SINCE SEPTEMBER 11, 2001, military service members have faced repeated deployments and financial hardship, and a significant number of veterans struggle with psychological or physical problems such as post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI). Many have been separated from the armed forces with a less than fully honorable discharge, often referred to as bad paper. Any discharge other than an honorable one can adversely affect a veteran’s benefits and life after service, for example in employment. Veterans may apply for an honorable discharge, but obtaining one is not easy. Attorneys can provide an invaluable service to veterans by helping them request a change in discharge status before administrative review and corrections boards.

With rare exceptions, when service members are discharged from the military, their service is characterized as 1) honorable, 2) general (under honorable conditions), 3) other than honorable, 4) bad conduct, or 5) dishonorable. Bad conduct and dishonorable discharges are punitive and result from court martial convictions, usually for serious crimes, under the Uniform Code of Military Justice.1 Anything other than an honorable discharge results in the loss of some or all of the benefits that are available from the Department of Veterans Affairs (V.A.).2

Everyone discharged from active duty receives a certificate known as a DD214. This form serves as a veteran’s proof of military service, and veterans are often asked to show it to potential employers, schools, and medical providers. Veterans must show the DD214 to the V.A. to prove eligibility for services—and, for example, to California’s Employment Development Department when filing for unemployment benefits after service. (See “Unemployment Benefits for Veterans under the UCX Program,” page 28.) Item 28 on the DD214 provides what is known as the narrative reason for separation. The military’s list of reasons includes completion of service and reduction in force as well as misconduct, alcohol abuse, or personality disorder.

Many veterans face difficulties because their DD214 includes a derogatory reason for separation. Between fiscal years 2001 and 2010, for example, more than 31,000 service members were discharged for personality disorders.3 Thousands of these people suffer or suffered from a medical condition warranting medical retirement, but a personality dis-

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order discharge deprives them of this benefit. This phenomenon is not new. During the Vietnam War, the military doled out bad paper generously, conferring 563,000 less-than-honorable discharges. Between 2006 and 2010, more than 34,000 Army soldiers were discharged for misconduct alone. Thousands of veterans who are in dire need of help for untreated physical and mental health conditions cannot get it because of bad paper, which itself may be the result of those conditions. Many of these veterans are falling into unemployment, homelessness, and drug and alcohol abuse. A 2010 study found that war-deployed Marines diagnosed with PTSD were over 11 times more likely to be discharged for misconduct than those without such a diagnosis. To alleviate this problem, attorneys can help veterans petition administrative review and corrections boards for discharge upgrades.

**Administrative Review Boards**

Each branch of the military has a Discharge Review Board (DRB) and a Board for Correction of Military/Naval Records (BCMR /BCNMR). These administrative law boards have the power to change the reason for discharge or dismissal, characterization of service, or other aspects of military records. The Marine Corps is part of the Department of the Navy, so Marine Corps veterans must seek relief from the Naval Discharge Review Board and/or the Board for Correction of Naval Records.

The DRBs have more limited powers than the BCMRs. A DRB may upgrade the characterization of service (except one that was given as a result of a general court martial) and may change the narrative reason for separation (except to or from a disability discharge). BCMRs have more extensive authority. Those boards can upgrade any discharge characterization, change any reason for discharge, change the date of issue of discharge (which may result in back pay), change a discharge to a disability retirement, remove inaccurate performance evaluations or other records, and change reenlistment codes.

If the relief sought may be granted by a DRB, a veteran must petition the DRB before applying to a BCMR. Attorneys advocating for a service member before a board should find out whether the veteran has previously applied for a discharge upgrade. If the veteran does not remember, counsel should make a request under the Freedom of Information Act and the Privacy Act for copies of prior applications and decisions from the relevant boards. Whether the veteran has applied for a discharge upgrade or not, some practitioners choose to bypass the DRBs completely by requesting additional relief, such as a change in reenlistment code, that only a BCMR may grant.

DRBs have procedures and rules that are different from those of the BCMRs, but the statute of limitations for all discharge review boards is 15 years from the date of discharge. There are no exceptions to this rule. DRBs are composed of five military officers. DRBs make decisions based on service and medical records (if applicable), the application and accompanying brief, and any other evidence submitted by the applicant. If after documentary review a DRB denies an applicant’s request for upgrade or change in reason for separation, the applicant has the right to a personal appearance hearing. While an applicant may forgo the initial documentary review step and request a personal appearance hearing only, this eliminates the option of having two chances at success.

At personal appearance hearings, the boards consider all evidence and testimony of the applicant and witnesses. Counsel may make opening and closing statements and question the applicant and any witnesses. Personal appearance hearings generally have greater success rates than documentary review alone. Rules of evidence do not apply, and the boards do not have subpoena authority. A veteran may appear alone or with counsel, or counsel may appear alone. While the Army and Air Force DRBs travel as needed, the others do not, thus requiring veterans to travel to Washington, D.C., at their own expense. This obstacle alone is insurmountable for many veterans and presents due process concerns.

If a veteran has exhausted all available remedies at the appropriate DRB, the veteran may seek relief from a BCMR. BCMRs maintain a three-year statute of limitations from the date of discovery of the error or injustice. This date may be three years from the date of discharge, or three years from the date of an adverse DRB decision, or three years from the date the veteran “discovered” the existence of a corrections board. The statute of limitations may be waived “in the interest of justice.” Generally, a BCMR that is inclined to grant relief will waive the statute of limitations, but if the board finds the case lacks merit, relief is denied because of the statute of limitations. When filing an application after the three-year deadline, one must include in the accompanying brief an explanation of why it is in the interest of justice to waive the deadline.

BCMRs are composed of civilian employees of the pertinent military branch. Some see

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2 Memorandum from the Under Secretary of Defense to Secretaries of the Military Departments, Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code (20 Sept. 2011), available at [http://sldn.3cdn.net/b6bf0a11d5054695_k2m6b382s.pdf](http://sldn.3cdn.net/b6bf0a11d5054695_k2m6b382s.pdf).
BCMRs as having more liberal standards and producing more reasonable decisions than DRBs. Veterans applying for an upgrade or correction before BCMRs may request documentary review or a personal appearance hearing, but in contrast to DRBs, applicants have no right to a personal hearing before a BCMR. Requests for personal appearance hearings are rarely granted. BCMRs are all located in the area of Washington, D.C., and do not travel.

In response to the epidemic of service members with PTSD or TBI who have been unjustly separated with less than fully honorable discharges, or who have been involuntarily discharged because of an alleged personality disorder instead of being given medical retirement, Congress amended the DRB statute in 2009 with two important provisions. First, if a veteran was diagnosed by a physician, clinical psychologist, or psychiatrist as experiencing PTSD or TBI as a result of deployment “in support of a contingency operation,” one member of the review board panel must be a physician, clinical psychologist, or psychiatrist. Second, if the request for relief “is based in whole or in part on matters relating to post-traumatic stress disorder or traumatic brain injury,” the board must “expedite a final decision and shall accord such cases sufficient priority to achieve an expedited resolution.”

**Bases for Upgrades and Corrections**

The boards do not engage in de novo review of the veteran’s discharge. DRBs grant upgrades on the basis of equity or propriety, and BCMRs consider injustice or error. For those veterans with bad conduct or dishonorable discharges, the boards may grant relief based on clemency only. In order to prove inequity and impropriety, one must overcome the presumption of regularity in the conduct of governmental affairs. This is a rebuttable presumption, but the burden is on the applicant to provide substantial credible evidence of divergence from regularity.

DRBs do not utilize stare decisis, and until recently, BCMRs did not either. In July 2011, however, the U.S. District Court for the District of Columbia found in *Wilhelms v. Geren* that the Army Board for Correction of Military Records must consider relevant prior decisions and distinguish its own precedent.

Impropriety may be found when a prejudicial error of fact, law, procedure, or discretion occurred. Impropriety may also be found if an expressly retroactive and favorable change in law or policy has been made. The impropriety must constitute more than harmless error. For example, an impropriety could exist if a service member was not granted the right to submit a statement in response to the proposed discharge as provided by military regulation. In order to make propriety arguments, an advocate must carefully review the regulations on discharge procedures to determine if there were any irregularities in the veteran’s case.

Inequity exists when current policies and procedures are more favorable than those existing at the time of discharge, when the discharge was inconsistent with disciplinary standards at the time, or when quality of service and capability to perform military service make the discharge unfair. Factors for consideration of the quality of service include the veteran’s military ranks, awards, and decorations; letters of commendation or reprimand; combat service; acts of merit; length of service; prior military service; civilian convictions; courts martial and other forms of discipline; and records of unauthorized absence.

Positive postservice history is imperative for any upgrade applicant but is not by itself a sufficient reason for an upgrade. Most boards recommend at least five to six years of positive postservice conduct, consisting of steady work or educational history, lack of a criminal record, community involvement, and a stable family life. Military and medical records form the primary body of evidence, however. Therefore, it is important to request service personnel and medical records utilizing Standard Form 180. The service medical records of a veteran who has applied for V.A. benefits may be found at the V.A. regional office nearest to the veteran. For this reason, a request under the Freedom of Information Act should be submitted to the appropriate regional office. It is important to request records even if the veteran believes he or she has complete copies of all records.

Other important military records to review include unit-specific files, such as unit logs, or after-action reports. If the veteran was involved with criminal misconduct in the military, counsel should request copies of criminal investigative files. If the military ever held an Article 32 evidentiary hearing involving a veteran, counsel should request a copy of the hearing summary. If the veteran was court martialed, counsel should request a copy of the court martial transcript.

Obtaining records can be a frustrating experience. It may take multiple requests to multiple locations to collect all the records needed. The Navy is notorious for destroying important personnel records. Advocates may argue that the lack of necessary evidence rebuts the presumption of regularity in the conduct of governmental affairs.

Upon receipt of the records, counsel should review them for any punishment or discipline the veteran received. Commanders may punish service members for anything found to be in violation of good order and discipline. Nonjudicial punishment is used regularly as a form of discipline that is less severe than a court martial. Attorneys should review the records, noting the number of punishments

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46 Los Angeles Lawyer November 2012
received, the degrees of severity, and when they occurred. Attorneys should also take note of any awards, good performance scores, medals, letters of commendation, or other positive notice the veteran received in service. Reviewing records for disciplinary action is essential, because the alleged misconduct is what the advocate needs to try to mitigate or explain. If misconduct occurred only after combat exposure, for example, one could make an argument that the conduct was a symptom of an underlying medical condition such as PTSD or TBI.

If the case relates in any way to a medical condition, it is necessary to obtain current medical records. For example, if a psychiatric disability could have led to misconduct that led to a bad discharge, a detailed psychiatric evaluation is in order. Journal articles discussing comorbidity of PTSD and substance abuse may also be helpful.

Other sources of information include relevant news stories, such as articles describing the battles in which the veteran participated. If applicable, an attorney should also request and review any relevant civilian criminal records. Percipient witness statements are useful to corroborate the client’s story. Fellow service members may provide good statements. It is always preferable to get a statement from someone higher in the chain of command than the client. People who know the veteran very well may be helpful when arguing that a veteran’s conduct was a result of PTSD or TBI. Family members and friends can describe the change in the veteran’s attitude or personality since the trauma or injury that led to the condition.

Evidence of postservice history can take the form of school transcripts, diplomas, marriage and birth certificates, and certificates of completion of alcohol or drug treatment programs, if applicable. If possible, counsel should include a statement or record to verify the veteran has no civilian criminal history.

Upgrade applications should also include at least three character statements. First, these statements should put the veteran in a positive light by demonstrating that the behavior that led to the discharge was an aberration in the life of an otherwise model citizen. Second, there should be evidence of reformation. If the discharge related to drug or alcohol abuse, evidence of successful treatment completion is essential. A statement from an employer or professor who can describe the veteran’s strong work ethic and leadership potential is valuable. Counsel should also include a statement that attests to the veteran’s honesty. Another statement should be from a religious or community leader to speak to the veteran’s standing in the community.

Finally, the veteran must write his or her own statement. In plain English, he or she should explain what led to the discharge and why the discharge should be upgraded or the record corrected. While the client should not shirk from accepting responsibility for those things he or she did wrong, the statement does give an opportunity to tell his or her side of the story, including mitigating factors.

Essentially, the attorney’s role is to review and gather the evidence, assist in the creation of statements and letters, and write an informal brief that synthesizes the material and creates a narrative that provides a sympathetic portrait of the veteran. Members of the boards are not lawyers.

If there is little to mitigate the client’s in-service misconduct, and there are no violations in the discharge procedures, and the veteran does not have much in the way of positive postservice history, the best course is to wait before applying. Inform the client that a successful application will require a clean record, completion of substance abuse treatment if appropriate, successful work history, and positive contributions to family and community.

**Submitting the Request**

DRBs require submission of DD Form 293, and BCMRs require use of DD Form 149. Many representatives at veterans service organizations make the mistake of filling out these short forms and submitting them without doing any legwork or attaching an accompanying brief or evidence. This rarely yields positive results. A complete application for upgrade or correction includes a cover letter, the application form, a brief, a copy of the veteran’s DD214, copies of relevant military personnel and medical records, and additional evidence.

Once the board receives the application, it will assign a docket number and mail a letter confirming receipt of the upgrade or corrections request. The Naval Discharge Review Board requests confirmation that all relevant evidence has been submitted. The review boards also request official copies of military and medical service records directly from the branch of service. The board then makes a decision based on the evidence and issues a decisional document outlining the reasons and bases for the decision. The applicant and counsel are notified of the decision and provided a copy of the decisional document. The names and votes of the panel are available upon request.

Veterans seeking benefits from the V.A. may also utilize a process known as a character-of-service determination instead of going through the entire discharge upgrade process. A favorable V.A. character-of-service determination grants baseline eligibility for benefits to a veteran whose discharge was granted under conditions other than dishonorable.

Military discharge review offers lessons in patience and fortitude. It takes a long time, and the success rate is low. The rewards, however, are priceless. Helping a veteran upgrade or correct a military discharge can mean the difference between a life of struggle and one of successful transition from combat to community.

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1. 10 U.S.C. §§816 et seq. See also 10 U.S.C. ch. 47.
2. 38 U.S.C. §§101(2), 3311(c).
10. 5 U.S.C. §§552, 552(a).
12. See, e.g., Kathleen Gilberd, Upgrading Less-Than-Fully-Honorable Discharges, THE AMERICAN VETERANS AND SERVICE MEMBERS SURVIVAL GROUP 324 (2008) (Air Force DRB documentary review applicants have a 15% success rate, while personal appearance applicants have a 45% success rate.).
14. Id.
22. DoD 1332.28, supra note 18, at E3.2.12.6. See also 32 C.F.R. §724.211.
23. See, e.g., 32 C.F.R. §724.902(c).
25. 32 C.F.R. §70.9(b).
26. 32 C.F.R. §70.9(c)(1)(ii); DoD 1332.28, supra note 24, at E4.3.1.2, E4.3.2, E4.3.3.
27. 32 C.F.R. §70.9(c)(3)(i); DoD 1332.28, supra note 18, at E4.3.3.1.
29. 10 U.S.C. §832.
32. Id.
34. 38 C.F.R. §3.12.