

Ask the Lawyer: Do I Have to Answer That?

By Mathew B. Tully

Q:

How should I respond if a superior officer asks me a question and the truth would probably get me in trouble?

A:

If a service member is suspected of committing an offense and is questioned by a superior or law enforcement officer about his or her involvement in it, the suspect should have been informed of his or her options as described in the military justice system's "Miranda/Tempia warning," including the right to remain silent and the right to counsel.

Under Rule 305 of the Military Rules of Evidence, until suspects are advised of their rights, military personnel cannot begin interrogating a suspect who is in custody. An interrogation cannot also commence if the interrogator is subjected to the Uniform Code of Military Justice and is "acting in a law enforcement capacity." This rule defines an "interrogation" as "any formal or informal questioning in which an incriminating response is sought or is a reasonable consequence of such questioning."

Under Article 31 of the Uniform Code of Military Justice, a service member cannot be forced "to incriminate himself or answer any question the answer to which may tend to incriminate him." If service members believe the answer to a question would be self-incriminating then they should invoke their right to remain silent or to counsel. Once they do this, questioning must immediately stop. This invocation, however, must be clear, according to the Navy-Marine Corps Court of Criminal Appeals. In *U.S. v. Shiloh* (1999), for example, the NMCCA said that "no particular words or actions are required to exercise one's right to remain silent, but its invocation must be unequivocal before questioning must stop."

In *Shiloh*, the court found that a Navy dental technician's statement to a Navy Criminal Investigative Service agent that "I don't have anything to say" was equivocal, especially when considering he remained seated in a room when his interrogators gave him the opportunity to leave. However, the dental technician's assertion that "I want to leave," and his subsequent departure from the room, were unequivocal.

Sometimes interrogators fail to read the Miranda/Tempia warning or ignore such unequivocal assertions and continue questioning the service member. If this happens, any statements the service member makes should not be admitted as evidence in court-martial proceedings. It is up to the accused's attorney to fight prosecutors' attempts to utilize improperly obtained incriminating statements.

For example, *U.S. v. Mitchell* (1999) involved a Navy ordnanceman who was found guilty at general court-martial of, among other things, premeditated murder. However, the U.S. Court

of Appeals for the Armed Forces set aside the finding of guilt and ordered a rehearing because of the erroneous admission of pretrial statements. In particular, CAAF took issue with a statement the ordianceman charged with premeditated murder made in response to a question asked by his chief petty officer out of "personal curiosity." The petty officer asked "Was it worth it?" and the ordianceman responded, "...it was an eye for an eye." He made this statement after he had been read his Article 31 rights and made a request in writing for counsel. Considering that the petty officer was a command representative who was questioning someone in jail and whom he knew was suspected of an offense and with whom he had no personal relationship, CAAF found the government violated the ordianceman's rights.

Service members questioned about an offense should request to consult with a military law attorney. A lawyer could advise them of their rights and ensure they do not volunteer any self-incriminating statements. If the service member has already made statements, a lawyer could explore whether interrogators violated his or her Article 31 rights.

Mathew B. Tully is an Iraq War veteran and founding partner of the law firm Tully Rinckey PLLC. E-mail questions to askthelawyerfedattorney.com. The information in this column is not intended as legal advice.