UPGRADING MILITARY DISCHARGES
AFFIRMING SERVICE, ERASING STIGMA,
TRANSFORMING LIVES

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CVLC’s mission is to remove legal barriers to health care, housing, and income for veterans recovering from homelessness and mental illness.

The Veterans Inclusion Project’s mission is to make veterans’ benefits accessible for all low-income veterans through a combination of national policy advocacy and capacity building for legal advocates.
DU Training Overview

Agenda:

• Basics of Discharge Upgrade practice
• DUs v. VA Character of Discharge Determinations
• DU Standards of Review
• Identifying Theories of the Case
• Finding Contentions
• Best Practices
A veteran’s DD214 is their Certificate of Release or Discharge from active duty.

**NOTE:** Veterans of the National Guard get a DD214 for initial training, and for any time that they were called up for federal Active Duty. However, the Certificate of Release received by National Guard is Form NGB 22, not a DD214.
Two important pieces of information on a veteran’s DD 214 are their:

1. Character of Service, and

2. Narrative Reason for Separation
Character of Service

**TYPES**

*Administrative Separations*
- Honorable
- General
- Uncharacterized
- Other than Honorable

*Punitive Separations*
- Bad Conduct
- Dishonorable
Narrative Reason

- Sufficient Service for Retirement
- Expiration of Term of Service
- Misconduct
- Pattern of Misconduct
- Personality Disorder
- Alcohol Rehabilitation Failure
- Conscientious Objector

- Misconduct (Serious Offense)
- Alcohol/Drug Rehabilitation Failure
- Reduction in Force
- Hardship
- Homosexual Act
  - no longer a valid narrative reason for separation
Why do Characterizations Matter?

- VA benefits
  - Healthcare
  - Disability compensation
  - Pension
  - GI Bill
  - Home loans
- Employability, re-enlistment
- Recognition of service to the country
- Stigma/Shame
Access to VA Benefits & VA Characterization Process

<table>
<thead>
<tr>
<th>Military Discharge Characterization</th>
<th>VA Character of Discharge Determination</th>
</tr>
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<tbody>
<tr>
<td>Honorable</td>
<td>“Honorable for VA Purposes”</td>
</tr>
<tr>
<td>General Under Honorable Conditions</td>
<td></td>
</tr>
<tr>
<td>Uncharacterized</td>
<td></td>
</tr>
<tr>
<td>Other Than Honorable / Undesirable</td>
<td>Subject to Review re whether “Dishonorable for VA Purposes”. Presumptively dishonorable until COD.</td>
</tr>
<tr>
<td>Bad Conduct</td>
<td></td>
</tr>
<tr>
<td>Dishonorable</td>
<td></td>
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**Auto**

**VA Review**
## CODs v. DUs

<table>
<thead>
<tr>
<th>VA Character of Discharge</th>
<th>DOD Discharge Upgrade</th>
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</thead>
<tbody>
<tr>
<td>- Considers only time in service</td>
<td>- Considers time in service and after (pre-service can be persuasive)</td>
</tr>
<tr>
<td>- Enables access to VA benefits, including compensation</td>
<td>- Access to all benefits (including GI bill if fully honorable)</td>
</tr>
<tr>
<td>- Does <strong>not</strong> change the DD214</td>
<td>- Changes DD214</td>
</tr>
</tbody>
</table>
The DU Application

What do DU applications have to include?

• DD293 or DD149 and DD214

What else do we suggest?

• Cover letter
• Detailed Brief
• Client Personal Statement
• Copies of all relevant military records
• Copies of all relevant medical records
• Proof of mental health diagnosis, if applicable
• A timeline of major events
• Evidence of positive character
• Other evidence as appropriate
Crafting Contentions / Issues

Standards of Review:

**DRBs**
- Equity 32 C.F.R. § 70.9(c)
- Propriety 32 C.F.R. § 70.9(b)

*Clemency*
*If the discharge was the result of a SPECIAL court martial conviction (10 U.S.C. 1553(a))*

**BCM/NRs**
- Injustice 10 U.S.C. §1552(a)(1)
- Error 10 U.S.C. §1552(a)(1)

*Clemency*
*If the discharge was the result of a special or general court martial conviction (10 U.S.C. 1552(f)(2))*
Equity / Injustice

Three regulatory reasons for an Equity/Injustice upgrade:

1. **Future Policy Change**: If, the policy that led to the veteran’s discharge has now been changed to such a degree that the veteran would not have been discharged as the policies currently stand. *32 C.F.R. § 70.9(c)(1)*

2. **In-service Inconsistencies**: If, at the time the veteran was discharged, the discharge was inconsistent with the standards of discipline at that time. *32 C.F.R. § 70.9(c)(2)*

3. **Personal Record**: If the discharge was inequitable/unjust based on evidence relating to A) quality of service or B) capability to serve. *32 C.F.R. § 70.9(c)(3)*
Two regulatory reasons for an Impropriety/Error upgrade:

1. An error of fact, law, procedure, or discretion occurred, and the error was prejudicial to the veteran during the discharge process. 32 C.F.R. § 70.9(b)(1)(i)
   - Prejudicial error means there is a “substantial doubt” that the discharge would have remained the same if the error had not been made.

2. A change in policy by the military service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge. 32 C.F.R. § 70.9(b)(1)(ii)
Hagel Memo - Sept. 4, 2014

- Statute of limitations liberally waived at the BCM/NRs (not the DRBs) for PTSD-related cases
- Liberal consideration for PTSD in service if symptoms in service treatment records or service records
- Special consideration for VA determination of service-related PTSD
- Liberal consideration for civilian provider diagnoses
- (Potential) Mitigation of misconduct

- Time limits waived (not DRB)
- De novo review of any decision on PTSD-based claim pre-Hagel standards, or any case in which Hagel standards were not applied
- Specific mention of TBI as a condition related to PTSD
“Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later.”

- Expands Carson and Hagel to include “mental health conditions, sexual assault, and sexual harassment”
- Mandates that Carson and Hagel standards apply to DRBs and BCMRs, and to ALL discharges
- Clarifies that the policy applies to characterization, narrative reason, separation code and re-enlistment code
Kurma Memo

Kurma Memo – pivotal questions

Gives express guidance on 4 main questions for the boards concerning mental health related DU cases:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?

2. Did that condition exist/ experience occur during military service?

3. Does that condition or experience actually excuse or mitigate the discharge?

4. Does that condition or experience outweigh the discharge?
**Unofficial** Post-Kurta DRB Trends

**Convincing Arguments**
- PTSD diagnosis (esp. in-service); TBI diagnosis anytime if service related
- Sought help during service
- Substance abuse related to post-deployment/trauma
- Post-service MH treatment; substance abuse treatment
- Combat, especially if meritorious
- VA service connection

**Unconvincing Arguments**
- No diagnosis
- Pre-trauma substance abuse; other pre-trauma misconduct
- Prior denial of mental health concerns
- Failure to participate in treatment
- SM could still “discern difference between right and wrong”
Wilkie Memo – For ALL cases

Wilkie Memo – July 25, 2018

Purpose: to clarify the inequity, injustice and clemency standards allowing the boards to “ensure fundamental fairness”

- Standard approach the boards should take in evaluating equity and clemency claims – emphasis on fairness and second chances

- Spells out factors for weighing the mitigating value of in-service proficiency, conduct and achievements.

- Specifically includes post-service conduct and achievements as criteria boards should use when determining whether to grant an upgrade.
Wilkie Memo – For ALL cases

Wilkie Memo – In-service considerations

- Military values honor sacrifice and achievement, rehabilitating service members and favoring second chances, and punishing only when necessary

- Service is often characterized as honorable despite minor or infrequent misconduct; it does not have to be flawless

- Severity of misconduct is not static. If the seriousness of the misconduct has dissipated over time (e.g., marijuana) the mitigating evidence may now outweigh the misconduct

- Responses to misconduct can differ substantially. Boards should consider “uniformity and unfair disparities in punishment as a basis for relief”
Wilkie Memo – For ALL cases

**Wilkie Memo – Post-service considerations**

- Post-service conduct (specifically related to criminal justice issues)*
- Post-service achievements
- Length of time since the misconduct
- The Applicant’s:
  - Character and reputation (also mentions character references)
  - Illness or old age
  - Service to the community (government work, volunteering)
  - Job history
  - Degree of contrition*

*particularly important in clemency cases*
Case Illustration – Inequities

- Post 9/11 Marine Veteran who served over 3 years of a 4 year enlistment. He served his first 2 years without incident, but in the beginning of his third year was the victim of a sexual assault.

- Shortly after the assault, he showed up late for duty and received an Unauthorized Absence (UA). A couple months later he went UA for several days, returned and tested positive for THC.

- His chain of command subsequently administratively separated him for pattern of misconduct with an Other than Honorable (OTH) characterization of discharge.

- He wants an upgrade for employment, access to VA Healthcare (he has been diagnosed with PTSD) and GI Bill benefits, and to remove a shameful, derogatory label on his service.
Table 2: Common examples of misconduct that could be evidence of PTSD, TBI\(^1\), MDD or another related mental illness

1. Unauthorized Absences (UAs) or Absent Without Leave (AWOLs); late to formations; missing appointments; failure to appear\(^2\)

Where to find in the OMPF:

- look for time lost indicated on DD214s; counseling statements; Non Judicial Punishments; Summary Courts-Martial; Courts-Martial transcripts

- **PTSD Symptoms:**
  - avoidance symptoms
    - examples include, inability to return to a duty station because of reminders of trauma; missing days of work because the service member has panic attacks when thinking about seeing her assailant
  - alterations in cognition and mood
    - examples include inability to show up to work because of feeling isolated and estranged from his peers, or because of distorted cognitions leading him to persistently blame himself or others in the unit for an incident that occurred while deployed
  - arousal symptoms
    - examples include failing to show up because the service member impulsively decided to take leave without requesting permission
Linking the Misconduct

**Expert Statements**

- If a mental health based claim, try to get a statement from a treating clinician. Ask the clinician to address:
  - Diagnosis, and approximate date of onset
  - Records reviewed
  - Current treatment
  - Likelihood that the underlying misconduct to the diagnosis
- If no diagnosis, consider obtaining a forensic psych evaluation.
Sample Medical Expert Questions

MST Case, with Post-Kurta Memo framing

The issues on which we request your opinion are:

- Whether in your professional medical opinion Ms. D experienced a sexual assault in January 2012.
- Whether in your professional medical opinion any behaviors exhibited by Ms. D after January 2012 were consistent with experiencing sexual assault.
- Whether in your professional medical opinion Ms. D currently meets the standard(s) for any mental health disorder(s).
- Whether in your professional medical opinion Ms. D’s mental health condition or experience of sexual assault contributed to her use of non-prescribed and illegal substances during her military service.
- Whether in your professional medical opinion Ms. D had a mental health disorder(s) during the period January 2012 to September 2015, and if so, whether that disorder(s) contributed to the conduct leading to her discharge.

Whether in your professional medical opinion any indicators identified by the DoD Kurta Memorandum show that Ms. D experienced a mental health condition and/or sexual assault during the period January 2012 to September 2015.
3.1.3 Mental Health as a Mitigating or Excusing Factor

As discussed above and in Chapter 9, Mental Health and Less than Honorable Discharges, the Hagel, Carson and Kurta Memos mandate liberal consideration for mental health-related discharge upgrades. In all cases involving mental health and MST, make the basic argument that the underlying mental health condition mitigated, excused or outweighed the misconduct leading to the negative discharge.

Basic mitigating/excusing/outweighing argument:

- Veteran’s application warrants an upgrade under the “liberal consideration” standard mandated by the Hagel, Carson and Kurta Memos.
- Under the Hagel, Carson and Kurta Memos, Veteran is entitled to liberal consideration of his diagnosis from a civilian provider [if VA provider, ask for “special consideration” instead of liberal].
- Veteran’s PTSD [or other mental health disorder] is a mitigating/excusing factor under the Hagel, Carson and Kurta Memos [Examples of proof include: tying misconduct to condition, ideally with medical opinion or treatment records; emphasizing pre-trauma good behavior versus post-trauma misconduct; statements from friends and family about change in behavior before and after the trauma; post-treatment good behavior or other positives, if applicable]
- Therefore, this Board should upgrade Veteran’s character of discharge to Honorable and change the narrative reason for separation and separation codes to [insert applicable narrative and SPN codes. If RE code change is requested, list here as well].
### Example contentions for an MST-based claim using The Hagel, Carson and Kurta Memos.

**MST/PTSD Vietnam Era case**

1. Under the Hagel, Carson, and Kurta Memoranda, because [veteran’s] MST-related PTSD directly led to the conduct that led to his discharge, his Other Than Honorable discharge is unjust.

2. Current separation regulations provide significantly greater procedural rights for Marines who experienced MST and there is substantial doubt that [veteran] would have received an Other Than Honorable discharge with the benefit of those rights, and therefore his OTH discharge is unjust.

3. Post-service, [veteran] has been a valuable member of the community and has fully engaged in mental health treatment for his MST-related PTSD, and therefore an OTH discharge is too harsh.
Case Illustration – Improprieties

- Post 9/11 Marine Veteran who served over 3 years of a 4 year enlistment. He served his first 2 years without incident, but in the beginning of his third year was the victim of a sexual assault.

- Shortly after the assault, he showed up late for duty and received an Unauthorized Absence (UA). A couple months later he went UA for several days, returned and tested positive for THC.

- His chain of command subsequently administratively separated him for pattern of misconduct with an Other than Honorable (OTH) characterization of discharge.

- He wants an upgrade for employment, access to VA Healthcare (he has been diagnosed with PTSD) and GI Bill benefits, and to remove a shameful, derogatory label on his service.
Identifying Improprieties

Find applicable regulations to identify propriety and inequity contentions:

- Service branch specific adsep regulations
- DODI adsep regulations
- Always compare current with regulation in place at the time of veterans’ adsep or underlying misconduct
- Others: Manual for Courts-Martial; federal legislation (NDAA) for years in question

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MARCORSEPMAN 1900.16-APPENDIX L

 Responsible Office: MMSR-2
 Phone: Comm: (703) 784-9322/9323
 DSN: 278-9324/9322/9323
 Reference: None

INVoluntary ADMINISTRATIVE DISCHARGE OUTLINE, CHECKLIST AND FORMS
(citations to paragraphs in MARCORSEPMAN)

STEP 1: DO LIMITATIONS ON SEPARATION PREVENT PROCESSING (6106)
1. Civilian or military acquittal.
2. Previous separation proceedings.

STEP 2: IDENTIFY THE STATUS OF THE RESPONDENT
1. Regular or Reserve (IRR or SMCR; obligor or non-obligor).
2. Amount of active and inactive-service.
3. Proximity to EAS, EOS, ECC, or retirement/FMCR.

STEP 3: IDENTIFY THE SEPARATION AUTHORITY (6307)
1. General rule: general court-martial convening authority.
2. Exceptions:
   a. SECNAV.
   b. CMC (DC M&RA).
   c. Delegated authority.

STEP 4: IDENTIFY THE BASIS OR BASES FOR DISCHARGE
1. General basis:
   a. Misconduct (6210).
   b. Unsatisfactory performance (6206).
   c. (Weight control) Body Composition Program failure (6215).
3.6.2 A Pattern of Misconduct

To warrant a pattern of misconduct discharge, the service member’s record must include:

A pattern of misconduct consisting of

(a) Discreditable involvement with civil or military authorities; or
(b) Conduct prejudicial to good order and discipline.⁹⁵

As with minor disciplinary infractions, this ground has its own counseling and rehabilitation requirements under which a commander cannot begin separation processing for a pattern of misconduct unless the service member has already been formally counseled about the deficiencies, and has had an opportunity to overcome those deficiencies. The counseling must be documented.⁹⁶

Find the separation authority section and ensure all procedures were proper.
3. **A Pattern of Misconduct**

   a. A minimum of **TWO** incidents occurring within one enlistment is required. Misconduct occurring in an extension of an enlistment is considered to be within one enlistment. The infractions may be minor or more serious. There must be discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline. The misconduct need not have been the subject of nonjudicial punishment or military or civilian conviction. Such incidents include, but are not limited to, an established pattern of minor unauthorized absences; an established pattern of dishonorable failure to pay just debts; or an established pattern of dishonorable failure to contribute adequate support to family members or comply with orders, decrees, or judgments of a civil court concerning support of family members; or an established pattern of child abuse or domestic, intimate partner, and immediate family member abuse. The incidents of misconduct do not have to be of the same nature. Separation authorities do not have to wait for a second incident of misconduct to begin processing for administrative separation if another basis is sufficient.

   b. Separation processing may not be initiated until the Marine has been counseled per paragraph 6105. The notification procedure contained in paragraph 6303 may be used if characterization of service under other than honorable conditions is not warranted and if the Marine has less than six years of total military service, including inactive-service in the Ready Reserve as a poolee in the Delayed Entry Program.
Adsep Requirements

4.1.2.1 Common errors in counselings

- Failure to provide the service member a formal, written counseling on his or her deficiencies.
- Failure to address one of the required elements in the counseling, such as detailing the deficiencies, giving specific recommendations for correcting the deficiencies, or explaining the consequences of failing to overcome the deficiencies.
- Failure to give the service member time to make the requisite changes to overcome his or her deficiencies prior to initiating separation.  
- Failure to timely counsel the service member. For example, a negative counseling statement is created at the time of, or after, the decision to separate (e.g., retroactive justification for separation).

Use the criteria required for the basis of separation, check for the proper forms, and look for common errors.
6105. **COUNSELING AND REHABILITATION**

1. Marine Corps policy is that reasonable efforts at rehabilitation should be made before initiation of separation proceedings.

2. Unless separation is mandatory, the potential for rehabilitation and further useful military service will be considered by the separation authority and, where applicable, the administrative board. If separation is warranted, despite the potential for rehabilitation, consideration should be given to suspension of the separation, if authorized.

3. In cases involving unsatisfactory performance, pattern of misconduct, minor disciplinary infractions, or other bases requiring counseling under paragraph 6105, separation processing may not be initiated until the Marine is counseled concerning deficiencies and afforded a reasonable opportunity to overcome those deficiencies as reflected in appropriate counseling and personnel records. No certain amount of time can be used to define “reasonable opportunity.” This must be determined by the commanding officer on a case-by-case basis. The commanding officer must sign adverse page 11 entries. Rehabilitation efforts must include the following and be documented in the Marine’s service record:

   a. Written notification concerning deficiencies or impairments;

   b. Specific recommendations for corrective action, indicating any assistance available;

   c. Comprehensive explanation of the consequences of failure to successfully take the recommended corrective action; and,

   d. Reasonable opportunity for the Marine to undertake the recommended corrective action.

   e. Make the following entry as appropriate on page 11 of the service record upon completion of counseling. The Marine will acknowledge by signing the entry. See reference (cj) MCO P1070.12K W/CH 1 paragraph 4006.3r, concerning rebuttal and counter-entry requirements. The Marine’s signature acknowledges that counseling has occurred, not that the Marine concurs with
Adsep Requirements

Formal Counseling Per Paragraph 6105 (MCO P1900.16)

1. Formal counselings in response to misconduct are filed under the Administrative Remarks section of a Marine’s OMPF. An entry in the Administrative Remarks section of a Marine’s service record is often colloquially referred to as a “Page 11”.

2. The body of the entry should describe the Marine’s misconduct and offer explicit guidance on how the Marine can correct the deficiency.

3. This sentence refers to Paragraph 6105 of MCO P1900.16, which mandates that a Marine must receive a formal counseling on a deficiency as well as a chance to remedy the deficiency before the Marine can be considered for Administrative Separation.
Tips for Successful Impropropriety Contentions

More likely to find errors if the document is present and contains an error, or can be part of pattern of errors.

• Ex. Page 11 does not specify deficiencies; dates of counseling and separation memo show inadequate time for requisite rehabilitation

If required document is missing, presumption of regularity makes it hard to prove a negative.

• Look for supporting studies or trends (DODIG, GAO, Rand, etc.)
Examples of Helpful Studies

2017 GAO Report: *Actions Needed to Ensure PTSD and TBI are Considered in Misconduct Separations*

**The Numbers:**
- 91,764 SM separated from misconduct (FY 2011-2015)
- 62% (57,141) had PTSD, TBI or other mental health diagnosis
- 23% received an OTH

**A Few of the Findings:**
- Navy does not require mental health screenings for in lieu of CM separations
- Over 1/3 of the USMC separation packets lacked pre-adsep mental health screening
- Almost ¼ of Army in lieu of CM separations lacked evidence of the mental health screening
Board are tremendously backlogged. Make it easy on the examiners (and frame the case on your own terms!) by crafting a clear and succinct contention list.

<table>
<thead>
<tr>
<th>AUTH FOR DISCHARGE: AFI 36-3208, PARA 5.52.4 (COMMISSION OF A SERIOUS OFFENSE)</th>
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<tbody>
<tr>
<td>ART 15; VAC; SCM; SPMC; GCM; ADDITIONAL:</td>
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<tr>
<td>ART15: 18 APRIL 2016 - (ART 91) ASSAULTED SNCO</td>
</tr>
<tr>
<td>LOC: 22 DECEMBER 2015 – FAILURE TO REPORT</td>
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<tr>
<td>LOR: 12 OCTOBER 2015 – FAILURE TO WEAR PROPER UNIFORM TO DUTY</td>
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<tr>
<th>EXAMINER’S NOTE:</th>
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<tr>
<th>NOTES:</th>
</tr>
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</table>

Applicant: [what they are asking for] Type what exactly the applicant is requesting (i.e. Requesting an upgrade of the discharge characterization to Honorable.)

Now type: [why they are asking] Applicant contends………

(b)(6):

DD4: This is important to note because we can only base judgment on the most current enlistment. His past enlistments do not factor into the board.

DD214:
Main Take Aways

✓ Boards are very backlogged – make examiners’ lives easy (and strengthen your case) by making a clear statement of contentions

✓ Mental health-related DOD memoranda recognize the impact of invisible wounds on service.

✓ Wilkie memo emphasizes “fundamental fairness” and second chances.

✓ Military regulations are your friends – use them as checklists

✓ Discharge upgrades are life altering – opening the door to robust benefits and reaffirming selfless service.