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Tully Rinckey PLLC Managing Partner Greg T. Rinckey discusses the latest trend in military law in regards to sexting or text-stalking.

Military appeals courts uphold sexting convictions
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By Kristin Davis

Troops have gotten in trouble for years for sending sexually explicit photos and messages over text message — even without much legal precedent. Now, several decisions handed down by appeals courts in recent months demonstrate how military law is catching up to technological phenomena of “sexting” and text-stalking, say attorneys who specialize in military justice. In what is perhaps the service’s most notorious sexting case, the Air Force Court of Criminal Appeals ruled in February a superior officer’s raunchy texts to younger enlisted airmen supported a charge of maltreatment, even if the subordinate airmen sent similar messages in return. William Gurney, the former command chief who spent four months in jail before he left the Air Force with a bad conduct discharge for those and other misdeeds, had asked the appeals court to reconsider the charge. In September, the Air Force Court of Criminal Appeals considered the case of an airman 1st class who sent a picture of his private parts to a 13-year-old girl. Military law, the airman argued, was too vague to support the charge. The court disagreed. “The military courts have made it clear that texting or sexting can be criminalized,” said attorney Greg Rinckey, managing partner of Tully Rinckey law firm and a former Army judge advocate general. “Sexting is actually producing the evidence of underlying fraternization, harassment, maltreatment. The text messages are, to a certain extent, the evidence. It’s good evidence.” Gurney

came under investigation in 2009 when a female senior airman showed the texts she'd received from him to Office of Special Investigations agents. She'd tolerated the messages from the then-top enlisted leader at Air Force Materiel Command — and sent nude photos of herself — because she hoped Gurney would help her receive a humanitarian transfer, the woman testified in court in 2010. Multiple witnesses described how Gurney would engage subordinate female airmen in innocuous conversation, only to follow up with emails and text messages that went from professional to sexually explicit. In eight months in 2009, Gurney sent 28,000 text messages from his government-issued BlackBerry, more than four times as many as the other 55 command staff employees combined. He was convicted of 15 charges stemming from relationships he had with 10 women, including maltreatment, indecent conduct and misuse of a military computer and cellphone. "We refer to a lot of this technology as 'digital lipstick.' In the past, you had hotel slips, phone records — now everything is digital," Rinckey said. And "because texting is so fast, people sometimes don't think before they text. It's fast, it's not formal, it's not thought out. We're seeing a lot of stupidity." Stalking conviction holds

The U.S. Court of Appeals for the Armed Forces in January heard arguments in the case of former Army Private 1st Class Jesus Gutierrez Jr., who was convicted of stalking a German woman between August and October of 2010. An Army panel had acquitted Gutierrez of rape, after which he made repeated — though not overtly threatening — calls and sent texts and Facebook messages. Gutierrez also twice showed up at his accuser's house, ringing her doorbell on the first occasion until she threatened to call police and, the second time, until military police showed up. In his appeal, Gutierrez claimed the only time he threatened the woman was the night the police were called — and that did not amount to stalking. He said he couldn't have known she feared him prior to that, Gutierrez argued, since the victim had never before involved the police. The jury had improperly relied on evidence of the rape, of which he had been cleared, to convict him of stalking, Gutierrez argued. The appeals court disagreed, citing in its March 20 opinion "evidence of repeated occasions of discrete stalking conduct, as well as a pattern of repeated telephone calls and text messages." Such evidence can be hard to refute, Rinckey said. "This is not the same as a comment that's made and it's gone. If you text somebody something, it's there. Some

people don't delete. Texts can be recovered to a certain extent. The other part is a lot of these text messages are not very thought out. A lot are crude, blunt and don't read well to a third party, to a panel, to a judge or a prosecutor," Rinckey said. The decisions provide law enforcement a guide to apply existing law to advancing technology, said Geoffrey Corn, a South Texas College law professor and retired Army judge advocate general. "The fact these cases are being pursued is an important demonstration of the commitment of commanders to protect people from mistreatment: harassment, inappropriate language, stalking. I think that's an important statement," Corn said. "The methods by which individuals are going to transgress are going to change over time because of the technology. The system has to be resilient enough to make sure the underlying spirit of the law is not diluted because of the manner in which the law is being violated."