Servicemen-turned-lawyers find legal fit

Forming a military law practice was natural for veteran lawyers.

After graduating from the University at Buffalo School of Law in 2006, Robert Singer went to boot camp in Jacksonville where he got his start in the JAG Corps.That spawned a nearly decade-long military career, which included a plethora of legal positions and travels that would take him from Florida to Virginia Beach to Pearl Harbor.Singer served on active duty as general counsel, naval prosecutor, Special Assistant U.S. Attorney and as a military defense attorney.After returning to Buffalo last year to take a position at Rupp Baase Pfalzgraf Cunningham, he looked for opportunities to expand its practices. Since he enjoyed working with service members and veterans as a military officer, he has an appreciation for their contributions and wanted to see them afforded the rights they deserve.Forming a military and veterans law practice at the firm seemed like a natural fit. These days he represents enlisted service members and military officers accused of misconduct or substandard performance as part of court-martials, Article 15/Non-judicial punishment proceedings and before administrative separation boards and boards of inquiry.“What initially drew me to it was not only did I have the experience for this practice, but it’s also something that is very fulfilling,” Singer said. “Representing anybody is always a fulfilling path, but when you represent somebody who may have gone on seven different deployments overseas over the course of 20 years or who has made enormous sacrifices for this country, they may be in a situation where they may lose their retirement or something they’ve worked so hard to get. Those are cases you really want to get involved in and make a difference.”It’s a specialized area of law so his background in military jobs and serving at an administrative level helped him break into it. By his side at the firm and helping to spearhead the efforts are two former soldiers who are now associates plus managing partner David Pfalzgraf, a Navy veteran.“Oftentimes nobody realizes that the military language is its own separate entity,” Singer said. “You really don’t understand it if you’re not in the military. And on top of that, all of the services speak their own language, too, so it’s really important to have those different experiences at a firm so you can relate.”It can be difficult to document a case when a client is dealing with severe service-related injuries or issues, according to Singer.“Being able to relate to those individuals, gain their confidence that you know what you’re talking about and speak their language, it helps them open up,” he said.When Anthony Kuhn, who was recently named managing partner at Tully Rinckey’s Buffalo office, got involved in the practice a few years ago, he thought it would encompass mostly VA-related matters and service-connected disability compensation, but it’s much more.He has handled medical and physical evaluation board ratings, traveled around the country for ROTC disenrollment hearings and litigated security-clearance cases through the Department of Hearings and Appeals for the State Department. He also has been involved in preparing clients for military justice and court-martials.“It’s a lot more than I anticipated when I first got involved in the practice but I love it,” said Kuhn, who graduated in 2015 from the University at Buffalo Law School after a nearly 20-year military career that included leadership posts. “There are constantly moving parts, I got to do some traveling and I get to represent my people — that’s the best part about it.”The ability to relate to clients is critical, according to Kuhn, and makes it easier for him to convince military clients that he will advocate for them. He’s even represented people he

knows personally, one of whom was a fellow combat veteran with a retirement issue.Kuhn has served in leadership positions at military installations nationwide and as an embedded intelligence adviser for the New Iraqi Army during Operation Iraqi Freedom. He trained and supervised thousands of soldiers in armies in two different countries and still serves as an Army Reserve first sergeant in Amherst.“Not only is he a friend of mine but he’s a fellow combat veteran,” Kuhn said, referring to the client. “He’s exactly the type of soldier I wanted to represent when I got involved in this practice area. And I get to do that now.”Common matters handled by military law attorneys include criminal cases and court-martials, sexual assault allegations, employment law, ROTC disenrollment, security clearances and failures of drug tests.During a court-martial, which is similar to an indictment or arrest of a civilian, a defendant has the right to counsel once he or she is being investigated but doesn’t have the right to assigned counsel or a JAG officer until official charges are brought, Kuhn said. For civilians, a defendant has the right to assigned counsel once there is an investigation.So attorneys like Kuhn can get retained privately by soldiers to come between them and the investigators.“Often we can take control and make sure that there aren’t any injustices that might have occurred had there not been any attorney involved,” he said.Sexual assault is something the military and Congress take a hard look at, according to Singer. He saw that firsthand during his time as senior special victims prosecutor in the military.“It presents various cases where they’re very difficult decisions for juries to make,” he said. “The last thing you want to have is someone get convicted of a crime for perhaps making a mistake or doing something short of criminal.”Kuhn said he’s noticed a rise in these types of claims. He was recently in Fort Drum where he went before an administrative separation board for a hearing on a similar matter.“Sometimes we’re able to get involved at that step and go through what is like a mini-trial,” he said.Matters involving the Board of Inquiry or Administrative Separation Board come up when soldiers have issues related to keeping proper standards, such as in fitness or discipline. Singer said everyone is entitled to a fair process. He has seen cases where soldiers faced scrutiny nearly 20 years into their service, close to retirement and a pension.“You don’t want to see a situation where they are arbitrarily fired from their job,” he said.He also represents soldiers seeking an honorable discharge, which is essential in obtaining benefits for which they are eligible once their service is complete.Due to misconduct, an ROTC candidate can be recommended for disenrollment, Kuhn said. However, commanding officers often struggle to do the right thing and may not have enough research, guidance or experience to make this type of decision. He said a hired attorney is allowed to be in the room during the hearing and offer assistance and guidance to the cadet before the hearing but cannot advocate for the client during it.According to Singer, without good credit, a soldier cannot garner security clearance. When a soldier makes bad decisions with credit cards and investments or has a house foreclosed on, it could wind up costing them their security clearance and job. As an attorney in these matters, Singer explains to an administrative law judge or panel of officers that the individual is still reliable and should retain his or her security clearance.Kuhn said a hired attorney can respond early in the process to the statement of reasons from the government why an individual should not be granted security clearance and possibly save the client time and money. He also has represented clients all the way through the process, including in a hearing before the Defense Office of Hearings and Appeals, if necessary.“If you can properly respond to the government’s statement of reasons, you can mitigate the concerns of the Department of State or work with government counsel to get security clearances granted or extended,” he said.A security clearance is also necessary for civilians who work for the Department of Defense or with a government agency, and military lawyers represent them during administrative hearings.In cases of failure of urine analysis, Kuhn said sometimes there can be an innocent ingestion of something like a medication and other times it could be a false positive. He said his work includes involving a toxicologist in these cases, drafting a written response, making sure the sample is retested and challenging the results of the test.The work of military law attorneys does not end there. Both Singer and Kuhn help soldiers by volunteering their time locally.

Kuhn is a member of the Committee for Veterans and Service Members of the Bar Association of Erie County. Singer is a mentor at the Buffalo Veterans Treatment Court, meeting with veterans once or twice a month who need legal help.Singer interned for Erie County Family Court Judge Lisa Bloch Rodwin, who at the time worked in the Domestic Violence Bureau of the Erie County DA’s Office. After Singer left the area, Judge Robert Russell started the first Veterans Treatment Court in 2008. Rodwin sent Singer an email to let him know about the court.“I told her if I ever come back to Buffalo, I’ll be a mentor in Veterans Court,” Singer said.Later, when he returned to Buffalo, Rodwin was the first person he went out to lunch with and she reminded him of what he said. Sure enough, shortly after he found himself in Russell’s courtroom fulfilling his promise.

Asian Restaurant Sued Over Discrimination of Caucasian Employee

Judge Awards Fees, Costs in Restaurant Bias Suit

by Joel StashenkoA woman is entitled to just over $11,000 in attorney's fees and costs after settling her reverse discrimination suit against an Asian restaurant in Niagara Falls.Though the $12,500 settlement between Alexandra Glenn and Fuji Grill was silent about fees and costs, Western District Judge William Skretny said it did not preclude her from seeking additional payment in Glenn v. Fuji Grill Niagara Falls, 1:14-cv-380.Skretny ruled from Buffalo that parties such as Glenn are entitled to seek costs after an entry of judgment is made under the Federal Rule of Civil Procedure 68, even if the settlement contains no provisions about entitlement to fees and costs. Glenn was the "prevailing party" in the civil rights action under Rule 68 by dint of the payment by her former employer, which represented success on a "significant issue in litigation," Skretny wrote, citing Texas State Teachers Assn. v. Garland School Dist., 489 U.S. 782 (1989).Skretny set the attorney's fee award at $8,239, and said Glenn was entitled to another $2,879 in costs. Her attorneys had sought $23,540 and $4,832, respectively.Glenn, a Caucasian, claimed that she was discriminated against during her 14 months working at Fuji Grill because the restaurant allegedly favored waitresses of Chinese descent in work assignments and in splitting tips.Lori Ann Hoffman, associate at Tully Rinckey in Buffalo, and Adam Charles Lease of Karpf Karpf & Cerutti in Bensalem, Pennsylvania, represented Glenn.Michael Schmahl of Niagara Falls and Richard Steiner, partner at Steiner & Blotnik in Buffalo, defended the restaurant.

Bizarre Stories: "Cost thousands of dollars" to Sue Mother for Changing last Name

Can I sue my mother for changing my last name?

Dear Moneyologist,

My family has been fragmented for at least the last three generations, creating an elaborate blend of step-everything and relationships that were seldom defined by blood. My deceased grandfather — whom I loved dearly — is not my relative by blood, nor is the so-called father whose name I carry. Suffice it to say our family traditions are fragmented or

non-existent.When my mother divorced and remarried, she and my step-father changed my name and my younger brother's to match his, creating this collection of five kids where the oldest two had one last name and the younger three had another (my parents had the youngest son together). Over the years, the older two and one of my younger brothers were excluded from our family by my parents — they were literally thrown away.I dropped out of high school and joined the army at 17, where I remained for the next 25 years. My wife and I have been married 38 years and have done pretty well for ourselves and four kids, residing in a home larger than any in the history of our extended families. I genuinely wanted to help bring things together among my fragmented family and came up with the idea several years ago to invite everyone to our house for Christmas — my parents, my younger (step) brother, his third wife, their children, and another lovely girl from his first marriage.I envisioned board games, talking in the kitchen, and touch football in the yard. Instead we got isolation, indifference to our home, and an absolute reluctance to follow any team-building suggestions I promoted. My wife watched me try to play the encouraging, happy host to our indifferent guests and became visibly livid. Everyone left a day early, and the period of cold shoulders began — no birthday cards, no calls. I continued to telephone after some six months and, over time, a regular pattern of communication resumed. I thought we had navigated the storm.Three years pass, and I was at my step-father's bedside as he slipped away. It was traumatic, but the next day it took another turn: My mother informed me that, in their will some two years prior, they had decided to leave my brother the house and that he and I could split "whatever other inheritance was left over." She added, "That's OK, right? Your wife said she would never live here," she insisted. My youngest (step) brother, their natural son would inherit their estate for his family.After 48 years pretending I was a son as well the truth was clear: I was not a son, and neither I, my wife, nor my children would enjoy a peaceful legacy or inheritance with this family.I know from reading your column that there is nothing I can do about people's decisions with their money and, honestly, could not accept a dime if it were offered. But the notion that they took a little boy of 12 and tattooed some stranger's name on his forehead — watching him pass that name on to his children (even naming his firstborn after the stepfather) — and later tossing him out with his other siblings makes me sad and furious.On the flip side of all this drama, I'm not walking away empty-handed. I now have an oddly humorous story about how "I once crafted a family reunion in hopes of establishing a Christmas tradition, and got disinherited for my trouble" and a powerful illustration for my kids on what not to do. I now insist that they will each receive their legacy regardless of what choices they make in this life.And it makes me question: Can I contest the will and possibly sue the estate for the legal fees associated with changing my name and the names of my children and grandchildren back to my original name — a dramatic reset of sorts? Do you think this is possible? I suppose this is tremendously difficult, but I'm just about angry enough to do it. Writing this alone was helpful, though I apologize for the length.ForrestDear Forrest,

I'm sorry to hear that you tried and failed to bring your family together. It sounds like your parents have had tumultuous relationships with their children and, even though you have organized Christmas and remembered people's birthdays and been present for your parents, you have not been able to break that pattern. Your mother based her decision on something your wife said or something your mother thinks she said. She may be a very sensitive person, or perhaps someone who finds trouble where there is none. You could always say, "You misunderstood," or, "That's not what happened." But, ultimately, you must abide by her decision.Life is unfair. As I said to a reader who was unhappy with the size of his inheritance ($10,000, to be exact), try not to define your entire relationship with your parents by the amount that is left to you in their will. As hard as it is to hear, this may not be about you. It may be that your parents have a limited capacity to give and receive love, and they may think that your youngest brother needs a house most of all. I don't know the details of your respective financial situations, but you say you live comfortably. The heavy lifting has already been done: You have built your own family without continuing these deep divisions.The legal

system is harsh when it comes to inheritance. If you weren't formally adopted by your stepfather, you likely have no standing to contest any aspect of your stepfather's will or its terms, says Blake Harris, an attorney at Mile High Estate Planning in Denver. But you would still have little recourse, even if he did adopt you. Why? Parents can leave whatever they want to who they want. What's more, if you were not mentioned in the will, you were technically not disinherited, Harris says. To successfully contest a will, it must be based on a claim that the will failed to fulfill legal requirements for its proper execution or that your stepfather "lacked testamentary capacity," he adds.You inherited your last name from your stepfather and, because you will not inherit the family home, you want to retaliate by changing your family's last name. Suing them in court would be costly and a fruitless task, given that your mother used a court order to give you your stepfather's last name. (This is often done by parents in a blended family, especially when the child's biological father is no longer around, so it's not that unusual and you would have little grounds for being treated unfairly.) "It would cost thousands of dollars to take this case and only a few hundred dollars to change your name," says Mathew Tully, founding partner of Tully Rinckey law firm in New York.We are a sum of our actions and this tit-for-tat goes against everything you stand for: The importance of family. Changing your name won't change who you are. But taking a frivolous court case would.

"Jeans and Sneakers" Fundraiser Aids Western New York Non-Profit

Law firm gives "Casual Friday" a whole new meaning

WILLIAMSVILLE, N.Y. (WKBW) - A Western New York law firm is giving "Casual Friday" a whole new meaning.The Tully Rinckey Firm is cashing in on employees who want to wear jeans and sneakers. It's all to raise money for non-profit organization across Western New York.Each Friday, employees would donate a dollar for every piece of casual clothing they would wear.This week, the firm donated $250 to Western New York Heroes. The group trains dogs on how to assist troops suffering from PTSD (Post Traumatic Stress Disorder).So far, The Williamsville law firm has given away more than $17,000 to charities.Associates said this is a way for the firm to stay connected to the Western New York community.

Feeling Defiant? WPA Protection Becoming Clearer

Federal Employees' Right to Disobey Is Becoming Clearer

Feeling defiant? Good, because there is a growing body of Merit Systems Protection Board (MSPB) case law on the little known "right-to-disobey" rule from the Whistleblower Protection Act (WPA).Finally, federal employees – and their lawyers – are now getting a better sense of what kind of orders can be disobeyed.Obedience is the cornerstone of the efficiency of the service. It is so important that the government would rather have employees obey orders that would result in a bad decision – even ones that could result in the loss of millions of dollars – rather than cross a superior. In such situations, employees must "obey now, grieve later." The exception to this rule pertains to situations where obedience would have resulted in "irreparable harm," as the MSPB held in Cooke v. U.S. Postal Service (1995).However, what the government does not like to point out is that "obey now, grieve later" relates to orders that would result in an employee violating a regulation or rule. But under 5 U.S.C. § 2302(b)(9)(D),

agencies cannot “take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment…for refusing to obey an order that would require the individual to violate a law” (emphasis added).A May 2014 report by the Office of Special Counsel noted that “[t]here is no case law directly addressing the application of (b)(9)(D).” But since then, case law on this “right-to-disobey” rule has been growing, and the most significant decision came last September in Rainey v. Department of State (2015). In this case, the appellant, a program director, refused to obey an order that would have made him violate agency regulation and a training course that clarifies the limits to his authority. He claimed the agency violated Section 2302(b)(9)(D) by stripping him of his job duties and giving him a subpar performance rating in retaliation for this disobedience.The appellant argued that the U.S. Supreme Court’s decision in Department of Homeland Security v. MacLean (2015) called for a broader interpretation of the word “law” under Section 2302 (b)(9)(D) that would incorporate agency rules and regulations, such as the one he would have violated had he obeyed the order. But the MSPB said that the Supreme Court in MacLean, which focused on a neighboring provision of the WPA, “determined that Congress’s use of the narrower word ‘law’ was deliberate.” This is the very same argument I made in my amicus curiae brief to the high court. The MSPB held, “we hold that the right-to-disobey provision at section 2302(b)(9)(D) extends only to orders that would require the individual to take an action barred by statute.”So what type of orders can employees refuse to obey if they were to result in a violation of law? The case law is still thin, but here are a few examples:Orders to store classified information on insufficiently secure systems. Special Counsel ex. rel Hickey v. Department of Homeland Security (2013) (nonprecedential);

Orders that would result in the violation of laws pertaining to the certification of travel vouchers. Davis v. Department of Defense (2006) Orders to make Social Security disability claim awards higher than what is appropriate. Krafsur v. Davenport (2013)

Orders to backdate a signature on credit card transaction documents. Dick v. Department of Health and Human Services (2014). Note: the MSPB judge in this case “assumed” that the refusal to carry out such an order could be “construed as the…refusal to obey an order…to backdate his signature in violation of law” (emphasis added)

Disobeying an order, whether it would result in a violation of law or regulation, is a very serious matter. If an employee feels as though he must disobey, he or she should always consult first with an experienced federal employment law attorney, who could assess the situation and determine whether such an action would be protected. An attorney could also prepare an MSPB appeal or an OSC complaint in the event the employee is subjected to reprisal.2015 Tully Rinckey PLLC. All rights reserved. This article may not be reproduced without express written consent from Tully Rinckey PLLC.

New York City Expansion Highlighted in ABA Journal

Fast-growing firm plans New York expansion, will plant flag in another state

next year

A fast-growing New York law firm is adding to its Binghamton office next month, plans to open in New York City next year and is looking to plant its flag in another state as well.“Our firm has gone national. We have offices across New York state, offices in California and Washington,” founding partner Mathew Tully of Tully Rinckey told the Albany Business Review.“We have

intentions of expanding into another state in 2016," he added, but declined to say which state.The Albany-based firm currently has nearly 130 employees, and lists over 60 attorneys on its website.

Pullano Featured in Chicago Tribune On Blackhawks' Patrick Kane Case

Chicago Tribune's Stacy St. Clair reported from Chicago.

As they await the result of forensic testing, local police signaled Friday that the investigation involving Blackhawks star Patrick Kane may take awhile.Hamburg police Chief Gregory Wickett confirmed the investigation for the first time and said the inquiry stemmed from an incident at Kane's gated lakesideBut Wickett told one reporter that the journalist was "wasting" time by staying in the Buffalo area this weekend, suggesting that the high-profile case will not be resolved any time soon."At this time, we are gathering information and awaiting forensic testing results," Wickett said.The Blackhawks and the National Hockey League have previously acknowledged the investigation involving Kane. The Buffalo News, which first reported the story, said the investigation began after a complaint was filed by a local woman.Kane spent the night of Aug. 1 at SkyBar, a popular Buffalo club about 15 miles from his suburban home, and stayed past midnight with friends, a manager at the bar said. The evening was documented on social media.Neighbors told the Tribune that three unmarked police cars descended upon Kane's Hamburg home Sunday, and several plainclothes officers entered his house using flashlights. At least one officer wore gloves and could be seen taking pictures in the front, said one witness, who asked not to be named.Wickett did not provide any details about the ongoing forensic testing, which is being handled by the Erie County crime lab. Local defense attorneys said it could take weeks before the results are available, and then possibly even longer for final determination in the case to be made."It can take awhile," Buffalo-based criminal defense attorney Peter Pullano said. "On a case like this, they are going to be extremely cautious. They're not going to rush it."In the meantime, Erie County prosecutors are working with Hamburg police to determine whether there is enough evidence to move forward."The case is clearly in the investigatory stage," said Buffalo attorney Terrence Connors, who is familiar with people overseeing the investigation. "It has been assigned to a senior prosecutor in the office of the district attorney. … She will be working with the local authorities to determine if there is sufficient evidence to either file a charge in local criminal court or to proceed to a grand jury presentation. Those are her options."Neither Kane nor his agent could be reached for comment.Kane, who grew up in nearby South Buffalo, won his third Stanley Cup championship with the Blackhawks in June. In keeping with the tradition of giving each player a day to spend with the Cup, Kane was slated to have the trophy Saturday and had planned to host a private party at SkyBar, according to a club manager.Blackhawks spokesman Brandon Faber said he doesn't know whether the Cup will be in Buffalo on Saturday or whether Kane will take his turn with it.The Cup was already in western New York on Friday as Blackhawks senior adviser Scotty Bowman hosted the trophy in his East Amherst home. Bowman, who was throwing a private party at his house, declined to comment on the Kane investigation through Faber, who spoke to the Tribune outside the home.

"They're going to be extraordinarily cautious," Pullano on Blackhawks' Patrick Kane

Police say investigation of Blackhawks' Patrick Kane might take awhile

As they await the results of forensic testing, native police signaled Friday that the investigation involving Blackhawks star Patrick Kane might take awhile.Hamburg police Chief Gregory Wickett confirmed the investigation for the primary time and stated the inquiry stemmed from an incident at Kane's gated lakeside mansion final weekend. He didn't supply any extra particulars in his temporary public assertion and declined to reply media questions.However Wickett informed one reporter that the journalist was "losing" time by staying within the Buffalo space this weekend, suggesting that the high-profile case won't be resolved any time quickly."Right now, we're gathering info and awaiting forensic testing outcomes," Wickett stated.The Blackhawks and the Nationwide Hockey League have beforehand acknowledged the investigation involving Kane. The Buffalo Information, which first reported the story, stated the investigation started after a grievance was filed by an area lady.Kane spent the night time of Aug. 1 at SkyBar, a well-liked Buffalo membership about 15 miles from his suburban house, and stayed previous midnight with pals, a supervisor on the bar stated. The night was documented on social media.Neighbors informed the Tribune that three unmarked police automobiles descended upon Kane's Hamburg residence Sunday, and a number of other plainclothes officers entered his home utilizing flashlights. A minimum of one officer wore gloves and could possibly be seen taking footage within the entrance, stated one witness, who requested to not be named.Wickett didn't present any particulars concerning the ongoing forensic testing, which is being dealt with by the Erie County crime lab. Native protection attorneys stated it might take weeks earlier than the outcomes can be found, after which probably even longer for remaining willpower within the case to be made."It might take awhile," Buffalo-based felony protection lawyer Peter Pullano stated. "On a case like this, they're going to be extraordinarily cautious. They are not going to hurry it."Within the meantime, Erie County prosecutors are working with Hamburg police to find out whether or not there's sufficient proof to maneuver ahead."The case is clearly within the investigatory stage," stated Buffalo lawyer Terrence Connors, who's conversant in individuals overseeing the investigation. "It has been assigned to a senior prosecutor within the workplace of the district lawyer. … She will probably be working with the native authorities to find out if there's adequate proof to both file a cost in native legal courtroom or to proceed to a grand jury presentation. These are her choices."Neither Kane nor his agent might be reached for remark.Kane, who grew up in close by South Buffalo, gained his third Stanley Cup championship with the Blackhawks in June. Consistent with the custom of giving every participant a day to spend with the Cup, Kane was slated to have the trophy Saturday and had deliberate to host a personal celebration at SkyBar, in line with a membership supervisor.Blackhawks spokesman Brandon Faber stated he does not know whether or not the Cup shall be in Buffalo on Saturday or whether or not Kane will take his flip with it.The Cup was already in western New York on Friday as Blackhawks senior adviser Scotty Bowman hosted the trophy

in his East Amherst house. Bowman, who was throwing a personal celebration at his home, declined to touch upon the Kane investigation via Faber, who spoke to the Tribune outdoors the house.

Open Marriage Consent Will Not Save You From Adultery Charge

Ask the Lawyer: 'Open' marriage as defense vs. adultery charge

Q. My wife and I have an open marriage. Can I be charged with adultery even though she allows me to sleep with other women?

A. Military swingers beware: A spouse's consent to sleep with other men or women will not save you from a conviction on the charge of adultery in violation of Article 134 of the Uniform Code of Military Justice.Adultery, an offense unique to the military, occurs when a service member has sexual intercourse with someone who is not his or her spouse or who is married to someone else. This conduct must be service discrediting or prejudicial to good order and discipline. You'll notice that this offense is triggered by sexual intercourse, regardless of whether it is consensual.In the 2013 case U.S. v. David J.A. Gutierrez, the appellant, an Air Force technical sergeant, tried to fight an adultery charge by arguing that he and his wife had an open marriage and she consented to his sexual activities outside their union. He argued that "adultery requires a victim spouse and that a spouse who consents is not a victim," according to the U.S. Air Force Court of Criminal Appeals.But the court rejected this argument that a spouse's consent can be used as a defense to an adultery charge. On appeal, the U.S. Court of Appeals for the Armed Forces earlier this year affirmed Gutierrez's adultery conviction, stating: "Participation of the appellant's wife in the offense is immaterial to the question presented, which is whether the government presented legally sufficient evidence at trial to sustain the conviction."While a service member cannot count on a spouse's consent to defeat an adultery charge, it could be beaten by showing the sexual affair that grew out of the open marriage was not open or notorious. In the 2012 case U.S. v. Gemayel A. Jones, the U.S. Army Court of Criminal Appeals noted that "although open and notorious conduct may be service discrediting, wholly private conduct is not generally service discrediting."In that case, the court set aside an adultery specification, finding that the adulterous activities between Jones, an Army specialist, and another junior enlisted soldier who was not his wife, did not have "a divisive or detrimental impact on their units" and there was insufficient evidence showing their relationship was open or notorious.Troops charged with adultery should consult with an experienced military law attorney. Depending on the circumstances, an attorney could show the service member did not have sexual intercourse with someone who was not his or her spouse or who was married to another, or show that the conduct was not service discrediting or prejudicial to good order and discipline.Mathew B. Tully is a veteran of the wars in Iraq and Afghanistan and founding partner of Tully Rinckey PLLC (www.fedattorney.com). Email questions to askthelawyer@militarytimes.com. The information in this column is not intended as legal advice.

Tully Answers: "Parties to a Mutual Combat are Wrongdoers"

Consensual violence is still against law

Q. If two service members agree to fight each other as a way to settle a dispute, can they be criminally charged with assault even though they both agreed to the fight?

A.

Just because someone says "hit me" doesn't make the invited act of violence defensible.Troops who engage in "mutual affrays" can be charged with and convicted of assault by battery in violation of Article 128 of the Uniform Code of Military Justice. That's because "[t]he law protects a societal interest in ensuring its members are free from injury or harm, and protects the public from exposure to such affrays and disorders," the Army Court of Criminal Appeals said in U.S. v. Mark A. Arab (2001).Consensual violence would only undermine this societal interest in public safety.As the Manual for Courts-Martial notes, an "assault" is an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated. And the actual use of unlawful force or violence can result in, depending on the extent of the injuries, an assault consummated by a battery or aggravated assault.Also, for the use of unlawful force or violence to qualify as an assault, "[i]t must be done without legal justification or excuse and without the lawful consent of the person affected." [Emphasis added.]In U.S. v. Alvin C. Wilhelm (1993), the accused, an Air Force senior airman, had been convicted at general court-martial of multiple specifications of assault and battery upon his wife.On appeal, Wilhelm argued that "when people voluntarily enter into an affray they consent to putting their persons at risk."The Air Force Court of Military Review noted that his interpretation omitted a "key word" from the military definition of battery, namely the "lawful" that precedes "consent.""The inclusion of the word, 'lawful' ... is not mere surplusage, for any consent implied in mutual combat is void as a matter of law," the court said.Certain exceptions are made for legally recognized sporting events, such as boxing or wrestling matches.Usually, a nonprovoking service member who is attacked can use a degree of force necessary to protect himself or herself — widely known as self-defense.But "parties to a mutual combat are wrongdoers, and the law of self-defense cannot be invoked by either, so long as he continues in the combat," the court noted in the Wilhelm case.Troops who were in a fight and later charged with assault and battery should immediately consult with an experienced military law attorney as the standards and application of lawful self-defense is quite nuanced and fact-intensive. Depending on the circumstances, an attorney could help show the combat was not mutual and raise the issue of self-defense.