

“THE LEGAL BRIEF”

Advice to the Guardians of the Great Lakes



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August 2010: Should YOU Question that Suspect...or Wait?

Reference (a): *Maryland v. Shatzer*, 559 U.S. __ (2010)

A scenario: A fight breaks out at your unit, you are able to “break it up,” but what do you do now with your shipmates who were involved? The short answer: **CALL the Ninth District legal office** for advice about reading the subject their rights under Article 31(b) of the Uniform Code of Military Justice; **DO NOT QUESTION** those involved until such advice is obtained. Article 31(b) applies to any military member suspected of violating the UCMJ or federal law, and you may think that you should immediately read them their Article 31(b) rights and question them. However, a recent Supreme Court decision and the following advice from your legal office may make a “hands-off” approach more prudent, particularly if the future investigation will involve the Coast Guard Investigative Services (CGIS). Here’s why:

THE RIGHT TO AN ATTORNEY AND THE SHATZER RULE:

For years, the rule has been that once a suspect invokes his right to speak to an attorney, all questioning must cease until the suspect has a reasonable opportunity to consult with an attorney. In *Shatzer*, the Court did not overturn this rule but established a clearer test. The rule, as set-forth in *Shatzer*, now allows investigators to re-interview a suspect without counsel after a 14-day break in “custodial custody.” Custodial custody includes those situations where the suspect would feel cut off from his normal life or that his interrogators control his fate. Most courts consider custodial custody terminated once a suspect is released and allowed to return to his normal life. In some ways this rule is beneficial for investigators because it allows them to re-interview suspects after the 14-day break without worrying about whether the suspect previously invoked his/her *Miranda* rights. However, the *Shatzer* decision also leaves no room for mistake if questioning is reinitiated during that 14-day period, regardless of the crime, jurisdiction, or investigating agency.

COAST GUARD POLICY:

Under current Coast Guard instructions, all actual, alleged, or suspected felony UCMJ violations, and federal felony or misdemeanor violations must be reported to CGIS. See COMDTINST 5520.5E available at <http://bit.ly/9gXx6q>. These instructions apply whenever a suspect or victim is a “covered person,” which includes active duty personnel, reservists on active duty, or civilian Coast Guard employees.

COMMAND IMPLICATIONS:

The *Shatzer* decision suggests that an entire investigation is in jeopardy if an alleged suspect is read their Article 31(b) rights prior to consulting with CGIS, because if an alleged suspect is innocently read his Article 31(b) rights and asks for a lawyer, CGIS is unable to interview and/or question the member for 14 days. Worse, if CGIS is unaware that the alleged suspect was read their Article 31(b) rights you may inadvertently cause CGIS special agents to conduct an unlawful interrogation.

Now, a question remains whether the *Shatzer* decision applies to “non-custodial” interrogations in the military. This is a question that needs to be answered by the military justice system. For the time being, it is best to act as if any questioning of a suspect in a military setting is “custodial.”

One of the unpleasant but necessary duties that we will have to confront at some point during our Coast Guard careers involves responding to events in which one or more of shipmates may be suspected of wrongdoing. However, if we respond to such event the right way, not only can we handle the situation correctly at the time, but we can also make sure that justice prevails further down the road.

For additional Guidance on the Investigation of Criminal Offenses see:
http://www.uscg.mil/legal/mj/Flowcharts/Investigation_Flowchart.asp

PLEASE CONTACT D9 LEGAL AT 216-902-6010 WITH ANY QUESTIONS. TO REACH THE DUTY ATTORNEY AFTER NORMAL WORKING HOURS CONTACT THE NINTH DISTRICT COMMAND CENTER AT 216-902-6117.