

Ask the Lawyer: Is Alcoholism a Defense?

By Mathew Tully

Q. Can a service member's alcoholism be raised as a defense to criminal charges?

A.

Despite the military's long-running campaign to curb alcohol abuse among service members, the Institute of Medicine of the National Academies recently said 47 percent of active duty service members engaged in binge drinking in 2008, compared to 35 percent a decade earlier. During the same period, the ranks of heavy drinkers rose to 20 percent from 15 percent.

If charged with an offense in which alcohol played a role, service members may be able to raise an affirmative defense of voluntary or involuntary intoxication. In *U.S. v. Hensler* (1995), the U.S. Court of Appeals for the Armed Forces said "[i]nvoluntary intoxication is treated like legal insanity. It is defined in terms of lack of mental responsibility." Under Rule for Courts-Martial 916, a service member suffers from a lack of mental responsibility when, at the time the crime was committed, he or she "was unable to appreciate the nature and quality or the wrongfulness of his or her acts" due to a "severe mental disease or defect." In other words, to qualify as involuntary intoxication the service member's level of intoxication had to be so great that he or she was unable to appreciate the wrongfulness of his or her conduct.

However, not all crimes committed while intoxicated are involuntary. The Navy Marine Corps Court of Criminal Appeals drove this point home in an earlier ruling for *U.S. v. Hensler* (1994), indicating that service members can drink heavily and compulsively without their alcoholism resulting in a severe mental disease or defect. Intoxication that falls short of this level "is considered voluntary and will not remove responsibility for a crime committed while so intoxicated," the court said.

Voluntary intoxication may be used as the basis for an affirmative defense to a specific intent crime, such as desertion (intent to remain away permanently), but not to a general-intent crime, such as rape (no specific intent necessary). In contrast, involuntary intoxication can be raised as an affirmative defense to both general- and specific-intent offenses. As the court explained in *Hensler* (1995), a service member's voluntary intoxication can make him or her "incapable of forming the necessary intent" to satisfy all elements of the offense.

Service members charged with offenses where alcohol or drug abuse was a factor should immediately consult with a military law attorney to explore whether they can raise any affirmative defenses.

