

# **Evaluating the Scope of the Psychotherapist-Patient Privilege Under Military Rule of Evidence 513 and DAC-IPAD Update**

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# Overview

- Background on DAC-IPAD
- The DAC-IPAD's study of the psychotherapist-patient privilege under M.R.E. 513, post *Mellette*
- The DAC-IPAD's military installation site visits

# Statutory Authority and Mission

- Section 546 of the National Defense Authorization Act for Fiscal Year 2015 [FY 2015 NDAA], as amended:

The DAC-IPAD shall provide independent advice and recommendations on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces, based on its ongoing review of cases.

- The Committee makes recommendations for systemic change when, in the DAC-IPAD members' collective judgment, it will improve the investigation, prosecution, and defense of sexual misconduct.

# Selecting Topics for Review

- Congressional Taskings
- Requests from the DoD General Counsel
- Committee Decision

# Select Reports

<https://dacipad.whs.mil/> (scroll down the “Reports” dropdown menu and select individual topic reports)

- *Report on Enforcement of Crime Victims’ Rights*, January 2025
- *Report on Exploring the Race, Ethnicity, and Gender of Military Panels at Courts-Martial*, July 2024
- *Report on Randomizing Panel Member Selection*, December 2023
- *Report on Sharing Information with Victims*, December 2023
- *Report on Reforming Pretrial Procedures*, June 2023
- *Report on Victim Impact Statements*, March 2023
- *Appellate Review Study*, March 2023
- *Report on Investigative Case File Reviews*, October 2020

# **M.R.E. 513: The Psychotherapist-Patient Privilege**

The DAC-IPAD reviewed 2 issues:

1. Whether the scope of M.R.E. 513 should be expanded to include diagnosis and treatment.
2. Whether the definition of “psychotherapist” under M.R.E. 513 should be expanded to include medical practitioners while engaged in treatment of a mental health issue.

# **M.R.E. 513: Diagnosis and Treatment**

(a) General Rule. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

*United States v. Mellette* (C.A.A.F. 2022): Privilege does not extend to all evidence of a patient's diagnosis and treatment.

# M.R.E. 513: Diagnosis and Treatment

*Jaffee v. Redmond* (U.S. Sup. Ct. 1996): Supreme Court recognized a federal psychotherapist-patient privilege.

- Effective therapy “depends upon an atmosphere of confidence and trust” and “the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.”
- “In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest.”



# **M.R.E. 513: Diagnosis and Treatment**

## **Federal and State Law**

### **Federal:**

- Privilege applies in civil and criminal cases
- Few opinions, but most recognize diagnosis and/or treatment as within the privilege

### **States:**

- Many cover diagnosis/treatment under rationale that they are borne of communications between patient and therapist and not including them in the privilege could chill a person's choice to seek treatment
- Those that don't cover diagnosis/treatment within privilege generally adopt a strict interpretation under philosophy that privileges should be narrowly tailored

# **M.R.E. 513: Diagnosis and Treatment Stakeholders**

- OSTC
- Defense
- Victims' counsel
- Appellate government and defense
- Psychiatrist and primary care physician
- Victims' advocacy representative

# **M.R.E. 513: Diagnosis and Treatment Stakeholder Perspectives**

- Some victims are hesitant to participate in courts-martial or seek mental health treatment following a sexual assault knowing their records will be reviewed by counsel.
- Including diagnosis and treatment within the privilege would deprive accused of constitutionally required information; there are cases in which this information has made a difference in the outcome of the case.
- Mental health/medical providers: can't draw a distinction between communications and diagnosis and treatment. Informing a victim that diagnosis and treatment records may be disclosed in a court-martial may be a barrier to mental health treatment.

# M.R.E. 513: Mental Health Providers

- **M.R.E. 513:** privilege between patient and psychotherapist
- **Psychotherapist:** psychiatrist, clinical psychologist, clinical social worker, other licensed or credentialed mental health professional, or “person reasonably believed by the patient” to have such a license or credential
- Does not cover primary care providers

# M.R.E. 513: Mental Health Providers

- Too few mental health professionals to provide care for all military personnel and family members who require it
- Primary care practitioners provide a substantial amount of mental health care
  - Prescribe medications
  - Some trained to engage in therapy
  - All interactions involve communications with the patient

# M.R.E. 513: Mental Health Providers

- **Federal:** Privilege doesn't extend to primary care providers
- **States:** Many states extend privilege to primary care providers
  - Define psychotherapist to include a person authorized to practice medicine, or who the patient believes is authorized to practice medicine, who is engaged in the diagnosis or treatment of a mental or emotional condition

# **DAC-IPAD Policy Subcommittee Proposed Recommendations**

1. Amend M.R.E. 513 privilege to include diagnosis and treatment
2. Amend definition of psychotherapist under M.R.E. 513 to include medical treatment providers while engaged in treating patients for mental health conditions.

# DAC-IPAD Site Visits

- Purpose: feedback from the field
- March – November 2024
- 16 military installations
- 150 small group discussions
- Over 600 personnel



# DAC-IPAD Site Visits

## Groups:

- Special trial counsel
- Trial counsel
- Defense counsel
- Victims' counsel
- Investigators
- Junior enlisted members
- Senior enlisted members
- Commanders
- Service academy students
- SAPR and EO

# DAC-IPAD Site Visits

## Topics:

- Timeliness of investigations
- OSTC implementation and deferral process
- Independence of OSTC and defense counsel
- Sufficiency of resources and personnel
- Experience and training
- M.R.E. 513
- Sexual harassment reporting, investigations, dispositions
- Command military justice tools for deferred offenses

# **DAC-IPAD Way Ahead**

## **DAC-IPAD pending reviews:**

- Investigations
- OSTC deferrals
- Discovery
- Administrative separation boards for sexual misconduct
- Conviction integrity unit study (ongoing)
- Support for military members accused of crimes (ongoing)

# Conclusion