

Ask the Lawyer

Q:

I think someone I know in the Navy is cheating on his wife with a civilian in another state. He's gone to great lengths to keep it a secret, but what would happen if he gets caught?

A:

Many people are familiar with the military's prohibition against adultery, established under Article 134 of the Uniform Code of Military Justice. However, a service member's extramarital romantic affair does not automatically equate to an adultery offense.

An extramarital romantic affair that does not involve sexual intercourse would not qualify as adultery. Service members, however, cannot be convicted of adultery solely on the fact that they engaged in extramarital sex, though court-martial

panels usually reach that conclusion in cases involving such conduct. Under Article 134, wrongful sexual contact is just one of three elements of adulterous conduct. The other two are that the service member or co-actor is married to someone else; and the conduct was prejudicial to good order, morale and discipline or of a nature discrediting to the armed forces.

The U.S. Court of Appeals for the Armed Forces recently ruled in *United States v. Fosler* that the government must be specific in charging how adulterous conduct was prejudicial to good order and discipline or of a nature discrediting to the armed forces. Saying in a charge that sexual conduct was "wrongful" does not satisfy this requirement. According to the 2008 Manual for Courts-Martial, prejudicial conduct has an "obvious, and measurably divisive effect on unit or organizational discipline, morale, or cohesion, or is clearly detriment to the authority or stature of or respect toward a service member."

Even though the individual you know has gone to great lengths to keep the affair secret, his discretion does not save him from an adultery conviction. Adulterous conduct that is kept private and goes unnoticed on base, might still be deemed prejudicial to good order and discipline or considered damaging to the reputation of the armed forces; therefore making it discrediting, according to the Manual for Courts-Martial.

The maximum punishment for adultery is a dishonorable discharge, one year of confinement and total forfeiture of pay and allowances. Service members charged with adultery should immediately contact a military law attorney to determine their rights.

A common defense to adultery includes that the affair was not "open and notorious," or in other words is kept private. Another defense is that the couple did not have a superior/subordinate relationship; thus, the extramarital affair was not prejudicial to good order and discipline or damaging to the reputation of the armed forces. The service member may have been genuinely unaware of the other's true marital status or unaware that the military does not recognize any status other than complete dissolution of marriage (i.e.,

divorce

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