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## Top Ten Practice Tips for Discharge Upgrades

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# Top Ten Practice Tips for Discharge Upgrades

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The willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional to how they perceive the Veterans of earlier wars were treated and appreciated by their nation.

President George Washington

## I. Introduction

160. Before deploying to Iraq, John Doe was an exemplary Marine, receiving the highest score in his marksmanship training. In Iraq, one of his responsibilities was guarding the perimeter of the Marines' camp from the nearby Iraqi village. It was known that Iraqi village children were sometimes asked to approach the perimeter between the Iraqi village and the Marines' camp to set off improvised explosive devices ("IED") concealed under their clothing. John was forced to hold his weapon pointed at children in case they came too close to the Marines' camp. One day, a teenager came too close. One

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of John's fellow Marines warned the teenager to retreat, but the teenager disregarded the warnings and came closer. The fellow Marine was forced to shoot the teenager, and the teenager, severely injured, was found to be carrying a concealed un-detonated IED. John was traumatized. Later that week, when doing patrols, his squadron came upon another Marine squadron that had walked up to an IED that had detonated, killing and mutilating several fellow Marines, further traumatizing John.

161. Before deployment, John was goal-oriented, upbeat, and focused on serving his country. Deployment left him agitated and on-edge. He slept only one or two hours a night. When he did fall asleep, he experienced violent dreams in which he re-lived the traumatic experiences he had endured in Iraq. Though undiagnosed, he suffered from Post Traumatic Stress Disorder ("PTSD"), and began self-medicating his symptoms with marijuana. A few months later, after he returned from Iraq, he tested positive for marijuana use, and was administratively discharged with a Less Than Honorable Discharge. Now, after discharge, he cannot find a job. No one seems to want to hire a Marine who received a Less Than Honorable Discharge. Although The Department of Veteran Affairs ("VA") has revised its policies, John does not have access to healthcare or other benefits, so his PTSD remains untreated.<sup>4</sup> He rarely leaves his mother's home and does not spend time with friends or family. Rather, he is withdrawn, isolated, anxious, and self-loathing. He longs to once again feel the pride and camaraderie he experienced in the Marine Corps.

162. Adam Smith was drafted into the Army and ordered to deploy to Vietnam when he was eighteen years old. In Vietnam, he was an infantryman. Late one evening in Vietnam, he was assigned to guard the area where his fellow soldiers slept. He desperately needed to go to the bathroom, so he walked away from his post to relieve himself, in the brush, away from the location he was supposed to be guarding. He sat down and fell asleep for a brief while. Suddenly, he awoke and walked back to his post. But, the area he should have been guarding had been ambushed. He found nine fellow soldiers, all of whom had been sleeping, killed. His commander ordered him to collect and bag his fellow soldiers' body parts, including decapitated heads. The horrendous experience left him with severe PTSD. Heroin was Less Than Honorable Discharge that deprived him of access to VA services and benefits. At the time, the PTSD diagnosis did not exist. He received no mental health diagnosis or treatment, despite suffering from severe PTSD symptoms. Instead, he continued to self-medicate with heroin and he became homeless. Before deploying to Vietnam, Adam was an honor student, the captain of his high school basketball team, and an Eagle Scout. He was a lighthearted, fun-loving young man who did not drink or smoke. After Vietnam, Adam struggled with substances and was unable to cope with everyday life.

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4 [38 C.F.R. 17.34](#).

163. Although John and Adam served in different generations, both suffered war-related trauma which caused PTSD. From different generations, these service members both suffered war-related trauma causing PTSD. They both self-medicated with drugs. When their drug use was revealed, both service members received Less Than Honorable Discharges, depriving them of VA healthcare, disability compensation, educational benefits, and housing benefits. Moreover, with Less Than Honorable Discharges, they could not find jobs. When they disclosed their Less Than Honorable Discharges, employers were uninterested. Their Less Than Honorable Discharges also deprived them of the hiring preference for state and federal government jobs that honorably discharged veterans enjoy. Finally, and probably most importantly, these gentlemen, who put their lives on the line for their country, suffered humiliation, having been stripped of the pride they felt as service members. The VA does not recognize them as veterans.

164. One of the most impactful ways attorneys can serve those who have served is to assist veterans with discharge upgrades. The military branches, especially the Marines, are issuing an increasing percentage of Other Than Honorable Discharges, leaving many veterans in need of this assistance. For years, the U.S. Department of Defense (“DoD”) issued Less Than Honorable Discharges based on the veteran’s diagnosis of a personality disorder, a condition that cannot be service-connected for VA purposes. Instead, many of these service members suffered from service-connected PTSD which caused misconduct such as self-medication with drugs, or missing or showing up late for work. Since the PTSD diagnosis did not exist until 1980,<sup>5</sup> veterans like Adam Smith who suffered from undiagnosed, combat-induced PTSD were harshly punished for self-medicating their PTSD symptoms with alcohol and drugs.

165. This article provides attorneys the following discharge upgrade practice tips as well as citations and links to helpful training materials. The following is a step-by-step process that will assist attorneys with the process of advocating for a discharge upgrade:

1. Identify the deadline and audience, and request records as soon as possible;
2. Screen cases, consult The Veterans Consortium Pro Bono Program,<sup>6</sup> use the DoD’s recommended framework for the brief, and carefully request relief;
3. Listen to the client’s story, understand the client’s goals, and set realistic client expectations;
4. Assist the client in preparing a personal statement;
5. Assist material witnesses in preparing statements;
6. Consider the VA character of discharge option;

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<sup>5</sup> DSM-III-R (1987).

<sup>6</sup> The Veterans Consortium Pro Bono Program, [Welcome to The Veterans Consortium](#).

7. Do not give up, and preserve opportunities to advocate;
8. Prepare for and rebut medical advisory opinions;
9. Adopt this article's recommended strategies for personal appearance hearings, and evaluate whether to request a hearing; and
10. Be patient, persistent, respectful, and flexible.

166. These tips primarily address cases in which the client received a Less Than Honorable Discharge for conduct related to a service-connected mental health condition. However, there are other types of discharge upgrades that this article does not explore, such as when veterans inequitably or inappropriately received Less Than Honorable Discharges because of sexual orientation (now based on outdated policies), or a faulty adjudicative process that violated DoD policies.

## **II. Identify the Deadline, Audience, and Request Records As Soon As Possible**

167. First, identify the deadline and the audience. After your application is complete, determine whether to file a petition with the client's service Discharge Review Board ("DRB") or Board for Correction of Military Records ("BCMR"). Each service branch has both of these Boards, which have been established by Congress and operate pursuant to DoD standards. Since the statutory filing period is different for each Board, this should be considered when deciding which Board to petition. The DRB's deadline to file is fifteen years from the date of discharge. The BCMR's deadline to file is three years within discovery of the "error or injustice," but is liberally waived in the interest of justice, especially when the client's application is compelling. If a veteran misses the DRB deadline, the matter will be referred to the appropriate BCMR. If the client is eligible for DRB review, the BCMR will recommend the client to apply to the DRB first. These Boards are generally comprised of officers, so keep your audience in mind when formulating your arguments. Make sure that the petition conveys the strength of your client's character. your client's overall character matters.

168. Next, it is important to obtain the client's military service records and review them before filing the petition. Board members will have access to the client's service records and will review them, so it is important to ensure that the petition does not contradict, but instead explains, the service records. Request such military records using the SF-180 form but, be careful where you send the form. There are different addresses according to the branch and date of discharge as well as the type of record requested. Personnel and medical records may be held at different facilities, and in that instance, two separate requests must be completed. When requesting personnel records, request the

DD-214 and check the “other” box and request a “full and complete personnel file.” To request medical records, check the “medical records” box and request “full and complete medical records, to include rehabilitation and psychiatric records.” If you are requesting more recent Army records, it is more expedient for the client to request the personnel records online. the client must sign the SF-180, but also include a Power of Attorney with a Privacy Act waiver, requesting that the records be sent to you.

169. As soon as practicable, ask your client to identify all private mental health providers who may have treatment records concerning any mental health conditions that your client suffered at the time of the misconduct that led to discharge. Do this even if that mental health condition was not yet treated or diagnosed at the time of the misconduct. Obtain a general release from the client so that you can obtain all of these private treatment records. Carefully review the private treatment records, because you may not need to submit all of them with the petition. Avoid overwhelming the Boards. Rather, select key, impactful treatment records that tend to illustrate that the client was likely suffering from a mental health condition at the time of the misconduct leading to the discharge.

170. If your client has received a favorable character of discharge determination from the VA, as soon as practicable, request the client execute VA form 21-22, a Power of Attorney, to allow you to obtain all VA mental health treatment records as well as the VA claims file if the client has filed for disability compensation. Please note that a favorable character of discharge issued by the VA does not alter the Less Than Honorable Discharge received by the client. The favorable character of discharge determination only permits the client to obtain some VA benefits. Favorable character of discharge determinations issued by the VA will be further discussed. Although the VA provides treatment records in a relatively timely fashion, the VA can take over a year to provide the entire claims file. To expedite the process of obtaining VA mental health treatment records, the client can physically retrieve the records by traveling to the VA hospitals where the client received treatment. As to the claims file, for veterans who have obtained a favorable VA character of discharge, it is best to file adjudicative decisions and other documents from the VA claims file evidencing mental health conditions that are service-connected with the petition. However, due to burdensome VA delays, it may not be wise to delay submitting the petition for receipt for the entire claims file. Instead, immediately request the entire claims file, but while you wait, telephone the VA and ask for the VA to facsimile all notification letters. These notification letters will describe the VA's decision as to the client's claims for disability compensation for service-connected conditions and will provide the rationale for those decisions. For example, for a veteran who has obtained a favorable VA character of discharge determination and received service-connection for PTSD, you can submit the VA's notification letters, that grant the client service-connection and explain the rationale for the decision with your discharge upgrade application.

171. Also, interview the client to uncover evidence that demonstrates the points you want to prove in your brief. Evidence such as the client's statements created at the time of the important events, such as the in-service trauma or resulting misconduct, is more compelling than similar evidence created long after the pivotal event. Did the client write a diary at the time of the combat related trauma, resulting mental health condition symptoms, or the misconduct that those mental health conditions symptoms caused? Did the client mail letters to family or friends on deployment describing the trauma or resulting mental health symptoms they experienced? These contemporaneous statements from the client are more persuasive than statements crafted long after these pivotal events. Finally, collect any awards or commendations from service, and documents evidencing accomplishments post discharge, such as a good credit score or a civic award.

### **III. Screen Cases, Consult The Client's Consortium, Adopt DoD Framework for Brief, and Request Relief Carefully**

172. The clients Consortium Discharge Upgrade Program provides pro bono representation to veterans with Other Than Honorable Discharges due to conduct related to mental health conditions. Although the clients Consortium ("TVC") focuses on mental health conditions, the organization is a great resource for tips, consultations, and resources for all types of discharge upgrades. The TVC has a practitioners manual for pro bono attorneys, and it designates a mentor for each pro bono attorney assigned a case through the TVC Pro Bono Program. This mentor is available to answer questions and provide feedback on draft briefs. If you want advice, contact the TVC.

173. Additionally, if you handle a discharge upgrade case through the TVC, the TVC will provide you with sample petitions and forms. For instance, the TVC provides sample forms to assist with preparing your client's personal statement. The TVC is a great support for attorneys handling a pro-bono case.

174. Consult the most up-to-date Office of Secretary of Defense ("OSD") guidance for discharge upgrades for veterans with mental health conditions connected to military service, such as mental health conditions resulting from combat or military sexual trauma ("MST"). Advocate within the framework laid out in this OSD guidance. OSD overhauled the discharge upgrade program for veterans with mental health conditions



in the Hagel,<sup>7</sup> Carson,<sup>8</sup> Kurta and Wilkie Memoranda,<sup>9</sup> to improve how Boards evaluate discharge upgrade petitions based on mental health conditions. Since the medical community did not recognize PTSD until 1980, Vietnam Veterans in particular received Less Than Honorable Discharges as a result of misconduct attributable to undiagnosed PTSD. Under the Hagel and Carson Memoranda, the Boards shall:

1. Give liberal consideration to military records that document symptoms of PTSD in determining whether a veteran had PTSD during service
2. Give liberal consideration to a PTSD diagnosis from a civilian provider
3. Give special consideration to VA diagnosis of service-connected PTSD
4. Consider whether undiagnosed PTSD contributed to misconduct at the time of discharge
5. Liberally waive time limits to consider applications or reconsider prior decisions
6. Give applications that involve PTSD timely consideration
7. Consult DoD mental health professionals to assess a veteran's claim of PTSD

175. The Kurta Memorandum provides clarifying guidance and directs Boards to consider four main questions when assessing upgrade requests that involve mental health related claims:

1. Did the client have a condition or experience that may excuse or mitigate the discharge?
2. Did that condition exist or 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?

176. These four questions form the framework for your client's discharge upgrade application. When preparing your client's petition, answer and address these four questions. Also consider these four questions when determining whether you need additional evidence to support your client's discharge upgrade request. When drafting your client's petition, also consult prior DRB and BCMR decisions. Past DRB and BCMR decisions are available at many state departments of veterans affairs. Locate online decisions

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7 *Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder*, [Secretary of Defense](#) (Sept. 3, 2014).

8 *Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records (BCMRs/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI)*, [Secretary of Defense](#) (Feb. 24, 2016).

9 *Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment*, [Secretary of Defense](#) (Aug. 25, 2017).

from the DRB and BCMR from October 1998 to the present.<sup>10</sup> Review prior decisions granting discharge upgrades under similar circumstances to help strengthen your arguments. Prior BCMR decisions have some precedential effect,<sup>11</sup> so use them to bolster your client's petition.

177. In your brief in support of the petition, carefully articulate the relief requested, both for the narrative reason included on the DD 214 and for the level of discharge. Request an upgrade to honorable and advocate in the brief as to why honorable is justified. In the brief, request a change of the narrative reason for discharge on the DD-214 to a less stigmatizing reason such as disability or secretarial authority. In the alternative, use your brief to request upgrade to General and explain why General is justified. For example, first request a change in the DD-214 narrative reason from "Misconduct" to "Disability," because equity demands "Disability" as the narrative reason due to the client's service-connected mental health condition. In the alternative, request a change of the DD-214 narrative reason from "Misconduct" to "Secretarial Authority." You can also use your brief to request an upgrade to General and explain why General is justified. Research applicable DoD policies to learn how the service defines each character of discharge, and the various narrative reasons for discharge. Then, in your brief, craft arguments applying key language from those DoD policies to the facts of your client's case to persuade the relevant Board to upgrade to the level of discharge and request a change in DD-214 narrative reason to the reason that is more equitable.

## **IV. Listen to Their Story, Understand Their Goals, and Set Realistic Expectations**

178. Before the initial client interview, consult expert guidance on interviewing and counseling clients who have suffered trauma. Less Than Honorable Discharges stigmatize and humiliate, negatively impacting the client's self-image and others' perception of the client. The stories of veterans with Less Than Honorable Discharges are deeply personal, making it challenging for veterans to share their traumatic experiences and misconduct. Veterans' stories and experiences can vary greatly. You may assist a client who was sexually assaulted by a commanding officer and was forced to remain under the abuser's command, or you may represent a veteran suffering from combat-induced PTSD who was self-medicating with illegal drugs and alcohol. Although clients' experiences vary, they involve highly sensitive information. Listen intently and compassionately. Show empathy. Start by asking open-ended questions eliciting non-sensitive information to make the client comfortable. Avoid beginning the initial interview with

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<sup>10</sup> *Boards of Review Reading Rooms*, [Department of Defense \(DoD\)](#); See also *Military Review Boards and Records*, [Army Review Boards Agency](#).

<sup>11</sup> *Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 162 (D.D.C. 2011).

probing questions about sensitive information. Take time to build rapport and earn client trust. Be patient, especially considering that the client may feel discarded by the military.

### ***Review Client's Military Record, and Don't Judge***

179. When you first receive a discharge upgrade case, you should review the client's military record and schedule an initial veteran meeting. Enter the meeting without bias or judgment toward your client. This meeting may be the first time the client is able to tell their story. Do not rush this meeting. Because of the deeply personal nature of their story, the client may take time to share their experiences. The initial veteran meeting may not result in you obtaining all the information you need to represent the client; it may take a series of meetings. Be patient while you earn your client's confidence. Discharge upgrade clients, many of whom may feel discarded by the society they served, may be skeptical about whether you can help them.

### ***Ask Open-Ended Questions***

180. Open-ended questions are the key to unlocking your client's story. While their military records contain part of the picture, learning your client's experiences is essential for preparing an effective and persuasive petition. Open-ended questions empower the client to provide free-form answers, enabling you to elicit vital information. The following questions may provide a wide range of responses:

- How are you?
- Tell me about yourself.
- Why did you enlist in the military?
- What was your experience?
- Describe your title and duties while in the military.
- Tell me about your deployment.
- Tell me about any challenges you encountered while being deployed.
- How did you feel when you returned from deployment?
- Describe the circumstances that led to your discharge.
- How has the discharge affected your life?
- Tell me about your transition to civilian life.
- Tell me about your relationship with your family.
- Tell me about your current employment situation.

- Describe your housing situation.
- Tell me about your hobbies and interests outside of work and family.
- Describe any medical treatment you obtained while in service. Describe any counseling or mental health treatment you obtained while in service.
- Describe any medical treatment you obtained after being discharged.
- Why do you want a discharge upgrade? How would a discharge upgrade improve your life?

181. Do not rush a veteran's answers to open-ended questions. Allow the client sufficient time to develop the answer to enable the client to provide information beneficial to the petition. If you only ask closed-ended questions, which typically require a yes or no answer, you will likely miss vital details and specifics that could strengthen the client's petition. Because of the personal nature of the petition, do not cross-examine your client by citing to the military record. Rather, advise the client that you have reviewed the military record and would like to gain further information or clarification so that you understand the circumstances surrounding the discharge. Again, you may not obtain the whole story in the first appointment. A series of meetings over a period of time may be required for you to elicit all information you need for a persuasive petition.

### ***Explain Procedure and Manage Client Expectations***

182. During the initial veteran meeting, explain the process of gathering necessary information for and drafting the petition. Explain that it often takes several months to obtain military records, VA records, and civilian medical records. VA and civilian medical records are more easily obtained if the client makes the initial request through the VA and other medical providers due to patient confidentiality and privacy concerns. the client can also assist by identifying fellow veterans who may be able to provide a buddy statement. Ask the client to introduce you to the person the client has identified to make a lay statement. Then, work with the witness to create the lay statement, following the recommendations in Tip 5 of this article. the client will need to prepare a personal statement. Explain that you will need to review the client's military records, medical records, any lay statements, the client's personal statement, and any additional information to build a persuasive discharge upgrade petition.

183. During this initial meeting, explore the client's goals and set realistic expectations. Explain to the client that the petition is not the appropriate vehicle to indict the military. Explain that there are no guarantees that the discharge will be upgraded and that it is exceedingly rare for a discharge to be upgraded to fully Honorable. Share with the client recent statistics concerning the client's services rates of success on discharge upgrade petitions. Additionally, many veterans are surprised that it may take as long as eighteen

months for a discharge upgrade petition to be decided. Be upfront with your client from the beginning; doing so helps set expectations and build trust.

## V. Assist in Preparing Personal Statement

184. Your client is your best resource in developing a personal statement in support of the petition. Although potentially overwhelming for the client, writing a personal statement can also prove cathartic and therapeutic. Consider various options for developing the client's personal statement, and, if you deem appropriate, present these options to your client and allow your client to choose their preferred option. For instance, interview your client and prepare a draft statement for your client to review and revise. Alternatively, provide your client with written questions to answer and then draft a personal statement for your client to review and revise. Finally, allow your client to write their story for you to review and revise to make the statement more concise, error-free, and persuasive. Use caution with this last option because one pro bono attorney received a fifty page single-spaced treatise in various fonts that the attorney had to decipher and condense. However, the last option may be optimum, if the client struggles with verbally communicating painful memories because allowing the client to write their story potentially enables the client to convey greater detail about traumatic or embarrassing experiences.

185. Instruct the client to provide concrete examples for their personal statement. To create a compelling petition, the client must be open and honest about traumatic experiences in service, symptoms of mental illness, and circumstances surrounding embarrassing misconduct, such as self-medication, and the ways in which the Less Than Honorable Discharge has impacted the client and the client's loved ones. Additionally, the client should explain reasons for seeking a discharge upgrade. These reasons may include: securing healthcare, housing, or other earned VA benefits; generating employment opportunities; and regaining self-esteem.

186. One of the author's pro bono cases illustrates effective lawyer-client collaboration that created a persuasive personal statement. The initial veteran interview revealed the client's life ambition had always been to serve in the Navy, so he enlisted as soon as he graduated from high school. Fellow sailors severely bullied and hazed the client while they were all serving off the coast of Japan. Traumatic harassment from the fellow sailors caused the client to suffer from anxiety and insomnia. He legitimately feared physical assault. He sought assistance from his commanding officer and the counselor on his ship. Military service records clearly recorded his efforts to seek assistance. But the bullying and hazing only intensified until the client attempted suicide by jumping off an aircraft carrier, hoping the propeller would kill him. After being submerged in water for nearly eight minutes, the client was rescued. Soon thereafter, he received a

Less Than Honorable Discharge from the Navy, having never received a mental health evaluation or treatment. Years after discharge, he was diagnosed with Bipolar Disorder I, Anxiety Disorder, and PTSD.

187. Even though the initial veteran meeting occurred over thirty years after the client's suicide attempt and resulting discharge, these traumatic events defined his life. After discharge, he struggled to find employment and had been homeless for decades. Veteran interviews revealed he was so ashamed of the suicide attempt and resulting discharge, that he did not even notify his treating psychologist. He also harbored anger towards the military for failing to protect him from his harassers and neglecting to provide the mental health services he desperately needed.

188. His personal statement needed to do the following.

1. State his reasons for entering the military: his patriotism and commitment to service.
2. Describe the mental health condition symptoms he experienced in service and the ways in which harassment in the military exacerbated those symptoms.
3. Explain that he reported to his command the harassment and its impact, but there was no response from his command.
4. Describe his mental health treatment history, including the initial date of diagnosis, the lack of mental health assessment or treatment he received in service, and his continued commitment to ongoing treatment.
5. State his goals for seeking a discharge upgrade: to obtain access to VA healthcare, disability compensation, housing, and other benefits to bring stability to his life.
6. Describe his efforts to regain stability after discharge and describe the impact the Less Than Honorable Discharge had on his life.

189. The client needed to include all of these things in his personal statement while avoiding blaming or indicting the military, and while simultaneously illustrating contribution and ownership for his conduct.

190. The personal statement is the primary mechanism to explain the facts surrounding the circumstances of the client's discharge and how the discharge has impacted the client's life. The personal statement can illustrate the client's strong character. Therefore, the client should describe societal contributions post-discharge, including maintaining employment, doing community service, caring for family, participating in religious and civic institutions, maintaining positive credit, and other conduct revealing good citizenship and strong moral character.

191. The personal statement is not the appropriate vehicle for confessing unrelated misconduct about which the client may feel remorse. The client seeks a discharge upgrade based on equity — the client's overall character outweighs the discharge. The personal statement is not the time for revealing unrelated behavior that is also symptomatic of the client's mental health condition, about which the client may feel guilt. Rather, the personal statement allows the client to show ownership of, and contrition for, the specific misconduct that led to discharge, and explain extenuating circumstances. For example, the client's personal statement can illustrate that they experienced service-related mental health condition symptoms that led to misconduct, such as self-medicating PTSD symptoms with illegal drugs.

192. Moreover, although veterans often feel legitimate resentment toward the military, the personal statement should not blame the military or others, such as commanders. Finally, it is important to ensure the personal statement does not contradict other materials in the petition because such inconsistencies undermine the client's credibility with the Board. Carefully review all provided materials such as lay statements, service records, and treatment records to ensure that the client's personal statement does not contradict other information in the application packet. Remember, just because you have collected mental health treatment records from private providers and reviewed them, does not mean that you need to submit all of those records with the application. Feel free to refrain from submitting unnecessary mental health treatment records or other records that may cast the client in a negative light. Remember, these petitions are about character.

## **VI. Assist Material Witnesses in Preparing Statements**

### ***Work with Lay Witnesses***

193. Work with the client to help identify witnesses to create statements in support of the discharge upgrade application. All lay statements should be made under oath and should be signed by the author, and, if possible, signed by a witness, and notarized. Review all statements in draft before they are finalized to allow the advocate to clarify and answer questions. Before contacting lay witnesses, ask the client why the client has identified the person as a potential lay witness and what information the lay witness will likely be able to provide. Consider relieving the client of the emotional strain and time commitment required to work with witnesses. Instead, request that the client provide the contact information for categories of people who may be willing to support the discharge upgrade application. These categories include: family members and friends; people who served in the military with the client; and, community members, colleagues, and employers who can attest to the client's post-service contributions to the community. Advocates should request the client to notify potential lay witnesses to

obtain consent for the advocate to contact the witnesses. Clarify that, if the client prefers to work directly with the witnesses, the client is free to do so. But draft a template for the statement and provide it to the client to give to the witness.

194. Provide templates to witnesses. Do not use one boilerplate template for all witnesses. Instead, after briefly interviewing the witness and the client about the likely content of the witness's statement, craft an individually tailored template for each witness to ensure the witness addresses key information of which the witness is aware. For example, the client may identify a buddy from service as a witness who can describe the client's stellar service before combat trauma, the combat trauma the client experienced, and the client's PTSD symptoms observed after the combat trauma. After receiving the client's permission, contact the buddy and explain why the buddy's lay statement will support the application for a discharge upgrade. Draft and then provide to the witness a template such as:

In the first paragraph, describe how you know (veteran) and for how long. In the second paragraph, describe your observations of (veteran's) service before the combat trauma. Was (veteran) reliable and hard-working? Describe concrete examples of (veteran's) professionalism before the combat trauma. In the third paragraph, describe the combat trauma that caused (veteran's) PTSD and disclose how you know about that trauma. Did (veteran) tell you? Did you experience the same combat trauma? In the fourth paragraph, describe the PTSD symptoms you observed after (veteran) experienced the combat trauma, but preferably before and during the misconduct that led to the discharge. Describe concrete examples. I have provided the VA's and the *Diagnostic and Statistical Manual of Mental Disorders — Fifth Edition* ("DSM-V") description of PTSD symptoms to trigger your memory of symptoms you observed.

195. Statements from people who served with the client potentially provide evidence of the combat trauma or military sexual trauma the client experienced; that the client was professional, effective, and committed in employment and other aspects of life before the trauma; and that the client experienced PTSD symptoms leading up to and during the time of the misconduct leading to the discharge.

196. DRBs primarily consist of military personnel. Keep your audience in mind by providing lay testimony that supports the client's strong moral character. Use lay evidence to illustrate that the client has worked hard after discharge to reestablish himself as a contributing member of society. Seek statements from community members, such as religious leaders from the client's church, mosque, synagogue, or other house of worship, employers, colleagues, friends, and family members who can describe the client's positive contributions to the community since discharge. For example, if the client volunteers at the Humane Society, obtain a statement from the director of that organization



about the client's volunteer service. If the client has participated in a twelve step program, a drug or alcohol abuse treatment program, or other rehabilitative program, obtain a statement from the director of that program attesting to the client's commitment to, and completion of, the program.

197. Friends and family can describe how deployment changed the client and describe symptoms observed of the client's distress that led to the misconduct resulting in a discharge. The following is an example:

Before deployment to Iraq, my son was upbeat, rose early in the morning, and was productive all day. After he returned from deployment, he often stayed in his room, sleeping all day. At night, he struggled to fall and stay asleep. He was constantly anxious and agitated. He could not tolerate crowds. Simple tasks that, before deployment, he completed with ease, like grocery shopping, left him overwhelmed and agitated.

198. Instruct family and friends to address PTSD symptoms in their statements. Lay statements are not the appropriate place to reveal the client's minor misconduct that may leave the Board with a negative impression of the client's moral character. Instead, lay statements should describe how the client changed after the trauma, the impact the trauma had on the client, and the mental health symptoms the witness observed. Provide lay witnesses who will describe PTSD symptoms with the DSM-V description of PTSD and the federal regulation and adjudicative manual VA uses for evaluating PTSD. Consider providing the lay witness a sanitized lay statement describing observed PTSD symptoms prepared in support of another discharge upgrade case, to allow the witness to review an effective lay statement example. If the client suffered from a different or additional mental health condition at the time of the misconduct leading to discharge, do the same for that condition. Instruct lay witnesses to reflect on their observations of the client, especially at the time of the misconduct leading to the discharge, to vividly describe concrete examples of PTSD symptoms they observed.

### ***Engage Medical Experts***

199. If possible, obtain statements from multiple mental health providers in support of the client's petition. Mental health professionals tend to focus on a patient's current conditions and symptoms. Carefully instruct the mental health professional to focus on the patient's condition at the time of the misconduct that led to discharge. Ask the expert to opine as to:

1. Whether the client has a mental health diagnosis;
2. Whether the in-service trauma led to the mental health condition;
3. Whether the diagnosis existed at the time of the misconduct; and
4. Whether the condition would likely have contributed to the misconduct.

200. Consider asking the treating provider to answer these questions. The treating provider can offer persuasive evidence in support of the petition for several reasons. First, the treating provider likely previously diagnosed the client with PTSD or another condition and will be familiar with the client's experiences in service that led to the condition. Second, the treating provider may have witnessed the client's mental health symptoms, especially if the provider treated the client near the time of the conduct that led to the discharge. Treating providers who observed the client's symptoms and conduct at the time of the discharge can provide first-hand evidence about whether the client had the mental health diagnosis at the time of the misconduct and whether the military experience caused or aggravated the mental health condition. However, there are some downsides to an expert statement from the treating provider. Under the Hippocratic Oath, the treating provider can do no harm to the patient. For this reason, the treating provider may be seen as less objective than a forensic expert. The treating provider's primary concern is the welfare of the patient and therefore may feel reluctant or unable to render an objective opinion as to whether the mental health condition led to the misconduct, if that opinion undermines the patient's application.

201. Therefore, also consider approaching a forensic mental health expert. Contact TVC, the clients clinical listserv, or other veterans advocates, to obtain recommendations for forensic experts adept at evaluating patients in connection with discharge upgrade applications. Try to select a forensic expert professionally experienced with the type of trauma your client experienced, as well as the mental health condition with which your client has been diagnosed. Strive to choose a forensic expert who is able to administer a full forensic exam of the client. If that is not possible, retain a forensic expert who can opine based on a thorough records review.

202. Provide the mental health provider a template and:

1. The client's military service records, including those describing the discharge and misconduct leading to the discharge;
2. The client's personal statement;
3. Mental health treatment records;
4. Other evidence supporting the application such as diary entries, letters to family and friends, and lay statements;
5. A clear timeline including entry into service, achievements in service, service-related trauma, misconduct, discharge, and mental health diagnosis; and
6. DoD guidance contained in the Hagel, Carson, Kurta and Wilkie Memoranda.

203. Articulate sample language in the template. In the mental health provider's voice, the statement should:

1. Specify all records reviewed;

2. Disclose whether the opinion was based on a history of treatment of the client, or on an interview or exam of the client;
3. Opine about whether the client likely suffered from a mental health condition at the time of the misconduct;
4. Opine about whether that mental health condition was linked to service;
5. Opine about whether the mental health condition likely contributed to or caused the misconduct leading to discharge; and
6. Disclose the mental health provider's qualifications such as training and experience treating veterans with PTSD.

204. Ask to review the mental health expert's statement before the expert finalizes that statement. Some mental health providers may not be willing to provide the advocate the statement in draft form to avoid the perception that the statement is not objective. Convey that you will honor the expert's protocol. However, explain that your review is not to change the expert's opinion but to ensure that the expert is not mistaken about the factual record.

## VII. Consider Seeking a VA Character of Discharge Determination

205. In addition to petitioning to upgrade the client's discharge with DoD, consider seeking a character of discharge determination from the VA.<sup>12</sup> Not all veterans with Less Than Honorable Discharges are eligible to seek a character of discharge determination from the VA.<sup>13</sup> Veterans with Under Honorable Conditions (General) discharges, or uncharacterized administrative separations characterized as "Entry-Level Separations," need not seek a VA character of discharge determination, unless the discharge documents reveal a separation with reason listed as a VA benefits bar under 38 U.S.C. 5303(a)<sup>14</sup> and 38 CFR 3.12(c).<sup>15</sup> However, veterans with Other Than Honorable, Bad Conduct, or "Uncharacterized" separations categorized as either "Void Enlistment" or "Dropped from the Rolls" can only access VA Benefits if the VA determines that their service was "under conditions other than dishonorable" for VA purposes.<sup>16</sup> Veterans who

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12 See Rose Goldberg, *VA Character of Discharge Determinations CLE*, [University of Montana](#) (Mar. 20–21, 2019).

13 38 U.S.C. §101(2).

14 38 U.S.C. 5303(a).

15 38 CFR 3.12(c).

16 38 U.S.C. 101(2); 38 C.F.R. 3.12(a), (k)(2-3).

have already upgraded their discharges with the DoD need not seek a VA character of discharge determination because DoD discharge upgrades are binding on the VA.<sup>17</sup>

### ***Explore Client's Goals and Clarify Benefits and Limitations of VA Character of Discharge Determination***

206. Seeking a VA character of discharge determination offers potential benefits. First, the VA, not the DoD, processes character of discharge determinations. If the client obtains a favorable outcome, the VA determines the client is Honorable for VA purposes, entitling the client to VA benefits, including disability compensation, pension, and housing. Second, a favorable character of discharge determination from the VA is persuasive evidence that should be submitted to support a DoD discharge upgrade petition. Third, the process for obtaining a VA character of discharge determination is typically more expeditious than the process for obtaining a DoD discharge upgrade. Fourth, there is no statute of limitations for VA character of discharges, and veterans with Less Than Honorable Discharges who qualify can always seek a character of discharge determination from the VA. Fifth, veterans can pursue both options because the DoD process and the VA process do not provide exclusive remedies. Advise eligible veterans to pursue both options. Sixth, in initiating a character of discharge determination, the client typically files a claim for a VA benefit.<sup>18</sup> Finally, the VA must apply the benefit of the doubt doctrine to character of discharge matters just as it does to disability compensation matters.<sup>19</sup> Therefore, if the evidence supporting a favorable character of discharge determination is as persuasive as evidence against a favorable determination, the VA decides in favor of the client.

207. However, the VA character of discharge determination option has limitations that advocates should explain to veterans. The VA's favorable character of discharge determination does not entitle the client to educational benefits such as the G.I. Bill. The VA considers this educational benefit a special award to which only veterans honorably discharged are entitled. Plus, obtaining a favorable character of discharge determination from the VA does not change military records. Therefore, succeeding on a character of discharge determination does not alter the character of service or narrative reason for separation on the DD-214. Civilian employers often inquire about discharge from military service, and the client will still suffer the stigma of a Less Than Honorable Discharge, even after receiving a favorable VA character of discharge determination. Moreover, veterans who receive a favorable character of discharge determination will

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17 See *Veterans Benefits Administration*, [U.S. Department of Veterans Affairs](#); See Rose Goldberg, *VA Character of Discharge Determinations CLE*, [University of Montana](#) (Mar. 20–21, 2019).

18 See Rose Goldberg, *VA Character of Discharge Determinations CLE*, [University of Montana](#) (Mar. 20–21, 2019); see also *Claims for VA Benefits and Character of Discharge*, [U.S. Department of Veterans Affairs](#).

19 [38 U.S.C. §5107](#).

not receive hiring preference awarded only to honorably discharged veterans when they apply for federal and state government employment.

### ***Initiate Process for VA Review of Character of Discharge by Filing Initial Claim***

208. Start by asking the client to execute a Power of Attorney with the VA allowing you to represent the client for the VA character of discharge determination and any VA benefits sought. This VA Form 21-22A will allow you to assist in filling out forms, such as statements in support of the claim, and to obtain status updates.<sup>20</sup> After filing the Power of Attorney, request that the VA forward to you, via facsimile, any VA decisional documents. One of this Article's authors learned this lesson when she represented a client who had received an Other Than Honorable Discharge. To the best of the client's recollection, he had never sought a VA character of discharge determination and had never filed for a VA benefit. The author requested the VA to facimile all VA decisional documents. That same day, the VA faxed a letter, dated only a few years after the client's discharge, indicating the client's discharge was Honorable for VA purposes. the client did not remember receiving the document. The author used that previous favorable character of discharge determination to support the client's DoD discharge upgrade petition, and she filed a claim for disability compensation for the client.

209. There is no designated VA form used to apply for a VA review of a veteran's character of discharge. Instead, to initiate the process the client typically files a claim for a VA benefit.<sup>21</sup> For example, the client may file an initial claim with the VA for disability compensation for service-connected PTSD. This initial claim will trigger a VA character of discharge determination.<sup>22</sup> Moreover, advocate in support of the initial claim by submitting to the VA, key evidence, such as lay statements from the client and material witnesses, private treatment records, and medical evidence supporting a nexus between service and the injury or disease for which the client seeks disability compensation.

### ***Use Character of Discharge Determination Framework and M21-1 Provisions when Preparing Brief***

210. The legal framework governing VA character of discharge determinations differs from the framework governing DoD discharge upgrades. When the VA reviews a character of discharge, the VA "examines the facts and circumstances that surround the Armed

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<sup>20</sup> See [VA Form 21-4138](#); [VA Form 21-22A](#).

<sup>21</sup> See Rose Goldberg, *VA Character of Discharge Determinations CLE*, [University of Montana](#) (Mar. 20–21, 2019).

<sup>22</sup> *Claims for VA Benefits and Character of Discharge*, [U.S. Department of Veterans Affairs](#).

Forces' characterization of service and assesses the statutory and regulatory bars to VA benefits."<sup>23</sup> As explored in depth in this section, in the application for VA review of character of discharge, provide to the VA:

- Available service treatment and personnel records;
- Relevant private treatment records;
- Lay and expert evidence;
- A legal brief; and
- The initial claim form for one or more VA benefits.

211. The VA must evaluate the character of discharge for each period of active duty service.<sup>24</sup> If the client has multiple enlistments, they are entitled to VA benefits for any period of service that is not "dishonorable" for VA purposes. Review the client's service records to determine the timeline, especially when there are multiple enlistments. For example, one of this Article's authors represented a veteran who had multiple enlistments. During one of the enlistments, the veteran suffered trauma that caused PTSD. The enlistment ended in Honorable Discharge and was therefore honorable for VA purposes. However, during the second enlistment, the client self-medicated their PTSD with marijuana, then tested positive for drugs, and received an Other Than Honorable Discharge. The author sought VA review of the client's character of discharge for the second enlistment, arguing that the second enlistment was Honorable for VA purposes because there were no bars to VA benefits. In her brief, the author also argued that the client's PTSD started during the first, Honorable, enlistment, and that the client was entitled to disability compensation, regardless of whether VA determined the second enlistment was Honorable for VA purposes.<sup>25</sup>

212. As of the publication of this Article, the VA has proposed a revised rule governing character of discharge determinations.<sup>26</sup> Before building the client's case, review that proposed rule. To gain insight into these cases, also review the supportive and critical comments on the proposal from stakeholders. In the future, the VA may revise, or even withdraw, the proposed rule. Regardless of the whether the VA adopts the proposed rule, the proposal reveals the VA's perceptions of:

- The current character of discharge determination statutory and regulatory framework;

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23 See Rose Goldberg, *VA Character of Discharge Determinations CLE*, [University of Montana](#) (Mar. 20–21, 2019).

24 [38 CFR 3.12\(a\)](#).

25 See *VA Character of Discharge Determinations Rule*, [Federal Register](#) (2021).

26 See *VA Proposes Modifications to Character of Discharge Determinations*, [ABA](#) (September 18, 2020); *Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge*, [Federal Register](#) (2020).

- The kinds of evidence that lead to a favorable determination; and
- The ways in which the current character of discharge determination regulation should be improved.

213. The regulatory bars to benefits relate to clients discharged or released because of:

- Agreement to an undesirable discharge to escape a trial by general court martial;
- Mutiny or spying;
- Offenses involving moral turpitude;
- Willful and persistent misconduct; and
- Aggravated homosexual acts.<sup>27</sup>

214. After evaluating the facts of the client's case, as well as applicable interpretive case law and VA General Counsel guidance, develop credible arguments that the regulatory bars do not apply. A thorough explanation of each of these regulatory bars is beyond the scope of this article. The following is a list of several key points. The VA's Office of General Counsel defined "moral turpitude" as a "willful act committed without justification or legal excuse which gravely violates accepted moral standards and would be expected to cause harm or loss to personal property."<sup>28</sup> The VA Office of General Counsel opined that moral turpitude offenses may include conduct not resulting in prosecution or conviction. VA regulations define "willful misconduct" as "an act involving conscious wrongdoing or known prohibited action." The act in question must implicate "deliberate or intentional wrongdoing with the knowledge of, or wanton and reckless disregard of, probable consequences." A technical violation of a regulation or ordinance is not willful misconduct.<sup>29</sup>

215. Evaluate the client's case. Is it possible to characterize the conduct in question as a mere technical violation? Moreover, an isolated offense does not qualify as "persistent misconduct" and multiple offenses are not necessarily persistent.<sup>30</sup> If applicable, argue that the client's misconduct, even if there were multiple offenses, was not "persistent misconduct." For example, one of the authors represented a veteran who received an Other Than Honorable Discharge because the client tested positive for marijuana use in-service, on two occasions. The author argued marijuana use was not an offense involving moral turpitude and that two incidents, especially considering that the client was self-medicating service-connected PTSD, did not constitute willful and persistent

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<sup>27</sup> 38 C.F.R. 3.12(d).

<sup>28</sup> VAOPGC 6-87(July 27, 1987); *Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge*, [Federal Register](#) (2020).

<sup>29</sup> 38 C.F.R. 3.1(n)(1).

<sup>30</sup> M21-1 Adjudication Procedures Manual, (III)(V)(1)(B)(3)(d).

misconduct. In cases like these, search for precedent cases in which the court or the Board of Veterans Appeals determined that misconduct similar to your client's conduct was not "willful and persistent misconduct" and draw analogies to show that previous decision-makers found no regulatory bar to VA benefits.<sup>31</sup>

216. Moreover, search the client's records, and interview the client to identify and include in the application, awards, deployments, and other commendations to prove that the client's service was otherwise honest, faithful and meritorious.

217. Similarly, although a felony conviction creates a rebuttable presumption of moral turpitude, interview the client, and search the record to identify and build evidence rebutting that presumption. Were there mitigating circumstances, such as a service-connected mental health issue, that may have caused the client's misconduct?

218. The VA's proposed rule for character of discharge determinations focuses on discharges due to homosexual acts involving aggravating circumstances (applying a bar to all aggravated sexual acts, regardless of sexual orientation); and, "[w]illful and persistent misconduct," and "offenses involving moral turpitude," (incorporating the VA's OGC, Manual for Courts-Martial, and UCMJ guidance to clarify terms).

219. The proposed rule also provides a "compelling circumstances" exception to certain regulatory bars to ensure fair character of discharge determinations in light of all pertinent factors. In the proposed VA rule concerning character of discharge determinations, the VA extends the "compelling circumstances" exception for the statutory AWOL benefits bar to the following regulatory bars sexual acts involving aggravating factors; willful and persistent misconduct, and moral turpitude offenses.

220. The "compelling circumstances" exception was not extended to mutiny or spying or for those who accept an Other Than Honorable Discharge in lieu of trial by court martial.<sup>32</sup>

221. In your brief, first tackle potential statutory bars.<sup>33</sup> The following statutory bars relate to a veteran discharged:

- As a conscientious objector who refused to comply with lawful orders;
- By reason of the sentence of a general court-martial;
- By resignation of an officer for the good of the service;
- As a deserter;

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31 See, e.g., [Bd. Vet App. No. 19138371 at 1–2](#) (May 17, 2019); [Bd. Vet. App. No. 1709699 at 5](#) (March 29, 2017); [Bd. Vet App. No. 19134639 at 3](#) (May 3, 2019).

32 See *VA Character of Discharge Determinations Rule*, [Federal Register](#) (2021).

33 [38 U.S.C. 5303\(a\)](#); [38 C.F.R. 3.12\(c\)](#).



- As an alien during . . . hostilities, where . . . the . . . service member requested . . . release; and
- Under Other Than Honorable conditions as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days.

222. Consult the applicable statute, interpret case law, and use the VA General Counsel guidance to identify and support arguments that none of the statutory bars apply. If the AWOL statutory bar applies, interview the client and review the client's records to identify "compelling circumstances" that may excuse the AWOL, such as family emergencies or hardships from combat. Even if a statutory bar seems to apply, search for viable counter arguments. For example, if the client was AWOL for more than 180 continuous days, were there extenuating circumstances such as mental health issues causing the client to leave or fail to report?<sup>34</sup>

223. Moreover, even if a regulatory or statutory bar applies, veterans are not barred from a favorable character of discharge determination if they were found to be insane at the time of the misconduct. Understanding the regulatory definition of insanity requires reviewing the applicable regulation as well as utilizing case law and the VA General Counsel guidance. For character of discharge determinations, insanity means that due to a disease there was prolonged deviation from the client's normal method of behavior; the client's behavior interfered with the peace of society; or the client lacked the adaptability to adjust to the social customs of the community in which the client lived.

224. The VA General Counsel has opined that antisocial personality disorder does not qualify as insanity for VA character of discharge. Moreover, the behavior in question cannot be directly attributable to a substance abuse disorder. Insanity, for the purpose of character of discharge determinations, is equivalent to psychosis, and PTSD can qualify. Insanity must be contemporaneous with the conduct that led to discharge, but the client does not need to prove that the insanity caused the misconduct.<sup>35</sup>

225. Finally, VA adjudicators rendering the character of discharge determination follow the VA manual M21-1. Find the most recent version of the manual online. Review its procedures for character of discharge determinations. Incorporate the manual's language into your brief, showing how the manual's provisions, when applied to the facts of the client's case, compel a favorable character of discharge determination.

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<sup>34</sup> See *VA Character of Discharge Determinations Rule*, [Federal Register](#) (2021).

<sup>35</sup> [38 U.S.C. 5303\(a\)](#); [38 C.F.R. 3.12\(c\)](#); [38 C.F.R. 3.354\(a\)](#); See Rose Goldberg, *VA Character of Discharge Determinations CLE*, [University of Montana](#) (Mar. 20–21, 2019); [VA OGC Prec. Op. 20-97](#); *A Character of Discharge Determinations Rule*, [Federal Register](#).

### ***Use Brief To Explain Mitigating Circumstances Surrounding Misconduct***

226. Not only should the brief in support of the character of discharge illustrate that the client is not barred by regulation or statute from a favorable character of discharge determination, the brief should articulate a clear timeline, using the tools of persuasion. Articulate mitigating circumstances, such as:

- Self-medication of mental health issues at the time of the misconduct,
- Years of service without misconduct,
- Mental health condition diagnoses at the time of the misconduct or diagnoses rendered thereafter, but relevant to the time of the misconduct (i.e. the client had the condition at the time of the misconduct, but was undiagnosed),
- Awards, commendations, and deployments, and,
- Combat trauma, military sexual trauma, or trauma suffered during or before the misconduct, unrelated to service, such as the death of a family member.

### ***Submit Lay and Expert Evidence in Support of VA Character of Discharge***

227. Merely submitting a legal brief is insufficient. Also submit lay and expert evidence supporting the VA application. After the VA receives the initial claim, the VA will respond with a Development Letter seeking evidence to develop the matter. More thorough guidance on assisting witnesses in creating lay and expert evidence is provided in this article's section concerning that topic. However, the following are a few added tips relevant for lay and expert statements in support of VA matters.

228. First, help the client create a personal statement explaining extenuating circumstances leading to the misconduct that resulted in discharge. In many instances, the client's statement will be substantially similar to the statement submitted in support of the DoD discharge upgrade petition. However, for the DoD discharge upgrade veteran statement, it is more important for the client to explore positive contributions to the community, such as community service, occurring after discharge, in the present day. For character of discharge determinations, the VA is less concerned with the present time, such as the client's current community service and positive contributions. Instead, the VA is interested in learning about extenuating circumstances leading to the misconduct that caused the discharge.

229. Second, work with lay witnesses to create statements supporting the character of discharge application. Lay statements should address circumstances relevant to the

time of misconduct leading to discharge. For example, service members who served with the client during the time of the misconduct could describe stressful or traumatic situations the client experienced before and during the time of the misconduct as well as mental health condition symptoms the witness observed prior to and during the time of the misconduct. Symptoms and trauma observed in the present, long after discharge, are typically not relevant. Because the lay witness may be eager to address recent observations, provide a template to focus discussion on observations made, or statements heard, prior to and during the time of the misconduct leading to discharge.

230. For the VA, lay witnesses are typically incompetent to diagnose mental illness. Laypersons are competent to address matters about which they have personal knowledge, such as symptoms observed. In the statement, the lay witness should establish credibility by explaining how long she has known the client, her relationship to the client, and how she knows the information (i.e. whether she observed or heard it). The template should provide model language to prevent the lay witness from diagnosing mental illness, thereby urging the witness to describe observations made during the relevant timeframe. Moreover, request to review the lay statement in draft form, before it is finalized, to answer any questions and reorient a witness focused on irrelevant information. Finally, lay statements should be made under oath by both the client and the lay witnesses, and the “under oath language” should be included in the template provided to the client or witness.

231. Medical expert statements help build a character of discharge case. Retain one or more medical experts to opine about whether the client’s mental health condition contributed to the misconduct leading to discharge. To support the initial claim for disability that triggers the character of discharge, the medical expert should opine as to the diagnosis of the claimed disability and whether the disability is connected to service. A disability is service-connected if it is as at least as likely as not developed or was aggravated during active duty. However, obtain stronger evidence of service-connection by suggesting in the template provided to the medical expert more certain language, such as, “I am firmly convinced that military service” caused the disability. Retain experts qualified to opine as to the question asked. For example, initiating a VA character of discharge matter with an initial claim for disability compensation for a back injury from service may require multiple expert opinions. Mental health experts can opine as to whether the client’s mental health condition may have led to the misconduct that resulted in discharge. But neurologists or orthopedic specialists will need to opine as to service connection and diagnosis for the back condition that is the subject for the initial claim.

232. Multiple experts providing separate positive opinions supporting the VA character of discharge case and the initial claim only strengthen each case. Provide the expert templates relevant to each case: the character of discharge and the initial VA claim,

and provide the expert a timeline of key events including trauma experienced in service, development of symptoms of mental health condition, misconduct leading to discharge, and events surrounding discharge. These templates should state that the expert reviewed all service records, treatment records, the client's statement, and all lay statements. Moreover, the template should clarify whether the opinion rendered was based on an exam of the client or treatment history of the client. The template should prompt the expert to provide his fully reasoned rationale supporting his determination. For the VA character of discharge matter, the cover letter should request the expert to opine about whether the expert believes the client suffered from one or more mental health conditions at the time of the misconduct leading to discharge and the rationale for that determination, including the client's relevant mental health diagnosis and the basis for that diagnosis, such as physical exam and records review.

233. Medical nexus opinions for DoD discharge upgrades or for VA PTSD disability compensation claims will likely be helpful in supporting a VA character of discharge. However, VA character of discharge matters may require the expert to opine as to whether the client was insane, for purposes of VA character of discharge, at the time of the misconduct. If it is necessary for the expert to opine about that issue, educate the expert about that unique insanity standard. Finally, request the opportunity to review an unsigned draft before the expert finalizes the opinion to answer questions and clarify the factual record.

### ***Collect and Submit Evidence That Existed at the Time of the Trauma, Trauma-Related Symptoms, Misconduct, and Resulting Discharge***

234. Evidence supporting the VA character of discharge application is often gathered years after the client's misconduct that led to the discharge. Therefore, VA adjudicators may find evidence produced years after the misconduct less compelling than evidence that existed at the time of the misconduct. This is also true for DoD discharge upgrades. Therefore, for both types of cases, interview the client to identify and collect evidence existing near the time of the misconduct, such as the client's letters, emails, and diary entries and mental health assessments and other medical records. For example, a letter from the client to his spouse describing the combat trauma experiences and related misconduct that led to the discharge, may be more compelling evidence than the client's spouse's statement created years after the combat trauma and resulting misconduct that led to discharge.

## ***Request Character of Discharge Hearing***

235. When filing the initial claim for disability compensation, request a hearing. Moreover, when responding to the VA Development Letter, once again request a hearing. the client must attend the hearing. Try to ensure the medical expert attends the hearing. Prepare the medical expert for the hearing. Ask leading questions of both the expert and the client because the rules of evidence do not apply. A hearing transcript will be prepared. the client can waive this right to expedite the process. Fully explain the character of discharge legal requirements to the hearing officer because VA adjudicators infrequently handle VA character of discharge matters. Instead they usually render decisions on disability compensation matters. The adjudicator may be unfamiliar with standards relevant to character of discharge determinations. This hearing is for the VA to develop and understand the record. Prepare the client well, and let the client tell the story, so that the client can answer any questions the adjudicator may have about the record.

## ***Keep at It***

236. The VA Regional Office conducts the character of discharge determination. If the Regional Office decision is unfavorable, appeal to the Board of Veterans Appeals (“BVA”) or pursue any of the options in the VA Claims Modernization Act. If the client receives an unfavorable decision from the BVA, appeal to the U.S. Court of Appeals for Veterans Claims (“Court”). A character of discharge determination is a factual finding, so the Court will defer to that finding, unless it is clearly erroneous. However, do not lose hope because the Court remands a large percentage of BVA decisions, often based on common BVA errors, such as a failure to provide an adequate statement of reasons and bases supporting its decision.

237. If VA agrees to a remand, ensure the Joint Motion for Remand specifies that the client may submit further argument and evidence on remand. In the past, under the legacy system, everyone agreed that veterans had the right to submit further argument and evidence on remand, but under the Modernization Act, VA has sometimes taken the position that a veteran does not automatically have this right on remand. Therefore, this language is key. Also request expeditious treatment in the Joint Motion for Remand. Moreover, if you are no longer able to represent the client when the matter reaches the Court or BVA level, contact the TVC that matches pro bono attorneys with unrepresented veterans before the BVA and the Court and provides a host of services, including an assigned mentor, brief review, and a screening memo prepared by an expert.

238. Carefully log attorney, law student, and paralegal hours of work in preparation of the character of discharge matter because if the client prevails in the appeal to the Court,

the client will likely be entitled to attorney's fees under the Equal Access to Justice Act, even if the legal services were pro bono.

## VIII. Do Not Give up, and Preserve Opportunities to Advocate

239. Upon receiving a discharge upgrade denial, consider your options. If the application was denied by a Discharge Review Board based on a document review and it is still less than 15 years since the discharge, consider requesting a personal appearance hearing. If the client was discharged over 15 years ago, discuss applying to the BCMR. If the denial was issued by the BCMR, determine whether there is basis for reconsideration. The BCMR will reconsider a case with substantial, new relevant evidence that the discharge was an error or injustice. If the client applied prior to some DoD directives and has mental health issues, they may have the opportunity to reapply. Recent court cases may allow certain cases to be automatically reconsidered or be eligible for reconsideration. For example, note the settlement terms of *Kennedy v. McCarthy*<sup>36</sup> require the Army Discharge Review Board to automatically reconsider some decisions involving a General or Other Than Honorable Discharge, where the client has a diagnosis of PTSD, traumatic brain injury or other mental health condition, or if they were a victim of military sexual trauma and did not receive full relief. Other cases are eligible for reconsideration under the same terms. A similar lawsuit is pending against the Naval Discharge Review Board. Discharge upgrade decisions may take one to four years. Be persistent, do not give up. Continue to advocate for the client.

240. Some Board decisions may be subject to review by the agency's Secretarial Review Authority ("SRA"), who may disagree with the voting board's decision and overturn the finding. For example, a Marine veteran applied to the Naval Discharge Review Board and the Board granted relief. However, the SRA provided a short one-page decision indicating that they disagreed with the Board and denied the upgrade. Upon receiving the decision his advocates submitted a rebuttal brief. The SRA again denied relief. The attorneys and veteran submitted a new application to the Board for Correction of Naval Records and are awaiting a decision. In a different veteran's case, counsel received a denial by the SRA. After the veteran submitted a compelling rebuttal, the SRA changed the decision granting the upgrade. When you receive an unfavorable determination during any stage of the discharge upgrade application process, review your options to submit a rebuttal or file for reconsideration.

241. Board decisions may also be appealed to federal court under the Administrative Procedure Act. The case may be filed in the federal district court or U.S. Court of Federal

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<sup>36</sup> *Kennedy v. McCarthy*, No. 3:16-cv-2010-CSH (U.S. Dis. Ct. Conn. 2010).

Claims. The courts will review the decisions using the same stringent standard applied to other administrative decisions. The court must set aside a decision that is, “arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with the law.” The claim must be brought within six years of the agency decision and the standard is difficult to prove. If denied by the BCMR, consider a character of discharge determination through the VA or other avenues to meet the client’s needs. Telling your client about the denial can be emotionally traumatic for the client. Explain to the client their options and support them however you can. It may be difficult to receive an unfavorable decision, but keep in mind other ways to advocate for your client.

## **IX. Prepare for and Rebut Medical Advisory Opinions**

242. If the application is based on a mental health or military sexual trauma argument, the BCMR must obtain a medical advisory opinion. The Discharge Review Boards (“DRB”) do not have the same requirement. If mental health symptoms are raised as part of the argument, the DRB must have a psychologist or psychiatrist as a voting member. The opinion should be issued by a psychologist or psychiatrist and opine as to whether the client had a mental health condition during service that may mitigate the discharge. If unfavorable, the Board for Correction of Naval Records will provide a copy of the opinion to the representative for a rebuttal. You will receive 30 days to respond, but consider filing for an extension. The Board used to grant up to 90 additional days; however, recently the BCNR was limiting the extension to 30 days. The additional days start from the date of the approval of the request. If you can, wait until asking for the extension. The best way to prepare for the medical opinion is to ensure that the original application includes sufficient medical evidence to prove the existence of the condition and the nexus between the symptoms and misconduct. Use ample evidence, to support your argument.

243. The opinion must conclude whether the client’s mental health condition was a mitigating factor in the misconduct. Generally, the opinion will outline the facts of the case, to include the misconduct, and summarize the medical evidence provided. The mental health professional will then opine as to whether the misconduct was mitigated by the condition. Ideally, the original submission should result in a favorable opinion. When framing the initial brief, outline the argument in accordance with the relevant DoD directive and provide sufficient medical evidence to support the occurrence of the condition or trauma and resulting mental health symptoms. If possible, obtain a nexus letter from the client’s treating doctor noting that the mental health condition existed during service and was connected to the misconduct.

244. If you receive a negative opinion, submit a response. Without a rebuttal, the Board will accept the opinion and likely deny the application. The rebuttal should include a brief with supporting medical documentation. If needed, obtain a new medical examination and opinion. The examiner must opine as to whether the veteran's symptoms existed during service and whether they mitigate the misconduct. Keep the submission concise and only respond to the opinion's findings. At times, the Board may refer the case to a mental health professional when a mitigation argument was not raised on the application. In a case based on a homosexuality discharge, the AFBCMR referred the case for a medical opinion because the facts concerned military trauma. The resulting opinion was irrelevant, but it was still provided to counsel for response. The advisory opinion will outline the rationale behind the determination that the condition does not mitigate the misconduct. Relying heavily on medical records, additional records such as lay statements and diary entries and scientific evidence, rebut the findings. After filing, you may receive a second advisory opinion, or the Board will issue the final decision.

## **X. Adopt Recommended Strategies for Personal Appearance Hearings**

245. Personal appearance hearings humanize the client by enabling the client to tell the story and answer questions. The focus of the hearing should be the client's testimony. Your primary role is to make the arguments and prepare the client for the emotional experience. It is encouraged to apply first for a document review when applying to the Discharge Review Board. If there is still sufficient time before the 15-year deadline, apply for a document review and preserve the right to a personal appearance hearing. If you first file for a document review, and are denied, you now know the basis for the Board's decision and can focus on overcoming those findings in the subsequent application. In addition, you have a second opportunity to prepare the case and the client.

246. At times, the client may insist on a hearing for the first filing. Discuss the pros and cons on foregoing a document review. If there is only time to file a document review or an application for a hearing, ask the client for their preference. If the client is willing and able to tell their story, a personal appearance hearing may be advantageous. However, if the client does not present well and is unable to speak to their compelling story, a document review may be the better avenue. If given the choice between an in-person hearing or a telephonic hearing, the in-person hearing may better enable board members to empathize with the client. However, telephonic hearings are less expensive and more convenient due to the Boards' locations. A low-income veteran may opt for a telephonic hearing due to travel costs.



247. The client has a right to a personal appearance hearing at the DRB if it still has been less than 15 years since the discharge. Note the BCMR rarely grants hearings, and this is not the basis for reconsideration. The client must meet other legal requirements for reconsideration, and then can request a hearing, but the request will likely be denied. When deciding between an in-person or telephonic hearing, think about the client. Sometimes being in the same room as military officers can be triggering for a veteran. If the client suffers from PTSD due to military sexual trauma by an officer, it may be uncomfortable for them to be in a room with other officers. It may be better for the client to have a telephonic hearing where the client can be physically separated from the Board. Understanding the comfort level of the client is useful in making the decision between a personal appearance hearing and a telephonic hearing.

248. Prior to the hearing, with the application, or at the earliest opportunity, submit a brief and supporting exhibits. Do not bring a lengthy brief the same day as the hearing. This does not provide the Board the opportunity to read and analyze the legal arguments. The Board prepares a file before the hearing that includes all documents submitted, the client's personnel and medical records, and a summary of the case.

249. Hearings are emotionally difficult for the client who must vividly describe traumatic memories and show contrition for misconduct. Have the client draft planned remarks, and review those remarks with the client. Undoubtedly, the remarks will reveal sensitive, personal information, but comfort the client by clarifying that all discharge upgrade proceedings and materials are confidential. Because the Board will ask directed questions, prepare the client for the hearing by having the client practice answering such directed questions. Also, prepare the client by asking your own leading questions you plan to ask at the hearing. The rules of evidence do not apply, so leading questions are permissible and provide a powerful tool for extracting key information from the client and material witnesses.

250. Thorough preparation is the key to an effective hearing. The Board will ask the client questions and allow character and expert witnesses to testify. Character witnesses may be used to attest to the client's in-service or current character, or can talk about the noticeable changes in the client pre- and post-trauma. Expert witnesses may include treating mental health professionals who provide a mitigation opinion. Thoroughly prepare these witnesses as well. If the Board has a mental health professional, prepare the client to speak to their mental health diagnoses, treatment, and symptoms. Know the timeline of the client's mental health treatment. Besides questions clarifying in-service conduct and facts, the Board will likely ask about post-service life. They may want to know about any post-service arrests, school, employment, family, etc. Include this information in the client's testimony and be ready to respond to these types of questions. Thoroughly prepare your client and witnesses to speak their story and answer questions.

251. At the hearing, first, offer a brief opening statement. In the statement, outline the argument. If you are alleging a mental health condition was a mitigating factor in the misconduct, state that and speak to the main supporting evidence. The Board will have already reviewed your case and know the arguments. The point of the opening statement is to frame the argument and introduce the client. Then allow the client to narrate their story chronologically, exploring any traumas, and the impact of those traumas, including the symptoms of the trauma-induced mental health condition.

252. The Board will know the client's infractions. The hearing is the client's opportunity to put the misconduct into context. For example, the client can explain the traumas he was exposed to during war. He can talk about coming home from deployment struggling with anxiety, insomnia, and hypervigilance, then self-medicating with marijuana. The client's records reflect the drug use; the testimony explains the conduct. If you prefer, you can use leading questions to navigate the client through their testimony. Note, the Army Discharge Review Board is now only allotting 20 minutes for the client to present their case, giving 60 minutes for the whole hearing. Thus, it is important for the client to have their statement prepared and timed to ensure that you are able to keep the presentation within the time limits. The client should also discuss their post-service life. Character and expert witnesses may be utilized to support the client's testimony and argument. Friends, family, employers, buddies from service, and treating mental health professionals may be considered as supporting witnesses.

253. After the testimonies, the Board will ask questions. These questions will probe into the client's service, medical history, post-service life, and character. If the witnesses are properly prepared, these questions should bolster the main argument. Keep the hearing's focus on the client's traumas in service; the trauma-related mental health condition mitigating the misconduct; earnest efforts to regain a productive life after discharge; and what an upgrade will mean for them, as applicable.

254. After the questions, deliver a brief closing statement, reinforcing the main contentions and the petition for an upgrade. Allow the client one last opportunity to reiterate their request for an upgrade and its importance. After the hearing, encourage the client to engage in relaxing activities and remind them to be patient as you await a decision.

## **XI. Be Patient, Persistent, Respectful, and Flexible**

255. Typically, the circumstances surrounding a Less Than Honorable Discharge are traumatic and deeply personal, and the clients often struggle with mental health issues. All of this requires you to be patient, persistent, respectful, and flexible. For example, homeless veterans' locations often change, so you have to adapt to meet their needs.

A post office box or a government-issued phone may be your only point of contact. Although you may not normally provide your cell phone number to clients, you may need to provide it to homeless veterans, because the only viable method of communication may be via text message. Homeless veterans may have limited minutes on their government-issued phones, which should be saved for emergencies.

256. You may become more than an advocate for the discharge upgrade petition; you may need to help the client with other matters. You may have to contact local area organizations for housing and counseling services. At times, you may need to delay developing evidence for a veteran who suffers a mental health, housing, or financial crisis. While you are not a mental health professional, you may receive worrisome communications requiring you to provide emotional support to your client to inspire the client to persist in pursuing the petition.

257. Moreover, logistical obstacles may prove overwhelming for veterans suffering from PTSD and other mental health conditions, so you will need to be understanding and creative. For example, one of the authors found that her client, located in another state, was overwhelmed by the logistics of mailing his VA treatment records to her legal office, for her review. Therefore, she located the closest FedEx office and gave the client directions. When the client arrived, she spoke with the FedEx official and paid for the postage for mailing the records to the legal clinic over the phone, relieving the client of the logistical obstacles of finding the FedEx office and paying for the mailing.

258. Respect your client's wishes, and be flexible. A pro bono client of one of the authors wrote a fifty page single-spaced treatise as his personal statement that was full of grammatical and typographical errors. Although preparing the exhaustive personal statement was cathartic, she decided the statement was not persuasive because it rambled and was difficult to follow. Therefore, she spent hours making the personal statement more concise and clear, only to find that the client preferred his own lengthy personal statement, because he was concerned that the shortened statement did not tell the whole story. To show that she honored his choices, she attached his fifty page personal statement to the petition, albeit as one of the final exhibits. But the concise personal statement was the first exhibit, and the personal statement that she cited in the brief. This compromise conveyed to the client that his advocate respected his wishes. She helped make him comfortable with the application process. In developing this creative solution, she was patient, persistent, respectful, and flexible.

## **XII. Conclusion**

259. While assisting veterans with discharge upgrade petitions presents its own unique challenges, the work is ultimately rewarding. You learn about deeply personal, traumatic, and sometimes humiliating events that have at least in some part defined your

clients' lives. We hope that the tips presented in this article can be a guide as you begin representing veterans in discharge upgrade applications.

260. First, identify the audience and request the records. Second, screen cases, consult the clients Consortium Pro Bono Program, use the DoD guidance framework for the brief, and carefully request relief. Third, listen to the client's story, understand their goals, and set realistic expectations. Fourth, assist the client in preparing a personal statement. Fifth, assist material witnesses in preparing statements. Sixth, consider the VA character of discharge determination option. Seventh, do not give up, and preserve opportunities to advocate. Eighth, prepare for and rebut medical advisory opinions. Ninth, adopt recommended strategies for personal appearance hearings, and effectively evaluate whether to request a hearing. Finally, be patient, persistent, respectful, and flexible.