

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 1**

Abuse of Power or Position

7. Services: Focusing on offenses involving abuse of power or position:

- a. What theories of criminal liability are used for trainer/trainee and senior/subordinate relationships, and why are they treated the same or differently?**

USA	<p>Strict liability is usually applicable for offenses involving trainer/trainee and improper senior/subordinate relationships. Generally, sexual acts or contact between trainer or trainee may be charged under Article 92, UCMJ, as a failure to obey an order or regulation. Specific regulations are listed in the Report on Protections for Prospective Members and New Members of the Armed Forces During Entry-Level Processing and Training. <i>See</i> http://jpp.whs.mil/Public/docs/Meetings/20140919/06_ReportOnProtectionsForProspectiveMembers DoD 2014.pdf.</p> <p style="padding-left: 40px;">Example: In that Drill Sergeant (E-6) (Name), U.S. Army, did at or near Fort Leonard Wood, Missouri, between on or about (Date) and on or about (Date), violate a lawful general order, to wit: paragraph 11-3e, Fort Leonard Wood Regulation 350-6, dated 17 July 2002, by wrongfully engaging in conduct of a sexual nature with (name), a trainee.</p> <p>The command is not limited to Article 92, however. Prosecutors can potentially charge trainer/trainee misconduct as:</p> <p style="padding-left: 40px;">(1) Violation of Art. 93, Cruelty and maltreatment of a subordinate. If the relationship or act is cruel or oppressive, and the victim was subject to the orders of the offender, this article can be used to address that conduct. This article is most often used as an alternative/lesser theory to a sexual assault charge under Art. 120. The maximum punishment is a dishonorable discharge, total forfeiture of pay and allowances, reduction to the lowest grade, and confinement for 1 year.</p> <p style="padding-left: 40px;">Example: In that Drill Sergeant (E-6) (Name), U.S. Army, did at or near (Location), between on or about (Date) and on or about (Date), maltreat (Name), a person subject to his orders, by sexually harassing her, to wit: (description of misconduct).</p> <p style="padding-left: 40px;">(2) Violation of Art. 120, Rape and sexual assault. If the conduct involved physical compulsion, violent coercion, threats, incapacity, etc., the conduct would be certainly charged under Art. 120, with punishments ranging up to a dishonorable discharge, total forfeiture of pay and allowances, reduction to the lowest grade, and confinement for life.</p> <p style="padding-left: 40px;">Example: In that Drill Sergeant (E-6) (Name), U.S. Army, did at or near (Location), between on or about (Date) and on or about (Date), commit a sexual act upon (Name), by causing bodily harm, to wit: (description of</p>
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misconduct).

(3) Violation of Art. 128, Assault. If the conduct involved unwanted physical contact or bodily harm, this charging theory would be used to cover lesser-included offenses of Art. 120 theories. Punishments range up to a dishonorable discharge, total forfeiture of pay and allowances, reduction to the lowest grade, and confinement for 10 years (for an assault with a loaded firearm). The most typically charging theory is assault consummated by a battery, which carries a maximum sentence of a bad conduct discharge, total forfeitures, and 6 months confinement.

Example: In that Drill Sergeant (E-6) (Name), U.S. Army, did at or near (Location), between on or about (Date) and on or about (Date), assault (Name), by (description of misconduct).

(4) Violation of Art. 133, Conduct unbecoming an officer. If the offending behavior was committed by an officer, whether factually consensual or not, it could be charged under this Article. The maximum punishment is a dismissal, total forfeiture of pay and allowances, and confinement for 1 year.

Example: In that First Lieutenant (O-2) (Name), U.S. Army, did at or near (Location), between on or about (Date) and on or about (Date), engage in an inappropriate relationship with (Name), a woman who was not his wife, conduct unbecoming an officer and gentlemen.

(5) Violation of Art. 134, Adultery. If either party were married, the conduct could be charged under this article whether or not factually consensual. The maximum punishment is a dishonorable discharge, total forfeiture of pay and allowances, reduction to the lowest grade, and confinement for 1 year.

Example: In that Drill Sergeant (E-6) (Name), U.S. Army, did at or near (Location), between on or about (Date) and on or about (Date), wrongfully have sexual intercourse with (Name), a married woman not his wife.

These offenses can be grouped into two broad conceptual categories: those that constitute criminal sexual misconduct and those that constitute military discipline offenses. "Military discipline" offenses are those acts that are criminal solely by virtue of their negative effect on the mission of the military, such as refusing to obey orders, absenting oneself from a place of duty, or falling asleep on guard duty.

A prosecutor selecting charges would likely distinguish the two categories in terms of consent: When prosecuting military discipline offenses, including Articles 92, 93 (except when the underlying conduct is an assault), 133, and 134, consent is irrelevant. The nature of the crime is the violation of the strictures of military service and resulting negative effect on the efficiency and effectiveness of the service – not the personal victimization of another person.

In contrast, criminal sexual misconduct offenses, consolidated in Art. 120, impose criminal liability out of a recognition of the harmfulness of the act upon another

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	<p>person. Consent is usually relevant. When consent is present, the government cannot ordinarily prove unlawful force, bodily harm, and other elements of these offenses.</p> <p>As a result, prosecutors would be more likely to charge the military discipline offenses to address trainee/cadre misconduct when there is little proof of non-consent, or when consent is in fact present. When a lack of consent is susceptible of proof, a prosecutor will likely charge the accused with both military discipline offenses <i>and</i> criminal sexual misconduct. They are not incompatible theories, and doing so may “criminalize: otherwise available defenses (i.e., adultery would criminalize a consent defense to sexual assault).</p>
<p>USAF</p>	<p>There are several theories of criminal liability used to characterize trainer/trainee and senior/subordinate misconduct. The most common theory is charging the misconduct as a violation of a lawful general regulation in violation of Article 92, UCMJ.</p> <p>The regulation most commonly used for superior/subordinate relationships is AFI 36-2909, <i>Professional and Unprofessional Relationships</i>, though AFI 1-1 also institutes a similar duty.</p> <p>For Air Education and Training Command (AETC) trainer/trainee cases, AETCI 36-2909, <i>Recruiting, Education, and Training Standards of Conduct</i>, is the most commonly used regulation. Training on AETCI 36-2909 is provided attached. (Atch 7.1)</p> <p>For the US Air Force Academy, USAFA Supplement to AFI 36-2909 is the most commonly used regulation.</p> <p>Additionally, AFI 36-2706, <i>Equal Opportunity Program Military and Civilian</i>, establishes a duty to refrain from sexual harassment. Depending on the specific facts, other UCMJ articles could be used such as sexual assault under Art 120, UCMJ; maltreatment of a subordinate under Art 93, UCMJ; conduct unbecoming an officer under Art 133, UCMJ; and fraternization under Art 134, UCMJ.</p> <p>Trainer/trainee and senior/subordinate relationships are not treated the same in many cases because while almost all trainer/trainee relationships are prohibited there are some senior/subordinate relationships that are not prohibited absent certain aggravators. For example, a Captain and a Major can date and have a personal or sexual relationship; however, if the Major was in the chain of command of the Captain that relationship would be prohibited.</p> <p>ATTACHMENT: Atch 7.1 – AETCI 36-2909 Training Slides (20 May 2004)</p>
<p>USN</p>	<p>Generally, Navy charges sexual acts or contact between trainers and trainees as a violation of Article 92, UCMJ. Applicable regulations are listed in the Report on Protections for Prospective Members and New Members of the Armed Forces during Entry-Level Processing and Training. This link for this report is on the JPP website at: http://jpp.whs.mil/Public/docs/Meetings/20140919/06_ReportOnProtectionsForProspe</p>

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	<p>ctiveMembers_DoD_2014.pdf. Improper relationships violate Navy Regulation 1137, located at http://doni.documentservices.dla.mil/US%20Navy%20Regulations/Chapter%2011%20-%20General%20Regulations.pdf, or other similar orders issued by specific training commands and are charged either as an Article 92 violation or an Article 93 (Maltreatment) violation depending on the circumstances of the given case.</p> <p>If there is an act or a statement that could constitute a threat, then rape [Article 120(a)(1), unlawful force or Article 120(a)(2) fear of death/grievous bodily harm] or sexual assault [Article 120(b)(1)(A), threatening or placing another in fear] may be charged. If no actual threat exists, then the allegation could be charged as a sexual assault [Article 120(b)(1)(B), bodily harm]. The theory of liability for these relationships is constructive force due to a power differential. Rape, sexual assault, and other sexual misconduct are charged under Articles 120 and 120c, UCMJ as appropriate.</p>
USMC	<p>The Marine Corps generally treats trainer/trainee relationships and senior/subordinate relationships the same and charges violations of these trusted relationships under Articles 92 for fraternization or sexual harassment, Article 93 for cruelty and maltreatment of a subordinate, Article 133, Conduct Unbecoming an Officer, or Article 134 Fraternization between an officer and enlisted.</p> <p>If there is misconduct beyond the existence of the relationship, the Marine Corps charges the additional misconduct, and can use the existence of the trainer/trainee or senior/subordinate relationship as direct or circumstantial evidence of fear or a threat, such as when charging sexual assault, or as an aggravating factor on sentencing.</p>
USCG	<p>Assuming the case involves sexual acts between a trainer and trainee, with no other additional circumstances, and thus the charging decision is based on abuse of the relationship between trainer and trainee, there are three theories of criminal liability. First, under all three versions of Article 120 (and potentially indecent assault under Article 134 prior to 2007), rape or sexual assault could be charged. <i>See, e.g., United States v. Simpson</i>, 58 M.J. 368 (C.A.A.F. 2003). Second, existing Coast Guard general orders prohibit sexual relationships, or even attempts to establish them, between any instructor at any Coast Guard training command and a recruit or someone who has graduated from recruit training within the last 365 days. This prohibition extends beyond Training Center Cape May, where all recruit training is conducted, and extends beyond recruit company commanders. Thus, any sexual relationship between an instructor and someone who has graduated from recruit training within the last year can be charged as a violation of a general order under Article 92. Finally, a sexual relationship between a trainer and trainee could be charged as a form of maltreatment under Article 93. The facts of each case dictate under which theory or theories the misconduct is charged.</p> <p>Senior-subordinate relationships, in general, are a far more complicated topic than trainer-trainee relationships. All the services already extensively regulate interpersonal relationships, to include not just romantic relationships. These</p>

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	<p>regulations prohibit some relationships between seniors and subordinates, and allow others. That being said, the same theories of criminal liability exist as for trainer and trainee relationships: sexual assault under Article 120, violation of a general order under Article 92, and maltreatment under Article 93. If the senior-subordinate relationship is between an officer and enlisted member, fraternization under Article 134 might also be available. A blanket strict liability prohibition on sexual acts between a senior and subordinate could be highly disruptive, as it would proscribe many existing and entirely consensual relationships that comply with existing service policies.</p>
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b. Provide copies (or hyperlinks to) Service and/or subordinate command policies that prohibit trainer/trainee relationships and senior/subordinate relationships.

USA	<p>Army Policy:</p> <ul style="list-style-type: none"> - Army Training and Doctrine Command Regulation 350-6, Enlisted Initial Entry Training Policies and Administration, prohibits trainers from engaging in sexual conduct with trainee. See http://www.tradoc.army.mil/tpubs/regs/tr350-6.pdf. - Army Regulation 600-20, Army Command Policy, prohibits fraternization between senior/subordinate ranks. See http://www.apd.army.mil/pdf/files/r600_20.pdf. - The Army separately prohibits recruiters from engaging in the conduct via U.S. Army Recruiting Command Regulation 600-25, Prohibited and Regulated Activities. See http://www.usarec.army.mil/im/formpub/rec_pubs/r600_25.pdf. - In addition to Army Policy, some initial entry training (IET) posts issue local regulations prohibiting personal relationships and sexual activity between trainees and cadre: - Fort Sill Regulation 600-3, Prohibited Practices – Permanent Party and Initial Entry Training Soldiers, prohibits unprofessional personal associations and other prohibited practices between IET trainees and permanent party personnel. See http://sill-www.army.mil/USAG/DHR/publications/Regs/Fort_Sill_Reg_600-3.pdf. - Maneuver Center of Excellence and Fort Benning Pamphlet 210-10 prohibits any relationship between permanent party personnel and IET trainees not required by the training mission. See http://www.benning.army.mil/mcoe/dot/mc3/content/pdf/MCoE%20PAM%20210-10.pdf. - U.S. Army Maneuver Support Center and Fort Leonard Wood Regulation 350-6, prohibits relationships between uniformed service members and IET trainees. See http://www.wood.army.mil/doimspt/FLW%20Publications/r350-6.pdf. - U.S. Army Combined Arms Support Command & Fort Lee Regulation 600-27 prohibits relationships between Fort Lee Personnel and IET trainees. See Enclosure 5. - Joint Base San Antonio 32d Medical Brigade Policy Memo 13-028. See Enclosure 5. - United States Army Intelligence Center, Fort Huachuca, Arizona Regulation
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	<p>600-50, Standards of Conduct, prohibits engaging or attempting to engage in any nonprofessional relationship between any permanent party member (including Drill Sergeant) and an IET student. <i>See</i> Enclosure 5.</p> <ul style="list-style-type: none"> - Defense Language Institute Foreign Language Center, Presidio of Monterey’s Command Policy on Prohibited Relationships. <i>See</i> Enclosure 5. <p>ENCLOSURE 5, Prohibited Practices Policies:</p> <ul style="list-style-type: none"> a. Fort Huachuca Regulation 600-50 – Standards of Conduct (2 Jan 2003) b. Presidio of Monterey Command Policy - Prohibited Relationships (21 Mar 2013) c. CASCOM&FL Regulation 600-27 – Improper Relationships with Initial Entry Training Soldiers (26 Sep 2003) d. Joint Base San Antonio, 32d Medical Brigade Policy Memo 13-028 – Prohibited Associations (19 Mar 2013)
USAF	<p>References:</p> <ul style="list-style-type: none"> - AFI 1-1, <i>Air Force Standards</i> http://static.e-publishing.af.mil/production/1/af/publication/afi1-1/afi1-1.pdf - AFRCI 36-2001, <i>Air Force Reserve Recruiting Procedures</i> http://static.e-publishing.af.mil/production/1/afrc/publication/afrci36-2001/afrci36-2001.pdf - AFI 36-2706, <i>Equal Opportunity Program Military and Civilian</i> http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2706/afi36-2706_ic-1.pdf - AFI 36-2909, <i>Professional and Unprofessional Relationships</i> http://static.e-publishing.af.mil/production/1/af_ja/publication/afi36-2909/afi36-2909.pdf - AETCI 36-2909, <i>Recruiting, Education, and Training Standards of Conduct</i> http://static.e-publishing.af.mil/production/1/aetci/publication/aetci36-2909/aetci36-2909.pdf - AFI 36-2909, <i>Professional and Unprofessional Relationships</i>, HQ United States Air Force - Academy Supplement http://static.e-publishing.af.mil/production/1/usafa/publication/afi36-2909_usafasup/afi36-2909_usafasup.pdf <p>ATTACHMENT: Atch 7.1 – AETCI 36-2909 Training Slides (20 May 2004)</p>
USN	<p>Responsive documents are attached in enclosure (4).</p> <p>ENCLOSURE 4:</p> <ul style="list-style-type: none"> - Recruit Training Command Instruction (RTCINST) 3000.1A – Recruit Training Command Standard Operating Procedures (2 Jun 2004) - OPNAVINST 5370.2C – Navy Fraternalization Policy (26 Apr 2007) - RTCINST 3000.1A CH-1 – Standard Operating Procedures (9 Aug 2004) - RTCINST 3000.1A CH-2 – Standard Operating Procedures (17 Feb 2005) - RTCINST 3000.1A CH-3 – Standard Operating Procedures (23 Jan 2008) - RTCINST 3000.1A CH-4 – Standard Operating Procedures (26 Jul 2011) - NAVCRUITRACOMINST 1600.3 CH-1 – Standards of Conduct for Recruit

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	<p>Training Command (20 Dec 2012)</p> <ul style="list-style-type: none"> - Commandant of Midshipmen Instruction (COMNAVCRUITCOMINST) 5370.1F Fraternization (12 Oct 2011) - COMDTMIDNINST 5400.6Q CH-1 – Midshipman Regulations Manual (15 Jan 2014)
USMC	<p><i>See enclosure (3).</i></p> <p>ENCLOSURE 3 Copies of Service or Subordinate Command Policies that Prohibit Trainer/Trainee or Senior/Subordinate Relationships:</p> <ul style="list-style-type: none"> a) Depot Order P1510.31 – Standing Operating Procedures for Recruit Training (20 Mar 2014) b) Depot Order 1100.5B – Relationships Between Recruiting Personnel and Prospective Applicants/Members of the Delayed Entry Program and Pre-Fleet Marines - Eastern Recruiting Region Order (11 Jul 2012) c) Depot Order 1100.4B – Recruiting Personnel Personal Relations with Members of the Delayed Entry Program, Prospective Recruit Applicants, and Prospective Officer Candidates Western Recruiting Region Order (01 Sep 2004) d) Marine Corps Recruiting Command Orders, Policy Letters, and Commanding General’s Policy Statement e) Marine Corps Intelligence Activity Order 5370.1 – MCI Anti-Harassment Policy and Equal Opportunity (EO)/ Equal Employment Opportunity (EEO)/ Fraternization/Hazing Policy Statements (07 Oct 2014) f) Training Command General Order 01-03 – Prohibited Activities (01 Oct 2003) g) MARFORSOUTH Order 5354.1B – Equal Opportunity Program (18 Jul 2006) h) MARFORSOUTH Equal Opportunity and Sexual Harassment Policy Statement (Undated) i) U.S. Navy General Regulations – Chapter 11
USCG	<p><i>See Attachments (3)-(7). See also Para.2.A.2.g., Commandant Instruction Manual 1600.2, Discipline and Conduct. The current version can be found at: http://www.uscg.mil/directives/cim/1000-1999/CIM_1600_2.pdf</i></p> <p>ATTACHMENTS 3 through 7 and above referenced Instruction:</p> <ul style="list-style-type: none"> - Attachment (3): Coast Guard Training Center Petaluma Instruction 1610.1G – Inappropriate Relationships or Conduct (29 Jul 2013) - Attachment (4): Excerpt from the United States Coast Guard Academy Regulations for the Corps of Cadets - Attachment (5): Superintendent Instruction 5370.2A – Personal Relationships within the Coast Guard (30 Apr 1992) - Attachment (6): General Order – Prohibited Relationships between Coast Guard Recruiting Command Staff and Applicants/Recent Applicants (09 Dec 2013) - Attachment (7): General Order – Prohibited Relationships between Instructors and Recent Graduates of Recruit Training (03 Sep 2013) - Referenced Commandant Instruction Manual 1600.2 – Discipline and Conduct,

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	Para.2.A.2.g. (Sep 2011). The current version can be found at: http://www.uscg.mil/directives/cim/1000-1999/CIM_1600_2.pdf
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