by victims and witnesses.*" [1]

Introduction

You are the chief of military justice at a large TRADOC installation. One of the trial counsel in your shop, who has only been in the position two months, comes into your office with a concerned look on his face. He has received a discovery request in his first rape case, a high-profile case involving allegations that a drill sergeant raped a trainee. The trial defense counsel learned that the trainee received counseling at the installation community health center after the rape, and now she is claiming that there may potentially be exculpatory evidence in the trainee's mental health records. The defense counsel is requesting that the government produce those records. After receiving the discovery request, the trial counsel spoke with the trainee. The trainee is extremely uncomfortable with anyone having access to her mental health records and will not give her consent to release the records. The trial counsel wants to know whether he has to produce the records in response to the defense discovery request. You know there is a psychotherapist-patient privilege, but you are not sure what the scope of the privilege is or to what extent it will protect the trainee's records. How should you advise the trial counsel?

President Clinton's issuance of Executive Order 13,140 in October 1999 established a military rule of privilege for communications between psychotherapists and patients. [2] As the newest rule of privilege, the contours of Military Rule of Evidence (MRE) 513 have yet to fully take shape. [3] The result is that military justice practitioners may not completely understand its implications. When dealing with MRE 513 and the psychotherapist-patient privilege, military justice practitioners may be inclined to focus on its applicability to statements of the accused. Trial counsel are often concerned with how they may effectively get around any claim of psychotherapist-patient privilege to admit statements of an accused into evidence. Defense counsel frequently focus on how they can use the privilege to protect statements of their clients. Practitioners may give little thought or emphasis to the other—and possibly more powerful—aspect of MRE 513, the protection it affords to confidential communications of victims and witnesses to psychotherapists.

This article examines the development of the psychotherapist-patient privilege in military law, focusing on MRE 513 from the perspective of how its provisions can be used by a trial counsel to protect statements made by victims and witnesses. The objective of this article is to ensure that trial counsel, chiefs of military justice, and victim-witness liaisons understand how MRE 513 shields victims and witnesses. This article examines the following areas: (1) the development of psychotherapist-patient privilege in federal law and the Supreme Court's decision in *Jaffee v. Redmond*; [4] (2) the development of psychotherapist-patient privilege in military law before and after *Jaffee*; (3) the adoption of MRE 513 and its provisions; (4) the obligations that

the victim-witness program provisions of *Army Regulation (AR) 27-10* [5] impose on trial counsel and victim-witness liaisons regarding the psychotherapist-patient privilege; and (5) the interplay between MRE 513 and service regulations regarding access to medical and mental health records.

The Development of Psychotherapist-Patient Privilege in Federal Law

The Supreme Court's recognition of a psychotherapist-patient privilege in *Jaffee* marked a major turning point in the development of a psychotherapist-patient privilege in federal law. [6] In order to understand the Court's decision in *Jaffee*, it is necessary to know some of the background regarding the development of federal privilege law.

*2 *Federal Privilege Law and Psychotherapist-Patient Privilege Before* Jaffee

For many years, Congress has authorized the Supreme Court to promulgate rules of court for civil actions, criminal cases, bankruptcy proceedings, and admiralty and maritime cases. [7] Based on this authority, in 1965, the Chief Justice of the Supreme Court, in his capacity as Chairman of the Judicial Conference of the United States, appointed the Judicial Conference Advisory Committee on Rules of Evidence (Advisory Committee) to draft federal rules of evidence. [8] The Supreme Court approved the Advisory Committee 's proposed Federal Rules of Evidence (FRE) and transmitted them to Congress in November 1972. [9]

Article V of the proposed FRE governed the rules of privilege. More specifically, Article V contained nine specific privilege rules, including a psychotherapist-patient privilege in proposed FRE 504. [10] Military justice practitioners should be familiar with proposed FRE 504 because MRE 513 is based in part on this proposed rule. [11] This section examines characteristics of the proposed FRE 504, to include the nature of the privilege, who holds the privilege, and the scope of the privilege.

The rule of privilege contained in the proposed FRE 504 provided as follows:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family. [12]

Under the proposed rule, the patient possessed the privilege. Besides the patient, a number of different parties could claim the privilege; they included the psychotherapist on the patient's behalf, the patient's guardian or conservator, or the personal representative of a deceased patient. [13]

The proposed rule was narrow in scope. It defined a “psychotherapist” as “a person authorized to practice medicine in any state or nation ... while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addition or ... a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.” [14] On its face, the proposed rule applied only to physicians performing psychotherapy-type treatment and licensed or certified psychologists. [15]

***3** The psychotherapist-patient privilege of the proposed rule was not absolute. It contained three exceptions. [16] The first exception concerned proceedings to hospitalize a patient for mental illness. [17] A second exception concerned examinations ordered by a judge. [18] The third exception dealt with situations when a mental or emotional condition was an element of a claim or a defense. [19]

The proposed privilege rules were particularly controversial. In congressional hearings, the privilege provisions in Article V of the proposed rules received substantial criticism. [20] In fact, "[d]isagreement over the privilege rules threatened to prevent passage of the remaining sections. Ultimately, the privilege section was eliminated and a single rule was substituted in its place." [21] Congress finally approved FRE 501, a general rule of privilege. Federal Rule of Evidence 501 provided that privilege rules "shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience." [22] Thus, Congress essentially deferred to the federal courts to determine which privileges exist under federal law.

Because FRE 501 left it to the federal courts to determine what privileges existed, the courts sometimes differed regarding whether federal law recognized a privilege. With respect to the psychotherapist-patient privilege, the different circuits of the U.S. Court of Appeals split concerning whether federal law recognized this privilege and the extent and scope of the privilege. [23] The Court granted certiori in *Jaffee v. Redmond* [24] to resolve this split.

The Jaffee *Decision*

In *Jaffee*, the Supreme Court recognized a psychotherapist-patient privilege under FRE 501. [25] Starting with the proposition that testimonial privileges are disfavored because the public should have access to all possible evidence, the Supreme Court noted that exceptions to the general rule disfavoring testimonial privileges could be justified by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." [26] The Supreme Court found that a psychotherapist-patient privilege would serve significant private and public interests. [27] Specifically, the Court reasoned that the psychotherapist-patient privilege would promote private interests because confidentiality was instrumental to an individual's successful treatment. [28] It also found that the psychotherapist-patient privilege would promote "the public ***4** interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." [29] The Supreme Court held that these public and private interests outweighed the modest evidentiary benefit that would result from denial of the privilege. [30] Because of the great societal benefits the Court believed would result from the privilege, it not only recognized the privilege, but also broadened its scope to cover communications to licensed social workers as well as licensed psychiatrists and psychotherapists. [31]

Although the Supreme Court recognized the psychotherapist-patient privilege, it did little to outline its bounds. The Court reasoned that "[b]ecause this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours." [32] Thus, the Supreme Court provided little guidance for lower courts to use in applying the privilege. [33] That left federal courts largely on their own to develop the contours of the federal psychotherapist-patient privilege. [34]

Psychotherapist-Patient Privilege in Military Law Before and After *Jaffee*

The development of the psychotherapist-patient privilege in military law has differed from that of federal law both before and after the *Jaffee* decision. Part of that difference may be attributed to the source of military law. Under Article 36 of the Uniform Code of Justice (UCMJ), the President may prescribe rules of evidence "which shall, so far as he considers practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts." [35] Under Article 36, "[a] majority of the Military Rules of Evidence were ... subsequently adopted with minor modifications from the Federal Rules of Evidence." [36]

One major difference between the FRE and the MRE, *however*, concerns the rules of privilege. Unlike FRE 501, which is a general rule of privilege, the MRE contain specific privileges. [37] The analysis to MRE 501 explains that a general rule of privilege is not practical in a military setting:

> Unlike the Article III court system, which is conducted almost entirely by attorneys functioning in conjunction with permanent courts in fixed locations, the military criminal legal system is characterized by its dependence upon large numbers of laymen, temporary courts, and inherent geographical and personnel instability due to the worldwide deployment of military personnel. Consequently, military law requires far more stability than civilian law. This is particularly true because of the significant number of non-lawyers involved in the military criminal legal system. Commanders, convening authorities, non-lawyer investigating officers, summary court-martial officers, or law enforcement personnel need specific guidance as to what material is privileged and what is not. [38]

Consequently, the MRE delineated very specific privileges. [39] Another difference is at the time of their implementation, the MRE did not recognize a psychotherapist-patient privilege. [40] In fact, the MRE not only failed to recognize a psychotherapist-patient ***5** privilege, but also explicitly rejected a physician-patient privilege. Military Rule of Evidence 501(d) provided that "[n]otwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." [41]

Before *Jaffee*, military courts uniformly rejected any claim of a psychotherapist-patient privilege because the rules did not recognize this privilege and explicitly rejected a doctor-patient privilege. [42] In *United States v. Mansfield*, the Court of Military Appeals (CMA) stated, "[T]here is no physician-patient or psychotherapist-patient privilege in federal law, including military law." [43] After the Supreme Court recognized a psychotherapist-patient privilege in *Jaffee*, the issue of whether *Jaffee* applied to the military remained.

Service Court Rulings

The service courts uniformly held that the application of a psychotherapist-patient privilege was inconsistent with and contrary to MRE 501(a) and 510(d). [44] Under MRE 501, military courts may adopt a new rule of privilege "recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence," provided the rule meets the requirements of MRE 501(a) and MRE 501(d). [45] Pursuant to MRE 501(a), the application of such a federally recognized privilege in military courts must be "practicable and not contrary to or inconsistent with the code, these rules, or this Manual." [46] Military Rule of Evidence 501(d) provides that "information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." [47] Thus, the question for military courts was whether MRE 501(a)(4) and MRE 501(d) precluded application of a psychotherapist-patient privilege in the military.

The Navy-Marine Court of Criminal Appeals (NMCCA) addressed whether the *Jaffee* privilege applied to the military in *United States v. Paaluhi*. [48] In *Paaluhi*, the NMCCA flatly rejected the argument that *Jaffee* created a psychotherapist-patient privilege in the military, stating that "the application of a psychotherapist-patient privilege to courts-martial would be 'contrary to' and 'inconsistent with' the language of [MRE] 501(d), 101(b), and 501(a)(4)." [49] Consequently, the NMCCA held that "until the President expressly exercises his authority under Article 36(a), UCMJ, there is no general psychotherapist-patient privilege applicable to courts-martial." [50] The NMCCA held that the military judge had properly admitted statements of the accused made during a psychological evaluation conducted by a Navy clinical psychologist. [51]

Similarly, the Air Force Court of Criminal Appeals (AFCCA) rejected the application of *Jaffee* to the military in *United States v. Stevens*. [52] Using a rationale comparable to that of the NMCCA, the AFCCA "interpret[ed] [MRE] 501(a)(4) and 501(d) to preclude application of the privilege recognized in *Jaffee*." [53] The court held that a psychotherapist-patient privilege did not protect the accused's statements to a clinical psychologist and a psychiatrist. [54]

***6** The Army Court of Criminal Appeals (ACCA) also rejected the application of *Jaffee* to the military in *United States v. Rodriguez*. [55] The ACCA held that "a federal common law psychotherapist-patient privilege, without specifically tailored parameters and exceptions necessary in a military environment, is not 'practicable' in trials by court-martial." [56] Noting that "[u]nlike the general privilege in the Federal Rules of Evidence, the privileges created by the Military Rules of Evidence have to be understood, interpreted, and applied ... by non-lawyers," [57] the ACCA found that it was not practicable "to expect non-attorneys to uniformly and accurately apply a general, undefined *Jaffee* privilege in a military environment." [58] Holding that the psychotherapist-patient privilege "is a narrower version of a broader doctor-patient privilege," the ACCA held that MRE 501(d) barred the *Jaffee* psychotherapist-patient privilege in courts-martial. [59] The ACCA concluded that a psychotherapist-patient privilege did not protect statements made by the accused to an Army psychiatrist. [60]

The Court of Appeals for the Armed Forces (CAAF) settled this issue on appeal in *United States v. Rodriguez*. [61] Affirming the ACCA's decision, the CAAF held that MRE 501(d) "precludes application of doctor-patient or psychotherapist-patient privilege to the military." [62] The CAAF concluded that a privilege did not apply to the accused's statements to an Army psychiatrist and held that:

> [P]rior to Jaffee there was no privilege. Post-Jaffee and prior to adoption of Mil.R.Evid. 513, there was still no psychotherapist-patient in the military because it was contrary to Mil.R.Evid. 501(d). When the President promulgated Mil.R.Evid. 513, he did not simply adopt Jaffee; rather, he created a limited psychotherapist privilege for the military. In the absence of a constitutional or statutory requirement to the contrary, the decision as to whether, when, and to what degree Jaffee should apply in the military rests with the President, not this Court. [63]

Military Rule of Evidence 513

In 1999, President Clinton exercised his authority under Article 36(a) and established a psychotherapist-patient privilege for the military. Executive Order 13,140 implemented MRE 513, which protected confidential communications between a patient and psychotherapist. [64] This rule covers any communication made after 1 November 1999. [65] The following sections highlight those provisions of MRE 513 that are relevant to trial counsel in protecting statements made by victims or witnesses.

*7 *General Nature of the Privilege*

Military Rule of Evidence 513 is not a physician-patient privilege, but "a separate rule based on the social benefit of confidential counseling recognized by Jaffee, and similar to the clergy-penitent privilege." [66] It applies only to UCMJ proceedings and does "not limit the availability of such information internally to the services, for appropriate purposes." [67]

The rule of privilege in MRE 513(a) protects "a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." [68] The rule defines a "patient" as "a person who consults with or is examined or interviewed by a psychotherapist for the purposes of advice, diagnosis, or treatment of a

mental or emotional condition." [69] Under this definition, a patient includes not only an accused, but also any victim or witness involved in the court-martial proceeding. "Psychotherapist" includes "a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility ...." [70]

Holder of the Privilege

Under MRE 513, the privilege belongs to the patient. Military Rule of Evidence 513(a) provides that the patient has "a privilege to refuse to disclose and to prevent another person from disclosing a confidential communication." [71] In addition to the patient, other specified persons may claim the privilege. [72] These specified persons include guardians, conservators and, psychotherapists or assistants to a psychotherapist acting on behalf of the patient. [73] As a result, the patient, or the guardian or conservator of the patient may authorize the trial or defense counsel to claim the privilege on the patient's behalf. [74]

Exceptions to the Privilege

The psychotherapist-patient privilege established in MRE 513 is not an absolute privilege. There are eight exceptions where the privilege is inapplicable: (1) the patient is deceased; [75] (2) the communication evidences spouse abuse, child abuse, or neglect, or "in a proceeding where one spouse is charged with a crime against the person of the other spouse or a child of either spouse;" [76] (3) federal law, state law or service regulation imposes a duty to report the communication; [77] (4) the patient's mental or emotional condition makes the patient a danger to himself or others; [78] (5) the communication "clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought ... to enable ... anyone to commit or plan to commit what the patient knew or reasonably ***8** should have known to be a crime or fraud;" [79] (6) if necessary to "ensure the safety and security" of military personnel or property, military dependents, mission accomplishment, or classified information; [80] (7) when an accused offers statements or other evidence "concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or [MRE] 302;" [81] and (8) when the communication's disclosure is constitutionally required. [82]

From an accused's perspective, these exceptions may appear to swallow the rule. [83] In many circumstances, the privilege will not protect an accused's statements to mental health professionals. [84] Conversely, exceptions that apply to the accused may not apply to statements victims or witnesses make to psychotherapists. [85] For instance, the exception in MRE 513(d)(7) concerning evidence the accused offers in defense, extenuation, or mitigation regarding a mental or emotional condition will not apply to statements of a victim or witness. [86] Overall, MRE 513 affords more protection to statements of victims and witnesses than it does to statements of an accused.

Procedures to Resolve Disputes

If the parties dispute the production or admissibility of records or communications of a patient, MRE 513 allows a party to seek an interlocutory ruling by the military judge. [87] To obtain a ruling, a party shall file a written motion at least five days before the entry of pleas, serve the motion on the opposing party and the military judge, and, whenever practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and the patient has an opportunity to present matters. [88] Military Rule of Evidence 513(e)(2) requires the military judge to hold a hearing before ordering the production or admission of a patient's records or communications. [89] If either party shows "good cause," the military judge may close the hearing. [90] At the hearing, either party may call witnesses, including the patient, and present other evidence. [91] The patient has

the opportunity to attend the hearing and be heard at his own expense, even if the parties do not call the patient as a witness. [92] A military judge may conduct an in camera inspection of the evidence in question "if necessary to rule on the motion" [93] and may admit none, part, or all of the evidence in question. Thus, a military judge may issue protective orders to prevent unnecessary disclosure of the patient's records or communications. [94] "The motion, related papers, and record of the hearing are to be sealed and remain under seal unless the military judge or an appellate court or appellate court orders otherwise." [95]

Role of the Trial Counsel

A victim or witness may authorize the trial counsel to claim the privilege. [96] When there is a dispute over the production or admissibility of records or communications of a victim or witness, the trial counsel may seek a ruling from the military judge. [97] A trial counsel can help protect a victim's or witness's ***9** privacy by invoking the protective procedures outlined in MRE 513, such as requesting a closed hearing or seeking protective orders, when appropriate. If a defense counsel seeks an interlocutory ruling from the military judge, the trial counsel should examine whether the defense has complied with the timeliness and notice requirements of MRE 513. [98]

Military Case Law Regarding MRE 513

Military case law does not provide any guidance regarding MRE 513, which is perhaps not surprising given its relatively recent implementation. [99] The trial counsel, therefore, may have to rely on other areas or sources for guidance on MRE 513 issues, such as when the exceptions to MRE 513 apply. [100] Military Rule of Evidence 513(d)(8) is the most likely exception to apply to statements a victim or witness makes to a psychotherapist. This exception provides that no privilege exists when disclosure is constitutionally required. [101] Defense counsel may attempt to use this exception as a catchall argument to overcome the privilege. While neither MRE 513 nor its analysis provides any substantive guidance on when disclosure is constitutionally required, "the exception probably envisions those situations where an accused's right to confrontation would be limited by a witness invoking the privilege under this Rule." [102]

Federal Case Law

Federal and military case law provides scant authority regarding the right to confrontation in connection to MRE 513. While there is no military case directly on point, federal cases addressing the confrontation right in the context of the privilege may have persuasive value. This section examines federal cases dealing with the Sixth Amendment right to confrontation overcoming the *Jaffee* privilege, and with the Sixth Amendment overcoming statutory privileges generally.

Given the differences between the general *Jaffee* privilege and the specific privilege in MRE 513, the relevance of federal case law to the military is questionable. Very little federal case law addresses when the Constitution requires an exception to the *Jaffee* privilege. No circuit court of appeals has considered this issue since *Jaffee*, [103] but one circuit addressed the issue prior to *Jaffee*. [104] Only four federal district courts have addressed the issue since *Jaffee*. [105]

The U.S. Court of Appeals for the Second Circuit's (Second Circuit) pre- *Jaffee* decision in In re *John Doe* [106] examined whether a court could review the psychiatric history of a crucial government witness in camera and subject to a protective order. Concerned "that a preclusion of any inquiry into appellant's psychiatric history would violate the Confrontation Clause," the Second Circuit held that "discovery concerning appellant's history of mental illness and treatment may go on *in camera* ***10** subject to the protective order." [107] The Second Circuit did not reach the issue of the admissibility of such evidence at trial. [108]

In *United States v. Alperin*, [109] the defense sought access to a victim's psychiatric records on the grounds that they might support the defendant's claim of self-defense. Noting that *Jaffee* did not address how to apply the psychotherapist-patient privilege when a defendant's constitutional rights were implicated, the district court applied a balancing test. [110] The district court ordered the production of the psychiatric records for an in-camera review to examine the potential relevance and materiality of the records. The court weighed the relevance and materiality of the records against the victim's privacy interest to determine whether disclosure was constitutionally required. [111]

In *United States v. Doyle*, [112] the defense sought access to the victim's psychiatric records. The defense argued that the government's calling the victim in support of an upward departure from the sentencing guideline waived any psychotherapist-patient privilege, and that the defendant's Sixth Amendment right to compulsory process trumped the psychotherapist-patient privilege. In quashing the defense subpoena request, the district court found that the victim had not waived the privilege and rejected the defense waiver argument. [113] The district court judge explicitly refused to use a balancing test when analyzing the Sixth Amendment issue because he believed that *Jaffee* had rejected such an approach. [114] He also refused to conduct an in camera hearing, holding that a review of the records would be a breach of the privilege. [115]

In *United States v. Hansen*, [116] the defense sought access to a deceased victim's psychiatric records to support a claim of self-defense. Finding that the deceased victim had little privacy interest and that "the likely evidentiary benefit is great," the court granted the defense request for a subpoena. [117] This case has little relevance for the military, however, because MRE 513(d)(1) allows for the disclosure of confidential communications when the patient is deceased. [118]

In *United States v. Haworth*, [119] the defense sought access to the psychiatric records of a government witness, contending that the defendant's Sixth Amendment right to confrontation required an exception to the *Jaffee* privilege. The district court, however, distinguished between the right to confrontation and a right to discover privileged information. After conducting an in-camera review, the court ruled that the records were privileged and were not subject to discovery. [120] Overall, these cases do not present a unified approach to resolving this issue. None have set forth any particular criteria or test that other courts could use.

Federal Cases Regarding Statutory Privileges and the Sixth Amendment Generally

The Supreme Court has not completely resolved the issues of when a defendant's Sixth Amendment rights to confrontation, cross-examination, and compulsory process overcome a statutory privilege. Nonetheless, trial counsel can still find some guidance in the Court's cases.

In *Davis v. Alaska*, [121] the Court examined whether the defendant was denied his right of cross-examination when the defense counsel was prohibited from questioning a witness ***11** regarding his juvenile record because the record was confidential under state statute. [122] The defense sought to question the witness about his juvenile probationary status resulting from his conviction for burglarizing two cabins. [123] The defense wanted to show that the witness could have made a faulty identification of the defendant because the witness feared the revocation of his probation or because he wished to shift suspicion away from himself to the defendant. [124] Relying on a state statute that made juvenile adjudications confidential, the trial judge granted the prosecution's motion for a protective order and prohibited the defense from inquiring about the juvenile adjudication of the witness. [125] The Court reversed, finding that the lower court denied the defendant his right to confrontation. The Court held that "[t]he State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding so vital a constitutional right as the effective cross-examination for bias of an adverse witness." [126]

In *Pennsylvania v. Ritchie*, [127] the Supreme Court addressed the issue of whether the defendant's Sixth Amendment right to confrontation was violated when he was denied access to the confidential files of child protective services. The defense sought access to the files, arguing that "the file might contain the names of favorable witnesses, as well as other unspecified exculpatory evidence." [128] A plurality of the Court rejected the broad interpretation of *Davis* for which the defendant argued. The Court reasoned that if it interpreted *Davis* to mean that any possible evidence of impeachment material trumps a statutory privilege, "the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery." [129] The Court concluded that "the failure to disclose the CYS [Children and Youth Services] file [did not violate] the Confrontation Clause." [130] Since the state statute in question did not grant CYS files absolute immunity, however, the Supreme Court affirmed that portion of the state supreme court's decision that remanded the case to the trial court for the trial judge to determine whether the file contained exculpatory information within the meaning of *Brady v. Maryland*. [131]

Thus, the Supreme Court has not yet fully resolved when a statutory privilege must yield to a defendant's constitutional rights. *Davis* implies that when the defense is already aware of the privileged information and can articulate a specific theory of relevance, the court must allow the defense to use that information at trial. *Ritchie* suggests that courts should not allow defendants access to privileged files merely because they offer vague theories that the records might contain potentially useful or relevant information. The area between these two opposite ends of the spectrum remains uncharted by he Supreme Court.

Military Case Law Regarding MRE 412

Because federal case law provides military attorneys with little assistance on when disclosure of confidential communications to a psychotherapist may be constitutionally required, it may be helpful to look to other areas of military law. For instance, both MRE 513 and MRE 412 have exceptions which dictate that courts must admit constitutionally required evidence. [132] An examination of MRE 412(b)(1)(C) may help a trial counsel to understand the contours of MRE 513(d)(8). [133]

Courts decide on a case-by-case basis whether evidence is constitutionally required under MRE 412(b)(1)(C). [134] To be required, the evidence must be relevant, material, and favorable to the defense, and its probative value must outweigh any unfair ***12** prejudice. [135] The key to admissibility under MRE 412(b)(1)(C) is relevance. [136] The defense must show that the evidence in question "is relevant to an important fact asserted or challenged by the defense. Relevance increases as defense counsel is able to link specific evidence to an articulated defense theory." [137] The defense "has the burden of demonstrating why the general prohibition in Mil.R.Evid. [MRE] 412 should be lifted to admit evidence of the sexual behavior of the victim." [138]

A trial counsel may argue that the rules regarding MRE 412(b)(1)(C) should apply by analogy to MRE 513(d)(8), given that they both address when evidence is constitutionally required to be admitted. The trial counsel may assert that the defense bears the burden to demonstrate why the psychotherapist-patient privilege does not apply in a particular case. Also, the trial counsel may argue that the defense must show that the confidential communication is relevant to an issue of importance asserted or challenged by the defense. Requiring the defense to articulate a specific theory regarding the relevancy of the evidence sought appears to be consistent with the Supreme Court's decision in *Ritchie*. At a minimum, *Ritchie* seems to caution that a judge should carefully examine any records for exculpatory evidence and should grant the defense access only to information for which *Brady* requires disclosure.

Defense counsel, however, may have difficulty articulating a specific theory of relevance because they often will not know the contents of the communications to which they seek access. Thus, defense counsel may have difficulty demonstrating that production of the communications is constitutionally required, particularly if they have the burden of proof. [139]

The Interplay of the Victim/Witness Program with MRE 513

Army regulations impose additional obligations on trial counsel in connection with the psychotherapist-patient privilege that are distinct from those imposed by MRE 513. *Army Regulation (AR) 27-10* requires trial counsel and victim-witness liaisons to inform victims and witnesses about their rights, including their right to have their privacy respected. [140] This section will explain how informing victims or witnesses about their rights includes advising them about their right to claim the psychotherapist-patient privilege.

Chapter 18 of *AR 27-10* outlines the Army's victim-witness program. [141] Under this program, all personnel within the military justice system, including commanders, judge advocates, and law enforcement officials, must ensure "that victims and witnesses of crime are treated courteously and with respect for their privacy. Interference with personal privacy and property rights will be kept to an absolute minimum." [142] Thus, a crime victim has "[t]he right to be treated with fairness, dignity, and a respect for privacy." [143] Additionally, when a victim "has been subjected to attempted or actual violence, every reasonable effort will be made to minimize further traumatization." [144]

The provisions of the Victim-Witness Program in *AR 27-10* impose an obligation on the trial counsel, the chief of military justice, and the victim-witness liaison to protect the privacy of victims and witnesses to the maximum extent possible. [145] Part of ensuring the privacy of victims and witnesses is ensuring that victims and witnesses know they can claim the psychotherapist-patient privilege. This includes informing victims and witnesses of their right to refuse to answer questions from either side regarding conversations with their psychotherapists and to claim the privilege during interviews with defense counsel. [146]

***13** Staff judge advocates (SJA) also have a responsibility to provide for annual victim-witness training to agencies involved with the victim-witness program. [147] As a practical matter, the military justice section often assumes this responsibility. The chief of military justice should ensure that trial counsel are trained regarding their responsibilities to inform victims and witnesses about their rights under the psychotherapist-patient privilege. The chief of military justice should also ensure that the appropriate medical and mental health personnel, law enforcement personnel, chaplains, and family advocacy personnel are trained regarding this privilege.

The Interplay of Service Regulations Regarding Access to Medical Records with MRE 513

The Army's regulation governing access to medical records, *AR 40-66*, [148] controls access to individuals' medical records. As with the victim witness program in *AR 27-10*, counsel must understand the interplay between the regulation and MRE 513. *Army Regulation 40-66* states that "DA policy mandates that the confidentiality of patient medical information and medical records will be protected to the fullest extent possible. Patient medical information and medical records will be released only if authorized by law and regulation." [149] Under *AR 40-66*, medical information or medical records may be disclosed without patient consent "to officers and employees of DOD who have an official need for access to the record in the performance of their duties." [150] Nonmedical personnel who may need medical information or medical records for official reasons include "unit commanders; inspectors general; officers, civilian attorneys, and military and civilian personnel of the Judge Advocate General's Corps; military personnel officers; and members of the U.S. Army Criminal Investigation Command or military police performing official investigations." [151] Thus, under *AR 40-66*, trial counsels, MPI investigators, CID agents, and commanders could access a victim's or witness's mental health records if they have an official need for the information.

There is "a disconnect between [MRE] 513 and *AR 40-66* because the regulation does not address the psychotherapist-patient privilege or outline any procedures in light of [MRE] 513." [152] The failure of *AR 40-66* to address MRE 513 creates a loophole for individuals with an official need for the information to access mental health records that MRE 513 intended to protect. Given

the psychotherapist-patient privilege that MRE 513 establishes for victims and witnesses, trial counsel and law enforcement personnel should refrain from using this loophole. If trial counsel or law enforcement personnel access this information, it may be easier for defense counsel to claim that MRE 513 does not protect the information. In particular, defense counsel may claim that the information is not protected under MRE 513 because its disclosure is constitutionally required (that is, by a Sixth Amendment right to confrontation or a Fifth Amendment right to due process). [153]

Comparison to Air Force Instruction 44-109

Unlike the Army, the Air Force revised its regulations in light of MRE 513. [154] *Air Force Instruction* (*AFI*) *44-109* "sets forth the rules concerning psychotherapist-patient confidentiality." [155] In contrast with *AR 40-66, AFI 44-109* prohibits disclosure of confidential communications to persons or agencies with an official need for the information when the evidentiary privilege of MRE 513 applies. [156]

Air Force Instruction 44-109 also establishes procedures for responding to MRE 513 issues. [157] When a mental health provider receives a request for confidential communications for use in a criminal investigation or UCMJ proceeding, the provider must first determine whether there is an exception to allow disclosure. [158] If there is no applicable exception, then the ***14** mental health provider informs the requestor "that the privilege is being claimed on behalf of the patient; that information will not be disclosed; and that any disagreement with this decision should be directed to the attention of the installation SJA." [159] If either the mental health provider or the requestor has questions regarding the applicability of the privilege, the installation SJA must determine whether an exception applies and whether to disclose the information. Although the SJA's determination is binding on the mental health provider and the requestor, the military judge still determines admissibility at trial. [160]

Proposal for Revision of AR 40-66

In light of the inconsistency between MRE 513 and *AR 40-66*, the Army should consider revising this regulation. Health care personnel and military justice practitioners need clearer guidance for accessing mental health records in a way that is consistent with MRE 513. These revisions could also reduce the risk of unauthorized disclosures. Such revisions could also give effect to the intent of MRE 513—to protect confidential communications made by victims and witnesses.

The Army should consider adopting procedures similar to those under *AFI 44-109*. The procedures of *AFI 44-109* are clear and logical with one exception— they make the SJA the decision authority for the application of MRE 513. This creates a potential conflict of interest, particularly because the SJA is required to give neutral and detached advice to the convening authority in military justice matters. [161] A better practice might be to have the hospital or military treatment facility commander designated as the deciding official with a requirement to seek legal advice from a judge advocate before deciding. Implementing these procedures would help ensure that individuals cannot circumvent the intended protection of MRE 513 because of the regulation's inconsistencies with MRE 513.

Conclusion

Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for the military. Military justice practitioners often focus on statements of the accused and whether MRE 513 protects such statements. However, MRE 513 also protects the statements victims and witnesses make to psychotherapists. The trial counsel plays a key role in this process. Victims and witnesses may authorize trial counsel to claim the privilege on their behalf. Trial counsel can seek interlocutory rulings from military judges to protect victim or witness communications to psychotherapists. Trial counsel and victim-witness liaisons also have an obligation under *AR 27-10* to protect the privacy of victims and witnesses. Trial counsel, victim-witness liaisons, and

chiefs of military justice should ensure that victims and witnesses are aware of their rights under MRE 513's psychotherapist-patient privilege.

Footnotes

1 Lieutenant Colonel R. Peter Masterton, *The Military's Psychotherapist-Patient Privilege: Benefit or Bane for Military Accused*?, ARMY LAW., Nov. 2001, at 22.

2 *See* Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999).

3 *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 513 (2002) [hereinafter MCM].

4 518 U.S. 1 (1996).

5 U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 18 (6 Sept. 2002) [hereinafter AR 27-10].

6 *See Jaffe*, 518 U.S. at 15.

7 COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS 29 (1962) [hereinafter RULE COMM. REPORT]; *see also* Act of June 29, 1940, Pub. L. No. 76-675, 54 Stat. 688 (discussing criminal rules); Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (governing civil rules); Bankruptcy Act of 1898, 55 Cong. Ch. 541, 30 Stat. 544.

8 RULE COMMITTEE REPORT, *supra* note 7, at v-vi. A preliminary draft of the proposed rules was circulated "to the bench, the bar, and the teaching profession" in March 1969. *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong. 41 (1974) (testimony of Judge Albert B. Maris, Chairman, Standing Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States); *see also* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969). There was no significant change in the psychotherapist-patient privilege provisions between the preliminary draft and the final draft subsequently submitted to Congress. *Compare* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. at 257-59 (containing preliminary draft of proposed psychotherapist-patient privilege), *with* Proposed Rules of Evidence for United States District Courts and Magistrates, 56 F.R.D. 183, 240-41 (1972) (containing final draft of proposed psychotherapist-patient privilege).

9 *See* 56 F.R.D. at 183 (containing transmittal memorandum and the full text of all the proposed rules). After receiving the proposed rules, Congress passed a statute which provided that Congress must expressly approve the Federal Rules of Evidence for them to become effective. Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9; *see also Hearings on H.R. 5463*, *supra* note 8 (providing testimony of Judge Albert B. Maris, Chairman, Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States).

10 56 F.R.D. at 230-58. The specific privileges included a lawyer-client privilege, a psychotherapist-patient privilege, a husband-wife privilege, a communication to clergyman privilege, a political vote privilege, a trade secrets privilege, a state secrets and other information privilege, and an identity of informer privilege. *Id.*

11 MCM, *supra* note 3, MIL. R. EVID. 513 analysis, at A22-45.

12 56 F.R.D. at 241. While the proposed FRE 504 created a psychotherapist-patient privilege, it contained "no provision for a general physician-patient privilege." *Id.*

13 *Id.* (Proposed FED. R. EVID. 504(c) 1972).

14 *Id.* at 240 (Proposed FED. R. EVID. 504(a)(2) 1972).

15 Major David L. Hayden, *Should There Be a Psychotherapist Privilege in Military Courts-Martial*?, 123 MIL. L. REV. 31, 46-47 (1987).

16 56 F.R.D. at 241 (Proposed FED. R. EVID. 504(d) 1972).

17 *Id.* (Proposed FED. R. EVID. 504(d)(1) 1972).

18 *Id.* (Proposed FED. R. EVID. 504(d)(2) 1972).

19 *Id.* (Proposed FED. R. EVID. 504(d)(3) 1972).

20 *See* S. REP. NO. 93-1277, at 6 (1974). According to Rep. William Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, a House subcommittee that worked on the proposed rules, "[Fifty] percent of the complaints in our committee related to the section on privileges." *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong. 6 (1974).

21 Hayden, *supra* note 15, at 44.

22 FED. R. EVID. 501. The full text of FRE 501 currently reads as follows:
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in the rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.
Id.

23 *Compare In re* Doc, 964 F.2d 1325 (2d Cir. 1992) (recognizing a psychotherapist-patient privilege under Rule 501), *and In re* Zuniga, 714 F.2d 632 (6th Cir. 1983) (recognizing a psychotherapist-patient privilege), *with* United States v. Burtrum, 17 F.3d 1299 (10th Cir. 1994) (declining to recognize a psychotherapist-patient privilege in a criminal child sexual abuse case), *In re* Grand Jury Proceedings, 867 F.2d 562 (9th Cir. 1989) (declining to recognize a psychotherapist-patient privilege), *and* United States v. Meagher, 531 F.2d 752 (5th Cir. 1976) (holding that no psychotherapist-patient privilege exists in federal criminal trials).

24 518 U.S. 1, 7-8 (1996) ("Because of the conflict among the courts of appeals and the importance of the question, we granted certiorari.").

25 *Id.* at 15. One factor that the Supreme Court relied on in recognizing the privilege was that all fifty states and the District of Columbia had adopted some form of a psychotherapist-patient privilege. *Id.* at 12.

26 *Id.* at 9 (quoting United States v. Trammel, 445 U.S. 40, 50 (1980) (quoting Elkins v. United States, 364 U.S. 206 (1960) (Frankfurter, J., dissenting)).

27 *Id.* at 10-12.

28 *Id.* at 10-11.

29 *Id.* at 11.

30 *Id.* at 11-12.

31 *Id.* at 15.

32 *Id.* at 18.

33 *See* Stacy Arnowitz, *Following the Psychotherapist-Patient Privilege Down the Bumpy Road Paved by* Jaffee v. Redmond, 1998 ANN. SURV. AM. L. 307, 319-20 (1998).

34 Two recent law review articles track the development of the federal psychotherapist-patient privilege since *Jaffee*. Melissa Nelken, *The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law*, 20 REV. LITIG. 1 (2000) (examining the major developments in the federal law of psychotherapist-patient privilege since *Jaffee*); Robert Aronson, *The Mental*

Health Provider Privilege in the Wake of Jaffee v. Redmond, 54 OKLA. L. REV. 591 (2001) (discussing federal decisions after *Jaffee*).

35 UCMJ art. 36 (2002).

36 Hayden, *supra* note 15, at 70.

37 MCM, *supra* note 3, MIL. R. EVID. 502-509, 513.

38 *Id.* MIL. R. EVID. 501 analysis, at A22-38 ("The Committee deemed the approach taken by Congress in the Federal Rules impracticable within the armed forces.").

39 The specifically listed privileges are: lawyer-client; communications to clergy; husband-wife; classified information; government information other than classified information; identity of informant; political vote; and deliberations of courts and juries. *See id.* MIL. R. EVID. 501 analysis, at A22-38; MIL. R. EVID. 502-509.

40 Hayden, *supra* note 15, at 66. The specifically listed privileges are: lawyer-client; communications to clergy; husband-wife; classified information; government information other than classified information; identity of informant; political vote; and deliberations of courts and juries. *See* MCM, *supra* note 3, MIL. R. EVID. 501 analysis, at A22-38; MIL. R. EVID. 502-509.

41 MCM, *supra* note 3, MIL. R. EVID. 501(d). "The military has always been explicit and intransigent in its non-recognition of any physician-patient privilege." Hayden, *supra* note 15, at 66.

42 *See* United States v. English, 47 M.J. 215 (1997); United States v. Mansfield, 38 M.J. 415 (C.M.A. 1993); United States v. Toledo, 25 M.J. 270 (C.M.A. 1987); United States v. Brown, 38 M.J. 696 (A.F.C.M.R. 1993).

43 38 M.J. 415, 418 (C.M.A. 1993).

44 *See, e.g.*, United States v. Rodriguez, 54 M.J. 156, 160 (2000), *cert. denied*, 531 U.S. 1151 (2001).

45 MCM, *supra* note 3, MIL. R. EVID. 501(a)(4).

46 *Id.*

47 *Id.* MIL. R. EVID. 501(d).

48 50 M.J. 782 (N-M. Ct. Crim. App. 1999), *rev'd on other grounds*, 54 M.J. 181 (2000).

49 *Id.* at 786.

50 *Id.* The NMCCA recently reaffirmed its position regarding the inapplicability of the *Jaffee* privilege to the military in *United States v. McDonald*, 57 M.J. 747 (N-M. Ct. Crim. App. 2002).

51 *Paaluhi*, 50 M.J. at 786.

52 No. 32733, 1999 CCA LEXIS 198 (A.F. Ct. Crim. App. June 4, 1999) (unpublished), *aff'd*, 54 M.J. 377 (2000).

53 *Id.*

54 *Id.*

55 49 M.J. 528 (Army Ct. Crim. App. 1998), *aff'd*, 54 M.J. 156 (2000), *cert. denied*, 531 U.S. 1151 (2001). In *United States v. Demmings*, the ACCA had suggested that *Jaffee* might apply to the military, but did not decide the issue because it held that the defense's failure to assert a privilege waived that issue at the court-martial. 46 M.J. 877, 883 (Army Ct. Crim. App. 1997). In *Rodriguez*, the ACCA treated the privilege issue as a matter of first impression. *Rodriguez*, 49 M.J. at 530.

56 *Id.* at 528.

57 *Id.* at 531-32.

58 *Id.* at 532.

59 *Id.* at 533.

60 *Id.* at 528.

61 54 M.J. 156 (2000), *cert. denied*, 531 U.S. 1151 (2001).

62 *Id.* at 160.

63 *Id.* at 161.

64 Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999).

65 *Id.* at 55,120. One author opined that the development of MRE 513 by the Joint Service Committee on Military Justice was "an attempt to head off Congressional action." Major Dru Brenner-Beck, ''*Shrinking" the Right to Everyman's Evidence: Jaffee in the Military*, 45 A.F. L. REV. 201, 239 (1998). Before the promulgation of MRE 513, the Senate Armed Services Committee proposed a provision to the National Defense Authorization Act of 1998 that would have required the Secretary of Defense to submit an amendment to the MRE to the President that would recognize a psychotherapist-patient privilege. *See* S. REP. NO. 105-29, at 319 (1997). The Conference Committee decided not to adopt that provision because the Department of Defense had "already made significant progress toward drafting a recommended amendment." H.R. CONF. REP. NO. 105-340, at 812 (1997).

66 *See* MCM, *supra* note 3, MIL. R. EVID. 513 analysis, at A22-45.
1999 Amendment: Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the Uniform Code of Military Justice. Rule 513 clarifies military law in light of the Supreme Court decision *Jaffee* ... In keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces. *See* the analyses for Rule 302 and Rule 501.
Id.

67 *Id.*

68 *Id.* MIL. R. EVID. 513(a).

69 *Id.* MIL. R. EVID. 513(b)(1).

70 *Id.* MIL. R. EVID. 513(b)(2).

71 *Id.* MIL. R. EVID. 513(a).

72 *Id.* MIL. R. EVID. 513(c).

73 *Id.*

74 *Id.*

75 *Id.* MIL. R. EVID. 513(d)(1).

76 *Id.* MIL. R. EVID. 513(d)(2).

77 *Id.* MIL. R. EVID. 513(d)(3).

78 *Id.* MIL. R. EVID. 513(d)(4).

79 *Id.* MIL. R. EVID. 513(d)(5).

80 *Id.* MIL. R. EVID. 513(d)(6). This is the broadest exception to the privilege. The privilege does not exist "if anyone believes that disclosure is necessary to protect military personnel, readiness, or the mission." STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 128 (Cum. Supp. 2001).

81 MCM, *supra* note 3, MIL. R. EVID. 513(d)(7).

82 *Id.* MIL. R. EVID. 513(d)(8).

83 SALTZBURG, *supra* note 80, at 128.

84 *See* Masterton, *supra* note 1, at 21-22 ("[B]ecause of the many exceptions to MRE 513, defense counsel should not rely on the rule to protect statements made by a client to mental health professionals").

85 *See, e.g.*, MCM, *supra* note 3, MIL. R. EVID. 513(d)(7).

86 *Id.*

87 *Id.* MIL. R. EVID. 513(e)(1).

88 *Id.* MIL. R. EVID. 513(e)(1)(A)-(B).

89 *Id.* MIL. R. EVID. 513(e)(2).

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* MIL. R. EVID. 513(e)(3).

94 *Id.* MIL. R. EVID. 513(e)(4).

95 *Id.* MIL. R. EVID. 513(e)(5). *See also* United States v. Briggs, 48 M.J. 143 (1998). In *Briggs*, the CAAF considered whether a military judge had properly denied the accused access to a rape victim's medical records. *Id.* at 144. The court stated that the preferred method for resolving discovery disputes concerning production of medical records "is for the military judge to inspect the medical records in camera to determine whether any exculpatory evidence was contained in the file prior to any government or defense access." *Id.* at 145. Although *Briggs* pre-dates the implementation of MRE 513, its preference for an in camera review to resolve discovery disputes regarding medical records would logically seem to apply to discovery disputes under MRE 513 as well.

96 *See* MCM, *supra* note 3, MIL. R. EVID. 513(c).

97 *See id.* MIL. R. EVID. 513(e)(1).

98 *See id.* MIL R. EVID. 513.

99 Appellate court decisions regarding psychotherapist-patient privilege are still dealing with communications occurring before 1 November 1999, the effective date of MRE 513. *See, e.g.*, United States v. McDonald, 57 M.J. 747, 757 (N-M. Ct. Crim. App. 2002). Statements at issue were made prior to 1 November 1999 and are not protected by MRE 513. *Id.*

100 Possible sources of guidance include federal case law and military cases applying MRE 412, the rape shield law. *See* MCM, *supra* note 3, MIL. R. EVID. 412(b)(1)(c). The commentary to the *Military Rules of Evidence Manual* indicates that it might be helpful to examine MRE 412(b)(1)(C) in connection with MRE 513(d)(8). SALTZBURG, *supra* note 80, at 129.

101 *See id.* MIL. R. EVID. 513(d)(8). Defense counsel are already being urged to use MRE 513(d)(8) to overcome the privilege. *See* Masterson, *supra* note 1, at 22-23.

102 SALTZBURG, *supra* note 80, at 129.

103 *See* United States v. Alperin, 128 F. Supp. 2d 1251, 1253 (N.D. Cal. 2001).

104 *In re* John Doe, 964 F.2d 1325, 1329 (2d Cir. 1992).

105 *See* United States v. Alperin, 128 F. Supp. 2d 1251, 1253 (N.D. Cal. 2001); United States v. Doyle, 1 F. Supp. 2d 1187, 1189-90 (D. Or. 1998); United States v. Hansen, 955 F. Supp. 1225, 1226 (D. Mont. 1997); United States v. Haworth, 168 F.R.D. 660 (D. N.M. 1996).

106 *John Doe*, 964 F.2d at 1329.

107 *Id.*

108 *Id.*

109 *Alperin*, 128 F. Supp. 2d at 1252.

110 *Id.* at 1253-54.

111 *Id.* at 1255.

112 1 F. Supp. 2d 1187, 1189-90 (D. Or. 1998).

113 *Id.* at 1189.

114 *Id.* at 1190.

115 *Id.* at 1191.

116 955 F. Supp. 1225, 1226 (D. Mont. 1997).

117 *Id.*

118 *See* MCM, *supra* note 3, MIL. R. EVID. 513(d)(1).

119 168 F.R.D. 660 (D. N.M. 1996).

120 *Id.*

121 415 U.S. 308 (1974).

122 *Id.* at 309.

123 *Id.* at 310-11.

124 *Id.* at 311.

125 *Id.*

126 *Id.* at 320.

127 480 U.S. 39, 42-43 (1987). A state statute required the files in question to remain confidential. *Id.* at 43.

128 *Id.* at 44. The prosecutor had also been denied access to the files. *Id.* at 44 n.4.

129 *Id.* at 52.

130 *Id.* at 54.

131 *Id.* at 57-58. Notably, the Supreme Court "express[ed] no opinion on whether the result in this case would have been different if the statute had protected the [Child and Youth Services] files from disclosure to *anyone*, including law enforcement and judicial personnel." *Id.* at 58. *See* Brady v. Maryland, 373 U.S. 83 (1963) (examining when exculpatory evidence must be turned over to the defense).

132 *Compare* MCM, *supra* note 3, MIL. R. EVID. 513(d)(8), *with* MCM, *supra* note 3, MIL. R. EVID. 412(b)(1)(C).

133 See Major Kevin D. Smith, *Navigating the Rape Shield Maze: An Advocate's Guide to MRE 412*, ARMY LAW., Oct./Nov. 2002, at 1 (providing general MRE 412 information).

134 United States v. Carter, 47 M.J. 395, 396 (1998).

135 *See* Smith, *supra* note 133, at 6; United States v. Greaves, 40 M.J. 432, 438 (C.M.A. 1994).

136 *See* Smith, *supra* note 133, at 6; *Carter*, 47 M.J. at 396.

137 SALTZBURG, *supra* note 80, at 601.

138 *Carter*, 47 M.J. at 396 (quoting United States v. Moulton, 47 M.J. 227, 228 (1998)).

139 Masterton, *supra* note 1, at 23.

140 *See* AR 27-10, *supra* note 5, para. 18-4(c), 18-10(a).

141 *Id.* ch. 18.

142 *Id.* para. 18-2(a).

143 *Id.* para. 18-10(a)(1).

144 *Id.* para. 18-2(b).

145 *Id.* paras. 18-2(a), 18-10(a)(1).

146 *See id.*

147 *Id.* para. 18-11(a).

148 U.S. DEP'T OF ARMY, REG. 40-66, MEDICAL RECORD ADMINISTRATION AND HEALTH CARE DOCUMENTATION para. 1-1 (10 Mar. 2003).

149 *Id.* para. 2-2.

150 *Id.* para. 2-4(a)(1).

151 *Id.* para. 5-23(e).

152 Major Bobbi L. Davis, The Psychotherapist-Patient Privilege and the Military Accused (2002) (unpublished LL.M. paper, The Judge Advocate General's School and Legal Center, U.S. Army) (on file with author).

153 *See* MCM, *supra* note 3, MIL. R. EVID. 513(d)(8).

154 The Navy, like the Army, has not revised its service regulations in light of MRE 513. Telephone interview with Lieutenant Sandra Johnson, Assistant Staff Judge Advocate, San Diego Naval Medical Center (Feb. 4, 2003).

155 U.S. DEP'T OF AIR FORCE, INSTR. 44-109, MENTAL HEALTH, CONFIDENTIALITY, AND MILITARY LAW para. 1.1 (1 Mar. 2000).

156 *Id.* para. 2.1. Paragraphs 2.2 to 2.4 of the AFI essentially reiterate the provisions of MRE 513. *See id.* paras. 2.2, 2.4.

157 *See id.* para. 2.5.

158 *Id.* Of course, if the patient waives the privilege, the mental health provider can simply disclose the information without having to worry about whether an exception applies. *Id.* para. 2.5.2.

159 *Id.* para. 2.5.2.

160 *Id.* para. 2.5.3.

161 *See* MCM, *supra* note 3, R.C.M. 406.

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