



NVLSP

NATIONAL VETERANS LEGAL SERVICES PROGRAM

What Every Veterans Advocate Needs to Know About Discharge Upgrades and VA Character of Discharge Determinations

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Training Overview

- Introduction
- Military Discharges
- Discharge Upgrade Applications
- Preparing a Successful Discharge Upgrade Application
- Options After a Denial
- VA Character of Discharge Determinations
- Questions

Who We Are

- NVLSP is a nonprofit organization formed in 1980. We work to ensure that our nation's disabled veterans and active duty personnel receive the benefits to which they are entitled.
- **What We Do:**
 - Individual Attorney Representation and Class Action Lawsuits
 - Training & Mentoring of Veterans Advocates
 - Publication of Training Materials- Including the *Veterans Benefits Manual*
 - Lawyers Serving Warriors®



Lawyers Serving Warriors®



- Lawyers Serving Warriors (LSW) is NVLSP's pro bono project that provides free legal assistance through a network of volunteer attorneys to veterans with various military disability issues

Lawyers Serving Warriors®

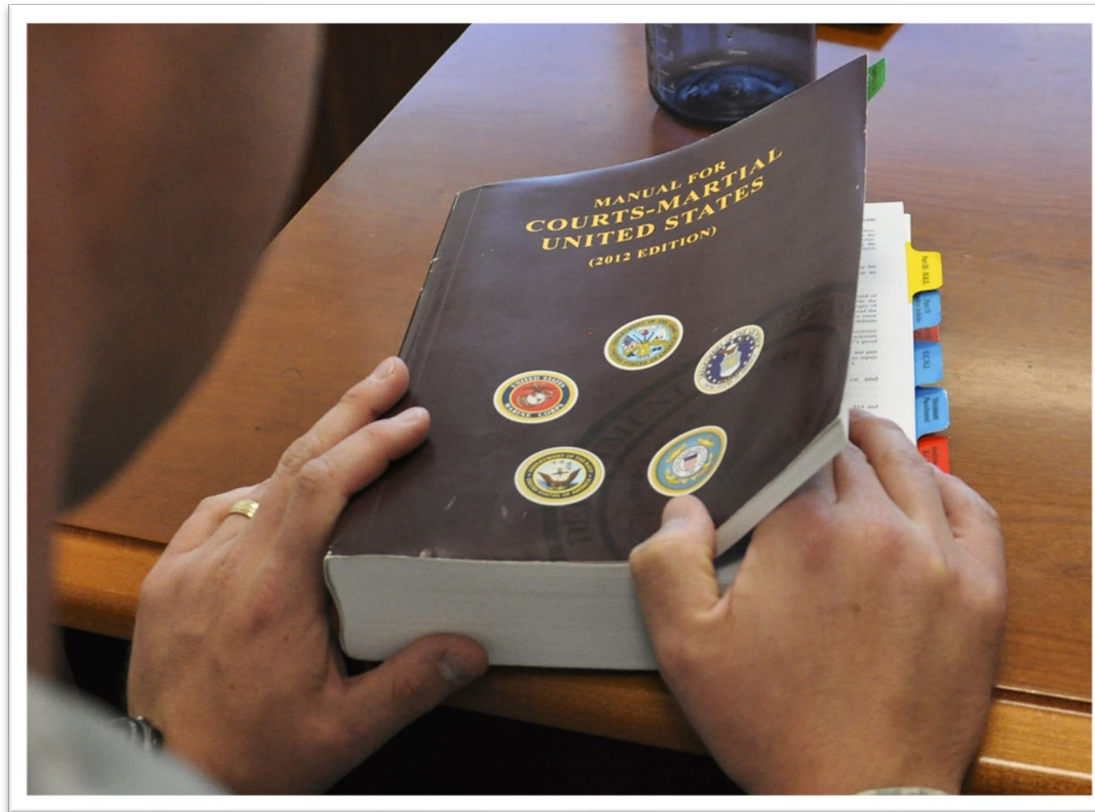
- Disabled veterans apply to LSW for legal assistance. The veterans military records are requested to evaluate the case.
- LSW staff attorneys review veterans' applications to determine whether cases fits our criteria and place eligible cases with volunteer law firm/ corporate counsel attorneys, mentoring the volunteers.



Lawyers Serving Warriors®

- Discharge Upgrades
- Military Medical Retirement Claims and Appeals
- Applications for Combat-Related Special Compensation
- Military Sexual Trauma claims
- Appeals (Court of Appeals for Veterans Claims and Board of Veterans' Appeals)





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Military Discharges

The Uniform Code of Military Justice

- The Uniform Code of Military Justice (UCMJ) is the federal law that defines criminal offenses under military law (10 U.S.C. §§ 801 to 946a).
- Need for an efficient system that:
 1. Meets unique disciplinary needs; and
 2. Can function world-wide in austere environments.

The Uniform Code of Military Justice

Many acts are criminal offenses in the military that are not in civilian life.

- Example: being late to work can be a violation of the UCMJ for failure to be at your appointed place of duty.
- UCMJ only applies to service members (SM) and not to civilians.

The Uniform Code of Military Justice

- When there is a violation of the UCMJ, the servicemember may be tried at a Court-Martial:
 - **Summary** → lowest level
 - **Special** → intermediate, can discharge
 - **General** → most serious, can discharge
- Court-martial conviction = federal conviction

Administrative Separations

- Each service branch has its own Administrative Separation Regulations that authorize separation of service members prior to the end of their enlistment term for listed reasons
 - Example: **AR 635-200 Active Duty Enlisted Administrative Separations**
 - AR 635-200 Chapter 14 “Separation for Misconduct”
 - AR 635-200 Chapter 6 “Separation Because of Dependency or Hardship”

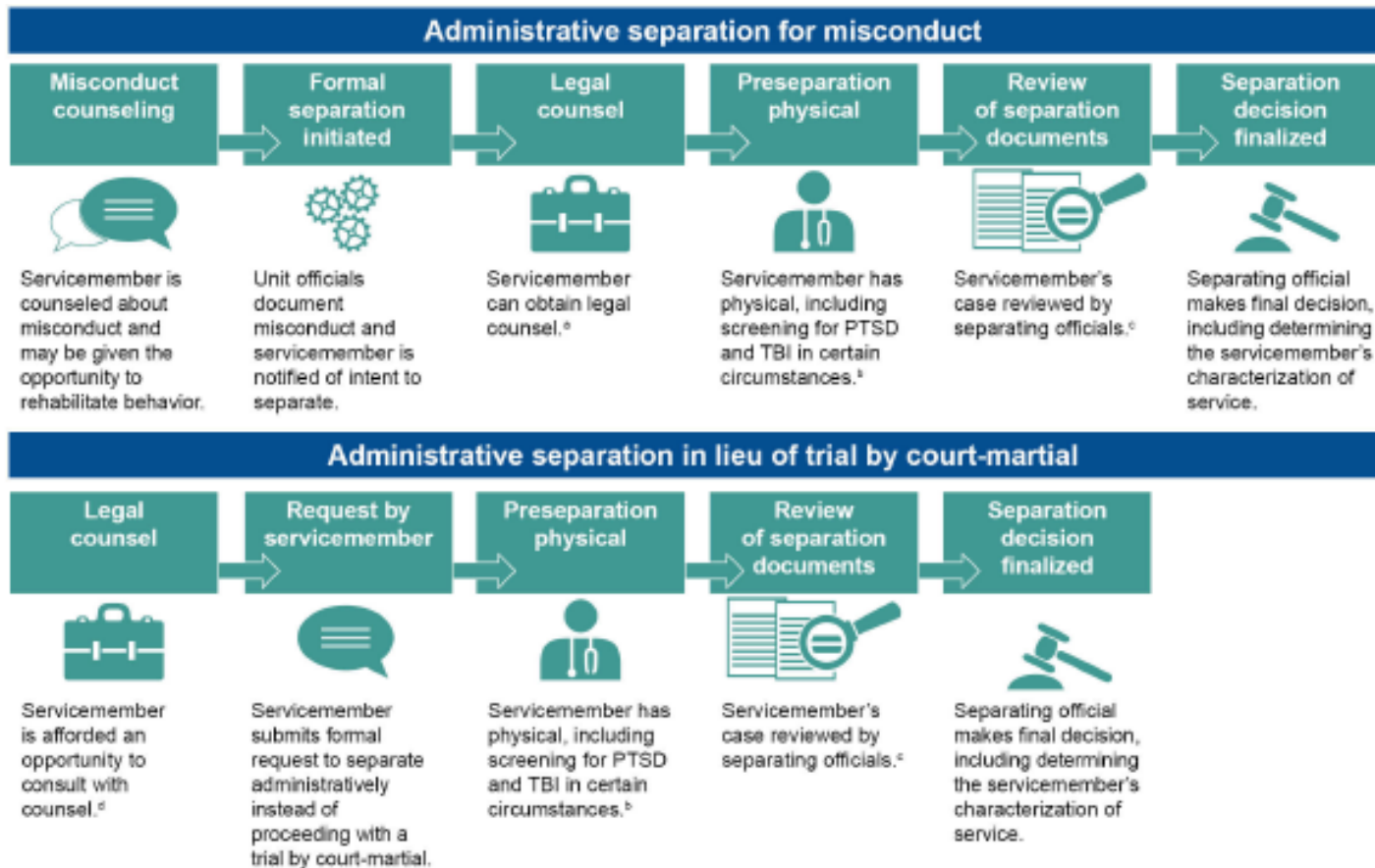
Typical Administrative Separation Chronology

- SM is counseled about misconduct and may be given opportunity for rehabilitation.
- Commander notifies SM of administrative separation.
- SM undergoes medical/mental health exam.
- Election of rights by SM (assisted by counsel).

Typical Administrative Separation Chronology

- Separation packet forwarded through SM's chain of command for recommendations.
- Initiating commander compiles report memorandum and submits separation packet to separation authority.
- Administrative hearing held (if entitled).
- Separation authority orders separation and assigns characterization of service.

Administrative Separation Timeline



Characterizations of Service



- **Administrative**
 - Honorable
 - General (Under Honorable Conditions)
 - Under Other Than Honorable Conditions (OTH)
 - Uncharacterized
- **Punitive (only received through a court-martial)**
 - Bad Conduct
 - Dishonorable/Dismissal

Characterization of Service

Characterization	Description (DOD Instruction 1332.14, Enlisted Administrative Separations, Encl. 4)
Honorable	<ul style="list-style-type: none"> • quality of service generally has met the standards of acceptable conduct and performance of duty for military personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate
General (Under Honorable Conditions)	<ul style="list-style-type: none"> • When service has been honest and faithful • Positive aspects of conduct or performance of duty outweigh negative aspects
Under Other Than Honorable Conditions (OTH)	<ul style="list-style-type: none"> • Separation is based upon a pattern of behavior that constitutes a significant departure from the conduct expected of service members • Separation is based upon one or more acts or omissions that constitutes a significant departure from the conduct expected of service members

Certificate of Release or Discharge from Active Duty (DD Form 214)

CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES		THIS IS AN IMPORTANT RECORD. SAFEGUARD IT.		ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID		
CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY						
1. NAME (Last, First, Middle)		2. DEPARTMENT, COMPONENT AND BRANCH		3. SOCIAL SECURITY NO.		
4.a. GRADE, RATE OR RANK	4.b. PAY GRADE	5. DATE OF BIRTH (YYMMDD)		6. RESERVE OBLIG. TERM DATE		
7.a. PLACE OF ENTRY INTO ACTIVE DUTY		7.b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete address if known)				
8.a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND			8.b. STATION WHERE SEPARATED			
9. COMMAND TO WHICH TRANSFERRED			10. SGLI COVERAGE		<input type="checkbox"/> None	
			Amount: \$			
11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)			12. RECORD OF SERVICE			
			a. Date Entered AD This Period	Year(s)	Month(s)	Day(s)
			b. Separation Date This Period			
			c. Net Active Service This Period			
			d. Total Prior Active Service			
			e. Total Prior Inactive Service			
			f. Foreign Service			
			g. Sea Service			
			h. Effective Date of Pay Grade			
13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service)						
14. MILITARY EDUCATION (Course title, number of weeks, and month and year completed)						
15.a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS EDUCATIONAL ASSISTANCE PROGRAM		<input type="checkbox"/> Yes <input type="checkbox"/> No	15.b. HIGH SCHOOL GRADUATE OR EQUIVALENT		<input type="checkbox"/> Yes <input type="checkbox"/> No	
16. DAYS ACCRUED LEAVE PAID						
17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION <input type="checkbox"/> Yes <input type="checkbox"/> No						
18. REMARKS						
19.a. MAILING ADDRESS AFTER SEPARATION (Include Zip Code)						
19.b. NEAREST RELATIVE (Name and address - include Zip Code)						
20. MEMBER REQUESTS COPY 4 BE SENT TO <input type="checkbox"/> DR. OF VET AFFAIRS <input type="checkbox"/> Yes <input type="checkbox"/> No			22. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title and signature)			
21. SIGNATURE OF MEMBER BEING SEPARATED						
SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)						
23. TYPE OF SEPARATION		24. CHARACTER OF SERVICE (include upgrades)				
25. SEPARATION AUTHORITY		26. SEPARATION CODE		27. REENTRY CODE		
28. NARRATIVE REASON FOR SEPARATION						
29. DATES OF TIME LOST DURING THIS PERIOD				30. MEMBER REQUESTS COPY 4 <input type="checkbox"/> Yes <input type="checkbox"/> No		
DD Form 214, NOV 88 Previous editions are obsolete						

- Acts as a summary of a veteran's service
- Prospective employers often require veterans to submit a copy of their DD Form 214.
- Commonly referred to as a DD 214 or Discharge Certificate

Important DD-214 Information

CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES THIS IS AN IMPORTANT RECORD. SAFEGUARD IT. ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID.

CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

1. NAME (Last, First, Middle)		2. DEPARTMENT, COMPONENT AND BRANCH		3. SOCIAL SECURITY NO.	
4.a. GRADE, RATE OR RANK	4.b. PAY GRADE	5. DATE OF BIRTH (YYMMDD)	6. RESERVE OBLIG. TERM DATE Year Month Day		
7.a. PLACE OF ENTRY INTO ACTIVE DUTY		7.b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete address if known)			
8.a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND			8.b. STATION WHERE SEPARATED		
9. COMMAND TO WHICH TRANSFERRED			10. SGLI COVERAGE Amount: \$ <input type="checkbox"/> None		
11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)		12. RECORD OF SERVICE Year(s) Month(s) Day(s)			
		a. Date Entered AD This Period			
		b. Separation Date This Period			
		c. Net Active Service This Period			
		d. Total Prior Active Service			
		e. Total Prior Inactive Service			
		f. Foreign Service			
		g. Sea Service			
		h. Effective Date of Pay Grade			
13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service)					
14. MILITARY EDUCATION (Course title, number of weeks and month and year completed)					
15.a. MEMBER CONTRIBUTED TO POST-VETERAN ERA VETERANS EDUCATIONAL ASSISTANCE PROGRAM		15.b. HIGH SCHOOL GRADUATE OR EQUIVALENT		16. DAYS ACCRUED LEAVE PAID	
17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION					
18. REMARKS					
19.a. MAILING ADDRESS AFTER SEPARATION (Include Zip Code)			19.b. NEAREST RELATIVE (Name and address - include Zip Code)		
20. MEMBER REQUESTS COPY 4 BE SENT TO DIR. OF VET AFFAIRS		21. OFFICIAL AUTHORIZED TO SIGN (Print name, grade, title and signature)			
23. SIGNATURE OF MEMBER BEING SEPARATED					
SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)					
23. TYPE OF SEPARATION		24. CHARACTER OF SERVICE (Include upgrades)			
25. SEPARATION AUTHORITY		26. SEPARATION CODE		27. REENTRY CODE	
28. NARRATIVE REASON FOR SEPARATION					
29. DATES OF TIME LOST DURING THIS PERIOD				30. MEMBER REQUESTS COPY 4	

DD Form 214, NOV 88 Previous editions are obsolete

Box 24 Characterization of Service

- General (Under Honorable Conditions)
- Under Other Than Honorable Conditions
- Bad Conduct
- Dishonorable

Box 28 Narrative Reason for Separation

- Completion of Required Active Duty
- Misconduct (Serious Offense)
- Drug Abuse
- In Lieu of Trial by Court-Martial

Important DD-214 Information

- The DD-214 also has other important information including:
 - Dates of Service
 - Foreign Service
 - Decorations and Awards
 - Time lost (Absent Without Leave time)
 - Military Occupational Specialty (MOS)

Statistics

- Since 1980, more than 575,000 SMs have received less than fully honorable discharges
- Between 2011 and 2015, **91,764** SMs were separated for misconduct.
 - **62%** (57,141) of those SMs had been diagnosed with PTSD, TBI, or some other mental health condition that could be associated with the misconduct.
- Between 2002 and 2013, **103,581** SMs received an OTH discharge characterization

Impacts of Characterization of Service

- A less than fully honorable discharge can:
 - Hurt employment opportunities
 - Damage reputation and self-esteem
 - Prevent a veteran from accessing benefits



Impacts of Characterization of Service

- **Honorable:** Eligible for all VA benefits (disability comp, health care, GI Bill, home loans)
- **General:** Eligible for all VA benefits except GI Bill
- **Not eligible for VA benefits:**
 - OTH
 - Bad Conduct
 - Dishonorable

Veterans with OTH May Still Receive Healthcare from VA

- A former SM who has an OTH discharge due to a regulatory bar under 38 C.F.R. § 3.12(d) retains eligibility for VA healthcare benefits for service incurred or service-aggravated disabilities.
- Treatment for mental health conditions may be provided under VA's tentative eligibility authority (38 C.F.R. § 17.34) to an individual with an OTH discharge who presents to VA seeking mental health care in emergency circumstances for a condition the former SM asserts is related to military service.



Discharge Upgrades

What is a Discharge Upgrade?

- Change the characterization of service:
 - Example: upgrade from “Other Than Honorable” to “Honorable”
- Change the narrative reason for separation to something less stigmatizing
 - Example, change from “Misconduct” to “Secretarial Authority”

Common Myths

Myths

- A diagnosis of PTSD will automatically get me a discharge upgrade.
- My buddy received a discharge upgrade and he had the same misconduct as me.
- I am not eligible for VA healthcare if I have an OTH discharge.
- If I do not have a PTSD diagnosis, I cannot be upgraded
- My discharge will be automatically upgraded after 6 months.

Facts

- Having a PTSD diagnosis can help an application, but Vets with PTSD are still denied upgrades.
- Many factors go into whether a Vet will receive an upgrade, so not everyone with the same misconduct will have the same outcome.
- Vets with OTH discharges may still be eligible for healthcare from VA for some service-connected disabilities.
- A discharge can be upgraded without a PTSD diagnosis.
- There are no automatic discharge upgrades.

Where to Apply

- Applications for a discharge upgrade are submitted to a board within the veteran's service branch.
- Each service branch has two boards:

Discharge Review Board (DRB)

Board for Correction of Military (or Naval) Records (BCMR/BCNR)

- Often referred to as Department of Defense boards; however, Coast Guard boards are located within the Department of Homeland Security.

Time Limits for Filing

- **Discharge Review Boards (DRB):**
 - Statute of Limitations: 15 years from date of discharge
 - Vet who is within 15 years of date of discharge must apply to the DRB for a discharge upgrade if eligible. Otherwise, Vet can apply to the BCMR/BCNR.
 - Vet only needs to submit an application before the 15-year deadline. They do not need to have received a decision before the end of the 15-year period.

Time Limits for Filing

- **Boards for Correction of Military (or Naval) Records (BCMR/BCNR):**
 - Statute of Limitations: 3 years from discovery of the “error or injustice.”
 - BCMRs may excuse a failure to file within three years of discovery if it finds it to be “in the interest of justice” to review the application. 10 U.S.C. § 1552(b).
 - BCMRs frequently waive the statute of limitations. Additionally, advocates can make creative arguments about when the error or injustice was discovered, and argue that the application is filed within 3 years of that discovery.

Composition of the Boards

Discharge Review Boards

- DRB panel is normally composed of 5 members, and must have a minimum of 3 members.
- Usually career military officers.
- One member of the DRB is designated as DRB President and may serve as the presiding officer.

Composition of the Boards

Discharge Review Boards (cont.)

- One member must be a psychiatrist, psychologist, or physician trained in mental health if:
 - Applicant was deployed in support of a contingency operation and was diagnosed with PTSD or TBI related to the deployment;
 - Applicant was diagnosed with a mental health disorder while in service; or
 - Applicant was diagnosed with PTSD due to military sexual trauma (MST). 10 U.S.C. § 1553(d)(1)(A and B).

Composition of the Boards

Board for Correction of Military/Naval Records

- At least three civilian members of the respective military service branch who are appointed by the Secretary of the Department.
- BCMR must request “advisory opinions” from others, such as a psychologist, to provide opinions on mental health issues.
- Ex. In your opinion, was GI Joe likely suffering from PTSD while in the Army?

Powers of the Boards

Discharge Review Boards

- Upgrade a Vet's characterization of discharge
 - CANNOT upgrade if the discharge was the result of a *General Court-Martial* conviction
- Change a Vet's narrative reason for separation.
- **A DRB cannot:**
 - Change re-enlistment codes only
 - Reinstate a person into the service
 - Issue an applicant a less favorable discharge than that issued at the time of separation

Powers of the Boards

Board for Correction of Military/Navy Records

- Upgrade a Vet's characterization of discharge
 - Even if given at a General Court-Martial
- Change the narrative reason for separation
- Medically retire a Vet
- Change re-enlistment codes
- Reinstate someone into the service.
- **A BCMR cannot:**
 - Issue an applicant a less favorable discharge than issued at the time of separation.

Types of Review at a DRB

Two Types of Review Available:

1. Records Review:

- Involves a review of the applicant's application; military records; and documentation submitted by the applicant, including statements, relevant evidence, and possibly brief or letter with argument in support of the application.
- DRB will have the Vet's OMPF and some service medical records.
- Burden of proof is on the applicant.

Types of Review at a DRB

Two Types of Review Available:

2. Personal Appearance Hearing:

- Formal rules of evidence do not apply.
- Applicants may make sworn or unsworn statements and introduce witnesses, documents, or other info.



Types of Review at a DRB

Two Types of Review Available:

2. Personal Appearance Hearing (cont.)
 - Non-adversarial proceeding (there is no trial counsel or prosecutor presenting evidence against the applicant).
- Hearing Chronology:
 - Opening statement;
 - Applicant's statement/Direct examination;
 - Questions from Board;
 - Non-adversarial, but Board members may ask direct questions when applicant or witness make sworn statements.
 - Character witness statements; and
 - Closing statement

Types of Review at a DRB

- An applicant may either:
 - a) Initially request a records review and later request a personal hearing (if still w/in 15 years)
 - b) Initially request a personal hearing
- DRB will not perform a records review if a Vet has already been granted a personal hearing
- Presumption of administrative regularity applies

Types of Review at a BCMR

Two Types of Review Available:

1. Records Review

- Involves a review of the applicant's application; military records; and documentation submitted by the applicant, including statements, evidence, and legal brief.
- BCMR will have the Vet's OMPF and some service medical records.
- Burden of proof is on the applicant.

Types of Review at a BCMR

Two Types of Review Available:

2. Personal Appearance Hearing (very rarely, if ever, granted):

- Unlike at DRB, applicants do not have a right to a hearing
- In practice, BCMRs almost never grant hearings
- Formal rules of evidence do not apply
- Applicants may make sworn or unsworn statements and introduce witnesses, documents, or other info

Types of Review at a BCMR

Reconsiderations:

- “Any request for reconsideration...shall be reconsidered...if supported by materials not previously presented to or considered by the board.” 10 U.S.C. § 1552(a)(3)(D).
- There is no time limit for filing a request for reconsideration.

Choosing a Forum

- To determine which board is appropriate to apply to, advocates must consider:
 1. when Vet was discharged
 - DRB applications must be filed w/in 15 yrs of discharge
 2. what Vet would like the board to do
 - BCMRs are the only boards that can review discharges from General Court-Martials or grant medical retirements
 3. whether Vet has exhausted administrative remedies
 - If Vet has the option to apply to DRB or BCMR, Vet must first apply to the DRB at least once

Hypo #1

- GI Joe served in the Army during the Vietnam War and was discharged with a Bad Conduct Discharge in 1970.
- He was convicted at a Special Court-Martial of violating the UCMJ Art 112a for use of marijuana.
- He has never applied for an upgrade before.
- He believes he has PTSD due to his service in Vietnam.

Survey #1

- Which Board should GI Joe apply to?
 - a) Army DRB
 - b) Army BCMR
 - c) Either

Answer: B

- GI Joe must apply to the Army BCMR
- He was discharged 50 years ago, so he is unable to apply to the Army DRB, because the time limit has expired.
- He will have to apply to the ABCMR and ask the ABCMR to waive the 3-year statute of limitations in the interests of justice

Hypo #2

- Sailor Sam served in the Navy until he was discharged in 2012 with an Other Than Honorable characterization of service.
- He applied to the Naval DRB in 2013, but was denied after a records review.

Survey #2

- Which Board should he apply to?
 - a) Naval DRB
 - b) BCNR
 - c) Either

Answer: C

- Sam can apply to either board.
- He was discharged less than 15 years ago, so he could apply to the NDRB, as long as he requests a personal appearance hearing.
- If he cannot afford to travel to the DC area or does not want a hearing, he could apply to the BCNR.
 - By having the records review at the DRB, he is deemed to have exhausted his administrative remedies, and can apply to the BCNR.

Hypo #3

- Jane is an Air Force Vet who was discharged in 2009 and received a General Discharge.
- You review her military and medical records, and believe she should have received a medical retirement from the Air Force.

Survey #3

- Which Board should she apply to?
 - a) Air Force DRB
 - b) Air Force BCMR
 - c) Either

Answer: B

- Jane must apply to the Air Force BCMR.
- At first glance, we might think she should apply to the Air Force DRB
 - She was discharged less than 15 years ago.
 - DRBs can also upgrade a General discharge to Honorable.
- However, a DRB cannot grant a medical retirement. She must apply to the AFBCMR if she wishes to obtain a medical retirement.

Legal Standards

- Boards are authorized to grant discharge upgrades on the basis of either procedural errors or inequities. **Clemency** is required to upgrade a discharge that was a sentence of a Special or General Court-Martial.

	DRB	BCMR
Inequity	“Equity”	“Injustice”
Procedural errors	“Propriety”	“Error”
Relief from Sentence of a Special or General Court-Martial	Clemency	Clemency
Regulations	10 U.S.C. § 1553 32 C.F.R. § 70.9	10 U.S.C. § 1552

Error & Propriety

- **Propriety** [DODI 1332.28, E4.2; 32 C.F.R. § 70.9(b)]
 - Involves whether or not the service branch properly followed its own rules and regulations for the discharge;
 - A prejudicial error of fact, procedure, or discretion occurred during the discharge; or
 - A retroactive change in policy is enacted.

Injustice & Equity

- **Equity** [DODI 1332.28, E4.3; 32 C.F.R. § 70.9(c)]
 - Current discharge policies are materially different than those that led to discharge
 - Substantial doubt that applicant would have received same discharge under current policies.
 - Discharge was inconsistent with disciplinary standards at the time
 - Quality of service and capability to serve
 - i.e. service history, awards, commendations, deployments, family and personal problems

Clemency

Clemency [10 U.S.C. §§ 1552(f)(2), 1553(a)]:

- Standard if discharge was result of Special or General Court-Martial sentence
- No strict definition
- Does the veteran deserve a second chance?

DoD Supplemental Guidance

- Beyond statutes and regulations, DoD has released “Supplemental Guidance” to assist boards in making determinations.
 - Try to help clarify standards and result in more equal outcomes for veterans.
- Current DoD Guidance:
 - DADT Stanly Memo (Sept 2011)
 - Hagel Memo (Sept 2014)
 - Carson Memo (Feb 2016)
 - Kurta Memo (Aug 2017)
 - Wilkie Memo (July 2018)

Preparing a Successful Application

Successful Application

- Step 1: Get Records
- Step 2: Research
- Step 3: Develop strong evidence and argument
- Step 4: Submit your application packet



Requesting Records

Should always request the veteran's:

- **Official Military Personnel File (OMPF);**
 - Request using SF-180
 - 3-6 months or longer to receive
- **Service Treatment Records (STRs); and**
 - Request using SF-180
 - 2-5 months or longer to receive
- **VA Claims File (if applicable)**
 - Request using Privacy Act Waiver
 - 8-12 months or longer to receive

Requesting Records

OMPF Contents	VA Claims File Contents
<ul style="list-style-type: none">• DD-214• Enlistment Contracts• Chronological Record of Service• Performance Evaluations• Disciplinary Records• Separation Packet	<ul style="list-style-type: none">• Any claims Vet made to VA• Rating Decisions• STRs (usually)• VA treatment records related to claims

Requesting Records

- In 1973, there was a fire at the National Personnel Records Center that destroyed many OMPFs.
- Request records from a variety of sources and work with Vet to obtain records from any civilian providers.



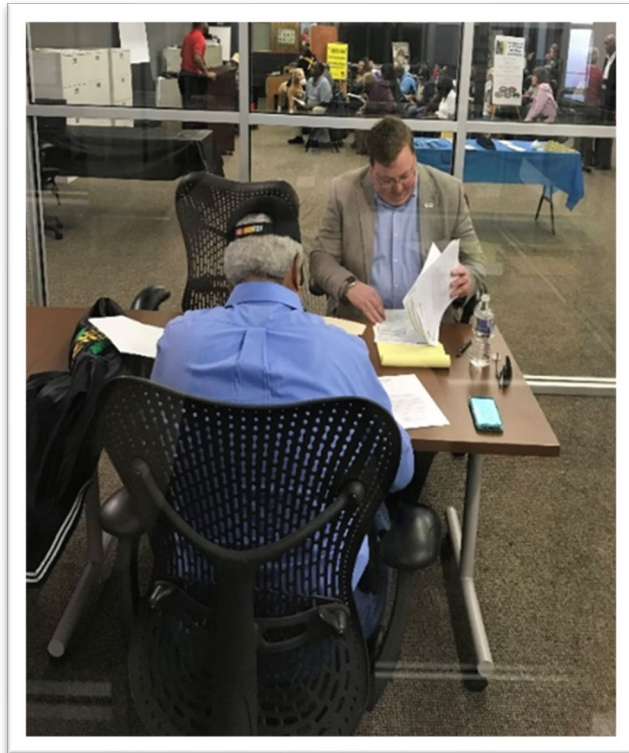
Researching

- View prior board decisions
 - Boards of Review Reading Rooms: www.boards.law.af.mil
 - Some decisions can be found on Lexis
- “Stare Decisis”
 - “agency must adhere to its precedents in adjudicating cases before it.”
 - “the need to consider relevant precedent becomes especially acute when a plaintiff has pointed to a specific prior decision as very similar to his own situation.”
 - *Wilhelmus v. Geren*, 796 F.Supp.2d 157 (D.D.C. 2011)
 - Unlike DRB

Researching

- Get copies of administrative separation regulations that were in place at the time of discharge and current versions.
 - Make sure the military followed the regulations then
 - Compare and see if service members have better protections now!

Mental Health Conditions & Traumatic Brain Injury (TBI)



- Boards must give “liberal consideration” to applications involving:
 - PTSD
 - TBI
 - Other Mental Health Conditions
- Guidance is relatively new
 - Hagel Memo (Sept. 2014)
 - Carson Memo (Feb. 2016)
 - Kurta Memo (Aug. 2017)

Hagel Memo

- Directs BCMR/BCNRs to liberally consider applications of Vietnam Vets who allege PTSD.
- Time limits will be liberally waived.
- Liberal consideration where STRs document one or more symptoms of PTSD.

Hagel Memo

- Special consideration given to VA diagnoses of PTSD or PTSD symptoms.
- Liberal consideration given to civilian provider diagnoses of PTSD.
- PTSD as a potentially mitigating factor when it can be reasonably determined that PTSD or PTSD-related conditions existed at the time of discharge.

Carson Memo

- Time limits and statute of limitations are waived if they would normally bar consideration of the case by the BCMR/BCNR
- Specified TBI as a PTSD-related condition
- Clarified BCMR/BCNR will grant de novo reviews utilizing Hagel Memo for applications previously considered by DRB or BCMR without benefit of guidance.

Kurta Memo

- Expands Hagel and Carson memos to include all mental health conditions, sexual assault, and sexual harassment.
- Extends Hagel and Carson standards to DRBs and BCMR/BCNRs and to **all** discharges, not just OTH.
- Guidance applies to characterization of service, narrative reason for separation, separation code, and re-enlistment code.

Kurta Memo

- “Liberal consideration” given to applications based on PTSD, TBI, other mental health conditions, MST
- Requests for discharge relief typically involve four questions:
 1. Did Vet have a condition or experience that may excuse or mitigate the discharge?
 2. Did that condition exist/experience occur during military service?
 3. Does that condition or experience actually excuse or mitigate the discharge?
 4. Does that condition or experience outweigh the discharge?

Kurta Memo

- Recognizes that an honorable discharge does not require flawless service
- Severity of misconduct changes over time
- Emphasizes that mental illness inherently affects behavior and choices
- Misconduct itself may be evidence of a mental health condition or behavior consistent sexual assault or harassment

Impact of a PTSD Diagnosis

- Study by Yale Law School Veterans Legal Clinic of recent PTSD-based discharge upgrade claims at the ABCMR:
 - 67% of applications granted where applicant had PTSD diagnosis
 - 0% of applications granted where no medical records establishing diagnosis were submitted



Military Sexual Trauma (MST)

- Correction Boards have been instructed to consider MST (sexual harassment, sexual assault, rape, etc.) as a mitigating factor.
- Recognition from the DoD that even if the experience was not reported, liberal consideration should still be applied.
- Correction Boards do not have to find that MST actually occurred to grant liberal consideration.
- Vet's testimony alone may establish that the experience occurred.

Don't Ask, Don't Tell

- **1993:** DADT policy is introduced. Barred openly gay, lesbian, or bisexual persons from military service.
- **2011:** Officially repealed, allowing LGBTQ service members to openly serve.
- **2011:** DoD guidance directs the Boards to grant requests to change narrative reasons for separation, characterization of discharge, and re-entry codes where:
 - (1) Original discharge was based solely on DADT or a similar policy in place prior to DADT

AND

 - (2) No aggravating factors (i.e. misconduct).

Personality Disorders

- SM who is diagnosed with a “personality disorder” can be administratively separated from the military without benefits.
- Reports have found that some SMs actually suffering from PTSD, TBI, or some other mental health condition were wrongfully discharged for a personality disorder



Post-Service Conduct

- Wilkie Memo (July 2018)
 - Covers all applications based on equity, injustice, or clemency
 - “It is consistent with military custom and practice to honor sacrifices and achievements, to punish only to the extent necessary, to rehabilitate to the greatest extent possible, and to favor second chances in situations in which individuals have paid for their misdeeds.”

Post-Service Conduct

- Evidence in support of relief may come from sources other than a Vet's service record.
- Vet or SM's sworn testimony alone, oral or written, may establish the existence of a fact supportive of relief.
- “Relief is generally more appropriate for nonviolent offenses than for violent offenses.”
- “The relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct in the case of the mitigating evidence in a case. For example, marijuana use is still unlawful in the military, but it is now legal under state law in some states and it may be viewed, in the context of mitigating evidence, as less severe today than it was decades ago.”

Application Package

- In general, a discharge upgrade application will include:

1) Application Form

- DRBs use DD Form 293
- BCMRs use DD Form 149

2) Cover Letter

3) Written Brief/Letter

4) Supporting Evidence

APPLICATION FOR THE REVIEW OF DISCHARGE FROM THE ARMED FORCES OF THE UNITED STATES <small>(Please read Privacy Act Statement and instructions on Pages 3 and 4 BEFORE completing this application.)</small>		OMB No. 0704-0004 OMB approval expires Dec 31, 2017
<small>The public reporting burden for the collection of information, 0704-0004, is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and reviewing the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Project Director, Paperwork Project, Washington, DC 20503-2975. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.</small> RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON BACK OF THIS PAGE.		
1. APPLICANT DATA (The person whose discharge is to be reviewed). PLEASE PRINT OR TYPE INFORMATION.		
a. BRANCH OF SERVICE (X one): <input type="checkbox"/> ARMY <input type="checkbox"/> MARINE CORPS <input type="checkbox"/> NAVY <input type="checkbox"/> AIR FORCE <input type="checkbox"/> COAST GUARD b. NAME (Last, First, Middle Initial) _____ c. GRADE/RANK AT DISCHARGE _____ d. SOCIAL SECURITY NUMBER _____		
e. CURRENT MAILING ADDRESS OF APPLICANT OR PERSON NAMED IN ITEM 11 (Forward notification of any change in address.) _____ f. TELEPHONE NUMBER (Include Area Code) _____ g. E-MAIL _____ h. FAX NUMBER (Include Area Code) _____		
2. DATE OF DISCHARGE OR SEPARATION (YYYYMMDD) (If date is more than 16 years ago, submit a DD Form 149)	4. DISCHARGE CHARACTERIZATION RECEIVED (X one) <input type="checkbox"/> HONORABLE <input type="checkbox"/> GENERAL/UNDER HONORABLE CONDITIONS <input type="checkbox"/> UNDER OTHER THAN HONORABLE CONDITIONS <input type="checkbox"/> BAD CONDUCT (Special Court-Martial only) <input type="checkbox"/> UNCHARACTERIZED <input type="checkbox"/> OTHER (Explain) _____	5. BOARD ACTION REQUESTED (X all that apply) <input type="checkbox"/> CHANGE TO HONORABLE <input type="checkbox"/> CHANGE TO GENERAL/UNDER HONORABLE CONDITIONS <input type="checkbox"/> CHANGE TO UNCHARACTERIZED (Not applicable to Air Force or service members with over 6 months of service) <input type="checkbox"/> CHANGE NARRATIVE REASON FOR SEPARATION: _____
3. UNIT AND LOCATION AT DISCHARGE OR SEPARATION _____		
6. ISSUES: WHY AN UPGRADE OR CHANGE IS REQUESTED AND JUSTIFICATION FOR THE REQUEST (Continue in Item 13. See instructions on Page 3.)		
7. (X if applicable) AN APPLICATION WAS PREVIOUSLY SUBMITTED ON (YYYYMMDD) AND THIS FORM IS SUBMITTED TO ADD ADDITIONAL ISSUES, JUSTIFICATION, OR EVIDENCE.		
8. IN SUPPORT OF THIS APPLICATION, THE FOLLOWING ATTACHED DOCUMENTS ARE SUBMITTED AS EVIDENCE: (Continue in Item 14. If military documents or medical records are relevant to your case, please send copies.)		
3. TYPE OF REVIEW REQUESTED (X one) <input type="checkbox"/> CONDUCT A RECORD REVIEW OF MY DISCHARGE BASED ON MY MILITARY PERSONNEL FILE AND ANY ADDITIONAL DOCUMENTATION SUBMITTED BY ME. <input type="checkbox"/> I AND/OR (counsel/representative) WILL NOT APPEAR BEFORE THE BOARD. <input type="checkbox"/> I AND/OR (counsel/representative) WISH TO APPEAR AT A HEARING AT NO EXPENSE TO THE GOVERNMENT BEFORE THE BOARD IN THE WASHINGTON, D.C. METROPOLITAN AREA. <input type="checkbox"/> I AND/OR (counsel/representative) WISH TO APPEAR AT A HEARING AT NO EXPENSE TO THE GOVERNMENT BEFORE A TRAVELING PANEL CLOSEST TO (enter city and state) _____ (NOTE: The Naval and Coast Guard Discharge Review Boards do not have traveling panels.)		
10. a. COUNSEL/REPRESENTATIVE (If any) NAME (Last, First, Middle Initial) AND ADDRESS (See item 10 of the instructions about counsel/representative.) _____		b. TELEPHONE NUMBER (Include Area Code) _____ c. E-MAIL _____ d. FAX NUMBER (Include Area Code) _____
11. APPLICANT MUST SIGN IN ITEM 12.a. BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name (last) and relationship by marking a box below. <input type="checkbox"/> SPOUSE <input type="checkbox"/> WIDOW <input type="checkbox"/> WIDOWER <input type="checkbox"/> NEXT OF KIN <input type="checkbox"/> LEGAL REPRESENTATIVE <input type="checkbox"/> OTHER (Specify) _____		
12. CERTIFICATION. I make the foregoing statements, as part of my claim, with full knowledge of the penalties involved for willfully making a false statement or claim. (U.S. Code, Title 18, Sections 287 and 1007, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)		CASE NUMBER (Do not write in this space.)
a. SIGNATURE - REQUIRED (Applicant or person in item 11 above)	b. DATE SIGNED - REQUIRED (YYYYMMDD)	

DD FORM 293, AUG 2015

PREVIOUS EDITION IS OBSOLETE.

Page 1 of 4 Pages

Adobe Designer 9.0

Supporting Evidence

- Relevant military records
- Vet's personal statement:
 - Positive aspects of military service
 - Struggles in-service
 - Statement of remorse and taking responsibility
 - Good character post-service
- Character References:
 - Fellow SMs or Vets
 - Family members
 - Employers/Teachers/Members of Community → anyone who can attest to the applicant's work ethic, leadership potential, honesty, good character, standing in community

Supporting Evidence

- Evidence of Mitigating Factors:
 - Medical records → If applicant's medical condition contributed to misconduct
 - Police reports if nothing negative
- Post-Service Good Conduct:
 - Family events → Marriage certificate, birth certificates of children
 - Education → transcripts/diplomas
 - Proof of rehabilitation → clean criminal record since service

Options After a Denial

Appeals to Federal Court

- If denied at BCMR or DRB, Vet can sometimes file a complaint in federal district court:
 - Bring suit under the Administrative Procedure Act
 - Court must “hold unlawful and set aside agency action, findings, and conclusions” found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. 706(2)(A)
 - Six year statute of limitations, running from date of denial from reviewing board

NDAA for FY 2020

- Congress passed law requiring the Secretary of Defense to establish a board of discharge appeals to hear appeals of requests for upgraded discharges and dismissals that had been denied by the service review agencies
- Has not yet been established
- Presumably would be an extra place for Vets to go if denied at DRB or BCMR
- Unclear how this will impact ability to file in federal court

VA Character of Discharge Determinations

VA Character of Discharge (COD) Determinations

- Is the Vet's service "honorable for VA purposes?"
- Separate from DRB and BCMR
- Can apply simultaneously for an upgrade and a VA Character of Discharge determination.



COD Det. is Not an Upgrade

- A favorable COD determination is not a true upgrade:
 - Only changes a Vet's status in the eyes of VA; status at the DoD remains unchanged
 - Vet's characterization of service (and their DD-214) will NOT be changed.
- Getting a favorable COD determination can be helpful to a discharge upgrade application.
 - Can result in Vet receiving VA benefits and healthcare, possibly giving Vet a needed mental health dx
 - Favorable COD determination is persuasive evidence to a DoD Board

VA Character of Discharge Determinations



- Vet found to have honorable COD for VA purposes will be eligible for VA comp, pension, housing programs, and all forms of healthcare
- Only a DoD discharge upgrade restores eligibility for G.I. Bill education benefits, which are administered by VA
- Discharge upgrade from the BCMR/BCNR and DRB is binding on VA

VA Character of Discharge Determinations

- Application for VA disability comp or pension should trigger a COD determination
 - No separate form or application necessary
 - VA will review facts and circumstances of service

Statutory Bars

38 U.S.C. § 5303

- The circumstances below may be considered a bar to VA benefits unless it is determined that the person was **insane** at the time of committing the offense. A favorable decision by the DRB or BCMR to upgrade a discharge may clear this bar to benefits.
 1. Discharge or dismissal issued by a general court-martial
 2. Discharge was because the SM was a conscientious objector who refused to perform military duty, wear the uniform, or comply with military authorities

Statutory Bars

38 U.S.C. § 5303

3. Resignation by an Officer for the good of the service
4. Discharged as a deserter
5. Discharged due alienage during a period of hostilities

Statutory Bars

38 U.S.C. § 5303

6. Discharged as a result of being AWOL for a continuous period of 180 days.
 - This bar **does not** apply if VA determines that there are “**compelling circumstances**” to warrant the prolonged unauthorized absence.
 - In considering whether there are compelling circumstances, VA must consider the reasons for the unauthorized absence, length and character of service prior to the period of unauthorized absence, or there is a valid legal defense that would have precluded the conviction for AWOL.

Regulatory Bars

38 C.F.R. § 3.12(d)

- A discharge under the circumstances below is considered “dishonorable” for VA purposes; however, this can be overcome by a favorable VA COD determination, a favorable decision from the DRB or BCMR, or by demonstrating that the Vet was “insane” at the time of the offense:
 1. Acceptance of an undesirable discharge to avoid trial by court-martial
 2. Mutiny or spying

Regulatory Bars

38 C.F.R. § 3.12(d)

3. An offense involving moral turpitude, generally meaning a felony conviction
4. Willful and persistent misconduct, applies specifically to discharge under other than honorable conditions. A discharge for a minor offense will not be considered willful and persistent misconduct when service was otherwise honest, faithful, and meritorious

Regulatory Bars

38 C.F.R. § 3.12(d)

5. Homosexual acts involving aggravating circumstances or other factors affecting performance of military duties.
 - This provision may be amended under VA's Proposed Rule to revise 38 C.F.R. § 3.12(d).

Proposed Changes for COD Determinations

- On July 20, 2020, VA issued a Proposed Rule to amend the regulation regarding regulatory bars to VA benefits, 38 C.F.R. § 3.12(d).
- The proposed changes impact the provisions regarding accepting a discharge in lieu of trial by court-martial and the bar for “homosexual acts involving aggravated circumstances.”
- The proposed changes would also revise the definition for “moral turpitude,” provide additional details regarding what is “willful and persistent misconduct,” and include a list of “compelling circumstances” that must be considered as potentially mitigating misconduct.

The Insanity Exception

38 C.F.R. §§ 3.12 and 3.354(a)

- A Vet may overcome a statutory or regulatory bar to VA benefits if it is determined that at the time of the offense leading to the discharge, the Vet was “insane”
- The insanity must have existed at the time of the offense, and does not have to be causally connected to the misconduct. In other words, a Vet does not have to establish that their insanity caused them to commit the misconduct.

The Insanity Exception

38 C.F.R. § 3.354(a)

VA defines an insane person as:

- one who, while not mentally defective or constitutionally psychopathic ... exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.

Multiple Periods of Service

- In some cases, a Vet may have multiple periods of service or enlistments that ended with a separation and characterization of discharge.
- This may make the Vet eligible for VA benefits if a prior period of service culminated with a discharge that was either Honorable or General under Honorable Conditions.

Tips for COD Determinations

- Evidence considered by VA:
 - Legal brief/letter or evidence provided by Vet
 - Vet's personal statement
 - Supporting statements from friends, family members, etc.
 - Medical opinions/treatment records
 - When arguing not willful and/or insanity
 - Service Records – VA has a duty to obtain a Vet's STRs and official military personnel file

Our Contact Info for Free Legal Services

Website:

<https://www.nvlsp.org/what-we-do/lawyers-serving-warriors/>

Phone:

202.265.8305, ext. 152

E-mail:

info@nvlsp.org



QUESTIONS



Upcoming VSO Webinars

Date	Webinar	Presenter
October 28 or 29	Special Monthly Compensation: How to Ensure Veterans are Properly Compensated for Loss of Quality of Life Due to Service-Connected Disabilities	<p>Ron Abrams</p> 
December 1 or 2	Assisting Survivors with Claims for VA Benefits Associated with Military Sexual Trauma	<p>Mary Edokpayi</p> 

Library of Past Webinars

- Previous NVLSP webinars are available [here](#)
 - Webinars are available for 72 hours after purchase
- Previous webinar topics include:
 - The New VA Appeals System (Appeals Modernization)
 - Modernized Claims and Appeals: Supplemental Claims and Recent Developments
 - New Changes to VA's Non-Service Connected Disability Pension Program
 - VA Benefits for Disabilities Caused by VA Health Care (§ 1151 Claims): The Basics and Important New Developments

NVLSP

VA Benefit Identifier

- **Questionnaire/App:** Helps Vets and VSOs figure out what VA service-connected disability benefits or non-service-connected pension benefits they might be entitled to.
- **3 WAYS to Access:**

[NVLSP Website](#)



NVLSP Training Opportunities

- NVLSP offers private in-person and webinar training tailored to the needs of individual groups.
- If you are interested in finding out more information, please contact our Director of Training and Publications, Rick Spataro, **richard@nvlsp.org**