

Chapter 10 - Homosexual Conduct

Many servicemembers are discharged each year for “homosexual conduct.” While some request this discharge, many others are discharged involuntarily. Members suspected of being lesbian or gay are often subjected to intrusive investigations about their sexuality and may face harassment within their commands. A few are court-martialed each year for homosexual acts.

A member may be separated for stating that he or she is homosexual or bisexual; for engaging in, attempting to engage in, or soliciting a homosexual act; or for marrying, or attempting to marry, someone of the same sex. Characterization will be Honorable, General (under Honorable Conditions), or an Entry Level Separation, unless the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act under certain “aggravating circumstances.” In such cases characterization may be Under Other Than Honorable Conditions (OTH).

The current military policy, commonly known as “Don’t Ask, Don’t Tell,” grew out of President Clinton’s campaign promise to eliminate the ban on gay men, lesbians, and bisexuals serving in the military. Military commanders, and their supporters in Congress, opposed the lifting of the ban. The President announced Don’t Ask, Don’t Tell as a compromise policy after much public debate, extensive Congressional hearings, and overt lobbying by military officials. However, the policy made very few substantive changes in military policy. Shortly after the policy was announced, Congress enacted legislation which, for the first time, made the military’s gay ban a matter of federal law.

Servicemembers who are suspected of stating they are gay, engaging in homosexual acts, etc., face the likelihood of a command fact-finding inquiry or a more formal investigation. They run the risk that coworkers, friends, and even family may be questioned and, in the process, told about their suspected sexual orientation or acts. This chapter provides an overview of the current policy, with information about seeking discharge and fighting separation, as well as information about the command inquiries and investigations, harassment, and potential for court-martial which all members suspected of being lesbian, gay, or bisexual may face. The “Documentation” and “Approaching the Command” sections have information for members seeking discharge. For members wishing to fight separation for homosexual conduct, the “Fighting Separation” section discusses steps to take.

Criteria

The Don’t Ask, Don’t Tell regulations, while written very carefully, are maddeningly, purposefully vague and leave much interpretation to command discretion. An understanding of the regulations is important but, because individual commands’ interpretations of the regulations can vary widely, counselors need to research local base policies.

In Don't Ask, Don't Tell, the DoD regulated a distinction between a member's sexual orientation and a propensity to engage in sexual acts. "A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service...unless manifested by homosexual conduct." However, the military's definition of homosexual conduct is broad to the point of absurdity. "Homosexual acts" can include hugging and hand-holding. Soliciting a homosexual act could include asking for a kiss. To discharge a member, the military must find that at least one of the following instances of "homosexual conduct" is supported by the evidence:

- Ω "The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts...;"
- Ω "The member has made a statement that he or she is homosexual or bisexual, or words to that effect, unless there is a further approved finding that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts...;"
- Ω "The member has married or attempted to marry a person known to be of the same biological sex...."

If homosexual acts are the basis for separation, the member will be separated unless the member argues, and the discharge authority (or an administrative board, if demanded) concurs, that:

- Ω "Such acts are a departure from the member's usual and customary behavior;"
 - Ω "Such acts under all the circumstances are unlikely to recur;"
 - Ω "Such acts were not accomplished by use of force, coercion, or intimidation;"
 - Ω "Under the particular circumstances of the case, the member's continued presence in the Armed Forces is consistent with the interest of the Armed Forces in proper discipline, good order and morale;" and,
 - Ω "The member does not have a propensity or intent to engage in homosexual acts...."
- If the member wishes to remain in the military, he or she has the burden to prove all five items to the military's satisfaction.

A statement of homosexuality or bisexuality is grounds for separation "because the statement indicates a likelihood that the member engages in or will engage in homosexual acts" but, the military claims, "not because it reflects the member's sexual orientation." If the member is found to have made a statement that he or she is gay, to remain in the military the member has the burden to prove that he or she "is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."

A member will not be discharged if a member "engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding or terminating military service." The Army suspends the member's burden of proof in situations where the member's conduct "was solely the result of a desire to avoid or terminate military service."

Potential For Court-Martial

Members who are suspected of homosexual acts may also risk investigation by the military's criminal investigative services. While commands normally prefer to administratively discharge members they believe are gay, these cases occasionally result in courts-martial for homosexual acts or related "offenses."

Military regulations do not preclude trial by court-martial. Members found to have attempted, engaged in, or solicited, homosexual acts could be charged under the following Uniform Code of Military Justice (UCMJ) articles:

- Ω Article 125, (10 USC §925) which outlaws sodomy;
- Ω Article 133, (10 USC §933) which criminalizes "conduct unbecoming an officer and a gentleman;"
- Ω Article 134, (10 USC §934) which criminalizes "all conduct of a nature to bring discredit upon the armed forces" and includes specific provisions for "indecent acts;" and,
- Ω Article 80, (10 USC §880) which criminalizes attempting any act defined as an offense under the UCMJ.

Unfortunately, the regulations give no further guidance on when court-martial might be appropriate. However, prosecution is more likely for cases involving "aggravating circumstances." (See "Aggravating Circumstances" on page 9.3.) Military standards apply whether a member is on-base or off-base, on-duty or off-duty. The potential for court-martial prosecution exists even when sexual activities occur in private, off-base, among consenting adults. (While it is not common, it does occur, particularly in the Air Force.)

Counseling

Members may seek counseling to get out of the military or to try to stay in. Or clients may not be sure of what they want. Regardless of why they seek assistance, facing the prospect of a homosexual conduct discharge can be very traumatic for servicemembers, who face not only discharge but "outing" about a very personal part of their lives. Members must consider how to explain their discharge to family or friends, what information superiors and coworkers may gain about very private aspects of their romantic life, and the prospect of harassment.

For a member accused of homosexual conduct or suspected of being gay, former friends and coworkers become potential accusers, the member may be ostracized within the command and could become the target of an investigation that might result in criminal charges. Civilian support can be invaluable to members facing the stress of an inquiry. In addition to the legal information the member receives from a counselor, it may be helpful to refer the member to psychological counseling, especially at a gay counseling/support center.

Members may be understandably reluctant to talk with a counselor about their sexual orientation. Military regulations define homosexuality and bisexuality but servicemembers may not be so sure about their “abstract sexual orientation” or their “propensity” or “intent” to engage in sexual acts. Many members will assume that you do not deal with gay and lesbian cases unless you present yourself as gay friendly. To do so, use materials that include homosexual conduct in the discharges or topics that you deal with. (CCCO’s Getting Out is a good overview of available discharges.) Include literature relating to gay and lesbian members among the materials available in your office or counseling center.

It is helpful to explain the Don’t Ask, Don’t Tell policy to the member in detail and for the member to read over the applicable Service regulation. Familiarity with the regulations will help the member make educated decisions about the case, and knowledge about the standards and procedures he or she will encounter can keep a member from feeling entirely helpless in a difficult situation.

A counselor can assist clients in exercising their rights intelligently, including the right to remain silent and decline to make a statement. A nonattorney can not legally advise a member to remain silent. That is, unless they have spoken to an attorney, members can not say, “My attorney has advised me to remain silent.” If no arrangement can be made for a client to consult with an attorney, members can assert their right to remain silent by saying, “I wish to exercise my right to remain silent.” Because commands often search for ways to punish lesbians and gay men it is especially important to obtain complete information about the member’s record, problems at the command, or other skeletons that might come to the command’s attention with a little searching. Clients facing disciplinary action need to consult with an attorney.

Seeking Discharge

A homosexual conduct discharge can be a way out for members of the military who no longer wish to remain there. Voluntary gay discharges are generally straightforward and among the faster discharges. However, there are pitfalls that can occasionally complicate a standard gay discharge. The procedure can turn into a protracted and embarrassing investigation and the member can receive a characterization of OTH for aggravating circumstances, as a result of dual processing for a misconduct discharge based on separate disciplinary problems, or for fraudulent enlistment. In rare cases, the member could even face court-martial.

Members need to consider several factors before seeking discharge for homosexual conduct:

- Ω That the member’s discharge papers (Form DD 214) will indicate “homosexual conduct.”
- Ω The possibility of harassment.
- Ω What other discharges might be available to the member.

One of the key factors in preparing a gay discharge request is ensuring that the command does not have, and will not get, harmful information from the member or other sources. Discuss with the member the importance of limiting information and documents given to the command. The command is likely to conduct a fact-finding inquiry (and may make outrageous demands for “proof”). Therefore, members need to know they have a right to remain silent and doing so can help prevent an unfavorable characterization of service.

Harassment

Servicemembers who are suspected of being lesbian or gay may face harassment from their commands and fellow servicemembers. It can take the form of rude jokes and name calling, increased scrutiny of the member’s performance or conduct (such as disciplinary action for minor infractions that the command tolerates from other members), orders to perform undesirable duties, death threats, and physical assaults by one or more people. In one well-known case, a sailor named Alan Schindler was beaten to death in Okinawa by shipmates who believed he was gay. In another case, a San Diego sailor was harassed, threatened, and sent death threats in which “fags must die” was written on paper airplanes made of newspaper articles about Alan Schindler. Shipmates had decided the San Diego sailor was gay after he and a male friend dyed each other’s hair. After a year of harassment and unsuccessful complaints to the command, he became so desperate that he persuaded a friend to break his leg to obtain a transfer from the ship.

Members of the military are literally trained for such homophobia. Recruits are taught that combat and obedience to orders is “manly,” while male recruits who do not hack it are accused by screaming drill sergeants of being “girls” or “fags.” Physical weakness and cowardice, portrayed as mortal threats to the survival of the unit, are equated with women and gays who are seen as dangerous threats to unit morale and cohesion. Women are at particular risk for accusations of homosexuality and are forced out of the military with gay discharges at a rate three to five times higher than men. Even the Pentagon’s own Defense Advisory Committee on Women in the Services (DACOWITS) acknowledged in 1989 that “unfounded allegations of homosexuality” were being used as a method of sexually harassing women in the military.

Servicemembers may seek counseling when they encounter harassment, or harassment may arise after a client begins to seek or fight discharge. In either case, harassment or threats should be taken very seriously because there is a real chance that such threats will escalate to physical violence. Clients may need emotional support (post-traumatic stress disorder is not an uncommon result of serious harassment) and practical help, such as money for an off-base hotel room.

Be prepared to take immediate and aggressive legal action. A strongly-worded letter faxed to the commanding officer may be sufficient to provide some protection. Some commands, particularly in the Navy, remember the Alan Schindler case and do not want to see such incidents repeated in their command. In other cases, one or more of the formal complaint procedures, in conjunction with outside intervention, may persuade the command to take action. Equal Opportunity offices will sometimes treat harassment

based on perceived sexual orientation as a form of sexual harassment and accept those complaints. The procedures can be lengthy; therefore, assertiveness at the first stages of the complaint process may persuade the command to take action rather than let the procedure run its course. (See Chapter 6, Grievances and Filing Complaints.)

It is usually best to document harassment before a complaint is made. However, when danger to the client is great, make the claim at once and document the harassment after the complaint is made. Unfortunately, it is not safe to assume that commands and military investigators will be thorough and evenhanded in questioning witnesses and searching for evidence of harassment.

Victims of homophobic harassment often rightly fear that reporting harassment will result in an investigation of their sexual orientation rather than an investigation of their harasser. Commands may be persuaded to ignore the harasser's allegations of homosexuality. After all, death threats are hardly the "credible evidence" which is required to initiate an investigation of homosexual conduct. If the victim rather than the harasser is investigated, point out to commands that other victims of homophobic and sexual harassment will be reluctant to come forward. If the command is not impressed with a counselor's arguments, consider contacting a Congressional office or the Servicemembers Legal Defense Network. (See "Other Resources" on page 9.16.) Clients considering filing complaints over harassment must review what information the command or coworkers may have, or may be able to find out without difficulty, about homosexual statements or acts. Behavior that is theoretically protected under Don't Ask, Don't Tell, (such as associating with lesbians, reading gay material, going to a gay bar, etc.) may also trigger an investigation of the member. An absence of evidence does not protect members against unfounded allegations — but it does make it harder for commands to pursue an investigation of the victim.

Documentation

Servicemembers can seek this discharge by stating, in writing, that they are gay and addressing the statement to the separation authority, via the commanding officer. Verbal statements should not be made instead of, or in addition to, the written statement. Commands may misunderstand or distort what was said — and perhaps claim a member admitted to acts under aggravating circumstances or acts warranting disciplinary action. Carefully review the written statement with the member before it is submitted. There are a number of ways to craft statements. Members may:

- Ω Write that they are homosexual, or lesbian, gay, or bisexual. (It is not necessary, but members can add that they decline to rebut the presumption that they have a propensity to engage in homosexual acts.)
- Ω Write that they desire to engage in, or intend to engage in, homosexual acts.
- Ω Wish to use more personal language to get across the idea that they are gay.
- Ω It can be empowering for members to talk positively about their orientation in their statements and some members like to add personal comments to their statements.

Members can state that:

- Ω They are perfectly happy with their sexual orientation but recognize that military regulations make it impossible for them to serve openly and honestly.
- Ω They have given the matter serious thought and feel that “coming out” is important.
- Ω Being gay is a good thing.

Many counselors warn against making strong political statements; such statements may trigger an investigation or harassment. Likewise, statements should not acknowledge engaging in homosexual acts. Some commands, on learning that acts have occurred, may feel compelled to seek more information through extensive command inquiries or investigations.

Usually, statements include a request for discharge. (Members who have received scholarships or bonuses will likely have to repay moneys if they request discharge directly. See Chapter 19, ROTC: Disenrollment and Separation.) The statements can request that the characterization of service be fully Honorable or simply assert that it should be Honorable or of a type warranted by their service record. Finally, the member should indicate that he or she does not intend to make any further statements. (Members who have consulted an attorney can state that they have been advised by their attorney to make no further statement.)

Approaching the Command

A written discharge request is submitted directly to the member’s commanding officer, either in person or by mail. Counselors can include a cover letter with the member’s statement which can: remind the command of the member’s rights, request that the member’s privacy be protected and, if necessary, ask for command assistance with any existing harassment. (Where the letter is written by an attorney, it can also explain that the writer has advised the client to make no further statements.) Most of all a cover letter informs the command that the member is not alone.

The servicemember must decide when to submit the statement. Although not common, commands have been known to prepare unsatisfactory evaluations of members after they are known, or suspected to be, gay. Therefore, the member might wait until the current evaluation period is over and the evaluation or fitness report has been completed. If the command is currently undertaking an investigation of other members, it may be best to wait until the investigation is over.

The member may wish to submit the request earlier if the member is:

- Ω still in entry level status;
- Ω particularly anxious;
- Ω experiencing harassment;
- Ω soon to be assigned to overseas duty or a ship departing on an extended tour. (The statement will occasionally delay the member’s deployment.)

Pressuring an Unresponsive Command

Generally, a statement is sufficient to trigger discharge proceedings. If the member's commander does not seem to be acting on the statement, a first step can be to communicate directly with the separation authority.

Skeptical commands may need to be provided with further documentation but, regardless of what command representatives may say, there are virtually no circumstances under which it is advisable to provide evidence of homosexual acts. Instead, members should provide information about their life or lifestyle, such as documentation that they belong to gay religious or political groups, subscribe to gay periodicals, attend PFLAG meetings with their parents, statements where members describe their appreciation of gay culture, the emotional experience of recognizing and appreciating that they are gay, etc. In some cases, members may ask friends, family members, ministers, or others to write statements about their sexual orientation. It is important for counselors to review any letter before it is submitted to the command to ensure that letter writers do not include information about sexual activity. Because command inquiries may involve attempts to interview these people, any letter writer must be reminded not to talk with military officials about sexual acts.

Members can also submit a letter from a civilian psychologist or doctor stating that the medical professional has had discussions with the member and that the member is indeed gay. Providing such a letter can prevent the military from investigating whether the member was lying in order to get out.

Some counselors prefer to avoid doctors' letters, as it may seem to imply that homosexuality is a medical issue. Where statements from doctors or therapists are used, they can point out that homosexuality is not an illness. As with other letters, these must avoid references to homosexual acts. (Military Rule of Evidence 501(d) does not recognize doctor-patient privilege. It is possible that a military doctor or psychologist could be required to testify or produce records that may include incriminating information provided by the member to the medical provider.) See Appendix 8, Supporting Statements from Medical Professionals.

Official Process

Command Inquiries and Investigations

Members suspected of being gay or lesbian, including those who have voluntarily submitted statements, will normally be subject to a command inquiry (also known as a commander's fact-finding inquiry) or an investigation. Commanders are encouraged to appoint an officer to conduct a fact-finding inquiry before determining that a discharge for homosexual conduct is warranted. Inquiries and investigations are supposed to be conducted only if the member's commander has "credible information" that there is a basis for discharge. (See "Credible Information" on page 9.3.)

There are now generally fewer investigations by criminal investigative agents of private consensual acts involving adults, and seldom is there an investigation where only a

statement is made. According to DoD Instruction 5508.8, a DoD law enforcement organization “shall not initiate a criminal investigation into adult private consensual sexual misconduct where such misconduct is the only offense involved” unless requested to do so by a commander or authorized by the director, or principal deputy, of the law enforcement organization. In all cases, there must be a determination that “credible information of adult private consensual sexual misconduct” exists and that “such an investigation is an appropriate use of investigative resources.”

An inquiry or investigation may include interviews with the member’s coworkers, neighbors, and friends which members often find intrusive, humiliating, and distressing. To make matters worse, inquiry officers, and especially investigators, have been known to lie and make threats to members suspected of homosexual conduct.

At no point in an inquiry or investigation should a member be asked, or required to reveal, their sexual orientation. However, upon receipt of credible information of homosexual conduct a member may be asked if they engaged in such conduct or may be questioned about any information they provided in the course of the fact-finding inquiry or related proceeding. Some inquiry officers and investigators have developed creative ways to ask about sexual orientation despite the regulations.

Before being questioned by an inquiry officer, members should be advised of the DoD policy on homosexual conduct and, when applicable, their right against self-incrimination under Article 31, UCMJ. In most cases, virtually all answers may tend to incriminate the member. For example, in most cases a command can obtain information on private acts only by the member’s own admissions, or the admissions of the member’s sex partner. It is crucial that members assert their right against self-incrimination and request an attorney before answering questions. Warn clients that information of an incriminating nature may also be elicited under circumstances other than formal questioning.

The basic rules for members suspected of homosexual conduct, including those who voluntarily submitted a statement, are:

- Ω Do not discuss the case with anyone without first consulting with counsel.
- Ω If questioned, exercise the right to remain silent and to have legal counsel present during any questioning.
- Ω Do not give any information (beyond first and last name) that is in any way connected with the case.

An inquiry or investigation may also be an attempt to identify other gay and lesbian members and eliminate them from the military (commonly known as a witchhunt) despite instructions to limit inquiries to “the factual circumstances directly relevant to the specific allegations.” If such a witchhunt does occur, people involved in the member’s case need to be informed about the need to limit information provided to the command by exercising the rights explained above.

For members seeking discharge, the command may skip the inquiry if the inquiry officer determines that the member's written statement is sufficient evidence to warrant discharge. Other inquiry officers will choose to undertake an extensive inquiry. If so, members seeking discharge may believe they have to cooperate with the inquiry officer or investigator in order to be discharged. However, verbal statements are not necessary and can cause great harm.

Notification

All members who are facing a discharge for homosexual conduct, whether the discharge process is initiated by the member or by the command, are entitled to written notice of the proposed discharge and have the right to an administrative discharge board. (See "Fighting Separation" on page 9.13 and Chapter 3, Understanding the Discharge Process, under "Notification" on page 3.7.)

Type of Separation

In most cases in which the sole basis for discharge is homosexual conduct, even those involving homosexual acts, the characterization of service should be Honorable, General (under Honorable Conditions), or an Entry Level Separation. If a member is discharged on the basis of homosexual conduct, that reason will be noted on the discharge document and that information may stigmatize the veteran (and possibly limit employment opportunities) in the future.

A characterization of Under Other Than Honorable Conditions (OTH) will result only if the military finds that, during the current enlistment, the member attempted, solicited, or committed a homosexual act under "aggravating circumstances." (See "Aggravating Circumstances" on page 9.3.)

Some commands may seek to prosecute members for sexual acts, resulting in a punitive discharge awarded as part of a court-martial sentence or a characterization of OTH as part of a discharge in lieu of court-martial. Commands may also dual process a member for misconduct.

Appeals

Fighting Separation

Clients facing an involuntary gay discharge must decide whether they want to: remain in the military, fight against a gay discharge and get out on another discharge, or simply fight for an Honorable characterization of service. Making such a decision is difficult for many clients. They may be in the midst of a distinguished career in the military and contemplating an involuntary homosexual conduct discharge, even when characterized under Honorable conditions, can be very difficult. In other types of cases, obtaining a discharge under Honorable conditions may be the height of achievement — for gay clients fighting separation, it can be a demoralizing defeat.

Laws and regulations regarding homosexual conduct discharges change often and local commands may not be familiar with the most recent court cases, military legal opinions, or regulations. Each Service's policies can also differ. For example, as of 1997, Army commands can be more confused about the policy than other Services; the Navy, perhaps because it has had more court challenges than the other Services, often has senior attorneys review possible high profile cases; the Air Force is more likely to court-martial members for private, consensual, off-base sexual acts. For the most current information, contact Servicemembers Legal Defense Network and the Military Law Task Force. (See "Other Resources" on page 9.16.)

Counselors who have reviewed current cases and the regulations may find that they know more about the issues than the military attorneys assigned to their clients. Military attorneys are often grateful for copies of case decisions and regulations, contacts with national groups tracking the policy, and suggestions from counselors or attorneys familiar with the policy.

Administrative Board

Discharges for homosexual conduct are processed under the administrative board procedure. (See Chapter 3, Understanding the Discharge Process, under "Administrative Board" on page 3.10.) However, some Army commands have been known to use the notification procedure (where the member has no right to a board hearing) when an OTH characterization is not sought. This is an error and can usually be demonstrated to the command by referring to the regulations.

Once members are notified of discharge proceedings, it is very common for legal officers, personnel officers, or senior enlisted personnel to urge members to waive their rights, especially the right to a board hearing. Members are told, for example, that demanding all rights will not make any difference because administrative boards always do what the command wants, or that the commander's recommendation for an Honorable characterization is always followed by the separation authority. Members may also be told that demanding their rights may lead to a worse characterization and will delay the process for months.

It is true that an administrative board hearing makes the discharge process take longer, but the other claims are not true. Demanding a board and other rights is the principal way members can prevent commanders and separation authorities from acting capriciously. Separation authorities often ignore command recommendations for a good discharge. But when a board is demanded, the separation authority is prohibited from giving the member a worse characterization than an administrative board recommends. If a board finds the member did not engage in homosexual conduct, the member can not be discharged for homosexual conduct unless it is based on new evidence. (In a few cases, the Secretary of the Service will get around the administrative board decision by discharging the member under the Secretary's plenary authority.)

Rules of evidence do not apply in administrative board hearings and members may face allegations based on hearsay, rumor, or behavior which is theoretically protected under Don't Ask, Don't Tell. There is no regulation or law, as of 1997, which bars commands from using information obtained in violation of Don't Ask, Don't Tell in discharge proceedings. For example, commands should not ask members, "Are you gay?" But if members answer, they have made a statement, and in theory the statement can be used in an administrative board hearing. (The military also takes the position that Don't Ask, Don't Tell is not a rule of evidence and that the information would also be admissible at court-martial.) An argument might be made that evidence presented at the administrative board hearing that is not "credible evidence" of homosexual conduct should not be considered.

The regulations allow very limited exceptions to discharge based on acts or statements. (See "Criteria" on page 9.2.) The administrative board has the legal burden of finding, by a "preponderance of the evidence," that a statement was made or an act was committed. But members bear the burden of proving, also by a preponderance of the evidence, that they qualify for an exception. The regulations suggest information and evidence the board might consider in deciding whether members have rebutted the presumption that a statement about sexual orientation shows a propensity to engage in acts. Such examples are not given for the exception to acts, although the elements of the exception help in considering evidence.

If an argument for an exception is made, be sure the issue is "clearly and specifically" raised. Only then must the board make a specific finding about whether retention is warranted under the exception. Because many military attorneys are unaware of this, a client's military counsel may fail to explain that they are raising the exception in their presentation of evidence. An administrative board's legal advisor may also fail to tell the members of the board that they must make findings if the issue of exceptions is properly raised.

The process of proving an exception can be extremely distressing when the member is, in fact, lesbian or gay. It might help win a case, but members will likely find it demeaning to renounce feelings, treat a sexual encounter as an aberrant accident, and promise not to engage in activities they consider honorable and decent.

Clients must sometimes make difficult decisions about challenging evidence against them. Where allegations are made by others who are themselves lesbian or gay, who are emotionally unstable, or who have engaged in drug use or misconduct, members must decide whether to raise this to the board. Members may also need to decide whether to make an all-out assertion of heterosexuality, or rebut the specific allegations and not speak about their sexual orientation. Many board members want to hear a flat out assertion of heterosexuality combined with testimony by dates or lovers of the other sex. Of course, the board may simply conclude that the member is bisexual.

Commanders, recorders, counsel for the member, and administrative board members often make significant errors in discharge proceedings — particularly in gay discharge

cases. Such errors may be a basis for demanding a new board, requesting an upgrade of a discharge, or challenging a discharge in federal court. It is very helpful to document in the member's service record any errors and efforts to protest them.

Appeals and Court Challenges

The military review boards discussed in Chapter 3, Understanding the Discharge Process, will generally not examine the constitutionality of military regulations or policies such as Don't Ask, Don't Tell. However, a review board can upgrade or change a discharge if it finds there was not enough evidence to warrant the discharge, or the military failed to follow its own regulations and the error was prejudicial to the member. In addition, a review board can upgrade a discharge as a matter of equity (fairness) where the applicant can show extenuating or mitigating circumstances. (For example, if a member receives a General (under Honorable Conditions) discharge for homosexual conduct because of poor performance evaluations resulting from alcoholism or stress over family problems a review board will sometimes upgrade the discharge.) The review boards vary in their attitudes towards gay cases.

Servicemembers and veterans have filed lawsuits in federal court to challenge the constitutionality of Don't Ask, Don't Tell and the policy which preceded it, mostly based on equal protection or first amendment arguments. The cases have resulted in some favorable district court decisions and a small number of favorable decisions in appellate courts. For the most part, however, the appellate courts have supported the military's position. As of 1997, the Supreme Court had not considered the constitutionality of the policy.

Other servicemembers and veterans petition the federal courts to consider the procedures and facts of their cases — instead of, or in addition to, challenging the whole policy on constitutional issues. Courts can overturn discharges or the decision of a review board where, for example, the military violated a member's basic rights in the discharge proceedings. The issue of improper questioning or investigation under Don't Ask, Don't Tell has been raised in only one or two cases, and it remains to be seen how courts will respond to this issue.