

**TALK THE TALK; NOW WALK THE WALK: GIVING AN  
ABSOLUTE PRIVILEGE TO COMMUNICATIONS BETWEEN A  
VICTIM AND VICTIM-ADVOCATE IN THE MILITARY**

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*The actions we take to enhance victim support and improve the manner in which we account for the actions taken will encourage more victims to come forward and report these tragic incidents. With time, an increased number of reported cases will build victim confidence in our investigative and military justice systems . . . .*<sup>1</sup>

*And 'tis a kind of good deed to say well  
And yet words are no deeds.*<sup>2</sup>

I. Introduction

“You just testified that Staff Sergeant \_\_\_\_\_ did not have any form of permission from you to do what he did. Isn't it true, though, that you told Mrs. \_\_\_\_\_, YOUR VICTIM ADVOCATE, that you felt responsible for what happened? Isn't it also true that you also told Mrs. \_\_\_\_\_ that you feel bad about what Staff Sergeant \_\_\_\_\_'s family is going through right now? And when you told this to YOUR VICTIM ADVOCATE, isn't it true that you two were alone? That you were telling the truth? That you had no reason to lie?”

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<sup>1</sup> Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Increased Victim Support and A Better Accounting of Sexual Assault Cases (JTF-SAPR-002) (22 Nov. 2004) [hereinafter JTF-SAPR-002].

<sup>2</sup> WILLIAM SHAKESPEARE, KING HENRY THE EIGHTH act 3, sc. 2, l. 153.

The previous paragraph describes the cross examination of a sexual assault victim at an Article 32 hearing. More than simple impeachment, the cross examination represents part of an overall campaign to re-victimize a sexual assault survivor during the legal process. This questioning reflects a calculated defense tactic to aggravate the effects of the “second rape” on the victim, making the personal costs of the criminal process too great for her<sup>3</sup> to bear. Bringing the victim advocate into the discovery process sends the distinct message to the victim that no area of her life is safe from defense examination. It is also a tactic that would be eliminated if a privilege existed to cover communications between a sexual assault victim and a victim advocate.

Sexual assault traumatizes by removing an element of control from an intimate aspect of the victim’s life.<sup>4</sup> The actual commission of the crime, however, only represents the start of a victimization process that does not conclude until months or years later.<sup>5</sup> Surprisingly, the criminal process, rather than the offender, often inflicts a large portion of the trauma the victim experiences.<sup>6</sup> Part of this trauma derives from the increasing realization by defense attorneys that the psyche of the victim represents another front, along with member selection or admissibility of evidence, in the legal campaign to avoid conviction of the accused. As recently seen in the Kobe Bryant case, the defense wins if they can intimidate a victim into refusing to testify in the courtroom.<sup>7</sup>

Defense tactics targeting the victim in a sexual assault case with psychological warfare are especially suited to the litigation of sexual assault cases under the Uniform Code of Military Justice (UCMJ), which contains procedures and rules not present in civilian criminal systems.<sup>8</sup> Unfortunately for victims, most of these procedures and rules, such as the Article 32 investigation and liberal discovery, form an integral part of the military’s criminal justice system. Consequently, they are unlikely to

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<sup>3</sup> The author recognizes that rape, sexual assault, and domestic violence are not gender specific crimes. In the interests of brevity, however, feminine and masculine pronouns are used for the victim and perpetrator, respectively, reflecting rates of prevalence.

<sup>4</sup> See Section II.A, *infra*.

<sup>5</sup> *Id.*

<sup>6</sup> See Section V.B.1., *infra*.

<sup>7</sup> See generally Jill Smolowe & Vickie Bane, *Too High a Price? After Kobe Bryant’s Accuser Refuses to Testify and the Laker Star Walks Free, Prosecutor Dana Easter Defends the Accuser—and Describes Her Ordeal*, PEOPLE, Sept. 20, 2004, at 200.

<sup>8</sup> See Section V.B.1., *infra*.

change, regardless of any public or congressional demands.<sup>9</sup> This article argues that one way of improving the military's treatment of sexual assault victims is to create a privilege for their communications with victim advocates. The President can achieve this by expanding Military Rule of Evidence (MRE) 513 to provide an absolute privilege for confidential communications between a victim and a victim advocate who has been appointed by an installation commander or commanding officer (hereinafter referred to as "advocate-victim privilege" or "proposed privilege").<sup>10</sup> This article also demonstrates that an evidentiary privilege for victim advocates in the Department of Defense (DOD) does not violate the Sixth Amendment rights of the accused.

Confidentiality is a controversial subject as it pertains to the victims of sexual assault crimes within the DOD.<sup>11</sup> The DOD has, however, recognized that confidential reporting increases the percentage of sexual assaults that are reported.<sup>12</sup> This article's proposed privilege, while subsuming the issue of reporting, is geared towards the advocate's interaction with the military judge and defense counsel, rather than a victim's initial consultations about whether to report the crime.<sup>13</sup> This article addresses the relationship between victim advocates and victims in the context of sexual assault survivors. The justifications for the proposed privilege would also apply to victims of domestic violence; therefore, the proposed privilege would also include the relationship between domestic violence victims and their advocates.

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<sup>9</sup> Some of the conditions which make victims vulnerable to increased emotional trauma during the criminal process evolve from the lack of privacy that will always exist in military life. This article considers the liberal discovery rules and Article 32 investigation requirements set forth by the *Manual for Courts-Martial* to be assets of the military criminal process. Abuses of these provisions are discussed in Section IV.A.3.a., *infra*, as justification for creating an advocate-victim privilege—not as a recommendation for abolishing the Article 32 investigation or curtailing military discovery.

<sup>10</sup> Most states that have codified this privilege refer to it as a victim advocate-victim privilege. For purposes of clarity and brevity, this article uses the term advocate-victim privilege.

<sup>11</sup> See Section II.D., *infra*.

<sup>12</sup> Dr. David Chu, Undersecretary of Defense for Personnel and Readiness, Special Defense Department Briefing on New Sexual Assault Policy (Jan. 4, 2005), available at <http://www.dod.mil/transcripts/2005/tr20050104-1922.html> [hereinafter Dr. Chu Briefing].

<sup>13</sup> A confidential report of sexual assault to rape crisis personnel that is not reported to law enforcement authorities will still have relevance in any subsequent case where the victim has been assaulted a second time.

## II. Background

An analysis of the dynamic that exists between the military, sexual assault victims, and victim advocates must occur prior to evaluating the worthiness of a privilege between victims and their advocates. The inherent conditions of military service amplify the already staggering effects on the victim of a sexual assault. An understanding of the role of victim advocates and the means by which they assist sexual assault survivors in the military is necessary to correctly evaluate the arguments for creating a privilege covering the survivor-advocate relationship.

### A. Sexual Assault and its Victims

Sexual assault represents a crime that is unique in its ability to harm victims. Rape and sexual assault, probably among the most underreported crimes in America,<sup>14</sup> psychologically impact their victims well beyond the duration of the actual crimes.<sup>15</sup> Studies have indicated that rape victims suffer from greater post-event anxiety than victims of other violent crimes.<sup>16</sup> Victims of rape and sexual assault also show an

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<sup>14</sup> U.S. DEP'T OF DEFENSE, TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT 63 (Apr. 2004) [hereinafter DOD TASK FORCE REP.]. In a Department of Justice study covering 1992 to 2000, less than 40% of sexual assault offenses were reported to authorities. CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS—RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000 (2002). The actual numbers are that only 36% of rapes, 34% of attempted rapes, and 26% of sexual assaults were reported to police between 1992 and 2000. *Id.*

<sup>15</sup> Patricia A. Resick, *The Psychological Impact of Rape*, 8 J. INTERPERSONAL VIOLENCE 223, 225 (1993).

Most rape victims experience a strong acute reaction that lasts for several months. By 3 months postcrime, much of the initial turmoil has decreased and stabilized. Some victims continue to experience chronic problems for an indefinite period of time. These problems fall under the categories of fear/PTSD, depression, loss of self-esteem, social adjustment problems, sexual disorders, and other anxiety disorders.

*Id.* D. J. WEST, SEXUAL CRIMES AND CONFRONTATIONS 201 (1987) (“A group of 31 victims were followed up two to three years after an assault. Anger was still being expressed by half these victims, as was embarrassment and over one third were fearful of being alone . . .”).

<sup>16</sup> Resick, *supra* note 15, at 227.

increased risk of suicide compared to non-victims.<sup>17</sup> These symptoms also place a strain on society through the secondary victimization of family members, co-workers, and treatment personnel.<sup>18</sup> Studies have shown that the strains of coping with sexual assault destroy a significant portion of existing relationships.<sup>19</sup>

Experts in treating victims of sexual assault recommend the establishment of a safe haven for the victim.<sup>20</sup> Treatment also focuses on the concept of “empowerment” or increased sense of self control, where victims realize, psychologically, that they have regained control of their lives.<sup>21</sup> Empowerment involves, among other things, control over whether the crime is reported to police and whether victim assistance personnel release information.<sup>22</sup> Sexual assault assistance personnel help victims understand what took place and clarify their feelings to facilitate the making of informed choices.<sup>23</sup> Confidentiality represents an absolute requirement for both victim empowerment and effective rape crisis counseling.<sup>24</sup>

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<sup>17</sup> *Id.* at 229.

<sup>18</sup> See generally REBECCA CAMPBELL, EMOTIONALLY INVOLVED: THE IMPACT OF RESEARCHING RAPE 70 (2002); Patricia A. Furci, *The Sexual Assault Nurse Examiner: Should the Scope of the Physician-Patient Privilege Extend That Far?*, 5 QUINNIPIAC HEALTH L.J. 229, 233 (2002).

<sup>19</sup> For example, studies indicate that over half of female victims of rape lose their husbands or boyfriends. Theresa L. Crenshaw, M. D., *Counseling of Family and Friends, in RAPE: HELPING THE VICTIM; A TREATMENT MANUAL* 51 (Susan Halpern ed., 1978).

<sup>20</sup> DOD TASK FORCE REP., *supra* note 14, at 30.

<sup>21</sup> Malkah T. Notman & Carol C. Nadelson, *Psychodynamic and Life-Stage Considerations in the Response to Rape*, in THE RAPE CRISIS INTERVENTION HANDBOOK 139 (Sharon L. McCombie ed., 1980). See generally LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE; SOCIETY’S CONTINUED BETRAYAL OF THE VICTIM 129 (1991); Jennifer Bruno, Note: *Pitfalls for the Unwary; How Sexual Assault Counselor-Victim Privileges May Fall Short of Their Intended Protections*, 2002 U. ILL. L. REV. 1373, 1377 (2002), referencing MARY P. KOSS & MARY R. HARVEY, THE RAPE VICTIM: CLINICAL AND COMMUNITY INTERVENTIONS 133-35 (2d ed. 1991). Reporting the offense is viewed as an “empowering” activity. MADIGAN & GAMBLE, *supra* at 123.

<sup>22</sup> REPORT OF PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY 80 (2003) [hereinafter AIR FORCE ACADEMY REP.]. “Giving victims choices helps them regain a sense of control over their lives and promotes the healing process.” *Id.*

<sup>23</sup> Rachel M. Capoccia, Note: *Piercing the Veil of Tears: The Admission of Rape Crisis Counselor Records in Acquaintance Rape Trials*, 68 S. CAL. L. REV. 1335, 1349 (1995).

<sup>24</sup> E-mail from Christine Hansen, Executive Director, The Miles Foundation, to Maj. Paul Schimpf, USMC (Feb. 7, 2005, 3:40 pm) [hereinafter CHRISTINE HANSEN] (on file with author). The Miles Foundation is a not for profit organization that advocates on behalf of sexual assault and domestic violence victims in the military. Miles Foundation, at <http://hometown.aol.com/milesfdn> (last visited Nov. 16, 2004).

## B. Sexual Assault and the Military: Same Problem—Different Decade

As a microcosm of our broader society, the military, not surprisingly, also grapples with sexual assault. What is counterintuitive, however, is that military service exacerbates many of the consequences of sexual assault. Despite the recent media attention on the problem, the military has faced the challenge of widespread sexual assaults by and on its service members for decades.

### 1. *Sexual Assault in the Military Setting*<sup>25</sup>

Empirical evidence indicates that sexual assault in the military is widespread<sup>26</sup> and more damaging to its victims than assaults in the civilian sector.<sup>27</sup> Several studies suggest that women in the United States military face a higher risk of sexual assault than their civilian counterparts.<sup>28</sup> This increased risk may result from the services recruiting in demographics whose females are more prone to

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<sup>25</sup> Anyone wishing to truly appreciate the military's sexual assault problems should read the series of articles that ran in the *Denver Post* on 16, 17, and 18 November 2003, which paint an extremely bleak picture of the military's treatment of women. Miles Moffett & Amy Herdy, *Betrayal in the Ranks*, DENVER POST, available at <http://www.denverpost.com/betrayal> (last visited Mar. 20, 2005) [hereinafter DENVER POST ARTICLES]. While highly inflammatory, the articles are relevant to understanding the intent behind the new DOD sexual assault policy, discussed in Section II.B.3., *infra*. The policy seems written to directly respond to most of the allegations made in the series of *Denver Post* articles.

<sup>26</sup> Multiple studies have shown a high prevalence of sexual assault in the military. A study of female hospital patients between 1994 and 1995 showed that 23% reported that they were a victim of sexual assault sometime during their military careers. DOD TASK FORCE REP., *supra* note 14, at 32. A 2003 study interviewed 558 women who were veterans of the Vietnam and Persian Gulf eras and found that 28% had experienced a rape or attempted rape during their military service. *Id.* at 58. Records taken by the Veteran's Administration appear to confirm these findings: "Of the almost three million veterans screened between March 2002 and October 2003, approximately 20.7% of females . . . screened positive for a history of military sexual trauma." *Id.*

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Sexual Assault can have a powerful and potentially long term effect on a victim's ability to cope. It often destabilizes a victim's sense of control, safety and well being, particularly if the victim lives in the same building, is assigned within the same command, and frequents the same base support and recreation facilities as the offender.

DOD TASK FORCE REP., *supra* note 14, at 32.

<sup>28</sup> Lee Martin, M.A., et al., *Prevalence and Timing of Sexual Assaults in a Sample of Male and Female U.S. Army Soldiers*, 163 MIL. MED. 213, 214 (1998).

victimization and whose males are more prone to perpetration when compared to national averages.<sup>29</sup> Exposure to combat conditions may increase the likelihood of service members to commit sex crimes.<sup>30</sup> Consistent with civilian society, military sexual assault victims have a low likelihood of reporting the crime.<sup>31</sup>

## 2. Prior DOD Responses to Sexual Assault Issues

National concern over issues of sexual assault in the military is not a new phenomenon. The armed services have acknowledged and struggled with issues of sexual assault for nearly twenty years. The most notorious incident remains the 1991 Tailhook Convention, which elevated the awareness of the military's sexual assault problems to the national level.<sup>32</sup> In response, congressional hearings, beginning in 1992, have probed sexual harassment and gender discrimination within the military on nearly a yearly basis.<sup>33</sup> In 1997, service members engaged in rape, sexual assault, and sexual harassment at Aberdeen Proving Ground, Maryland.<sup>34</sup> In 2003, allegations of systematic sexual assaults at the Air Force Academy prompted a congressional inquiry.<sup>35</sup>

The current military sexual assault crisis began in 2003 with a series of articles in the *Denver Post* describing assaults on female service-members in the Iraq and Afghanistan theatres.<sup>36</sup> The media reports

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<sup>29</sup> Lex L. Merrill, Ph.D., et al., *Prevalence of Premilitary Adult Sexual Victimization and Aggression in a Navy Recruit Sample*, 163 MIL. MED. 209, 211 (1998); "Women who enter the military may have experienced more childhood and adolescent sexual assaults than comparable female civilians." Martin, et al., *supra* note 28, at 214.

<sup>30</sup> Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651, 661 (1996). Empirical evidence from the current war supports this theory, as well. Kelley Beaucar Vlahos, *Sex Assaults Against Women GIs Increase in War Time*, May 31, 2005, FOXNEWS, <http://www.foxnews.com/story/0,2933,158098,00.html>.

<sup>31</sup> In 2003, military data showed a reporting rate of only 70 sexual assaults per 100,000 active duty members. DOD TASK FORCE REP., *supra* note 14, at 59. Also in 2003, a DOD Inspector General survey found that less than 20% of the sexual assaults occurring at the United States Air Force Academy were reported. AIR FORCE ACADEMY REPORT, *supra* note 22, at 52.

<sup>32</sup> DOD TASK FORCE REP., *supra* note 14, at 93.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 94.

<sup>35</sup> Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, §§ 501-503, 117 Stat. 559, 609-10 (2003); DOD TASK FORCE REP., *supra* note 14, at 96.

<sup>36</sup> DENVER POST ARTICLES, *supra* note 25; *see also* Miles Moffeit, *Activists Question Speed of Military Rape Reforms*, DENVER POST, July 12, 2004, at A1.

depicted a military institution that fostered an environment of sexual assault and treated victims callously.<sup>37</sup> Over eighteen months, victims reported more than 100 allegations of sexual assault in the Iraq, Afghanistan, and Kuwait theatres.<sup>38</sup> By 8 December 2004, the Miles Foundation, a support group for military sexual assault and domestic violence victims, claimed to have received 273 reports of sexual assault in Iraq, Kuwait, Afghanistan, and Bahrain.<sup>39</sup> Congressional response to the allegations followed swiftly.<sup>40</sup> In February of 2004, Defense Secretary Donald Rumsfeld ordered a task force to investigate sexual assaults against service members in the Iraqi combat theater.<sup>41</sup> The task force subsequently expanded its scope to a DOD-wide review.<sup>42</sup> This task force issued a comprehensive report in April of 2004.<sup>43</sup> Among other things, the task force recommended that the DOD establish avenues to increase the privacy of sexual assault victims.<sup>44</sup> Congress reacted to the report, ordering the DOD to review its sexual assault policy, under threat of congressional action.<sup>45</sup> The DOD conducted its corresponding review in secret sessions (to the chagrin of victims' rights groups and congressional leaders).<sup>46</sup>

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<sup>37</sup> U.S. DEPT. OF THE ARMY, THE ACTING SECRETARY OF THE ARMY'S TASK FORCE REPORT ON SEXUAL ASSAULT POLICIES 11 (May 27, 2004) [hereinafter ARMY TASK FORCE REP.].

<sup>38</sup> Daniel Pulliam, *Pentagon Criticized for Closed-door Meeting on Sexual Misconduct*, Sept. 24, 2004, at <http://www.govexec.com/dailyfed/0904/0924304dp1.htm>.

<sup>39</sup> Daniel Pulliam, *Pentagon Blames Air Force Academy Leaders for Sexual Misconduct Scandal*, Dec. 8, 2004, at <http://www.govexec.com/dailyfed/1204/120804p1.htm>.

<sup>40</sup> See generally Moffeit, *supra* note 36, at A1.

<sup>41</sup> George Cahlink, *Pentagon Chided for Failure to Prevent Sexual Assaults*, June 3, 2004, at <http://www.govexec.com/dailyfed/0604/0603004g1.htm>.

<sup>42</sup> Daniel Pulliam, *Task Force to Investigate Navy and Army Academies*, Sept. 23, 2004, at <http://www.govexec.com/dailyfed/0904/092304dp1.htm>.

<sup>43</sup> DOD TASK FORCE REP., *supra* note 14, at cover page.

<sup>44</sup> *Id.* at 49. Another recommendation suggested development of a full spectrum sexual assault response capability for military locations. *Id.*

<sup>45</sup> Daniel Pulliam, *Congress Orders Pentagon to Review Sexual Misconduct Policies*, Oct. 12, 2004, at <http://www.govexec.com/dailyfed/1004/101204dp1.htm> ("According to a congressional aide, if the Defense Department is not able to come up with a better means of providing aid to soldiers who have been sexually assaulted . . . then the [Congressional Caucus for Women's Issues] will work to get Congress to rewrite the Pentagon's policy.").

<sup>46</sup> Pulliam, *supra* note 38.



### 3. *The New DOD Sexual Assault Policy*

These secret deliberations yielded the DOD's new sexual assault policy, presented in a press conference on 4 January 2005.<sup>47</sup> Undersecretary of Defense for Personnel and Readiness, Dr. David Chu, issued the policy as a series of eleven directive-type memorandums.<sup>48</sup>

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<sup>47</sup> Dr. Chu Briefing, *supra* note 12.

<sup>48</sup> Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Collateral Misconduct in Sexual Assault Cases (JTF-SAPR-001) (12 Nov 2004) [hereinafter JTF-SAPR-001 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Increased Victim Support and A Better Accounting of Sexual Assault Cases (JTF-SAPR-002) (22 Nov 2004) [hereinafter JTF-SAPR-002 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Data Call for CY04 Sexual Assaults (JTF-SAPR-003) (22 Nov 2004) [hereinafter JTF-SAPR-003 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Review of Administrative Separation Action Involving Victims of Sexual Assault (JTF-SAPR-004) (22 Nov 2004) [hereinafter JTF-SAPR-004 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Commander Checklist for Responding to Allegations of Sexual Assault (JTF-SAPR-005) (15 Dec 2004) [hereinafter JTF-SAPR-005 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Department of Defense (DOD) Definition of Sexual Assault (JTF-SAPR-006) (13 Dec 2004) [hereinafter JTF-SAPR-006 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Training Standards for DoD Personnel on Sexual Assault Prevention and Response (JTF-SAPR-007) (13 Dec 2004) [hereinafter JTF-SAPR-007 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Response Capability for Sexual Assault (JTF-SAPR-008) (17 Dec 2004) [hereinafter JTF-SAPR-008 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Collaboration with Civilian Authorities for Sexual Assault Victim Support (JTF-SAPR-010) (17 Dec 2004) [hereinafter JTF-SAPR-010 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Training Standards for Sexual Assault Response Training (JTF-SAPR-011) (17 Dec 2004) [hereinafter JTF-SAPR-011 Memo]; Memorandum, Undersecretary of Defense for Personnel and Readiness, to Secretaries of Military Departments, et al., subject: Training Standards for Pre-Deployment Information on Sexual Assault and Response Training (JTF-SAPR-012) (undated) [hereinafter JTF-SAPR-012 Memo]. Three additional memoranda were added to the policy on the subjects of confidentiality, essential training tasks, and evidence collection on Mar. 16, Apr. 26, and June 30, 2005, respectively. Memorandum, Deputy Secretary of Defense, to Secretaries of Military Departments, et al., subject: Confidentiality Policy for Victims of Sexual Assault (JTF-SAPR-009) (16 Mar 2005) [hereinafter JTF-SAPR-009 Memo]; Memorandum, Deputy Secretary of Defense, to Secretaries of Military Departments, et al., subject: Essential Training Tasks for a Sexual Assault Response Capability (JTF-SAPR-013) (26 Apr.

The new policy included a diverse assortment of training and organizational requirements. First, the new DOD policy encouraged commanders to defer adjudicating issues of collateral misconduct on the part of the sexual assault victim until after the conclusion of the criminal case.<sup>49</sup> Also related to victim misconduct, the policy directed that each military service establish a system for reviewing the administrative discharge of all sexual assault victims.<sup>50</sup> The policy also required that each service implement measures to ensure that all sexual assault incidents are properly investigated and adjudicated.<sup>51</sup> To assist in preparing a pending DOD report to Congress, the policy mandated that each service report numbers and dispositions of sexual assault cases during 2004.<sup>52</sup> The DOD also promulgated a list of response protocols for commanders who are responding to a sexual assault allegation.<sup>53</sup> These guidelines enjoin the commander to “[s]trictly limit the fact or details regarding the incident to only those personnel who have a legitimate need to know”<sup>54</sup> and “[e]nsure the victim understands the role and availability of a Victim Advocate.”<sup>55</sup> In response to past confusion of sexual assault with sexual harassment, the new policy also provided a definition for sexual assault.<sup>56</sup> The policy also required the services to implement yearly, accession, and pre-deployment training sessions on sexual assault prevention and response.<sup>57</sup> The new policy touches upon the role of civilian sexual assault resources, tasking military installations with enhancing coordination with them through “collaboration.”<sup>58</sup> Most

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2005) [hereinafter JTF-SAPR-013 Memo]; Memorandum, Deputy Secretary of Defense, to Secretaries of Military Departments, et al., subject: Sexual Assault Evidence Collection and Preservation Under Restricted Reporting (JTF-SAPR-014) (30 June 2005) [hereinafter JTF-SAPR-014 Memo].

<sup>49</sup> JTF-SAPR-001 Memo, *supra* note 48 (“One of the most significant barriers to reporting of a sexual assault is the victim’s fear of punishment for some of the victim’s own actions . . . (i.e., underage drinking or other alcohol offenses, adultery, fraternization or other violations of certain regulations or orders).”).

<sup>50</sup> JTF-SAPR-004 Memo, *supra* note 48.

<sup>51</sup> JTF-SAPR-002 Memo, *supra* note 48.

<sup>52</sup> JTF-SAPR-003 Memo, *supra* note 48.

<sup>53</sup> JTF-SAPR-005 Memo, *supra* note 48.

<sup>54</sup> *Id.* at attachment.

<sup>55</sup> *Id.*

<sup>56</sup> JTF-SAPR-006 Memo, *supra* note 48 (“Sexual assault is a crime. Sexual assault is defined as intentional sexual contact, characterized by use of force, physical threat or abuse of authority or when the victim does not or cannot consent.”).

<sup>57</sup> JTF-SAPR-007 Memo, *supra* note 48; JTF-SAPR-011 Memo, *supra* note 48; JTF-SAPR-012 Memo, *supra* note 48. Pre-deployment training must identify victim advocates as a resource that will be available to victims of sexual assault. JTF-SAPR-012 Memo, *supra* note 48.

<sup>58</sup> JTF-SAPR-010 Memo, *supra* note 48.

relevant to this article, the new policy requires each service to create Sexual Assault Program Coordinators and “establish the capability of a Victim Advocate to respond to each report of sexual assault.”<sup>59</sup> Finally, the last policy memorandum purports to create a mechanism for confidential reporting.<sup>60</sup>

### C. Victim Advocates in the DOD

The new DOD sexual assault policy did not create the profession of victim advocates. Other DOD task forces had already commented on the presence of victim advocates.<sup>61</sup> Instead, the new DOD policy officially recognized what was already widely known in civilian circles: victim advocates play an essential role in a sexual assault victim’s recovery process.

#### 1. Purpose of Victim Advocates

Victim advocates assist victims of sexual assault and domestic violence in coping with the unfamiliar tensions of the treatment and criminal processes. Victims who receive advocacy services have an increased likelihood of receiving medical information and treatment.<sup>62</sup> The average sexual assault victim is woefully uneducated about the

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<sup>59</sup> *Id.*

<sup>60</sup> JTF-SAPR-009 Memo, *supra* note 48. “This reporting option gives the member access to medical care, counseling and victim advocacy, without initiating the investigative process.” *Id.* The memorandum states that improper disclosure of confidential communications may result in discipline under the UCMJ. *Id.*

<sup>61</sup> The DOD Task Force on Sexual Assault focused specifically on Victim Advocates. Recommendation 6.5 addressed the need for victim advocates: “Establish a DoD-wide policy requiring victim advocates be provided to victims of sexual assault and create a mechanism for providing victim advocates in deployed environments.” DOD TASK FORCE REP., *supra* note 14, at 52. To implement this recommendation, the task force recommended that the DOD “ensure Victim Advocates can assist in providing a range of coordinated services and support to victims which may be used to help the victim in reducing the effects of trauma.” *Id.* The task force recommended the provision of victim advocates in both CONUS installations and deployed locations. *Id.* The Task Force investigating sexual assault at the Air Force Academy also recognized the important role of victim advocates. AIR FORCE ACADEMY REP., *supra* note 22, at 80.

<sup>62</sup> Rebecca Campbell & Patricia Yancey Martin, *Services for Sexual Assault Survivors: The Role of Rape Crisis Centers*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 232 (Claire M. Renzetti et al. ed., 2001).

mechanics of the legal process.<sup>63</sup> Victim advocates provide general information about the legal process and reduce the level of intimidation felt by victims as a result of their participation in this process.<sup>64</sup> This victim advocate role is equivalent to that of workers at rape crisis centers who provide “dissemination of information, active listening, and emotional support.”<sup>65</sup> Victim advocates also play a critical role in reducing secondary victimization, the term assigned to “insensitive, victim-blaming treatment from community system personnel.”<sup>66</sup> Interaction with victim advocates reduces the severity of stress symptoms endured by sexual assault victims.<sup>67</sup> Rather than technical skills, successful advocacy is based on absolute loyalty and trust:

The crux of advocacy is identifying the site of problems and the standpoint from which to articulate and pose solutions to those problems. . . . This standpoint of advocacy is unattainable when the advocate has only partial loyalty to the woman. *Advocates must offer absolute confidentiality*, a clear commitment to the safety needs of a woman, and the ability to speak out on behalf of women . . . . (emphasis added).<sup>68</sup>

This guidance is critical because the criminal process itself often re-traumatizes the victim.<sup>69</sup>

The new DOD sexual assault policy provides significant detail on the intended purpose of victim advocates serving the military: “The victim advocate shall provide crisis intervention, referral and ongoing non-clinical support to the victim of a sexual assault. Support will include providing information on available options and resources so the victim

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<sup>63</sup> Amanda Konradi, *Too Little, Too Late: Prosecutors’ Pre-Court Preparation of Rape Survivors*, 22 L. & SOC. INQUIRY 1, 4 (1997).

<sup>64</sup> *Id.* at 49.

<sup>65</sup> Edna B. Foa et al., *Treatment of Rape Victims*, 8 J. INTERPERSONAL VIOLENCE 256, 259 (1993).

<sup>66</sup> Campbell & Martin, *supra* note 62, at 231.

<sup>67</sup> *Id.* at 235.

<sup>68</sup> Ellen Pence, *Advocacy on Behalf of Battered Women*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 339-40 (Claire M. Renzetti, et al. ed., 2001).

<sup>69</sup> MADIGAN & GAMBLE, *supra* note 21, at 7 (“The second rape is when the survivor is strong enough, brave enough, and even naive enough to believe that if she decides to prosecute her offender, justice will be done. It is a rape more devastating and despoiling than the first.”).

can make informed decisions about their case.”<sup>70</sup> This role of providing guidance to victims and advocacy on their behalf contrasts with the victim’s commander’s responsibilities under the policy. Rather than helping his or her victim make “informed decisions,” the commander must “[l]isten/engage in quiet support of the victim.”<sup>71</sup>

## 2. *Victim Advocates in the Armed Services*

Prior to the new DOD sexual assault policy, victim advocate services varied amongst the different branches of the armed forces.<sup>72</sup> Victim advocacy services in the armed forces varied by service, installation, and command.<sup>73</sup> The services consistently directed their victim advocates to engage in what amounted to crisis intervention, but to refrain from treatment.<sup>74</sup> The Marine Corps also moves its policy towards

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<sup>70</sup> JTF-SAPR-008 Memo, *supra* note 48.

<sup>71</sup> JTF-SAPR-005 Memo, *supra* note 48, at attachment.

<sup>72</sup> One of the goals of the new policy is standardization. *Id.*

<sup>73</sup> DOD TASK FORCE REP., *supra* note 14, at 15. Prior to the new DOD policy, the U.S. Navy and Marine Corps utilized the Sexual Assault Victim Intervention (SAVI) or, as known by its acronym, the SAVI program, to handle response to sexual assault and set guidelines for victim advocates. NAVY SEXUAL ASSAULT VICTIM INTERVENTION ADVOCATE TRAINING COURSE, MODULE THREE, at <http://www.persnet.navy.mil/pers66/savi/savitrng/Role%20sg.doc> (last visited Jan. 30, 2005) [hereinafter SAVI MODULE]. The Air Force refers to victim advocates as victim support liaisons. Air Force victim support liaisons exist separate and apart from the Victim Witness Assistance Program. The stated purpose of victim support liaisons is to “focus solely on the alleged victim of the sexual assault and to support him/her throughout the process, ensure continuity of care without regard to the outcome of legal or administrative actions, and close the seams among the many AF functions that must respond to the victim’s needs.” Memorandum, The Secretary of the Air Force, to ALMAJCOM, subject: Interim Measure for Victim Support (1 Apr. 2004) [hereinafter Secretary of Air Force Memo]. Prior to the recent focus on sexual assault in the military, the Army utilized its victim advocates to assist domestic violence survivors. ARMY COMMUNITY SERVICE FAMILY ADVOCACY PROGRAM, at <http://www.lewis.army.mil/DPCA/ACS/FAP/> (last visited Mar. 16, 2005). “The primary purpose of the Victim Advocate (VA) is to provide comprehensive assistance and liaison to and for victims of spouse abuse . . . . Military spouses who are victims of spouse abuse and are ID card holders are eligible for services of the VA.” *Id.*

<sup>74</sup> The Marine Corps recognizes a slightly more expansive view of the role of victim advocates, clearly specifying their purpose as “crisis intervention.” U.S. MARINE CORPS, ORDER 1752.5, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM para 6.a(8) (28 Sept 2004) [hereinafter MCO 1752.5]. Victim advocates in the Navy are prohibited from engaging in crisis intervention and counseling, regardless of their expertise. SAVI MODULE, *supra* note 73. Instead, victim advocates are directed to “provide empathy, to listen, and to offer emotional support.” *Id.* The Air Force victim support liaison is prohibited from providing any form of treatment to victim or soliciting details of the

empowerment.<sup>75</sup> The services all direct their victim advocates to keep services confidential.<sup>76</sup> A unique Army development, however, involves the prospective establishment of active duty victim advocates.<sup>77</sup> These unit victim advocates will be active duty soldiers and must be deployable and between the ranks of staff sergeant and first lieutenant (inclusive).<sup>78</sup> The new DOD policy specifically approves this type of victim advocate.<sup>79</sup>

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assault. SECRETARY OF AIR FORCE MEMO, *supra* note 73. “The liaison does not need to know any details of the alleged assault and should not solicit them. . . . Victim support liaisons are not counselors, legal officials, or investigators, and should not attempt to provide any type of clinical counseling or guidance . . .” *Id.*

<sup>75</sup> MCO 1752.5, *supra* note 74, para. 6.i.(6). (“All Marine Corps personnel shall: (6) Ensure that a person who is sexually assaulted is treated . . . in a manner that does not usurp control from the victim, but enables the victim to determine their needs and how to meet them;”).

<sup>76</sup> The fourth canon of the Navy’s SAVI program requires advocates to “[b]e confidential.” SAVI MODULE, *supra* note 73. This enjoinder is limited by recognizing that the victim advocate may have to reveal information and, therefore, confidentiality should never be promised to a victim. *Id.* In its entirety, the training course states:

The issue of confidentiality is complicated. As an Advocate, confidentiality means that you must not discuss with friends, family members, etc. any details of your interaction with the victim. However, the Advocate may be required to provide information to individuals with the ‘need to know’ (e.g., medical personnel, legal personnel). Therefore, Advocates must not promise a victim that he/she will never release information.

*Id.*

<sup>77</sup> Eric Cramer, *Army to Train 1,000 Advocates to Help Sexual Assault Victims*, Mar. 18, 2005, SOLDIERS ONLINE, <http://www.pica.army.mil/Voice2005/050325/050325%20Sexual%20assault.htm>.

<sup>78</sup> *Id.* This arrangement clearly solves the problem of providing advocate assistance to victims who are deployed. Whether or not active duty soldiers can function effectively as victim advocates appears problematic, however. For instance, an effective advocate must be willing to confront a commanding officer who is not treating a victim properly. It is difficult to imagine soldiers antagonizing their chain of command on behalf of a victim. It is also unclear whether sexual assault victims would trust a member of the chain of command. Regardless, the first active duty advocate who fails to effectively provide support has the potential to permanently maim the program’s reputation with victims.

<sup>79</sup> JTF-SAPR-008 Memo, *supra* note 48 (“The victim advocate can be . . . staff assigned as a collateral duty . . .”).

#### D. Confidentiality, Confidantes, and Privilege

Multiple victim organizations and military task forces have recommended “confidential reporting” for victims of sexual assault.<sup>80</sup> They cite guarantees of confidentiality as the best way to encourage victims to report sexual offenses. Studies have shown that confidential reporting procedures increase the number of sexual assaults that are actually reported.<sup>81</sup> Department of Defense leaders have recently rejected an expansive definition of “confidential reporting” that would allow the charging of a service member with sexual assault while his victim remained anonymous.<sup>82</sup>

In promulgating its new sexual assault policy, the DOD has committed itself to a policy that will provide for confidential reporting.<sup>83</sup> Although recognizing the importance of confidentiality to victims in reporting and treatment, the DOD apparently believes that such options already exist.<sup>84</sup> For instance, an Army task force found that satisfactory levels of privileged and confidential avenues of communication already exist, but the avenues are not widely recognized.<sup>85</sup> This acceptance of the status quo apparently relies on a belief that chaplains and psychotherapists can satisfy any victim needs for confidentiality.<sup>86</sup> This reliance is misplaced and based on flawed assumptions.

Foremost among these assumptions is the belief that military chaplains possess an absolute evidentiary privilege for *all* communications they receive and can, therefore, provide an avenue of

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<sup>80</sup> *Hearing to Examine Policies and Programs for Preventing and Responding to Incidents of Sexual Assault in the Armed Forces Before the Personnel Subcommittee, Senate Armed Services Committee*, 107th Cong., 150 Cong. Rec. D 111 (Feb. 25, 2004) (statement Christine Hansen, Executive Director, The Miles Foundation, at [http://www.globalsecurity.org/military/library/congress/2004\\_hr/040225-hansen.pdf](http://www.globalsecurity.org/military/library/congress/2004_hr/040225-hansen.pdf)).

<sup>81</sup> Pam Zubeck, *Report Draws Line On Confidentiality*, COLO. SPRINGS GAZ., Nov. 30, 2004, at A1.

<sup>82</sup> Dr. Chu Briefing, *supra* note 12.

<sup>83</sup> JTF-SAPR-009 Memo, *supra* note 48. The new DOD sexual assault policy apparently settles a prior debate over the concept of “confidentiality.” Previous service task forces have sometimes questioned the value of confidential reporting. Officials at the Air Force Academy viewed a confidential reporting policy as giving the victim “a disparate amount of control over the situation” and working “at odds with the need for investigation and punishment of offenders.” AIR FORCE ACADEMY REP., *supra* note 22, at 19.

<sup>84</sup> *See generally* DOD TASK FORCE REP., *supra* note 14, at 30-32.

<sup>85</sup> THE ACTING SECRETARY OF THE ARMY’S TASK FORCE REPORT ON SEXUAL ASSAULT POLICIES 17 (27 May 2004).

<sup>86</sup> *See generally* DOD TASK FORCE REP., *supra* note 14, at 30-32.

confidential reporting for sexual assault victims.<sup>87</sup> The notion of absolute chaplain confidentiality is based on MRE 503, the Communications to Clergy privilege.<sup>88</sup> While chaplains may, due to their own professional standards, keep communications confidential, their legal ability to withhold sexual assault victim communications from disclosure is unclear. Chaplains possess a privilege limited only to statements made by the declarant as an act of conscience or religion.<sup>89</sup> In the past, the Court of Appeals for the Armed Forces (CAAF) has stated, even more bluntly: “A communication is not privileged, even if made to a clergyman, if it is made for emotional support and consolation rather than as a formal act of religion or as a matter of conscience.”<sup>90</sup> More recently, the CAAF focused on the role of the chaplain, rather than the nature of the statement: “When a chaplain questions a penitent in a confidential and clerical capacity, the results may not be used in a court-martial because they are privileged.”<sup>91</sup> The limited nature of MRE 503 does not address the other question of whether a victim would desire or

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<sup>87</sup> The Deputy Secretary of Defense’s memorandum on confidentiality for sexual assault victims references the protections of privileged communications with a chaplain. JTF-SAPR-009 Memo, *supra* note 48. The United States Army Sexual Assault website promises confidentiality when a victim speaks with a chaplain concerning a sexual assault. United States Army Sexual Assault Prevention and Response Website, Response and Care, I Have Been Sexually Assaulted. What Should I Do?, <http://www.sexualassault.army.mil/ResponseandCare.cfm> (last visited Jan. 13, 2005) (“[C]haplains are confidential counseling channels: they will not reveal the sexual assault to anyone else without a victim’s consent.”). The Air Force model for sexual assault victim support states that “the liaison may provide information on the availability of confidential counseling provided by the installation chaplains.” SECRETARY OF AIR FORCE Memo, *supra* note 73. The Air Force Academy report also recognizes that chaplains “play an important role in responding to the needs of individual facing a personal crisis.” AIR FORCE ACADEMY REP., *supra* note 22, at 77.

<sup>88</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 503 (2002) [hereinafter MCM].

<sup>89</sup> *United States v. Napoleon*, 46 M.J. 279, 285 (1997).

<sup>90</sup> *Id. Cf.*, *United States v. Isham*, 48 M.J. 603, 606 (N-M. Ct. Crim. App. 1998) (holding that the declarant must only view the chaplain as a spiritual advisor and intend that the communication remain confidential in order for the communication to be privileged). Under this expansive reading of the privilege, communications from a sexual assault victim to a chaplain would almost certainly be privileged.

<sup>91</sup> *United States v. Benner*, 57 M.J. 210, 212 (2002). The CAAF possesses an opportunity to resolve ambiguities about MRE 503 in the immediate future. The Army Court of Criminal Appeals refused to expand the privilege to cover statements made during a marriage counseling session. *United States v. Shelton*, 59 M.J. 727, 732 (Army Ct. Crim. App. 2004). The CAAF has granted a petition for review to determine whether the privilege was incorrectly interpreted. *United States v. Shelton*, 60 M.J. 314 (2004).



seek the services of a chaplain to report an offense.<sup>92</sup> Furthermore, MRE 503 was clearly not intended as a vehicle for the reporting of sexual assaults.<sup>93</sup> Its use in this manner would need to survive Sixth Amendment scrutiny in the matter discussed in Section V, *infra*. In addition to questionable reliance on chaplains, dependence on psychotherapists for confidential reporting is also problematic. First, a strong stigma still exists in America to avoid engaging in psychotherapy for fear of being labeled as crazy.<sup>94</sup> Second, the accessibility of psychiatrists or psychologists to deployed victims is unclear.<sup>95</sup>

The new DOD sexual assault policy provides a laundry list of reforms.<sup>96</sup> Only the future will tell whether any of these measures will actually reduce the number of military sexual assaults. On a sobering note, some studies suggest that education programs produce little effect on rates of victimization.<sup>97</sup> Furthermore, reducing the sexual assault rate still does nothing to ease the daunting challenges, discussed in Section

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<sup>92</sup> Military chaplains, overwhelmingly male and usually in their mid-thirties or older, represent a different social demographic than the typical sexual assault victim. Studies have shown that female sexual assault victims prefer to relate to other females. Daniel Silverman, *The Male Counselor and the Female Rape Victim*, in THE RAPE CRISIS INTERVENTION HANDBOOK 193 (Sharon McCombie ed., 1980). It is unclear how the religious preferences of a victim affect whether they are inclined to report a sexual assault to a chaplain. DOD TASK FORCE REP., *supra* note 14, at 31. Furthermore, the relationship between a non-religious person and a chaplain may not survive the Utilitarian tests for a privilege. See Section III.A., *infra*.

<sup>93</sup> Military Rule of Evidence 503 was intended to follow proposed FRE 506(a)(2). MCM, *supra* note 88, MIL. R. EVID. 503 analysis, at A22-39. Federal Rule of Evidence 506(a)(2) was intended to follow the common law practice of the states on the priest-penitent privilege. GLEN WEISSENBARGER & JAMES J. DUANE, FEDERAL EVIDENCE 223 (4th ed. 2001). Most state evidentiary codes contain both some type of clergy privilege and sexual assault counselor privilege, indicating two distinct roles. Consequently, the common law priest-penitent privilege is not a vehicle for reporting sexual assaults.

<sup>94</sup> Resick, *supra* note 15, at 249.

<sup>95</sup> The U.S. Navy only began adding a clinical psychologist to medical department of aircraft carrier battle groups in 1998. Captain Dennis P. Wood, *Psychiatric Medevacs During a 6-Month Aircraft Carrier Battle Group Deployment to the Persian Gulf: A Navy Force Health Protection Preliminary Report*, 168 MIL. MED. 43, 46 (2003). The aircraft carrier medical department is responsible for the needs of over 12,000 personnel. *Id.* at 43.

<sup>96</sup> See Section II.B.3., *supra*.

<sup>97</sup> Karen Bachar & Mary P. Koss, *From Prevalence to Prevention: Closing the Gap Between What We Know About Rape and What We Do*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 133 (Claire M. Renzetti et al. ed., 2001). “[I]t has not been empirically established that these programs can accomplish the mutually exclusive goals of rape prevention and rape avoidance/resistance education in a way that is effective and that does not polarize program participants.” *Id.* at 136.

IV.A.3.a., *infra*, faced by someone already victimized. Increasing the effectiveness of victim advocates, on the other hand, would provide tangible benefits to victims of sexual assault.<sup>98</sup> A meaningful victim advocate system for the military requires that a grant of absolute confidentiality protect the advocate-victim relationship. This can only be achieved through codification of an unqualified evidentiary privilege within the MRE.

### III. Privileges in the Military

Creation of a privilege involves more than issuing a policy memorandum directing a confidential relationship. The only way to remove the conversations between advocates and victims from the criminal process is the creation of an evidentiary privilege recognizing the confidentiality of the victim-victim advocate relationship. This privilege, under the MRE, would preclude the defense exploring this relationship during discovery or trial.

#### A. Privileges Under the MRE

Military Rules of Evidence codify specific privileges, many deriving from the common law.<sup>99</sup> These include a lawyer client privilege,<sup>100</sup> a privilege for communications to clergy,<sup>101</sup> a husband-wife privilege,<sup>102</sup> a privilege for classified information,<sup>103</sup> an informant privilege,<sup>104</sup> and a psychotherapist-patient privilege.<sup>105</sup> Professor Lederer described the theory behind this specific enumeration of the different privileges as arising “because many military personnel were stationed in places where they did not have easy access to legal advice, accessibility and certainty required the adoption of specific privilege rules.”<sup>106</sup> Controlling the admissibility of evidence in courts-martial, the MRE currently do not

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<sup>98</sup> See *infra* Section IV.A.

<sup>99</sup> United States v. McElhaney, 54 M.J. 120, 131 (2000); Fredic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 15 (1990).

<sup>100</sup> MCM, *supra* note 88, MIL. R. EVID. 502.

<sup>101</sup> *Id.* MIL. R. EVID. 503.

<sup>102</sup> *Id.* MIL. R. EVID. 504.

<sup>103</sup> *Id.* MIL. R. EVID. 505.

<sup>104</sup> *Id.* MIL. R. EVID. 507.

<sup>105</sup> *Id.* MIL. R. EVID. 513.

<sup>106</sup> Lederer, *supra* note 99, at 15.

contain a privilege concerning the interactions between a victim advocate and a sexual assault victim.

The lack of an expressly codified advocate-victim privilege does not categorically preclude its recognition in a court-martial. Courts-martial may still apply rules of evidence from the federal system. The military rules are closely related to the federal criminal system. Article 36 of the UCMJ requires that military courts-martial follow the Federal Rules of Evidence (FRE) and procedure to the extent that the President considers them practicable to the military.<sup>107</sup> Military Rule of Evidence 101(b) directs military courts to utilize “the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”<sup>108</sup> Military Rule of Evidence 1102 provides that changes to the FRE are automatically reflected in the MRE after the passage of two years.<sup>109</sup>

Despite these connections, changes to the FRE do not automatically translate into changes in the MRE.<sup>110</sup> Military courts should use caution when applying federal statutes and rules of evidence to the military system.<sup>111</sup> Some commentators and judges have argued that the existence of a separate military criminal justice system apart from the federal system proves congressional intent to keep the two systems separate.<sup>112</sup> This indicates a preference for deliberate changes as put forth by the President, rather than application of civilian statutes.<sup>113</sup> When interpreting whether to apply a federal evidentiary rule, the CAAF has examined the degree of uniformity in the federal courts.<sup>114</sup> Uniformity alone, however, does not guarantee the transfer of an evidentiary rule. The CAAF has rejected interpretations that run contrary to the principles of the *Manual for Courts-Martial* or the UCMJ.<sup>115</sup>

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<sup>107</sup> UCMJ art. 36 (2002).

<sup>108</sup> MCM, *supra* note 88, MIL. R. EVID. 101(b).

<sup>109</sup> *Id.* MIL. R. EVID. 1102.

<sup>110</sup> United States v. McElhaney, 54 M.J. 120, 124 (2000).

<sup>111</sup> *Id.* at 126.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> United States v. McCollum, 58 M.J. 323 n.3, 337 (2003).

<sup>115</sup> *Id.* at 341.

## B. Privileges Under the FRE

If the FRE recognize a privilege between victim advocates and victims, the MRE might apply the privilege, as well. One of the largest diversions between the FRE and the MRE, however, occurs in the area of privilege law. Unlike the MRE, the Federal Rules are deliberately vague on the parameters of privilege law.<sup>116</sup> In approving FRE 501, Congress rejected nine proposed areas of privileged communications.<sup>117</sup> When analyzing privileges in criminal cases under the FRE, Rule 501 states that principles of common law, as interpreted by the federal courts, govern the law of privileges.<sup>118</sup> The Supreme Court has explained that this allows a development of privilege law to evolve with the nation's history.<sup>119</sup> The Federal common law on privilege rarely addresses the issue of communications between victim advocates and sexual assault victims.<sup>120</sup> When this issue has been litigated, federal courts have treated the advocate-victim privilege as an expansion of the psychotherapist-patient privilege.<sup>121</sup> Consequently, an understanding of the psychotherapist-patient privilege is required for analysis of an advocate-victim privilege.

## C. Psychotherapist-Patient Privilege in Federal Courts

When codified, the FRE did not enumerate a specific psychotherapist-patient privilege. Instead, the psychotherapist-patient privilege gradually grew on a case-by-case basis. Eventually, the United States Supreme Court ruled on the scope of the privilege in 1996.<sup>122</sup> Since then, federal courts have gradually expanded the contours of the privilege.

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<sup>116</sup> WEISSENBERGER & DUANE, *supra* note 93, at 198.

<sup>117</sup> *Id.*

<sup>118</sup> FED. R. EVID. 501.

<sup>119</sup> *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

<sup>120</sup> Federal courts seldom handle sexual assault cases. *See generally* Lederer, *supra* note 99, at 21.

<sup>121</sup> *United States v. Lowe*, 948 F.Supp. 97, 99 (Mass. Dist. Ct. 1996).

<sup>122</sup> *Jaffee v. Redmond*, 518 U.S. 1 (1996).

*I. Jaffee v. Redmond*

As discussed earlier, the FRE left the development of privilege law to the federal courts. By 1996, a split had developed amongst the circuits regarding the recognition of a psychotherapist-patient privilege.<sup>123</sup> In *Jaffee v. Redmond*, the Supreme Court resolved the split by creating an unqualified federal psychotherapist-patient privilege.<sup>124</sup> The case originated from a police shooting in 1991.<sup>125</sup> On 27 June 1991, Mary Lu Redmond, a police officer for the Village of Hoffman Estates in Illinois, shot and killed Ricky Allen.<sup>126</sup> Subsequent to the incident, Ms. Redmond attended approximately fifty counseling sessions with a licensed clinical social worker.<sup>127</sup> These counseling sessions were for treatment purposes.<sup>128</sup> Litigation of the privilege arose when Ms. Redmond and the social worker refused to provide the counseling notes or answer questions about the counseling sessions during the discovery process.<sup>129</sup>

The case eventually made it to the United States Supreme Court which recognized a federal psychotherapist-patient privilege in a 7-2 opinion.<sup>130</sup> Writing for the majority, Justice Stevens relied on a utilitarian<sup>131</sup> analysis to support the creation of the psychotherapist-patient privilege.<sup>132</sup> Justice Stevens conducted a balancing test, finding that the privilege's benefits outweighed the cost in lost evidence.<sup>133</sup> He also cited a nearly unanimous trend among state evidentiary codes.<sup>134</sup> In recognizing the privilege, however, he left the burden of defining its parameters to the lower federal courts, preferring instead to allow other courts to "delineat[e] [its] contours."<sup>135</sup> Justice Stevens did say, however, that privilege, when existing, was absolute.<sup>136</sup>

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<sup>123</sup> *Id.* at 7.

<sup>124</sup> *Id.* at 1.

<sup>125</sup> *Id.* at 3.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 5.

<sup>128</sup> *Id.* at 7 n.5.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 15.

<sup>131</sup> See Section IV.A., *infra*, for a discussion of the Utilitarian rationale for privileges.

<sup>132</sup> Carolyn Peddy Courville, *Rationales For the Confidentiality of Psychotherapist-Patient Communications: Testimonial Privilege and the Constitution*, 35 HOUS. L. REV. 187, 197 (1998).

<sup>133</sup> *Jaffee*, 518 U.S. at 15.

<sup>134</sup> *Id.* at 14.

<sup>135</sup> *Id.* at 18. In dissenting, Justice Scalia disagreed with the majority on a number of points. First, Justice Scalia looked at the same cost-benefit analysis as the majority and reached a different result, believing instead that the privilege could become a mechanism

## 2. Expansion of the Federal Psychotherapist-Patient Privilege

The federal courts have not significantly expanded the scope of the psychotherapist-patient privilege since the *Jaffee* decision.<sup>137</sup> Some federal case law does, however, support recognition of an evidentiary privilege for victim advocates.<sup>138</sup> Other cases expand the psychotherapist-patient privilege to apply to communications made to members of employee assistance programs.<sup>139</sup> Employee Assistance

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for injustice. *Id.* at 19 (Scalia, J., dissenting). Justice Scalia also took issue with the majority's analysis of the importance of a privilege to the psychotherapist-patient relationship, noting that the relationship had flourished without a federal privilege up to that time. *Id.* at 24 (Scalia, J., dissenting). He also noted that other, more critical relationships exist without the assistance of a privilege. *Id.* Justice Scalia also disagreed with the decision to expand the privilege to social workers, arguing that no consensus on the definition of or need for social workers existed. *Id.* at 29-35 (Scalia, J., dissenting). See generally Courville, *supra* note 132, at 217, for a rebuttal of Justice Scalia's assertions about the validity of the psychotherapist-patient privilege.

<sup>136</sup> *Jaffee*, 518 U.S. at 18.

<sup>137</sup> In the immediate aftermath of *Jaffee*, the Seventh Circuit refused to expand the new privilege in a criminal case to statements made by a defendant to workers at an Alcoholics Anonymous hotline in the case of *United States v. Schwensow*. 151 F.3d 650 (7th Cir. 1998). The *Schwensow* court based its decision on a finding that the purpose of the hotline workers involved facilitation and encouragement, rather than treatment or diagnosis. *Id.* at 658. Likewise, the Eighth Circuit refused to expand *Jaffee* to encompass an "ombudsman privilege" in *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 791 (8th Cir. 1997). The *Carman* court stated that, although alternative dispute resolution benefits society, "far more is required to justify the creation of a new evidentiary privilege." *Id.* at 793. The court also stated that the benefits of the ombudsman program would still accrue without the presence of an evidentiary privilege. *Id.* at 794.

<sup>138</sup> *United States v. Lowe* is most closely on point. In it, the district court held that a federal privilege exists for communications between a victim and a rape crisis counselor as defined by Massachusetts. 948 F.Supp. 97 (Mass. Dist. Ct. 1996). As defined by Massachusetts, a rape crisis counselor was not a licensed social worker or psychotherapist. *Id.* at 99.

<sup>139</sup> The Ninth Circuit has expanded the psychotherapist-patient privilege to include workers from employee assistance programs (EAPs) in the case of *Oleszko v. State Compensation Ins. Fund*. 243 F.3d 1154, 1159 (9th Cir. 2001). District courts outside the Ninth Circuit have also recognized the importance of EAPs. *Greet v. Zagrocki* involved an attempt by a plaintiff to discover files from a police department's EAP program. The court characterized the EAP program as "engag[ing] in sensitive counseling on problems of alcohol dependency." 1996 U.S. Dist. LEXIS 18635 (E. Dist. Pa., 1996).

Programs perform roles analogous to those performed by victim advocates in the military.<sup>140</sup>

#### D. Psychotherapist-Patient Privilege in Courts-Martial

As discussed previously, the MRE contain a psychotherapist-patient privilege. One would have expected that, given the close proximity between the military and FRE, the psychotherapist-patient privilege would have become immediately effective upon the decision in *Jaffee v. Redmond*.<sup>141</sup> Instead, the psychotherapist-patient privilege did not exist in courts-martial until 1998 and operates differently today than its operation in federal courts.

##### I. *United States v. Rodriguez*

The CAAF evaluated the applicability of the *Jaffee* decision to courts-martial in the case of *United States v. Rodriguez*.<sup>142</sup> Writing for the majority, Judge Crawford began her analysis by examining the relationship between the MRE and the FRE.<sup>143</sup> Judge Crawford noted that, unlike the FRE, the MRE were issued by the President.<sup>144</sup> In contrast to the Federal Rules' empowerment of courts to develop privilege law, the President specified a number of privileges for military courts to recognize, reflecting a belief in the importance of certainty for

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<sup>140</sup> The *Oleszko* court described an EAP's job description as "extract[ing] personal and often painful information from employees in order to determine how to best assist them." *Oleszko*, 243 F.3d at 1157.

<sup>141</sup> See Section III.A., *supra*, for a discussion on the relationship between the MRE and the FRE.

<sup>142</sup> 54 M.J. 156, 157 (2000). The case arose after Specialist (SPC) Hector Rodriguez, U.S. Army, shot himself in the stomach, allegedly to avoid duty. *Id.* at 156. While recovering from the wound, Specialist Rodriguez received treatment from a civilian psychiatrist to whom he admitted intentionally shooting himself. *Id.* at 157. SPC Rodriguez's defense counsel attempted to suppress this statement under the psychotherapist-patient privilege recognized in *Jaffee*. *Id.* Unlike previous cases in military service courts that examined the scope of *Jaffee v. Redmond* in relation to courts-martial, the *Rodriguez* case occurred after the President promulgated MRE 513, the military version of the psychotherapist-patient privilege. *Id.* at 160. For another military appellate court case on this issue, see *United States v. Paaluh*, 50 M.J. 782 (N-M. Ct. Crim. App. 1999).

<sup>143</sup> *Rodriguez*, 54 M.J. at 157.

<sup>144</sup> *Id.*

military courts on evidentiary rules.<sup>145</sup> Judge Crawford then turned her attention to MRE 501.<sup>146</sup> Military Rule of Evidence 501 allows a party to claim a privilege if it is provided in “principles of common law generally recognized in the trial of criminal cases in the United States district courts . . . insofar as the application . . . is practicable and not contrary to or inconsistent with the code, these rules, or this manual.”<sup>147</sup> Judge Crawford explained that the President intended to provide flexibility for military courts through the use of this provision.<sup>148</sup> Judge Crawford held that the President did not intend for military courts to follow *Jaffee*, as it was decided, holding that MRE 501(d), which expressly prevents a doctor-patient privilege in the military, prevented military courts from recognizing the psychotherapist-patient privilege until the promulgation of MRE 513, via executive order.<sup>149</sup>

*United States v. Rodriguez* clearly stands for the proposition that the FRE and the MRE are distinct. This interpretation precludes the notion that the MRE simply mirror the federal rules and should be interpreted in the same way. The decision also limits the ability of military courts-martial to apply privileges that are not expressly codified.<sup>150</sup> This interpretation appears to conflict with MRE 501,<sup>151</sup> which the drafters of the MRE felt allowed adoption of privileges that had not been codified.<sup>152</sup>

## 2. Scope of MRE 513

Military Rule of Evidence 513 establishes the psychotherapist-patient privilege for evidence in courts-martial.<sup>153</sup> Military Rule of

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> MCM, *supra* note 88, MIL. R. EVID. 501(a)(4).

<sup>148</sup> *Rodriguez*, 54 M.J. at 158.

<sup>149</sup> *Id.* at 161.

<sup>150</sup> *Cf.*, U.S. v. McCollum, 58 M.J. 323, 341 (2003) which implies that the MRE can be interpreted outside their express scope, assuming a uniformity in federal and state interpretation.

<sup>151</sup> MCM, *supra* note 88, MIL. R. EVID. 501.

<sup>152</sup> Lederer, *supra* note 99, at 27. When describing MRE 501, Professor Lederer stated: “As a result, military law has a body of specific privileges and may adopt other new privileges that are accepted by the federal district courts.” *Id.*

<sup>153</sup> MCM, *supra* note 88, MIL. R. EVID. 513. Military Rule of Evidence 513 was promulgated via executive order in 1998. For general discussion on the applicability of MRE 513, see Major Stacy E. Flippin, *Military Rule of Evidence (MRE) 513: A Shield to*



Evidence 513 consists of five portions: the general rule, definitions, the owner of the privilege, exceptions to the privilege, and a procedure for determining the privilege's applicability.<sup>154</sup> The provisions of MRE 513 make the military's psychotherapist-patient privilege significantly more limited in scope than the corresponding expansive federal privilege. Military Rule of Evidence 513 states the privilege does not apply to evidence of certain crimes. These circumstances include when the communication constitutes evidence of "spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse."<sup>155</sup> Additionally, the military psychotherapist-patient privilege contains broad escape clauses for safety purposes. Subparagraph (d)(6) states that the privilege does not apply when the safety of military personnel, dependents, or security of classified information is at stake.<sup>156</sup> Likewise, no privilege exists when the patient either poses a danger to another person or themselves.<sup>157</sup> Military Rule of Evidence 513 specifies that disputes over its privilege are settled with a hearing<sup>158</sup> and, if necessary, an *in camera* review.<sup>159</sup> This methodology of revealing confidential information to the military judge amounts to a qualified, rather than an absolute, psychotherapist-patient privilege for the military. It also establishes MRE 513 as a second-tier privilege; unlike the attorney-client, marital, and communications to clergy privileges which have no provision for *in camera* review.

Some would argue that MRE 513, as it presently exists, already covers victim advocates. This proposition is incorrect for several reasons. First, the plain language of MRE 513 does not include victim advocates. Subparagraph (b)(2) defines psychotherapist as a "psychiatrist, clinical psychologist, or clinical social worker who is licensed . . . to perform professional services."<sup>160</sup> Generally, courts construe statutes and rules according to their plain language which

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*Protect Communications of Victims and Witnesses to Psychotherapists*, ARMY LAW., Sept. 2003, at 1; Lieutenant Colonel R. Peter Masterton, *The Military's Psychotherapist-Patient Privilege: Benefit or Bane for Military Accused?*, ARMY LAW., Nov. 2001, at 18.

<sup>154</sup> Military Rule of Evidence 513 may be viewed in its entirety in app. A, *infra*.

<sup>155</sup> MCM, *supra* note 88, MIL. R. EVID. 513(d)(2).

<sup>156</sup> *Id.* MIL. R. EVID. 513(d)(6).

<sup>157</sup> *Id.* MIL. R. EVID. 513(d)(4).

<sup>158</sup> The military judge must conduct a hearing outside the presence of members. *Id.* MIL. R. EVID. 513(e)(2).

<sup>159</sup> If necessary to make a decision on the motion, the military judge must also conduct an *in camera* review of the evidence in question. *Id.* MIL. R. EVID. 513(e)(3).

<sup>160</sup> *Id.* MIL. R. EVID. 513(b)(2).

would, in this case, omit victim advocates.<sup>161</sup> The CAAF has already stated that, owing to the President's flexibility in drafting executive orders, it will only apply changes to rules based on "express language, rather than [language that is] pressed or squeezed" from the text.<sup>162</sup>

Another reason to doubt that MRE 513 already encompasses victim advocates stems from the reluctance of the CAAF to make what is, in essence, a policy judgment on the degree of confidentiality that the victim advocate-victim relationship should enjoy. The CAAF has already held that policy issues are best left to "the political and policy-making elements of the government."<sup>163</sup> Finally, MRE 513 limits the scope of the privilege to statements "made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."<sup>164</sup> As discussed in Section II.C.2., *supra*, service regulations prohibit victim advocates from providing any form of treatment or professional counseling to sexual assault or domestic violence victims.

#### IV. Justification For Expanding MRE 513 to Include Victim Advocates

As discussed above, MRE 513 clearly does not encompass the advocate-victim relationship. Furthermore, the *Rodriguez*<sup>165</sup> case stands for the proposition that the codification of specific privileges in the MRE restricts the ability of military courts to recognize new privileges. Therefore, recognition of an advocate-victim privilege requires an executive order modifying MRE 513. Modifying MRE 513, rather than codification of a new MRE, is proposed in keeping with the trend in federal courts to expand the psychotherapist-patient privilege to cover this relationship.<sup>166</sup> This section discusses the justifications for the promulgation of a new MRE 513 via executive order. As discussed in Section III.C.1., *supra*, the Supreme Court demonstrated the framework for evaluating the recognition of a new evidentiary privilege in the case of *Jaffee v. Redmond*.<sup>167</sup> In evaluating the psychotherapist-patient

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<sup>161</sup> *United States v. McCollum*, 58 M.J. 323 (2003).

<sup>162</sup> *Id.* at 340.

<sup>163</sup> *Id.* at 342.

<sup>164</sup> MCM, *supra* note 88, MIL. R. EVID. 513(a).

<sup>165</sup> 54 M.J. 156 (2000).

<sup>166</sup> *See supra* Section III.C.2. Regardless of whether MRE 513 is modified or a new MRE is created, the justifications for the privilege remain the same.

<sup>167</sup> 518 U.S. 1 (1996).

privilege, the Supreme Court conducted both a balancing test and an evaluation of emerging state evidentiary trends.<sup>168</sup>

#### A. Utilitarian Balancing Test Supports the Proposed Privilege

The traditional Utilitarian Model for evaluation of the worthiness of an evidentiary privilege is attributed to Dean John Henry Wigmore. Dean Wigmore evaluated privileges on the basis of four conditions.<sup>169</sup> The Utilitarian Model for a privilege allows for the empirical evaluation of the privilege's validity by applying a cost-benefit type analysis to the exclusion of evidence.<sup>170</sup> In other words, benefit from the privilege must outweigh the cost from excluding the particular evidence. The examination of the societal benefit as proposed by the privilege is, in fact, a two part analysis. First, the court evaluates the magnitude of the proposed benefit.<sup>171</sup> The second portion of the analysis involves determining the extent to which the aforementioned benefits would decline if the relationship were stripped of a portion of its confidentiality.<sup>172</sup> In developing Federal common law on privilege, Federal courts have interpreted the Utilitarian Model and Supreme Court guidance as placing a significant burden on parties seeking to establish a new privilege; the party advocating the new privilege bears the burden of showing a public good worth the cost of excluding evidence.<sup>173</sup>

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<sup>168</sup> *Id.* at 11-13.

<sup>169</sup> Dean Wigmore proposed that a privilege existed if four conditions could be met. They were:

- (1) The communications must originate in a *confidence* that they will not be disclosed;
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*;
- (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation (emphasis in original).

JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (McNaughton rev. 1961).

<sup>170</sup> Courville, *supra* note 132, at 197.

<sup>171</sup> Carman v. McDonnell Douglas Corp., 114 F.3d 790, 793 (8th. Cir. 1997).

<sup>172</sup> *Id.*

<sup>173</sup> Trammel v. United States, 445 U.S. 40, 50 (1979).

In the case of our proposed privilege, the loss to society consists of a potentially relevant witness (the victim advocate) and evidence (statements by the victim) in sexual assault trials. The harm suffered by the defense from the loss of this evidence is minimal. Since victim advocates are discouraged from discussing details of the case with the victim, the lost evidence will relate to impeachment material such as a victim's self-blame or regret over the legal process. This evidence has limited probative value since it is a common emotional reaction for victims of sexual assault, regardless of whether it is true or not.<sup>174</sup> Furthermore, the defense is losing out on evidence that will not exist, but for the presence of a privilege. Without assurances of confidentiality, victim communications with advocates will decrease significantly.<sup>175</sup> Additionally, this evidence could be obtained by questioning the victim directly.<sup>176</sup> Rather than truly harm the defense, the privilege will deprive the accused of one odious potential tactic in their campaign of psychological warfare against the victim (if they choose to wage one).<sup>177</sup> As demonstrated below, this loss of evidence is clearly outweighed by the multiple benefits of granting a privilege to the advocate-victim relationship.

### *1. Privilege Benefits Society By Aiding Victim Recovery*

Numerous benefits result from affording a privilege to the advocate-victim relationship. First and foremost, the privilege will provide the essential element of confidentiality to the relationship.<sup>178</sup> The DOD's new sexual assault policy relies heavily on victim advocates to improve the plight of sexual assault victims.<sup>179</sup> Empirical evidence indicates that sexual assault victims view the assistance provided by victim advocates

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<sup>174</sup> Notman & Nadelson, *supra* note 21, at 135.

<sup>175</sup> Leslie A. Hagen & Kim Morden Rattet, *Communications and Violence Against Women: Michigan Law on Privilege, Confidentiality, and Mandatory Reporting*, 17 T.M. COOLEY L. REV. 183, 189 (2000).

<sup>176</sup> The proposed privilege would not prohibit the defense from asking the victim at the Article 32 hearing or other interview whether she feels guilty or at fault for the sexual assault. What would be prohibited is defense interviews of the victim advocate to inquire about these topics.

<sup>177</sup> Wendy Murphy, *Gender Bias in the Criminal Justice System*, 20 HARV. WOMEN'S L.J. 14, 15 (1997).

<sup>178</sup> Dean Wigmore's second element is that "confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties." WIGMORE, *supra* note 169, § 2285.

<sup>179</sup> JTF-SAPR-008 Memo, *supra* note 48.

as the most important component in their recovery.<sup>180</sup> Confidentiality is an essential component in the relationship between the advocate and victim.<sup>181</sup> Removing guarantees of confidentiality will decrease the likelihood that victims will seek the support of a victim advocate and obtain future medical treatment.<sup>182</sup> Confidentiality remains paramount throughout the relationship until its conclusion.<sup>183</sup> Second, a guarantee of an absolute privilege will assist victims in overcoming the lack of trust that they place in the system. Studies have shown that interactions with treatment and legal personnel foster feelings of distrust among sexual assault victims.<sup>184</sup> Providing victim advocates with an absolute evidentiary privilege represents one potential way for advocates to establish the trust of a victim. The victim advocate represents an important gatekeeper in encouraging the victim to seek psychological treatment, as often more than mere crisis action is required for the victim.<sup>185</sup> This method of gaining trust may be even more critical in the advocate-victim relationship as contemplated by the Army, where active duty soldiers will serve as victim advocates.<sup>186</sup> In all likelihood, successful implementation of the Army's victim advocate program will require a privilege for its active duty victim advocates.<sup>187</sup>

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<sup>180</sup> Anna Y. Joo, *Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor*, 32 HARV. J. ON LEGIS. 255, 265 (1995).

<sup>181</sup> HANSEN, *supra* note 24.

<sup>182</sup> Tera Jckowski Peterson, *Distrust and Discovery: The Impending Debacle in Discovery of Rape Victims' Counseling Records in Utah*, 2001 UTAH L. REV. 695, 698-700, 709 (2001).

<sup>183</sup> Hagen & Rattet, *supra* note 175, at 189 ("drastic change in the dynamics between healer and victim . . .").

<sup>184</sup> Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights From Mental Health Professionals Who Treat Survivors of Violence*, 14 VIOLENCE & VICTIMS 261, 268 (1999). Mental health professionals perceived that interactions with "community professionals" left rape victims "feeling distrustful of others." *Id.*

<sup>185</sup> Foa, et al., *supra* note 65, at 271.

<sup>186</sup> See *supra* Section II.C.2, for a discussion of the Army's planned utilization of victim advocates.

<sup>187</sup> An active duty victim advocate will already be operating at a disadvantage. The 2004 task force found that service members prefer to report incidents of sexual assault to agencies outside of the military. DOD TASK FORCE REP., *supra* note 14, at 29. The 2004 task force also made a finding that victim advocacy programs operated by full-time civilians are more effective than their military counterparts. *Id.* at 35.

## 2. *Privilege Benefits Society by Allowing for Collaboration*

The new DOD sexual assault policy requires that commanders take affirmative steps to collaborate with civilian agencies in responding to sexual assaults.<sup>188</sup> A large disparity currently exists, however, between the rules of privilege between the two systems.<sup>189</sup> Effective collaboration will require uniformity between the two systems. The issue of an advocate-victim privilege can effectively derail cooperation between military and civilian systems.<sup>190</sup> Demands for military discovery may potentially subject civilian response personnel to loss of funding, certification, and even criminal penalties for violating state or federal privacy law.<sup>191</sup> If victims have interacted with civilian advocates they may have an expectation of privacy in their interactions with victim advocates. Civilian victim advocates often advertise an absolute privilege of confidentiality.<sup>192</sup>

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<sup>188</sup> JTF-SAPR-010 Memo, *supra* note 48.

<sup>189</sup> See *infra* app. C, for a listing of state evidentiary privileges that apply to victim advocates (as opposed to the MRE which do not recognize the privilege).

<sup>190</sup> The author has been in the interesting position of attempting to enforce a military judge's order that a victim advocate employed by a California county disclose victim communications to a defense counsel. The state district attorney supervising the victim advocate adamantly refused to have the victim advocate comply. More recently, a military judge threatened to have a Colorado rape counselor arrested for refusing to turn over records of sessions with a victim. Associated Press, *Cadet Rape Halted Over Refusal On Files*, NEW YORK TIMES, June 25, 2005, <http://www.nytimes.com/2005/06/25/national/25rape.html?ex=1124424000&en=ed3ae11f705e26d9&ei=5070>.

<sup>191</sup> Discussion of the effects of the Health Insurance Portability and Accountability Act (HIPAA) on rape crisis centers is beyond the scope of this article. For a general discussion of HIPAA, see Tamela J. White & Charlotte A. Hoffman, *The Privacy Standards Under the Health Insurance Portability and Accountability Act: A Practical Guide to Promote Order and Avoid Potential Chaos*, 106 W. VA. L. REV. 709, 726-27 (2004).

<sup>192</sup> The City of San Diego Police Department, *Your Rights as a Survivor of Sexual Assault*, <http://www.sannet.gov/police/prevention/rights.shtml> (last visited Jan. 30, 2005).

*You have the right to CONFIDENTIALITY with your victim advocate. Anything that is said between you and your victim advocate is held in the strictest confidence. Your advocate from the Rape Crisis Center DOES NOT work for the police department or the district attorney's office, and will not disclose any information you discuss in private without your written consent.*

*Id.* (emphasis in original).

### 3. *Privilege Benefits Society by Reducing Re-Victimization*

The legal redress that society provides to its sexual assault victims may sometimes result in their re-victimization.<sup>193</sup> Some studies even indicate that participation in the legal process impairs the recovery of a sexual assault victim.<sup>194</sup> Due to the inherent trauma present in testifying against their attacker, it is nearly impossible to prevent the criminal process from adversely affecting the victim.<sup>195</sup> Military conditions place sexual assault victims in the military at a disadvantage, relative to their counterparts in civilian society. Expanding the scope of MRE 513 to include victim advocates represents a necessary step in helping sexual assault survivors cope with re-victimization.

#### *a. Re-Victimization Through the Military Criminal Process*

The military's increased re-victimization of sexual assault survivors occurs due to multiple conditions. First, the rules of discovery in the military contribute to re-victimization. This re-victimization often occurs due to the increased access to the victim that military defense counsel, as opposed to their civilian counterparts, enjoy.<sup>196</sup> Junior enlisted victims endure a disparate power status when they interact with commissioned officers serving as defense counsel. Discovery also impacts a broader spectrum of the military victim's life than her civilian counterpart's. Unlike civilian society, service members in the military often do not possess a social sphere outside of the work environment.

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<sup>193</sup> Campbell & Raja, *supra* note 184, at 262 ("Secondary victimization is the unresponsive treatment rape victims receive from social system personnel."). Some of the agencies within the DoD have begun to recognize this problem. Marine Corps Order 1752.5 recognizes the problem with potential re-victimization. Marine Corps Order 1752.5, *supra* note 74, para. 3.c. ("Sexual assault victims have at times been considered responsible for their predicament and are sometimes re-victimized by those in a position to assist.").

<sup>194</sup> Patricia Cluss et al., *The Rape Victim: Psychological Correlates of Participation in the Legal Process*, 10 CRIM. JUST. & BEHAV. 354-55 (1983). "[D]ata analyses support the suggestion that participating in the prosecution of a rape case may be disruptive for the victim." *Id.* at 354.

<sup>195</sup> Resick, *supra* note 15, at 243 ("testifying in court' emerged as one of the most fear-provoking stimuli reported by victims").

<sup>196</sup> See generally DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 395 (5th ed. 1999). As part of the military discovery process, the author believes that trial counsel should routinely encourage all government witnesses, including victims, to speak with the defense counsel.

Phrased another way, junior service members live in close proximity to their colleagues and experience little separation in their professional and private lives. Empirical evidence substantiating this problem exists in the reasons given for low reporting rates of sexual assault at the Air Force Academy. The top two reasons for failing to report were fear of embarrassment and fear of ostracism by peers.<sup>197</sup> This interconnection of social and professional lives allows a defense counsel to completely destroy the privacy of a sexual assault victim, through interviewing her entire social network, spreading and lending credibility to what are often spurious rumors. Consequently, this amounts to a unique form of trauma for sexual assault victims as they observe all their friends and colleagues meeting with defense counsel to discuss any and all rumors of unsavory conduct.

The discovery process can also lead to victims experiencing a sense of betrayal. Service members who are not accused of a crime do not have a choice regarding whether they will talk with a defense counsel.<sup>198</sup> According to the victim's perception, however, their fellow service members who provide innocuous good military character evidence to the defense are still taking sides in the case.<sup>199</sup> Victims who view members of their social circle as non-supportive often experience an increased amount of trauma symptoms.<sup>200</sup> Victims also can feel betrayed by the military prosecutor. Although victims sometimes mistakenly view the trial counsel as their attorney, the trial counsel represents the government.<sup>201</sup> Therefore, statements made by a victim to a government prosecutor must be disclosed to the defense if they contain any exculpatory information, leading to a sense of betrayal on the part of the victim.<sup>202</sup> Additionally, the trial counsel's duty in evaluating the

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<sup>197</sup> AIR FORCE ACADEMY REP., *supra* note 22, at 52 (referencing the May 2003 Inspector General survey).

<sup>198</sup> SCHLUETER, *supra* note 196, at 303 ("commanders should take extra care to ensure military members know and understand they have a positive duty to provide any information relevant to an accused's case whether it is favorable or not").

<sup>199</sup> The good military character defense is uniquely available to an accused in the military. See generally Elizabeth Lutes Hillman, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879 (1999).

<sup>200</sup> Resick, *supra* note 15, at 244.

<sup>201</sup> UCMJ art. 38 (2002).

<sup>202</sup> MCM, *supra* note 88, RCM 701(a)(6). In addition to its commonly understood definition, exculpatory material also includes impeachment evidence. Knowing these discovery requirements, most trial counsel are loathe to have the victims prepare any type of written statement beyond what has already been taken by criminal investigators. Discovery obligations, however, apply to oral and electronic communications as well.



strength of the case forces a critical evaluation of the victim's credibility, rather than unconditional support.<sup>203</sup>

Finally, Article 32 investigations serve as the crown jewel of re-victimization in the military. Article 32 of the UCMJ requires an "investigation" of charges before the convening of a general court-martial.<sup>204</sup> While representing an important procedural safeguard for the accused, the Article 32 investigation can quickly deteriorate into an exercise in re-victimization when the defense counsel is ruthless.<sup>205</sup> During their Article 32 testimony, victims are routinely questioned about drug use, drinking habits, and sexual behavior.<sup>206</sup> Coupled with demeaning questions, victims often must endure theatrics from defense counsel attempting to satisfy twin goals of browbeating the victim and posturing for their client.<sup>207</sup> Some may argue that the presence of the

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Any correspondence from a victim that indicates frustration with the process, guilt, or reluctance to testify may yield impeachment evidence and should be provided to the defense. Consequently, the trial counsel should automatically turn over to the defense any email or letters they receive from a victim that espouse these sentiments.

<sup>203</sup> See generally Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213, 224 (1991).

<sup>204</sup> MCM, *supra* note 88, RCM 405. As a part of the discovery process, the Article 32 investigation is designed to uncover facts in the case so that the investigating officer may make a recommendation to the general court-martial convening authority on the disposition of charges.

<sup>205</sup> In the author's experience, this problem is more prevalent with retained civilian counsel.

<sup>206</sup> Military Rule of Evidence 412 ostensibly applies at an Article 32 hearing. MCM, *supra* note 88, R.C.M. 405(i). Application of MRE 412 is usually avoided by couching the evidence as "constitutionally required." The discovery-driven purpose of an Article 32 investigation allows defense counsel to delve into areas of limited relevance that would not be admissible at the trial. For example, defense counsel frequently ask questions about victims' sexual practices that would be prohibited under MRE 412 at trial.

<sup>207</sup> The procedural composition of the Article 32 investigation offers no practical form of protection to victims. Although the investigation is usually conducted by a judge advocate, he or she is seldom a military judge. More importantly, no members are present for the investigation. The absence of these individuals, who could easily become inflamed if they felt someone was mistreating a victim, from the proceeding removes any incentive for a defense counsel to treat a victim respectfully. On the other hand, multiple incentives exist for a defense counsel to mount a psychological assault on a victim during an Article 32 exam. First and foremost, a scathing and humiliating cross examination may convince a victim that the limited satisfaction gained from the legal process is not worth its emotional and psychological cost. This humiliation stems from numerous factors ranging from question topics to being laughed at by the accused. Second, the consequence-free Article 32 hearing provides the perfect opportunity for defense counsel to posture and grand-stand for their client. Unfortunately for the victim, much of this conduct comes at her expense.

trial counsel at the Article 32 investigation protects the rights of victims. On the contrary, a shrewd defense counsel understands instead that cross examination of a victim at an Article 32 represents a chance to drive a wedge between the victim and the prosecutor.<sup>208</sup> In response to objectionable questioning, the trial counsel faces two unappealing options. The trial counsel can either object to the questions, knowing he or she will probably be overruled, losing credibility with the victim, or remain silent, making the victim think that no one is standing up for her.<sup>209</sup>

*b. Presence of a Confidante Reduces Re-Victimization*

Creating a privilege for the relationship between sexual assault victims and their victim advocates provides the victim with one unequivocal ally in the legal process. Refusing to allow an advocate-victim privilege deprives the victim of a confidante. As discussed previously, this deprivation eliminates a critical element in the recovery of the sexual assault victim. It also magnifies re-victimization. The Executive Director of the Miles Foundation, Christine Hansen, described the importance of the relationship between a victim and victim advocate by stating: "The presence of a 'confidant' to a victim of domestic or sexual violence is vital to the care and treatment of victims, physically and emotionally."<sup>210</sup> Studies show that sexual assault victims benefit from social support.<sup>211</sup> In the case of victim advocates, this support does not take the form of treatment, but rather an ability to present oneself as an absolute confidante. As discussed above, the trial counsel is utterly incapable of providing the emotional safe-harbor necessary for a victim's emotional health during the criminal process. Relying on chaplains for

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<sup>208</sup> Military Rule of Evidence 412 states that evidence of a sexual assault victim's past sexual activities or character at trial is inadmissible at trial by court-martial. MCM, *supra* note 88, MIL. R. EVID. 412 (2002). This exclusionary rule, unlike an evidentiary privilege, does nothing to keep this information confidential during the discovery process. On the contrary, this material must be given to the defense in order to evaluate the Constitutional validity of its exclusion.

<sup>209</sup> Some readers will respond that the trial counsel can avoid this dilemma through preparation of the victim. The author contends, however, that no amount of preparation will allow a novice victim to understand the true (and sometimes farcical) nature of Article 32 proceedings.

<sup>210</sup> HANSEN, *supra* note 24. The Miles Foundation is a not for profit organization that advocates on behalf of sexual assault and domestic violence victims in the military. Miles Foundation, at <http://hometown.aol.com/milesfdn> (last visited Nov. 16, 2004).

<sup>211</sup> Resick, *supra* note 15, at 246.

absolute confidentiality is also a mistake.<sup>212</sup> Unless the victim is married, she possesses no safe outlet to express her thoughts and feelings about her life and the legal process.<sup>213</sup> The marital relationship provides a privileged outlet for the victim to discuss the case.<sup>214</sup> Unfortunately, studies indicate that over half of female victims of rape ultimately lose their husbands or boyfriends as a result of the psychological strain on the relationship.<sup>215</sup>

#### B. Proposed Privilege Reflects an Emerging Trend in State Rules

As recognized by the United States Supreme Court in *Jaffee v. Redmond*<sup>216</sup> and by the CAAF in *United States v. McCollum*,<sup>217</sup> trends in state evidentiary law provide persuasive authority for the validity of a privilege.<sup>218</sup> A consensus among states also provides evidence of the common law's "reason and experience" referenced by FRE 501.<sup>219</sup> Owing to the nature of the privilege in question here, state law is even more persuasive. Outside of the District of Columbia, most sexual assault cases are tried under state law, rather than federal law.<sup>220</sup>

State evidentiary codes vary on the degree of confidentiality and privileges that protect the relationships between sexual assault victims and victim advocates. Despite this variance, it is possible to discern a trend toward protecting the communications victims and victim advocates. As of January of 2005, a person providing services in the civilian sector that are equivalent to those provided by a military victim advocate would be covered by an evidentiary privilege in twenty-five of the fifty states.<sup>221</sup> Of these, thirteen states have expressly codified the

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<sup>212</sup> The priest-penitent privilege only applies in cases a formal act of religion or a matter of conscience. See Section II.D., *supra*, for a more thorough discussion of this issue.

<sup>213</sup> A lack of positive support from a spouse may sometimes inhibit the emotional recovery of a victim. Resick, *supra* note 15, at 244.

<sup>214</sup> MCM, *supra* note 88, MIL. R. EVID. 504.

<sup>215</sup> Crenshaw, *supra* note 19, at 51.

<sup>216</sup> 518 U.S. 1 (1996).

<sup>217</sup> 58 M.J. 323 (2003).

<sup>218</sup> In fact, the Supreme Court has stated that "policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one." *Jaffee*, 518 U.S. at 12.

<sup>219</sup> *Id.* at 13.

<sup>220</sup> Lederer, *supra* note 98, at 21.

<sup>221</sup> See *infra* app. C.

victim advocate-victim privilege.<sup>222</sup> Another twelve possess expansive sexual assault counselor-victim privileges that would encompass statements made by victims to personnel functioning in a role equivalent to military victim advocates.<sup>223</sup> Nine more states possess restrictive sexual assault counselor-victim privileges that would not include victim advocates.<sup>224</sup> One distinguishing factor in determining whether these privileges would apply to military victim advocates is whether the relationship involves “assistance,” rather than “treatment.” As discussed in Section II.C.1., *supra*, victim advocates in the DOD do not provide “treatment.” Consequently, any state privileges that required that the advocates provide treatment were not construed to cover military victim advocates. Another factor involved whether the employee was operating under the direct supervision of a licensed psychiatrist, psychologist, or social worker. This condition will probably apply to military victim advocates who work for family advocacy programs headed by credentialed personnel; privileges requiring this condition were assumed to apply to military victim advocates. Only sixteen states have no privilege beyond that of the psychotherapist-patient privilege in place to assist victims of sexual assault or domestic violence.<sup>225</sup> Interestingly, three states grant evidentiary privileges to peer support counselors who, while not supporting crime victims, arguably provide the same type of services as military victim advocates.<sup>226</sup>

Some will argue that a fraction of twenty-five of fifty states does not represent enough of a trend to justify a new evidentiary privilege. At the time of its promulgation, the psychotherapist-patient privilege enjoyed significantly more support than the sexual assault counselor-victim privilege currently possesses.<sup>227</sup> Currently, only one United States circuit court has ratified the expansion of the psychotherapist-patient to a broad scope that would include facilitators of mental services.<sup>228</sup> In past

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<sup>222</sup> Alaska; Arizona; Colorado; Florida (domestic violence victim advocate); Kentucky; Maine; Montana; Nevada; Pennsylvania; Vermont (crisis worker); Washington; Wisconsin; Wyoming. *See app. C, infra.*

<sup>223</sup> California; Florida; Hawaii; Illinois; Massachusetts; Michigan; Minnesota; New Hampshire; New Jersey; New Mexico; New York; Utah. *See app. C, infra.*

<sup>224</sup> Alabama; Connecticut; Indiana; Missouri; Nebraska; Ohio; South Carolina; Virginia; West Virginia. *See app. C, infra.*

<sup>225</sup> Arkansas; Delaware; Georgia; Idaho; Iowa; Kansas; Louisiana; Maryland; Mississippi; North Carolina; North Dakota; Oklahoma; Oregon; Rhode Island; South Dakota; Tennessee; Texas. *See app. C, infra.*

<sup>226</sup> Hawaii; Louisiana; North Carolina. *See app. C, infra.*

<sup>227</sup> *Jaffee v. Redmond*, 518 U.S. 1 (1996).

<sup>228</sup> *Oleszko v. State Compensation Ins. Fund*, 243 F.3d 1154 (9th Cir. 2001).

holdings, the CAAF has hesitated to make changes to privilege law based on only one circuit court.<sup>229</sup> This objection fails, however, due to a lack of proper perspective. If the perspective is changed to analyze how many states provide more protections for sexual assault victims during the legal process than the military's criminal system the answer will be quite uniform- all of the states provide greater protection. An overwhelming majority possess some degree of privileged communications for victims beyond the psychotherapist-patient privilege. In contrast, the military only provides a weakened version of the psychotherapist-patient privilege.<sup>230</sup>

#### V. Sixth Amendment Ramifications of Expanding MRE 513

Defendants whose cases are harmed by the operation of privileges may attack the validity of the privilege on Constitutional grounds.<sup>231</sup> The Sixth Amendment to the United States Constitution states that "the accused shall enjoy the right to . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."<sup>232</sup> Through the cases of *Davis v. Alaska*,<sup>233</sup> *Washington v. Texas*,<sup>234</sup> and *Pennsylvania v. Ritchie*,<sup>235</sup> the Supreme Court has interpreted this language as giving an accused the right to compulsory process (for the production of evidence) and the right to confront and cross examine witnesses.<sup>236</sup> Additionally, the government possesses an obligation, under *Brady v. Maryland*,<sup>237</sup> to provide all potentially exculpatory material to the defense.<sup>238</sup>

During the 1970s, rape reform laws were enacted to combat the practice of re-victimizing victims during the trial.<sup>239</sup> With their advent, the scope of the defense's areas for cross examination of the sexual assault victim was severely reduced. This reduction places an increased

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<sup>229</sup> *United States v. McCollum*, 58 M.J. 323, 341 (2003).

<sup>230</sup> *See supra* Section III.D.2.

<sup>231</sup> MCCORMACK ON EVIDENCE 279 (John William Strong ed., 4th ed., 1992).

<sup>232</sup> U.S. CONST. amend. VI.

<sup>233</sup> 415 U.S. 308 (1974).

<sup>234</sup> 388 U.S. 14 (1967).

<sup>235</sup> 480 U.S. 39 (1987).

<sup>236</sup> MCCORMACK, *supra* note 231, at 279.

<sup>237</sup> 373 U.S. 83 (1963).

<sup>238</sup> *Id.* at 87.

<sup>239</sup> *Michigan v. Lucas*, 500 U.S. 145, 150 (1991).

emphasis on the defense counsel's need to actively seek out any inconsistent statements that the victim may have made concerning the rape or sexual assault.<sup>240</sup> These inconsistent statements represent potential evidence to prove bias or motive to fabricate an allegation.<sup>241</sup>

#### A. Rights of an Accused Under the Confrontation Clause

The Confrontation Clause involves the right of an accused to confront witnesses against him or her through face-to-face testimony and cross examination.<sup>242</sup> Since the sexual assault victim will be the main witness in the government's case, confrontation concerns regarding in person testimony will ordinarily be satisfied.<sup>243</sup> The accused will argue, though, that the proposed privilege reduces the ability to effectively cross-examine the alleged victim. With rape shield laws already limiting his ability to defend himself, an accused will argue that the Sixth Amendment requires that he be given access to these statements between victims and victim advocates in the hope of finding inconsistencies. The normal emotional reactions of a sexual assault victim include doubts, insecurity, and self blame—all emotions that a defense counsel will classify as exculpatory evidence for impeachment of the victim.<sup>244</sup> Resolution of this issue involves determining whether confrontation only applies at trial or if it applies to the entire courts-martial process, including discovery.<sup>245</sup> The United States Supreme Court sought to delineate the contours of the right to effective confrontation in the case of *Davis v. Alaska*.<sup>246</sup> Here, the Court stated that in order to be effective, cross examination had to be meaningful.<sup>247</sup> The Court took up the issue again in *Pennsylvania v. Ritchie*.<sup>248</sup> This time the Court determined that restrictions on the discovery process did not render cross-examination ineffective.<sup>249</sup>

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<sup>240</sup> Capoccia, *supra* note 23, at 1345.

<sup>241</sup> *Id.* at 1349.

<sup>242</sup> *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

<sup>243</sup> An exception to this would occur if the victim recants and the government attempts to prove the offense through prior testimony or hearsay evidence. The proposed privilege would preclude the victim advocate from testifying for this purpose.

<sup>244</sup> Joo, *supra* note 180, at 264.

<sup>245</sup> Capoccia, *supra* note 23, at 1355.

<sup>246</sup> 415 U.S. 308 (1974).

<sup>247</sup> *Id.* at 320.

<sup>248</sup> 480 U.S. 39 (1987).

<sup>249</sup> *Id.* at 52.

Despite the presence of an advocate-victim privilege, the constitutional right of the accused to effective cross examination is still satisfied. The content of the statements made by the victim to the victim advocate will contain limited probative value if the guidelines of the advocacy program are being followed which preclude discussion of the facts of the case or providing active counseling.<sup>250</sup> The Illinois Supreme Court expressly relied on this lack of probative content while holding that an absolute privilege for sexual assault counselors did not violate the Constitutional rights of a defendant.<sup>251</sup>

#### B. Rights of an Accused Under the Compulsory Process Clause

The Compulsory Process Clause requires the government to turn over exculpatory information. It also guarantees the accused's right to produce favorable witnesses. Regarding the proposed privilege, the accused would argue that his compulsory process rights are violated through the inability to call the victim advocate as a witness and the failure to provide the statements made by the alleged victim to the victim advocate. The Supreme Court established the right to compulsory process in the case of *Washington v. Texas*.<sup>252</sup> In this case, the Court held that the prohibition on calling witnesses, coupled with a limited scope of cross examination, operated to deny a fair trial to a Texas defendant.<sup>253</sup> One objection to granting an absolute privilege to victim advocates stems from the fact that this privilege would preclude the testimony of a potential defense witness, the victim advocate.<sup>254</sup> In the case of *Ritchie v. Pennsylvania*,<sup>255</sup> the Court compared the compulsory process clause with the due process clause.<sup>256</sup> The Court found that the due process clause afforded protections that were at least equal to the compulsory process clause.<sup>257</sup>

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<sup>250</sup> See *supra* Section II.C.

<sup>251</sup> *People v. Foggy*, 521 N.E. 2d 86, 91 (Ill. 1988).

<sup>252</sup> 388 U.S. 14 (1967).

<sup>253</sup> *Id.* at 23.

<sup>254</sup> Maureen B. Hogan, Note, *The Constitutionality of an Absolute Privilege for Rape Crisis Counseling: A Criminal Defendant's Sixth Amendment Rights Versus a Rape Victim's Right to Confidential Therapeutic Counseling*, 30 B.C. L. REV. 411, 416 (1989).

<sup>255</sup> 480 U.S. 39 (1987).

<sup>256</sup> *Id.* at 51-2.

<sup>257</sup> *Id.* at 56.

The proposed advocate-victim privilege does not violate the Compulsory Process Clause of the Sixth Amendment. The service guidelines for victim advocates generally preclude their exposure to truly probative exculpatory evidence. Instead, the advocate-victim relationship simply creates a potential confidante for sexual assault victims. A privileged confidante is readily available to victims who possess the economic means to hire their own attorney or are presently married. If, *arguendo*, one believes that advocate-victim conversations contain probative impeachment evidence, the proposed privilege should still survive Constitutional scrutiny due to the military's needs as a separate society under *Parker v. Levy*.<sup>258</sup> From an equity standpoint, the accused's rights in the military are already bolstered through the available defense of good military character<sup>259</sup> and procedural protections.<sup>260</sup>

## VI. Mechanics of the Proposed Victim Advocate-Victim Privilege

Once one agrees with the imperative need for an advocate-victim privilege in the United States military, the question of how to implement it remains. While most state evidentiary rules enumerate separate sexual assault counselor, victim advocate, and psychotherapist privileges,<sup>261</sup> federal courts recognizing this type of privilege have expanded the federal psychotherapist-patient privilege created by *Jaffee v. Redmond*.<sup>262</sup> Similarly, the author of this article recommends the expansion of MRE 513 to include the proposed advocate-victim privilege, rather than the promulgation of an entirely new MRE.<sup>263</sup> This expansion must exempt victim advocates from the normal mechanics of MRE 513, however, which include an *in camera* review by the military judge of any privileged material in dispute.<sup>264</sup> Defining the privilege requires two variables: the privilege's scope and its parties. The author's proposal for a modified MRE 513 is contained in Appendix B, *infra*. The proposed

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<sup>258</sup> “[M]ilitary society has been a society apart from civilian society . . . .” 417 U.S. 733, 744 (1974).

<sup>259</sup> See generally Hillman, *supra* note 199, at 879.

<sup>260</sup> The accused is protected through liberal discovery rules and the Article 32 investigation. See *supra* Section V.B.

<sup>261</sup> See *infra* app. C.

<sup>262</sup> 518 U.S. 1 (1996).

<sup>263</sup> This approach is also consistent with Art. 36, RCM 1102, and MRE 102. See *supra* Section III.A.

<sup>264</sup> See *supra* Section IV.B.2.a.



modifications are contained in bold font. The author's intent is to propose a privilege that is strong enough to accomplish the purpose of giving sexual assault victims a confidante without violating the Sixth Amendment.

#### A. Absolute, Unqualified Privilege

Regarding the scope of a privilege, the Supreme Court has stated: "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."<sup>265</sup> This principle argues for an advocate-victim privilege that is absolute. The operation of MRE 513, however, subjects its privilege to an *in camera* review by a military judge.<sup>266</sup> Consequently, in order to meet the needs of the advocate-victim relationship, MRE 513 must be modified in a way that places victim advocates outside of its normal mechanics. Otherwise, *in camera* reviews will completely eviscerate the privilege and the relationship that it seeks to foster.<sup>267</sup> The proposed rule addresses this concern by in subparagraph (e)(6) by removing advocate-victim communications from the delineated procedure to determine admissibility.<sup>268</sup>

The language additions in Subparagraph (d) remove victim advocates from most of the exceptions to the privilege that are enumerated.<sup>269</sup> A new exception, specifically applying to victim advocates, is present in Subparagraph (d)(9).<sup>270</sup> This exception states that the privilege will not apply in cases where the victim advocate works with the government in preparing a victim for testimony. This exception seeks to ensure that the government will not use the privilege as a means to conceal pre-trial preparation. For example, the privilege would not apply when a victim advocate coaches or alters the testimony of a victim.

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<sup>265</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

<sup>266</sup> MCM, *supra* note 88, MIL.R. EVID. 513.

<sup>267</sup> HANSEN, *supra* note 24. Under a simple relevance standard, provisions for *in camera* review amount to an almost automatic turnover of the evidence. "In every case in which consent is raised as the defense, a defendant will be able to assert that the complainant's records may contain information bearing on a motive to lie." *Commonwealth v. Fuller*, 423 Mass. 216, 228 (1996).

<sup>268</sup> Proposed MRE 513 (e)(6), app. B, *infra*.

<sup>269</sup> Proposed MRE 513 (d), app. B, *infra*.

<sup>270</sup> Proposed MRE 513(d)(9), app. B, *infra*.

## B. Identifying the Parties to the Privilege

The proposed military victim advocate-victim privilege involves two parties, the crime victim and the victim advocate. In order to prevent the proposed privilege from becoming overbroad, the parties must be defined in limited terms.

### 1. *Victim Advocates*

The advocate-victim privilege, as proposed, is absolute and encompasses an extremely broad class of statements. This proposed privilege will possess a strength that is equivalent to that of the attorney-client or marital privileges. Consequently, a narrow definition of victim advocates is essential; otherwise, the proposed privilege would probably violate the Sixth Amendment of the United States Constitution, as discussed in Section V, *supra*.

The proposed privilege should include two classes of victim advocates. First, the privilege should apply to victim advocates in the civilian sector. The new DOD sexual assault policy's mandate on collaboration requires this inclusion of civilian victim advocates.<sup>271</sup> Second, the proposed privilege would also apply to military victim advocates who are designated in writing by an officer exercising General Court-Martial Convening Authority (GCMCA). Requiring appointment by a GCMCA prevents expansion of the proposed privilege into an unworkable system where numerous individuals within the family advocacy programs could claim coverage by the privilege. Military victim advocate status would depend upon appointment by the GCMCA, rather than any licensing requirement for the individual advocate. The need for a licensing requirement is eliminated by the military services' prohibition on victim advocates providing treatment. It also corresponds to the justification for the privilege--the relationship between advocate and victim--rather than the professional status of the victim advocate.<sup>272</sup> Distinguishing between victim advocates and those personnel who

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<sup>271</sup> See *supra* Section IV.A.2.

<sup>272</sup> Focusing a privilege solely on the status of the victim advocate would potentially create social inequality. See generally Joo, *supra* note 179, at 266.

provide treatment is also necessary to shield the proposed privilege from erosion due to the use of rape trauma syndrome evidence.<sup>273</sup>

## 2. Victims

Most of the current debate over the roles of victim advocates stems from their role assisting victims of sexual assault. The proposed privilege is not intended to apply to all generic classes of victims under the UCMJ. The relationship between domestic violence victims and a victim advocate, however, is nearly identical to that of sexual assault victims. The justifications for protecting the privilege between a sexual assault victim and their victim advocate also apply to the advocate-domestic violence victim dynamic. Consequently, the new privilege utilizes language capable of encompassing victims of both sex crimes and domestic abuse.<sup>274</sup>

## VII. Conclusion

While the numbers of purported sexual assaults and domestic violence in the military may shock the nation's conscience, the more sinister aspect of the equation involves the systematic re-victimization of sexual assault victims that occurs under the military's procedural and evidentiary rules--a re-victimization largely unrecognized by the DOD. Although the new DOD sexual assault policy strikes all the right chords regarding the seriousness of the problem, it offers little in its present form that will tangibly assist sexual assault victims in overcoming the challenges that they face. The policy does, though, seek to ensure that sexual assault victims receive the support of victim advocates. The support of a victim advocate can assist a sexual assault victim if the victim advocate can provide the victim with a confidante. Currently,

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<sup>273</sup> Use of rape trauma syndrome evidence potentially destroys the effectiveness of MRE 412 because it increases the relevance of past sexual evidence. *See generally* Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 N.W. U. L. REV. 1271, 1329 (1994). Use of Rape Trauma Syndrome evidence is widespread in courts-martial. Lieutenant Colonel Elspeth Cameron Richie, *Reactions to Rape: A Military Forensic Psychiatrist's Perspective*, 163 MIL. MED. 505 (1998). Likewise, communications made during post-assault treatment of a victim possess increased relevance when the government offers rape trauma syndrome evidence. Current DOD regulations preclude victim advocates from providing treatment to victims. *See supra* Section II.C.

<sup>274</sup> Proposed MRE 513 (b)(6), app. B, *infra*.

victim advocates cannot perform this mission because they do not possess any type of evidentiary privilege. Modifying MRE 513 to include an advocate-victim privilege represents a concrete measure towards aiding sexual assault victims. This privilege will enable victim advocates to act as true confidantes and provide victims with a safety zone where they are immune from defense harassment tactics. Giving victims an unconditional ally, a victim advocate armed with an evidentiary privilege, will do more than provide the wry knowledge that they are now a statistic or a training point. It will make an actual difference in helping the survivor recover from a sexual assault.

**Appendix A****Military Rule of Evidence 513**

## MRE 513

(a) *General rule of privilege.* 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 UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule of evidence:

(1) A “patient” is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A “psychotherapist” is 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, or is a person reasonably believed by the patient to have such license or credentials.

(3) An “assistant to a psychotherapist” is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) “Evidence of a patient’s records or communications” is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who may claim the privilege.* The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(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 Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is constitutionally required.

(e) *Procedure to determine admissibility of patient records or communications.*

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof *in camera*, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise.

**Appendix B****Proposed Modification of MRE 513** (proposed changes in bold)

## Rule 513. Psychotherapist-patient privilege

(a) *General rule of privilege.* A **victim or a patient** has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between **a victim and victim advocate and a patient** and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made **by the victim** for the purpose of **seeking support or assistance or by the patient for** facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule of evidence:

(1) A “patient” is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A “psychotherapist” is 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, or is a person reasonably believed by the patient to have such license or credentials.

(3) An “assistant to a psychotherapist” is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) “Evidence of a patient's records or communications” is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the



same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

**(6) A “victim” is a person who has been victimized by a crime of sexual assault or domestic violence.**

**(7) A “victim advocate” is a military employee who has been designated as a victim advocate in writing by an officer exercising general court-martial convening authority or a civilian worker in an organization that offers treatment to victims of sexual assault and/or domestic violence.**

(c) *Who may claim the privilege.* The privilege may be claimed by the **victim or** patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The **victim advocate**, psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

(1) when the patient **or victim** is dead;

(2) **between a patient and their psychotherapist or assistant to their psychotherapist** when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist **or victim advocate** are sought or obtained to enable or aid anyone to commit or

plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) **between a patient and their psychotherapist or assistant to their psychotherapist** when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(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 Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) **between a patient and their psychotherapist or assistant to their psychotherapist** when admission or disclosure of a communication is constitutionally required;

(9) **when a victim advocate collaborates with the government in preparing a victim for court-martial testimony.**

(e) *Procedure to determine admissibility of patient records or communications.*

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof *in camera*, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise.

**(6) The foregoing procedures of this subparagraph for determining admissibility shall not apply to privileged communications between a victim and a victim advocate under this rule.**

## Appendix C

## State Advocate-Victim Privileges

| State    | Privilege                       | Statute Cite                      | Comments  |
|----------|---------------------------------|-----------------------------------|---|
| Alabama  | Counselor-Client Privilege      | ALA R. EVID. 503A (2005)          | “Victim Counselor” is someone who provides treatment-- therefore it would not cover military victim advocates |
| Alaska   | Victims’ Advocate Privilege     | ALASKA STAT. § 24.65.200 (2004)   | Applies to all crime victim advocates; would encompass DOD victim advocates                                   |
| Arizona  | Crime Victim Advocate Privilege | ARIZ. REV. STAT. § 13-4430 (2004) | Would encompass DOD victim advocates; <i>in camera</i> hearing upon showing of reasonable cause               |
| Arkansas | Psychotherapist-patient only    |                                   | No coverage of DOD victim advocates   |

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|-------------|---|---|--|
| California  | Sexual assault victim counselor-victim privilege              | CAL. EVID. CODE § 1035.4 (2005)           | Expansive privilege for sexual assault counselors; any employee who provides assistance; privilege is qualified  |
| Colorado    | Victim's advocate-victim privilege                            | COLO. REV. STAT. § 12.63.6-115 (1) (2004) | A "victim advocate" means a person at a battered women's shelter or rape crises organization or a comparable community-based advocacy program for victims of domestic violence or sexual assault; would cover DOD victim advocates |
| Connecticut | Battered women's or sexual assault counselor-victim privilege | CONN. GEN. STAT. § 52-146k (2004)         | Must provide counseling to the victim; therefore, DOD advocates would not qualify; state courts have converted the legislature's absolute privilege into a qualified privilege   |

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| Delaware | Psychotherapist<br>-patient only  |   | No coverage of<br>DOD victim<br>advocates  |
| Florida  | Privileges for<br>both Domestic<br>violence<br>advocate-victim<br>and sexual<br>assault<br>counselor-<br>victim | FLA. STAT. §<br>90.5035<br>(2004);<br>FLA. STAT. §<br>90.5036<br>(2004) | Expansive<br>privilege for<br>sexual assault<br>counselors;<br>sexual assault<br>counselor<br>privilege<br>encompasses any<br>employee of a<br>rape crisis center<br>who provides<br><i>assistance</i> to<br>victims. This<br>would certainly<br>encompass<br>military victim<br>advocates<br>working within<br>the Family<br>Advocacy<br>Program. |
| Georgia  | Psychotherapist<br>-patient only  |   | No coverage of<br>DOD victim<br>advocates  |

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| Hawaii   | Victim-counselor (applies to both sex. assault and domestic violence); peer support counseling (for law enforcement) | HAW. REV. STAT. § 505.5 (2004)         | Expansive privilege for sexual assault counselors; This privilege will only cover military victim advocates if the head of the installation family advocacy program is a "social worker, nurse, psychiatrist, psychologist, or psychiatrist." Required to provide "assistance" (treatment is not required). |
| Idaho    | Public Officer in Official Confidence  | IDAHO CODE § 9-203.5 (2004)            | No coverage of DOD victim advocates   |
| Illinois | Confidentiality of statements made to rape crisis personnel  | 735 ILL. COMP. STAT. 5/8-802.1. (2004) | Absolute privilege; requirement for assistance only; would cover DOD victim advocates   |
| Indiana  | Victim counselor-victim privilege.   | IND. CODE ANN. § 35-37-6-9 (2004)      | Statute requires treatment for the privilege; no coverage of DOD victim advocates   |

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| Iowa          | Privilege for professional counselors  | IOWA CODE § 622.10 (2004)  | No coverage of DOD victim advocates   |
| Kansas        | Psychotherapist-patient only   |  | No coverage of DOD victim advocates   |
| Kentucky      | Counselor-client privilege   | KY. REV. STAT. ANN. § 421.570 (2004)   | Counselor only required to assist; victim advocate explicitly recognized as counsel; would include DOD victim advocates |
| Louisiana     | Health care provider privilege and peer support member privilege                               | LA. CODE EVID. ANN. ART. 510 (2004); LA. CODE EVID. ANN. ART. 518 (2004)   | No coverage of DOD victim advocates   |
| Maine         | Sexual assault counselor privilege; Victim advocate privilege; Gov't victim advocate privilege | 16 ME. REV. STAT. ANN. § 53-A (2004); 16 ME. REV. STAT. ANN. § 53-B (2004); 16 ME. REV. STAT. ANN. § 53-C (2004) | Will cover DOD victim advocates; Qualified privileges only  |
| Maryland      | Privilege for social workers   |  | No coverage of DOD victim advocates   |
| Massachusetts | Privileged communications between sexual assault victim and certain counselors                 | MASS. GEN. LAWS CH. 233 § 20J (2005)   | State court qualified what had been an absolute privilege; will cover DOD victim advocates                              |



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|-------------|--|-------------------------------------|---|
| Michigan    | Privilege for sexual assault counselors                              | MICH. COMP. LAWS § 600.2157A (2004) | State court qualified what had been an absolute privilege; would cover DOD victim advocates                                     |
| Minnesota   | Privilege for sexual assault counselors                              | MINN. STAT. §595.02 (2004)          | Counselor is someone who provides assistance and works under supervisor at rape crisis center; would cover DOD victim advocates |
| Mississippi | Psychotherapist-patient only   |                                     | No coverage of DOD victim advocates   |
| Missouri    | Professional counseling privilege                                    | MO. REV. STAT. § 337.540 (2004).    | Not much more than basis psychotherapist privilege; no coverage of DOD victim advocates   |
| Montana     | Advocate privilege   | MONT. CODE ANN. § 26-1-812 (2004)   | Would cover DOD victim advocates  |
| Nebraska    | Physician-patient privilege; professional counselor-client privilege | NEB. REV. STAT. § 27-504 (2004)     | No coverage of DOD victim advocates   |
| Nevada      | Victim-Victim Advocate privilege                                     | NEV. REV. STAT. § 49.2547 (2004)    | Would cover DOD victim advocates  |

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| New Hampshire  | Sexual assault counselor privilege         | N.H. REV. STAT. ANN. § 173-C:1 (2004) | Sexual assault counselor is anyone with requisite training that works in a rape crisis center; would cover DOD victim advocates |
| New Jersey     | Victim counselor confidentiality privilege | N.J. STAT. ANN. § 2A:84A-22.14 (2004) | Victim counselor need only provide assistance; would cover DOD victim advocates   |
| New Mexico     | Victim counselor privilege                 | N.M. STAT. ANN. § 31-25-3 (2004).     | Privilege covers anyone working in a victim counseling organization; would cover DOD victim advocates                           |
| New York       | Rape crisis counselor privilege            | N.Y. C.P.L.R. § 4510 (2004)           | Privilege covers anyone working under the direction of a rape crisis center; would cover DOD victim advocates                   |
| North Carolina | Counselor privilege                        | N.C. GEN. STAT. § 8-53-8 (2004)       | Applies to professional counseling services; no coverage of DOD victim advocates  |
| North Dakota   | Psychotherapist-patient only               |                                       | No coverage of DOD victim advocates   |
| Ohio           | Psychotherapist-patient only               |                                       | No coverage of DOD victim advocates   |

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|----------------|--|--|---|
| Oklahoma       | Psychotherapist<br>-patient only   |  | No coverage of<br>DOD victim<br>advocates   |
| Oregon         | Psychotherapist<br>-patient only   |  | No coverage of<br>DOD victim<br>advocates   |
| Pennsylvania   | Counselor/advo<br>cate privilege   | 23<br>PA.C.S. §<br>6116<br>(2004)            | Would cover<br>DOD victim<br>advocates  |
| Rhode Island   | Psychotherapist<br>-patient only   |  | No coverage of<br>DOD victim<br>advocates   |
| South Carolina | Professional<br>counselor<br>privilege   |  | No coverage of<br>DOD victim<br>advocates   |
| South Dakota   | Lots of<br>privileges,<br>including<br>school<br>counselors, but<br>apparently not<br>one for victim<br>advocates; |  | No coverage of<br>DOD victim<br>advocates   |
| Tennessee      | Psychotherapist<br>-patient only   |  | No coverage of<br>DOD victim<br>advocates   |
| Texas          | Physician-<br>patient only   |  | No coverage of<br>DOD victim<br>advocates   |
| Utah           | Sexual assault<br>counselor-<br>victim   | UTAH<br>CODE<br>ANN. §<br>78-3C-3<br>(2004). | Counselor<br>defined as a<br>volunteer at a<br>rape crisis<br>center; would<br>cover DOD<br>victim<br>advocates |

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| Vermont       | Victim-Crisis Worker                               | VT. STAT. ANN. TIT. § 1614 (2004)        | “Crisis Worker” is defined as a provider of services to victims of abuse or sexual assault; would cover DOD advocates   |
| Virginia      | Counselor-client; social worker-client             | VA. CODE ANN. § 8.01-400.2 (2004)        | “counselor” privilege would probably not cover DOD victim advocates   |
| Washington    | Sexual assault advocate-victim                     | REV. CODE WASH. (ARCW) § 5.60.060 (2004) | Need only provide support; DOD victim advocates would qualify   |
| West Virginia | Licensed professional counselor-client             | W. VA. CODE § 30-31-13 (2004)            | No coverage of DOD victim advocates   |
| Wyoming       | Family violence and Sexual assault advocate-victim | WYO. STAT. § 1-12-116 (2004)             | “Advocate” or “family violence or sexual assault advocate” means a person who is employed by or volunteers services to any family violence and sexual assault program; would include DOD victim advocates |