

Updates on Military Criminal Law/Procedure and Tips on Nevada Bar Engagement with Armed Forces Service Members

BY WILLIAM "JOE" BARTON IV, ESQ.

As of 2021, there were 12,375 active-duty military service members in the Silver State.¹ Not only are these Nevada service members subject to our state and federal criminal laws, but they are also subject to the Uniform Code of Military Justice (UCMJ), which is the military criminal code. See UCMJ Art. 1 to 146, 10 U.S.C. §§ 801-946. If you are an attorney whose familiarity with the military justice system is limited to what you've seen in the movie *A Few Good Men* or on the television program *JAG*, this article will provide you with some insights on a unique area of law that applies to service members here in Nevada. And hopefully, it might even inspire you to volunteer as a pro bono attorney for our service members.

The UCMJ covers all aspects of military criminal law and procedure, broken down into what are known as "articles." Articles 1-76 address jurisdiction, qualifications of counsel, victim's rights, forum, pre-trial hearings, and rights of the service member. Articles 77-134 are known as the "punitive" articles, as these list the crimes applicable to each service member, including elements, maximum punishment, etc. These punitive articles include the uniquely military crimes such as Article 86, Absent without Leave (AWOL), and Article 92, Dereliction of Duty/Failure to Obey a Lawful Order, as well as the traditional crimes, such as Article 119, Murder, and Article 121, Larceny. Finally, Article 134, known as the "General Article," includes the ability for additional misconduct to be criminalized, whether it be novel misconduct that does not fit other crimes or the incorporation of state and federal criminal statutes. The terminal element of Article 134 is that the misconduct at issue must be, "servicing discrediting" or "prejudicial to good order and discipline." See UCMJ Art. 134, 10 U.S.C. § 934.

Since the UCMJ was first codified in 1950, Congress has amended the code to include additional crimes, edit elemental language, and change the decision authority that governs who makes the decision regarding a service member's misconduct. The system is based on the "commander."

Decision Authority

Commanders (commissioned officers in special status in which they "command" a unit) have decision authority when it comes to disposition discipline for members of their command. Commanders are assisted by judge advocates (military lawyers) in choosing from their toolbox of options, ranging from administrative paperwork to a court-martial (which could result in a federal conviction). Commanders also wear two hats. As the military also involves employment, Commanders are like "bosses" as well as "factfinders" in the criminal system. Thus, a commander makes, at the same time, disposition decisions that affect a member's life, liberty, and employment.

Commanders are, in essence, the "factfinders" for most discipline, except for courts-martial (where the factfinder is either a military judge or a panel of higher-ranking officers or officers and enlisted personnel). Depending on the level of discipline, the standard is by a preponderance of the evidence. At courts-martial, the standard is beyond a reasonable doubt and is conducted as a trial. The commander, however, is the one to make the decision to "prefer" charges on a service member, not the judge advocates.

With the beginning of the 2023 calendar year, the National Defense Authorization Act (NDAA) of 2022

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required the Department of Defense to perform several changes to the military justice system by the end of 2023.² These changes are in the process of implementation in all service departments.

Office of Special Trial Counsel

The NDAA of 2022 requires that each military department establish an Office of Special Trial Counsel, which will be headed by a general officer judge advocate, to independently review, assess, and prosecute special victim crimes. Authority to dispose of these cases will belong to the special trial counsel, instead of the service member’s commander. The special victim crimes will include the following Articles of the UCMJ: 117a, 118, 119, 120, 120b, 120c, 125, 128b, 130, and 132, and the standalone offense of child pornography under Article 134 of the UCMJ. The scope will also include the inchoate offenses of conspiracy, solicitation, or attempt under Articles 81, 82, or 80 of the UCMJ, relative to the underlying offenses. The special trial counsel will have a binding recommendation, and commanders will need to follow the recommendation. Commanders will, however, have the ability to dispose of a case within their authority if the special trial counsel takes no action.

The Office of Special Trial Counsel is now like the District Attorney or U.S. Attorney, as it currently has “prosecutorial discretion” for the covered offenses under the NDAA of 2022.

Sexual Harassment

The NDAA also added a new crime to the UCMJ — sexual harassment. Under Article 134, the General Article, sexual harassment is now a delineated crime. Before, sexual harassment was disposed of in the employment context. If the misconduct was serious enough, it could rise to the criminal level as a dereliction of duty, under Article 92, or maltreatment, under Article 93. With the new crime, misconduct by service members that falls within the two main categories of sexual harassment may be punished criminally.

Generally speaking, in order for the misconduct to qualify as sexual harassment under Article 134, the following elements must be met:

- 1) the service member must have knowingly made sexual advances, demands or requests for favors, or knowingly engaged in other conduct of a sexual nature;
- 2) the conduct must have been unwelcomed;
- 3) under the circumstances, the conduct would cause a reasonable person to believe that submission or rejection would be used as a basis for employment decisions, or was so severe or repetitive that a reasonable person would and did perceive a hostile work environment; and
- 4) the final terminal element must have been prejudicial to good order and discipline or service discrediting.

The new crime has only been in existence since 2022. It will be interesting to see how this new crime, in conjunction with the new military justice procedures of the Office of Special Trial Counsel, will impact the military justice system.

A Young Nevada Lawyer’s Perspective and an Easy Way to Assist

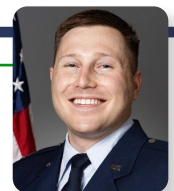
As an assistant staff judge advocate, part of my everyday job is to see clients for legal assistance. Title 10 and Department of the Air Force policy entitle these clients to receive free legal services, with some exceptions. The assistant staff judge advocates are able to give clients from all over the U.S. legal advice, consistent with their state bar rules. As service members ourselves, JAGs are licensed from different states from where they may be stationed and practicing. JAGs see all kinds of issues come through the office, and JAGs are usually young attorneys. When a client comes in with a particularly complex issue, JAGs do their best to give the best

legal advice for the client. However, JAGs could always use help and assistance from attorneys practicing in the particular area of law that affects the client.

When JAGs need help, they are taught to look at the American Bar Association Legal Assistance for Military Personnel Military Pro Bono Project (www.militaryprobono.org) Operation Stand-By. Once a JAG logs into the site, there is a list of attorneys and their contact information by state and practice area. It allows JAGs to contact attorneys in a particular jurisdiction for assistance in a specific area of law to aid and assist a client. As a beneficiary of this site, I encourage fellow Nevada attorneys to sign up either for Operation Stand-By or to look for military pro bono cases to assist a service member or their family with a unique legal controversy. You can register for either of these programs at www.militaryprobono.org/join.

ENDNOTES:

1. See <https://www.governing.com/now/2021-military-active-duty-personnel-civilians-by-state> (last visited 10-23-22).
2. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021).



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