



The Newsletter of the
Military Law Task Force of
the National Lawyers Guild

On Watch

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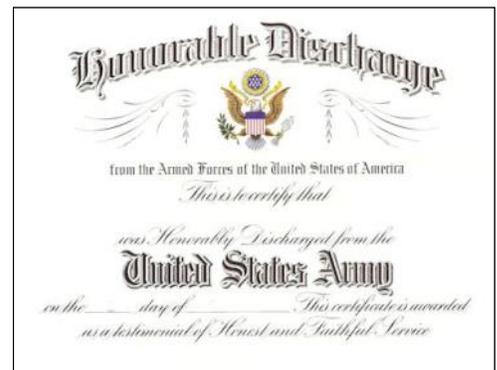
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'Lock & Load' Before Discharge or, How to Protect One's Future Rights Before or Upon Discharge From the Military

BY TERESA PANEPINTO

The following details a short checklist of what every servicemember should do before being discharged from the military. Even if a servicemember is not thinking of applying for VA benefits or trying to upgrade a discharge, taking these steps at the time of discharge will protect her if she changes her mind in the future.

The Department of Veterans Affairs, the Discharge Review Boards, and the Boards for Correction of Military/Naval Records rely heavily (if not exclusively) on documentary evidence. It is often difficult and time-consuming to track down such evidence after one has been discharged, so the more proactive a servicemember is at the time of discharge, the easier it may be for her/him to get VA benefits and/or a discharge upgrade in the future.



Create a paper trail:

- If a servicemember is injured in-service, but never seeks medical care for the injury, proving the injury is "service-connected" will likely be quite difficult. It is of the utmost importance, therefore, to seek such medical care. Even if proper treatment is not provided, or an incorrect diagnosis is given, having some form of documentation is better than none.
- It is also important to disclose any injuries or medical conditions (both somatic and psychiatric) on both DD Form 2697, "Report of Medical Assessment", and during the separation medical exam. If the servicemember answers "no" or "uncertain" to question 18 ("At the present time, do you intend to seek Department of Veterans Affairs (VA) disability"), that is o.k. Not answering yes will not bar the servicemember from applying for VA benefits in the future.

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- If the servicemember is not able or does not want to seek military medical care, but seeks civilian medical care, these records could be used instead. The same is true for Reservists and National Guard members who are unable or unwilling to seek care from the VA. Please note that medical records made at the time of discharge could also be used, be they from military or civilian sources.
- If there were instances of discrimination, report it as close as possible to the time it occurred.
- While not given as much weight, personal journals and letters mentioning instances of discrimination are also helpful, so long as they were written at or close to the time of the occurrence. For example, a servicemember who emails his mother about his commander using racial epithets could be used as evidence of such discrimination (keep in mind that rules of evidence do not apply in discharge review board or board for correction of military records proceedings).

Get copies of all records:

- Personnel records (known as SRB – Service Record Book, or OMPF – Official Military Personnel File) are essential.
 - This information should be accessible to servicemembers from their on-line accounts (soldiers may use Army Knowledge Online; Marines use Marine Online).
- Please note that the **Navy** is notorious for destroying personnel records, making it all the more important for sailors to get complete copies of records before their discharges!!!!
- In general, a discharge “packet” should include Staff Judge Advocate (SJA) review of the discharge recommendation, the command’s recommendation and attachments. The attachments are generally any documents related to the discharge, such as records of NJPs in relation to a misconduct discharge, or medical exam reports for a medical discharge.
- Of course, all medical records are also necessary (this should include documentation of everything from the initial entrance exam at MEPS, DD Forms 2807 and 2808; to the final discharge exam).
- Sometimes psychiatric records are not included with other medical records. In fact, many behavioral and

mental health clinics keep their own files; copies of those records should be requested directly from them. If necessary, the servicemember should use DD Form 2870, “Authorization for Disclosure of Medical or Dental Information.”

- Note that, under certain circumstances, such records may be withheld from the servicemember. If this happens, a servicemember may ask a civilian mental health professional to request those records on her/his behalf.
- If the servicemember ever attended any drug or alcohol rehabilitation program (even just a record of attendance at an orientation), and the records are not included in her/his regular medical records, be sure to specifically request copies of those records as well.
- If there was ever a positive urinalysis result, but the servicemember does not admit to using drugs, JAG or civilian counsel may request complete copies of the test results, chain of custody document, and other per-

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inent information from the drug lab itself. Also, if necessary, JAG or civilian counsel may request a portion of the urine sample to be sent directly to a civilian lab for independent testing.

- If relevant, request Inspector General, Equal Opportunity and other reports involving the servicemember and/or her/his unit. Additionally, if anyone in the unit ever initiated a Congressional inquiry regarding an issue that affected the servicemember (e.g. everyone in a unit receiving NJPs for refusing the anthrax vaccine), get copies of all correspondence related to it, if possible.
- Get copies of unit incident reports, after-action reports, log books, and any other type of documentation that may be relevant to a potential VA claim or discharge upgrade case. Such documents are especially helpful if one is trying to demonstrate that her/his command had a pattern of being unreasonably difficult, punitive, or arbitrary in its actions. Please note that these documents are rarely kept for more than two years, so it is all the more important to get copies of them before being discharged.
- If the servicemember was ever the subject of a criminal investigation, request copies of those records from the investigating body (i.e. Army's CID – Criminal Investigative Division, or Navy's NCIS – Naval Criminal Investigative Services).
- Transcripts or summaries of both non-judicial and judicial proceedings are also extremely important. If the servicemember is court-martialed, get the transcript. If an Article 32 hearing occurred, get the summary. Likewise, get transcripts or summaries of administrative separation board hearings. If no record was made because of retention or a not guilty finding, a JAG could

request copies of the audio recordings, so long as the request is made right away.

Get and maintain permanent contact information for others:

- If the servicemember has an ally up the chain of command, be sure to keep that person's contact information. Ideally, get a letter in support of a discharge upgrade, or corroborating the medical condition or stressor. Letters from higher-ups are given great weight.
- Service buddies and other witnesses may prove invaluable in corroborating a veteran's statement regarding a combat trauma, an instance where the servicemember was treated unjustly, etc.
- The servicemember should ask these individuals now if they would be willing to write a statement on her/his behalf at some point in the future.
- If the command has a Facebook page, yearbook, newsletter, or other social publication, this will help in tracking down witnesses in the future.

Conclusion

The records and information described here can make all the difference in making a claim for benefits or upgrading a discharge in order to be eligible for benefits. Attorneys and counselors working with servicemembers should make them aware of the importance of obtaining this information upon discharge when it is most easily available.

Teresa Panepinto is the Legal Director of Swords to Plowshares, a non-traditional veterans organization in San Francisco. She is an active member of the Bay Area Military Law Panel and the Military Law Task Force.

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'Don't Ask, Don't Tell' Repealed – for 8 Days

Congress approves eventual repeal, but policy back in effect pending presidential implementation, timeline unknown

BY JEFF LAKE

Unless you have been hiding under a rock these last few months, you have probably heard that the debate concerning the military's "Don't Ask Don't Tell" (DADT) policy has reached a fever pitch. This article will attempt to summarize the recent developments concerning the policy and examine prospects for the future.

As discussed in the last issue of *On Watch*, the Log Cabin Republicans brought suit and requested an injunction against the policy. A trial was held in front of U.S. District Judge Virginia A. Phillips. On September 9, 2010, Judge Phillips issued an 86 page Memorandum Opinion declaring the policy to be unconstitutional under the Fifth and First Amendments. On October 12, 2010, the Judge issued an

order permanently enjoining the military from enforcing the policy. However, eight days later on October 20th, the Obama administration filed a request with the 9th Circuit Court of Appeals for a stay, which the court granted. On November 5th, the U.S. Supreme Court refused to lift the stay. The matter is now pending at the 9th Circuit.

In another case implicating DADT, on September 24, 2010 U.S. District Judge Ronald B. Leighton, who had originally granted the Government's motion to dismiss, ruled on remand that Major Margaret Witt should not have been discharged from the Air Force in 2004 just

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NLG CONVENTION REPORT

BY JEFF LAKE

The National Lawyers Guild held its "Law for the People" Convention on September 22-26 in New Orleans, Louisiana.

During the convention, the MLTF held its annual membership meeting. A small but committed group met to discuss the current state of the military and the direction of the MLTF for the coming year.

Dan Mayfield and Kathy Johnson were reelected to the Steering Committee and Reber Boulton was nominated to serve. Reber has since been appointed.

The group discussed ways to work with students and to coordinate with other NLG committees. Finally, plans

were made to continue the publication of *On Watch* and to update and improve the MLTF website.

The MLTF held a workshop on *Challenging Sexual Harassment in the Military* that was attended by about 15 people. The presenters were MLTF members James Branum, Teresa Panepinto, Jim Klimaski and Rachel Natelson from the Service Women's Action Network.

The presenters spoke about the many problems faced by victims of sexual harassment in the military. One presenter stated, "even if you win you lose" because a military career is effectively over once accusations of sexual harassment are made. Finally, the presenters discussed ways to enforce the current regulations

and bills pending to improve responses to this problem.

Clearly this is an issue which needs lots of attention and the MLTF is exploring ways to continue work on this issue in the future. If you are interested in contributing, please contact the MLTF.

For those interested in the rest of the Convention, reports and articles can be found in the current issue of *Guild Notes* at <http://www.nlg.org/guildnotes/winter-2010>. The next NLG Convention is scheduled for October 12-16 in Philadelphia. The MLTF encourages all members to attend the convention and participate in the annual membership meeting and workshop(s) to be held there.



short of retirement following 17 years of service. Major Witt had won in the 9th Circuit, allowing her the right to present the facts of her discharge. The District Court has now found that DADT as applied to Major Witt violated her rights. On November 23rd, the Obama administration appealed that decision to the 9th Circuit.

Following these court decisions, the policy debate returned to the Pentagon and the United States Senate. The Pentagon has now modified the policy and any discharges under DADT must have, “the personal approval of the Secretary of the Military Department concerned, in coordination with the Under Secretary of Defense for Personnel and Readiness and the General Counsel of the Department of Defense.”

Study: most service members positive or neutral on DADT repeal

Since the last issue of *On Watch*, the Pentagon has now released the results of its infamous “study” of military personnel and military families concerning the DADT policy. As discussed in the last issue, the survey used to conduct the study was fundamentally flawed. Nevertheless, the survey results still show that the vast majority military personnel believe that the repeal of DADT would have a positive effect on the military or have no effect. Only 30 percent believed it would have a negative effect.

Following release of the study, attention turned to Capitol Hill and the United States Senate. Hearings were immediately scheduled with the Secretary of War (aka Defense) Robert Gates and the Joint Chiefs of Staff. The military leaders stated that they could handle the repeal of DADT and would prefer an orderly repeal rather than a court-imposed injunction.

House, Senate pass DADT repeal bills

Following the hearings, the House of Representatives passed H.R. 2965, amended to be a “repeal” of DADT and not attached to any other legislation. The measure then moved to the Senate. After some behind-the-scenes maneuvering, the bill came to the floor of the Senate on December 18th, where it passed 65-31.

The “repeal” that was passed clearly states that DADT “shall remain in effect until such time that all of the requirements and certifications required by subsection (b) are met.” The requirements of subsection (b) are as follows:

1. The Secretary of Defense has received the results of the survey he requested. Presumably this requirement has been met as mentioned above.

2. The President states to the Congressional Defense Committees that the report has been considered, the DOD has prepared “the necessary policies and regulations” and that implementation of the regulations “is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.”

The legislation states that the full repeal of DADT will take place 60 days after all of the above occurs.

Clearly the preparation of “the necessary policies and regulations” will be the key to getting to a full repeal. The legislation carries absolutely no deadline. Thus, it will be up to activists to push the military and the President to comply with the requirements as soon as possible. Given the military’s history, this could be quite a struggle.

Don’t believe the headlines: DADT still in effect

As this article is being written just days after the Congressional vote, it is not clear how the new legislation will affect the pending court cases involving DADT. In addition, it is not clear how the military will respond to pressure to fully end DADT and whether the President will continue to make it a priority.

At the end of the day, the policy remains in full force and effect despite all the headlines heralding a “repeal.” Unfortunately, the advice lawyers and counselors should be giving to servicemembers also remains the same, as there has really been no change in policy. While it seems that discharges under DADT will continue to dwindle, a discharge is still possible under the policy.

For eight days there was full repeal of “Don’t Ask Don’t Tell.” All those concerned about this issue need to continue to fight for a permanent repeal in the days and months ahead. The MLTF will continue to monitor developments concerning DADT and work with our allies for a real repeal.

Jeff Lake is an attorney in San Jose, California. He is a member of the MLTF Steering Committee.

About the Military Law Task Force

The National Lawyers Guild's Military Law Task Force includes attorneys, legal workers, law students and "barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes *On Watch* as well as a range of legal memoranda and other educational material; maintains a listserv for discussion among its members and a website for members, others in the legal community and the public; sponsors seminars and workshops on military law; and provides support for members on individual cases and projects.

The MLTF defends the rights of servicemembers in the United States and overseas. It supports dissent, anti-war efforts and resistance within the military, offering legal and political assistance to those who challenge oppressive military policies. Like its parent organization, the NLG, it is committed to the precept that human rights are more sacred than property rights.

The Task Force encourages comments, criticism, assistance, subscriptions and membership from Guild members and others interested in military, draft or veterans law. To join, or for more information, please check our website at www.nlgmltf.org or contact the Task Force at:

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