

# Introduction

Welcome to military discharge upgrade practice. This Manual addresses a practice area of great importance to hundreds of thousands of individuals who have served in the United States armed forces, but are often denied the title of “veteran” and excluded from the benefits and services usually offered to veterans.

The Manual is designed to be a desk reference and guide to representing veterans with less-than-honorable or otherwise stigmatizing discharges in changing those designations. The introduction provides a brief background on this area of law and why it matters, information about the authors of the Manual, and the purpose of the Manual and its limitations. The introduction then discusses the audience for the Manual and provides a note about the use and meaning of the term “less-than-honorable.” Finally, the introduction offers guidance about how to use the Manual.

## 1.0 A Brief Overview of Discharge Characterization and Why It Matters

Since its inception, the U.S. armed forces have been assigning characterizations to servicemembers’ discharges when they are separated from the service, but only since World War II have so many servicemembers received stigmatizing and sometimes unjust less-than-honorable discharges with such severe consequences.<sup>1</sup> The rate of veterans with less-than-honorable discharges has been climbing since World War II, through the Vietnam War, and to the present day.<sup>2</sup> In the post-9/11 era, the armed forces have been discharging servicemembers with less-than-honorable discharges at higher rates than ever before.<sup>3</sup>

A less-than-honorable discharge imposes real harm and stigma on veterans. Not only is there shame and stigma associated with a less-than-honorable status, but the status may be a total or presumptive barrier to access needed veteran services. Currently, 6.5 percent of veterans who have served since 2001 are denied access to basic benefits offered by the Department of Veterans Affairs (VA) because of Other Than Honorable or other less-than-honorable discharge

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1. See the below note about terminology for more information about what the term “less-than-honorable” signifies.

2. Veterans Legal Clinic, Legal Services Center of Harvard Law School, *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper 2* (2016) (hereinafter “Underserved”), available at <https://www.swords-to-plowshares.org/wp-content/uploads/Underserved.pdf>.

3. *Underserved* at 9.

characterizations.<sup>4</sup> This means that a large number of recent veterans—including many who have served in combat operations or endured hardship deployments—are cut off from critical VA services, such as medical and mental health care, housing support, and educational benefits.<sup>5</sup>

The reasons for this dramatic increase in less-than-honorable discharge rates are varied, but there is no denying that less-than-honorable discharges have significant, long-term effects on a population of veterans greatly in need of support. In the post-9/11 era, a greater percentage of servicemembers have deployed multiple times, with fewer and shorter breaks between deployments, than previous generations. This has contributed to high rates of Post-Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), and mental health conditions that are known to contribute to conduct leading to a less-than-honorable discharge.<sup>6</sup> With increased understanding of these conditions, it has become clear that many servicemembers—both in this era and in prior eras—have been discharged less-than-honorably due to circumstances related to unresolved and untreated mental health conditions incurred during service.<sup>7</sup>

These veterans are often denied access to benefits and services from VA and face significant challenges transitioning back to civilian life.<sup>8</sup> In addition to the personal and social shame of a less-than-honorable discharge, veterans with less-than-honorable discharges are more likely to be unemployed or underemployed, lack access to appropriate health care, experience isolation from peers and family, develop substance abuse and mental health challenges, and suffer poor physical health.<sup>9</sup> Veterans with less-than-honorable discharges are more likely to have mental health conditions and are twice as likely to commit suicide.<sup>10</sup> They are more likely to be homeless and to be involved with the criminal justice system.<sup>11</sup> In short, veterans with less-than-honorable discharges are especially in need of the very benefits that they are too often denied.

Despite the high rates of less-than-honorable discharges, the rates at which the military review boards charged with correcting unjust or unlawful discharges actually grant relief have remained low. The overall rate is usually in the single digits and has been for the past few decades.<sup>12</sup> One reason for this low rate is the lack of available and reliable information about the discharge upgrade process, so that veterans

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4. *Underserved* at 2.

5. Ali R. Tayyeb & Jennifer Greenburg, “Bad Papers”: *The Invisible and Increasing Costs of War for Excluded Veterans*, Figure 1 at 4 (2017) (hereinafter “Cost of War”), available at [http://watson.brown.edu/costofwar/files/cow/imce/papers/2017/Tayyeb%20Greenburg\\_Bad%20Papers%20.pdf](http://watson.brown.edu/costofwar/files/cow/imce/papers/2017/Tayyeb%20Greenburg_Bad%20Papers%20.pdf).

6. *Invisible Wounds of War: Psychological and Cognitive Injuries, their Consequences, and Services to Assist Recovery* (Terri Tanielian ed., 2008) at xix, available at [https://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND\\_MG720.pdf](https://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG720.pdf); R.M. Highfill-McRoy et al., *Psychiatric Diagnoses and Punishment for Misconduct: The Effects of PTSD in Combat-Deployed Marines*, BMC Psychiatry (2010).

7. *Cost of War* at 1; *Underserved* at 13.

8. *Cost of War* at 1–2.

9. *Id.*

10. *Underserved* at 2.

11. *Id.*

12. *Veterans Discharge Upgrade Manual* at 21.

and their advocates do not know how to properly present a case to the military review boards that would convince the board to act favorably. Many applicants are not even sure to whom to address their applications or that more is needed than to fill out the small boxes on the one-page application forms for the board.<sup>13</sup> Moreover, there are a very few practitioners who are knowledgeable about discharge upgrade law, and even fewer who are willing to offer pro bono representation to the disproportionately low-income population of less-than-honorably discharged veterans.

There is much that we as advocates can do to correct these issues.

## 2.0 Mission Statement

The authors of and contributors to this Manual are from nonprofit civil legal aid organizations and law school veterans clinics that aim to protect and advance veterans' rights and to ensure that no veteran is denied the care and treatment that he or she needs. Our organizations have a particular focus on serving veterans with disabilities, and for that reason, the Manual focuses in part on developing and presenting issues related to the “invisible wounds of war,” that is, mental health conditions, traumatic brain injuries, and the relationship of drug and alcohol use to those conditions that have often been undetected or misunderstood—and potentially viewed as less-than-honorable. The Manual seeks to expand the life-stabilizing and life-changing effects that discharge upgrade advocacy can bring to veterans who unjustly received a less-than-honorable discharge characterization.

## 3.0 Purpose and Limitations

This Manual provides a comprehensive guide to screening, developing, supporting, and pursuing a discharge upgrade petition for a veteran with a less-than-honorable discharge. In most cases, that will mean putting together an application to request an Honorable discharge characterization with a nonstigmatizing narrative reason, separation code, and reentry code. However, the Manual also offers some guidance on other forms of records correction before the military review boards. The Manual further offers guidance on review board hearings and judicial review in federal court, as well as some information about access to the Department of Veterans Affairs through the character of discharge review process.

In undertaking this task it is important to note the many practice guides that have preceded this publication, including the Veterans Discharge Upgrade Manual published by the Connecticut Veterans Legal Center and Yale Law School, and Chapters 20 and 21 of the Veterans Benefits Manual published by the National Veterans Legal Services Program. These guides have offered critical information about discharge upgrade practice when little other reliable and current information was

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13. *Id.*

available, but they were not—and did not purport to be—the comprehensive, substantive treatise that would support advanced advocacy in this area of law.

The progenitor of this work and the most comprehensive manual written to date is the National Veterans Legal Services Program’s *Military Discharge Upgrading, and Introduction to Veterans Administration Law: A Practice Manual*, originally published in 1982 and last updated in 1990. That manual, which was hundreds of pages long, provided deep analysis of review board and federal court cases, offered practice tips, included checklists and samples, and was otherwise the essential text for discharge upgrade practitioners at the time. However, much has changed in discharge upgrade practice since that time, not least the great advancement in the understanding of mental health conditions like PTSD and of experiences like military sexual trauma, which have in turn led to regulatory and policy changes at the military review boards. The time is therefore ripe for a new comprehensive discharge upgrade practice manual.

While this Manual offers extensive, in-depth guidance about discharge upgrade law, there are topics that it does not cover or addresses only briefly. For example, the Manual does not include direct information about records corrections that are not discharge upgrades, such as obtaining medals and awards, removing harmful evaluation reports or punishments, or seeking retroactive promotion. The Manual also is not a comprehensive guide to the practice of federal veterans benefits law before the Department of Veterans Affairs or state veterans benefits law. Even in those areas that the Manual does go into detail, the Manual cannot discuss every relevant board or federal court case. We hope to address some of these gaps in future editions of the Manual.

There are many different veterans who have less-than-honorable discharges, but in particular the authors seek to create a resource to help those who are most vulnerable and who have endured the greatest injustice: veterans who are low income, who are homeless, who suffer from mental health and substance abuse challenges, who have experienced sexual assault, who have been the targets of racism, homophobia, or other discrimination. Our goals include helping these individuals gain access to federal veteran benefits and health care, as well as state veteran benefits and programs, as well as hopefully to heal or overcome the experience of a less-than-honorable discharge.

Discharge upgrade law is a burgeoning area of practice. We are pleased to share with you this mission of providing zealous and excellent advocacy to vulnerable veterans so that they gain access to the resources they need and deserve.

## 4.0 Target Audience

### 4.1 Veterans Advocates

Our primary purpose is to provide veterans’ rights advocates (nonprofit and pro bono attorneys and nonattorney advocates affiliated with veterans service

organizations and other veterans organizations) with a comprehensive guide to discharge upgrade law.

By using this guide, veterans advocates can assist veteran applicants not only to fill out their applications completely, but also to develop their claims by identifying procedural errors in the separation process, finding inequities and injustices in the discharge, collecting and developing documents that support arguments for relief, thoroughly and compellingly presenting a narrative in the light most favorable to an applicant, and framing and preserving legal issues for review to an appellate court.

This Manual does not assume that readers have served in the military or have any familiarity with the armed forces or military law. Indeed, the authors have written the Manual presuming that the reader has little to no existing knowledge about military life and law, and we welcome new entrants to this area of practice. We hope that the Manual provides useful background information about the lives of servicemembers and how the armed forces operate, in order to best advocate for their veteran clients.

## 4.2 Veterans

While our primary audience is veterans advocates, veterans who themselves have less-than-honorable discharges might find this resource helpful. It can feel empowering to learn about the boards, how they operate, what matters to them, and how to present a discharge upgrade application, and this Manual will touch on all those topics. However, this Manual is not intended to serve as legal advice for veterans considering or pursuing a discharge upgrade or records correction.

There are other guides more directly targeted at veterans who do not have training in law or as veterans advocates, including the self-help guide published by Swords to Plowshares<sup>14</sup> and the GI Rights Fact Sheet Regarding Discharge Upgrades.<sup>15</sup>

## 4.3 Current Servicemembers

Current servicemembers might find this resource of interest, particularly given the dearth of information about the effects of a less-than-honorable discharge and access to benefits. However, we caution you that this Manual is not intended to serve as legal advice for servicemembers currently going through a separation process or court-martial. We suggest that you turn to resources that have been

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14. The Swords to Plowshares discharge upgrade self-help guide is available online at <https://www.swords-to-plowshares.org/guides/upgrading-your-discharge>.

15. The GI Rights resources on discharge upgrades are available online at <https://girightshotline.org/en/military-knowledge-base/topic/discharge-upgrades>.

specifically developed for servicemembers in that situation, such as the GI Rights Fact Sheets Regarding Discharges.<sup>16</sup>

## 5.0 A Note on Terminology

Throughout the Manual, we will use the term “less-than-honorable” generally to mean characters of service or discharge statuses that are not fully Honorable. That is, “less-than-honorable” includes General (Under Honorable Conditions), Other Than Honorable (formerly known as Undesirable), Bad Conduct, Dishonorable, Dismissal, and Uncharacterized. Technically, all General discharges and some Uncharacterized discharges are under honorable conditions and therefore in the category of “honorable” discharges—but they are not the capital-H Honorable characterization that every servicemember strives for and upon which the armed forces place so much emphasis, and they carry stigma and shame for many veterans. We will sometimes also refer to these discharges as “less-than-fully honorable.”

However, because of the legal differences between discharges that are under honorable conditions (such as a General discharge) and less-than-honorable discharges (Other Than Honorable, Bad Conduct, Dishonorable, Dismissal), and between all those characterizations and having an Uncharacterized discharge, in some places, the Manual will refer only to some subset of these discharges. Mainly, the Manual will often talk about the statuses of Other Than Honorable, Bad Conduct, Dishonorable, and Dismissal that impose a presumptive barrier to accessing many federal and state veteran benefits. When doing so, it should be made explicit or be clear from context.

Some veterans and veterans advocates use the term “bad paper” instead of “less-than-honorable” to refer to these categories of harmful and stigmatizing discharges. For the sake of clarity and consistency, this Manual chooses to use the term “less-than-honorable.” Readers should know, however, that both terms are often used, that they can mean the same thing, and that certain veterans may prefer one over the other.

As a final note on terminology and methodology, it is important to recognize that some individuals receive Honorable discharges but still have stigmatizing or highly personal information on their DD 214 discharge papers or other military records that they wish to change or have removed. For example, many servicemembers were Honorably discharged but with the narrative reason of personality disorder, and in many cases, that personality disorder diagnosis was erroneous. Another example is veterans who were discharged based on their sexual orientation and have DD 214s that state the veteran was discharged for “Homosexual conduct” or as a “Class III Homosexual.” Because these veterans have stigmatizing or personal information that they wish to have removed and that may cause

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16. The GI Rights Facts Sheets are available online at <https://girightshotline.org/en/military-knowledge-base/#topic-military-army-navy-air-force-marines-coast-guard-discharges>.

ongoing harm or shame, even though they have Honorable discharges, this Manual will address how to assist them even though they do not fit into the “less-than-honorable” category.

## 6.0 How to Use This Manual

We suggest that readers use this Manual as a reference throughout the process of developing a discharge upgrade application. It would be helpful to review Parts I and II, which provide an administrative and procedural overview about discharge upgrade law and the steps advocates must take to develop a strong discharge upgrade application. Once a reader has identified the key issues at play in a given case, the Table of Contents can direct the reader to the particular chapters that might address that point. However, multiple chapters will likely be relevant in each case. For example, for a combat veteran suffering a traumatic brain injury, it would be helpful not only to read the chapters associated with traumatic brain injury but also the chapters associated with mental health conditions and medical separation. It also might be useful to review the subchapter on developing an equitable contention related to good post-service conduct. It is also very important to refer back to the statutory and regulatory authority under which the veteran was discharged.

Finally, keep in mind that this is an area of law that is ever expanding and changing. In just the past five years, the Department of Defense has issued multiple memoranda on the topic of upgrades for veterans who developed mental health conditions in service or experienced military sexual trauma, which reflect a much more liberal and sympathetic attitude toward discharge upgrade applications on those bases. Furthermore, know that this area is significantly underdeveloped and there are substantial gaps in the development of less-than-honorably discharged veterans’ rights. We therefore encourage readers to at once use this Manual as a reference point for what answers we currently know, but at the same time to engage in creative advocacy to construct novel arguments or pathways by which to zealously represent veterans. We welcome comments and feedback on the Manual so that future versions can be improved and expanded.

Thank you and good luck!