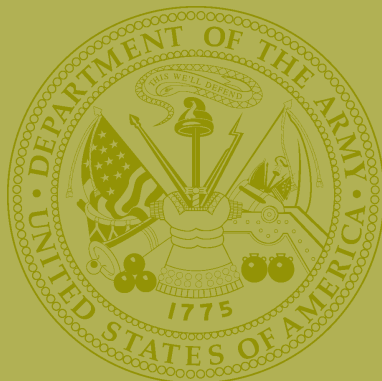


SURVIVAL ★ GUIDE ★



A Comprehensive Guide to
“Don’t Ask, Don’t Tell, Don’t
Pursue, Don’t Harass” and
Related Military Policies



FOURTH EDITION
MARCH 2003





Notice

TO: SERVICE MEMBERS
FR: SLDN
RE: WARNING

URGENT

ARTICLE No. 31

SERVICE MEMBERS: Under Article 31 of the Uniform Code of Military Justice (UCMJ), you have the right to remain silent and to consult with a defense attorney if you are investigated. **Say Nothing. Sign Nothing. Get Legal Help.** Call SLDN at (202) 328-FAIR for confidential legal counseling.

ACKNOWLEDGEMENTS

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DEDICATION

To those who have served and continue to serve faithfully in enforced silence to secure for America the freedom that is denied to them.

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We welcome your feedback. For suggestions regarding new sections for the 'Survival Guide,' or other ideas, please email us at legal@sldn.org.



A Vision.

Freedom to Serve

A Mission.

SLDN is a national, non-profit legal services, watchdog and policy organization dedicated to ending discrimination against and harassment of military personnel affected by Don't Ask, Don't Tell and related forms of intolerance.

Goals for Freedom.

Lift the ban preventing gays, lesbians and bisexuals from serving openly and honestly in the military.

Provide free legal services to service members harmed by *Don't Ask, Don't Tell* and related, discriminatory policies.

Protect service members from harassment based on perceived sexual orientation or gender identity.

Advocate for policies and practices that improve the lives of service members.

Support service member and veteran pride as lesbian, gay, bisexual or transgender persons.

Strengthen organizational capacity to assure the freedom to serve in the most cost-effective, strategic fashion.

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VIII. How You Can Help SLDN Assist Service Members



I. ABOUT THE *SURVIVAL GUIDE*

The *Survival Guide* explains the military’s “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” policy and how it is being used in the field. It also provides “survival tips” for service members and covers practical aspects of military culture with which the advocates and civilian friends of service members should be familiar.

The *Survival Guide* includes an overview of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” Subsequent sections correspond with the major provisions in the Department of Defense (DoD) directives implementing “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” and with service members’ most common questions about the policy. The service regulations mirror the DoD directives. Members of the Army, Air Force, Navy, Marine Corps and Coast Guard, their friends and their advocates should find the information in this guide useful.

It is important to review the entire guide before studying the individual sections, which are arranged in alphabetical order. This will provide a sense of the overall policy, which is necessary to understand each of the sections and how they work together, on paper and in practice.

Information in this guide may help service members make informed decisions about how to lead their lives, how to protect themselves and how to respond if they are targeted under this policy. This guide does

not, however, provide comprehensive counseling for service members, nor is it a substitute for seeking help from a defense attorney or legal worker (a non-attorney, such as a paralegal or military counselor, who is experienced in military administrative law matters). Each situation is different and must be evaluated and handled based on its own facts.

Every service member should know the information contained in this guide. Although “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” specifically targets lesbians, gays and bisexuals, in practice other service members have been impacted. The military’s policy is often used as a means to retaliate against people, regardless of their sexual orientation. This is particularly true for women, who are investigated and discharged at rates far higher than men and who are accused of being gay in retaliation for resisting sexual harassment or assault. Uninformed investigators and commanders also may assume that transgender service members are gay and wrongly attempt to kick them out of the service under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”



II. SERVICE MEMBERS' LEGAL RIGHTS

If you gain nothing else from this guide, please know that service members have certain legal rights under Article 31 of the Uniform Code of Military Justice (UCMJ). If questioned about their personal life or sexual orientation by anyone in the military, service members have the right to:

- ★ **Say Nothing**
- ★ **Sign Nothing**
- ★ **Get Legal Help**

These rights are extremely important any time service members face a command inquiry or formal criminal investigation. A wrong word can mean the difference between staying in or getting kicked out, saving pension or educational benefits versus forfeiting them, even freedom or prison. Signing the wrong thing could mean a waiver (giving up) of legal rights.

If questioned about their sexual orientation or activities, service members are encouraged to exercise their legal right to consult with a defense attorney

before making any statements. Under Article 31, investigators must stop the questioning and allow service members to see an attorney if they ask to consult with one.

While investigators and commanders are supposed to advise service members accused of homosexual conduct of their rights prior to any questioning, they often do not. Service members may have to assert their legal rights before they are advised of them. They may have to tell investigators and commanders that they do not wish to say or sign anything and that they wish to consult with a defense attorney. Some investigators and commanders have trouble accepting this, and service members must be prepared to be firm.



III. WHOM TO CALL FOR HELP

For free, confidential legal counseling, please contact:

Servicemembers Legal Defense Network (SLDN)

P.O. Box 65301

Washington, D.C. 20035-5301

(202) 328-3244 (voice)

(202) 797-1635 (fax)

legal@sldn.org (e-mail)

www.sldn.org (web site)

Other resources of interest to service members
are listed in the back of this guide.



IV. AN OVERVIEW OF “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS”

“Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” (DADTDPDH) is a ban on lesbians, gays and bisexuals serving in the military – similar to the policies banning service that have been in place for the past fifty years.¹ DADTDPDH is the only law in the land that authorizes the firing of an American for being gay.² There is no other federal, state, or local law like it. Indeed, DADTDPDH is the only law that punishes lesbians, gays and bisexuals for coming out. Many Americans view DADTDPDH as a benign gentlemen’s agreement with discretion as the key to job security. That is simply not the case. An honest statement of one’s sexual orientation to anyone, anywhere, anytime may lead to being fired.

A. The History of the Policy

DADTDPDH is the result of a failed effort by President Clinton to end the ban on gays in the military. Spurred in part by the brutal 1992 murder of Seaman Allen Shindler, then candidate Clinton proposed ending the ban by issuing an Executive Order overriding the Department of Defense regulations that barred gays from serving. Congress, however, intervened and the ban was made law, theoretically preventing action by future Commanders in Chief.

This law was, however, significantly different from prior prohibitions on service in three respects. First, Congressional and military leaders acknowledged, for the first time in 1993, that lesbians, gays and bisexuals serve our nation and do so honorably.³ Second, the policy also states sexual orientation is no longer a bar to military service.⁴ Third, President Clinton, Congress

and military leaders agreed to end intrusive questions about service members’ sexual orientation⁵ and to stop the military’s infamous investigations to ferret out suspected lesbian, gay and bisexual service members.⁶ They agreed to take steps to prevent anti-gay harassment.⁷ They agreed to treat lesbian, gay and bisexual service members even-handedly in the criminal justice system, instead of criminally prosecuting them in circumstances where they would not prosecute heterosexual service members.⁸ They agreed to implement the law with due regard for the privacy and associations of service members.⁹ The law became known in 1993 as “Don’t Ask, Don’t Tell, Don’t Pursue” to signify the new limits to investigations and the intent to respect service members’ privacy.

Small steps were made to keep some of these promises. Questioning on sexual orientation at induction stopped. Criminal prosecutions have decreased and

witch-hunts have declined. President Clinton issued an Executive Order ending discrimination in the issuance of security clearances.¹⁰ The Department of Defense issued guidelines on anti-gay harassment and limits on investigations.

Then, in 1999, PFC Barry Winchell was murdered by fellow soldiers at Fort Campbell, Kentucky. In the wake of this murder, the Department of Defense (DoD) issued new guidance on prohibiting anti-gay harassment. President Clinton issued an Executive Order providing for sentence enhancement under the Uniform Code of Military Justice (UCMJ) for hate crimes,¹¹ as well as a limited psychotherapist-patient privilege.¹² In February 2000, Pentagon officials added “Don’t Harass” to the title of the policy. The Pentagon then did a survey on anti-gay harassment, finding it was widespread.¹³ Thereafter the Pentagon formed a working group which issued a 13-point action plan to address anti-gay harassment which the services were then directed to implement. (The full text of this plan is included as an attachment).

These limited steps, spurred in large part by the murder of PFC Barry Winchell, have done little to fulfill the promises made when the policy was created. Intrusive questioning continues. Harassment continues in epidemic proportions. Little regard for service member privacy has been shown during the life of this law. Simply put, asking, pursuing and harassing have continued since the law was passed.

B. The Don’ts in “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass”

Don’t Ask. “Don’t Ask” means that service members are not supposed to be asked about their sexual orientation.¹⁴ Experience has shown, however, that some commanders, inquiry officers and investigators continue to ask service members about their sexual orientation, despite the rules to the contrary. Service members are not required to reveal their sexual orientation if they are asked about it. Lesbian, gay and bisexual service members who answer and reveal their orientation are likely to be discharged, even

though it was against the policy for military officials to ask about their sexual orientation in the first place.

Don’t Tell. Under “Don’t Tell,” lesbian, gay and bisexual service members face discharge if they disclose their sexual orientation.¹⁵ This provision was intended to target public declarations of sexual orientation. Lawmakers promised that service members would be left alone as long as they kept their orientation a “personal and private” matter. As the law has come to be implemented, however, there is no privacy for service members as promised in 1993, when “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” became law. If a military commander finds out that a service member has confided their sexual orientation to anyone — even parents, a psychologist or chaplain¹⁶ — the service member will likely face discharge. One exception is security clearance interviews, where truthful statements about sexual orientation or activities are not supposed to be used as a basis for discharge.¹⁷ “Don’t Tell” also does not overturn the attorney-client privilege that exists under military law and that, in general, requires military defense attorneys to keep conversations with their clients confidential.

Don’t Pursue. “Don’t Pursue” was intended to stop the infamous witch hunts against lesbian, gay and bisexual service members. More than a dozen specific investigative limits as laid out in DoD instructions and directives comprise “Don’t Pursue.” It is the most complicated and least understood component of the policy. These investigative limits establish a minimum threshold to start an inquiry and restrict the scope of an inquiry even when one is properly initiated.

A service member may be investigated and administratively discharged if they:

- 1) make a statement that they are lesbian, gay or bisexual;
- 2) engage in physical contact with someone of the same sex for the purposes of sexual gratification; or
- 3) marry, or attempt to marry, someone of the same sex.¹⁸

Only a service member's commanding officer may initiate an inquiry into homosexual conduct.¹⁹ In order to begin an inquiry, the commanding officer must receive credible information from a reliable source that a service member has violated the policy.²⁰ Actions that are associational behavior, such as having gay friends, going to a gay bar, attending gay pride events, and reading gay magazines or books, are never to be considered credible information of sexual orientation.²¹ In addition, a service member's report to his/her command regarding harassment or assault based on perceived sexuality is never to be considered credible evidence.²²

If a determination is made that credible information exists that a service member has violated the policy, a service member's commanding officer may initiate a "limited inquiry" into the allegation or statement. That inquiry is limited in two primary ways. First, the command may only investigate the factual circumstances directly relevant to the specific allegation(s).²³ Second, in statements cases, the command may only question the service member, his/her chain of command, and anyone that the service member suggests.²⁴ In most cases of homosexual statement, no investigation is necessary.²⁵ Cases involving private sexual acts between consenting adults should be dealt with administratively, and criminal investigators should not be involved.²⁶

The command may not attempt to gather additional information not relevant to the specific act or allegation, and the command may not question anyone outside of those listed above without approval from the Secretary of that Service.²⁷ Such an investigation is considered a "substantial investigation."²⁸ In order to request authority to conduct a "substantial investigation," the service member's command must be able to clearly articulate an appropriate basis for an investigation.²⁹

As with a "limited inquiry," only a service member's commanding officer has the authority to request permission to conduct a "substantial investigation."³⁰ By definition, a "substantial investigation" is anything that extends beyond questioning the service member, the service member's immediate chain of command, and anyone the service member suggests.³¹

Don't Harass. The "Don't Harass" component was added to attempt to address the rampant harassment because of perceived sexual orientation in the military. Officially, "[t]he Armed Forces do not tolerate harassment or violence against any service member, for any reason."³² The Pentagon has also committed to implement a 13 point Anti-Harassment Action Plan in 2002 (the text of this plan is included as an attachment to this Guide). As of 2003 this plan has not been fully implemented. There are many regulations and laws that prohibit harassment and can be applied to anti-gay harassment cases. However, these regulations are not well enforced and harassment remains a serious problem. Harassment can take different forms, ranging from a hostile climate rife with anti-gay comments, to direct verbal and physical abuse, to death threats.

C. The Three Things That Will Get You Discharged

Under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" service members may be discharged for homosexual conduct. The military defines homosexual conduct very broadly. Homosexual conduct includes (1) a statement that one is gay, (2) a homosexual act, attempted act or solicitation of an act, and (3) a marriage or attempted marriage to someone of the same gender.³³ Service members should review thoroughly the sections in this guide that cover these reasons for discharge. An abbreviated version follows.

1. Statements. Statements are admissions, like "I am gay." There are many other statements that may form a basis for discharge under current regulations. Words that are not as direct as "I am gay" but convey the same sense, such as "I am not a gay man, but my boyfriend is," can lead to administrative discharge processing. Additionally, behavior, or words that a so-called "reasonable person" would believe were intended to mean that the person making the statement is gay, are now considered statements. According to Department of Defense hypotheticals, for example, carrying a gay pride banner that states, "Lesbians in the military say lift the ban" could be

interpreted as a statement of sexual orientation.

“Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” presumes that service members who state they are gay engage in, intend to engage in, or have a propensity to engage in homosexual acts. Discharge is mandatory for service members who state their sexual orientation unless they rebut (disprove) this presumption, usually at an administrative discharge board. Rebutting the presumption has proven to be a nearly impossible task. Lesbian, gay and bisexual service members should not come out on the false hope that they can rebut the presumption and keep their careers.

2. Acts. The military defines homosexual acts as more than having sex with someone of the same gender. Acts include any touching of a person of the same gender for purposes of sexual gratification, and any touching that a “reasonable person” would believe shows a propensity (likelihood) to engage in gay acts. Kissing, hugging, and hand-holding have all been viewed as homosexual acts under this policy.

Discharge is mandatory for homosexual acts. “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” retains one long-standing exception for service members who can prove, among other criteria, that their homosexual acts were a departure from their customary behavior and will not occur again and that their retention is in the best interest of the service. Service members should be warned that, in practice, there is very little chance of being retained under this exception, which service members refer to as “Queen for a Day.”

3. Marriage. Though lesbians, gay men and bisexuals cannot be legally married at this time, the “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” regulations prohibit marriage and “attempted marriage” anyway. Some commands have also initiated discharge proceedings based on evidence of same gender commitment ceremonies or civil unions. Domestic partnership registration may also trigger separation under the prohibition on “attempted marriage;” such registration could also be considered a “statement” of sexual orientation.



V. EVERYTHING YOU WANTED TO KNOW ABOUT "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS" BUT WERE AFRAID TO ASK

Acts

"Don't Ask, Don't Tell, Don't Pursue, Don't Harass" defines "homosexual acts" broadly. Acts can include kissing, hand-holding and other bodily contact between people of the same gender, not just sex.

A "homosexual act" means any bodily contact, actively undertaken or passively permitted, between members of the same gender for the purpose of satisfying sexual desires, and any bodily contact (for example, hand-holding or kissing, in most circumstances) that a reasonable person would understand to demonstrate a propensity or intent to engage in an act.³⁴

Homosexual acts are one of the three grounds for discharge under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass." The regulations treat attempts and solicitations the same as acts, putting members at risk of being discharged for attempted hugging or solicitation of a kiss.³⁵

The regulations state that the "preferred method" of handling allegations of homosexual acts occurring in private between consenting adults is in the administrative system, through commanders' inquiries and administrative discharge boards.³⁶ This guidance is being followed in most commands.

Some commanders, however, have singled out gay

service members for court-martial under the Uniform Code of Military Justice (UCMJ). Sodomy (oral or anal sex, whether heterosexual or homosexual) is a criminal offense under Article 125 of the UCMJ. Kissing, hugging and other forms of touching may be charged as crimes under the "general articles," Article 133 (officers) and Article 134 (enlisted or officers). Conviction under Article 125, 133 or 134 can result in up to five years in prison for each act, dishonorable discharge, reduction in pay grade and fines and forfeitures.³⁷

While most service members do not face criminal prosecution for gay acts, the risk is very real.

HOMOSEXUAL ACTS ARE ONE OF THREE GROUNDS FOR DISCHARGE UNDER "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS"

- ▶▶ See "Administrative Discharge Boards and Boards of Inquiry," "Attorneys," "Criminal Prosecution," "Discharge Characterizations," "Hand-Holding and Kissing," "Homosexual Conduct," "Legal Rights" and "Recoupment" for additional information. See the "Queen For A Day" section for one rare exception to administrative discharges for homosexual acts.

Administrative Separation Boards and Boards of Inquiry

Most enlisted service members who are processed for discharge for homosexual conduct have the right to a hearing before an administrative separation board (also known as an administrative discharge board).³⁸

Non-probationary officers have the right to a board of inquiry.³⁹ Depending on the service branch, probationary officers (those with less than five years of service) may be entitled to a board of inquiry. Any of these boards is a non-judicial adversarial hearing.

These boards allow service members to fight for retention, or to fight for a better discharge characterization than the command wants to give them (which may be essential to obtain GI Bill benefits or avoid recoupment).

In these hearings, service members can exercise the following rights:

- to have a military attorney represent them, and also to have civilian legal counsel arranged by them at no cost to the government;
- to bring their own witnesses;
- to introduce statements and other evidence;
- to ask the government to produce witnesses (though these requests are not always granted);
- to cross-examine witnesses called by the military; and
- to testify under oath or make an unsworn statement on their behalf.⁴⁰

An administrative separation board usually has three officers⁴¹ and/or senior enlisted members (in the case of enlisted personnel)⁴² who hear evidence from the service member and from the military. The theoretically impartial board members are instructed to weigh evidence by the “preponderance of the evidence” standard.⁴³ The military must produce evidence that is of greater weight, or is more convincing, than the service member’s evidence in order to persuade the board to decide in favor of the military. The slightest edge in the military’s favor is enough for it to win. This is an easier standard for the military to

meet than the standard used at court-martial, where the government must prove a service member’s guilt “beyond a reasonable doubt.”

Further, evidence that would not be allowed in a court-martial is allowed in administrative separation boards. The only restriction on evidence that may be introduced is “relevance.”⁴⁴ Administrative separation boards may consider hearsay, rumors and circumstantial evidence if considered relevant. Some boards may view the investigative limits contained in “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” as non-binding. Indeed, the policy states that the investigative limits of the policy create no “procedural or substantive rights.”⁴⁵

Administrative separation boards are required to make findings of fact about whether or not service members have engaged in homosexual conduct (statements, acts or marriages). When board members find that homosexual conduct has occurred, with very few exceptions, they **MUST** recommend discharge and make a recommendation about the appropriate discharge characterization. The board can also make a finding, when appropriate, that a statement was **NOT** made for the purpose of seeking separation. The board can also recommend against recoupment.

After reviewing all of the evidence presented, the board then makes its recommendations and findings of fact to the separating authority. The separating authority can accept or modify the board’s recommendations.⁴⁶

Many experienced military-law attorneys believe that, as a practical matter, boards often do **NOT** weigh the evidence to the required standard. In their view, board members often make decisions based more on what they think the command wants than on the evidence (or lack of evidence) in a case.⁴⁷ Board members’ anti-gay bias and the relaxed standards of evidence that allows rumors, hearsay, and illegally obtained information to be considered by the board can present major problems for service members accused in gay cases.

Command legal officers and other command representatives often tell service members that administrative boards will do them no good, will only prolong the separation process, will cause the command to pursue UCMJ proceedings, or will result in a worse discharge. These “scare tactics” are designed to coerce a service member into waiving their right to a hearing. It is done to save the command time and resources and is not usually done in the best interests of the service member.

Service members should never take such “advice” from the command that wants to discharge them. Instead, they should contact defense counsel (either military defense counsel, SLDN, or a civilian attorney well-versed in military law and procedure) for the information they need to make an informed decision. Service members who waive the right to a hearing without legal consultation may be giving up the most valuable method to challenge an inappropriate discharge.

Service members should strongly consider pursuing an administrative board if they have been wrongly accused, the evidence against them is weak, their accuser is not credible, the command is recommending a discharge characterization other than honorable, or the service member is concerned about their GI Bill benefits or recoupment.

- ▶ See “Acts,” “Attorneys,” “Discharge Characterizations,” “Discharge Process,” “Homosexual Conduct,” “Legal Rights,” “Marriage,” And “Statements” For More Information. See “Queen For A Day” And “Rebuttable Presumption” for rare exceptions to discharge for homosexual conduct. Compare to “Criminal Prosecution.”

Aggravating Circumstances

Aggravating circumstances are circumstances that permit the military to give a service member an Other Than Honorable (OTH) discharge characterization for homosexual acts.⁴⁸ Usually, service members dis-

charged for homosexual conduct receive an Honorable or General (under honorable conditions) discharge characterization, depending on their overall service record.

SERVICE MEMBERS HAVE THE RIGHT TO SAY NOTHING, SIGN NOTHING AND CONSULT WITH AN ATTORNEY IF QUESTIONED ABOUT HOMOSEXUAL CONDUCT OR THEIR SEXUAL ORIENTATION

An OTH based on aggravating circumstances can only be given if an administrative discharge board or a discharge authority (the officer authorized to order a discharge) makes a finding that, during the current term of service, the service member attempted, solicited or committed a homosexual act in the following circumstances:

- By using force, coercion, or intimidation;
- With a person under 16 years of age;
- With a subordinate in circumstances that violate customary military superior-subordinate relationships;
- Openly in public view;
- For compensation;
- Aboard a military vessel or aircraft; or
- In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.⁴⁹

Some of these circumstances, like sex with a minor, could result in an OTH discharge for heterosexual conduct. Others, however, allow OTH discharges in circumstances that don't apply to heterosexuals, such as engaging in public displays of affection. Since the circumstances cover such a wide range of activities, members who make any statements about their behavior run the risk that investigators will find, or even manufacture, a circumstance warranting an OTH discharge.

- ▶ See “Acts,” “Criminal Prosecution,” “Discharge Characterizations,” “Discharge Paperwork (DD Form 214)” and “Discharge Upgrades” for more information.

Asking

“Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, their sexual orientation,”⁵⁰ according to the current regulations.

Despite the regulations, some officials continue to ask about sexual orientation. Some have asked service members directly, “Are you gay?” Others have used creative phrasing, such as, “Do you find other men attractive?”

Service members do not have to answer questions about their sexual orientation.⁵¹ If service members reveal their sexual orientation, even in response to a direct question that violates the policy, they will likely face discharge.

Be aware that commanders are allowed to question service members about specific incidents of homosexual conduct, if they have received credible information about that conduct.⁵² Homosexual conduct means: (1) a verbal or nonverbal statement by the service member that he or she is gay, (2) a homosexual act, or (3) marriage or attempted marriage to a person of the same gender.⁵³

Service members have the right to say nothing, sign nothing and consult with an attorney if questioned about homosexual conduct.

▶ See “Acts,” “Attorneys,” “Credible Information,” “Homosexual Conduct,” “Investigative Limits,” “Investigative Tactics,” “Legal Rights,” “Marriage” and “Statements” for more information.

Association With Known Homosexuals

Association with known homosexuals, in and of itself, is not a basis for investigation or discharge. The regulations state:

[c]redible information does not exist when...
[t]he only information known is an associa-

tional activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct.⁵⁴

Despite the regulations, service members should be cautious about associational activities. Co-workers and commanders are likely to become suspicious if they know service members have gay friends, read gay literature or belong to gay organizations. This can lead to harassment and to intensified command scrutiny in an attempt to find a reason to investigate or discharge a service member. Because the regulations say this activity is not enough to provide evidence of homosexual conduct “in and of itself,” some commanders might also try, wrongly in our view, to use associational activities to back up information about homosexual conduct that appears flimsy when taken alone.

▶ See “Computers,” “Credible Information,” “Emergency Contact,” “Gay Bars,” “Gay Pride Parades and Events,” “Gay Publications,” “Insurance Beneficiaries,” “Investigative Limits” and “Investigative Tactics” for more information.

Attorneys

In general, defense attorneys, either civilian or military, serve as an advisor to service members. Their role is to provide legal guidance and help a service member see the options available in a particular case, pointing out the pros and cons and generally recommending a course of action that presents the least risk of legal harm to the client.

All lawyers are bound by professional ethics in helping their clients. Lawyers cannot assist clients in committing crimes. Lawyers are under NO duty to assist a client in committing fraud, for example, assisting a service member to make a false statement about sexual orientation in order to be discharged.

Article 31 of the UCMJ documents the rights that service members have to protect themselves from compulsory self-incrimination. Article 31 is similar to the civilian *Miranda* rights, however, Article 31 is broader. The bottom line is, if being investigated by the military, say nothing, sign nothing and ask to speak with a defense attorney. Defense attorneys can either be military attorneys or civilian attorneys.

a. Military Attorneys

Each Service has military lawyers, officers in the Judge Advocate General Corps, detailed to assist members with legal defense. These attorneys have ethical obligations to be zealous advocates for their clients. Command attorneys, legal officers who advise commanders, may not keep information told to them confidential. Therefore, in discussing his or her case with a military attorney, a service member should not speak to any military attorney without asking two key questions: “Are you a defense attorney?” and “Is our conversation confidential?” If the answer to *both* questions is “YES” then it is OK to talk to that lawyer. If the answer to either question is “NO” then do NOT speak to them about a case.

Service members have the right to *consult* with a military attorney if they are questioned by a military investigator.⁵⁵ In nearly all gay cases, service members should ask to consult with an attorney before answering any questions. If a service member requests to consult with a defense attorney, investigators are supposed to stop the questioning and allow the service member to speak with one.⁵⁶ Some services or bases allow service members to consult with a military attorney at any time, even if they are not being questioned, but it is often difficult to see military defense counsel until there is an interrogation or a formal case.⁵⁷

Typically, a service member may not be *represented* by a military attorney until after an investigation has been conducted and either criminal charges have been filed or the command has started discharge pro-

ceedings.⁵⁸ In the military, an attorney represents a service member when the attorney has been assigned to take the service member’s case.

In nearly all circumstances, an attorney who represents a service member must keep conversations with that service member confidential, unless the service member gives them permission to do otherwise.

When a service member consults with an attorney, the attorney is also supposed to keep this conversation confidential even if the attorney does not yet represent the service member and the attorney’s only role is to advise him or her.

There are limited circumstances in which a service member’s conversation with an attorney may not be confidential. For example, attorneys are not supposed to keep threats by their client to kill or maim another person confidential. Under certain circumstances, the presence of a third person during an interview may keep it from being confidential.

Service members should be warned that command staff judge advocates, command legal officers, prosecutors and “recorders” (attorneys or other officers who represent the government in administrative discharge boards) have no obligation to keep conversations with service members confidential. Anything service members say to these officials can and will be used against them.

Service members may ask for a different attorney, called “individual military counsel,” instead of the attorney assigned to represent them.⁵⁹ Service members are required to ask for a new attorney by name. The attorney must be in an assignment that allows representation of individual service members; his or her command must agree that the attorney is “reasonably available;”⁶⁰ and, normally, he or she must be nearby. Service members who do not have the name of another attorney can ask their assigned attorney for help in getting another lawyer. Service members

SERVICE MEMBERS SHOULD ASK ANY ATTORNEY THEY SPEAK WITH “ARE YOU A DEFENSE ATTORNEY?” AND “IS OUR CONVERSATION CONFIDENTIAL?” IF THE ANSWER TO BOTH QUESTIONS IS “YES” THEN IT IS OK TO TALK TO THAT LAWYER.

should consider requesting different military counsel if they feel their assigned attorney is uncomfortable handling their case.

b. Civilian Attorneys

Service members also have the right to a civilian attorney or legal worker (a non-attorney, such as a paralegal or military counselor, who is experienced with the military's administrative system), but must arrange for one on their own.⁶¹ Civilian attorneys and legal workers can assist service members during an investigation, before charges or discharge paperwork are filed and before military attorneys are usually allowed to represent service members. Having a civilian attorney or legal worker does not prevent service members from requesting a military attorney.

Civilian attorneys and legal workers can do other things that military attorneys may not, such as help service members contact Congress or utilize the media if service members wish to do so. A civilian attorney or legal worker can work with the military attorney as soon as the military attorney is allowed to come to the service member's defense.

Civilian attorneys also have a duty of confidentiality. When a service member consults with a civilian attorney or is represented by an attorney, the attorney must keep his or her conversations with the service member confidential, unless the service member gives him or her permission to do otherwise.

▶ See "Investigations" and "Legal Rights" for more information.

Basis for Discharge

Under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" there are three grounds for discharge:

A basis for discharge exists if: (1) The member has engaged in a homosexual act; (2) The member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propen-

sity or intent to engage in homosexual acts; or (3) The member has married or attempted to marry a person of the same sex.⁶²

▶ See "Acts," "Discharge Process," "Marriage" and "Statements" for more information.

Bisexuality

Under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" a bisexual is "a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts."⁶³ The law provides that a member who makes a statement that they are bisexual shall be separated from the armed forces.⁶⁴

Despite what the law says, there is a tendency on the part of some commanders to disbelieve members who state they are bisexual. Often commanders believe that this statement is made only as a way to seek separation and conclude that the service member is someone who lacks the propensity to engage in homosexual conduct. While commanders are increasingly asking service members to offer "proof" of their sexual orientation before taking their statements as credible, this is even more pronounced in bisexual statement situations. This is particularly true if the service member is married or currently involved in an opposite gender relationship.

There is no requirement in any regulation, or in the law, for a service member to prove their sexual orientation. Because of the severe criminal consequences that can come from proof of homosexual acts, service members are strongly encouraged not to try to prove their orientation. The best advice for any service member thinking about making a statement or trying to prove their orientation is to contact a competent, experienced defense attorney.

▶ See "Coming out" for more information.

Chaplains

Chaplains are an important resource for service members. Some Services, particularly the Army, advise service members to speak with chaplains as a confidential resource, especially in situations where reporting anti-gay harassment is involved. Under military law, chaplains must keep conversations confidential when service members seek their spiritual guidance.⁶⁵ Chaplains do not have to keep conversations confidential when a service member speaks with them for reasons other than spiritual guidance.

Directive 1304.19 (Appointment of Chaplains to the Military), Sept. 18, 1993, describes the qualifications, responsibilities, and the duties of chaplains. The directive states:

It is DoD policy that professionally qualified clergy shall be appointed as chaplains to provide for the free exercise of religion for all members of the Military Services, their dependents, and other authorized persons. . . .

They shall minister to personnel of their own faith group, and facilitate ministries appropriate to the rights and needs of persons of other faith groups in the pluralistic military environment. Chaplains also shall provide professional staff chaplain support to the Military Department concerned.

DoD Directive 1304.19 ¶ 3.

However, the Directives do not explicitly address issues of confidentiality in any fashion. The individual services do, however, have their own regulations concerning chaplains. For example, the regulation states that “[Chaplains] will not disclose confidential communications in private or in public.”⁶⁶

Service members should be careful speaking with chaplains. Some chaplains have turned in service members who revealed their sexual orientation. Others have instructed gay service members to turn

themselves in. Still others have dropped hints in conversation with commanders that have led to the outing of gay service members. Some chaplains have carelessly talked about their conversations in enough detail that commanders could figure out the service members involved. A few chaplains have even berated lesbian, gay and bisexual service members, telling them that they are “going to hell.”

Service members confide in military chaplains at their own risk. Service members should speak with chaplains only about spiritual matters (not, for example, about what it means, psychologically, to be gay). Service members should specifically state that they seek spiritual guidance in an effort to increase the likelihood that their conversations will be protected by law.⁶⁷

**SERVICE MEMBERS SHOULD
AVOID DISCLOSING THEIR
SEXUAL ORIENTATION TO
CIVILIAN POLICE.**

If a chaplain violates confidentiality and reveals the service member’s sexual orientation to the command, the service member will likely face discharge. While the service member can take action against the chaplain through the appropriate denomination’s disciplinary process, or by filing an Inspector General complaint against the chaplain, this will not save the service member’s career.

Chaplains also routinely misinform service members about what the regulations say and about their legal rights. Do not expect chaplains to know the regulations or answers to legal questions; these are better addressed by a defense attorney or legal worker.

►► **Compare to “Attorneys” and “Doctor and Psychotherapist - Patient Conversations.”**

Civilian Police

As a general rule, service members should treat civilian police as they would military police and invoke their legal rights to say nothing, sign nothing and consult with an attorney if questioned about their private lives. If a service member is involved with civilian law enforcement authorities, it should be presumed that

the military will be notified of any incidents. In most areas, civilian police routinely turn reports involving a military member over to the military.

Service members should avoid disclosing their sexual orientation to civilian police. If a service member's sexual orientation is noted in any reports, or is an issue in the civilian incident that required a police response, that information is often disclosed to the military and can be used by the military as a basis for beginning administrative or disciplinary proceedings.

A service member has the constitutional right to object to a search of one's off-base home without a search warrant.⁶⁸ There are many exceptions to this rule, however. A service member should state their objection to a warrantless search and call an attorney right away. Even if the police have a warrant the service member should state that he or she objects to the search. However, with or without a warrant, the service member should not interfere with a search. A service member who physically tries to prevent a search runs the risk that the police will respond roughly or charge them for interfering with police activities. After stating the objection to the search, it is best to leave further argument to an attorney.

Civilian police often bring a military police officer with them when they try to search a service member's off-base home. Even if a military police officer is present, a service member can object to a search. The presence of the military police does not change the rules about searches.

A gay service member sometimes needs help from civilian or military police in situations that might raise questions about their sexual orientation or private life. For example, in a domestic dispute between a same sex couple where the police are called, questions will be asked about the relationship. In those cases, if possible, a service member should immediately speak with a defense attorney or a legal worker experienced with these issues. With legal assistance, a service member may be able to obtain the help needed from the police without encountering problems with the military.

Problems may arise in emergencies where a service member faces an immediate threat of harm. If there is a real need to talk to police or other law enforcement officials and there is no time to seek legal help first, a member should stick to recounting the facts as they have occurred. A service member should avoid making any statement about their own orientation or private life, if at all possible. A service member should still speak with an attorney or legal worker as soon as possible.

For service members who have been UA or AWOL for 30 days or more, whatever the reason for leaving without authorization, the military usually declares them to be a deserter and issues a federal arrest warrant.⁶⁹ Civilian police have access to these warrants and will often arrest the service member.⁷⁰ Usually, this happens when a service member in a deserter status is stopped for a routine traffic violation. Civilian police sometimes seek out deserters and service members have been arrested in their homes on federal warrants. Service members arrested by civilian police for desertion should say nothing, sign nothing and ask for a defense attorney.

- ▶ See "Attorneys," "Civilians and Investigations," "Extortion," "Harassment/Death Threats/Hate Crimes," "Legal Rights," "Searches" and "UA" for further information.

Civilian Protections Against Anti-Gay Discrimination in Employment

"Don't Ask, Don't Tell, Don't Pursue, Don't Harass" does not apply to civilians. Civilian federal employees enjoy much greater protection against discrimination based on sexual orientation. President Clinton issued Executive Order 13087 in 1998, which prohibits discrimination based on sexual orientation in the federal civilian work force.⁷¹ This order covers all civilian employees of the federal government including those who work for the military Services, the Department of Defense and the Department of Transportation. This Executive Order was left intact by President Bush when he assumed office in 2001.

President Clinton also issued an Executive Order in 1995 that is still in effect, which prohibits the government from denying security clearances to individuals based solely upon their sexual orientation.⁷² That order applies to both service members and federal civilian employees.

▶ See “Security Clearances” for further information.

Civilians and Investigations

Generally, military investigators have no jurisdiction over civilians. While military investigators may attempt to question civilian friends and family members in an effort to obtain information against suspected gay troops, civilians have no obligation to answer questions or to let military investigators search their homes without a search warrant. Anything civilians tell military investigators, no matter how harmless it may seem, can be used against the service member.

Military investigators may bring civilian police officers with them when they try to question civilians. Even if a civilian police officer is present, civilians still have the right not to answer questions and to object to a search of their homes without a search warrant.⁷³ It is not safe, however, to try to physically block or interfere with the officers’ actions.

Civilians may tell military investigators (and civilian police who come with them) to leave. If the investigators refuse to leave, civilians may obtain help by calling a defense attorney or legal worker.

▶ See “Attorneys,” “Civilian Police” And “Searches” for further information.

Coming Out

Coming out - openly acknowledging being lesbian, gay or bisexual - is usually a very personal, sometimes

traumatic, experience. Ideally, being open about sexual orientation should be a non-issue in the military. The reality is that coming out to the military has many legal risks and it may have an impact on the service member’s civilian life after discharge. Coming out should never be seen as an easy way to get out of the military or to avoid a service obligation.

Under the policy, coming out – usually by making a statement of homosexual or bisexual orientation – creates a “rebuttable presumption” that the service member engages in, intends to engage in, or has a propensity to engage in homosexual acts. If the service member does not rebut (disprove) the presumption, a task that is nearly impossible, federal law generally requires the military to discharge the service member.⁷⁴

It does not matter to whom the service member comes out. If the military finds out, any statement acknowledging being lesbian, gay or bisexual can be used as a basis for discharge. If a

service member wants to stay in the military, coming out to anyone could put their military career at risk. Even a private statement to family, a close friend, a doctor or a chaplain can result in the end of a career.

If a service member feels compelled to come out to the military, saying the wrong thing may affect their discharge characterization or could place them at risk for being court-martialed. Therefore, service members should consult with a defense attorney before making a statement.

Why Do People Make Coming Out Statements?

INTEGRITY

Honor is a Core Value in the military. The policy’s requirement that lesbian, gay or bisexual service members live in the closet, lying daily, evading, dissembling and hiding their sexual orientation from peers, superiors and subordinates, directly conflicts with the Services’ basic values. Many service mem-

CIVILIANS HAVE NO OBLIGATION TO ANSWER QUESTIONS OR LET MILITARY INVESTIGATORS SEARCH THEIR HOMES WITHOUT A SEARCH WARRANT

bers see coming out as a matter of integrity, a way of demonstrating the Services' Core Value of being honest and honorable.

HARRASSMENT

Another major reason for coming out is as a means of escaping anti-gay threats and harassment, or because service members find they are unable to serve in a homophobic military. The military, while recognizing that anti-gay harassment undermines unit cohesion and combat readiness, has consistently refused to take concrete action to end anti-gay harassment, hold harassers accountable, and address the wide-spread tolerance of anti-gay comments, slurs and "jokes."

Coming out is not the only way to deal with threats or harassment. If a service member feels threatened, they should immediately report the situation to their chain of command, a chaplain, a doctor, base security or the master-at-arms, the inspector general's office or a military attorney. While each of the services has regulations which govern the investigation of alleged anti-gay harassment, specifically stating that commands are NOT to investigate the person making the complaint, service members should be careful in how they report harassment so that they do not inadvertently "out" themselves. When reporting threats or harassment a service member should say: "I'm being harassed because they think I'm gay" or "I'm being threatened because I am perceived to be a lesbian." Do not say "I am being harassed because I am gay."

A service member who decides to come out to the military should not make a statement or write a letter on their own and give it to the command. Because there are legal risks involved, a service member is strongly encouraged to contact an experienced attorney or legal worker, who can help them make a careful, written statement that leaves no confusion about what was or was not said and that avoids the many pitfalls under this policy.

A service member who comes out to their command is

likely to be questioned. If an attorney has advised the member to remain silent, the service member should hold firmly to that advice. If the member has not sought the advice of a defense attorney, the service member should speak to an attorney before answering any questions.

No matter what military officials may say, a service member should not provide information about any sexual activities or relationships and should not turn over photos, letters or other "proof" about their sexual orientation. There is absolutely no requirement under the law or in any Service regulation for members to prove that they are lesbian, gay or bisexual. This information is not required by the military and volunteering it may place the service member at legal risk in other ways.

A service member should be prepared for the possibility that the command will seek to question co-workers and, in some cases, family members and civilian friends. Civilians are under no obligation to answer questions from military investigators. Depending on the circumstances, military members may not have to answer questions about their co-workers and friends. Because this is a complicated area, military members are encouraged to consult with a defense attorney before making a statement so that they can be informed of the rules concerning permissible command inquiries.

"Coming Out" has Some Risks

A statement does not always equal discharge - A common misperception among service members is that if they simply tell the military they are lesbian, gay or bisexual the military will discharge them almost immediately. Increasingly, this is not the case. The command may not believe the service member's statement or may not care that the service member is gay. If the command does decide to discharge the service member for stating that he or she is gay, the discharge process could take as long as three to six months. And in rare occasions, even longer.

Commands may inappropriately investigate - Military commands may investigate service members' private lives following their statements of sexual orientation. The service member's command may search anything the service member has on-base, including barracks room, locker, and car, without the service member's permission.

Discharge paper work will say "homosexual" - Any time a service member is discharged from the military they receive discharge paperwork called a DD Form 214.⁷⁵ If a service member is discharged for "coming out" to the military, the DD-214 will state the reason for discharge. For example it may say, "Homosexual Admission," "Homosexual Statement," or "Homosexual Conduct." The DD-214 will also contain a reenlistment code that will prevent the service member from ever reenlisting in any branch of the service, usually an RE-4 code. Future civilian employers may request to see a copy of a service member's complete DD-214 before they hire the service member.

Benefits may be at risk - Service members risk losing several benefits, including the Montgomery G.I. Bill educational benefits, if they "come out." In order to receive benefits under the GI Bill, a service member must receive an Honorable discharge and have completed two or three years of a service commitment (depending on what the enlistment contract states). If a service member does not meet these requirements, the service member will NOT receive the GI bill after discharge.⁷⁶

Discharge characterizations may be lowered - Every service member who leaves the military receives a discharge characterization. If discharged for "coming out" to the military, a service member may receive a discharge that is Honorable, General, or under some circumstances Other than Honorable. If the service member receives a less than Honorable discharge, the service member risks losing some VA benefits and may face added challenges in finding civilian employment. Although service members dis-

charged for "coming out" should receive an honorable discharge as long as the service member's military record is good, some commands still try and improperly award lower discharge characterizations than a service member deserves just because he/she made a statement of sexual orientation.

Military may ask for money back - If a service member has not served his/her entire commitment, the military may require the service member to repay scholarships, bonuses, or special pay they may have received. This is especially true in cases where service members "come out" to the military for the purpose of being discharged prior to the completion of their commitment.

False statements equal criminal offenses - If the military determines that your "coming out" statement is false or a lie, the military may retain the service member in the service and may also prosecute the service member criminally

for providing a false official statement to the government.

What Will the Command Do When A Service Member Comes Out?

The command may react in one of many ways to a service member "coming out" to them. They may:

- 1) begin the process of discharge; or
- 2) issue a counseling statement to the service member; or
- 3) present the service member with a memorandum stating that an inquiry or investigation will be launched; or
- 4) tell the service member, formally or informally, that they do not believe the "coming out" statement and they will take no further action; or
- 5) say nothing at all and take no action on the statement; or
- 6) not talk with the service member at all until

TALK TO A DEFENSE ATTORNEY BEFORE MAKING ANY STATEMENT!

issuing a formal Notice of Administrative Separation.

Unfortunately, commands are increasingly more likely to refuse to believe service members' "coming out" statements. This often occurs in cases where: (1) the service member has tried to resign or leave the military in the past for other reasons; (2) the service member's command knows that the service member has had an opposite sex relationship (wife, husband, etc.); or (3) the service member's command views the service member as valuable, does not care that the service member is gay, and is willing to allow the service member to continue serving.

Even if a command is reluctant to believe a service member's statement, a service member should NOT provide proof of homosexual acts under any circumstance. Despite what a command may claim, the law does not require proof that a service member is lesbian, gay or bisexual.

Privacy Regarding Your Statements.

The Privacy Act, which is a federal law, prohibits service members' personal information from being shared with anyone except those who need to know in the chain of command.⁷⁷ There is, however, no guarantee that the service member's statement will be kept quiet and the service member may find that co-workers quickly find out that the service member has "come out." The only safe place in the military to talk about sexual orientation is with a defense attorney.

What Happens If The Command Recommends Discharge?

If recoupment (repayment of scholarships, bonuses or special pay) is not at issue, the service member is willing to be discharged, and the command recommends a discharge characterization consistent with the service member's overall record, the discharge proceedings should be straight-forward. However, service members should NOT waive any rights prior to speak-

ing to a defense attorney.

If the command recommends a less favorable discharge characterization than the member's record supports, dredges up other reasons for discharge, seeks recoupment, or the service member wants to fight discharge, the member should generally contest the discharge action at an administrative discharge board or board of inquiry.

For more information on coming out to the military, please see SLDN's "Coming Out to the Military" Memorandum included in this guide.

- ▶ See "Administrative Discharge Boards and Boards of Inquiry," "Aggravating Circumstances," "Asking," "Attorneys," "Civilians and Investigations," "Credible Information," "Criminal Prosecution," "Discharge Characterizations," "Discharge Process," "G.I. Bill Education Benefits," "Homosexual Conduct," "Rebuttable Presumption," "Recoupment," "Reenlistment Code," "Searches" and "Statements" for further information. See also the memorandum on coming out in the attachments.

Complaints - Making

Service members have the right to make legal complaints either through the military or outside military channels. Among others, they can use this right to complain about harassment or violations of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."

As a general rule, the military does not look kindly on people who make complaints. Service members who want to complain about improper treatment or violations of military regulations should have the assistance of an attorney in making their complaint. An attorney can help them decide the best complaint method for their situation, encourage the command or the service to treat the complaint seriously and help to protect against retaliation for making the complaint.

Normally, complaints cannot be used to attack discharge proceedings or disciplinary actions, though

they can be useful in bringing the military's attention to problems in those proceedings. Sometimes commands take a second look at discharge or disciplinary proceedings if they realize that the proceedings are tied to improper or illegal actions.

Some of the more common complaint procedures are:

(1) "Writing Up." Any service member subject to the UCMJ can file charges against another service member for a violation of the UCMJ.⁷⁸ Service members can ask their commands to take disciplinary action against other members who violate the Uniform Code of Military Justice (UCMJ) or punitive regulations. Requests are normally made in writing.

Unfortunately, service members cannot demand that offenders be disciplined; it is up to the command to decide whether to take any action. Another practical reality is that a junior service member who attempts to place a senior service member "on report" can be retaliated against by the senior in ways that are hard to prove as retaliation - i.e. bad work assignments, assigned to guard duty or watch on weekends or leave periods, assignments to work details, etc.

(2) Article 138. UCMJ Article 138 permits service members to seek redress of a grievance against their commanding officer. Service members may seek this form of redress whenever they feel they have been wronged, whether or not a law or regulation has been violated. These complaints usually begin with a letter to the commander asking for specific redress (an apology, a training session about the limits of the policy for all personnel, a dressing down for the offender, a transfer to get away from harassment, etc.). If the commander doesn't grant the request in a reasonable time, a formal complaint may be made to any commissioned officer, superior to the commanding officer, who shall forward the complaint to the officer exercising

general court-martial convening authority over the commander. That officer must act on the complaint and report the matter to the Secretary of the Service.⁷⁹

(3) Inspector General (IG). Service members may complain to the inspector general of their base, Service, or the Department of Defense about harassment or violations of regulations.⁸⁰ Once they are made, the handling of complaints is generally out of service members' hands. The inspector general's office does not itself have the power to correct problems, but its findings and recommendations are normally taken seriously by commands.

(4) Equal Opportunity (EO). Each branch of the service has equal opportunity offices or officers to handle complaints of race and gender discrimination and harassment. Complaints regarding anti-gay harassment are not part of EO representatives' mission. Service members are sometimes required to document EO complaints themselves. These offices also make recommendations to the command rather than taking action themselves.

(5) Congressional inquiries. Members of the military have the right to communicate with their Members of Congress and to ask their help in resolving problems with the military.⁸¹ Despite military rumors to the contrary, they do not need command permission to do so, and need not notify their commands. In some cases, Congressional inquiries are no more than a polite exchange of letters between a Congressional aide and a liaison officer at the Service's headquarters. When presented with concrete evidence and asked for specific types of assistance, however, sympathetic Members of Congress can urge the services or local commands to take concrete action about violations of the gay policy, such as witch hunts.

(6) Media/Press. The military hates bad press. Public attention brought by the press can often be an effective

SERVICE MEMBERS SHOULD NEVER USE THEIR WORK COMPUTERS OR ".MIL" EMAIL ACCOUNTS FOR PERSONAL USE ESPECIALLY COMMUNICATING INFORMATION ABOUT THEIR SEXUAL ORIENTATION. SERVICE MEMBERS SHOULD ALSO NOT COMMUNICATE INFORMATION ABOUT THEIR SEXUAL ORIENTATION WITH MILITARY PERSONNEL EVEN THROUGH THEIR PERSONNEL EMAIL ACCOUNTS.

tive tool to make the military comply with its policies and hold violators accountable. Service members should not approach the media, or members of the press, on their own without talking to a defense attorney first to get appropriate legal counsel. While the press can be an influential tool, once the story is in the media stream, there is little the service member can do to control it. In addition, the service member may be ordered to not to communicate with the press after the initial complaint is made. In these cases, a defense attorney can represent the service member's interests to the press to protect the service member from getting into trouble for disobeying an order. Complaining to the press, and using its ability to influence the military, should only be done with legal counsel and only as part of a legal strategy to redress a wrong.

These and other complaint procedures can be used to bring outside attention to violations of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass." To be successful, complaints must normally be supported by documentary evidence, witness statements or other evidence. It is helpful, in most cases, to gather statements and other evidence before making a complaint, to avoid the possibility the offender or his or her friends may intimidate witnesses or destroy evidence. In addition, it helps to have legal assistance in evaluating the strength of the evidence and in preparing a complaint.

Service members who face retaliation for making complaints often have protection under the Military Whistleblower Protection Act.⁸² Under the Act, service members who make certain types of complaints are entitled to prompt IG investigations of any adverse personnel action or threatened adverse personnel action taken to retaliate for their complaint.

If the retaliation results in formal adverse action, service members are also entitled to expedited proceedings before the Board for Correction of Military Records (BCMR) or Board for Correction of Naval Records (BCNR), depending on the service. One example is an involuntary discharge based on false allegations of homosexual conduct lodged in retaliation for a sexual harassment complaint to an IG.

► See "Attorneys" "Extortion," "Harassment/Death Threats/Hate Crimes," "Investigative Limits" and "Legal Rights" for more details.

Computers

Many service members believe their computer correspondence and on-line discussions are secure. They are not. Government emails (.mil accounts) and government computer systems should not be used for personal matters unless authorized by the command and should NEVER be used by a service member for communicating information about sexual orientation or private sexual conduct (i.e. viewing pornography). Military members should never write personal letters or diaries on work computers, including authorized laptop computers used off base. Use of military computers for personal reasons risks violation of regulations and base policies on misuse of government equipment and may lead to detection by coworkers or investigators.

Statements of sexual orientation and information about gay activities obtained by military officials from computer drives, disks, e-mail or on-line services have been used to investigate and discharge service members.

Sometimes, military investigators go on-line to scan for gay military members or to catch suspected gay service members talking about their sexual orientation or activities. In the past, there have also been attempts to bait gay service members. Service members should never assume that someone is who they claim to be when they are on-line.

Investigators routinely search work computers and service members' government network accounts for security reasons. Investigators have retrieved suspected gay service members' e-mail. Investigators have also searched the personal computers and disks of suspected gay service members, using programs to retrieve deleted files. A service member should never consent to a search of their non-government personal computer without speaking with a defense attorney first. In general, the government needs a search war-

rant to search and/or seize information from a private computer that is not on-base.

To be safest, service members who live on-base should never save files containing private information or identifying lesbian, gay or bisexual friends on their personal computers or disks.

- ▶ See “Gay Publications,” “Inquiries,” “Inspections,” “Investigations,” “Investigative Tactics,” “Pornography” and “Searches” for further information.

Corporal Klinger Provision

If a service member makes a statement, engages in homosexual acts or attempts to marry someone of the same gender solely to avoid military service, the military does not have to discharge him/her.⁵³ This clause was intended to prevent straight service members from claiming to be gay in order to miss a deployment or get out of the military. This clause has also been used by commanders seeking to keep gay service members in the military.

- ▶ See “Acts,” “Basis for Discharge,” “Coming Out,” “Homosexual Conduct,” “Inquiries,” “Investigations,” “Marriage,” “Queen For A Day,” “Recoupment” and “Statements” for further information.

Credible Information

Credible information is the standard used to determine whether it is permissible to initiate an inquiry or investigation into homosexual conduct. Only a service member’s commander⁸⁴ or the director, commander or principal deputy of a criminal investigative organization (CID, OSI, and NCIS)⁸⁵ may initiate an inquiry or investigation into homosexual conduct. He or she may initiate an inquiry or investigation only if there is credible information that a basis for discharge exists (a statement, act or marriage).⁸⁶ A criminal investigative organization should not initiate

an investigation unless there is credible evidence of criminal activity.

In theory, credible information is not just any information. It has to be reliable. The policy states:

[c]redible information exists where the information, considering its source and the surrounding circumstances, supports a reasonable belief that a [s]ervice member has engaged in homosexual conduct. It requires a determination based on articulable facts, not just a belief or suspicion.⁸⁷

According to examples listed in the regulations, credible information includes a report from a reliable person that he or she heard or saw a service member: (1) make a verbal or nonverbal statement, or (2) engage in gay acts or a marriage or attempted marriage.⁸⁸ Keep in mind that these are just examples. They do not include everything that could be defined as credible information.

The regulations also explain when credible information does not exist:

Credible information does not exist when . . . (1) the individual is suspected of engaging in homosexual conduct, but there is no credible information, as defined, to support that suspicion . . . ; (2) the only information is the opinions of others that a member is homosexual . . . ; (3) . . . the inquiry would be based on rumor, suspicion, or capricious claims concerning a member’s sexual orientation; or (4) the only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes.⁸⁹

Again, these are examples, not a complete list.

A CRIMINAL INVESTIGATIVE ORGANIZATION SHOULD NOT INITIATE AN INVESTIGATION UNLESS THERE IS CREDIBLE EVIDENCE OF CRIMINAL ACTIVITY.

In practice, many commanders and leaders of the investigative agencies are unaware of, or ignore, the requirement to have credible information before starting an inquiry or investigation.

Some service members, when told they were being investigated for homosexual conduct, have asked the command to put into writing the credible information that has formed the basis for the inquiry. Others have suggested to their defense attorneys to approach the command and request that the inquiry stop when there is no credible information to support it.

- ▶▶ See “Association with Known Homosexuals,” “Gay Bars,” “Gay Pride Parades and Events,” “Gay Publications,” “Inquiries,” “Investigations” and “Investigative Limits” for further information.

Criminal Prosecution

A service member cannot be criminally prosecuted simply for being lesbian, gay, bisexual or transgender. There must be some act that violates the UCMJ for the military to seek to criminally prosecute a service member. In general, “the preferred method of handling allegations of private consensual acts between adults of the same gender is through the administrative discharge system.”⁹⁰

Some commanders, however, file criminal charges against service members accused of homosexual acts. Others use the threat of criminal prosecution to coerce service members to accept lesser administrative discharges, either General (under Honorable Conditions), or Other Than Honorable (OTH) discharge in lieu of court-martial. The latter can result in loss of veterans and unemployment benefits and lead to substantial prejudice in obtaining civilian employment. While most service members do not face criminal prosecution for consensual, adult gay acts, there remains a legal risk.

Service members may be charged with violating Article 125 of the Uniform Code of Military Justice (UCMJ) for sodomy (oral or anal sex, whether hetero-

sexual or homosexual) or the “general articles,” Article 133 (officers) or Article 134 (enlisted or officers), for kissing, hand-holding or other forms of touching. Convictions under Article 125, 133 or 134 can, in some cases, result in up to five years of imprisonment for each act, a punitive discharge (Bad Conduct discharge or Dishonorable discharge), reduction in pay-grade and fines and forfeitures.⁹¹

Service members should be aware that commands often try to find ways to charge as many violations as possible out of each alleged incident. Commands may try, for example, to charge service members accused of one sexual encounter with both sodomy under Article 125 and indecent acts under Articles 133 or 134. Also, commands sometimes add on charges of alleged homosexual acts as “escalators” - to increase potential jail time or to add more coercion against an accused member to accept a plea bargain - in cases where other criminal activity is alleged, e.g. drug use.

Service members should be aware of other provisions under which suspected gay troops are at risk for possible prosecution. Service members are sometimes charged with fraud for collecting marital benefits while involved in opposite gender marriages.⁹² Service members who have misrepresented their sexual orientation or activities during interrogations by military officials have been charged with making false official statements.⁹³ Some commanders have been quick to charge gay service members for fraternization in circumstances where straight service members would not be charged.⁹⁴ Some commanders have threatened charging service members with failure to obey orders (Article 92)⁹⁵ for making statements about sexual orientation after being ordered not to make such statements.

Regardless of their sexual orientation, HIV-positive service-members have faced criminal prosecution for violating orders to notify health care workers or sexual partners of their HIV status, and for violating orders against unsafe sex (by not using condoms, for example). Some have also been charged with aggravated assault for having unprotected sex.

Service members who are questioned by military authorities face a Catch-22 situation. If they are ordered to reveal information about their sexual conduct, and tell the truth they may face criminal charges for their sexual conduct. If they lie about their sexual conduct when they are ordered to reveal it, they may face criminal charges for making false official statements.

As a result, service members should remember a few simple guidelines. Do not lie. Do not volunteer personal information if questioned by military authorities about sexual orientation or your private life.

Do invoke your Article 31 legal rights - say nothing, sign nothing and get legal help.

- ▶ See “Acts,” “Aggravating Circumstances,” “Attorneys,” “Homosexual Conduct,” “Investigative Tactics,” “Legal Rights,” “Marriage” and “Unauthorized Absence (UA)/Away Without Leave (AWOL)” sections for further information.

Delayed Entry Program (DEP)⁹⁶

Some individuals enlist in the military and delay the date when they are to report for basic training. The UCMJ applies to “volunteers from the time of muster or acceptance into the armed forces.”⁹⁷ An enlistee becomes a member of the armed forces, and subject to the UCMJ and military regulations, “upon taking the oath of enlistment.”⁹⁸ Homosexual conduct, i.e. statements, acts or marriage, if brought to the attention of the military before the service member reports for basic training, most likely will cause the individual to be administratively released from their enlistment contract.

Members may be discharged from the delayed entry program - they are “attrited” with an uncharacterized discharge (DEP discharge).⁹⁹ The member does not receive a DD-214 because they have not been on active duty.¹⁰⁰ This type of separation can usually be

approved by the commander of the local recruiting district where the member enlisted. Members should be prepared to report, however, on their “ship date,” unless they have documentation which states that they have been released from the military.

Discharge Characterizations

Upon discharge, military members receive a discharge characterization. An Entry Level Separation (ELS) with an uncharacterized discharge may be granted to a service member who has less than 180 days of active service and whose record warrants an Honorable or General discharge.¹⁰¹ Administratively, only three types of discharges can be awarded: Honorable, General (Under Honorable Conditions), or Other Than Honorable (OTH). A Bad Conduct Discharge (BCD) or a Dishonorable Discharge (DD) can only be awarded by court-martial.

The standard for service members receiving a discharge under DADTDPDH is the same as for service members who come to the end of their term of service (ETS/EAOS) or, if officers, who resign their commission under routine circumstances. Service members should receive an Honorable or a General (under honorable conditions) discharge characterization based on their overall record.¹⁰²

Some commanders recommend a lesser discharge characterization than the service member’s service record merits, usually recommending a general (under honorable conditions)

characterization when an honorable discharge is warranted. The service member must decide whether or not it is important to contest the command’s recommendation. As a general rule, if a service member merits an honorable discharge, he or she should fight for one up-front - usually by requesting an administrative separation (ADSEP) board, or a Board of Inquiry (BOI) for officers.

Some commands have tried to persuade service mem-

SOME COMMANDS HAVE TRIED TO PERSUADE SERVICE MEMBERS TO ACCEPT A GENERAL DISCHARGE BY SAYING IT CAN BE EASILY CORRECTED LATER. THIS IS NOT TRUE.

bers to accept a general discharge by saying it can be easily corrected later. This is not true. There is no “automatic” upgrade of a general discharge to an honorable after six months because of a homosexual discharge. Similarly, appealing to the Board for the Correction of Military or Naval Records (BCMR/BCNR) is not a guarantee of an upgrade. The standard for review at the BCMR/BCNR is to correct an “injustice or error.”¹⁰³

Administratively, there are usually only two ways to get an OTH discharge in DADTDPDH cases. In cases involving “aggravating circumstances,” commanders and discharge boards can recommend an OTH discharge characterization.¹⁰⁴ Service members may also face an OTH discharge if they are “dual processed” for homosexual conduct and another reason for discharge, usually misconduct, which warrants an OTH. The misconduct may be based on a series of minor disciplinary problems that the command might otherwise have ignored, or on a single more serious offense.

Discharge characterizations determine eligibility for veterans’ benefits and have an impact on civilian employment opportunities. An Honorable discharge entitles veterans to all veterans’ benefits for which they are eligible,¹⁰⁵ and is mandatory for educational benefits under the Montgomery G.I. Bill programs.¹⁰⁶ A General discharge entitles veterans to almost all other benefits. A General discharge may raise some questions among some civilian employers about a veteran’s performance.

Service members with OTH discharges risk losing most, if not all, veterans’ benefits; the Veterans Administration (VA) should make a case-by-case decision. They also face substantial prejudice in civilian employment and, in many states; an OTH discharge bars collection of unemployment compensation when they are discharged from the military.

The uncharacterized ELS alone should not affect entitlements to benefits. However, veterans who served for less than 180 days will be eligible for few benefits because they served for such a short time.

Service members convicted at courts-martial may receive a Dishonorable Discharge (DD) or a Bad Conduct Discharge (BCD). Such a discharge deprives veterans of substantially all veterans’ benefits. (However, vested benefits from a prior period of honorable service are not forfeited.) It is also likely to result in substantial prejudice in civilian employment and, in many states, may bar collection of unemployment compensation when they are discharged from the military.

► See “Aggravating Circumstances,” “G.I. Bill Education Benefits,” “Recoupment” and “Unemployment Benefits” for further information.

Discharge paperwork (DD Form 214)

Service members receive two copies of the DD-214 when they are discharged - a short form and a long form.¹⁰⁷ The long form includes the narrative reason for discharge, the discharge characterization, the three-letter or three-number discharge code corresponding to the reason for discharge, and a reenlistment code. This information is not included on the short form.

Under DADTDPDH there are three grounds for discharge - a homosexual (or bisexual) statement, homosexual act or homosexual marriage. Remember that under the policy each of these qualifies as conduct, even a statement or admission of a homosexual or bisexual orientation. If discharged under the Service’s homosexual conduct policy, the narrative reason for discharge will state “Homosexual Conduct - Admission/Statement,” “Homosexual Conduct - Acts,” or “Homosexual Conduct - Marriage,” or words to that effect, depending on the basis for discharge.

The reenlistment code usually listed on the DD-214 when a service member is discharged for homosexual conduct will be an “RE-4.” This means that the service member is ineligible to reenlist in any branch of the military or any component of a branch (i.e. active duty, reserves or National Guard). The Air Force uses a different code than “RE-4” but the code used has the same meaning.¹⁰⁸

Some civilian employers are aware of the long form and may ask for a copy during the hiring process. If applying for a government position, either municipal, state or federal, veterans should expect to be asked to provide a copy of their DD-214. Many state licensing authorities, such as nursing, medicine or bar examiners, may also ask for a copy when an applicant seeks a license to practice their profession. As a result, service members discharged under DADTDPDH often find that their DD-214 will “out” them to civilian employers (and anyone else who has access to their records).

► See “Discharge Characterizations,” “Discharge Process,” “Reenlistment Code” and “Unemployment Benefits” for more information.

Discharge Process

Whether service members ask for discharge or are faced with discharge against their wishes, they go through a formal administrative separation (ADSEP) procedure. The short answer about how long this process takes is: it takes as long as it takes. While there are guidelines in each service for the time it takes to process separation paperwork, the services can, and often in the case of statements do, drag their feet in processing service members. DADTDPDH discharges often take two to four months to complete. In some cases, it can take up to a year to discharge a service member under DADTDPDH.

In some services, this procedure begins with the company commander’s recommendation for discharge. Unless the recommendation is disapproved, the service member is formally notified of discharge proceedings. The Navy often begins the process with formal notification of administrative separation proceedings.

Service members are sometimes told that they face possible discharge before being formally notified. Inquiries or investigations must normally be completed before discharge processing begins. Service members often experience a frustrating limbo period before formal action is taken.

The formal notification should tell service members the reason for discharge (such as homosexual conduct), the specifics on which the discharge is based (such as an alleged statement of homosexual orientation made on a particular date) and the least favorable characterization of discharge they could receive. The notification also describes the principal rights available in the discharge process. Members are told to sign this letter to acknowledge that they have read or received it; if they do not sign it, the letter is often marked “member refused to sign.”

At the same time, or soon thereafter, service members are given an election of rights form, also called a statement of awareness/waiver of rights form. On this form, they must elect any rights they wish in the discharge proceedings. These rights usually include:

- to consult with military or civilian counsel before filling out the rest of the form;
- the right to an administrative discharge board hearing;
- the right to representation by military counsel at the hearing;
- the right to civilian counsel at their own expense;
- the right to obtain documents to be shown to the discharge authority; and
- the right to present a written statement instead of demanding a hearing.

This form must be filled out and returned to the command. Commands, generally, will specify to the service member when the paperwork needs to be completed.

Before electing or waiving any rights, service members should consult with a defense attorney first. Even cases that seem straightforward can have hidden pitfalls, and it is much easier to give up rights later than to demand a right which has already been waived.

If service members waive the right to a hearing, their

**DO NOT WAIVE ANY
RIGHTS BEFORE SPEAKING
WITH AN ATTORNEY**

cases are forwarded to the discharge authority (the officer authorized to approve the discharge), along with the command recommendation and any statements or evidence the service members submit. The discharge authority decides whether discharge is proper and, if so, what characterization of discharge will be given. Discharge authorities normally ask their staff judge advocates for a legal review to ensure the case is “sufficient in fact and law.”

Some services allow members to submit “conditional waivers” of the right to have an administrative separation board. In a conditional waiver, the service member basically waives their right to a board in exchange for the guarantee of a particular discharge characterization, often Honorable or General (Under Honorable Conditions). Commands are often willing to accept a conditional waiver because it saves the command the expense and time required to conduct the board. The Navy, however, does not permit the submission of a conditional waiver.

If service members demand an administrative discharge board, military counsel is appointed to represent them. They may request a different military attorney, if they wish, and may also bring in a civilian attorney at their own expense.

If an administrative board recommends retention, the case is also forwarded to the discharge authority. He or she can approve the board’s recommendation to keep the service member in the military or, if he or she wants to go against the board’s recommendation, the discharge authority can forward the case to the Secretary of that Service with a recommendation for discharge. In such a case, a discharge authorized by the Secretary would have to be Honorable or General (Under Honorable Conditions).

If the board recommends discharge, the discharge authority has the power to decide on retention instead, or to change the characterization of discharge to a more favorable one. Military or civilian attorneys can encourage the command to recommend retention or a more favorable discharge characterization by submitting a rebuttal or letter of deficiency. The rebuttal or

letter of deficiency outlines problems with the hearing, such as bias on the part of board members, incorrect findings of fact and incorrect conclusions of law. While discharge authorities normally follow board recommendations, they will occasionally give a better result when errors are pointed out to them.

If the final decision is for separation, the separating authority will send the command authorization to discharge the member and will provide the command with directions concerning the completion of the discharge paperwork (DD-214).

- ▶ See “Administrative Discharge Boards and Boards of Inquiry,” “Attorneys” and “Legal Rights” for further information. Compare to “Criminal Prosecution.”

Discharge Upgrades

Service members who receive less than fully Honorable discharges may be able to upgrade their discharge characterizations by applying to the Discharge Review Board or the Board for Correction of Military or Naval Records (BCMR/BCNR) for their branch of service. The standard of review at these boards is high, to correct “injustice or error,” and upgrades are not guaranteed.¹⁰⁹ If a command recommends a lesser discharge characterization that is not merited by a member’s service record, service members are advised to contest the characterization at an administrative separation board or board of inquiry for officers.

Contrary to persistent misinformation, there is no such thing as an “automatic” upgrade after six months that will upgrade a General (Under Honorable Conditions) discharge to an Honorable one.

While a full discussion of discharge upgrades is beyond the scope of this guide, interested service members may want to contact one of the organizations listed in the “Selected Resources for Service Members” section of this guide that may be able to assist with discharge upgrades.

- ▶ See “Discharge Characterizations” for further information.

Doctor and Psychotherapist - Patient Conversations

As a general rule, conversations between service members and their military doctors, psychologists and other military mental health care providers are not confidential.

Some military health care providers wrongly continue to believe that they have a duty to report lesbian, gay, bisexual or transgender service members to their commands. Other health care providers may report LGBT members because of anti-gay animus. Military health care providers can also be compelled to provide information about a service member. While there is no regulation that requires health care providers to “out” their patients, there is also no regulation which prohibits this action. Anything service members reveal to military health professionals can be used against them to start inquiries or investigations, and as evidence in administrative discharge proceedings. For these reasons, service members should be very cautious revealing any information regarding their sexual orientation or activities to military health care providers.

There is a very limited psychotherapist-patient privilege (Rule 513 of the Military Rules of Evidence), added in 1999, that may prevent disclosure of information that a service member shares with a psychotherapist, or an assistant, during a court-martial.¹¹⁰ However, this privilege does not apply in administrative separation hearings, which constitute the majority of cases under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”¹¹¹

Because of the lack of confidentiality with military health care providers, many service members seek medical and mental health treatment in the civilian community. Some military health care providers even counsel service members to seek civilian treatment when the provider suspects that sexual orientation will be an issue. Service members who choose to be treated by civilian practitioners should be aware that the ser-

vices have regulations which require members to report that they have received medical or mental health treatment outside the military medical system. Should the military learn of such treatment, and the member has not reported it, the member may face UCMJ punishment for failure to obey an order or regulation (Article 92). If a member lies about receiving treatment, they are at risk of violating the UCMJ by making a false official statement. Civilian practitioners will most likely keep the information about a service member confidential unless the service member gives permission to release the information to the military. Because of the reporting requirements, service members can be forced by the military into giving this permission.

Investigators often ask service members to identify their civilian mental health providers and the reason for treatment on security clearance questionnaires. Often, investigators will press service members to sign an authorization form allowing them to question health care providers. Refusal to allow this access may result in the service member not receiving a security clearance. In some cases, however, investigators have questioned providers without first seeking service members’ authorization. Most civilian mental health professionals refuse to answer such questions, but service

members should speak with their civilian providers before starting treatment to verify that their conversations are confidential and will not be revealed to security clearance investigators without their permission. In general, service members should not give civilian providers permission to disclose treatment information without first speaking to a defense attorney who is experienced in military matters.

► See “Attorneys,” “Chaplains” and “Security Clearances” for further information.

IN GENERAL, SERVICE MEMBERS SHOULD NOT GIVE CIVILIAN PROVIDERS PERMISSION TO DISCLOSE TREATMENT INFORMATION WITHOUT FIRST SPEAKING TO A DEFENSE ATTORNEY WHO IS EXPERIENCED IN MILITARY MATTERS.

Emergency Contact Information

For Service Member Emergency:

Each service member is required to keep an emergency data sheet updated. This form usually lists the primary next of kin (PNOK) and other persons of interest that a service member wants notified in case of an emergency or if the service member becomes killed in action (KIA), wounded in action (WIA), missing in action (MIA) or is taken as a prisoner of war (POW). The regulations limit those who can be listed as the PNOK and a member's same-sex partner would not be included. However, the member can list anyone they choose as a person to be notified in an emergency.¹¹² While the military would not notify the "interested person" as quickly as they would a spouse or other PNOK, the military would make the notification.

The first DoD memorandum on the new policy, dated 19 July 1993, states, "The listing by a service member of someone of the same gender as the person to be contacted in case of an emergency...or in a similar context, does not provide a basis for separation or further investigation."¹¹³ The subsequent regulations did not directly address this issue. Commanders would be hard pressed to classify an emergency contact listing as grounds for discharge under the regulations or as credible information, which is required before a commander may initiate an inquiry or investigation. Service members should be warned, however, that commanders do not always follow the rules. Further, such a listing may result in suspicion and close scrutiny of service members' lives.

For Partner / Significant Other Emergency:

The Red Cross traditionally provides notification to military members if a family member has a medical emergency or death while the service member is deployed. Often the member will be granted emergency leave to tend to the situation if the service member's presence is requested.

If your same sex partner needs to pass a message to you while you are deployed, he or she may do so

under the Red Cross Armed Forces Emergency Services¹¹⁴ messaging system through your partner's local Red Cross chapter. The Red Cross will need the following information about you so that your partner can pass a message to you:

- Service member's full name
- Branch of Service
- Social Security Number
- Military Address
- Information about the deployed unit and the home base unit

The Red Cross has fairly rigidly defined what kinds of messages can be passed; however, the organization will allow same sex partners to send the message if it otherwise qualifies for the message service. The Red Cross will not reveal the relationship of your same sex partner to the military. If your same sex partner attempts to pass a qualified message but is having difficulty with the Red Cross because of status as a same sex partner, the partner can contact SLDN for assistance.

The notification can be arranged either through a local Red Cross chapter or through the central Red Cross notification center. A message will then be sent via the military to the service member.

The notification does not come with the same level of priority as notification of a spouse's or family member's emergency. The notification is treated as a notification about a close friend and not a family member or spouse. Because it comes with less priority, the military is less likely to allow the service member emergency leave to attend to their situation. Service members will have to make a difficult decision about how much information to share. In at least one instance, the military began discharge proceedings against a member who reluctantly explained her relationship to her dying partner in order to be allowed to tend to her family crisis.

▶ See "Association With Known Homosexuals," "Credible Information," "Inquiries," "Insurance Beneficiaries," "Investigations" and "Investigative Limits" for further information. Contact information for the Red Cross is included in the "Resources" section of this guide.

Extortion

Extortion is a criminal offense. Under Article 127 of the Uniform Code of Military Justice (UCMJ), a service member who “communicates threats¹¹⁵ to another person with the intention thereby to obtain anything of value or any acquittance, advantage or immunity is guilty of extortion and shall be punished as a court-martial may direct.”¹¹⁶

Service members convicted of extortion risk Dishonorable discharge, forfeiture of all pay and allowances and up to three years in confinement.¹¹⁷ Civilians found guilty of blackmail under the United States Code may be subject to a \$2,000 fine and one year imprisonment.¹¹⁸

Hypotheticals provided with the DoD Directives issued on 21 December 1993 indicate that gay service members can report extortion attempts based on their sexual orientation or associations with known gay people as long as they do not reveal their orientation when making the report. The hypotheticals are not rules, however, and are not binding on commanders.

The hypotheticals do not address extortion attempts based on accusations of gay acts. Nor do they provide any guidance to service members who are blackmailed by people who know their sexual past and use this information against them.

Former Under Secretary of Defense Rudy de Leon issued a memorandum on 12 August 1999 that provides some general guidance about this problem. The “de Leon memo” does not rule out the use of evidence of homosexual conduct that comes from harassers or persons who have made threats. The memo states that commanders should “carefully consider the source of that information and the circumstances under which it was provided in assessing its credibility.”

Generally, service members who become the victims of extortion attempts should seek legal help immedi-

ately in order to determine the safest way to proceed.

- ▶ See “Acts,” “Basis for Discharge,” “Civilian Police,” “Civilians and Investigation,” “Credible Information,” “Harassment/Death Threats/Hate Crimes,” “Inquiries,” “Investigations,” “Investigative Limits” and “Complaints - Making” for further information.

Gay Bars

Service members may go to a gay bar under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”¹¹⁹ However, they may not engage in homosexual conduct while at the bar. If someone reports service members engaging in bodily contact such as kissing, holding hands or touch dancing with someone of the same gender while at a bar, service members will likely face investigation and discharge under the regulations.

As a practical matter, coworkers and superiors may suspect that service members are gay if they see them at a gay bar.

Some commands have attempted to prevent service members from going to gay bars by placing establishments “off-limits.” Service members risk disciplinary action if they violate an “off-limits establishment” order. Service members should check with

their command’s “off-limits establishments” designation list to ensure they are not violating orders.

- ▶ See “Acts,” “Association with Known Homosexuals,” “Basis for Discharge,” “Civilian Police,” “Civilians and Investigations,” “Credible Information,” “Gay Pride Parades and Events,” “Gay Publications,” “Hand-Holding and Kissing,” “Homosexual Conduct,” “Inquiries” and “Investigations” for more information.

Gay Pride Parades and Events

Service members may attend gay pride parades, but must wear civilian clothes.¹²⁰ Military members must

SERVICE MEMBERS CONVICTED OF EXTORTION RISK DISHONORABLE DISCHARGE, FORFEITURE OF ALL PAY AND ALLOWANCES AND UP TO THREE YEARS IN CONFINEMENT.¹¹⁷

also be on off-duty time, according to the general regulations on rallies and political rights.

Military members must be careful not to make a “non-verbal statement,” for example holding a sign saying “Gay and Proud,” or engage in “homosexual acts” such as hugging someone of the same gender while at the parade, or they will risk discharge, if reported.

It is safest not to carry a sign or wear gay-themed buttons, T-shirts, etc. at a parade (or anywhere else), particularly if the language suggests that the wearers themselves are lesbians, gay men or bisexuals. According to hypotheticals provided with the regulations, for example, carrying a banner that says, “Lesbians in the military say, ‘Lift the Ban!’” could be interpreted as a nonverbal statement of sexual orientation and result in investigation and discharge.

Be aware that pride parades are often covered by the media. Service members may want to scan the parade route to make sure they are not being photographed or televised against their wishes.

Participation in public gay events should be considered carefully. As a practical matter, others may suspect that service members are gay if they are seen at a gay pride parade or other event.

Military members should not wear articles of their uniform to any gay event, as it could place them at risk of action under uniform regulations.

- ▶▶ See “Acts,” “Administrative Discharge Boards and Boards of Inquiry,” “Association with Known Homosexuals,” “Credible Information,” “Gay Bars,” “Gay Publications,” “Hand-Holding and Kissing,” “Homosexual Conduct,” “Inquiries,” “Investigations” and “Statements” for further information.

Gay Publications

Possessing or reading gay publications is not by itself a grounds for investigation or discharge.¹²¹

Despite the regulations, some commanders have started inquiries and searched the rooms of service members solely because they had gay magazines or popular, gay-themed videos and books. As a practical matter, it is not safe to keep gay magazines and literature in barracks rooms, wall lockers or service members’ cars.

- ▶▶ See “Acts,” “Administrative Discharge Boards and Boards of Inquiry,” “Computers,” “Credible Information,” “Homosexual Conduct,” “Inquiries,” “Inspections,” “Investigations,” “Investigative Limits” and “Searches” for further information.

G.I. Bill Education Benefits

Service members must have an Honorable discharge and must serve a minimum number of years (usually 2 or 3 years, depending on the enlistment contract) to be eligible for educational benefits under the Montgomery G.I. Bill. Service members who do not meet these requirements will not receive a refund of the money they have invested in the program and will lose G.I. Bill benefits. This includes service members discharged for homosexual conduct.

Service members who receive a General discharge, but who upgrade their discharge characterization to Honorable, may become eligible for G.I. bill benefits if they served long enough before being discharged.

- ▶▶ See “Discharge Characterizations” and “Discharge Upgrades” for more information.

Hand-Holding and Kissing

Hand-holding, kissing and other forms of physical contact can be interpreted as homosexual acts and result in discharge or, in rare circumstances, even court-martial. A homosexual act is defined as “any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires and any bodily contact (for example, hand-holding or kissing, in most circumstances) that a

reasonable person would understand to demonstrate a propensity or intent to engage in such an act.”¹²²

This broad definition of homosexual acts poses a real problem, particularly for people who are used to expressing non-sexual affection in a physical manner. Inquiries could potentially be initiated against service members, regardless of their actual sexual orientation, on the basis of a photograph in which two men simply have their arms around each other, or on the statement of a witness that she observed two women consoling each other.

- ▶ See “Acts,” “Aggravating Circumstances,” “Criminal Prosecution” and “Homosexual Conduct” for more information.

Harassment/Death Threats/ Hate Crimes

According to Department of Defense Directive 1304.26, “[t]he Armed Forces do not tolerate harassment or violence against any service member, for any reason.”¹²³ This is one of several regulations and laws that prohibit harassment and can be used in gay cases. Harassment can take different forms, ranging from a hostile climate rife with anti-gay comments to direct verbal and physical abuse to death threats.

It is helpful for service members to document harassment when it occurs. Service members should write down as exactly as possible the facts of what occurred, including the date, time and place of the incident, the name or description of each harasser, and the names of any witnesses who observed the harassment. If service members receive a threatening note, they should handle it as little as possible and place it in a zip-lock bag or other container that will preserve it. Service members should also, if possible, take photos of any destruction of property they experience or ask people who are trustworthy to look at the destruction so that there are witnesses to it.

Service members should make copies of their documentation and any other information they receive.

For service members who are actually lesbian, gay or bisexual, it is best if witnesses do not know about their sexual orientation or private lives. This will reduce the likelihood that witnesses can provide damaging information if they are improperly questioned, about service members’ sexual orientation or private lives instead of the harassment.

Lesbian, gay and bisexual service members who wish to report harassment face significant obstacles. These service members are likely to face discharge if their sexual orientation or activities are revealed in the course of reporting harassment or any resulting investigations. This puts these men and women in a real bind, because officials usually ask people who report harassment or hate crimes to describe the nature of the incident and why they think it happened. Officials may also discover information about service

members’ private lives from the harassers, witnesses and others who are interviewed in connection with the harassment.

Service members now have some limited protection as the result of a memorandum from former Under Secretary

of Defense Rudy de Leon dated 12 August 1999 entitled “Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality.” The “de Leon memo” states, in part:

The fact that a service member reports being threatened or harassed because he or she is said or is perceived to be a homosexual shall not by itself constitute credible information justifying the initiation of an investigation of the threatened or harassed service member.... The report of a threat or harassment should result in the prompt investigation of the threat or harassment itself.¹²⁴

There is an Executive Order that permits prosecutors in crimes against service members motivated by anti-

**SERVICE MEMBERS SHOULD
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gay animus to enhance the sentence for the underlying crime as a hate crime. (A copy of the Executive Order is included as an attachment).

The Pentagon has also adopted and is supposed to be implementing a 13 point Anti-Harassment Action Plan (the full text of this plan is included as an attachment). The implementation of this plan, if it is fully implemented, should improve conditions in the Services. The plan requires better training on anti-gay harassment, more effective avenues of reporting anti-gay harassment, enforcement of the anti-harassment directives and measurement of the effectiveness of the steps taken. Unfortunately, although this plan was ordered by the Secretary of Defense to be implemented by the Services in 2000, very little of the plan has been implemented.

Service members should contact a defense attorney or legal worker if they are harassed to assess their options.

There will, however, be times when service members are unable to contact an attorney or legal worker, or are facing an immediate threat of physical harm and decide they must report the harassment on their own. In these circumstances, service members should report the facts of the harassment, not their personal lives. Service members can say, for example, "On this date, this person did this to me. . . ." or, "On this date, I returned from duty and found this threatening note tacked to my door." Service members should not say, "I'm being harassed because I am gay." Nor should service members answer questions about their sexual orientation or private lives. If a service member is questioned about his or her personal life or sexual orientation, the service member should not answer and ask to speak to a defense attorney.

As a last resort, service members facing the threat of immediate physical harm can seek safety behind the locked door of their chaplain's office, especially on deployed ships where there may be nowhere else to go. As discussed earlier, however, service members should not, in most cases, confide their sexual orientation or activities to a military chaplain.

Service members who report anti-gay harassment should consider asking their commands not to reveal the nature of the harassment to other service members. Revealing that a service member has been harassed because he or she is perceived as gay is likely to create and fuel rumors that could further jeopardize a service member's safety, even if he or she is not actually gay.

Commanders, inquiry officers and investigators may not know the above limits or may just ignore them. Legal assistance at the earliest stages of any inquiry or investigation into harassment may help prevent or reduce problems.

- ▶ See "Unauthorized Absence (UA)/Absence Without Leave (AWOL)," "Asking," "Attorneys," "Chaplains," "Credible Information," "Extortion," "Investigative Limits," "Legal Rights" and "Complaints - Making" for further information. See Appendix for a copy of the "de Leon memo."

Homosexual Conduct

Homosexual conduct is defined as "a homosexual act, a statement by the [s]ervice member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage."¹²⁵

Homosexual conduct is a basis for discharge under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."

- ▶ See "Acts," "Criminal Prosecution," "Hand-Holding and Kissing," "Marriage" and "Statements" for more information.

HIV Infection / AIDS

HIV positive personnel may not enlist in the armed forces.¹²⁶ Active duty service members are periodically tested for HIV. Those who test HIV+ while on active duty are allowed to continue serving, so long as they remain healthy (i.e., "medically fit for duty"). An HIV+ member may request an administrative separation from the Service, but the Services are not obliged to approve the request.¹²⁷

HIV+ members are given formal, written “safe sex” orders requiring them to disclose their HIV status to all persons prior to having sexual relations, as well as to always use condoms. Violation of this order may result in the service member’s criminal prosecution under the UCMJ.

There are some duty assignment limitations placed on HIV+ members. For example, HIV+ members generally may not serve overseas, in combat specialties, or in billets designated as “deployable.”¹²⁸

Generally, DoD and Service policies provide for medical treatment for HIV+ members via military medical facilities, and require that HIV+ members’ health status be treated confidentially. Active duty personnel who show symptoms of any HIV-related condition are evaluated for medical fitness and, if found unfit for duty, medically separated from service. Service members who are medically unfit with at least a 30% disability rating (using the Department of Veterans Affairs “Schedule for Rating Disabilities”) will probably be medically retired (i.e., retire from active duty with a pension along with access to military health care facilities). Service members who are medically unfit with less than a 30% disability rating usually receive a one-time disability severance payment rather than disability retirement. These members are then eligible for limited health care through VA medical facilities.¹²⁹

Reserve and National Guard service members who test HIV positive are generally involuntarily separated from the Service, unless they are eligible for an available “non-deployable” billet.

HIV+ members face problems in four broad – and overlapping – areas: (1) sexual contact tracing; (2) confidentiality; (3) promotion eligibility; and (4) harassment.

a. Contact Tracing: When a member tests positive for HIV, the Services conduct a vigorous contact tracing effort. Military health care workers ask for names of sexual contacts and others who may have been exposed to

HIV by the positive service member. The information provided by the HIV+ patient during this epidemiological assessment is not supposed to be used to the patient’s detriment via personnel or legal channels. However, the policy offers no assurance that the protections provided to the HIV+ patient will apply to military personnel identified as lesbian, gay or bisexual as the result of the HIV patient’s naming them as sexual partners.

b. Confidentiality: There is no physician patient confidentiality in the military medical setting. The perceived link between gay sex and HIV infection remains strong in the military. DoD has implemented a policy prohibiting “adverse personnel actions” against those testing HIV+ (including involuntary administrative discharge, court-martial, or unfavorable entries in personnel record) based solely on information obtained during epidemiological assessments (i.e., contact tracing).¹³⁰ These protections do not apply, however, to other communications between HIV+ patients and military health care providers. Also, these protections do not prevent “nonadverse personnel actions,” such as reassignment, removal from flight status, etc.

c. Promotion Eligibility: Although generally allowed to continue serving, so long as medically fit for duty, HIV+ members report facing increasing problems in competing for and obtaining promotions. Assignment limitations, such as the prohibition on serving overseas, for example, prevent many HIV+ members from obtaining necessary experience required for promotions in certain specialties.

d. Harassment: Although military regulations require confidentiality of HIV test results, limiting official knowledge of HIV+ service members’ status to commanding officers and medical personnel, in reality, HIV+ test results have sometimes been made known widely throughout commands. Such medical privacy violations may cause considerable embarrassment to, and even harassment of, HIV+ service members. Male HIV+ service members are also often assumed to be gay, and may be at greater risk of being harassed because of their perceived sexual orientation.

**HIV POSITIVE PERSONNEL
MAY NOT ENLIST IN THE
ARMED FORCES.¹²⁶**

- ▶ See “Doctor and Psychotherapist – Patient Conversations” and “Harassment” for more information.

Inquiries - Administrative

Inquiries are administrative investigations that are conducted by the commanding officer or an officer appointed by the commander. They are also called fact-finding inquiries or commanders’ inquiries, and are the preferred way of handling allegations of homosexual conduct.

Under the “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” policy, a service member may be investigated and administratively discharged if they commit one of the following acts: 1) make a statement that they are lesbian, gay or bisexual; 2) engage in physical contact with someone of the same sex for the purposes of sexual gratification; and 3) marry, or attempt to marry, someone of the same sex.¹³¹ Only a service member’s commanding officer may initiate an inquiry into homosexual conduct.¹³² In order to begin an administrative inquiry the commanding officer must receive credible information from a reliable source that a service member has engaged in homosexual conduct.¹³³

In order to begin an inquiry, the commanding officer must receive credible information from a reliable source that a service member has engaged in homosexual conduct.¹³⁴ “Credible information exists when information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct.”¹³⁵

If a commander chooses to conduct an inquiry, he may choose between two types. The first investigative type is called a “limited inquiry.” “Limited inquiries” are most often used in cases where a service member has made a statement that he/she is lesbian, gay or bisexual. During a “limited inquiry” in a statement case, the command may only question the service member, his/her chain of command, and anyone that the service member suggests.¹³⁶

The second type of inquiry is called a “substantial investigation.” By definition, a “substantial investigation” is anything that extends beyond questioning the service member, the service member’s immediate chain of command, and anyone the service member suggests.¹³⁷ In order to conduct a “substantial investigation,” the commander must seek permission from the Secretary of that Service.¹³⁸ In order to request authority to conduct a “substantial investigation,” the service member’s command must be able to clearly articulate an appropriate basis for necessitating such an investigation.¹³⁹

Unfortunately, many commanders do not know about or choose to ignore the “substantial investigation” limitations. These commanders proceed to question others regarding the service member’s statement without proper permission. Commanders also sometimes pressure service members to volunteer names of others the inquiry officer may question. Service members should not provide names of individuals to the inquiry officer without consulting a defense attorney.

Whether an inquiry is a “limited inquiry” or a “substantial investigation,” service members should be told of the acts that they are alleged to have committed and informed of their legal rights under Article 31 of the Uniform Code of Military Justice (UCMJ). Service members should remember their legal rights to remain silent and to consult with an attorney before waiving any rights or making any statements to inquiry officers.¹⁴⁰

- ▶ See “Asking,” “Attorneys,” “Civilians and Investigations,” “Credible Information,” “Homosexual Conduct,” “Investigations - Criminal” “Investigative Limits,” “Investigative Tactics,” “Legal Rights” and “Statements” for more information.

Inspections

There are many situations, like inspections, when commands can look through service members’ workspaces, on-base quarters, lockers, etc., without a

search warrant. Inspections can include examinations of property and spaces in all or part of a unit or ship, or vehicles going on or off a military base, among others.

Information about homosexual conduct that is found during inspections may be used against service members. Service members should be careful about bringing anything on base that could lead to suspicions that they are gay.

- ▶ See “Computers,” “Gay Publications,” “Legal Rights,” “Pornography” and “Searches” for more information.

Insurance Beneficiaries

According to the first DoD memo on the policy, dated 19 July 1993, service members should be able to list persons of the same gender as their insurance beneficiaries without risk of investigation or discharge.¹⁴¹ As a practical matter, however, some commanders and prosecutors have used insurance beneficiary information against service members. Service members should know that commanders, prosecutors and investigators have access to personnel files, including insurance forms. If a service member is questioned about their relationship to the same gender beneficiary, he or she should not explain the nature of the relationship.

- ▶ See “Association With Known Homosexuals,” “Emergency Contact,” “Inquiries,” “Investigations,” “Investigative Limits” and “Legal Rights” for more information.

Investigations - Criminal

According to military regulations, cases involving private sexual acts between consenting adults should be dealt with administratively and criminal investigators should not be involved in investigating the allegations.¹⁴² Criminal investigations by the Naval Criminal Investigative Service (NCIS), Air Force Office of Special Investigations (OSI), Army Criminal

Investigation Command (CID), etc. are still a possibility. In cases of consensual conduct, however, investigations are rare.

If a commander refers an allegation of homosexual conduct to a criminal investigative agency, the agency director, commander or principal deputy is required by the regulations to make his or her own independent evaluation of whether there is credible information of “sexual misconduct” before deciding to investigate.¹⁴³

The investigative agencies may start an investigation without a referral from a service member’s commander only if the agency director, commander or principal deputy authorizes it.¹⁴⁴ Before launching an investigation, the agency director, commander or principal deputy must evaluate whether there is credible information of homosexual conduct and whether such an investigation is an appropriate use of scarce investigative resources.¹⁴⁵

In a criminal investigation, service members should be told of the acts that they are alleged to have committed and informed of their legal rights under Article 31 of the Uniform Code of Military Justice (UCMJ). Agents must also give these warnings to witnesses who are suspected of violating the UCMJ. Investigators should give service members a rights warning or waiver form before interviewing them. The form states the alleged crime (but doesn’t describe the circumstances), the right to remain silent, the right to consult counsel, etc. Unfortunately, investigative agents sometimes neglect to give service members this form until mid-way through an interview.

Service members should remember their legal rights to remain silent and to consult with an attorney before waiving any rights or making any statements to criminal investigators.¹⁴⁶

- ▶ See “Attorneys,” “Civilians and Investigations,” “Credible Information,” “Criminal Prosecution,” “Discharge Process,” “Inquiries,” “Investigative Limits,” “Investigative Tactics” and “Legal Rights” for more information.

IF QUESTIONED, SERVICE MEMBERS SHOULD SAY NOTHING, SIGN NOTHING AND CONSULT WITH AN ATTORNEY

Investigative Limits - Administrative and Criminal

“Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” imposes limits on gay investigations and inquiries.

Limitations on Administrative Inquiries

Only commanders may begin an inquiry/investigation.¹⁴⁷ In order to begin an inquiry the commanding officer must receive credible information from a reliable source that a service member has engaged in homosexual conduct.¹⁴⁸ “Credible information exists when information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct.”¹⁴⁹

Actions that are associational behavior, such as having gay friends, going to a gay bar, attending gay pride events, and reading gay magazines or books, are never to be considered credible evidence of a service member’s sexual orientation, nor is it evidence of homosexual conduct.¹⁵⁰ In addition, a service member’s report to his/her command regarding harassment or assault based on perceived sexuality is never to be considered credible evidence of the service member’s sexual orientation or homosexual conduct.¹⁵¹

Inquiries must be “limited to the factual circumstances directly relevant to the specific allegations.”¹⁵² In addition, during “limited inquiries” in statements cases, commands may only question the service member, his/her chain of command, and anyone the service member suggests.¹⁵³ In “substantial investigations,” commands must request the authority to conduct a “substantial investigation,” by clearly articulating an appropriate basis for necessitating such an investigation.¹⁵⁴

In administrative inquiries, “[a]t any given point of the inquiry, the commander or appointed inquiry official must be able to clearly and specifically explain which grounds for separation he or she is attempting

to verify and how the information being collected relates to those specific separation grounds.”¹⁵⁵ This means the command is not supposed to use one allegation as an excuse to try to dig up additional allegations against the service member or to start a witch hunt for other suspected gay troops.

Finally, asking about a service member’s sexual orientation is strictly prohibited.¹⁵⁶ Inquiry officers are only allowed to ask about conduct, for example “did you say you were gay?” but not about sexual orientation, for example “are you gay?”

In practice, many commanders and inquiry officers ignore these limits. Commanders often rush to launch inquiries without evaluating whether accusations are credible and, in numerous cases, despite indications that the accusations are untrue. Inquiry officers routinely attempt to expand the scope of inquiries beyond the original allegations, and to question service members about their sexual orientation and activities, as well as those of their co-workers.

Limitations on Criminal Investigations

Only commanders or the directors, commanders or principal deputies of investigative agencies may begin an investigation. Heads of criminal investigative agencies must also evaluate whether it is “an appropriate use of investigative resources” to initiate an investigation.¹⁵⁷ Individual investigative agents may not start such investigations on their own. In any criminal investigation, the investigation should be conducted in an even-handed manner, regardless of whether the alleged activities are homosexual or heterosexual.¹⁵⁸ Criminal investigations into private consensual same gender sexual acts are rare.

- ▶ See “Asking,” “Attorneys,” “Basis for Discharge,” “Civilians and Investigations,” “Credible Information,” “Inquiries - Administrative,” “Investigations - Criminal,” “Investigative Tactics – Administrative and Criminal,” “Legal Rights” and “Witch Hunts” for further information.

Investigative Tactics – Administrative and Criminal

Despite the investigative limits contained in “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,” military commanders, inquiry officers and investigators have been known to do the following during investigations and inquires:

- Read private letters, diaries, and computer files to seek evidence of homosexuality.
- Search or inspect rooms, desks and wall lockers for “gay” personal effects, such as gay magazines, literature and videos, and use them as a basis of inquiry or as evidence of homosexual conduct.
- Ask about sexual orientation through direct or surrogate questions, such as, “Are you attracted to individuals of the same gender?” or “How would you describe your relationship with your roommate?”
- Seek out and question parents, other family members and close civilian and military friends about service members’ sexual orientation and activities and use these statements against service members.
- Investigate personnel because they discuss their sexual orientation or information about their private lives with a physician, psychologist, close friend, parents or family.
- Investigate the sexual orientation or acts of military members who report harassment or threats based on actual or perceived sexual orientation.
- Investigate women who report sexual harassment and assault, or who rebuff men’s sexual advances, and who are labeled lesbians in retaliation.

**SERVICE MEMBERS HAVE THE
RIGHT TO REMAIN SILENT AND
IN ALMOST ALL CASES SHOULD**

- Threaten service members with imprisonment if they do not confess that they are gay or have engaged in gay acts, or name other suspected gay personnel.
- Promise service members leniency if they confess to being gay or to gay acts, or if they name other suspected gay personnel.
- Lie about the existence of other evidence to coerce confessions or pressure service members to name other suspected gay personnel.
- Falsely claim that friends have already turned in the service member and that he/she has nothing to lose by cooperating with investigators.
- Falsely say the “new” policy allows service members to reveal their sexual orientation to investigators.
- Use the “good guy, bad guy” tactic, with the “good guy” claiming to like gays and dislike the ban.
- Use associations with known gay people as “proof” of gay conduct.
- Use information from civilian police as a basis for discharge, such as reports of hate crimes based on orientation, statements of orientation to show lack of consent in rape cases, or evidence seized when civilian roommates’ homes are searched.
- Tell service members that they have been accused of forcible sodomy in order to extract a confession that the acts were consensual, which also can be prosecuted as a crime.
- Fail to warn service members of their legal rights to say nothing, sign nothing and consult with a defense attorney, or give them this information only after they have made incriminating statements.

- Fail to advise service members of the reason they are under investigation and of the policy on homosexual conduct.
- ▶▶ See “Acts,” “Asking,” “Association with Known Homosexuals,” “Attorneys,” “Chaplains,” “Civilian Police,” “Civilians and Investigations,” “Computers,” “Credible Information,” “Criminal Prosecution,” “Extortion,” “Harassment/Death Threats/Hate Crimes,” “Homosexual Conduct,” “Inquiries - Administrative,” “Inspections,” “Investigations - Criminal,” “Investigative Limits,” “Legal Rights,” “Lie Detector Tests,” “Phones,” “Searches” and “Witch Hunts” for more information.

Legal Rights

Under Article 31 of the Uniform Code of Military Justice (UCMJ), service members have the right to say nothing, sign nothing, and get legal help if they are questioned about their sexual activities. “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” also states that service members do not have to answer questions about their sexual orientation.

The Military Rules of Evidence (MRE) provide additional protections to service members in criminal investigations. MRE 305(c), for example, states that accused service members must be informed of the nature of the accusation, advised of their right to remain silent and advised that any statement may be used as evidence against them in a court-martial before they are questioned. Under MRE 305(f)(2), “questioning must cease until counsel is present” when a service member “chooses to exercise the right to counsel.” MRE 304(b) provides for exclusion, in certain circumstances, of statements or other evidence from a court-martial in cases where the military obtained such information in violation of the rules of evidence.

Service members should be aware, however, that the Military Rules of Evidence do not apply in administrative discharge proceedings. Even if investigators break the rules during an administrative or criminal investigation, any evidence they obtain can and will

likely be used against service members for the purpose of seeking administrative separation. Lesbian, gay and bisexual service members do not have to, and should not, answer questions regarding their sexual activities during any type of investigation or inquiry.

In general, service members’ best defense against gay investigations is to exercise their legal rights. Some investigators and commands have trouble accepting this. Service members must be prepared to be firm in exercising the following legal rights.

a. Say Nothing

Service members have the right to remain silent and in almost all gay cases they should. If they want to stay in the military, anything they say can and will be used against them. If they want to get out, saying the wrong thing can lower their discharge characterization or get them court-martialed.

Investigators sometimes promise leniency or threaten harsh treatment to extract confessions or names of other suspected gay people. These promises and threats are hollow. Usually, giving in to them will only make things worse, not better.

Sometimes, investigators engage service members in seemingly casual conversations, attempting to lull service members into divulging damaging information. Service members should not chat with investigators.

Service members can tell investigators and commanders that they wish to consult with an attorney before deciding whether to make any statements or answer any questions.

Service members can say that they have been told that it is best to speak with an attorney first, regardless of the circumstances. Service members may also ask investigators and commanders to write their questions down on paper. Attorneys or legal workers can then review the questions and talk with service members about how to proceed. Attorneys and legal workers can also review the questions to determine

whether they violate “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” and can attempt to have improper questions dropped.

b. Sign Nothing

Service members do not have to sign or initial anything during an investigation and generally should not do so before consulting an attorney or a legal worker experienced in military matters.

Often, service members will be asked to waive their legal rights. Some have been led to sign blank or partially completed sworn statement forms, only to find that investigators have filled them out later so as to incriminate the service members.

Service members can inform investigators that they must show the papers to an attorney and seek the attorney’s guidance before deciding whether to sign or initial the paperwork.

c. Get Legal Help

Service members have the right to consult with an attorney and generally should do so in gay cases before giving up any rights and before making any statements. Investigators and commanders must stop all questioning and allow service members to see an attorney if they ask to consult with one.

Service members may have to assert their legal rights before they are advised of them, i.e., expressly tell investigators and commanders that they do not wish to say or sign anything and that they wish to consult with an attorney. While investigators and commanders are supposed to advise service members accused of homosexual conduct of their rights prior to any questioning, they often do not.

▶ See “Attorneys,” “Investigative Limits,” “Investigative Tactics” and “Witch Hunts” for further information.

Lesbian Baiting

Lesbian baiting is a form of anti-gay harassment as well as a form of sexual harassment. Women are often called lesbians, regardless of their sexual orientation, for a variety of retaliatory reasons. Some men accuse women who refuse their sexual advances of being lesbians. Other men who sexually harass women accuse them of being lesbians when the women report the sexual harassment, in an attempt to turn the investigation away from their own misconduct. Others, men and women, accuse female superior officers of being lesbians in retaliation for poor performance evaluations or unpopular orders. Yet others accuse successful women of being lesbians to derail

their careers. The stereotype remains that women in nontraditional job fields are viewed, as many have noted, as “dykes.” For this and other reasons, women continue to be disproportionately impacted by “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”¹⁵⁹ Women have been consistently discharged at a rate nearly twice their

presence in the services since the implementation of the policy.

▶ See “Harassment” for more information.

Lie Detector Tests

Lie detector tests are required as part of the security clearance process for some billets. Refusing to take a lie detector test as part of this process may result in denial of a billet or removal from a billet. Security clearance lie detector tests often contain indirect questions which could cause problems. For example, for service members in a relationship with a non-United States citizen, questions regarding contacts with foreign nationals may be complicated to answer. Evidence of sexual orientation discovered during the course of a security clearance investigation cannot be used to deny a service member his or her security clearance and cannot be used as a basis for discharge.¹⁶⁰

LESBIAN BAITING IS A FORM OF ANTI-GAY HARASSMENT AS WELL AS A FORM OF SEXUAL HARASSMENT.

During criminal investigations, investigators sometimes ask service members to take lie detector (polygraph) tests. Experienced attorneys and counselors almost always recommend that members not take lie detector tests given by the military. These tests are conducted by personnel of the services' criminal investigative agencies. These personnel are sometimes not objective in the way they ask polygraph questions or interpret test results. There is no legal requirement that service members consent to a lie detector test.

Service members who want to take a lie detector test should arrange a test from an independent civilian expert. They do not need command permission to do so, and it is best not to mention the test to the command beforehand. It helps if the arrangements are made through a civilian attorney, who can locate a reputable polygrapher and help him or her focus on the specific questions that need to be answered.

There is significant disagreement about the validity of lie detector tests (military or civilian). Nevertheless, results of polygraph tests can sometimes be used informally to try to persuade commanders or inquiry officers that allegations are unfounded. Polygraph results can often be used in administrative separation board hearings, though the government will sometimes object to them. As a general rule, polygraph evidence is not admissible in courts-martial.

- ▶ See "Asking," "Attorneys," "Investigations," "Investigative Tactics," "Legal Rights" and "Security Clearances" for more information.

Marriage/ Civil Unions

Marriage or an attempted marriage to someone of the same gender is a basis for discharge. Although gay people cannot legally marry at present, some commands have attempted to use this provision to discharge service members who have had civil unions, commitment ceremonies, registered as domestic partners or have been seen purchasing rings with their partners.

Some commands have tried to charge gay service members in opposite gender marriages with fraud, if service members have received the extra financial benefits the military gives to married couples, especially if the service member has not shared this benefit with his or her opposite gender spouse.

- ▶ See "Criminal Prosecution" for more information.

Marriage of Convenience

Lesbian, gay and bisexual service members sometimes marry an individual of the opposite gender in an effort to disguise their sexual orientation. Service members should be aware that if they are married and their sexual orientation is discovered their marriage may be questioned. Since married service members receive extra pay, they may face or be threatened with the criminal charge of defrauding the government for the extra monies.

Further, if a lesbian, gay or bisexual service member married to the opposite gender makes a statement regarding their sexual orientation, they should be prepared for the command to question the truth of their statement.

- ▶ See "Coming out" and "Statements."

Merchant Marines

The Merchant Marines are not an armed service and therefore "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" does not apply to the Merchant Marines. However, graduates of the U.S. Merchant Marine Academy receive a reserve commission in either the U.S. Navy or in the National Oceanic and Atmospheric Administration (NOAA). "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" does apply to the Navy reserves, although not to NOAA.

- ▶ See "National Oceanic and Atmospheric Administration (NOAA)" and "Reserves."

National Guard

The DADTPDH policy applies to the Army and Air National Guard units of the various states. It applies because the Guard has the ability to be federalized, or called to active duty.¹⁶¹ The same general rules that apply to active duty personnel under DADTPDH apply to guardsmen. Administrative separation processing in the Guard is generally much slower than it is for active duty members. The UCMJ applies to service members of the Army and Air National Guard only when in federal service.¹⁶² Some states have enacted state laws which mirror the provisions of the UCMJ and these regulations would generally apply to Guardsmen when they are not in federal service.

National Oceanic and Atmospheric Administration (NOAA)

The National Oceanic and Atmospheric Administration (NOAA) is one of the seven “uniformed services” but is not an “armed service.” “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” does not apply to the commissioned NOAA officer corps. Similar to the Public Health Service (PHS), NOAA officers are subject to the UCMJ “when assigned to and serving with the armed forces.”¹⁶³

▶ See “Public Health Service (PHS)” for more information.

Phones

Military phones may be monitored for security reasons. Service members should not discuss their sexual orientation, activities, relationships or details of their cases from a military phone, even with an attorney or legal worker. The one safe government phone on base is in the military defense attorney’s office.

Private telephones in the service member’s on-base home or barrack’s room are generally safe, so long as the telephone is listed in the service member’s name, the service member is paying the telephone bill and

the government is not directly involved in the installation or maintenance of the phone. There is no guarantee of safety. Investigators occasionally use wiretapping and surveillance against service members suspected of criminal activity. As an alternative, service members can use an off base phone. As with private on-base phones, there is no guarantee of safety from an off-base phone. Private on-base phones and off-base phones are much safer, however, than a military phone. Calling from a personal cell phone is also a good alternative, however, cell transmissions may be intercepted.

If unable to leave base, service members should use an on base pay-phone. Service members should make sure that no one can overhear the call. Pay phones are also a better option than military phones.

▶ See “Computers” and “Legal Rights” for more information.

Pornography

Service members should never keep pornography or sexually explicit materials on base. This can result in discipline under local base policies forbidding pornography. Though rarely enforced against service members with heterosexual pornography, these policies have been enforced with a vengeance against those who possess gay pornography.

Even service members who live off base must weigh the slight risk that any pornography could be seized in a search of their homes and, depending on its content and the jurisdiction, could lead to criminal charges.

Service members should be especially careful about pornography that appears to depict minors. Service members based overseas must also be concerned with customs inspections of their household goods, including articles such as videotapes.

Service members should never use a government computer to access pornographic computer sites.

**MILITARY PHONES ARE
ROUTINELY MONITORED
FOR SECURITY REASONS**

Using a government computer to access pornographic sites constitutes misuse of government property and can lead to criminal charges.

In addition, possessing or viewing on line gay pornography is likely to create suspicions that a service member is gay and prompt his or her command to launch a gay investigation.

► See “Computers,” “Credible Information,” “Criminal Prosecution,” “Inspections” and “Searches” for more information.

Public Health Service (PHS)

The Public Health Service (PHS) is one of the seven “uniformed services” but it is not part of the “armed forces.” While the entire PHS can be militarized, this has not been done since the Korean War. As a general rule, “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” does not apply to Public Health Service (PHS) commissioned officers. Being openly gay is neither a bar to appointment in the PHS nor a bar to continued service. PHS officers “when assigned to or serving with the armed forces”¹⁶⁴ (Army, Navy, Air Force, Marine Corps, and Coast Guard), are subject to the UCMJ, including Article 125 (Sodomy), Article 133 (Conduct Unbecoming), and Article 134 (Indecent Acts), and military regulations, including “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”

In peacetime, PHS officers usually have the ability to decline a posting to the military and, in turn, avoid any difficulty. In wartime, the ability to decline a post will most likely be over ridden by the needs of the service.

Queen for a Day

Service members will nearly always face discharge if the military finds that they have engaged in, attempted to engage in, or solicited homosexual acts. There is an exception, however, for service members who convince a discharge board that the act or acts were an unusual event and are not likely to happen again. Service mem-

bers often call this the “Queen for a Day” clause. It is officially called the five retention criteria.

To be retained in the military despite evidence of homosexual acts, service members must demonstrate that:

- (1) Such acts are a departure from [their] usual and customary behavior;
- (2) Such acts [. . .] are unlikely to recur;
- (3) Such acts were not accomplished by the use of force, coercion or intimidation;
- (4) Under the particular circumstances of the case, the [service member’s] continued presence in the Armed Forces is consistent with the interests of the Armed Forces in proper discipline, good order and morale of the Service; and,
- (5) The [service member] does not have a propensity or intent to engage in homosexual acts.¹⁶⁵

The regulations are the same for officers and enlisted members.

Some service members, on rare occasion, have been successful under this exception by presenting truthful evidence of a heterosexual life and unusual circumstances leading to the homosexual acts. Service members have presented testimony about heterosexual relationships; evidence of stressful circumstances at the time of the gay acts (e.g., the death of a spouse or parent, a divorce or trauma from an abusive heterosexual relationship); and, witnesses who say they have never seen any indication of homosexual behavior. Expert witnesses such as psychologists and sexologists have been called by service members to testify, for example, that the service members are not predisposed to homosexual activity and that the incidents in question are the kind of incidents that are due to unusual circumstances. These are examples, not an exhaustive list.

Although the chances of being retained are very low, service members facing discharge for gay acts should ask their attorney about this option if they think they

can meet the five retention criteria.

- ▶ See “Acts,” “Administrative Discharge Boards and Boards of Inquiry,” “Discharge Process” and “Homosexual Conduct” for more information.

Rebuttable Presumption

Under current policy, a statement of homosexual or bisexual orientation creates a “rebuttable presumption” that the service member engages in homosexual acts, or has the “propensity or intent to do so.”¹⁶⁶

In other words, the military assumes that service members engage in, intend to engage in or have a propensity to engage in gay acts if they say they are lesbian, gay or bisexual. The regulations define propensity as “more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.”¹⁶⁷ This definition is not very clear and may leave service members, commanders and inquiry officers without real guidance.

The military must show, by a preponderance of the evidence, that a service member made a statement of his or her sexual orientation. It is the service member’s burden, however, to rebut (disprove) the presumption raised by such a statement, i.e., that the service member engages in, intends to engage in or has a propensity to engage in gay acts. This task is usually undertaken at an administrative discharge board. The service member must also “prove” his or her case by the preponderance of the evidence standard.¹⁶⁸ Preponderance of the evidence means the evidence of greater weight that goes to the truth of the matter.¹⁶⁹

A board may consider nearly any information to determine if a service member has “rebutted the presumption.” The regulations mention:

- (1) whether a service member has engaged in homosexual acts,

- (2) the member’s credibility,
- (3) testimony from others about the member’s past conduct, character and credibility,
- (4) the nature and circumstances of the member’s statement, and
- (5) any other evidence relevant to whether the member is likely to engage in homosexual acts.¹⁷⁰

The regulations specifically point out that this list is not exhaustive.

Rebutting the presumption has proven to be a nearly impossible task. Service members should not come out on the false hope that they can rebut the presumption and keep their careers.

- ▶ See “Acts,” “Administrative Discharge Boards and Boards of Inquiry,” “Coming Out,” “Criminal Prosecution,” “Discharge Process,” “Homosexual Conduct” and “Statements” for more information.

RECOUPMENT CASES HAVE BEEN MARKED BY SOME OF THE MOST INTRUSIVE INVESTIGATIVE TACTICS

Recoupment

Recoupment is a military demand for repayment of a pro-rated portion of scholarships, bonuses or special pay from service members who are discharged before they have completed their service obligation. Recoupment policies differ based on the reason for separation. Recoupment policy in cases involving discharge for statements of homosexual or bisexual orientation (“coming out” cases) is governed by a memorandum issued on 17 May 1994 by former Deputy Secretary of Defense John Deutch (“Deutch memo”). A federal court ruling involving recoupment in a gay “statements” case affirmed that the Deutch Memorandum establishes DoD recoupment policy.¹⁷¹

Current policy states that service members who are involuntarily, and honorably, discharged for making a statement of homosexual or bisexual orientation shall not be ordered to repay their scholarships, bonuses or

special pay.¹⁷² Service members whose purpose in making a statement of orientation is to seek separation or avoid a service obligation may be ordered to repay recoupment funds. Unfortunately, commanders, inquiry officers and discharge board members often are unaware of this guidance or simply ignore it. Given that the Deutch memorandum exempts statements of sexual orientation from recoupment in certain circumstances, service members should not reveal information about homosexual acts or same gender marriages or unions.

Recoupment cases have been marked by some of the most intrusive investigative tactics. In an effort to curb investigative abuses by military authorities, DoD, in August 1999, established the “substantial investigation” limitation which prohibits the Services from initiating in-depth investigations into gay service members’ private lives without first obtaining permission from the “Military Department Secretarial level.”¹⁷³ Many commands, however, are not aware of this limitation and continue to initiate unauthorized investigations, particularly in cases involving potential recoupment.

In the recoupment context, the purpose of a “substantial investigation” would be to determine whether the lesbian, gay or bisexual service member made a “coming out” statement in order to be discharged from military service, thereby avoiding his/her remaining time-in-service obligation. If a “coming out” statement was not made for the purpose of seeking separation from further military service, recoupment would be inappropriate. For example, if a service member “came out” in an effort to adhere to the Service’s core value of integrity, or the member “came out” to protect against anti-gay harassment, or the member “came out” on the advice of a mental health care provider, the member should not be “recouped” against – so long as the member genuinely intended to continue military service.

In “coming out” cases where recoupment may be an issue, the command is likely to ask for permission to conduct a substantial investigation. The Air Force has been particularly insistent that gay service mem-

bers be “recouped” against, regardless of the motive behind the service member’s “coming out” statement. For example, the Air Force has written guidance which encourages its inquiry officers to recommend recoupment in “statements” cases.¹⁷⁴ A lesbian, gay or bisexual Air Force member – who has received a scholarship, bonus or special pay monies in exchange for a service obligation – who makes a “coming out” statement, faces an almost certain recoupment effort. The Army, Navy and Marine Corps appear to be shifting to follow the Air Force’s example and the Navy in particular is seeking recoupment more often in “coming out” cases.

A service member’s failure to try to stay in the Service, after making a statement of gay orientation, may be interpreted as “evidence” of an intent to voluntarily separate from the Service. For example, if a lesbian, gay or bisexual service member has the opportunity for an administrative hearing prior to being discharged, failure to request a hearing and failure to argue for retention in the Service, may lead the Service to believe the member actually wants a discharge, thereby increasing the possibility of recoupment.¹⁷⁵ In short, if a gay service member makes a “coming out” statement because the member actually wants to leave the service, it is almost certain the service member will be required to repay the monies.

Military members who owe a service obligation because of funded education, bonuses or special pay should not take any steps such as coming out, waiving their right to a discharge board or signing any discharge paperwork before speaking with an attorney or legal worker who is experienced with recoupment issues.

- ▶ See “Administrative Discharge Boards And Boards Of Inquiry,” “Attorneys,” “Civilians And Investigations,” “Coming Out,” “G.I. Bill Education Benefits,” “Homosexual Conduct,” “Investigations” And “Investigative Tactics” “Substantial Investigations” For More Information. See the “Deutch Memo” included in the attachments.

Reenlistment Code

Service members discharged for gay-related reasons are usually given reenlistment codes that prevent their reentry or reenlistment in the armed forces. These are normally RE-4 in the Army, Navy and Marine Corps and RE-2C or RE-2B in the Air Force.

- ▶ See “Discharge Paperwork (DD Form 214)” and “Unemployment Benefits” for more information.

Reserves – SELRES, Active Reserves and IRR

“Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” applies to all service members of the reserve component of the various Services. The UCMJ applies to reservists while on active duty and on inactive duty training. The UCMJ applies at all times to members of the Fleet Reserve and Fleet Marine Corps Reserve. Some services have specific reserve regulations pertaining to the administrative processes to be followed in gay cases. Other Services apply the same regulations to both active duty and reserve personnel.

The Selected Reserve (SELRES) and Active Reserves are the reservists who usually drill one weekend each month and have an annual active duty training period. These individuals are accruing credit towards a reserve retirement whether or not they are in a paid billet. They are usually the first reservists mobilized during an emergency either as part of a unit or as an individual augmentee. The Individual Ready Reserve (IRR) is a broader manpower pool of individuals who generally are finishing their obligated service, or are continuing to remain in the military, without a mandatory drill commitment and without accruing credit towards retirement.

As a general rule, the military takes much longer to process reserve administrative matters than it does the active duty force matters. The administration of the “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t

Harass” policy is no exception. While the military generally does not look for evidence of homosexual conduct by reservists, the military can, and does, respond when it obtains information about lesbian, gay, bisexual reservists. Reservists who are the target of a command investigation should say nothing, sign nothing and ask to speak with a defense attorney. Reservists thinking about disclosing their sexual orientation to the military are strongly encouraged to speak to a defense attorney before doing so. For reservists who make statements, the reserves will generally initiate discharge proceedings but at a very slow pace overall, especially for reservists in the IRR. Individual commands may take even longer to discharge members, in some instances taking more than a year for the discharge to be complete.

- ▶ See “Attorneys,” “Coming Out,” “G.I. Bill Education Benefits,” “Homosexual Conduct,” “Investigations” And “Investigative Tactics” for more information.

ROTC - Junior

“Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” does not apply to Junior Reserve Officer Training Corps (JROTC). The policy only applies to active and reserve service members who have taken an official oath for the branch of the military they are entering. JROTC students cannot officially recite an oath of service and are not in the military.¹⁷⁶

If a JROTC student is harassed because he/she is perceived to be lesbian, gay or bisexual, that student should immediately report the harassment to a school supervisor. If the harassment is coming from other JROTC students, the student should report the harassment to the JROTC instructor. If the JROTC instructor does not end the harassment, the student should report both the harassment and the JROTC instructor’s failure to stop the harassment to a school supervisor.

“DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” APPLIES TO ALL SERVICE MEMBERS OF THE RESERVE COMPONENT OF THE VARIOUS SERVICES.

ROTC - Senior

Reserve Officer Training Corps (ROTC) cadets are considered service members and “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” applies to them.¹⁷⁷ While the military generally does not look for evidence of homosexual conduct by ROTC students, the military can, and does, respond when it obtains information about LGB ROTC students. ROTC students who are the target of a command investigation should say nothing, sign nothing and ask to speak with a defense attorney. Students with ROTC scholarships thinking about disclosing their sexual orientation to the military are strongly encouraged to speak to an attorney before doing so. If an ROTC student is disenrolled under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,” the student will lose his or her ROTC scholarship, and may be asked to pay the military back for the money already spent on his or her education.

- ▶ See “Attorneys,” “Coming Out,” “G.I. Bill Education Benefits,” “Homosexual Conduct,” “Investigations,” “Investigative Tactics” and “Recoupment” for more information.

Searches

Sometimes commands obtain evidence of homosexual conduct as a result of searches by civilian law enforcement agencies or military authorities.

As a general rule, searches of civilian homes and most other off-base searches require a search warrant from a civilian judge, and searches on base or aboard ship require a search authorization from a commander or a military judge or magistrate. A search warrant is a written document, but a military search authorization may be verbal.

There are so many exceptions to search warrant and search authorization requirements, however, that individuals should not assume that a warrantless search or one without military search authorization is illegal. Military personnel or civilians who are confronted with a search should obtain an attorney’s

advice. In some cases, this can be done by calling the attorney before or while the search is happening, and asking the attorney to talk with the officials conducting the search.

It is seldom helpful to consent to a search, even if it looks as though there is a valid search warrant. If people give their consent, or permission to search, any violation of the laws governing searches and seizures is irrelevant. People who wish to object to a search should say clearly and politely that they do not consent to the search. They should not try to block the search, obstruct civilian or military police, or even get into a shouting match with law enforcement officials.

Service members whose homes, lockers, etc., are searched illegally may be able to keep the resulting evidence out of court-martial proceedings. Service members, however, cannot keep out evidence that was illegally obtained from a third person’s home, locker, etc.

In administrative discharge proceedings, the rules of evidence governing courts-martial do not apply. The government considers itself free to introduce illegally-obtained evidence in discharge cases and there is no way to keep that evidence out.

- ▶ See “Civilian Police,” “Civilians and Investigations,” “Computers,” “Criminal Prosecution,” “Gay Publications,” “Inspections,” “Investigations,” “Legal Rights” and “Pornography” for more information.

Security Clearances

The security clearance area is one of the most difficult on which to counsel service members. What is appropriate for one service member may hurt another. The only absolute advice that applies across the board is: Do Not Lie. Service members are strongly urged to call an experienced lawyer for individual counseling based on their situation before going through a security clearance interview.

Under former President Clinton’s May 1995 Executive Order¹⁷⁸ and resulting policy changes, questions

about sexual orientation or same-sex sexual activities are improper and should not be asked unless they become relevant to resolve a legitimate national security issue. Legitimate security concerns include sexual conduct, whether heterosexual or homosexual, that “could make an individual susceptible to exploitation or coercion, or indicate a lack of trustworthiness, reliability, or good judgment that is required of anyone with access to classified information.”¹⁷⁹

Most security clearance investigators seem to be complying with current policy and not asking about sexual orientation or activities. Some investigators, however, ignore the rules and ask inappropriate questions concerning sexual orientation or activities.

There is nothing to prevent security clearance investigators from giving information about service members’ sexual orientation or activities obtained during security clearance interviews to commanders.¹⁸⁰ According to the regulations governing security clearance investigations, however, commanders are not supposed to use this information as a basis for discharge. “[I]nformation about homosexual orientation or conduct obtained during a security clearance investigation will not be used by the Military departments in separation proceedings.”¹⁸¹ Many commands are unaware of the security clearance regulations. Some have tried to discharge service members based on information given in security clearance interviews.

Some commanders have scrutinized or retaliated against gay members through other means after learning they are gay from security clearance investigators.

If asked, service members do not have to answer questions regarding sexual orientation. “The new policy specifies that an individual’s efforts to follow DoD policy on homosexual conduct in the Armed Forces by not openly acknowledging his or her homosexual orientation do not constitute concealment.”¹⁸² Service members should be aware that they may be questioned about persons living with them.

Investigators usually ask about the nature of the relationship, for service members who live with their same sex partner such questions pose risks. Service members in relationships with foreign nationals may be questioned about the nature of that relationship. Service members should contact a defense attorney prior to a security clearance investigation to discuss the appropriate way to answer these questions.

Some advocates take the position that service members do not have to answer questions concerning sexual activities, either. Under Article 31 of the Uniform Code of Military Justice (UCMJ), service members have the right to remain silent when asked about activities that could be charged as crimes. Service members should be aware, however, that the investigator may not share this view and that failure to cooperate could result in the loss of, or denial of, a security clearance.

Some service members have responded to questions about sexual activities by saying that they have never done anything that would subject them to blackmail or hurt national security. Service members should, of course, be sure this is a true statement before considering this approach themselves.

It is safest for service members to seek guidance from an attorney regarding how to deal with security clearance interviews.

► See “Acts,” “Attorneys,” “Criminal Prosecution,” “Extortion,” “Legal Rights,” “Lie Detector Tests” and “Statements” for more information. See the attached excerpts from the President’s Executive Order forbidding discrimination based on sexual orientation in the security clearance process.

Separation Pay

Service members with at least six years of honorable active duty service who are involuntarily discharged from active duty for homosexuality are entitled to sep-

IT IS SAFEST FOR SERVICE MEMBERS TO SEEK GUIDANCE FROM AN ATTORNEY REGARDING HOW TO DEAL WITH SECURITY CLEARANCE INTERVIEWS.

separation pay. Regulations limit the payment to one-half of the separation pay that would normally be received. However, the regulations also allow the half-separation pay limitation to be waived in extraordinary circumstances to avoid an injustice when a service member's service record merits full separation pay.

While the regulations may vary slightly by service, the member generally must meet three criteria, in order to be eligible for half-separation pay:

- (1) be involuntarily discharged from active duty;
- (2) have at least six years of active duty service; and
- (3) receive an Honorable discharge.

A service member who voluntarily requests separation or who is discharged because of misconduct is not eligible for separation pay.

While all discharges under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” are usually labeled as “involuntary,” the military can, and often does, treat a member’s unsolicited (the military uses the phrase “voluntary”) statement of sexual orientation as a request for separation and deny a member separation pay. Because of this, it is important for any active duty service member who has over six years of active service and a good record, and is considering coming out to the military, to contact a defense attorney to discuss the consequences before making such a statement.

► See “Coming out” for more information.

Service Academies

“Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” applies to students attending the Service Academies - West Point, Naval Academy, Air Force Academy, etc. Cadets and midshipman are members of the active military force. Students at the Academies who are the target of a command investigation should say nothing, sign nothing and ask to speak with an attorney. Students who are thinking about disclosing their sexual orientation to the military are strongly encour-

aged to speak to an attorney before doing so. If a student at any of the Academies is discharged under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,” the student will be disenrolled from school and may be asked to pay the military back for the money already spent on his or her education.

► See “Attorneys,” “Coming Out,” “G.I. Bill Education Benefits,” “Homosexual Conduct,” “Investigations,” “Investigative Tactics” and “Recoupment” for more information.

Statements

“A basis for discharge exists if . . . [t]he member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts”¹⁸³ According to the regulations:

A ‘statement that a member is homosexual or bisexual, or words to that effect,’ means (1) language or behavior that (2) a reasonable person would believe (3) intends to convey the statement (4) that a person engages in or has a propensity to engage in homosexual acts. This includes such statements as ‘I am a homosexual,’ ‘I am gay,’ ‘I am a lesbian,’ ‘I have a homosexual orientation,’ and the like.¹⁸⁴

Service members should beware that expressions of desire or romantic interest are also likely to be interpreted as statements.

Service members are not safe making private statements to family members, close friends, military psychologists and others. Some service members have been turned in by people they trusted. There is no doctor-patient confidentiality in the military. There is limited psychotherapist-patient confidentiality, but it does not apply to administrative separation proceedings; this privilege only applies to criminal cases. In rare instances, inquiry officers have sought out and questioned parents, other relatives and former employers, some of whom have unwittingly provided

information that was then used against the service member.

The regulations also prohibit “nonverbal statements,” but they do not define them. This gives prejudiced commanders a lot of room to target suspected gay service members. To be safe, military members should not wear or display gay symbols, as these symbols could be construed as nonverbal statements. Service members should be aware that gestures of sexual interest could also be interpreted as nonverbal statements.

- ▶ See “Acts,” “Administrative Discharge Boards and Boards of Inquiry,” “Asking,” “Corporal Klinger Provision,” “Credible Information,” “Discharge Process,” “Homosexual Conduct,” “Inquiries,” “Investigations,” “Investigative Tactics” and “Rebuttable Presumption” for more information.

Stop Loss

A stop-loss order suspends certain administrative discharges during times of war or conflict to help the Pentagon and Services retain sufficient personnel for combat readiness. In 1991, Gulf War stop-loss orders applied to discharges of lesbian, gay and bisexual personnel. However, the stop-loss orders issued after the events of September 11, 2001, when Operation Enduring Freedom was launched, expressly excluded discharges of lesbian, gay and bisexual service members, meaning service members continued to be discharged. If the United States enters another armed conflict it is likely that stop-loss orders will be issued. Service members can find out if lesbian, gay or bisexual discharges are included by checking the armed services web pages or by contacting Servicemembers Legal Defense Network.

- ▶ See “Survivor Benefits” and “War.”

Survivor Benefits

A service member can list anyone they choose as the beneficiary of their Serviceman’s Group Life Insurance (SGLI). The fact that the beneficiary is not a family member or “spouse” and is of the same gender as the member is neither grounds for discharge nor credible information upon which a commander can begin an investigation into a member’s sexual orientation.

In the event that a service member is killed on active duty or is captured, there are benefits that the member’s spouse or next of kin is entitled to, including a death gratuity or outstanding pay. Regulations limit these entitlements to a spouse or blood relative. A service member cannot designate their same-sex partner or significant other to receive these benefits.

- ▶ See “Insurance Beneficiaries.”

IN REPORTING HARASSMENT, SERVICE MEMBERS SHOULD NOT DISCLOSE THEIR SEXUAL ORIENTATION BUT RATHER SHOULD STATE THAT THEY ARE BEING HARASSED BASED ON “PERCEIVED SEXUAL ORIENTATION.”

Transgender Military Issues

The term “transgender” is a broad umbrella under which several different groups of individuals may identify themselves. For the purposes of this guide, we will discuss only those groups that may have difficulties under military rules and regulations.

Two different situations exist where transgender individuals may run afoul of military regulations. The first is when attempting to join the military. The second relates to service members already in the military.

Enlistment / Appointment / Commissioning

The Department of Defense sets the criteria, including physical standards, which must be met by all applicants for military service. Every person attempting to join the military must undergo a physical examination as part of the induction process.

The military considers having had any type of gender confirming surgery to be a major genital abnormality or defect, even if there are no complications after surgery. If an individual is at any other stage of transition, or does not plan on having surgery, the military considers transsexuality, being born with the wrong biological gender, to be a disqualifying psychiatric condition.

The military will find out about a post-operative transsexual either during the physical exam and history or through the entry-level background security-clearance investigation. Lying on the form or to the doctor, or omitting the information, could potentially be viewed as a fraudulent enlistment and subject an individual to UCMJ penalties and discharge.

An individual may request a waiver of any condition from the branch that they are attempting to join. Each service sets its own rules regarding whether or not a waiver request is appropriate and whether or not such a request will be approved. NO waivers for transgender service members were requested between 1996 and 2000, the years for which data was available from the Department of Defense.

Currently Serving Members

Transsexuals, persons who are born with the wrong biological gender, who are thinking about coming out or starting their transition while in the military, should be aware of a strong bias against recognizing the standard of care involving hormone therapy, living in the appropriate gender, and surgery. The military medical system does not support the Harry Benjamin standard of care¹⁸⁵ and will not provide the medical support necessary for transitioning service members. Generally, the services apply physical standards that make transsexualism a disqualifying condition which impacts on military fitness and a basis for a non-medical discharge. Transsexual service members also face the possibility of being discharged for having a personality disorder.

Service members who seek psychological or medical

treatment through the military should know that conversations with military health-care providers are not confidential and any statement concerning being transgender can, and most likely will, be reported to their commands and separation proceedings begun. For those members who seek treatment from civilian providers, beware that each service has regulations governing military members seeking outside health care and may include reporting requirements. Failure to abide by these regulations could potentially place a member at risk for UCMJ action. Further, cross-dressing as part of the transition process, even when prescribed by competent medical providers, may be considered a violation of the UCMJ and can potentially be prosecuted at court-martial.

Because the potential exists for the military to apply the rules of the homosexual conduct policy to transgender members, it is important to not make any statements about sexual conduct, even to military health care providers. For example, the military would view a pre-operative male-to-female transsexual, self-described as a heterosexual female, having sexual relations with males to be committing homosexual acts subject to administrative and disciplinary proceedings.

While anecdotal stories of individuals who have transitioned while in the reserves and were allowed to remain in the military have been heard, SLDN has not documented any case where a known transsexual has been allowed to continue in the service.

Any service member considering transitioning while in the military should consult with an attorney knowledgeable about military law and transgender issues first.

Transvestitism or Cross dressing is addressed in regulations concerning conduct and separation proceedings. Each service has different regulations and the specific manner of addressing the situation will depend on the service member's status as an enlisted or officer, and by which component they are in, active duty, reserve, or National Guard. In some of the regu-

lations, transvestitism is considered to be misconduct / sexual perversion / sexual deviation that subjects the member to potential UCMJ action and subsequent discharge.

While not a per se violation of either UCMJ Article 133 (Conduct Unbecoming) or Article 134 (General Article pertaining to good order and discipline), cross-dressing can be the basis for judicial, non-judicial, or administrative separation proceedings. The service is to look at various factors in deciding if cross-dressing by a member is prejudicial to good order and discipline: 1) the time, 2) the place, 3) the circumstances, and 4) the purpose for the cross-dressing.¹⁸⁶

The bottom line is that, as a practical matter, any cross-dressing, even in the context of medical treatment as part of the standard of care for gender dysphoria or gender identity disorder, will most likely be considered by the military to be prejudicial to good order and discipline.

Gender Non-conforming Service

Members – either effeminate males or masculine women who may or may not identify as transgender – are often perceived as being lesbian or gay by others in the military. These service members are often subject to anti-gay harassment. In the case of women who are told to appear more feminine, this is also potentially a form of sexual harassment.

Service members being harassed should be able to report the harassment to their chain of command through channels designated by each service. In reporting harassment, service members should NOT disclose their sexual orientation but rather should state that they are being harassed based on “perceived sexual orientation.”

Every service member must abide by service regulations that address uniform and grooming standards.

▶▶ See “harassment” and “lesbian baiting” for more information.

Unauthorized Absence (UA)/ Absence Without Leave (AWOL)

When faced with investigation or harassment, some service members are tempted to leave their units without permission. Going AWOL (Absence Without Leave), referred to in the Navy as UA (Unauthorized Absence), is a violation of Article 86 of the Uniform Code of Military Justice (UCMJ). It is a serious matter that nearly always hurts service members more than it helps them.

Service members who go AWOL may face arrest and nearly always face punishment, including restriction, non-judicial punishment (NJP) and even court-martial. Going AWOL may increase a service member’s chance of getting an Other Than Honorable (OTH) discharge. It usually makes the discharge process go slower for those who want to get out of the military and can lead to confinement.

Service members who go AWOL sometimes miss a movement or deployment. “Missing movement” is a violation of Article 87 of the UCMJ. This is a serious offense that can result in court-martial or increase the chances of an Other Than Honorable discharge based on misconduct.

After being AWOL for more than 30 days, a service member is administratively classified as a deserter which means a federal warrant is issued for the service member’s arrest and the service member could face even harsher treatment, including court-martial.

By law, civilian advocates may assist AWOL service members as long as they do not “urge” or “counsel” service members to stay AWOL. They are not required to turn in AWOL soldiers and are not prohibited from giving information to service members who do not want to return. Advocates may assist service members in returning to the military but the decision to go back belongs to the service members.

Procedures for returning service members to the mil-

**THERE ARE ALMOST ALWAYS
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AGAINST HARASSMENT
THAN GOING AWOL.**

itary differ among the services. Experienced attorneys or legal workers can help service members determine the safest way to go back. AWOL service members should find out about AWOL policies for their service and for different bases from an attorney or legal worker before returning.

Some AWOL service members return to the military accompanied by their civilian counselor or attorney, or armed with a letter from them.

Another option is for service members to turn themselves in to a military defense attorney. As a last resort, service members may present themselves to their chaplain or directly to their commander, using the open door policy. But, service members must be very careful not to reveal information about their sexual orientation, activities or relationships that could be used against them.

There are almost always better ways for service members to resolve problems or protect against harassment than going AWOL. There are complaint procedures and tools that service members can use to protect themselves, but it is best to have legal assistance in using them.

Where service members believe their lives are in immediate jeopardy, they may feel they have to choose between risking their lives or facing the consequences of going AWOL. If possible, service members should immediately get civilian legal assistance or consult with a military defense attorney. Service members may also be able to obtain help from the chaplain, their chain-of-command or directly from the commander through the open door policy.

If time does not permit these options, however, service members may have to weigh the situation and make a choice. Even where they leave because of a death threat, service members may face punishment for going AWOL. While there are defenses to going AWOL, such as duress, there is never a guarantee that they will prevent punishment in a particular case. Only service members can decide whether threats are so serious that they would rather leave

and risk being punished for going AWOL than stay with their unit.

- ▶ See “Attorneys,” “Chaplains,” “Criminal Prosecution,” “Discharge Characterizations,” “Harassment/Death Threats/Hate Crimes,” “Legal Rights” and “Complaints - Making” for more information.

Unemployment Benefits

Service members who are discharged for homosexual conduct may face difficulties in obtaining unemployment benefits in some states, regardless of the characterization of their discharge. Many jurisdictions will not give unemployment benefits to those separated from the military for certain reasons, including homosexual conduct.

- ▶ See “Discharge Paperwork (DD Form 214)” for more information.

Veterans (including Retirees):

As a practical matter, lesbian, gay, bisexual and transgender veterans – to include military retirees – are not at risk of harm from “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”¹⁸⁷ In fact, there are many lesbian, gay and bisexual veterans – including military retirees – who live their lives very openly and have suffered no adverse government action related to the policy.

Veterans who are not military retirees face no legal risk whatsoever from “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”

Lesbian, gay and bisexual retirees, however, face a theoretical risk from “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”¹⁸⁸ Retirees are, technically speaking, still considered members of the armed forces. Some retirees may be called back into military service in times of national emergency. However, the

risk – if it exists at all – is, in reality, very small.

Congress enacted “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” to apply to active duty, reserve and National Guard military personnel, as evidenced by the extensive congressional hearings on the subject.¹⁸⁹ The transcripts of the United States Senate’s 1993 public hearings resulting in “Don’t Ask, Don’t Tell” contain no indication that neither Congress nor the military intended for the policy to apply to retired veterans. No lesbian, gay, bisexual or transgender retiree has been recalled to active duty during the life of the policy.¹⁹⁰

If a lesbian, gay or bisexual retiree were to be recalled to military service during a time of national emergency, presumably they would be at risk of investigation and involuntary discharge if the military received credible evidence they had engaged in “homosexual conduct.” There are no known cases of any military retiree being targeted under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” in any way. The risk of the government going after retired lesbian, gay bisexual and transgender veterans is, therefore, negligible.

Retirees, however, also remain subject to the Uniform Code of Military Justice (UCMJ) and may be subject to courts-martial jurisdiction while in retired status.¹⁹¹ The military’s application of the UCMJ to retirees, however, is very different from its application to active duty personnel. In theory, if a retiree commits a crime while retired, the military may recall the retiree to active duty for criminal prosecution under the UCMJ. In practice, however, the military usually does not become involved in such situations, preferring to allow civil authorities to handle allegations of retiree criminal misconduct.

The most likely scenario for a retiree to be recalled to active duty for UCMJ sanction would be if the retiree is accused of criminal misconduct while on active duty which publicly embarrasses the military.¹⁹² In such a case, the military may be more likely to invoke

UCMJ jurisdiction, although such occurrences are very rare. Many lesbian, gay bisexual and transgender retirees are concerned about UCMJ risk via Article 125 (Sodomy). While it is true that the military may criminally prosecute lesbian, gay bisexual and transgender retirees for “homosexual acts” engaged in either while on active duty or while retired, the likelihood of such prosecution is very remote.¹⁹³

It is important to note that the UCMJ’s jurisdiction does not extend to any other discharged veterans, it extends only those who are retired. There are no known instances where the military has prosecuted a retiree under the UCMJ solely because the military learned that he or she is lesbian, gay, bisexual or transgender. Again, over the years, many lesbian, gay, bisexual and transgender retirees have been out-of-the-closet to their family and friends, at their jobs and

in their communities, and – in some instances – even taken high profile, public positions against “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” There is no known evidence that the military targeted any of these retirees.

A VETERAN'S SEXUAL ORIENTATION SHOULD HAVE NO BEARING ON A VETERAN'S ELIGIBILITY FOR VA BENEFITS.

Veterans Benefits

A veteran’s sexual orientation should have no bearing on a veteran’s eligibility for VA benefits. Lesbian, gay, bisexual and transgender veterans should be clear that the Department of Defense and the Department of Veterans Affairs (VA) are separate federal agencies. “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” does not apply to VA. Lesbian, gay, bisexual and transgender veterans interested in obtaining more information regarding their eligibility for VA benefits should contact the Department of Veterans Affairs or their states’ office dealing with veterans’ affairs (www.nasdva.com).

Gay veterans (including retirees) who wish to network with their peers, and perhaps become more active in speaking out against “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” should contact

Servicemembers Legal Defense Network. Another resource is the American Veterans for Equal Rights (AVER) at www.aver.us. Service Academy alumni may also contact the Service Academy Gay and Lesbian Alumni Association (SAGALAA) at www.academygala.org.

War

Historically during time of war discharges of lesbian, gay and bisexual service members have slowed or stopped, either by official order, such as stop-loss, or through unofficial practice. If the United States enters a war, service members should expect that discharges based on sexual orientation will slow or cease.

During a military mobilization, service members who make a statement about their sexual orientation, regardless of the reason for making a statement about sexual orientation - including harassment, threat, integrity or other reason - should not expect the command to immediately initiate the discharge process. Commanders are focused on the mission and not on discharging valued team members.

Veterans who are interested in rejoining the military during a time of war should check their discharge paperwork. Veterans who have been discharged under the “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” policy will probably not be able to rejoin.

▶▶ See “Discharge Paperwork,” “Stop Loss,” “Survivor Benefits,” “Veterans” and “Emergency Contact”

Witch Hunts

On July 19, 1993, former President Clinton proclaimed that “Don’t Ask, Don’t Tell” would put an end to witch hunts.¹⁹⁴ Nevertheless, witch hunts continue in some commands. Witch hunts include mass investigations where service members are pressured to name others who might be gay, and fishing expeditions that go beyond the scope of any allegation made into every aspect of service members’ private lives.

Investigators may threaten service members with punishment if they do not “confess” to being gay or accuse others. Some investigators promise leniency if service members “cooperate” by giving names. Investigators may falsely promise that friends will not get in trouble if service members accuse them of being gay.

Investigators do not have the authority to decide cases, or to carry out the threats and promises they usually make to pressure service members. In the experience of attorneys and legal workers who handle gay cases, giving names of other service members never, ever helps, no matter what investigators say.

Service members’ best defense against witch hunts is to exercise their legal rights to say nothing, sign nothing, and get legal help. Service members and others who learn of witch hunts should contact Service members Legal Defense Network immediately.

▶▶ See “Asking,” “Association with Known Homosexuals,” “Attorneys,” “Civilians and Investigations,” “Inquiries - Administrative,” “Investigations - Criminal,” “Investigative Limits,” “Investigative Tactics,” “Legal Rights,” “Complaints - Making” and “Searches” for more information.

1 C. Dixon Osburn, *A Policy in Desperate Search of a Rationale: The Military's Policy on Lesbians, Gays and Bisexuals*, 64 UMKC L. Rev. 199 (1995).

2 DADTDPDH does not address gender identity. For information on military rules and regulations see the section on transgender issues in this guide.

3 *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on the Armed Services*, 103d Cong., 707 (1993) (statement of General Colin Powell) [hereinafter Powell Statement]. “[H]omosexuals have privately served well in the past and are continuing to serve well today.” *Id.* See also, Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Military Departments, *Policy on Homosexual Conduct in the Armed Forces* [hereinafter Aspin Policy Memorandum] (Jul. 19, 1993). “[T]he Department of Defense also recognizes that individuals with a homosexual orientation have served with distinction in the armed forces of the United States.” *Id.*

4 DEP’T OF DEFENSE DIRECTIVE 1332.14, *Enlisted Administrative Separations* [hereinafter DoDD 1332.14], para. E3.A1.1.8.1.1 (1994); DEP’T OF DEFENSE INSTRUCTION 1332.40, *Separation Procedures for Regular and Reserve Commissioned Officers* [hereinafter DoDI 1332.40], para. E2.3 (1997). “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 . . .” *Id.*

5 See DEP’T OF DEFENSE DIRECTIVE 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction* [hereinafter DoDD 1304.26], para. E1.2.8.1 (1994).

6 See Powell Statement, *supra* note 3. “We will not ask, we will not witch hunt, we will not seek to learn orientation.” *Id.*

7 See Aspin Policy Memorandum, *supra* note 3, attachment *Policy Guidelines on Homosexual Conduct in the Armed Forces*; see also DoDD 1304.26, *supra* note 5, *Applicant Briefing Item on Separation Policy*. “The Armed Forces do not tolerate harassment or violence against any service member, for any reason.” *Id.* See also, Memorandum from Under Secretary of Defense for Personnel and Readiness [hereinafter P & R] Rudy de Leon to the Secretaries of the Military Departments, *Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality* [hereinafter de Leon Investigating Harassment Memorandum] (Aug. 12, 1999).

8 Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Military Departments, *Implementation of the DoD Policy on Homosexual Conduct in the Armed Forces* [hereinafter Aspin Implementation Memorandum] (Dec. 21, 1993). “[The new policy] provides that investigations into sexual misconduct will be conducted in an evenhanded manner, without regard to whether the alleged misconduct involves homosexual or heterosexual conduct.” *Id.*

9 See PUB. PAPERS William J. Clinton, 1993, vol. 1, p. 1111. President Clinton pledged that the policy would provide for “a decent regard for the legitimate privacy and associational rights of all service members.” *Id.* Then Senator William Cohen understood that the small amount of privacy under the current policy was intended to prevent the military from prying into people’s private lives. See, *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services*, 103d Cong. 787 (statement of Senator William Cohen).

10 Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 7, 1995).

11 Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999). See also, Manual for Courts-Martial (2000) rev. [hereinafter MCM], part III, Military Rule of Evidence 513.

12 See also, MCM, part II, Rule for Court-Martial 1001(b)(4).

13 See Evaluation Report: *Military Environment With Respect*

to the Homosexual Conduct Policy, Office of the Inspector General of the Department of Defense, Rept. No. D-2000-101 (Mar. 16, 2000).

14 DoDD 1332.14, *supra* note 4, para. E3.A4.1.4.3; DoDI 1332.40, *supra* note 4, para. E8.4.3.

15 DoDD 1332.14, *supra* note 4, para. E3.A4.1.3.2.2; DoDI 1332.40, *supra* note 4, para. E8.3.2.2.

16 Communications with Chaplains regarding “spiritual matters” are protected. However, discussing sexual orientation may not be considered a spiritual matter. Please see the section on Chaplains in this Guide.

17 See DEP’T OF DEFENSE REG. 5200.2-R, *Personnel Security Program* [hereinafter DoD 5200.2-R], para. C2.4.3.4.3 (1996).

18 See DoDD 1332.14, *supra* note 4, para. E3.A1.1.8.1.1; DoDI 1332.40, *supra* note 4, para. E2.3.

19 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.1.1; DoDI 1332.40, *supra* note 4, para. E8.1.1.

20 *Id.*

21 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.3.3.4; DoDI 1332.40, *supra* note 4, para. E.8.3.3.4.

22 See de Leon Investigating Harassment Memorandum, *supra* note 7.

23 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.1.3; DoDI 1332.40, *supra* note 4, para. E8.1.3.

24 See Office of the Under Secretary of Defense (P&R), Report to the Secretary of Defense: *Review of the Effectiveness of the Application and Enforcement of the Department’s Policy on Homosexual Conduct in the Military* [hereinafter Under Secretary of Defense (P&R) 1998 Report], at 11,12 (Apr. 1998); See also Memorandum from Under Secretary of Defense (P&R) Rudy de Leon to the Secretaries of the Military Departments, *Implementation of Recommendations Concerning Homosexual Conduct Policy* [hereinafter de Leon Implementation Memorandum] (Aug. 12, 1999).

25 *Id.*

26 DEP’T OF DEFENSE INSTRUCTION 5505.8, *Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations* [hereinafter DoDI 5505.8], para. 4.2 (2000).

27 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.1.3; DoDI 1332.40, *supra* note 4, para. E8.1.3.; see also, Under Secretary of Defense (P&R) 1998 Report, *supra* note 24, at 11,12; see also, de Leon Implementation Memorandum, *supra* note 24.

28 See Under Secretary of Defense (P&R) 1998 Report, *supra* note 24, at 12.

29 See *id.*

30 See de Leon Implementation Memorandum, *supra* note 24.

31 See Under Secretary of Defense (P&R) 1998 Report, *supra* note 24, at 12.

32 DoDD 1304.26, *supra* note 5, *Applicant Briefing Item on Separation Policy*; see also, Aspin Policy Memorandum, *supra* note 3, attachment *Policy Guidelines on Homosexual Conduct in the Armed Forces*.

33 See DoDD 1332.14, *supra* note 4, para. E2.1.7; DoDI 1332.40, *supra* note 4, para. E1.1.12.

34 10 U.S.C. § 654 (f)(3).

35 10 U.S.C. § 654 (b)(1).

36 See DoDI 5505.8, *supra* note 26, para. 1.2. See also, Under Secretary of Defense (P&R) 1998 Report, *supra* note 24, at 9.

37 See MCM, part IV, paras. 51(e)(4), 59(e), and 90(e), respectively.

38 See DoDD 1332.14, *supra* note 4, para. E3.A1.1.8.4.

39 See DoDI 1332.40, *supra* note 4, para. E3.2.2.5.

40 See DoDD 1332.14, *supra* note 4, para. E3.A3.1.3; DoDI 1332.40, *supra* note 4, para. E5.4.

41 See DoDI 1332.40, *supra* note 4, para. E4.1.

42 See DoDD 1332.14, *supra* note 4, para. E3.A3.1.3.5.1.
43 See DoDD 1332.14, *supra* note 4, para. E3.A3.1.3.5.7.2; DoDI 1332.40, *supra* note 4, para. E3.3.3.
44 See DoDD 1332.14, *supra* note 3, para. E3.A3.1.3.5.5.
45 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.1.5; DoDI 1332.40, *supra* note 4, para. E8.5.
46 See *generally*, DoDI 1332.40, *supra* note 4, para. E3.3.3.
47 Members of the board can be challenged for cause, however, if defense counsel can show bias or susceptibility to outside influence. See DoDI 1332.40, *supra* note 4, para. E5.1.
48 See DoDD 1332.14, *supra* note 4, para. E3.A1.1.8.3; DoDI 1332.40, *supra* note 4, para. E7.2.2.2.
49 *Id.*
50 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.4.3; DoDI 1332.40, *supra* note 4, para. E8.4.3.
51 *Id.*
52 *Id.*
53 See DoDD 1332.14, *supra* note 4, para. E2.1.7; DoDI 1332.40, *supra* note 4, para. E1.1.12.
54 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.3.3; DoDI 1332.40, *supra* note 4, para. E8.3.3.4.
55 See MCM, part III, Military Rule of Evidence 305(d)(1).
56 See MCM, part III, Military Rule of Evidence 305(d)(2).
57 See *e.g.*, COMMANDER NAVY LEGAL SERVICES COMMAND INSTRUCTION 5800.1E, § 1103 (2002).
58 *Id.*
59 See MCM, part II, Rule for Court-Martial 506(b).
60 See MCM, part II, Rule for Court-Martial 506(b)(1).
61 See MCM, part II, Rule for Court-Martial 506(a).
62 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.3.2; DoDI 1332.40, *supra* note 4, para. E8.3.2.
63 10 USC §654(f)(2).
64 10 USC §654(b)(2).
65 MCM, part III, Military Rule of Evidence 503(a).
66 See, *e.g.*, AIR FORCE MANUAL 52-103, *Chaplain Service Readiness Manual*, attachment 10. The quoted language is part of the Covenant and Code of Ethics for Chaplains of the Armed Forces as prescribed by the National Conference on Ministry to the Armed Forces.
67 Service members should inform a chaplain that the communication should not be disclosed to third parties. “A communication is ‘confidential’ if made to a clergyman in the clergyman’s capacity as a spiritual adviser or to a clergyman’s assistant in the assistant’s official capacity and is not intended to be disclosed to third persons” MCM, part III, Military Rule of Evidence 503(b)(2).
68 See U.S. CONST. amend. IV.
69 See DEP’T OF DEFENSE DIRECTIVE 1325.2, *Desertion and Unauthorized Absence*, para. 4.1.2 (1990). Desertion may also be proven by intent of a person leaving or going to a foreign country under certain circumstances. See *id.*, at paras. 4.1.1 and 4.1.3.
70 See MCM, part II, Rule for Court-Martial 302(b)(3); see also, UCMJ, Art. 8.
71 Exec. Order No. 13,087, 3 C.F.R. 13087 (1998) (The Executive Order is Included as an attachment to this Guide).
72 Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 7, 1995).
73 See U.S. CONST. amend. IV.
74 See 10 U.S.C. § 654(b)(2).
75 DEP’T OF DEFENSE FORM 214, *Certificate of Release or Discharge from Active Duty*.
76 See *generally*, VA Pamphlet 22-90-2, *The Montgomery GI Bill – Active Duty* [hereinafter VA Pamphlet 22-90-2], Dep’t Veterans Affairs (2001).
77 Personal information is protected under the Privacy Act of 1975. See *generally*, DEP’T OF DEFENSE DIRECTIVE 5400.11, *DoD Privacy Program* (1999).

78 Any person subject to the UCMJ can prefer charges against any other member subject to the Code. MCM, part II, Rule for Court-Martial 307(a). However, the common practice is only commanders, through the aid of command legal officers, prefer charges.
79 See MCM, part A2, § 938.
80 See 10 USC § 1034.
81 See U.S. CONST. amend. IV; see also, 10 USC § 1034.
82 See 10 USC § 1034; see also, DEP’T OF DEFENSE DIRECTIVE 7050.6, *Military Whistleblower Protection* (2000).
83 10 U.S.C. § 654(e); see also, DoDD 1304.26, *supra* note 5, *Applicant Briefing Item on Separation Policy*; DoDD 1332.14, *supra* note 4, para. E3.A1.1.8.4.7.2; DoDI 1332.40, *supra* note 4, para. E2.3.3.
84 See DoDD 1332.14, para. E3.A4.1.1.1; DoDD 1332.40, para. E8.1.1.
85 See DoDI 5505.8, *supra* note 26, para. 6.3.
86 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.1.1; DoDI 1332.40, *supra* note 4, para. E8.1.1.
87 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.3.1; DoDI 1332.40, *supra* note 4, para. E8.3.1; see also, DoDI 5505.8, *supra* note 43, para. E1.1.2.
88 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.3.4.1; DoDI 1332.40, *supra* note 4, para. E8.3.4.1.
89 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.3.3; DoDI 1332.40, *supra* note 4, para. E8.3.3.
90 See DoDI 5505.8, *supra* note 26, paras. 1.2, 4; see also, Under Secretary of Defense (P&R) 1998 Report, *supra* note 24, at 9.
91 See MCM, part IV, paras. 51(e)(4), 59(e), and 90(e), respectively.
92 See MCM, part IV, para. 58 (UCMJ Art. 132).
93 See MCM, part IV, para. 31 (UCMJ Art. 107).
94 See MCM, part IV, para. 83 (UCMJ Art. 134 (Fraternization)). Note that only commissioned or warrant officers may be charged with fraternization. *Id.* Enlisted members can be charged with violating applicable service regulations. See MCM, part IV, para. 16 (UCMJ Art. 92).
95 See MCM, part IV, para. 16 (UCMJ Art. 92).
96 See *generally*, 10 USC § 513.
97 10 USC §802(a)(1).
98 10 USC §802(b).
99 See DoDD 1332.14, *supra* note 4, para. E3.A1.1.5.5.
100 See DEP’T OF DEFENSE INSTRUCTION 1336.1, *Certificate of Release or Discharge from Active Duty* [hereinafter DoDI 1336.1], para. 3.3.1 (2002).
101 See DoDD 1332.14, *supra* note 4, para. E3.A1.1.6. Entry level separation is not available for officers.
102 See DoDD 1332.14, *supra* note 4, paras. E3.A1.1.8.3, E3.A2.1.3; DoDI 1332.40, *supra* note 4, para. E7.2.1; see also, Aspin Implementation Memorandum, *supra* note 8, attachment *Overview, Directives Implementing the New DoD Policy on Homosexual Conduct in the Armed Forces*.
103 See DEP’T OF DEFENSE DIRECTIVE 1332.28, *Discharge Review Board (DRB) Procedures and Standards* [hereinafter DoDD 1332.28], para. E3.3.6 (1983).
104 See DoDD 1332.14, *supra* note 4, para. E3.A1.1.8.3; DoDI 1332.40, *supra* note 4, para. E7.2.2.2.
105 See *generally*, VA Pamphlet 22-90-2, *supra* note 76.
106 *Id.*
107 The short form is called Member Copy 1 and the long form is called Member Copy 4. See DoDI 1336.1, *supra* note 100, para. 3.2.1.1.
108 For the Air Force, the code is 2B or 2C. See AIR FORCE INSTRUCTION 36-2606, *Reenlistment in the Air Force*, table 3.2 (2001).
109 See DoDD 1332.28, *supra* note 103, para. E3.3.6.
110 MCM, part III, Military Rule of Evidence 513.
111 Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999).

- 112 See DEP'T OF DEFENSE INSTRUCTION 2310.5, *Accounting for Missing Persons*, para. 4 (2000).
- 113 See Aspin Policy Memorandum, *supra* note 3, attachment *Policy Guidelines on Homosexual Conduct in the Armed Forces*.
- 114 See <http://www.redcross.org/services/afes/> (Jan. 20, 2003).
- 115 Threats can include but are not limited to “a threat to accuse the person threatened . . . of any crime . . . [or a] threat to expose any secret affecting the person being threatened . . .” MCM, part IV, para. 53(c)(2).
- 116 MC (2000) rev., part IV, para. 53 (UCMJ, Art. 127).
- 117 MCM, part IV, para. 53(e).
- 118 18 USC § 873.
- 119 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.3.3.4; DoDI 1332.40, *supra* note 4, para. E8.3.3.4.
- 120 *Id.*
- 121 *Id.*
- 122 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.2.4.1; DoDI 1332.40, *supra* note 4, para. E1.1.11.
- 123 See DoDD 1304.26, *supra* note 5, *Applicant Briefing Item on Separation Policy*; *see also*, Memorandum from Assistant Secretary of Defense (P&R) Edwin Dorn to the Assistant Secretaries of the Military Services, *Briefing Armed Forces Applicants* (undated); *see also*, Aspin Policy Memorandum, *supra* note 3, attachment *Policy Guidelines on Homosexual Conduct in the Armed Forces*.
- 124 See de Leon Investigating Harassment Memorandum, *supra* note 7.
- 125 See DoDD 1332.14, *supra* note 4, para. E2.1.7; DoDI 1332.40, *supra* note 4, para. E1.1.12.
- 126 See 32 C.F.R. § 58.4(a); *see also*, DEP'T OF DEFENSE DIRECTIVE 6485.1, *Human Immunodeficiency Virus-1 (HIV-1)* [hereinafter DoDD 6485.1], para. 4.1 (1992); for specific service regulations, *see generally*, SECRETARY OF THE NAVY INSTRUCTION (SECNAVINST) 5300.30C, *Management of Human Immunodeficiency Virus-1 (HIV-1) Infection in the Navy and Marine Corps* (1990); ARMY REGULATION (AR) 600-110, *Identification, Surveillance, and Administration of Personnel Infected With Human Immunodeficiency Virus* (1996); AIR FORCE INSTRUCTION 48-135, *Human Immunodeficiency Virus Program* (2000); AIR FORCE INSTRUCTION 48-106, *Prevention and Control of Sexual Transmitted Diseases* (1994).
- 127 “Individuals with serologic evidence of HIV-1 infection who are fit for duty shall not be retired or separated solely on the basis of serologic evidence of HIV-1.” 32 C.F.R. § 58.4(c) (2002). But, it is the policy of DoD to “retire or separate [active duty] or Reserve Service members infected with HIV-1 who are determined to be unfit for further duty.” 32 C.F.R. § 58.4(e) (2002).
- 128 See 32 C.F.R. § 58.6(p) (2002); *see also*, DoDD 6485.1, *supra* note 126, para. 6.16.
- 129 See 38 C.F.R. § 4.88a, item 6351 (1994).
- 130 See DoDD 6485.1, *supra* note 126, Enclosure 3.
- 131 See DoDD 1332.14, *supra* note 3, para. E3.A1.1.8.1.1; DoDI 1332.40, *supra* note 3, para. E2.3.
- 132 See DoDD 1332.14, para. E3.A4.1.1.1; DoDD 1332.40, para. E8.1.1.
- 133 *See id.*
- 134 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.1.1; DoDI 1332.40, *supra* note 4, para. E8.1.1.
- 135 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.3.1; DoDI 1332.40, *supra* note 4, para. E8.3.1; *see also* de Leon Investigating Harassment Memorandum, *supra* note 7.
- 136 See Under Secretary of Defense (P&R) 1998 Report, *supra* note 24, at 11,12; *see also* de Leon Implementation Memorandum, *supra* note 24.
- 137 See Under Secretary of Defense (P&R) 1998 Report, *supra* note 24, at 12.
- 138 *See id.*
- 139 *See id.*
- 140 See UCMJ, Art. 31(b).
- 141 See Aspin Policy Memorandum, *supra* note 3, attachment *Policy Guidelines on Homosexual Conduct in the Armed Forces*.
- 142 See DoDI 5505.8, *supra* note 43, para. 1.2; *see also*, Under Secretary of Defense (P&R) 1998 Report, *supra* note 24, at 9.
- 143 See DoDI 5505.8, *supra* note 26, para. 6.2.1.
- 144 See DoDI 5505.8, *supra* note 26, para. 6.3.
- 145 *See id.*
- 146 See UCMJ, Art. 31(b).
- 147 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.1.1; DoDI 1332.40, *supra* note 4, para. E8.1.1; *see also*, DoDI 5505.8, *supra* note 26, para. 6.3.
- 148 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.1.1; DoDI 1332.40, *supra* note 4, para. E8.1.1.
- 149 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.3.1; DoDI 1332.40, *supra* note 4, para. E8.3.1; *see also* de Leon Investigating Harassment Memorandum, *supra* note 7.
- 150 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.3.3.4; DoDI 1332.40, *supra* note 4, para. E8.3.3.4.
- 151 See de Leon Investigating Harassment Memorandum, *supra* note 7.
- 152 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.1.3; DoDI 1332.40, *supra* note 4, para. E8.1.3.
- 153 See Under Secretary of Defense (P&R) 1998 Report, *supra* note 24, at 12.
- 154 *See id.*
- 155 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.4.4; DoDI 1332.40, *supra* note 4, para. E8.4.4.
- 156 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.4.4; DoDI 1332.40, *supra* note 4, para. E8.4.3.
- 157 See DoDI 5505.8, *supra* note 26, para. 6.3.
- 158 See Aspin Implementation Memorandum, *supra* note 8.
- 159 See Michelle M. Benecke and Kirsten S. Dodge, *Military Women: Casualties of the Armed Forces' War on Lesbians and Gay Men*, GAY RIGHTS, MILITARY WRONGS: POLITICAL PERSPECTIVES ON LESBIANS AND GAYS IN THE MILITARY 71-108 (Craig A. Zimmerman, ed., 1996).
- 160 See Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 7, 1995), § 3.1(d).
- 161 DADTDPDH does not apply to state militias and some auxiliary forces; however, someone considering joining a state organization or auxiliary should consult with a lawyer regarding whether DADT applies.
- 162 See 10 USC § 802(a)(3); UCMJ, Art. 2.
- 163 10 USC § 802(a)(8); UCMJ, Art. 2.
- 164 *Id.*
- 165 See DoDD 1332.14, *supra* note 4, para. E3.A1.1.8.1.2.1; DoDI 1332.40, *supra* note 4, para. E2.3.1.1.
- 166 See DoDD 1332.14, *supra* note 4, para. E3.A1.1.8.1.2; DoDI 1332.40, *supra* note 4, para. E2.3.1.2.
- 167 See DoDD 1332.14, *supra* note 4, para. E2.1.10; DoDI 1332.40, *supra* note 4, para. E1.1.17.
- 168 See DoDD 1332.14, *supra* note 4, para. E3.A1.1.8.4.5; DoDI 1332.40, *supra* note 4, para. E8.4.6.
- 169 See DoDD 5505.8, *supra* note 26, para. E2.2.16.
- 170 See DoDD 1332.14, *supra* note 4, para. E3.A1.1.8.1.2.2; DoDI 1332.40, *supra* note 4, para. E2.3.1.2.
- 171 See *generally*, Hensala v. Dep't of the Air Force, 148 F.Supp.2d 988 (N.D. Cal. 2001).
- 172 Memorandum from Deputy Secretary of Defense John Deutch to the Secretaries of the Military Departments, *Recoupment of Education Assistance Funds, Bonuses and Special Pay from*

Persons Disenrolled or Separated on the Basis of Homosexual Conduct, p. 3 (May 17, 1994).

173 See de Leon Implementation Memorandum, *supra* note 24.

174 See generally, HQ ARPC/JA “Guide to Inquiry Officers in Recoupment Dispute Cases” (Denver, CO, undated).

175 See Hensala, *supra* note 171.

176 In rare instances, a JROTC cadet may have taken the oath of enlistment as part of the Delayed Entry Program or entry in the Reserves or National Guard. If the oath of enlistment has been taken, “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” does apply to the cadet’s status with regard to the Delayed Entry Program, Reserves or National Guard. “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” would still not apply to JROTC participation.

177 In some circumstances, students can take ROTC classes without signing a contract with the Service. In these circumstances, “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” may not apply.

178 Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 7, 1995).

179 Aspin Policy Memorandum, *supra* note 3, attachment *Policy Guidelines on Homosexual Conduct in the Armed Forces*. See also, DoD 5200.2-R, *supra* note 17, app. 8, “Sexual Conduct”.

180 *But*, “Information about an individual’s sexual orientation or statements by an individual that he or she is a homosexual or bisexual, or words to that effect, shall not be referred or reported to law enforcement agencies or to Military Departments (other than consolidated adjudication facilities) for any purpose. If investigative reports containing such information are referred to law enforcement agencies or Military Departments for other reasons, information subject to the limitations in this paragraph will be removed.” DoD 5200.2-R, *supra* note 17, para. C2.4.3.4.3.

181 Aspin Implementation Memorandum, *supra* note 8, attachment *Overview, Directives Implementing the New DoD Policy on Homosexual Conduct in the Armed Forces*.

182 *Id.*

183 See DoDD 1332.14, *supra* note 4, para. E3.A4.1.3.2; DoDI 1332.40, *supra* note 4, para. E8.3.2.

184 *Id.*

185 See <http://www.hbigda.org/soc.html> (Jan. 20, 2003).

186 See *United States v. Guerrero*, 33 M.J. 295, 298 (C.M.A. 1991).

187 SLDN thanks Lara Ballard, Esq., and Bridget Wilson, Esq., for their contributions to our understanding of veterans legal issues pertaining to “Don’t Ask, Don’t Tell.” Ms. Ballard is a former Army Captain and member of the American Veterans for Equal Rights (AVER) who lives in Washington, DC. Ms. Wilson is a nationally recognized military law expert who lives in San Diego, CA.

188 In other federal statutes dealing with military and veterans’ affairs, the phrase “members of the armed forces” is used in a way that includes retirees. The “Don’t Ask, Don’t Tell” statute, however, does not provide a definition of “members of the armed forces,” therefore the inclusion of retirees under this statute is very much hypothetical.

189 See generally, *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on the Armed Services*, 103d Cong. (1993).

190 In fact, the government has not recalled a retired military member to active duty – for purposes of emergency mobilization – since World War II.

191 See 10 U.S.C. § 802(a)(4), (5).

192 Such cases have included murder, child molestation, and adultery between a General Officer and wife of a subordinate. The government, however, has not invoked its UCMJ jurisdiction to prosecute consenting adult activities (such as sodomy) against retirees during the past 30 years. Even active duty service members do not normally face criminal prosecution related to consenting, adult, off-base, non-fraternizing, non-paid, non-public conduct (i.e., homosexual acts).

193 A well known case from the 1950’s provides a good example for how UCMJ matters pertaining to retirees and gay “acts” were handled a long while ago. Retired Rear Admiral Shelden G. Cooper was convicted of sodomy under Article 125, conduct unbecoming an officer, Article 133, and indecent acts charged under Article 134. He was a retiree and was activated for purposes of courts-martial in the Eleventh Naval District, located in San Diego. He was sentenced to dismissal from the Navy and total forfeitures of his retirement benefits. The charged sodomy was consenting adult sodomy. The Article 133 violation was a specification that alleged “publicly associated with persons known to be sexual deviants to the disgrace of the Armed Forces.” *Hooper v. United States*, 326 F.2d 982 (Ct.Cl.), *cert. denied*, 377 U.S. 977 (1964).

194 PUB. PAPERS William J. Clinton, 1993, vol. 1, p. 1111.



VI. SELECTED RESOURCES FOR SERVICEMEMBERS

★ Military/Veterans Resources ★

Alexander Hamilton Post 448
www.post448.org

American Veterans for Equal Rights
www.aver.us

Air Force Times
www.airforcetimes.com

Army Times
www.armytimes.com

Citizen Soldier
(212) 679-2250

DefenseLink (Department of Defense Homepage)
www.defenselink.mil

G.I. Rights Hotline
1-800-394-9544
www.girights.org

Marine Corps Times
www.marinecorpstimes.com

Military Law Task Force
(619) 233-1701

National Association of State Directors of Veterans Affairs
www.nasdva.com

National Institute for Military Justice
www.nimj.org

National Organization of Veterans' Advocates, Inc. (NOVA)
www.vetadvocates.com

National Veterans Legal Services Program
www.nvlsp.org

Navy Times
www.navytimes.com

Red Cross
<http://www.redcross.org/>

Service Academy Gay & Lesbian Alumni (SAGALA)
www.academygala.org

Women's Research & Education Institute
www.wrei.org

★ Legal Resources ★

American Civil Liberties Union - Lesbian & Gay Rights Project
www.aclu.org/issues/gay/hmg1.html

Gay & Lesbian Advocates & Defenders
www.glad.org

Lambda Legal Defense and Education Fund (Lambda)
(212) 809-8585
www.lldf.org

National Center for Lesbian Rights
www.nclrights.org

★ National Advocacy Organizations ★

Amnesty International
www.amnesty.org

BiNet USA
www.binetusa.org

Equality Project
www.equalityproject.org

Gay Asian Pacific Support Network
www.gapsn.org

Gay & Lesbian Alliance Against Defamation
www.glaad.org

Gay, Lesbian & Straight Education Network
www.glsen.org

Gay & Lesbian Victory Fund
www.victoryfund.org

Human Rights Campaign
www.hrc.org

**International Gay & Lesbian
Human Rights Commission**
www.iglhrc.org

**Lesbian & Gay Immigration
Rights Task Force**
www.lgirtf.org

Log Cabin Republicans
www.lcr.org

**National Black Lesbian & Gay
Leadership Forum**
www.nblglf.org

**National Gay & Lesbian Task
Force**
www.ngltf.org

**National Latino/a Lesbian &
Gay Organization**
www.llego.org

**National Organization for Women
- Lesbian Rights Homepage**
<http://www.now.org/issues/lgbi/index.html>

National Stonewall Democrats
<http://stonewalldemocrats.org>

**Parents, Families & Friends of
Lesbians & Gays**
www.pflag.org

People for the American Way
800-326-7329
pfaw@pfaw.org

Republican Unity Coalition
www.republicanunity.com

★ Transgender Resources ★

FTM International
www.ftm-intl.org

Gender Education & Advocacy
www.gender.org

GenderPAC
(202) 462-6610
www.genderpac.org

**International Conference on
Transgender Law &
Employment Policy**
www.ictlep.org

**National Transgender
Advocacy Coalition**
www.ntac.org

**Transgender Law & Policy
Institute**
www.transgenderlaw.org

Transgender Legal Issues
www.transgenderlegal.com

**Transgendered Network
International**
www.tgni.com

★ HIV/AIDS Resources ★

AIDS Action
www.aidsaction.org

Gay Health
www.gayhealth.com

Gay Men's Health Crisis
www.gmhc.org

**International AIDS Vaccine
Initiative**
www.iavi.org

The NAMES Project
www.aidsquilt.org

**National Association of People
with AIDS**
www.napwa.org

National Minority AIDS Council
www.nmac.org

Veterans Health Administration
<http://vhaaidsinfo.cio.med.va.gov/>

★ Youth ★

YouthHIV.org
www.youthhiv.org

**Youth Resources
National Youth Advocacy
Coalition**
www.nyacyouth.org

Out Proud
www.outproud.org

Out Youth
www.outyouth.org

Scouting For All
www.scoutingforall.org

**Sexual Minority Youth
Assistance League**
www.smyal.org

★ LCBT Professional Resources ★

**Gay & Lesbian Medical
Association**
www.glma.org

Gay Officers Action League
www.goalny.org

LEGAL International
<http://members.aol.com/legalint>

**National Lesbian & Gay Health
Association**
www.nlgha.org

**National Lesbian & Gay
Journalists Association**
www.nljga.org

**National Lesbian & Gay Law
Association**
www.nlgla.org

★ Academic Resources ★

Center for the Study of Sexual Minorities in the Military
www.gaymilitary.ucsb.edu

Institute for Gay & Lesbian Strategic Studies
www.iglss.org

Stanford University's 'Don't Ask, Don't Tell' Project
<http://dont.stanford.edu>

★ Family Resources ★

Children of Lesbians & Gays Everywhere
www.colage.org

Family Pride Coalition
www.familypride.org

Love Makes A Family Project
www.lovesmakesafamily.org

★ Spiritual Resources ★

DignityUSA (Gay Catholics)
www.dignityusa.org

Lutherans Concerned
www.lcna.org

Metropolitan Community Churches
www.ufmcc.org

Soulforce
www.soulforce.org

Unitarian Universalist Association
www.uua.org

United Methodist Reconciling Ministries
www.rmnetwork.org

★ National Directory of Lesbian & Gay Community Centers ★

www.gaycenter.org/natctr/index.htm

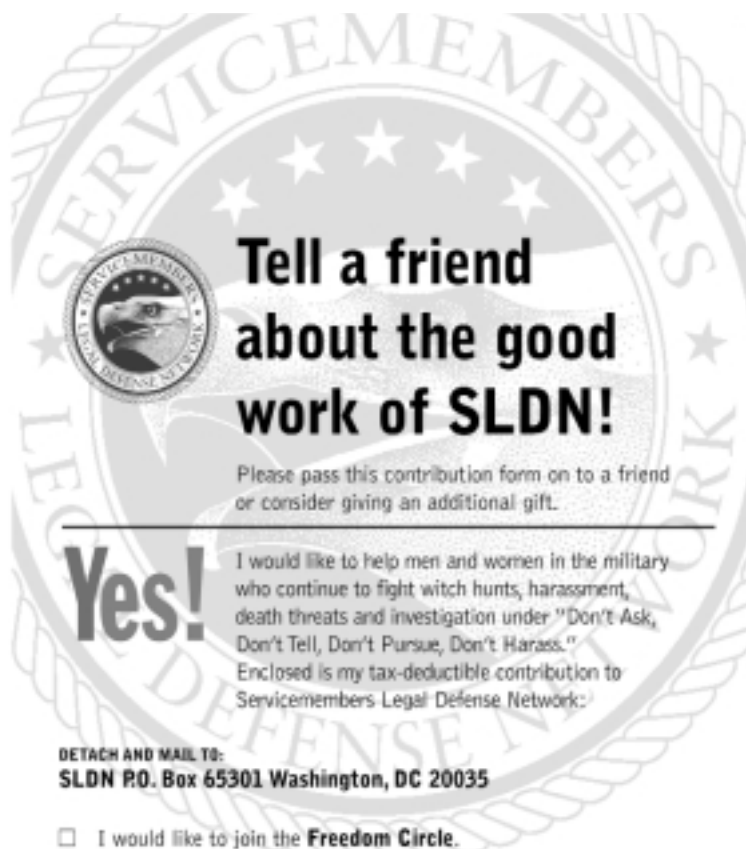
★ Also Available from SLDN: ★

SLDN's Annual Reports:
Conduct Unbecoming, The Annual Report on "Don't Ask, Don't Tell, Don't Pursue, Don't Harass." available at
www.sldn.org



VII. ATTACHMENTS

VIII. HOW YOU CAN HELP SLDN ASSIST SERVICEMEMBERS



Tell a friend about the good work of SLDN!

Please pass this contribution form on to a friend or consider giving an additional gift.

Yes!

I would like to help men and women in the military who continue to fight witch hunts, harassment, death threats and investigation under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass." Enclosed is my tax-deductible contribution to Servicemembers Legal Defense Network:

DETACH AND MAIL TO:

SLDN P.O. Box 65301 Washington, DC 20035

- I would like to join the **Freedom Circle**.
My contribution is : \$ _____.
- I would like to join the **Patriot Circle**. (gifts \$1,000 or more)
My contribution is : \$ _____.
- I would like to join "**Roll Call!**" – SLDN's sustainer program.
Please charge my credit card \$ _____ each
 month quarter. I understand that I may cancel my
"Roll Call!" pledge at anytime.
- I am interested in next year's **11th Annual End the Witch Hunts!** Please send me information about:
 Table Captain Sponsorship Steering Committee

PAYMENT OPTIONS:

- Check made payable to SLDN
- MasterCard Visa Discover American Express
- Card #: _____
- Exp: _____
- Signature: _____
- Full Payment \$ _____/month \$ _____/quarter

SLDN is a 501(c)(3) organization. All contributions are tax-deductible to the fullest extent of the law.

SLDN: P.O. Box 65301, Washington, DC 20035-5301
202.328.3244

Fax: 202.797.1635 • e-mail: sldn@sldn.org • web: www.sldn.org

You are important to SLDN!

How you can continue to help SLDN:

- Join the Steering Committee or become a Table Captain or Sponsor for next year's "End the Witch Hunts" event.
- Tell a friend or family member who serves in the military about SLDN. Whether your friend or family member is gay or straight, he or she may know of someone who need our assistance. Call 202/328.FAIR.
- Remember SLDN in your 2002 end-of-the-year giving with a contribution or gift of stock.
- Designate SLDN on the Combined Federal Campaign form if you are a federal employee. This fall, find SLDN listed in the Human & Civil Rights Organizations of America (#2259). If you participate in the United Way campaign, write in "Servicemembers Legal Defense Network."
- Become a member of the **Patriot Circle** (\$1,000 or more annually) or the **Freedom circle** (\$35 or more annually).
- Join "Roll Call!" – SLDN's sustainer program. Pledge your continued support with monthly or quarterly tax-deductible contributions.
- Include SLDN in your planned giving through your will, trust, etc.
- If your employer matches charitable contributions, please fill out a matching gift form and send it to SLDN.
- Join SLDN's "Front Line" e-mail action alert list. Your voice makes a difference!

Please call SLDN's Development Department for more information at 202-328-3244 or e-mail sldn@sldn.org.



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