# Can You Do That?

## Recognizing Collateral Attacks on Military Sexual Assault Testimony through the Civil Discovery Rules in State Court

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This article provides situational awareness and sets forth considerations that JAGs should consider when analyzing a case that implicates multiple jurisdictions.

### INTRODUCTION

Members of the Armed Forces enjoy many rights and privileges incident to military service. Some privileges are well known, while others are less so—even to those with great familiarity with the military. One such lesser-known privilege is the federal officer removal statute, **28 U.S.C. § 1442**. Though it is used infrequently and may be relatively unknown to Air Force Judge Advocates (JAGs), it is still important to understand its significance and effect. The following describes a specific case where the federal officer removal statute was implicated through the creative use by civilian counsel. This article provides situational awareness and sets forth considerations that JAGs should consider when analyzing a case that implicates multiple jurisdictions.

### THE LAW

Before discussing this case, it is important to understand three additional laws and rules—first, the federal officer removal statute, second, the rules surrounding depositions, and third, a servicemember's duty to report criminal conduct. We will now examine each, in turn.

#### "Federal Officer" and Removal to Federal Court

The federal officer removal statute codified at 28 U.S.C. § 1442 gives federal court jurisdiction over *civil matters* directed at "[t]he United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such

office."[1] "Historically, removal under [Section 1442…] was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his [or her] official duties…. It also enables the defendant to have the validity of [his or] her immunity defense adjudicated, in a federal forum. For these reasons, [the United States Supreme] Court has held that the right of removal is absolute for conduct performed under color of federal office…."[2] A 2011 amendment to Section 1442(d)(1) expanded the definition of "civil action" to include "any proceeding."[3]

### Depositions

Depositions are uncommon in military justice, and even the most experienced military justice practitioners may utilize them very infrequently across an entire career.[4] Therefore, this article will not discuss the applicability or use of depositions in courts-martial except to say that there are three principal authorities for using depositions in military law practice,[5] and "the primary purpose [for depositions in military law practice] is to preserve the testimony of unavailable witnesses for use at trial."[6]

In contrast, depositions occur frequently in civil cases.[7] The Federal Rules of Civil Procedure describe circumstances where they are appropriate,[8] and they specifically state that a deposition "may not be used as a substitute for discovery."[9] Most states have adopted the Federal Rules' limits on conducting pre-litigation discovery, [10] but a few jurisdictions have more expansive ones.[11] Texas is a jurisdiction with a broad discovery standard. Codified as Texas Rule of Civil Procedure 202, Texas authorizes "a pre-suit deposition either to perpetuate testimony in an anticipated case or to *investigate a potential claim*."[12] In Texas, a party may seek court-authorized depositions for either evidence preservation or evidence *development* purposes.

### Affirmative Duty to Report Criminal Conduct

The final consideration is a military member's obligation to report criminal conduct. The Navy imposes an affirmative duty to report criminal offenses on its members.[13] By policy, "the Army has imposed on commanders, leaders, and other personnel under special circumstances, regulatory duties to report crimes."[14] The Air Force has gone about half-way, requiring *some* people to report *sexual assaults*.[15] Military courts have also upheld convictions of service members who failed to report other offenses with which they were not personally involved.[16]

With these laws and rules as a background, we now turn to the aforementioned case.

## THE CASE

### Background Facts

Given recent changes to the UCMJ, it is important to note that the events surrounding this case first occurred in summer 2014. That summer, two students who were assigned to the Department of Defense's Medical Education and Training Campus on Joint Base San Antonio-Fort Sam Houston joined their friends for an evening of partying at area bars. They later moved to an off-base hotel where the partying continued. Throughout the evening and early morning, they consumed a large quantity of alcohol. Eventually, the two students had sex. The male student contended that the sex was consensual based on their flirting and kissing. The female student disagreed and stated she was sexually assaulted. The female student did not initially report the alleged assault to military authorities. She shared details of the incident with a friend from her training class. The friend immediately reported the allegations, and local civilian law enforcement started an investigation. Contemporaneous with the start of the investigation, the female student also completed a sexual assault forensic examination at an area hospital.

Civilian law enforcement interviewed several witnesses, including the female student, and collected evidence. The case was later turned over to military criminal investigators. The male student was removed from his class and did not complete training with his peers. In contrast, the female student finished her training and eventually moved on to her first assignment. After completion of the investigation, charges were preferred against the male student and an Article 32 hearing was held in late 2015 or early 2016, and charges were referred to trial in 2016.

## Request for Deposition in Order to "Interview" Complaining Witness

The exact timing is unclear from the civil record, but at some point prior to trial, the male student tried to reach out to the female student. It is likewise unclear if he tried to contact her through counsel. He stated that, "[l]eading up to the pretrial investigation, [he] made multiple requests to interview [the complaining witness.]" He sought "an *informal* interview" with the female student, asking "that [the female student] be present at the pretrial investigation to offer a statement." This did not happen. As a result, the male student went to state court to obtain permission under Rule 202 of the Texas Rules of Civil Procedure (Texas Rule 202) to "interview" the female student. Texas Rule 202 is used to preserve or develop evidence that may be needed later at trial. [17] As a practical effect, Texas Rule 202 could be employed as an intimidation or harassment technique because there is no requirement for a case to proceed beyond the evidence-development stage.

The male student filed a request under Texas Rule 202 to depose the female student. [18] The male student sought three objectives in his request, including that he wanted to: (1) gain insight into the facts underlying her claims, including the female student's alleged level of intoxication and biases or motives; (2) assess the strengths and weaknesses of his criminal case; and (3) gauge potential causes of action for a Texas state court civil suit. The court granted on an *ex parte* basis and allowed the deposition to proceed.

Once the court granted the request, the male student served it on the female student. It is important to note that while the female student's home of record was Texas, she was not there. She had already moved to her first duty station outside of Texas. Nonetheless, the male student knew her home address, served her there, and proceeded under *civil*, not *criminal*, discovery rules. Had the male student proceeded under criminal rules, it is likely a no-contact order would have been in place, effectively barring the male student from contact with her. Since the male student operated under the civil rules, there was no record of a no-contact order to prevent him from pursuing his course of action.

## Removal of Case from State Court to Federal Court

It is unclear whether the female student or someone else actually received the notice for deposition. What is clear is that shortly after the request was granted by the Texas court, a JAG contacted the U.S. Attorney's Office. After seeking and obtaining representation authorization from the Constitutional Torts Branch of the Department of Justice,[19] the U.S. Attorney's Office immediately filed a Notice of Removal to have the case moved from state court to federal court as authorized by the federal officer removal statute.

As would be expected, the male student opposed this action. He argued that federal removal officer statute should be narrowly construed. He also argued that a Texas Rule 202 petition is not a "civil action" upon which relief can be granted and thus fell outside of the federal officer removal statute. Further, he asserted that no actual offense occurred under the applicable service regulation, arguing his belief that since the sex was consensual, no UCMJ violation occurred and no report was required. In the alternative, he argued that even if an offense had occurred, the female student was in violation of military regulations, because she failed to report the offense to *military* authorities by self-admitting to a *civilian* hospital under the care of *civilian* medical providers.

Unsurprisingly, the U.S. Attorney opposed the male student's assertions. First, the U.S. Attorney argued the broad applicability of the removal statute itself, stating the purpose of the "federal officer removal statute is to provide a neutral forum in which federal officers could present their defenses" for actions taken in an official capacity.[20] Second, the U.S. Attorney argued that a Texas Rule 202 action was a "civil action" because a 2011 amendment specifically broadened the definition of "civil action" to include petitions under Texas Rule 202.[21]

Third, the U.S. Attorney argued that the female student had properly turned to military authorities when she reported the

assault. The U.S. Attorney further noted at the time the Texas Rule 202 action was filed the *military* was prosecuting the male student, and not the State of Texas. This was prima facie evidence that the female student had reported the incident to *military* authorities in accordance with the applicable guidance. The U.S. Attorney also highlighted that the female student submitted to a forensic examination at a civilian hospital, but only *after* she had gone to a *military* one, and was told the military lacked the capability to perform the procedure. Moreover, the female student's assault occurred "incident to service," and federal courts have stated a "service member is injured 'incident to service' if the injury is because of [a] military relationship with the Government."[22] The unique character of the military makes it "'a specialized society separate from civilian society' with 'laws and traditions of its own [developed] during its long history.'"[23]

## THE OUTCOME

Military authorities completed their investigation and charged the male student with sexual assault in the fall of 2015.

### Disposition

In the fall of 2016, the case proceeded to trial by court-martial. The male student, as accused, was convicted of sexual assault. He received, among other punishments, confinement and a punitive discharge.

The civil case was decided shortly after the court-martial finished. Rather than dismissing the case as moot, the federal court considered the male student's arguments. First, the court considered the removability of the case under the federal officer removal statute. It rejected the male student's argument that the matter was not a "civil action" for purposes of removal and determined that the attempt to depose a federal officer pre-suit is removable. It then considered whether the female student acted beyond the scope of her employment because she confided in a friend instead of reporting her assault to the chain of command. The court determined she acted properly within the scope of the rules and that a factual basis exists for the civil case to be removed to federal court. [24] Based upon these findings, the court denied the male student's motion to remand and dismissed the case with prejudice.

### Lessons Learned

A few lessons can be drawn from this case which are useful for military practitioners, and these lessons apply to Air Force JAGs representing the government, the defense, and victims.

**FIRST, there may be several courts involved in a case beyond those that deal with criminal law.** In the above case, the underlying sexual assault occurred at an off-base hotel with civilian authorities involved during the initial investigation. As such, non-federal (i.e., state) courts had jurisdiction over any non-federal claims that may have arisen during the incident. Although this particular case involved a criminal investigation and action under the UCMJ, understanding local rules may have benefits in other areas such as legal assistance. For example, Reserve and Guard lawyers with local jurisdictional expertise can be a valuable resource for active-duty practitioners on local rules and practices.

**SECOND, there is tension between civil and criminal discovery rules which military justice practitioners rarely face.** In general, criminal discovery rules are narrower than civil discovery,[25] and civil discovery rules cannot be used to obtain information otherwise unobtainable in a criminal case.[26] This distinction is not merely academic, because as seen in this case, the male student tried to use civil discovery rules to initiate contact with the female victim that was otherwise prohibited. Had he been successful, the male student could have intimidated the female student into not assisting in the investigation and prosecution of the criminal case that ultimately resulted in his conviction.

**THIRD, JAGs should act aggressively to protect the rights of their clients as well as to preserve testimony that may be needed in prosecuting military courts-martial.** The federal officer removal statute may be a tool to shield military victims from such behavior noted above, intended to intimidate and dissuade them from participating in investigating and prosecuting serious crimes.[27] Further, a more difficult case is presented when a civilian victim is involved who has no obvious connection

to federal service. [28] In such instances, it may be necessary to first obtain immunity from the Attorney General under 18 U.S.C. § 6004 for civilian witnesses to shield them from this sort of attack.

## CONCLUSION

In the case described, the serendipitous confluence of three events led to the successful application of the federal officer removal statute: (1) a U.S. Attorney's Office who was familiar with the rule; (2) a JAG who reached out to the U.S. Attorney when assisting a military member; and (3) a relatively straightforward fact pattern. A basic understanding of the federal officer removal statute equips military justice practitioners with another tool to assist in the investigation and prosecution of serious crimes that overlap multiple jurisdictions.

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## EXPAND YOUR KNOWLEDGE:

### EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **American Bar Association:** Your At-A-Glance Tool for Information on Depositions and Witnesses (April 15 2019), https://www.americanbar.org/groups/litigation/resources/evidence/
- **The Federal Lawyer:** Federal Officer Removal: The Misunderstood Removal Statute (May 2013), https://www.perkinscoie.com/images/content/2/9/v2/29047/05-2013-federal-lawyer.pdf.pdf

## ENDNOTES

[1] 28 U.S.C. § 1442 (a)(1) (2016) emphasis added.

[2] Arizona v. Manypenny, 451 U.S. 232, 241–42 (1981) (internal citations omitted). Four elements must be satisfied for a state case to be successfully removed to federal court under this statute: "(1) [T]he defendant [must be] a person; (2) . . . the federal government or federal officer directed the defendant to take action; (3) . . . the action was the causal nexus of the plaintiff's claim; and (4) . . . a colorable federal defense exists as to the claim." Andrew E. Shipley and John F. Henault, *Federal Officer Removal: The Misunderstood Removal Statute*, Fed. Law., May 2013, at 72 (citing Mesa v. California, 489 U.S. 121 (1989)).

[3] Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2(a)(1)(C), 125 Stat. 545 (2011).

[4] For a more comprehensive discussion of use of depositions in military law practice, *see* Colonel Mark L. Allred, *Depositions and a Case Called* Savard, 63 A.F. L. Rev. 1 (2009).

[5] These three authorities are: Article 49, MRE 804, and RCM 702. Article 49 authorizes depositions in courts-martial "so far as otherwise admissible under the rules of evidence." MRE 804 applies in cases where a witness is unavailable and is the rule referred to by Article 49. RCM 702 provides the mechanism for depositions to be used in military trial practice.

[6] Manual for Courts-Martial, United States [hereinafter MCM], app. 21, at A21-33 (2016) (Discussion of RCM 702).

[7] Fed. R. Civ. P. 27.

[8] Penn. Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1374 (D.C. Cir. 1995) (a proponent must show he or she is acting in anticipation of litigation, he or she has an interest in the potential litigation, the facts which the proponent desires to establish through the deposition, the identity of the individuals to be deposed, and the anticipated testimony expected from each witness).

[9] *Id.* at 1376.

[10] *Id.* at 235–36.

[11] *Id.* at 236–38.

[12] *Id.* at 242 (emphasis added).

[13] U.S. Dep't of Navy, U.S. Navy Regulations, 1990, art. 1137 (Sept. 14, 1990): "Persons in the naval service shall report as soon as possible to *superior* authority all offenses under the Uniform Code of Military Justice which come under their observation, except when such persons are themselves already criminally involved in such offenses at the time such offenses first come under their observation." (Emphasis added.) In *United States v. Serianne*, the Navy-Marine Corps Court of Criminal Appeals addressed the self-incrimination aspect of this regulation, but ultimately upheld the validity of this requirement. *See* United States v. Serianne, 68 M.J. 580 (N-M. Ct. Crim. App. 2009), *aff'd* 69 M.J. 8 (2010). For an excellent discussion and analysis of this case, *see* Lieutenants Randall Leonard and Joseph Toth, *Failure to Report: The Right Against Self-Incrimination and the Navy's Treatment of Civilian Arrests After* United States v. Serianne, 213 Mil. L. Rev. 1 (2012).

[14] U.S. Dep't of Army, Reg. 600-20, Army Command Policy (Nov. 6, 2014). Army policy on this matter states: "[E]nsuring the proper conduct of soldiers is a function of command. Commanders and leaders in the Army, whether on or off duty or in a leave status, will…[t]ake action consistent with Army regulations *in any case* where a soldier's conduct violates good order and military discipline." *Id.* at ¶4-4a (emphasis added).

[15] U.S. Dep't of Air Force, Instr. 90-6001, Sexual Assault Prevention and Response (SAPR) Program, ¶3.7.3 (May 21, 2015, incorporating Change 1, dated Mar. 18, 2016): "Any military member or civilian employee, other than those authorized to receive confidential communications or otherwise exempted by operation of law, regulation, or policy, who receives a report of an adult sexual assault incident involving a subordinate in the individual's supervisory chain *will report* the matter to the SARC, Commander (or equivalent) and AFOSI." (Emphasis added.) *But see* ¶3.7.4, which states military members not in the supervisory chain "are strongly encouraged, but not required to report" sexual assaults. *See also* U.S. Dep't of Air Force, Instr. 1-1, Air Force Standards, ¶2.3 (Aug. 7, 2012, incorporating Change 1, dated Nov. 12, 2014), imposes the ethics requirements of the Executive Branch upon members of the Air Force, which also includes mandatory disclosures of misconduct. However, the introduction states "[t]his instruction is directive in nature and *failure to adhere to the standards set out in this instruction can form the basis for adverse action under the Uniform Code of Military Justice*. An example would be a dereliction of duty offense under Article 92" (emphasis added).

[16] United States v. Heyward, 22 M.J. 35, 36–37 (C.M.A. 1986) (holding it "entirely reasonable for the Air Force to impose upon its members a special duty to report drug abuse . . . . in attempting to maintain high standards of health, morale, and fitness for duty"); *see also* United States v. Medley, 33 M.J. 75, 77 (C.M.A.1991) (holding "a person in a position of military leadership" may be prosecuted for "consciously ignor[ing] the blatant criminal conduct of subordinates," because the "duty not to tolerate malfeasance cuts to the very core of military leadership and responsibility").

[17] Texas Rule of Civil Procedure 202 (Texas Rule 202) is more expansive than Federal Rule of Civil Procedure 27 (Federal Rule 27). *See* Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. Mich. J.L. Reform 217, 236–38 (2007). Federal Rule 27 limits the scope of authority given to private litigants to conduct pre-litigation discovery (as discussed below), while Texas Rule 202 states "a presuit deposition [may be taken] either to perpetuate testimony in an anticipated case or to *investigate a potential* claim." *Id.* at 242 (emphasis added). In other words, a party may seek court-authorized depositions for either evidence preservation purposes or evidence *development* purposes. There is no requirement that a case actually proceed beyond the evidence development stage.

[18] To understand the significance of the male student's attempt to depose the female victim under Texas Rule 202, it is important to understand how this rule differs from Federal Rule 27, which authorizes depositions in civil cases. To depose a witness under Federal Rule 27, a proponent must show he or she is acting in anticipation of litigation, he or she has an interest in the potential litigation, the facts which the proponent desires to establish through the deposition, the identity of the individuals to be deposed, and the anticipated testimony expected from each witness. *See* Penn. Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1374 (D.C. Cir. 1995). In addition, Federal Rule 27 states that a deposition "may not be used as a substitute for discovery." *Id.* at 1376. Most courts and commentators have construed Federal Rule 27 as limiting the "scope of authority given to private litigants to conduct [pre-litigation] discovery." *See* Hoffman, *supra* note 17 at 226.

Most states have specifically adopted Federal Rule 27's limits on conducting pre-litigation discovery. *Id.* n.65 at 235 (identifying the states of Hawaii, Idaho, Maine, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Mexico, South Carolina, Utah, Washington, and West Virginia who adopted Federal Rule 27's limitations). Other states have adopted rules where the language differs from the Federal rule but has been narrowly construed in court. *Id.* n.70 at 236 (identifying Alaska, California, Colorado, Illinois, Indiana, Iowa, Kentucky, Louisiana, and Maryland). In contrast, other states have broader discovery

rules, including New York, *id*. n.71 at 237, Florida, *id.* n.77 at 239, but these states do not limit as expansive discovery as is authorized in Texas. Only Alabama has discovery rules that appear as broad as those in Texas, *see id*. at 240–41, but Alabama differs in the important respect of "clearly preclude[ing] the taking of an oral deposition that is not coincident with the production of documents to investigate claims before suit." *Id*. at 241. Therefore, Texas stands alone in the breadth and scope of pre-suit discovery that is authorized in civil matters.

[19] *See* 28 C.F.R. §§ 50.15–50.16.

[20] The U.S. Attorney cited precedent that "the right of removal is absolute for conduct performed under color of federal office,… and the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of [the removal statute].'" *See* Manypenny, *supra* note 22 at 242, (citing Willingham v. Morgan, 395 U.S. 402, 407 (1969)).

[21] Removal Clarification Act of 2011, *supra* note 23. All case law cited by the male student pre-dated the 2011 amendment and are expressly superseded. The U.S. Attorney also cited *Advanced Orthopedic Designs v. Shinseki*, a case from the Western District of Texas which specifically rejected an argument that a petition for pre-suit discovery from the Unites States Department of Veterans Affairs under Rule 202 is not removable. *See* 886 F. Supp. 2d 546, 549 (W.D. Tex. 2012).

[22] Dickson v. Wojcik, 22 F. Supp. 3d 830 (W.D. Mich. 2014) (citing United States v. Johnson, 481 U.S. 681, 689 (1987)).

[23] Parker v. Levy, 417 U.S. 733, 743 (1974).

[24] In addition to analyzing Section 1442, which was the basis for the U.S. Attorney's action, the court also analyzed Section 1442a, which specifically applies to members of the armed forces. The court reached the same conclusion with regard to both statutes.

[25] Comment, *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 1052 (1961):

> First, there [is] a fear that broad disclosure of the essentials of a prosecution's case would result in perjury and manufactured evidence. Second,…revealing the identity of confidential government informants would create the opportunity for intimidation of prospective witness and would discourage the giving of information to the government. [Third,] since the self-incrimination privilege would effectively block any attempts to discover from the defendant, [the defendant] would retain the opportunity to surprise the prosecution whereas the state would be unable to obtain additional facts. This procedural advantage over the prosecution is thought to be undesirable in light of the defendant's existing advantages.

[26] In the seminal case on this issue, *Campbell v. Eastland*, the Fifth Circuit Court of Appeals expressly stated: "A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal trial." 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963). This case is not controlling in military courts-martial, but the principle may be persuasive to military trial and appellate judges.

[27] Under RCM 405(i)(2)(a), "[t]he victim of an offense under the UCMJ has the right…to be reasonably protected from the accused," which arguably includes being contacted by the accused. In a situation where a military accused vehemently asserts innocence against a sexual assault allegation by a civilian victim, it is not hard to imagine the accused seeking permission to depose the civilian victim as authorized by local court rules. Notwithstanding the right described above in RCM 405(i)(2)(a), this rule pertains to pretrial hearings under Article 32, UCMJ, and is inapplicable until preferral of charges. Thus situation of a military accused and a non-military victim likely results in a "race to the courthouse" between the prosecution to promptly prefer charges and the defense to depose the accuser.

[28] In the case described by this article, the victim was an active-duty service member who qualified for protection under the federal officer removal statute. It is unclear how a case would be handled where a military accused tried to use civil discovery rules against a civilian victim, because the victim would not have an obvious federal privilege that could be asserted. Since a civilian victim has no obvious connection that would permit them to assert a claim, it is likely that some other action would be needed if a military accused tried to use civil discovery rules to "question" a civilian victim.