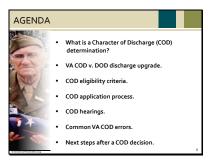


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COD Practice Site: Oakland Vet Center

- Swords to Plowshares has been working with veterans with "bad paper" since 1974 and is a pioneer in this area of veterans law.
- Oakland Vet Center-Swords to Plowshares Medical-Legal Partnership, launched November 2016.
- Only 1 of ~3 Medical-Legal Partnerships at the ~300 Vet Centers across the country.
- Center Center
- Vet Centers are unique! Unlike VHA, Vet Center doors are open to veterans with <u>all discharge statuses</u>.
- To qualify for therapy at a Vet Center, veterans must have experienced Military Sexual Trauma, served in a combat theater or other area of hostility, or operated a drone.

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What is a COD Determination?



Determination by the VA that a veteran's discharge was "other than dishonorable."

- 38 U.S.C. § 101 (2): "The term 'veteran' means a person
 who served in the active military, naval, or air service,
 and who was discharged or released therefrom under
 conditions other than dishonorable."
- Favorable COD renders a veteran "Honorable for VA purposes."



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Military discharge characterization Honorable General / Under Honorable Conditions Uncharacterized Other Than Honorable / Undesirable Bad Conduct Dishonorable Subject to COD

VA COD v. DOD Discharge Upgrade

- VENUE:

 - VA adjudicates CODs.
 DOD/DHS adjudicates discharge upgrades.
- CORRECTING MILITARY RECORDS:
 CODs do NOT change a veteran's military records. VA issues a decision letter finding the veteran "Honorable for VA Purposes."
 - > Discharge upgrades DO change military records, including but not limited to the Character of Service and Narrative Reason for Separation.

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VA COD v. DOD Discharge Upgrade



- ELIGIBILITY: BOTH restore eligibility for VA healthcare, compensation, pension, housing programs.
 - > ONLY DOD discharge upgrade restores eligibility for G.I. Bill education benefits.
- AUTHORITY: VA COD persuasive before DOD and DOD discharge upgrade binding on VA.
- HEARINGS: more accessible in COD process.
- SPEED: CODs tend to be faster.



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COD Eligibility Criteria



38 C.F.R. § 3.12: VA's criteria for determining whether a former service-member is "Honorable for VA purposes."

- Contains Statutory and Regulatory Bars.
 - > Regulatory bar: eligible for VA healthcare for service-connected conditions under "Chapter 17" without favorable COD.
 - > Statutory bar: ineligible for Chapter 17 healthcare. See also 38 U.S.C. § 5303(a) for statutory bars.

Discharge circumstances & Chapter 17 healthcare: 38 C.F.R. § 3.36o(b).

COD Regulatory Bars

38 C.F.R. § 3.12(d)

- Willful and persistent misconduct.
- Moral turpitude.
- Discharge in lieu of a General Court-Martial.
- Mutiny or spying.
- Homosexual conduct with aggravated circumstances.

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Willful & Persistent Misconduct



Engaging in willful AND persistent misconduct during military service. A discharge because of a minor offense will not be considered willful and persistent misconduct if service was otherwise honest, faithful, and mentoriou 3C.F.R. § 3.12(d)(4).

WILLFUL

- "Deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." 38 C.F.R. § 3.1(n)(1).
- Mental health may mitigate against willfulness.
- Drug use: not willful if "isolated and infrequent" or secondary to in-service disability. 38 C.F.R. § 3.301(c)(3).

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Willful & Persistent Misconduct



PERSISTENT

- Multiple offenses not necessarily persistent. M21-1 Part III.v.1.B.3.d.
- Not persistent if spread out in time. See, e.g., Bd. Vet. App. No. 1515536.
- Duration of prior service may be a factor. See, e.g., Bd. Vet. App. No. 9621544.
- AWOL: no set benchmark for how long is persistent.
 Winter v. Principi, 4 Vet. App. 29 (1993) (18% service persistent).

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Minor Misconduct, Otherwise Meritorious

MINOR

- Not minor if precludes performance of duties. Stringham v. Brown, 8 Vet. App. 445, 448 (1995).
- Technically, NJPs are minor. UCMJ Art. 15; see, e.g., Bd. Vet. App. No. 151396o.
- AWOL >30 days not minor. Winter v. Principi, 4 Vet. App. 29 (1993).

OTHERWISE HONEST, FAITHFUL, & MERITORIOUS

Awards, deployment, performance marks, etc.

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Moral Turpitude



An offense involving moral turpitude. This includes, generally, conviction of a felony. 38 C.F.R. § 3.12(d)(3).

MORAL TURPITUDE

- "Willful act," "gravely violates accepted moral standards," "expected to cause harm to person or property." VA OGC Prec. Op. 6-87.
- Felony creates *rebuttable presumption* of moral turpitude. VA OGC Prec. Op. 6-87.
- Must consider mitigating circumstances. M21-1 Part III.v.1.B.3.c.

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Less Common Regulatory Bars



- In lieu of a General Court-Martial. 38 C.F.R. § 3.12(d)(1).
 DD214 may state "in lieu of Court-Martial" or "for good of service" → look at record to see if in lieu General Court-Martial.
- Mutiny or spying. 38 C.F.R. § 3.12(d)(2).
- Homosexual conduct with aggravated circumstances. 38 C.F.R. § 3.12(d)(5).

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COD Statutory Bars

38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(c)

- Discharge by General Court-Martial.
 - Dishonorable discharges and some Bad Conduct discharges; often not stated on DD214.
- AWOL >= 180 continuous days, unless:
 "Compelling circumstances," e.g., quality of service, reasons for going AWOL, maturity, health, mitigating circumstances.
 38 C.F.R. § 3.12(c)(6)(i iii).

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COD Statutory Bars



- > Refers to UCMJ Art. 85, not "AWOL," "UA," "Dropped from rolls."
- Conscientious objector who refused to follow lawful orders. >Some conscientious objectors follow orders.
- Alien during a period of hostilities when service-member requested his/her release.
- Resignation of an officer for the good of the service.

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"Insanity" Exception



Not barred if insane at the time of the offense leading to discharge. 38 C.F.R. § 3.12(b).

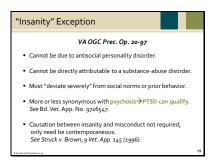
- Insane:

 Not "mentally defective or constitutionally psychopathic."

 - Exhibits, due to disease:
 "a more or less prolonged deviation from his normal method of behavior."
 - 2. Or "interferes with the peace of society."
 - 3. Or "lack[s] the adaptability to make further adjustment to the social customs of the community in which he resides."

38 C.F.R. § 3.354(a).

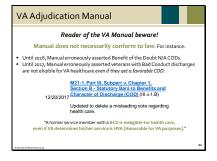




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COD Application Process (1) VBA Directly: Must apply for a benefit. COD review not done spontaneously. COD review not necessarily done when seeking VA healthcare or housing. COD should be triggered automatically with benefit application. $\bullet \ \ \text{No separate COD application process or form}.$ Apply for: Compensation, Pension, Home Loan Eligibility

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COD Application Process



(2) Through VA Health Administration eligibility review.

- Insist the VA hospital eligibility office complete VA Form 10-7131.
- Check that it requests COD review.
- Get copy. File the copy with a VA Form 21-4138 requesting establishment of a claim. Provide supporting COD evidence and arguments.

>Not uncommon for veterans to have received a COD review and a denial but not be aware.

> Need New & Material evidence to reopen if past appeal deadli



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Elements of a COD Application



To trigger COD review:

- Benefit application.

 E.g., 2:x-3:6EZ compensation form.

 Eng., 2:x-3:6EZ compensation form.

 Form 2:x-4:38. "I request to hearing on the issue of my COD."

 Notation of New & Material Evidence (if necessary).

 Form 2:x-4:38. "The attached claimant statement provides New & Material Evidence on the issue of Chandrater of Discharge to reopen the claim."

Can be provided with application or at/after hearing:

- Legal bire

 Veteranstatement.

 Supporting statements.

 Finends, family fellow service-members, commanders.

 Medical opinions/treatment records.

 If any on ot willful and/or insanity.

 Service records.

Service Chronology

IMPORTANT to create a complete chronology of veteran's service, using military records and other evidence. Use the chronology to:

- Tell your client's story.
- Demonstrate behavior change (e.g., Military Sexual Trauma).
- Help medical experts write opinions.
- Argue against persistence, show insanity (severe deviation in conduct), give reasons for AWOL, etc.



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How to Obtain a COD Hearing



- $\bullet \;$ Request a hearing in benefits application to trigger COD.
- Reaffirm desire for a hearing within 60 days of receiving COD development letter.
- Submit evidence entitling veteran to expedited consideration (homelessness, financial hardship, age, etc.) and request expedited scheduling of hearing.



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COD Hearings at the VA Regional Office

- Sometimes in-person, sometimes by video.
- No time limit.
 (Mine have ranged from 20 min. to 2 hrs.)
- Usually two VA adjudicators, sometimes more.
- Sometimes possible to speak informally with Hearing Officer in advance and provide evidence directly.
- Do not assume Hearing Officer has read your filings.
- Hearing Officer is not a COD specialist.

 $\label{thm:constraint} \textit{Hearing Officer will not necessarily decide the COD!}$

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COD Hearing Format

- Hearing will begin by Hearing Officer reading a script.
- Then will open the floor to you to conduct the hearing as you please, to give an opening, call witnesses, etc.
- · Leading questions are permitted.
- Hearing is recorded and transcribed.
- You are allowed to take as many off-the-record breaks as you like to confer with the veteran or for any other reason.



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COD Hearing Testimony



- Veteran should attend. (May be possible for veteran to call in.)
- Hearing Officer will always ask if veteran has something to say. But veteran is not required to testify.
- Not always a good idea for veteran to testify.

FRIENDS, FAMILY, BUDDIES, ETC.

- Friends/family likely only helpful if knew veteran during service. Can attend for moral support.
- Buddies can be very helpful, but rare for them to attend
- Dogs: apparently permitted at Oakland RO hearings.



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COD Hearing Testimony

MEDICAL EXPERTS

- Permitted to attend and testify with veteran consent. (Form signed at hearing.)
- Prepare your medical expert thoroughly.
- Clinicians may tend to focus on current, as opposed to in-service, symptoms.
- ${\blacktriangleright}$ Familiarize them with VA terms (e.g., insanity, willfulness).

Common VA Questions at COD Hearings

- You were denied before. Why should VA grant now?
- Why did you only start mental health treatment X years after service?
- Did you turn yourself in after your AWOL or were you caught?
- Did anyone in your command do anything to try to stop your discharge?
- Did anyone else in your unit receive an OTH?
- Were you satisfied with your Court-Martial lawyer?
- Are you getting treatment for your PTSD?
- How do you feel about your service?
- Have you filed a discharge upgrade application?





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Often VA Asks Few Questions



Common for Hearing Officers not to Ask Many Questions

- Position that they are present simply to "absorb" veteran's evidence and to get it on the record.
- <u>Ask Questions</u> to prompt Hearing Officer to reveal their reaction to evidence and overall assessment of veteran's case to create opportunity to respond:
 - ➤ E.g., given the evidence presented, are there any barriers to a favorable COD?

Get Hearing Officer's contact information.



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After the COD Hearing



- Wait for hearing transcript. (Can take several months.)
- Veteran has the right to waive the transcript to speed up decision process.
- Sometimes additional development if Hearing Officer suspects military records are incomplete, for instance.
- Can submit additional evidence.
- Follow up with Hearing Officer to make sure case has been assigned and is being worked.

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Common VA COD Errors

- Fail to recognize multiple enlistment periods. (38 C.F.R. § 3,13).
- Patent factual errors (e.g., typo that AWOL was 100 days instead of 10).
- Higher evidentiary burden for Bad Conduct discharges irrespective of Court-Martial type.
- Mental health in service only relevant if condition amounts to "insanity" as defined in VA law.
- Failure to consider all evidence of record; look at list in denial.

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Common VA COD Errors



- Benefit of the Doubt rule inapplicable because applicant is not a "veteran."
- Refusal to expedite under Flashes (e.g., Homeless Flash) because applicant is not a "veteran."
- Application of DOD-like "error" standard.
- Mixing up statutory and regulatory bars for Chapter 17 healthcare purposes.

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Life After a Favorable COD

VA healthcare, benefits, and housing eligibility!

- Some delay in processing of service-connection claims, but little confusion about eligibility post-COD.
- Sometimes a fight to get enrolled in VA healthcare due to inadequate training of eligibility staff.
- In many cases, easy to convert COD filings into DOD upgrade filings.



Life After a Negative COD

Keep Fighting!



- Request Reconsideration, fast.
- File a Clear & Unmistakable Error (CUE) claim.
- Consider pushing for VHA eligibility for serviceconnected conditions under Chapter 17 if eligible.

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Some Takeaways



- Make friends at your VA Regional Office!
- Get contact information at every opportunity.
- Almost always request a hearing.
- $\bullet \ \ \text{Tell your client's story through the lens of VA COD laws}.$
- Do not overlook traumas that occurred during service unrelated to service.
- Do not assume Hearing Officer/decision-maker knows COD laws or rules.

Try to prevent common VA errors!

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QUESTIONS?



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