

The Military's Psychotherapist-Patient Privilege: Benefit or Bane for Military Accused?

Lieutenant Colonel R. Peter Masterton
Staff Judge Advocate
Fort Dix, New Jersey

Introduction

In 1999, the Military Rules of Evidence (MRE) were amended to create a new psychotherapist-patient privilege.¹ The new privilege, contained in MRE 513,² was designed to protect conversations with psychiatrists, psychologists, and other mental health professionals.³ The military developed this privilege in response to a 1996 decision by the Supreme Court⁴ that recognized a similar privilege in the federal district courts, and highlighted the nearly universal acceptance of a psychotherapist-patient privilege in other jurisdictions in the United States.⁵

The new military privilege protects statements made by soldiers accused of crimes, and also statements by military and civilian victims and witnesses.⁶ The privilege contains many exceptions,⁷ which make it difficult for accused soldiers to take advantage of its protections. In contrast, the privilege can prevent defense attorneys from discovering or using statements made by victims and witnesses who may testify against their clients.

This article discusses the origins and purposes of the new privilege and analyzes its effects. It examines the rule from the standpoint of the military defense counsel, focusing on the dan-

gers involved when accused soldiers talk to psychotherapists and the difficulties the privilege can pose when defense counsel attempt to obtain statements from victims and witnesses.

Development of the Psychotherapist-Patient Privilege in Federal Court

When the Federal Rules of Evidence (FRE) were proposed in 1971, they contained a number of specific privileges, including a psychotherapist-patient privilege. The drafting committee recognized the importance of protecting the relationship between psychotherapists and patients. The committee stressed that psychotherapists must obtain patients' trust to diagnose their problems and treat them properly.⁸

Congress was unable to reach a consensus on what privileges the new FRE should include.⁹ When Congress adopted the FRE, it did not include the psychotherapist-patient privilege, or any of the other specific privileges.¹⁰ Instead, Congress promulgated FRE 501, which recognizes federal common law as the source for privileges under the new rules.¹¹ Congress left recognition of privileges up to the federal courts to decide on a case-by-case basis.

1. Exec. Order No. 13,140, 64 Fed. Reg. 196 (Oct. 12, 1999).
2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 513 (2000) [hereinafter MCM].
3. See *id.* analysis, app. 22, at A22-24.
4. *Jaffee v. Redmond*, 518 U.S. 1 (1996).
5. See MCM, *supra* note 2, MIL. R. EVID. 513 analysis, app. 22, at A22-24.
6. *Id.* MIL. R. EVID. 513(a) (the rule applies to "patients").
7. *Id.* MIL. R. EVID. 513(d).
8. Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 240-44 (1972).
9. See STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 691-92 (7th ed. 1998).
10. See FED R. EVID.
11. FED. R. EVID. 501. The rule provides, in pertinent part:

[E]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress, or in 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.

Id.

Several federal appeals courts responded by creating some form of psychotherapist-patient privilege. The Court of Appeals for the Sixth Circuit recognized the privilege in 1983;¹² the Second Circuit followed suit in 1992;¹³ the Tenth Circuit recognized the privilege in 1994, but limited its application;¹⁴ and the Seventh Circuit recognized the privilege in 1995.¹⁵ Other federal appeals courts declined to recognize a psychotherapist-patient privilege.¹⁶

In 1996, the Supreme Court resolved the split among the circuits. In *Jaffee v. Redmond*,¹⁷ the Court recognized a psychotherapist-patient privilege under federal common law, using the authority provided by FRE 501.¹⁸ The Court found that all fifty states recognized some form of a psychotherapist-patient privilege.¹⁹ The Court distinguished a general physician-patient privilege by noting that physicians can successfully diagnose and treat patients based upon physical exams, whereas psychotherapists must obtain their patients' trust for successful diagnosis and treatment.²⁰

Development of the Psychotherapist-Patient Privilege in the Military

The MRE adopted in 1980 contained a list of specific privileges.²¹ Unlike the federal district courts, the military felt it needed specific guidance because the military justice system involves many non-lawyers, such as commanders and investigating officers.²²

The list of privileges did not include a psychotherapist-patient privilege, and specifically rejected the more general physician-patient privilege.²³ The MRE did include a provision that permitted the courts to discover new privileges based upon federal common law.²⁴ In *United States v. Toledo*,²⁵ however, the Court of Military Appeals declined to recognize a common law psychotherapist-patient privilege.²⁶

After the Supreme Court's ruling in *Jaffee v. Redmond*, the military courts addressed whether the new federal common law psychotherapist-patient privilege applied to the military. Initially, the Army Court of Criminal Appeals (ACCA) suggested that it might.²⁷ In 1997, however, the Court of Appeals for the Armed Forces (CAAF) stated in dicta that the common law privilege did not apply to the military.²⁸ After the adoption of

12. *In re Zungia*, 714 F.2d 632 (6th Cir. 1983).

13. *In re Doe*, 964 F.2d 1325 (2d Cir. 1992).

14. *United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1995).

15. *Jaffee v. Redmond*, 51 F.3d 1346 (7th Cir. 1995), *aff'd*, 518 U.S. 1 (1996).

16. *See United States v. Meagher*, 531 F.2d 752 (5th Cir. 1976); *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989); *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983).

17. 518 U.S. 1 (1996).

18. *Id.* at 15.

19. *Id.* at 12.

20. *Id.* at 10.

21. *See MCM*, *supra* note 2, MIL. R. EVID. 501-509 analysis, app. 22, at A22-37 - 43.

22. *Id.* MIL. R. EVID. 513 analysis, app. 22, at A22-38.

23. *Id.* MIL. R. EVID. 501(d). "Notwithstanding 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." *Id.*

24. *Id.* MIL. R. EVID. 501(a). The rule states:

A person may not claim a privilege with respect to any matter except as required by or provided for in (1) the Constitution of the United States as applied to members of the armed forces; (2) An Act of Congress applicable to trials by courts-martial; (3) These rules or this Manual; or (4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual.

Id.

25. 25 M.J. 270 (C.M.A. 1987).

26. *See id.* at 275-76.

MRE 513 in 1999, the CAAF confirmed its earlier dicta, holding that statements to psychotherapists made before the effective date of the new rule were not protected by either a common law privilege or a retroactive application of the new rule.²⁹

Military Rule of Evidence 513

Military Rule of Evidence 513 applies to all statements made after 1 November 1999.³⁰ The rule creates a psychotherapist-patient privilege for investigations and proceedings under the Uniform Code of Military Justice (UCMJ).³¹ The drafters adopted the rule because of the military's policy of following the FRE when they are not inconsistent with the needs of the military.³²

Protections of the Rule

Military Rule of Evidence 513 gives patients the privilege to prevent disclosure of a confidential communication with psychotherapists or their assistants. The communication must have been made for the purpose of "facilitating diagnosis or treatment of the patient's mental or emotional condition."³³ Under the rule, patients' confidential communications and related medical records are protected from disclosure or production before trial, and are protected from admission into evidence at trial.³⁴

The rule broadly defines "psychotherapist." The definition includes psychiatrists, clinical psychologists, or clinical social

workers that are licensed in any state or hold credentials from a military health care facility. It also includes "any person reasonably believed by the patient to have such a license or credentials."³⁵ An "assistant to a psychotherapist" is "anyone assigned to assist a psychotherapist in providing professional services, or reasonably believed by the patient to be so assigned."³⁶

The rule also broadly defines "confidential communications." Communications are confidential if they are "not intended to be disclosed to third persons," except those to whom disclosure is reasonably necessary to further the professional services.³⁷

Either the patient or his guardian can assert the privilege. The patient may also "authorize trial counsel or defense counsel to claim the privilege on his or her behalf."³⁸ Also, the "psychotherapist or assistant who received the communication may claim the privilege" on the patient's behalf.³⁹

Exceptions to the Rule

There are a number of exceptions to MRE 513.⁴⁰ These exceptions address situations when the protections of the rule are unnecessary or when an important public interest mandates disclosure.

Patient's Death. The first exception provides that the privilege does not survive the patient's death.⁴¹ In this case, disclosure will not hinder treatment.

27. In *United States v. Demmings*, 46 M.J. 877 (Army Ct. Crim. App. 1997), the court suggested that after the Supreme Court recognized the psychotherapist-patient privilege, it could be available in military courts. *Id.* at 881. The ACCA held that Demmings had "waived the issue by [not raising the] privilege at his court-martial." *Id.* at 883.

28. *United States v. English*, 47 M.J. 215, 216 (1997). *See also* *United States v. Flack*, 47 M.J. 415, 417 (1998) (defense counsel not ineffective by failing to raise issue of psychotherapist-patient privilege).

29. *United States v. Rodriguez*, 54 M.J. 156, 161 (2000); *United States v. Paaluh*, 54 M.J. 181, 183 (2000).

30. *Rodriguez*, 54 M.J. at 161.

31. MCM, *supra* note 2, MIL. R. EVID. 513.

32. *Id.* MIL. R. EVID. 513 analysis, app. 22, at A22-44.

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

34. *See id.* MIL. R. EVID. 513(e).

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

36. *Id.* MIL. R. EVID. 513(b)(3).

37. *Id.* MIL. R. EVID. 513(b)(4).

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

39. *Id.*

40. *Id.* MIL. R. EVID. 513(d).

Family Discord. The second exception deals with family discord. The privilege does not exist “when the communication is evidence of spouse abuse, child abuse or neglect,” or when a “spouse is charged with a crime against the . . . other spouse or [one of their children].”⁴² This is an important exception because many soldiers are charged with these types of offenses.⁴³

Danger to Patient or Others. The next four exceptions to MRE 513 involve situations when patients may pose a danger to themselves or others. The privilege does not apply when law or service regulations impose a duty to report the communication;⁴⁴ when psychotherapists or their assistants believe the patient’s mental or emotional condition makes the patient dangerous;⁴⁵ when “the communication clearly contemplated the future commission of a fraud or crime” or if the patient asks psychotherapists for help in the commission of a fraud or crime;⁴⁶ and when disclosure is “necessary to ensure the safety of military personnel, military dependents, military property, classified information, or a . . . military mission.”⁴⁷

Mental Condition on Defense. The seventh exception addresses the accused who raises the issue of his mental condition at court-martial. The accused loses the privilege when he offers evidence concerning his mental condition in defense, extenuation, or mitigation.⁴⁸

Constitutionally Required Disclosure. The last exception to the rule prohibits the use of the privilege when disclosure is constitutionally required.⁴⁹ The accused’s right to a fair trial may require disclosure of such statements.

Military Rule of Evidence 513(e) details the procedure for determining the applicability of the privilege. When the privilege is in dispute, either party may ask the military judge for an interlocutory ruling.⁵⁰ The moving party must file a motion “at least five days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to.”⁵¹ The military judge can move this deadline forward or backward and may permit a party to file the motion during trial.⁵² The moving party must “serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient’s guardian.”⁵³

The military judge will conduct a hearing before ordering production or admission of psychotherapist-patient communications. At the hearing, which the military judge can close to the public, the parties “may call witnesses, including the patient, and offer other relevant evidence.”⁵⁴ The court must allow the patient “a reasonable opportunity to attend the hearing and be heard,” but need not unduly delay the proceedings.⁵⁵ The hearing is outside the presence of the members, and, if the military judge needs to examine the statement, the judge will do so *in camera*.⁵⁶ To prevent improper disclosure, the judge can issue a protective order or admit only part of a statement,⁵⁷ and the motion, related papers, and the record of the hearing are sealed.⁵⁸

Protecting Statements Made by the Accused

Because of the many exceptions to MRE 513, defense counsel should not rely on the rule to protect statements made by a

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

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

43. See BUREAU OF JUSTICE STATISTICS, VIOLENCE BY INTIMATES (Mar. 1998); BUREAU OF JUSTICE STATISTICS, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS (Mar. 1996). Both publications can be found at the Bureau of Justice Statistics’ Web site at www.ojp.usdoj.gov/bjs/pubalp2.htm.

44. MCM, *supra* note 2, MIL. R. EVID. 513(d)(3).

45. *Id.* MIL. R. EVID. 513(d)(4) (this includes danger to the patient himself).

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

47. *Id.* MIL. R. EVID. 513(d)(6).

48. *Id.* MIL. R. EVID. 513(d)(7).

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

50. MCM, *supra* note 2, MIL. R. EVID. 513(e)(1).

51. *Id.* MIL. R. EVID. 513(e)(1)(A).

52. *Id.*

53. *Id.* MIL. R. EVID. 513(e)(1)(B).

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

client to mental health professionals. There are several methods of protecting a client's conversation with a psychotherapist that are more effective than MRE 513. Defense counsel may have a mental health professional designated as a part of the defense team.⁵⁹ Alternatively, the defense can obtain a mental examination under Rule for Courts-Martial (RCM) 706.⁶⁰

Mental health professionals can become a part of the defense team in two ways. Defense counsel can ask the convening authority or military judge to designate a psychotherapist as part of the defense team;⁶¹ however, defense counsel will need to show that they need the assistance of a psychotherapist to prepare their case.⁶² Alternatively, the accused may hire a private psychotherapist at his or her own expense to assist the defense counsel.⁶³ In either case, the attorney-client privilege protects the client's statements to his psychotherapist; any statements the client makes during therapy will be protected to the same extent as his conversations with his defense counsel.⁶⁴

The second option for the accused is a mental status evaluation under RCM 706. Although the attorney-client privilege does not cover the psychotherapist who conducts this examination, the psychotherapist can only disclose limited information to the trial counsel.⁶⁵ Generally, this means that trial counsel will be unable to discover specific statements made by the accused.⁶⁶

In either case, the defense counsel should closely monitor clients' conversations with mental health professionals. The defense counsel should explain disclosure limitations to the psychotherapist to ensure that he does not inadvertently reveal the clients' statements to prosecutors.

Obtaining Statements of Victims and Witnesses

Although MRE 513 provides little protection to statements made by the accused, it can provide substantial protections to statements made by victims and witnesses. This makes the defense counsel's job even more difficult. During pretrial preparation, defense counsel will want to examine statements made by victims and witnesses to psychotherapists. At trial, defense counsel will want to introduce anything helpful in the statements. Military Rule of Evidence 513 can create obstacles at both of these stages.

To overcome MRE 513 during pretrial discovery, defense counsel should argue that the Constitution requires disclosure of statements made by victims and witnesses to psychotherapists.⁶⁷ Due process guarantees the accused the right to discovery of material evidence that is favorable to the defense.⁶⁸ Defense counsel can demonstrate this by showing that the statements are admissible as evidence of bias or prior inconsis-

55. *Id.*

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

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

58. *Id.* MIL. R. EVID. 513(e)(5).

59. *See* United States v. Toledo, 25 M.J. 270 (C.M.A. 1987).

60. *See* MCM, *supra* note 2, R.C.M. 706.

61. *See id.* R.C.M. 703(d). Defense counsel can find names and addresses of psychotherapists for this purpose on the Experts Directory of the Trial Defense Service Internet site, located at www.jagcnet.army.mil/USATDS.

62. *See id.* *See, e.g., Toledo*, 25 M.J. at 276.

63. *See Toledo*, 25 M.J. at 276.

64. *See* MCM, *supra* note 2, MIL. R. EVID. 502(a); *Toledo*, 25 M.J. at 275-76; United States v. Mansfield, 38 M.J. 415, 418 (C.M.A. 1993).

65. MCM, *supra* note 2, R.C.M. 706(c)(2). The trial counsel will only receive a statement consisting of the psychotherapist's ultimate conclusions to the following questions:

- (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?
- (B) What is the clinical psychiatric diagnosis?
- (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?
- (D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct and cooperate intelligently in the defense?

Id.

66. *See id.* R.C.M. 706(c)(5).

67. MCM, *supra* note 2, MIL. R. EVID. 513(d)(8).

tent statements. Defense counsel may also demonstrate this by showing how they may lead to other admissible evidence, such as testimony that a witness is untruthful.

The defense counsel often will not know the contents of the statements they seek. This makes it difficult to argue that their production is constitutionally required. Therefore, defense counsel must obtain as much background information about the victims and witnesses as possible to determine what their statements to psychotherapists and their mental health records may contain. Defense counsel should talk to the witnesses and victims and their families, friends, and co-workers.

Defense counsel may also gain access to the statements of victims and witnesses to psychotherapists by using other exceptions to MRE 513. For example, a psychotherapist may disclose a statement of a witness or victim if that patient poses a danger to others, including the accused.⁶⁹ The psychotherapist can also disclose statements that contemplate the commission of an offense, such as perjury.⁷⁰

To overcome MRE 513 at trial, defense counsel should argue that the Constitution requires admission of statements made by victims and witnesses to psychotherapists. Defense counsel may do this by demonstrating that the statements reveal bias or prejudice.⁷¹

A defense counsel needing access to a protected statement should request relief from the military judge well before trial. The motion deadline is five days before the entry of pleas; the judge may waive this deadline only for good cause.⁷²

Conclusion

Military Rule of Evidence 513 provides defense counsel with more burdens than benefits. It does not effectively protect clients' statements, but may effectively prevent defense counsel from discovering statements made by victims and witnesses.

Defense counsel should not over-rely on the rule's protections. Instead, they should seek other means of protecting their clients' statements, such as having the psychotherapist assigned to the defense team or by requesting a mental status evaluation under RCM 706.

Defense counsel must seek ways to overcome MRE 513 when it prevents access to the statements of victims and witnesses. Defense counsel can argue that the accused's right to a fair trial mandates disclosure, or that one of the other enumerated exceptions to MRE 513 requires access to the statements.

68. *Pennsylvania v. Ritchies*, 480 U.S. 39 (1987); *Brady v. Maryland*, 373 U.S. 83 (1963).

69. MCM, *supra* note 2, MIL. R. EVID. 513(d)(4).

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

71. *See Olden v. Kentucky*, 488 U.S. 227 (1988); *Davis v. Alaska*, 415 U.S. 308 (1974).

72. MCM, *supra* note 2, MIL. R. EVID. 513(e)(1)(A).