

*Author's Disclaimer: Divergent views on Posttraumatic Stress Disorder (PTSD) are underscored by recent efforts to revise the clinical diagnostic criteria. As a result of inconsistent perspectives on diagnosis or treatment, authors are hard-pressed to identify a single or perfect solution to the problem. Legal organizations may desire to approach the attorney's role in a cautious manner, limiting the attorney's response to decisional impairments that stem from PTSD symptoms. This article represents only the individual views of the author. The author was not directed to write this article in his military capacity and wrote it on his own time. By surveying assessment and counseling techniques and suggesting how attorneys might benefit from them, this article does not suggest that these approaches must or should be adopted by all attorneys providing legal services to clients. This article previews the possibilities of an enhanced client counseling role with the hope that consideration of these ideas will enrich the dialogue in the military and civilian sector on the best ways to serve clients with unique needs.*

**THE VETERANS\* LAWYER AS COUNSELOR: USING  
THERAPEUTIC JURISPRUDENCE TO ENHANCE CLIENT  
COUNSELING FOR COMBAT VETERANS WITH  
POSTTRAUMATIC STRESS DISORDER†**

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\* The term "veteran," as used in this article, refers to any person who has previously served or who is currently serving in the armed forces. Combat veterans consequently include servicemembers on active duty who have prior deployments.

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## I. Introduction

As the campaigns in Iraq and Afghanistan continue, both military and civilian lawyers will encounter an increasing number of clients with Posttraumatic Stress Disorder (PTSD).<sup>1</sup> Some of these clients will still need clinical diagnosis and treatment at the time they visit the attorney's office.<sup>2</sup> Whether the lack of clinical involvement stems from the problems of an overtaxed medical system<sup>3</sup> or the veteran's own

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<sup>1</sup> For a concise description of PTSD as it relates to client counseling, see, e.g., Captain Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 202 MIL. L. REV. 144, 152–59, 162–78 (2009). An appendix containing the diagnostic criteria is reproduced *infra* Appendix A for ease of reference. See generally AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 467–68 (4th ed. Text Revision 2000) [hereinafter DSM-IV-TR].

<sup>2</sup> Seamone, *supra* note 1, at 146–47 (describing reasons why “a great many Soldiers, Sailors, Airmen, and Marines are slipping through the cracks”).

<sup>3</sup> E.g., Laura Savitsky et al., *Civilian Social Work: Serving the Military and Veteran Populations*, 54 SOCIAL WORK 327, 336 (2009) (describing limitations on the ability to provide adequate services to combat veterans); Roy R. Reeves, *Latest Strategies in the Diagnosis and Treatment of PTSD*, 85 MED. ECON. 42, 42 (2008) (“Unfortunately, the diagnosis of PTSD is often missed in the primary care setting.”). As Savitsky and her colleagues demonstrate, misdiagnosis can often prevent Soldiers with PTSD from receiving treatment. *Id.* For an example from the Army, see, e.g., Radio Broadcast, *Crew and VoteVets.org ask House Armed Services to Investigate Army Misdiagnoses of Service Members and Veterans with PTSD—As Cost Cutting Measure* (5 May 2009 3:43 PM GMT) (reporting the alleged tape-recorded confession of Army Psychologist Douglas McNich, “[A]ll clinicians up here are being pressured not to diagnose PTSD and diagnose Anxiety Disorder NOS instead . . . . I think it's not fair. I think it's a horrible way to treat soldiers . . . .”). For an example from the Department of Veterans Affairs, see, e.g., Mark Dombeck, *Why the VA Doesn't Want to Diagnose Iraq War Veterans' PTSD*, MentalHelp.net, available at [http://www.mentalhelp.net/poc/view\\_doc.php?type=doc&id=15324](http://www.mentalhelp.net/poc/view_doc.php?type=doc&id=15324) (last visited Dec. 20, 2009) (explaining policy and

reluctance to seek treatment,<sup>4</sup> systemic failures are transforming attorneys into PTSD “first responders.”<sup>5</sup> The first article of this series proposed a new perceptual frame, which acknowledges not only that the attorney can play a role in detecting PTSD symptoms and encouraging clinical diagnosis, but also that the attorney may be contending with a client whose decisions are impaired by the same condition.<sup>6</sup> This article provides practical tools for the lawyer confronted with such dilemmas, including a simple screening method for PTSD and Traumatic Brain Injury (TBI), exercises to identify and neutralize a client’s distorted thoughts, and resources to avoid retrauma and stress responses in the office or the courtroom.

Many of the methods proposed in this article originate from the discipline of psychology. In response to concerns that such tools are reserved for licensed mental health professionals, this article recognizes that mental health providers are clearly in the best position to diagnose and treat PTSD. While this article does not suggest the attorney is a substitute for a licensed clinician, it recognizes that attorneys are in a unique position to encourage clients to seek mental health assistance and to help clients understand legal issues in a way mental health professionals simply cannot.<sup>7</sup> This article explores the contours of the attorney’s enhanced counseling role with the hopes that an ethic of care comes naturally in the legal services provided to veterans with PTSD.

This article challenges a common approach to client counseling. All too often, attorneys adopt a “too much information” perspective when presented with a client’s emotional baggage.<sup>8</sup> Some may be brilliant on

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budgetary reasons for misdiagnoses and reprinting excerpts of an e-mail by Norma Perez to fellow VA employees: “Given that we are having more and more compensation seeking veterans, I’d like to suggest that you refrain from giving a diagnosis of PTSD straight out. Consider a diagnosis of Adjustment Disorder . . . . Additionally, we really don’t have the time to do the extensive testing that should be done to determine PTSD . . . .”).

<sup>4</sup> Seamone, *supra* note 1, at 154 n.54.

<sup>5</sup> *Id.* at 145 (“As a ‘signature’ disability evaluation characterizing the Iraq and Afghanistan campaigns, PTSD has transformed many legal assistance and trial defense attorneys into first responders in the quest to ensure the well-being of these combat veterans.”).

<sup>6</sup> *See generally id.*

<sup>7</sup> *Infra* text accompanying note 97.

<sup>8</sup> In family law practice, for example, many attorneys

. . . often avoid responding to clients’ characterizations of their spouse or of some event during the marriage; they try to discourage

matters of legal interpretation but, nevertheless, incompetent in the ways they relate to clients.<sup>9</sup> Many lawyers have begun to recognize the values of an enhanced approach to client counseling where they must address emotional influences as part of their legal role.<sup>10</sup> In certain areas of law, courts have mandated this role in the provision of legal services.<sup>11</sup> They have incorporated “therapeutic jurisprudence,” as a baseline for representation.<sup>12</sup> As a subset of the comprehensive law movement,<sup>13</sup> therapeutic jurisprudence is a philosophy of law practice in which the attorney is “sensitive to the therapeutic and antitherapeutic consequences

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the expression of emotion in or through the divorce and make a professional practice of being emotionally unresponsive to what are for many of their clients the central issues in the divorce. In this sense, “clients largely talk past their lawyers.” Lawyers seek to define or redefine the divorce dispute by focusing on the financial rather than the emotional aspects of the dispute and by trying to get their clients to talk about the future rather than the past.

Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43, 47–48 (1991).

<sup>9</sup> Marjorie A. Silver, *Supporting Attorneys’ Personal Skills*, 78 REV. JUR. U.P.R. 147, 151 (2009) (describing the problem of the attorney who is a “legal automaton, perhaps brilliant in the traditional knowledge and skills of his profession, but lacking in the emotional competence necessary to comprehend, let alone be responsive to, the depth of his client’s pain”).

<sup>10</sup> E.g., Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UKMC L. REV. 965, 982 (2007) (“To ignore fear, anger, anxiety, sadness, denial, or any other psychological states of mind is to leave the client in a condition that makes rational informed decision-making difficult, if not impossible. Extreme stress interferes with the ability to receive information and store that information in working memory.”).

<sup>11</sup> E.g., Christina A. Zawisza & Adela Beckerman, *Two Heads are Better Than One: The Case-Based Rationale for Dual Disciplinary Teaching in Child Advocacy Clinics*, 7 FL. COASTAL L. REV. 631, 651–52 (2006) (observing that “[s]tate courts have increasingly adopted detailed practice norms or guidelines for lawyers representing children,” which incorporate therapeutic jurisprudence).

<sup>12</sup> *Id.* at 651 (observing how various rule provisions are “quintessentially therapeutic jurisprudential in [their] approach”).

<sup>13</sup> E.g., Susan Diacoff, *Law as a Healing Profession: The “Comprehensive Law Movement,”* 6 PEPP. DISP. RESOL. L.J. 1, 1–2 (2006) (identifying several areas of law within the comprehensive law movement, including “collaborative law,” “transformative mediation,” and “therapeutic jurisprudence”). All of the diverse theories share two characteristics common to the comprehensive law movement: “(1) a desire to maximize the emotional, psychological and relational well-being of the individuals and communities involved in each legal matter; and (2) a focus on more than just strict legal rights, responsibilities, duties, obligations, and entitlements.” *Id.* at 5.

that sometimes flow from legal rules, legal procedures, and the roles of legal actors.”<sup>14</sup>

In the representation of a client, therapeutic jurisprudence includes an exploration of the “law’s healing potential” and maximization of the client’s emotional well-being.<sup>15</sup> A component of this general framework includes the concept of “lawyer as counselor”<sup>16</sup> and “client-centered” counseling,<sup>17</sup> terms which recognize that the attorney’s obligation to a client includes far more than gathering facts, litigating in court, or performing administrative tasks.<sup>18</sup> In this therapeutic role, the attorney becomes a part of the client’s world to better assist the client in making raw, real-life, hard decisions.<sup>19</sup> Criminal defense attorneys practice therapeutic jurisprudence when they work with clients to develop a relapse prevention plan that can be offered to the court to address the danger of recidivism after the case is long over.<sup>20</sup> Family law attorneys

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<sup>14</sup> Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25, 25 (1997).

<sup>15</sup> Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 108 (2001).

<sup>16</sup> E.g., David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, 67 REV. JUR. U.P.R. 317, 318–19 (1998) (recognizing that “[t]herapeutic jurisprudence . . . can give true structure and substance to the notion of the lawyer as counselor . . .”).

<sup>17</sup> Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLIN. L. REV. 605, 606 (2007) (“Therapeutic jurisprudence is committed to client-centered counseling.”).

<sup>18</sup> Client-centered counseling, for example, is a method “characterized by the client playing a strong role in attorney-client decision-making, and by the lawyer filtering information and alternatives through empathizing with the client and figuring out how to best serve the true needs of the client as defined by the client.” Kimberly O’Leary, *Evaluating Clinical Law Teaching—Suggestions for Law Professors Who Have Never Used the Clinical Teaching Method*, 29 N. KY. L. REV. 491, 497 n.22 (2002) (discussing DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 19–23 (1991)).

<sup>19</sup> Here, the practitioner of therapeutic jurisprudence goes beyond analysis of the law, taking into “account the external ramifications to the person’s physical and mental health affected by a decision.” Leslie Larkin Cooney, *Heart and Soul: A New Rhythm for Clinical Externships*, 17 ST. THOMAS L. REV. 407, 408 (2005). From this perspective, the attorney welcomes “insights and techniques drawn from psychology . . . and social work” while addressing the client’s legal issues. Winick & Wexler, *supra* note 17, at 605 (“Therapeutic jurisprudence is committed to client-centered counseling.”).

<sup>20</sup> E.g., David B. Wexler, *Criminal Law: Relapse Prevention Planning Principles for Criminal Law Practice*, 5 PSCYHOL. PUB. POL’Y & L. 1028, 1032 (1999):

practice therapeutic jurisprudence when they investigate with a testator the potential turmoil that may result for the family when one of many children is excluded from a will.<sup>21</sup>

Despite the fact that there are no military regulations or pamphlets spelling-out how to incorporate therapeutic jurisprudence in the representation of a client, military and civilian attorneys often make do. They practice therapeutic jurisprudence, perhaps without even labeling it as such, every time they coordinate with a commander to ensure that an accused can go on leave before a court-martial or interview beneficiaries of an elderly testator to better anticipate the likelihood of a will contest. The thrust of this article is that therapeutic jurisprudence and client-centered practice is not elective or optional when attorneys represent combat veterans affected by Posttraumatic Stress Disorder (PTSD) but rather an obligation.

This article has six parts. Part II explores the necessary overlap between the spheres of psychology and the law. It addresses the general reluctance of attorneys to approach issues from a psychological perspective and identifies situations in which attorneys must nevertheless venture into such territory alone, without the guidance of mental health professionals. It examines the positions of various organizations on an attorney's "work of a psychological nature," including state legislatures, psychology licensing boards, and professional associations. It concludes that much leeway is accorded to use psychological tools when the tools relate to the provision of necessary legal services, when attorneys provide appropriate disclaimers, and when they remain within the bounds of legal professional responsibility rules. Part II also provides a sample client disclaimer to provide adequate notice of the attorney's limitations and lack of psychological expertise when using psychological exercises or charts.

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By engaging the client to think through his or her behavioral patterns that lead to criminality, by engaging the client then to devise ways both to avoid high-risk situations and also to cope with such situations should they arise, a criminal lawyer in essence is engaging the client in the cognitive-behavioral change process of relapse prevention planning.

<sup>21</sup> Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLIN. L. REV. 259, 294 (2000). Here, especially, "a lawyer sensitive to Therapeutic Jurisprudence might have explored with the mother the likely reaction of her son to being excluded from the will." *Id.*

Having established the attorney's freedom to use psychological techniques, Part III draws an important comparison between veterans' counsel and elder law attorneys who must often screen their clients for decisional impairment and mental conditions. This Part identifies two simplified screening tools that fall short of official clinical diagnosis but still provide enough information about PTSD and TBI to assist the attorney from a legal perspective. This Part also provides a checklist, modified from the recommendations of the American Bar and American Psychological Associations, to help veterans' counsel determine whether referral to a mental health provider is necessary as a result of diminished capacity, rather than PTSD symptoms which normally do not mandate court intervention.

Part IV identifies practical steps attorneys can take to neutralize PTSD's negative influences on the representation. This Part focuses exclusively on planning considerations that anticipate "psycholegal soft spots"—aspects of a case that are likely to trigger stress responses—during the course of trial preparation or court proceedings.<sup>22</sup> This Part introduces a series of questions and prompts to increase both the attorney and client's awareness of potential PTSD triggers and measures to limit their aggravating effects. It also introduces the concept of notebooks, in which the client will keep all information related to the case, and peer support networks that will overcome the common problems of information mismanagement and missed appointments.

In crossing the threshold from prevention of PTSD triggers to PTSD trigger responses, Part V offers prophylactic measures to ensure that attorneys remain within the boundaries of legal counseling. Although statutes impose few restraints,<sup>23</sup> the enhanced counseling function of veterans' counsel envisions numerous limitations on a lawyer. The techniques offered in this article are limited to breathing and relaxation exercises, cognitive behavioral therapy forms and worksheets, and self-guided audio-recordings. Where any techniques are similar to ones used by licensed clinicians, this article adopts simplified versions that have been evaluated by therapists and vetted for public consumption in the form of self-directed guides. In other words, while many of the techniques recommended by this article have their roots in psychological studies and clinical practice, the specific tools featured in these pages are drawn from self-help books that can be found in most bookstores. The

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<sup>22</sup> *Infra* text accompanying note 39.

<sup>23</sup> *Infra* Part II.C.

coupling of these resources with appropriate notice to clients will ensure that attorneys fulfill their legal counseling function and do not inadvertently become clinical psychologists or social workers.

## II. Preliminary Considerations for the Attorney's Use of Psychological Techniques

### A. The Stigma of Using Psychological Methods in Law Practice

Although many clinicians and legal practitioners recognize a pressing need for lawyers to learn about psychology, address clients' emotional reactions, and counsel on nonlegal matters, military and civilian lawyers lack uniform guidance.<sup>24</sup> Failure to incorporate such considerations in law practice is best explained by a general reluctance to tackle psychological issues.<sup>25</sup> Attorneys may fear professional consequences for practicing psychology without a license.<sup>26</sup> They may believe that their lack of training and experience could hurt, instead of help, the client.<sup>27</sup> Or, they might believe that referral of the client to a qualified mental health provider satisfies their professional obligation to

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<sup>24</sup> Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 419 (2005) ("Nonlegal counseling remains an elusive concept in the context of the attorney-client relationship."); see also Diacoff, *supra* note 13, at 6 (explaining how attorney approaches to address clients' emotional concerns "(if it occurs at all) happens haphazardly and without direction").

<sup>25</sup> Diacoff, *supra* note 13, at 59; *id.* at 5 (recognizing that "[t]he dominant, traditional approach found in the profession usually downplays, if not ignores," the client's feelings, emotions, and an attorney's involvement in addressing them").

<sup>26</sup> E.g., Symposium, *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship: A Panel Discussion*, 19 TOURO L. REV. 847, 867-68 (2004) (comments of Professor Silver):

[T]raditionally lawyers have felt that in order to do their job right they have to keep a certain distance . . . if you go further that might invite charges of malpractice. There are definite boundaries to be drawn in terms of what is appropriate and what is not. I believe that you don't cross that boundary in terms of you don't try and become a social worker for your client.

<sup>27</sup> James R. Elkins, *A Counseling Model for Lawyering in Divorce Cases*, 53 NOTRE DAME L. REV. 229, 264 (1978) ("Unlike other helping professionals, such as marriage counselors, psychiatrists, and social workers, the attorney often lacks training in human relations skills and therefore feels unprepared to adopt the counseling model of the attorney-client relationship.").

address any psychological issues. In military justice circles, attorneys of this mindset may very well believe that their obligation ends with the results of a sanity board.<sup>28</sup>

Many desire to avert the risk that the client will become dependent on the attorney for guidance in *all* things, seriously confusing the attorney's legal function.<sup>29</sup> Under this view, while the attorney must necessarily be a legal counselor, she should not attempt to be the client's "social worker."<sup>30</sup> A combination of these concerns has resulted in a

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<sup>28</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 706(c)(2)(A)–(D) (2008) [hereinafter MCM]:

When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions:

(A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? . . .

(B) What is the clinical psychiatric diagnosis?

(C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?

(D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?

In addressing the provisions of Rules for Court-Martial 706, a military author observes that defense attorneys often request sanity boards despite the fact that the reports usually "contain[ ] anti-climactic results declaring the accused sane at the time of the offense and fit to stand trial." Major Jeff A. Bovarnick, *Trying to Remain Sane Trying an Insanity Case*: United States v. Captain Thomas S. Payne, ARMY LAW., June 2002, at 12, 14.

<sup>29</sup> E.g., Lynette M. Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163, 169 (2007) (explaining that problems arise when the client turns to the attorney "for help with more than just the specific legal issue").

<sup>30</sup> E.g., Symposium, *supra* note 26, at 867–68 (comments of professor Silver) (explaining that it crosses an impermissible boundary for an attorney to become a client's social worker); Judy H. Kluger et al., *The Impact of Problem Solving on the Lawyer's Role and Ethics*, 29 FORDHAM URB. L.J. 1892, 1918 (2002) (comments of Susan Hendricks) (identifying this position as a reason why defense attorneys do not desire training in matters regarding mental health disorders or their treatment).

uniform approach to the attorney-client relationship that seeks to avoid these issues.<sup>31</sup>

A hands-off approach is quite valid in many areas of legal practice. For instance, few psychological issues are likely to arise during the drafting of contracts or transfer of real property.<sup>32</sup> However, other legal matters are prone to evoke raw emotions, such as “child abuse, domestic violence, criminal defense, immigration, matrimonial practice, and representation of mentally ill persons.”<sup>33</sup> For example,

The depressed client, preoccupied with the prospect of a divorce, is no longer able to make decisions due to an inability to think and concentrate. In addition, the low self-esteem and guilt associated with depression may prompt an attitude of “I don’t care what happens to me,” which can seriously undermine the attorney’s efforts to achieve a result in accordance with the client’s best interest.<sup>34</sup>

Particularly in these areas, where emotions run high, it is impossible for the attorney to exercise her duties unless she uses psychological techniques during the course of the representation.<sup>35</sup> Attorneys, in fact,

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<sup>31</sup> *E.g.*, Diacoff, *supra* note 13, at 5 (recognizing that “[t]he dominant, traditional approach found in the [legal profession] usually downplays, if not ignores [extralegal] concerns”).

<sup>32</sup> *E.g.*, Silver, *supra* note 21, at 261:

A lawyer’s representation of a client for a real estate closing may not be especially fraught with intensity. Yet a client seeking to avoid deportation, incarceration, or loss of custody of a child is likely to demand a great deal of attention from her attorney, not all of which will be of a legal nature.

<sup>33</sup> *Id.* at 299.

<sup>34</sup> Elkins, *supra* note 27, at 257.

<sup>35</sup> *E.g.*, Robin Wellford Slocum, *The Dilemma of the Vengeful Client: A Prescriptive Framework for Cooling the Flames of Anger*, 92 MARQ. L. REV. 481, 511–12 (2009) (observing that when a client suffers from “perceptual distortions and a limited ability to engage in effective problem-solving,” it is “naïve to suggest that a lawyer could competently advise such a client without addressing humanistic concerns that are so clearly imbedded within the legal decisions”); Andrew S. Watson, *The Lawyer as Counselor*, 5 J. FAM. L. 7, 7 (1965) (“[F]or better or for worse, the very nature of a lawyer’s activities forces him into [a counseling] role.”). The attorney must know how to identify and overcome mental issues that can impede effective representation. Mark K. Schoenfeld & Barbara Pearlman Schoenfeld, *Interviewing and Counseling Clients in a*

regularly engage in some level of psychological analysis, often without even knowing it, when they reach the opinion that “something about my client has changed”<sup>36</sup> or when they must overcome a client’s state of denial over an unsettling issue.<sup>37</sup> In explicitly recognizing this unspoken truth, the “comprehensive law” movement, including therapeutic jurisprudence, has emerged to challenge this status quo and promote the use of psychology to improve the well-being of all persons involved in litigation.<sup>38</sup> This practical approach to lawyering provides extremely useful insights to veterans’ counsel.

#### B. The Attorney’s Enhanced Client Counseling Role

Therapeutic jurisprudence uses the term “psycholegal soft spots” to describe phases of litigation or legal representation that are known to cause anxiety and displeasure, such as cross-examination or preparing for discovery.<sup>39</sup> These soft spots are confirmed by physiological research demonstrating that “the litigation process itself” or “the issues underlying the litigation” often produce(s) negative effects on a person similar to

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*Legal Setting*, 11 AKRON L. REV. 313, 314 (1978) (“The interviewer must know the psychological factors which impede the accurate flow of information.”); Elkins, *supra* note 27, at 230 (“Only by being aware of the client’s emotional trauma during [the transitional nature of divorce and separation] can the attorney begin to understand and appreciate the dynamics of his relationship with the client.”).

<sup>36</sup> ABA COMM. ON L. & AGING & AM. PSYCHOLOGICAL ASSN., ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS 3 (2005) [hereinafter DIMINISHED CAPACITY HANDBOOK] (LEXIS Course No. SM054). See also ANDREW S. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS 11 (1976) (“While lawyers may not often arrive at the depth of understanding about clients which the psychologist or psychiatrist might, at the very least they can have human awareness about the complex and relatively invisible motives that drive their clients into conflict.”).

<sup>37</sup> E.g., Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot*, 4 PSCYH. PUB. POL. & L. 901, 905 (1998) (“A preventive lawyer attempting to present the client the advantages of having advance directive instruments for various purposes should therefore be prepared to confront denial and similar psychological mechanisms used to avoid thinking about these anxiety-provoking eventualities.”). In this respect, “Although lawyers are not clinicians, they can learn much from how clinicians deal with patients in similar circumstances.” *Id.* at 906.

<sup>38</sup> E.g., Diacoff, *supra* note 13, at 1–4.

<sup>39</sup> E.g., Winick, *supra* note 15, at 108 (“The litigation process is riddled with ‘psycholegal soft spots,’ a therapeutic jurisprudence term for potential trouble points that can produce anger, anxiety, stress, hurt, hard feelings, or other strongly negative emotional reactions that diminish the client’s psychological wellbeing.”).

post-traumatic stress.<sup>40</sup> Studies of “Forensic stress disorder” (FSD), reveal that the stress of litigation can inevitably amplify existing conditions, such as PTSD, increasing the risk of harm to clients.<sup>41</sup> Given the rising suicide rate among active duty personnel,<sup>42</sup> the staggering statistics on suicide attempts by all of the nation’s veterans,<sup>43</sup> and the identification of legal problems as a leading suicide risk factor,<sup>44</sup> attorneys representing combat veterans simply cannot ignore the influence of psycholegal soft spots on their clients.<sup>45</sup>

While “simple alterations” in client counseling practice can often assist clients,<sup>46</sup> practitioners of therapeutic jurisprudence recognize that many situations often demand an enhanced counseling role.<sup>47</sup> To effectively assist clients with PTSD, military and civilian attorneys should adopt a comprehensive approach to counseling. The PTSD First-Responder frame meets the first two objectives: a basic understanding of PTSD and treatment approaches and relationships with mental health professionals that incorporate legal considerations in the treatment of the client.<sup>48</sup> The sections below explore three additional components of the comprehensive approach: (1) screening tools to identify PTSD and TBI “red flags”; (2) methods to identify PTSD psycholegal soft spots; and (3) techniques to clarify a client’s thinking and enhance the attorney-client relationship. In each of these new areas, it will be crucial to understand the difference between “clinical assessment,” which is rightfully in the realm of the clinician, and “legal assessment,” which is at the heart of the lawyer’s obligation.

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<sup>40</sup> Larry J. Cohen & Joyce H. Vesper, *Forensic Stress Disorder*, 25 L. & PSYCHOL. REV. 1, 2 (2001).

<sup>41</sup> *Id.* at 14 (“[I]ndividuals who witnessed violent or life threatening-events as well as those people who were involved in traumatic accidents prior to litigation experience acute stress reactions.”).

<sup>42</sup> *E.g.*, Mark Mueller & Tomãis Dinges, *The Wounds Within: Suicide in the Military*, STAR LEDGER (Newark, N.J.), Nov. 22, 2009, at 1 (observing statistics showing all-time record highs for the Army and Marine Corps in 2009).

<sup>43</sup> *E.g.*, Bob Egelko, *Federal Court Hears Vets’ Appeal on Mental Health*, S.F. CHRON., Aug. 13, 2009, at A7 (reporting Veterans’ Administration (VA) statistics that eighteen veterans commit suicide every day and one thousand more, within the VA’s care attempt suicide every month).

<sup>44</sup> *E.g.*, Savitsky et al., *supra* note 3, at 333.

<sup>45</sup> Seamone, *supra* note 1, at 145–52 (highlighting prevention of harm to a client as a chief reason why attorneys must adopt a new perceptual frame as PTSD first-responders).

<sup>46</sup> *Id.* at 164.

<sup>47</sup> *See infra* Part II.C.

<sup>48</sup> Seamone, *supra* note 1, at 145–52, 165–81 (identifying these considerations as key aspects of the PTSD First-Responder perspective).

### C. The Practice of Law Inevitably Overlaps with Psychology

Ethical rules and court opinions that address counseling by lawyers make two things clear. First, the lawyer's role as counselor often requires the attorney to counsel clients on matters outside of the law.<sup>49</sup> Second, non-legal counseling by an attorney is governed by the framework of Rules 1.1,<sup>50</sup> 1.2(A),<sup>51</sup> 1.4(b),<sup>52</sup> and 2.1. Collectively, these rules require the attorney to be competent when providing non-legal counsel,<sup>53</sup> to respect the client's autonomy on objectives of the representation,<sup>54</sup> and to adopt measures to ensure that the attorney's communication is effective.

Aside from these requirements, there are few hard-and-fast rules. To a large extent, attorneys are expected to undertake independent study to determine when an issue is beyond their ability.<sup>55</sup> As of 2005, a scholar recognized that "no reported decision has disciplined an attorney for addressing a client's nonlegal matters when the attorney did not have the training needed to handle those matters."<sup>56</sup> Despite this,

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<sup>49</sup> American Bar Association Model Rule 2.1 states: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation." MODEL RULES OF PROF'L CONDUCT R. 2.1 (2006) [hereinafter ABA MODEL RULES]. The Army Rule is identical. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 2.1 (1 May 1992) [hereinafter AR 27-26]. See also John M. Burman, *Advising Clients About Non-Legal Factors*, WYO. LAW., Feb. 2004, at 40-41 ("It is seldom possible to explain the 'practical implications' of a client's legal rights without referring to non-legal factors.").

<sup>50</sup> The military rule, AR 27-26, *supra* note 49, R. 1.1, is analogous to the American Bar Association Rule: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

<sup>51</sup> *Id.* R. 1.2(A) (directing, in part, "[a] lawyer shall abide by a client's decisions concerning the objectives of representation").

<sup>52</sup> *Id.* R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation.").

<sup>53</sup> *E.g.*, Natt Gantt, *supra* note 24, at 388 ("Lawyers must first consider whether, in offering nonlegal advice, they are violating their duties under Model Rule 1.1 to provide 'competent representation to a client.'").

<sup>54</sup> *E.g.*, *id.* at 406 ("Lawyers are authorized under Rule 2.1 to counsel clients on moral considerations; however, lawyers who simply fail to abide by the client's decisions involving objectives may be disciplined under Rule 1.2.").

<sup>55</sup> See AR 27-26, *supra* note 49, cmt. to R. 1.1 ("A lawyer can provide adequate representation in a wholly novel field through necessary study or consultation with a lawyer of established competence in the field in question.").

<sup>56</sup> Natt Gantt, *supra* note 24, at 389.

he concluded, “Lawyers are potentially subject to professional discipline for their nonlegal counseling whether it occurs at the church altar or in the county courthouse.”<sup>57</sup>

Because work of a psychological nature has an indirect bearing on the resolution of a legal issue, Rule 2.1 provides the ethical basis for the attorney’s discussions and implementation of psychological techniques in the attorney-client relationship. However, the purpose for using these techniques extends beyond Rule 2.1 to Rule 1.4(b), which addresses the attorney’s duty to communicate effectively with the client. Like its civilian counterpart, Army Rule of Professional Conduct 1.4 indicates that attorneys have an obligation to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>58</sup> The techniques addressed in this article are designed to enable effective communication with clients who have a condition that inevitably leads to distorted thoughts.

In many cases, attorneys must use methods of psychological analysis or intervention to carry out the representation of their clients.<sup>59</sup> For example, when a divorce client is angry and seeks to use the legal process to exact vengeance on a spouse, the attorney “must in fact address the client’s underlying emotional pain in order to provide competent representation.”<sup>60</sup> The need to engage in some level of psychological analysis is most evident in the field of elder law, where the issues of competence and diminished capacity often arise. Elder law

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<sup>57</sup> *Id.* at 410.

<sup>58</sup> AR 27-26, *supra* note 49, at R. 1.4(b).

<sup>59</sup> Winick, *supra* note 37, at 918.

Attorneys are not clinicians and should not try to function as such. Yet, attorneys need to understand the ways clinicians function and transplant some of those learnings into the attorney-client relationship. They need to understand the insights of psychology and apply those insights into their professional dealings, because lawyers, like clinicians, often function as counselors. Effective counseling skills are something that no good lawyer should be without.

Professor Winick, for example, surveys clinical responses to a client’s denial and recommends that attorneys borrow techniques that have been successfully incorporated by clinicians to overcome such resistance. *Id.* at 908 (“Some of these management techniques are beyond the ability of lawyers without clinical training, but many attorneys will be able to adapt one or more of these approaches in dealing with client denial in the law office.”).

<sup>60</sup> Slocum, *supra* note 35, at 487.

attorneys are expected to carefully observe a client to “ensure that [the client] understands why he is at the office and that he has the mental capacity to provide the information needed for competent counseling.”<sup>61</sup> Not only must “the attorney . . . be vigilant for hints that the retiree cannot fully remember, comprehend, or adequately assess his situation,”<sup>62</sup> the attorney must often visit the client’s home and family to fully assess the situation.<sup>63</sup> The relative inexperience of some legal assistance attorneys in the military does not excuse them from having to make the same observations.<sup>64</sup> Additionally, the checklists and resources developed for elder law attorneys rely heavily on evaluations of client behavior and the incorporation of psychological considerations, which further highlights the need for psychological examination.<sup>65</sup> Even an attorney’s decision to seek or forego a competency assessment represents some level of psychological analysis by that attorney.<sup>66</sup>

While veterans’ courts and other specialized courts have promoted awareness of psychological conditions in the legal process, professional legal organizations have identified lawyers’ individual obligation to incorporate psychology into their legal practice. Nowhere is this mandate clearer than in the field of capital litigation, where defense attorneys are expected to counter clients’ self-destructive thoughts and take affirmative measures in support of their clients’ best interests, despite the deficient thoughts. The American Bar Association’s *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, for example, explains,

Some clients will initially insist that they want to be executed—as punishment or because they believe that

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<sup>61</sup> Colonel Gene S. Silverblatt & Lieutenant Colonel Linda K. Webster, *Legal Assistance Issues for Retirees: A Counseling Primer on Old Age, Disability, and Death Issues*, ARMY LAW., Aug. 2004, at 19, 24.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* See also DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 21 (“If the lawyer has the ability to interview clients in their home setting, there is a definite advantage in being able to see some of their functioning in their natural and familiar environment.”).

<sup>64</sup> Silverblatt & Webster, *supra* note 61, at 19 (observing “[l]egal assistance attorneys are often the least experienced attorneys in a staff judge advocate’s (SJA) office”); *id.* at 35 (“Legal assistance attorneys must realize that older clients often need additional care and concern.”).

<sup>65</sup> *E.g.*, DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 29–33 (presenting a four-part “Capacity Worksheet for Lawyers”).

<sup>66</sup> *Id.* at 3 (observing that attorneys are making “preliminary assessment[s] of capacity” when they decide whether or not to refer a client for professional evaluation).

they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt but not present mitigation. It is ineffective assistance for counsel to simply acquiesce to such wishes, which usually reflect overwhelming feelings of guilt or despair rather than a rational decision . . . .<sup>67</sup>

Rather than blindly following clients' self-destructive wishes, attorneys are expected to, and regularly do, exert pressure on their clients by double-teaming with other attorneys or enlisting the help of clergy or relatives to encourage the consideration of alternative, disfavored approaches.<sup>68</sup> These tactics often include involvement of the client's mother to induce an extreme degree of guilt at the prospect of the client's execution.<sup>69</sup> As one experienced defense attorney explains, attorneys have a duty to bully and manipulate clients, even if clients experience emotional trauma as a result of the attorney's intimidating or downright coercive tactics.<sup>70</sup>

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<sup>67</sup> ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES cmt. to Guideline 10.5 (rev. ed 2003) [hereinafter DEATH PENALTY GUIDELINES].

<sup>68</sup> *Id.*

<sup>69</sup> The case of *United States ex. rel. Brown v. LaVallee*, 424 F.2d 457 (2d. Cir. 1970), for example, addressed a situation where the capital defendant's mother was enlisted to help convince the defendant to abandon a bogus self-defense claim that his seasoned attorneys believed would fail miserably. In the "stormy and emotional" encounter between the client and his mother, she repeatedly warned him that he would be going to the electric chair and pleaded with him not to force her to claim his electrocution-charred remains after the sentence. *Id.* at 459. After he pleaded guilty, the defendant later complained that he had not made his decision voluntarily due to his mother's behavior. The court, in condoning such conduct, recognized that, originating from his counsel and his mother, the tactics, while extremely unpleasant, nevertheless amounted to sound advice rather than "coercion."

<sup>70</sup> As an expansion on Professor Abbe Smith's observation that effective representation requires the attorney's deliberate use of "trust, fear, guilt, sadness . . . grief . . . ganging up, hounding, and outright bullying," Abbe Smith, *The Lawyer's "Conscience" and the Limits of Persuasion*, 36 HOFSTRA L. REV. 479, 481 (2008), she goes on to clarify some of these terms:

By bullying, I mean applying pressure. Forceful language is sometimes necessary, even verbal abuse, even yelling. Badgering, cajoling, needling, filing, inciting—are all methods that might help a client finally see the light. Again, I seldom worry about exerting too much pressure. I worry instead about failing to exert enough. By manipulation, I mean a range of techniques that might work to get under the client's skin, get them to lower their defenses, and ultimately get them to change their minds.

The attorney's obligation to adopt psychological counseling perspectives in legal representation extends to the practice of family law as well. While the American Academy of Matrimonial Law Attorneys observes that "few attorneys are qualified to do psychological counseling," its standards, nevertheless, indicate that the attorney can, and should, address the emotional issues expected to arise from litigation.<sup>71</sup> Lawyers cannot ignore the psychological impact of marital proceedings because, often, "[u]ntil the client is emotionally stabilized, he/she will not be able to digest and understand the legal aspects of the divorce."<sup>72</sup> Outside of these contexts, courts have also recognized the attorney's independent obligation to address a client's known substance abuse problem in a realistic way.<sup>73</sup>

Considering the frequency at which attorneys intentionally inflict psychological harm on their clients—with the approval of the courts<sup>74</sup>—one might reasonably question whether the converse is also true. That is, shouldn't an attorney be able to use psychological techniques to heal the client and improve the client's well-being so far as it relates to the representation? The answer has been clarified in the affirmative, not by legal ethics opinions, but in a combination of state statutes addressing the practice of psychology and the prerequisites for licensure. Military and civilian lawyers can draw much from the careful and comprehensive analysis of these statutes.

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*Id.* 493.

<sup>71</sup> AM. ACAD. OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY cmt. to Standard 1.2 (Nov. 2000), available at <http://www.aaml.org/go/library/publications/bounds-of-advocacy/1-competence-and-advice/>.

<sup>72</sup> Marsha B. Freeman & James D. Hauser, *Making Divorce Work: Teaching a Mental Health/Legal Paradigm to a Multidisciplinary Student Body*, 6 BARRY L. REV. 1, 18 (2006). See also Slocum, *supra* note 35, at 491 ("[S]o long as the client is operating from a reactive emotional state, neither the client nor the lawyer can accurately assess just how realistic the client's concerns may be.").

<sup>73</sup> For example, in *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 834-35 (Minn. 1991), a case involving driving under the influence, the Minnesota Supreme Court commented on the defense attorney's obligation to address the client's well-being:

A good lawyer is not only interested in protecting the client's legal rights, but also in the well-being, mental and physical health of the client . . . A lawyer has an affirmative duty to be a counselor to his client. . . . The lawyer may be able to persuade a problem drinker to seek treatment.

<sup>74</sup> See *supra* discussion accompanying notes 69–70.

Surprisingly, many state legislatures have already articulated the standard that has long eluded legal scholars and bar associations. Their rules address attorneys' use of psychological techniques as part of their legal duties. While the jurisdictions differ in the scope of these rules, the general principles and precautions adopted by leading states offer veterans' counsel many valuable lessons.

In several jurisdictions, statutes permit professionals from outside the field of psychology to use techniques that fall within the definition of psychology practice. While the great majority of these jurisdictions leave the category of professionals open,<sup>75</sup> at least ten states explicitly

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<sup>75</sup> *E.g.*, ALASKA STAT. § 08.86.180(b)(3) (Michie 2009) (referring to “a qualified member of another profession”); ARIZ. REV. STAT. § 32-2075(c) (2008) (referring to “other recognized professionals that are licensed, certified, or regulated under the laws of this state”); ARK. CODE ANN. § 17-97-103(a)(3) (Michie 2009) (referring to “members of other professions licensed under the laws of Arkansas”); COLO. REV. STAT. § 12-43-306(2) (2008) (referring to “members of other professions licensed under the laws of this state”); DEL. CODE ANN. tit. 34 § 3519(b) (2009) (referring to “qualified members of other recognized professions”); FLA. STAT. ch. 490.014(1)(b) (2009) (referring to “qualified members of other professions”); GA. COMP. R. & REGS. R. 510-10-.04 (2009) (referring to “a person with a license issued by another professional board” who “is currently authorized by state law to practice”); HAW. REV. STAT. ANN. § 465-3(a)(5) (Michie 2009) (referring to “[a]ny person who is a member of another profession licensed under the laws of this jurisdiction to render or advertise services”); IDAHO CODE § 54-2303(5) (Michie 2009) (referring to “qualified members of other professions licensed or registered by the state of Idaho”); KAN. STAT. ANN. § 74-5344(a) (2008) (referring to “qualified members of other professional groups”); KY. REV. STAT. ANN. § 319.015(3) (Michie 2009) (referring to “[p]ersons licensed, certified, or registered under any other provision of the Kentucky Revised Statutes”); LA. REV. STAT. ANN. § 37:2365A (West 2009) (referring to “[m]embers of other professions which are licensed or certified under the laws of this state”); MISS. CODE ANN. § 73-31-27(1)(d) (2008) (referring to “members of other professional groups licensed or certified by the state of Mississippi”); NEB. REV. STAT. ANN. § 38-3113(2) (Michie 2009) (referring to “[m]embers of other recognized professions that are licensed, certified, or regulated under the laws of this state”); N.C. GEN. STAT. § 90-270.4(e) (2009) (referring to “a qualified member of other professional groups, licensed or certified under the laws of this State”); N.M. STAT. ANN. § 61-9-16D (Michie 2009) (referring to “qualified members of other professional groups who are licensed or regulated under the laws of this state”); OKLA. STAT., tit 59, § 1353(2) (2009) (referring to “qualified members of other professions”); OR. REV. STAT. § 675.090(1)(d) (2007) (referring to “A person who is licensed, certified or otherwise authorized by the state of Oregon to render professional services”); 63 PA. CONS. STAT. § 1203(3) (2009) (referring to “qualified members of other recognized professions”); R.I. GEN. LAWS § 5-44-23(a) (2009) (referring to “members of other recognized professions that are licensed, certified, or regulated”); S.C. CODE ANN. § 40-55-90(A)(1) (Law. Co-op. 2008) (referring to “A licensed member of another profession who is regulated by the Department of Labor, Licensing and Regulation”); UTAH CODE ANN. § 58-1-307(1)(f) (2009) (referring to “an individual

identify attorneys among the non-psychological professionals who may use psychological techniques in the course of law practice.<sup>76</sup> For example, California's statute states,

Nothing in this chapter shall be construed to prevent qualified members of other recognized professional groups licensed to practice in the State of California, such as, but not limited to, physicians, clinical social workers, educational psychologists, marriage and family therapists, optometrists, psychiatric technicians, or registered nurses, or attorneys admitted to the California State Bar, or persons utilizing hypnotic techniques . . . . from doing work of a psychological nature consistent with the laws governing their respective professions . . . .<sup>77</sup>

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licensed under the laws of this state, other than this title"); VA. CODE ANN. § 54.1-1-3601(9) (Michie 2009) (referring to "[a]ny person performing services in the lawful conduct of his particular profession or business under state law"); WASH. REV. CODE ANN. § 18.83.200(4) (West 2009) (referring to "[a]ny person who must qualify under the employment requirements of a business or industry . . . when such person is carrying out the functions of his or her employment"); WIS. STAT. ANN. § 455.02(2m)(a) (West 2008) (referring to "[a] person lawfully practicing within the scope of a license, permit, registration, certificate or certification granted by this state"); WYO. STAT. ANN. § 33-27-114(a) (Michie 2009) (referring to "members of other recognized professions who are licensed, certified or regulated under the laws of this state").

<sup>76</sup> *E.g.*, CAL. BUS. & PROF. CODE § 2908 (Deering 2009) (including "attorneys admitted to the California State Bar"); MASS. ANN. LAWS ch. 112 § 125 (Law. Co-op. 2009) (including "attorneys-at-law"); MICH. COMP. LAWS § 333.18214(4) (2009) (including a "lawyer"); MO. REV. STAT. § 337.045(1) (2009) (including "attorneys"); MONT. CODE ANN. § 37-17-104(1) (2007) ("including "lawyers"); N.J. STAT. ANN. § 45:14B-8 (West 2009) (including "attorneys at law"); N.Y. EDUC. § 7605(4) (consol. 2009) (specifically including "any individual who is credentialed under any law, including attorneys"); S.D. CODIFIED LAWS § 36-27A-2(7) (Michie 2009) (including "attorneys"); TEX. OCC. CODE ANN. § 501.004(a)(3)(A) & (b)(2) (Vernon 2009) (including "an attorney"); VT. STAT. ANN. tit. 26, § 3005(a) (2009) (including "lawyers"); W. VA. CODE ANN. § 30-21-2(e)(5) (Michie 2009) (including "lawyers").

<sup>77</sup> CAL. BUS. & PROF. CODE § 2908 (Deering 2009). New Jersey's statute contains practically identical language. N.J. STAT. ANN. § 45:14B-8 (West 2009):

Nothing in this act shall be construed to prevent qualified members of other professional groups such as physicians, osteopaths, chiropractors, members of the clergy, authorized practitioners, attorneys at law, social workers or guidance counselors from doing work of a psychological nature consistent with the accepted standards of their respective professions . . . .

In recognizing the expansiveness of the attorney's duty to counsel, the Michigan statute explains:

This part does not prohibit a certified, licensed, registered, or other statutorily recognized member of any profession including a lawyer, social worker, school counselor, or marriage counselor from practicing his or her profession as authorized by law.<sup>78</sup>

Among the states where the statutes define an open category of professionals, judicial opinions have taken the liberty to clarify that attorneys are necessarily included in this group. For example, in *Alonzo v. Blue Cross of Greater Pennsylvania*,<sup>79</sup> the court for the Eastern District of Pennsylvania explained that the statute, which applies to "qualified members of other professions," equally applies to attorneys:

[T]his section . . . allows individuals like [plaintiff] . . . to offer psychological services without first obtaining a license from the state as long as he does not hold himself out to the public as a "psychologist." It similarly permits ministers, lawyers, and other professionals to do "work of a psychological nature" without first obtaining a license from the State of Pennsylvania.<sup>80</sup>

The provisions that allow attorneys and other professionals to use psychological techniques, despite the lack of required training and licensure, nearly all recognize these rules as exemptions<sup>81</sup> or exceptions<sup>82</sup> to a licensing requirement. In some jurisdictions, the statutes recognize that attorneys and other professionals are permitted to use psychological

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<sup>78</sup> MICH. COMP. LAWS § 333.18214(4) (2009).

<sup>79</sup> 611 F. Supp. 310 (E.D. Pa. 1984).

<sup>80</sup> *Id.* at 314.

<sup>81</sup> *E.g.*, ARIZ. REV. STAT. § 32-2075(c) (2008) (permitting nonpsychologist professionals to use psychological techniques as an "exemption" to the rule); CAL. BUS. & PROF. CODE § 2908 (Deering 2009) (same); HAW. REV. STAT. ANN. § 465-3 (Michie 2009); IDAHO CODE § 54-2303 (Michie 2009) (same). The state of Vermont, for example, elected to place attorneys in an exempt status, while it classified other persons within a category of exceptions. *Compare* VT. STAT. ANN. tit. 26, § 3005(a) (2009) (listing lawyers as exempt), *with id.* § 3004 (identifying exceptions).

<sup>82</sup> *E.g.*, GA. COMP. R. & REGS. R. 510-10-04 (2009) (titing the provision "Exception to Unlicensed Practice").

techniques, recognized as such.<sup>83</sup> Others, however, explain that these methods are properly defined as the practice of the other profession by virtue of the fact that the techniques are necessary to carry-out the non-psychologist's professional duty.<sup>84</sup> In West Virginia, for example, a lawyer who uses "certain psychological techniques, procedures, methods, and principles," is not considered to be engaged in the "practice of psychology," as long as she is engaging in the profession of law in good faith.<sup>85</sup>

Despite the different approaches, almost all of the definitions recognize the reality that psychology necessarily "overlaps" with nonpsychological professional disciplines and that a literal reading of psychology licensing laws would actually prevent the operation of these other professions.<sup>86</sup> In the Illinois Clinical Psychologist Licensing Act, the legislature observed that the strict interpretation of the law could prevent even self-help groups or programs from functioning.<sup>87</sup> Consequently, no matter how detailed a jurisdiction's definition of psychology, those that recognize the necessary overlap nevertheless authorize professionals, like attorneys, to use psychology techniques.

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<sup>83</sup> *E.g.*, HAW. REV. STAT. ANN. § 465-3(a) (Michie 2009) (permitting professionals like attorneys to render services such as "psychotherapy") & 465-3(b) (allowing "any psychological activities" defined in the Act); ALASKA STAT. § 08.86.180(b)(3) (Michie 2009) (permitting qualified members of other professions to perform "work of a psychological nature"); MISS. CODE ANN. § 73-31-27(1)(d) (2008) (same); CAL. BUS. & PROF. CODE § 2908 (Deering 2009) (same); IDAHO CODE § 54-2303(5) (Michie 2009) (same); N.J. STAT. ANN. § 45:14B-8 (West 2009) (same); 63 PA. CONS. STAT. § 1203(3) (2009) (same); KAN. STAT. ANN. § 74-5344(a) (2008) (same).

<sup>84</sup> *E.g.*, KY. REV. STAT. ANN. § 319.015 (Michie 2009) (distinguishing that "services consistent with the laws regulating their professional practice and the ethics of their profession" are "activities not included in the practice of psychology").

<sup>85</sup> W. VA. CODE ANN. § 30-21-2(e)(5) (Michie 2009).

<sup>86</sup> *E.g.*, MISS. CODE ANN. § 73-31-27(1) (2008) ("The practice of psychology as defined by this act overlaps with the activities of other professional groups and it is not the intent of this act to regulate the activities of these professional groups.").

<sup>87</sup> *E.g.*, 225 ILL. COMP. STAT. 15/3-(g) (2009):

Nothing in this Act shall prohibit individuals not licensed under the provisions of this Act who work in self-help groups or programs or not-for-profit organizations from providing services in those groups, programs, or organizations, provided that such persons are not in any manner held out to the public as rendering clinical psychological services . . . .

Among state legislatures that allow the use of psychological methods by non-psychologist professionals, they have also imposed various limitations on this excepted use of psychology. The minimal prerequisites include (1) that an attorney's use of the psychological technique occurs "within that person's scope of practice";<sup>88</sup> (2) that the attorney must be guided by the ethical guidelines of his or her own profession in implementing any psychological technique;<sup>89</sup> and (3) that the attorney must not claim to be a psychologist, possess a psychology license, or have the training to enable the practice of psychology.<sup>90</sup>

On the issue of holding one's self out as a psychologist, some of the statutes recognize that any attorney could implicitly lead a client to believe she is a licensed psychologist even if this is never explicitly clarified.<sup>91</sup> Court opinions suggest that this may occur if the attorney talks about having received some college training in psychology without providing the proper disclaimers.<sup>92</sup> The notice requirements of various jurisdictions provide a framework for the successful protection of client autonomy and compliance with the state statutes. The script in Appendix B incorporates these requirements in a useful example.

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<sup>88</sup> ARIZ. REV. STAT. § 32-2075 (2008). Hawaii modifies the language by permitting the attorney to use psychological techniques, so long as "such activities are incidental to the person's lawful occupational purpose." HAW. REV. STAT. ANN. § 465-3(b) (Michie 2009).

<sup>89</sup> *E.g.*, MO. REV. STAT. § 337.045(1) (2009) (requiring that attorneys' "work of a psychological nature" must be "consistent with their training and consistent with any code of ethics of their . . . profession").

<sup>90</sup> *E.g.*, ALASKA STAT. § 08.86.180(b)(3) (Michie 2009) (permitting use of psychological techniques:

If the person does not hold out to the public by a title or description of services incorporating the words "Psychology," "Psychological," "Psychologist," "Psychometry," "Psychometrics," "Psychometrist," "Psychotherapist," "Psychoanalysis," "Psychoanalyst," or represents to be trained, experienced, or qualified to render services in the field of psychology.

In a far less detailed manner, Arizona's statute simply prohibits a nonpsychologist from "claim[ing] to be a psychologist." ARIZ. REV. STAT. § 32-2075 (2008).

<sup>91</sup> *E.g.*, CAL. BUS. & PROF. CODE § 2908 (Deering 2009) (requiring that attorneys not "state or imply that they are licensed to practice psychology"); DEL. CODE ANN. tit. 34 § 3519(b) (2009) (prohibiting the implication that one is a psychologist or so licensed); N.J. STAT. ANN. § 45:14B-8 (West 2009) (same).

<sup>92</sup> *E.g.*, *Markis v. Bureau of Prof'l & Occupational Affairs*, 599 A.2d 279, 282 (Pa. Commw. Ct. 1991) (addressing a situation where the massage therapist who provided advice expected that the recipient of such advice would know he was not licensed based on "common sense").

With these considerations in mind, military and civilian attorneys should feel more comfortable exploring and exercising the duty to assist clients with PTSD. The following subsections provide an integrated approach to evaluation and intervention.

### III. A Screening Method to Identify PTSD “Red Flags” for Planning Counseling Interventions or Possible Referrals to Mental Health Professionals

Because veterans with PTSD are often unaware of or mask their symptoms, lawyers may be the first to identify the need for evaluation and treatment.<sup>93</sup> In the field of military justice, active duty clients with PTSD are often labeled “problem Soldiers” by their chain-of-command based on irresponsible behavior stemming from PTSD.<sup>94</sup> During mandatory legal counseling for non-judicial punishment,<sup>95</sup> defense attorneys are in a unique position to observe PTSD “red flags.”<sup>96</sup> Here, even before the servicemember has seen a clinician, the attorney often has the benefit of past counseling statements and information about prior behavior and infractions.<sup>97</sup> By identifying criminal behavior trends and

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<sup>93</sup> Seamone, *supra* note 1, at 147–48.

<sup>94</sup> *E.g.*, ERIC NEWHOUSE, FACES OF COMBAT PTSD & TBI: ONE JOURNALIST’S CRUSADE TO IMPROVE TREATMENT FOR OUR VETERANS 4 (2008) (recounting the comment of Steve Robinson, Director of Veterans Affairs for Veterans for America, who said, “Too many vets suffering from PTSD are being treated with disciplinary action.”).

<sup>95</sup> U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE ¶ 3-18c, at 8–9 (16 Nov. 2005) [hereinafter AR 27-10] (recognizing the Soldier’s right to consult with a defense attorney prior to the acceptance or rejection of company or field grade-imposed nonjudicial punishment).

<sup>96</sup> While attorneys may not be capable of diagnosing PTSD, a working knowledge of the condition will permit the attorney to identify “red flags”—indications that further analysis will help determine the extent of the client’s condition—during the course of their interaction with clients. *E.g.*, DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 4.

<sup>97</sup> Defense attorneys, by virtue of their function, often learn more about a client, in the full context of that client’s behavior and criminal history, than mental health professionals will learn given the limitations of the clinicians’ professional relationship with the same client. *E.g.*, James A. Cohen, *The Attorney-Client Privilege, Ethical Rules, and the Impaired Criminal Defendant*, 52 U. MIAMI L. REV. 529, 537 (1998) (“The defense lawyer, unlike the mental health expert, judge, or prosecutor, observes the client in the context of the particular facts and law of the case, and, thus, is in a position to know the extent to which the client can rationally understand and cooperate.”). *See also* Major Jeremy A. Ball, *Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Service Members*, ARMY LAW., Dec. 2005, at 1, 5 (“Unlike the members of a

assisting the combat veteran in receiving necessary treatment, the attorney can intervene early on, *before* the command initiates separation proceedings.<sup>98</sup> Otherwise, some active duty servicemembers may only have the opportunity to visit with mental health professionals during the chapter process, when it is too late for meaningful intervention.<sup>99</sup>

In addressing family law issues as well, the legal assistance attorney is also in a unique position to observe PTSD “red flags.” The veteran’s family history may provide deep insights into his or her condition. A servicemember contemplating divorce or responding to the spouse’s initiation of divorce can describe transformation of the marriage since the return from combat, including his or her own behaviors. If the veteran has become distant from the family or experienced other behavior symptomatic of PTSD, these “red flags” can also be persuasive indicators of the need for clinical intervention.

#### A. The Lawyer’s Capacity Analysis Model for Elder Law Issues

A criminal defense attorney, who represents a client but fails to learn of existing PTSD, may have engaged in malpractice, simply by failing to discover evidence that would contribute to that client’s defense.<sup>100</sup> This rule imposes some obligation on the criminal attorney to detect the existence of psychological conditions and potentially to evaluate the extent of the condition with the aid of a qualified clinician. This is little different from the personal injury attorney’s obligation to consider whether her client suffered from PTSD as a result of an accident.<sup>101</sup>

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sanity board, who may observe the accused for only a handful of hours, the defense counsel works with the accused on a regular basis over an extended period of time.”)

<sup>98</sup> This assumes that the client has consented to such efforts. *See* AR 27-26, *supra* note 49, R. 1.6(a) (mandating nondisclosure of “information relating to the representation of a client” absent the client’s consent).

<sup>99</sup> U.S. DEP’T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS ¶ 1-32*b*, at 14 (6 June 2005) [hereinafter AR 635-200] (mandating “mental status evaluations conducted by a psychologist, or master level, licensed clinical social worker” prior to any separation of a Soldier for misconduct); *see also* Seamone, *supra* note 1, at 150 n.28 (discussing the provisions of 38 C.F.R. § 3.12(b) (2009), which bar veterans benefits based on characterization of discharge or acts of misconduct, and commentators’ reflections on the effects of these regulatory provisions).

<sup>100</sup> *E.g.*, Seidel v. Merkle, 146 F.3d 750, 755–57 (9th Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999) (finding defense counsel “constitutionally ineffective” for failing to investigate the defendant’s PTSD symptoms and organic brain damage).

<sup>101</sup> *E.g.*, Robert H. Aaronson et al., *Attorney-Client Confidentiality and the Assessment of Claimants who Allege Post Traumatic Stress Disorder*, 76 WASH. L. REV. 313, 341

Even in the latter scenario, the plaintiff's attorney is expected to know the diagnostic criteria for PTSD and resort to a PTSD checklist to identify the need for further investigation.<sup>102</sup>

Legal assistance and trial defense attorneys should preliminarily screen clients for PTSD and Traumatic Brain Injury (TBI) based, first, on the prevalence of undiagnosed conditions, and second, on the potential for these conditions to adversely affect the attorney-client relationship. While TBI is not the focus of this article, TBI can appear in tandem with PTSD<sup>103</sup> and can influence a client's judgment in a number of ways.<sup>104</sup> Screening for TBI can be done quickly, in a manner that could indicate further need for a full neuropsychological workup.<sup>105</sup> Given the ease of screening, evaluation for TBI should also be included in the lawyer's initial PTSD screening.

For good reason, this article does not advocate the use of complex psychological testing instruments by attorneys. Attorneys should avoid formal testing because they lack the training to accurately interpret results or to attach proper weights to factors that can affect the test outcomes.<sup>106</sup> These variables often include "limits to the validity of tests; impact of mental status; education level; [and] environmental variables (*e.g.*, lighting, noise . . . )."<sup>107</sup> There is also always a danger that

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(2001) (observing that "[d]iscussion with the client's attorney about potential [PTSD] symptoms may be necessary to protect the client's rights").

<sup>102</sup> *Id.* at 317 (expecting lawyers to evaluate PTSD criteria in a checklist format).

<sup>103</sup> *E.g.*, LAURIE B. SLONE & MATTHEW J. FRIEDMAN, *AFTER THE WAR ZONE: A PRACTICAL GUIDE FOR RETURNING TROOPS AND THEIR FAMILIES* 193 (2008) (recognizing the potential that Soldiers will develop both PTSD and TBI, especially after sustaining a physical injury).

<sup>104</sup> *E.g.*, KEITH ARMSTRONG ET AL., *COURAGE AFTER FIRE: COPING STRATEGIES FOR TROOPS RETURNING FROM IRAQ AND AFGHANISTAN AND THEIR FAMILIES* 142 (2006) ("Survivors of TBI can have extreme difficulty taking in new information and retrieving it when needed. They can also have problems with attention, concentration, and organizing information.").

<sup>105</sup> See 3 Question DVBIC TBI Screening Tool Instruction Sheet, available at <http://dvbic.gbkdev.com/images/pdfs/3-Question-Screening-Tool.aspx> [hereinafter MTBI Instruction Sheet] (explaining that "the purpose of [the DVBIC TBI] screen is to identify service members who may need further evaluation for mild traumatic brain injury (MBTI)" and that "a clinical interview is required," regardless of the results, because, "[t]he MBTI screen alone does not provide diagnosis of MBTI").

<sup>106</sup> DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 4 ("It is generally not appropriate for lawyers to use formal clinical assessment instruments . . . as they are not trained in using and interpreting these tests, the information yielded is limited, and the results may be misleading.").

<sup>107</sup> *Id.* at 28.

attorneys will attach far too much weight to test results that clinically-trained professionals would interpret differently in light of other clinical impressions.<sup>108</sup> This article, instead, advocates the middle-ground recommended by the American Bar Association's Committee on Aging and by the American Psychological Association. Their guidance for attorneys who assist elderly patients is particularly useful in distinguishing a permissible role in lawyer assessment of mental conditions.

These two organizations have recognized that elderly clients require attorneys to be detectives, regularly searching for signals of impaired decision-making capacity and competence.<sup>109</sup> While attorneys have a role in assessing clients' behavior and cognition, this role is limited to the use of preliminary *legal* screening techniques.<sup>110</sup> Much like the rationale behind the psychology licensing statutes, the legal screening technique is necessary insofar as it assists attorneys in carrying out their official duties.<sup>111</sup> While clinicians could easily criticize attorney screening as incomplete or perfunctory, to lawyers, the results of attorney screening are acceptable because they meet legal standards and do not have significance at a clinical level.<sup>112</sup> In recognizing the attorney's limited assessment function, one clinician observed,

While you will be directly addressing and responding to the client's emotional and psychological state, your goal is clearly to achieve the best outcome you can and keep the client as focused toward that goal as you are able. All your work around the client's affective needs are in

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 21; see also Silverblatt & Webster, *supra* note 61, at 24.

<sup>110</sup> Lynne Gold-Bilin & Jonathan W. Gould, *Post Traumatic Stress Disorder and the Practice of Family Law*, 19 J. AM. ACAD. MATRIMONIAL L. 17, 28 (2004):

The diagnosis of PTSD is beyond the expertise of most attorneys who do not have training in diagnosis of mental disorders. While it is important for family law attorneys to be familiar with interview-based assessment procedures designed to screen for family violence, a diagnosis such as PTSD must be made by a competent mental health professional.

<sup>111</sup> DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 9 (distinguishing between "legal" and "clinical" assessment); Gold-Bilin & Gould, *supra* note 110, at 32 ("[T]he more that is known about this syndrome, how to recognize and how it impacts clients, the better attorneys can serve those they represent.").

<sup>112</sup> DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 9.

service of that goal. This is different from having a primary objective of helping the client deal with his feelings and personal problems.<sup>113</sup>

To this end, the attorney's assessment function includes "having the tools to understand your client's psychological state and the situations that unfold, and to understand the relationship between you and your client well enough to know when and how to step in with management techniques."<sup>114</sup>

If a client has deployed to combat and experienced a traumatic event or injury, military attorneys should determine whether the client has been diagnosed or is currently receiving treatment.<sup>115</sup> If the client is not in treatment or indicates that he did not take the Post Deployment Health Assessment or follow-up assessments seriously,<sup>116</sup> the attorney should use two preliminary screening devices to address the potential for undiagnosed PTSD or TBI. Despite the potential value of these tools, this article does not support automatic screening of all combat veterans. It expects that attorneys will identify the potential value of screening when there is reason to be concerned for the client's well-being, such as indications that the client has been influenced by multiple deployments, the display of behaviors that are characteristic of PTSD symptoms, or identification of distorted and self-defeating thoughts during the course of client counseling.<sup>117</sup>

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<sup>113</sup> SANFORD M. PORTNOY, *THE FAMILY LAWYER'S GUIDE TO BUILDING SUCCESSFUL CLIENT RELATIONSHIPS* 58 (2000).

<sup>114</sup> *Id.* at 51.

<sup>115</sup> Seamone, *supra* note 1, at 180–82.

<sup>116</sup> While screening processes exist to probe for signs of combat trauma, results of these tests are of limited value when respondents conceal information. *E.g.*, SLONE & FRIEDMAN, *supra* note 103, at 50:

Although this screen is mandatory, it is acknowledged that once service members are back in the States, just about the only thing you want to do is go home. You are also bombarded with information and paperwork during this time period. This makes the results of the PDHA somewhat hard to interpret. Some returning troops will deny any problem on the PDHA, because, if they admit to them, they believe their return home may be delayed.

<sup>117</sup> *E.g.*, Seamone, *supra* note 1, at 182 (discussing the concept of "triage" in the attorney's function as PTSD first-responder, the value of military badges and awards as visual cues, and the value of "casual questions probing prior or multiple deployments").

## B. The PTSD Checklist-Military Version

Attorneys should consider the PTSD Checklist-Military Version (PCL-M) as a preliminary screening tool for PTSD.<sup>118</sup> This checklist is a 17-question test, which roughly corresponds to the diagnostic criteria in the DSM-IV-TR.<sup>119</sup> The checklist requires subjects to rate symptoms experienced within a period of time, e.g., whether, in the last month, the client suffered “[r]epeated, disturbing *memories, thoughts, or images* of a stressful military experience from the past.”<sup>120</sup> Subjects then rate the frequency of the symptom addressed with numerical scores from 1 (“Not at all”) to 5 (“Extremely”). Persons interpreting the test can use the cumulative numerical values as indications of the effectiveness of treatment or the need for more comprehensive PTSD testing.<sup>121</sup> While studies have explored the accuracy and validity of the PCL-M as a tool for PTSD diagnosis, a more accurate and valid test is the Clinician-Administered PTSD Scale (CAPS) or structured clinical interviews that explore a subject’s symptoms in far greater detail.<sup>122</sup>

The simplicity of the PCL-M and its striking similarity to the DSM-IV-TR’s diagnostic criteria make it far less likely that a client might read into the questions and fake the disorder when tested. Critics of attorneys who use PTSD as part of their litigation strategy often remark that

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<sup>118</sup> The “M” designation in “PCL-M” represents the test version which has been tailored to the military. *E.g.*, Frank W. Weathers et al., *The PTSD Checklist (PCL): Reliability, Validity, and Diagnostic Utility* 1 (Paper Presented at the Annual Meeting of International Society for Traumatic Stress Studies (San Antonio, Tex., Oct. 1993)), available at [www.pdhealth.mil/library/downloads/PCL\\_sychometrics.doc](http://www.pdhealth.mil/library/downloads/PCL_sychometrics.doc) (last visited Jan. 7, 2010) (noting that the PCL-M contains “reexperiencing symptoms written specifically for military experience” as opposed to the PCL-C civilian version).

<sup>119</sup> *E.g.*, *Primer, PCL: Post-Traumatic Stress Disorder (PTSD) Checklist*, PDH-CPG Tool Kit Pocket Cards ver. 1.0, at 1 (Dec. 2003) (“The PCL is a standardized self-reporting scale for PTSD comprising 17 items that correspond to key symptoms of PTSD.”).

<sup>120</sup> PTSD Checklist-Military Version (PCL-M), question 1, available at <http://www.pdhealth.mil/guidelines/appendix4.asp>; see also Appendix C to this article.

<sup>121</sup> Weathers et al., *supra* note 118, at 1 (“For example, in order to assess symptom severity repeatedly in the context of a treatment protocol, the time frame of one month can be changed to ‘the past week’ instead of ‘the past month.’”).

<sup>122</sup> *E.g.*, Aaron Levin, *VA to Keep Using DSM to Diagnose PTSD in Vets*, PSYCHIATRIC NEWS, July 21, 2006, at 1, 1 (noting the benefits of “structured or semistructured interviews such as the Clinician-Administered PTSD Scale (CAPS), the Structured Clinical Interview for DSM-IV (SCID), the PTSD Symptom Scale-Interview Version (PSS-I)”).

patients can study-up on the disorder and fake it for their own benefit.<sup>123</sup> However, even the staunchest critics of attorney involvement in assessment distinguish impermissible behavior from genuine attempts at assessment. Their concerns revolve around those lawyers who discuss testing validity measures with a client, provide the client with copies of the test to study, feed answers to the client, or coach the client on techniques to use during a mental health assessment.<sup>124</sup> In these situations, “[t]o the extent that lawyers assist in the *creation* of symptoms that did not otherwise exist, they violate the Rules of Professional Conduct.”<sup>125</sup> These impermissible and unethical measures are far removed from legitimate inquiry into the client’s existing condition and symptoms:

Lawyers may properly provide information about the diagnosis and symptoms of PTSD so that clients might determine whether they have experienced such symptoms. A plane-crash victim who has had nightmares or is afraid to take airplane trips may not realize such effects can form the basis for a PTSD diagnosis or resulting damages. Discussion with the client’s attorney about potential symptoms may be necessary to protect the client’s rights. For example, the attorney might ask specific questions about unusual fears, dreams, relationship problems, inability to engage in certain activities, and other difficulties that occur post-trauma.<sup>126</sup>

Attorney use of the PCL-M in a non-suggestive manner should provide the attorney with a preliminary identification of PTSD “red flags” for further investigation. A copy of the PCL-M and its instructions are reproduced at Appendix C for ease of reference.

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<sup>123</sup> *E.g.*, Aaronson et al., *supra* note 101, at 335 (“Individuals can malingering PTSD symptoms on their own, with the assistance of reading material, or with the benefit of coaching by relatives, friends, or counsel.”).

<sup>124</sup> *Id.* at 341 (“[A]n attorney actually telling a client to study a list of symptoms, a book on PTSD, or sample depositions of clients who successfully obtained a PTSD diagnosis would appear to constitute impermissible coaching.”).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

### C. The Defense & Veterans Brain Injury Center TBI Screening Tool

Attorneys with awareness that a client suffered any type of injury during a deployment or training exercise should use the Three Question TBI Screening Tool developed by the Defense and Veterans Brain Injury Center (DVBIC) to assess clients who potentially suffer from TBI.<sup>127</sup> The brief form inquires into the client's history of injury during combat and the attributes of the injury that require a more intensive clinical analysis.<sup>128</sup> The developers of the instrument emphasize that it is not a means of diagnosis, but rather a means to "identify service members who may need further evaluation for mild traumatic brain injury (MTBI)."<sup>129</sup> For the same reasons as the PCL-M, the DVBIC screening tool is an ideal way for the attorney to identify "red flags" without substantial risk of improper suggestion or misinterpretation. A copy of the DVBIC TBI Screening Tool and its instructions are reproduced at Appendix D.

In an environment where trial defense attorneys are likely to see clients with PTSD or TBI, and one in which both of these conditions can potentially have value at a court-martial, administration of these two brief assessment tools can assist in meeting that counsel's duty of preliminary inquiry into a client's mental condition. By documenting the attorney's efforts to meet this responsibility, these preliminary screens can also help avert claims of ineffective assistance because of a failure to investigate, especially where the attorney has determined that a sanity board is not desirable under the individual circumstances of the case.

### D. Competency Determinations Under Rule 1.14

A diagnosis of PTSD is not the same as incompetence or insanity. Even if a client suffers from severe PTSD that results in a brief psychotic episode, he may still be found to "appreciate the nature and wrongfulness" of such behavior.<sup>130</sup> Posttraumatic Stress Disorder

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<sup>127</sup> See 3 Question DVBIC TBI Screening Tool, available at [www.DVBIC.org](http://www.DVBIC.org), (reproduced at *infra* Appendix D).

<sup>128</sup> *Id.*

<sup>129</sup> MTBI Instruction Sheet, *supra* note 105.

<sup>130</sup> Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 191 MIL. L. REV. 67, 94 (2007) (discussing the sanity board's conclusion in *United States v. Thomas*, 56 M.J. 523, 525 (N-M. Ct. Crim. App. 2001)). For this reason, "The accused must recognize that his chances for success when raising PTSD as a defense are slim." *Id.* at 104.

screening must, therefore, be distinguished from the determination of whether the client's condition is a detriment to his or her representation. Questions of competency may never arise with a particular PTSD client, and this article does not recommend conducting a competency determination as a matter of course in every preliminary interview. Regardless of how PTSD fits into a particular case, attorneys may have an ethical obligation under Rule of Professional Conduct 1.14 or its civilian analogue to inquire into the competence of the client when there is a basis to believe the client cannot meaningfully assist in his own defense. Severe cases of PTSD may, at some point, necessitate the attorney's consideration of the client's competency.

To this end, Army Rule of Professional Conduct 1.14 provides:

**Rule 1.14 Client Under a Disability**

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.<sup>131</sup>

The Army text and comments are lifted practically verbatim from the ABA's *Model Rules of Professional Responsibility*<sup>132</sup> and do not seem to reflect any modification due to the unique nature of military service.<sup>133</sup> Rule 1.14 imposes an obligation on legal assistance attorneys and criminal defense attorneys alike, especially considering the mandate to carry on as normal an attorney-client relationship as possible even when the client suffers from a mental affliction.

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<sup>131</sup> AR 27-26, *supra* note 49, R. 1.14.

<sup>132</sup> The only difference between the ABA Rule and the Army's Rule is the removal of a portion of the final comment, in which the ABA rules describe the impact of an attorney's consideration of the disposition of property.

<sup>133</sup> AR 27-26, *supra* note 49, at 1, Item 7b, describing how the ABA rules were "the basis" for the Army Rules and explaining various military-based reasons for deviations from the ABA Rules.

Military attorneys who observe serious effects of PTSD on their clients must consider how the condition might impact the attorney-client relationship. This requires a degree of work on the attorney's part. Prior to 2002, ABA Rule 1.14 was criticized for its lack of specific guidance on how to make a preliminary determination of competence, which would indicate the need for expert consultation or other action.<sup>134</sup> The ABA's 2002 revisions to the Model Rules finally provided much-needed guidance.<sup>135</sup> The Army Rules have not yet incorporated these revisions, but attorneys might benefit from these new standards.

The revised ABA Rule 1.14 now states:

#### **1.14 Client With Diminished Capacity**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to

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<sup>134</sup> *E.g.*, DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 8 (recognizing that revisions to the Rule provide recommendations "for the first time" since the Rule's inception).

<sup>135</sup> *Id.*

reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.<sup>136</sup>

The most significant revisions to the Rule occurred in its comments, which provide attorneys with practical guidance for evaluating whether the client's condition is sufficient to warrant referral to a mental health professional.<sup>137</sup> Comment 6, which is directly incorporated from an elder law article by Peter Margulies,<sup>138</sup> states:

In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of the state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.<sup>139</sup>

Together, the revisions to the Rule and its comments "acknowledge the lawyers' assessment functions, and, indeed, suggest a duty to make informal capacity judgments in certain cases."<sup>140</sup>

In 2005, the American Bar Association Commission on Law and Aging teamed with the American Psychological Association to create an assessment tool for attorneys investigating client competency.<sup>141</sup> Addressing the concerns raised by Rule 1.14, the "Competency Worksheet for Lawyers" is a formal checklist, which requires the attorney to observe the client's functioning at a cognitive, emotional, and behavioral level.<sup>142</sup> After appraising the client's understanding of legal concepts and decisions in the case, the attorney rates the severity of

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<sup>136</sup> ABA MODEL RULES, *supra* note 49, R. 1.14.

<sup>137</sup> *Id.* cmts. to R. 1.14.

<sup>138</sup> See generally Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 *FORDHAM L. REV.* 1073 (1994).

<sup>139</sup> *Id.* cmt. 6 to R. 1.14.

<sup>140</sup> DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 8.

<sup>141</sup> See generally *id.*

<sup>142</sup> *Id.* at 29–33.

mental problems and identifies specific actions to address them, which can include consultation or referral to a mental health professional.<sup>143</sup>

The Competency Worksheet for Lawyers was initially tailored to address legal issues that commonly arise during the representation of older patients in a civil law capacity, such as contractual, donative, or testamentary capacity.<sup>144</sup> Because the framework is equally viable in addressing the capacity of a PTSD client to make crucial decisions in a family or criminal law matter, a modified PTSD Competency Worksheet for Lawyers is included with these materials at Appendix E.<sup>145</sup> Together, the PCL-M, the DVBIC Screening Tool, and the PTSD Competency Worksheet for Lawyers (if needed) offer a comprehensive package to meet the attorney's responsibilities to preliminarily screen clients for PTSD-related issues.

More challenging than screening, however, is the attorney's method for dealing with limiting symptoms of PTSD that arise during the course of legal representation. The following section describes how attorneys can effectively plan for such occasions with a focus on the individual needs of a PTSD client.

#### IV. A Method to Identify PTSD "Psycholegal Soft Spots"

A "psycholegal soft spot" is any phase or issue in the legal process that could subject a client to stress or tension.<sup>146</sup> In criminal law, these

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 31–32 (addressing a range of elder law issues and legal transactions).

<sup>145</sup> Without specific reference to the modified rule or its standard, in addressing the assessment of an R.C.M. 706 sanity board, one military author has recognized, "only the defense counsel has the ability to assess whether or not the accused is truly able to assist in the defense of the case over a longer period of time." Ball, *supra* note 97, at 5. Major Ball further suggests that counsel can use a similar list of questions to assist them in making their individual determination. *Id.*

<sup>146</sup> *E.g.*, Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 43 (1997):

Whereas the concept of legal soft spots refers to factors in a client's affairs that may give rise to future legal trouble, the concept of psychosocial soft spots might include the identification of social relationships or emotional issues that ought to be considered in order to avoid conflict or stress.

soft spots normally include withstanding cross-examination or any type of procedure that poses a threat to the client's autonomous decision-making.<sup>147</sup> In family law, they may include "a request to modify a child custody agreement,"<sup>148</sup> the drafting of a will in which family members are intentionally excluded,<sup>149</sup> or a host of other events.<sup>150</sup> Based on the intense dread that arises from their condition, veterans with PTSD will likely encounter all of the non-military soft spots facing litigants.<sup>151</sup> Throughout the representation, in fact, the PTSD client may be predisposed to view even "minor events" in "an intensely negative light."<sup>152</sup> However, in addition to standard psycholegal soft spots, the client will likely face "PTSD soft spots" uniquely oriented to their combat experience.

Similar to the self-sabotaging capital defendant,<sup>153</sup> a client with PTSD may view the negative effects of the court-martial process or a pending divorce as a form of deserved punishment, to which he or she will easily acquiesce without attorney intervention. Without careful self-assessment, a client may not be able to identify these soft spots in advance.<sup>154</sup> Despite this obstacle, an attorney can gain a better understanding of litigation-specific PTSD soft spots by exploring the

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Here, the authors further distinguish that such a soft spot may "simply be a recognition that a particular type of legal proceeding . . . often places clients under severe psychological or emotional distress." *Id.*

<sup>147</sup> Astrid Birgden & Tony Ward, *Pragmatic Psychology Through a Therapeutic Jurisprudence Lens: Psycholegal Soft Spots in the Criminal Justice System*, 9 PSYCH. PUB. POL'Y & L. 334, 356-57 (2003) (identifying "parole decisions based on risk assessments" and hearings addressing the client's "competence to stand trial" as psycholegal soft spots).

<sup>148</sup> Stolle et al., *supra* note 146, at 43.

<sup>149</sup> Dennis P. Stolle, *Advance Directive, AIDS, and Mental Health: TJ Preventive Law for the HIV-Positive Client*, 4 PSYCH. PUB. POL'Y & L. 854, 862 (1998).

<sup>150</sup> E.g., PORTNOY, *supra* note 113, at 69-70 (identifying eight "common junctures in the legal process that set off reactions in clients, ranging from the "serving of papers" to "conferences involving spousal contact").

<sup>151</sup> "Combat PTSD victims have an expectation for the worst case scenario. It is not necessarily the moment that is so troubling but rather an expectation of what will happen in the future." ASHLEY R. HART II, AN OPERATOR'S MANUAL FOR COMBAT PTSD: ESSAYS FOR COPING 6 (2000).

<sup>152</sup> *Id.* at 53. At the same time, such dread, if detected early during the planning process, can "be relabeled as a cue to use coping techniques. . ." *Id.* at 54.

<sup>153</sup> See DEATH PENALTY GUIDELINES *supra* note 67, cmt. to Guideline 10.5.

<sup>154</sup> ARMSTRONG ET AL., *supra* note 104, at 85 ("Particular issues or situations that upset [a Soldier] more easily than others are called "red flag moments." Making a list of these red flag moments can prepare [the Soldier] to be on alert for an intense reaction of anger before it happens.").

client's reactions to previews of the litigation phases and developing contingency plans. In a very real way, the planning process can often prevent a client from experiencing overwhelming reactions to PTSD triggers or moderate the intensity of such reactions.<sup>155</sup> In this context, "The mere acknowledgement of uncomfortable feelings may suffice to render such feelings more manageable."<sup>156</sup>

Clinician Keith Armstrong and his colleagues, in their practical text *Courage After Fire*, recommend various considerations for an effective PTSD trigger awareness plan. These suggestions can easily be modified to address a client's PTSD-related psycholegal soft spots. Figure 5, below, provides categories of triggers that attorneys should explore with clients for this purpose.<sup>157</sup>

Prompts for PTSD Trigger Awareness Plan
<p><u>Litigation Trigger List:</u> (Evaluate Issues that Would Cause Anxiety if Those Matters Arose; Rate Expected Anxiety Level from 1-10; Identify the Physical Reaction You Expect to Experience for Each Trigger) (Identify Related Thoughts During Reactions.):</p> <ul style="list-style-type: none"> <li>Photographs (Specify) (Rate) (Physical Reactions) (Related Thoughts)</li> <li>Letters</li> <li>Content of Testimony</li> <li>Seeing a Witness</li> <li>Seeing a Spectator in the Courtroom</li> <li>Discussions of Potential Defenses by Judge, Prosecutor, Plaintiff, Defendant, Attorney</li> <li>Smells or Sounds</li> <li>Anniversary Dates Expected During Representation</li> <li>Mental Images Unrelated to Litigation Expected</li> </ul>
<p><u>Measures to Decrease Anxiety:</u> (For each of the above issues, propose a method that could reduce or eliminate the anxiety specific to each of these issues and rate the expected success rate for the measure. For example, if substituting a positive mental image, like a trip to the beach, would decrease anxiety indicate the positive image and the rating for it.)</p>
<p><u>External Factors</u> (List the Expected Frequency of Activities and the Expected Level of Adherence to Estimated Frequency 1-10):</p> <ul style="list-style-type: none"> <li>Daily Hours of Sleep Planned (Specify) (Rate)</li> <li>Types of Exercise Planned</li> <li>Social Activity Planned</li> <li>Participation in Group or Individual Therapy Planned</li> </ul>

**Fig. 5. Prompts for PTSD Trigger Awareness Plan**

<sup>155</sup> *Id.* (observing that the planning process can be used to "prevent" red flag moments).

<sup>156</sup> Silver, *supra* note 21, at 296.

<sup>157</sup> These measures were adapted from ARMSTRONG ET AL., *supra* note 104, at 72–73, 77, 80, 83, 88–89.

As depicted above, the attorney should ask the client to consider his anticipated reactions to particular pieces or evidence or segments of testimony that may inevitably come to light at trial. With such knowledge, the attorney can identify areas to approach in a more cautious manner, limiting the potential for retrauma of the client.

Attorneys can further explore specific responses with similar tools. If a client already reacted to a litigation trigger, such as an emotional response to the reading of the charges or the receipt of the petition for divorce or separation, each reaction can be evaluated with a rating sheet like the "Anger Rating Sheet" summarized in Figure 6, below:<sup>158</sup>

<u>Anger Rating Sheet</u>
<p><u>General Likes and Dislikes About my Anger:</u></p> <ul style="list-style-type: none"> <li>• Likes: <i>E.g., "It gives me a rush, makes me feel 'pumped.'"</i></li> <li>• Dislikes: <i>E.g., "Sometimes I feel out of control."</i></li> </ul> <p><u>For a Specific Situation. e.g., "A coworker accidentally spilled some of his coffee onto my shoe. I yelled, called him an idiot, and then left the meeting." Anger Ruler Rating (1-10) = 6:</u></p> <p>What I did (behaviors): <i>e.g., "I yelled and stormed out of the room."</i></p> <p>What I said (statements/words): <i>e.g., "You idiot."</i></p> <p>What I thought (thoughts): <i>e.g., "That idiot is so clumsy. He could make a serious mistake."</i></p> <p>What I felt (emotions): <i>e.g., "Unsure, maybe scared, very irritated and annoyed."</i></p> <p>What I felt in my body (physical reactions): <i>"I tightened my arms and fists like I was going to hit him, and I could feel my heart racing."</i></p> <p><u>What I Could Have Done Differently?</u></p> <p>What could I have done to decrease my anger? (behaviors): <i>e.g., "I could have taken a time-out."</i></p> <p>What could I have said to decrease my anger (statements/words): <i>e.g., "I could have made a joke about it like: 'My shoe doesn't drink coffee, it would prefer some water.'"</i></p> <p>What could I have thought that would have decreased my anger? (thoughts): <i>e.g., "It was an accident—he didn't do it on purpose. Anyone could make that mistake. It doesn't mean that he's dangerous to be around."</i></p> <p>What could I have done to help decrease the tension in my body? (physical reactions): <i>e.g., "I could have done some deep breathing or concentrated on relaxing my arms and hands."</i></p>

**Fig. 6. Sample Completed Anger Rating Sheet**

<sup>158</sup> Abbreviated from *id.* at 88–89. The complete Anger Rating Sheet and its instructions are contained in *Courage After Fire: Coping Strategies for Troops Returning From Iraq and Afghanistan and Their Families* © 2006, authored by Keith Armstrong, LCSW, Suzanne Best, Ph.D., and Paula Domenici, Ph.D. Ulysses Press granted permission to reprint these contents.

As in the case of the PTSD Trigger Awareness Plan, the Anger Rating Sheet furthers the objective of addressing productive alternatives to dysfunctional behavior that can impair the representation.

Clients and attorneys can benefit greatly from periodically revisiting the same questions over the course of the representation to determine whether the client's concerns and reactions have transformed in any measurable way.<sup>159</sup> If the client's ratings on certain issues reflect a decrease in anxiety, the attorney should devote more time to the areas where high levels of anxiety and dread have remained constant or increased.

The client's bodily sensations matter as much as words to the attorney and client alike. When clients consider potential sources of discomfort in the litigation process, or their lives in general, there will inevitably be physical and emotional responses that are difficult to define in concrete ways. These raw and undefined responses constitute the "felt sense" of a problem.<sup>160</sup> As one trauma clinician recognizes, "The felt sense encompasses a complex array of ever-shifting nuances. The feelings we experience are typically much more subtle, complex, and intricate than what we can convey in language."<sup>161</sup>

Because these senses originate from the unconscious, clients may only be able to articulate that an issue causes a particular physical sensation or makes them feel uncomfortable.<sup>162</sup> Attorneys and their clients, therefore, must remain receptive to unsettling bodily sensations that arise during discussions of a case. Without simple interventions to explore felt sensations, unrecognized feelings may accumulate into cognitive distortions and other obstacles to effective communication and decision-making.<sup>163</sup> Simple methods exist to unpack and explore "felt

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<sup>159</sup> *E.g.*, Robert S. Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN. L. REV. 98, 111 (1970) ("A total and thorough legal counseling function should contemplate the retrospective appraisal of the process at every stage. That is to say, there is a need to appraise the appropriateness and effectiveness of perception and intelligence, of calculation and decision, of planning and operation, and adjustment and outcome.").

<sup>160</sup> *E.g.*, EUGENE T. GENDLIN, *FOCUSING* 53 (Bantam Books 2d ed. 1981) (1978).

<sup>161</sup> PETER A. LEVINE, *HEALING TRAUMA: A PIONEERING PROGRAM FOR RESTORING THE WISDOM OF YOUR BODY* 49 (2005).

<sup>162</sup> *E.g.*, *id.* at 50 (observing that the notion of "not so good," can actually be defined in terms of bodily sensations as "[m]y head feels heavy[,] [m]y left shoulder is tingly[,] [a]nd my hand is warm").

<sup>163</sup> *Id.* at 54:

senses” of a problem. These methods are all based on identifying physical sensations, crystallizing them into tangible feelings, and appreciating the situations in which they arise.<sup>164</sup>

Having a PTSD Trigger Awareness Plan in hand partially meets the attorney’s planning responsibilities. Because veterans with TBI or PTSD often have problems maintaining concentration, the planning process must also foresee the possibility that the client will lose focus on key issues in the representation. The biggest recurring issues are missed appointments and the failure to track developments in a case.<sup>165</sup> Two specialized interventions can effectively address these issues: (1) encouraging the client to develop a notebook or journal specific to the litigation; and (2) enlisting the assistance of persons close to the client to act as a litigation support network when the attorney is not able to be present.

The client’s litigation notebook exists to “record contemporaneously the occurrence of significant events” and maintain continuity in the representation.<sup>166</sup> Clients can use the notebook as a single location to record appointment times and dates, express concerns about the litigation, and complete homework assignments provided by the attorney. Because clients with PTSD and TBI respond particularly well to written

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By bringing yourself back to your body, you can track the effect of [a] thought on your bodily sensations. When you’re not able to recognize the thought as a thought, the unpleasant sensations that the thought invokes may increase until you are feeling fear, anxiety, or panic. . . . If you tighten up without noticing the thought that caused tightening, your response tends to be more catastrophic, leading you to believe that something bad is going to happen.

<sup>164</sup> Effective guided exercises can be found on the fourth and fifth tracks of Peter Levine’s CD, *Healing Trauma*, respectively titled, “From ‘Felt Sense’ to Tracking Specific Sensations” and “Tracking Activation: Sensations, Images, Thoughts, and Emotions.” HEALING TRAUMA (Peter A. Levine & Sounds True 2004). An attorney could easily use this or other resources to orient a client to effective litigation planning. *E.g.*, ANN WEISER CORNELL, THE POWER OF FOCUSING: A PRACTICAL GUIDE TO EMOTIONAL SELF-HEALING (1996).

<sup>165</sup> *E.g.*, Parker, *supra* note 29, at 170 (describing “missed appointments, chronic lateness, failure to produce requested documents, and avoidance of the [attorney’s] questions” as common occurrences in the representation of traumatized clients).

<sup>166</sup> J. Sherrod Taylor et al., *Preparing the Plaintiff in the Mild Brain Injury Case*, 15 TRIAL DIPL. J. 65, 67 (1992).

instructions,<sup>167</sup> attorneys can also use the notebook to emphasize important trial preparation tasks.

Involvement of trusted third-parties is particularly important in the case of a combat veteran with PTSD or TBI:

In most TBI cases, lawyers should consider establishing a strong relationship with at least one member of the client's family or with one of the client's close friends. The family member or friend, who is not saddled with the [cognitive] impairments, is better able to promote the interests of the case than the client may be. Additionally, family members and friends may be used to reinforce the actions of counsel to ensure that the client understands more fully what is involved in this sort of litigation.<sup>168</sup>

Such recommendations also apply to elder law attorneys because they address the cognitive impairments that result from the aging process.<sup>169</sup>

This comprehensive planning approach permits veterans' counsel to preview the litigation landscape, identifying sensitive terrain that may require attorney or clinical intervention. It also provides the attorney with a method to demonstrate genuine concern for the client's situation from the outset of the representation, which is essential to a trusting relationship. Involvement of trusted third-parties permits the attorney to monitor the client and reinforce key instructions, even when the attorney is not present to keep the client on task. The next Part explores specific interventions the attorney can use to reverse the effects of cognitive distortions, anxiety, or unwanted influences on the client.

#### V. Techniques to Clarify the Client's Thinking and Enhance the Attorney-Client Relationship

“When client expectations are unrealistic or distorted, they may severely interfere with the attorney-client relationship.”<sup>170</sup> At the heart

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<sup>167</sup> *Id.* at 69 (“Giving written direction increases the probability that the TBI client will actually follow them.”).

<sup>168</sup> *Id.* at 68.

<sup>169</sup> *E.g.*, Silverblatt & Webster, *supra* note 61, at 24.

of the representation is always assisting the client in reaching an informed legal decision. To meet this goal, after the attorney has identified a client's distorted thoughts, she must intervene to enable meaningful representation:

You must be able to contain a client who is in a heightened state of excitability, whose affects are intense enough to derail the work, when acting out of inappropriate behavior or impulses has occurred or might occur, or whenever you perceive that you need to intervene in a more forceful way to hold a client in place.<sup>171</sup>

While many attorneys do not envision their role as one of "intervention," effective representation requires precisely this.<sup>172</sup>

At the very least, the attorney's obligation to a PTSD client requires techniques to help the client recognize impediments to full comprehension. In their description of attorney "reality orienting" activities, researchers observe how attorneys often expose clients to "situational realities" by identifying faulty patterns of thought and grounding the client in a more realistic alternative.<sup>173</sup> To this end, attorneys commonly help clients identify personal, legal, and emotional objectives through definition and redefinition of their goals.<sup>174</sup>

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<sup>170</sup> Elkins, *supra* note 27, at 239.

<sup>171</sup> PORTNOY, *supra* note 113, at 99.

<sup>172</sup> *Id.* at 70 ("I want you to think of yourself intervening. It will help you to focus on the moments and the circumstances that require you to actively choose what to say or do in response to a client. It's that active thought process that will enhance your client relationship skills.").

<sup>173</sup> Schoenfield & Schoenfield, *supra* note 35, at 317–20. Importantly, reality orienting can occur without concern for coming up with a cure for the client's mental condition. *Id.* at 317.

<sup>174</sup> Hugh Brayne, *Counselling Skills for the Lawyer: Can Lawyers Learn Anything from Counsellors?*, 32 L. TCHR. 137, 154 (1998) (explaining that it is necessary to specify "not just factual information," but also "emotional information," from the client because "vagueness of understood information leads to poor advice").

Attorneys also regularly help clients identify cognitive “blind-spots” in their own recitation of issues by pointing-out and exploring the client’s:

- Failure to own a problem;
- Failure to define problems in solvable terms;
- Faulty interpretation of critical experiences . . . and feelings;
- Evasions, distortions, and game playing;
- Failure to identify or understand the consequences of behavior; or
- Hesitancy or unwillingness to act on new perspective.<sup>175</sup>

These functions are little different from a counselor’s functions when guiding a patient through Cognitive Behavioral Therapy (CBT) exercises.<sup>176</sup> However, the attorney has additional obligations to a client that a counselor does not. While the counselor “accept[s] responsibility toward a client but not for the client,” the attorney must often go further to “take responsibility for the client’s problem. . . .”<sup>177</sup>

Beyond these standard interventions, more intensive measures are often required by the nature of a case. In situations involving defendants who have been charged with sexually molesting children, accused persons often display a higher degree of denial.<sup>178</sup> Whether this response is due to internal factors, such as extreme guilt, or external factors, such as fear of being labeled a pedophile, attorneys must often force the client to recognize and reverse the client’s “cognitive distortions” insofar as these distortions relate to the facts or the law.<sup>179</sup> Sometimes, such

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<sup>175</sup> *Id.* at 147.

<sup>176</sup> Seamone, *supra* note 1, Part II.E.2 (reproducing the A-B-C worksheet and describing the aims and methods of cognitive behavioral therapy).

<sup>177</sup> Brayne, *supra* note 174, at 147. See also Brigid Coleman, Note, *Lawyers who are Also Social Workers: How to Effectively Combine Two Different Disciplines to Better Serve Clients*, 7 WASH. U. J. L. & POL’Y 131, 144 (2001) (describing a prevailing “self-determination” model of therapeutic counseling that rejects therapist advice to patience).

<sup>178</sup> E.g., David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 284 (1994) (“One of the most striking features of sex offenders, particularly child molesters, is their heavy ‘denial and minimization.’”).

<sup>179</sup> *Id.* Professor Wexler observes that these distortions often take the form of “nothing happened,” “something happened but it wasn’t my idea,” or “something happened and it was my idea but it wasn’t sexual.” *Id.*

attorneys engage in role-playing where clients assume the roles of alleged victims so they can identify otherwise unacknowledged facts:

[T]he law . . . induce[s] defense lawyers to engage clients in an exercise of “cognitive restructuring,” including role reversal. For example, the defense attorney may ask the sex offender how he would vote as a juror in the case. In therapeutic jurisprudence terms, the result would be a revised legal arrangement that would restructure the role of the defense lawyer in a way that would promote therapeutic values.<sup>180</sup>

Although role-playing and other methods of psychodrama normally require the use of a trained mental health professional in a clinical setting,<sup>181</sup> individual attorneys might require the technique to effectuate their individual legal responsibilities.<sup>182</sup> As is the case with the attorney's use of other psychological techniques, “The tools of counseling are to be used only for the purposes defined in the professional obligations of lawyers.”<sup>183</sup> Common approaches for reversing the effects of cognitive distortions should be considered and implemented to address PTSD soft spots identified during the planning process.

Although various techniques are used in the clinical treatment of PTSD, this article does not advocate wholesale or indiscriminate use of Exposure Therapy (ET), Cognitive Processing Therapy (CPT), and Eye Movement Desensitization Reprocessing (EMDR) by the attorney.<sup>184</sup> While Exposure Therapy is included in the military and Department of Veterans Affairs's approach to therapeutic PTSD intervention, the essential element of reexperiencing highly traumatic events can, and

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<sup>180</sup> *Id.* at 286.

<sup>181</sup> Dana K. Cole, *Psychodrama and the Training of Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1, 37 (2001) (noting concerns that “use of psychodrama by someone other than a therapist trained in psychodrama would be inappropriate and could result in unintended consequences, such as psychological harm to the participants”).

<sup>182</sup> Wexler, *supra* note 178, at 283 (describing how it can require a “role-reversal” exercise to overcome the child molester's denial). In fact, attorneys have been encouraged to use the method for their own professional development, to improve their identification with clients or troubling aspects of a case. *See generally* Cole, *supra* note 181.

<sup>183</sup> Brayne, *supra* note 174, at 147.

<sup>184</sup> For basic descriptions of these clinical techniques, see Seamone, *supra* note 1, at II.E.1–3.

does, lead to behavioral consequences. Clients can easily become overwhelmed, and require additional interventions or medications simply to recover from the taxing effect of an exercise.<sup>185</sup> While clinicians have the ability to design stepped programs, which regulate the amount of exposure to trauma over the course of extended treatment, we cannot expect attorneys to reach this calculus as part of their legal counseling duties.<sup>186</sup> Nor should we expect attorneys to respond to negative exposure reactions the way a trained clinician would.

Although many psychology licensing statutes permit an attorney to use advanced clinical interventions,<sup>187</sup> this article recommends a more conservative approach. Attorney interventions to address the byproducts of PTSD in the course of legal representation should be limited to relaxation techniques and specialized CBT worksheets to counteract distorted thoughts. If a lawyer desires to use a technique without the guidance of a trained clinician, she can permissibly turn to a variety of commercially produced self-help texts developed by clinicians for non-clinical use. If the attorney desires to implement more advanced approaches, she should first consult with a trained clinician for guidance or incorporation of legal concerns in the therapist-client relationship.

#### A. Relaxation Techniques

At the most general level, relaxation techniques include a variety of physical exercises ranging from meditation to yoga. Relaxation and meditation exercises are valued for clearing a client's mind and bringing the client into the moment, so he has the enhanced ability to focus on the matters at hand.<sup>188</sup> In the context of PTSD, some exercises significantly

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<sup>185</sup> E.g., U.S. DEP'T OF VETERANS AFFAIRS & DEP'T OF DEF., VA/DoD CLINICAL PRACTICE GUIDELINE FOR THE MANAGEMENT OF POST-TRAUMATIC STRESS, at I-22 (2004) (observing the risk that exposure therapy can actually increase a patient's "level of distress" in some cases).

<sup>186</sup> *Id.* at I-20.

<sup>187</sup> See *supra* Part II.C.

<sup>188</sup> See, e.g., Evan M. Rock, Note, *Mindfulness Meditation, The Cultivation of Awareness, Mediator Neutrality, and the Possibility of Justice*, 6 CARDOZO J. CONFLICT RESOL. 347, 350-51 (2005):

The goal of mindfulness meditation has been described as trying to see what is. In other words, meditation is a means of cultivating an awareness of what exists in the present moment, without objective, ambition, or judgment. Practicing mindfulness meditation allows the

improve cognitive functioning. Exercises that increase breathing can undo the body's natural response to anxiety, which is to seize-up and prevent the flow of oxygen to the brain.<sup>189</sup> Another benefit of deep-breathing exercises is their value in stopping obsessive thoughts when a patient is asked to think about breathing and speak about breathing simultaneously: “[A]s cognitive science has demonstrated, we can't focus on thoughts about the past and the future and at the same time experience two or more sensations in the body at the present moment.”<sup>190</sup> Furthermore, because patients who are physically relaxed have greater awareness of their physical state at a given time, they are more likely to gain early awareness of negative bodily sensations that could advance into serious cognitive disturbances.<sup>191</sup>

As a result of these benefits, progressive muscle relaxation and deep-breathing are usually incorporated prior to, during, and after therapy sessions with PTSD patients.<sup>192</sup> The attorney can choose from among dozens of effective techniques with a client at any time to improve the client's receptiveness to legal information. Appendix F reproduces a lengthy muscle relaxation exercise recommended for combat veterans with PTSD.<sup>193</sup> Detailed techniques like this can easily be incorporated into the attorney's practice through verbal instructions or reference to a book. Alternatively, shorter techniques, such as Fred Miller's “Quieting

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development of a person's innate ability to recognize thoughts and emotions as they arise.

Professor Leonard Riskin, an advocate for the practice of mindfulness meditation by lawyers, has explained in detail the benefits of being in the present moment. See Leonard Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002).

<sup>189</sup> E.g., ARMSTRONG ET AL., *supra* note 104, at 38; *id.* at 39 (“Relaxation drills reverse the ‘fight-or-flight’ response.”).

<sup>190</sup> PAUL HANNAM & JOHN SELBY, TAKE CHARGE OF YOUR MIND: CORE SKILLS TO ENHANCE YOUR PERFORMANCE, WELL-BEING, AND INTEGRITY AT WORK 50 (2006). Breathing while counting each exhalation backwards from fifteen has also been recognized as an effective way to quiet the mind based on the same principles. FRED L. MILLER, HOW TO CALM DOWN: THREE DEEP BREATHS TO PEACE OF MIND 23–24 (2002).

<sup>191</sup> LEVINE, *supra* note 161, at 54.

<sup>192</sup> E.g., STEVEN TAYLOR, CLINICIAN'S GUIDE TO PTSD: A COGNITIVE BEHAVIORAL APPROACH 161–64 (2006) (describing the clinical use of applied relaxation techniques for patients with PTSD, including tense-release relaxation, release-only relaxation, and rapid relaxation).

<sup>193</sup> ARMSTRONG ET AL., *supra* note 104, at 45–49.

the Mind by Counting Backward” exercise in Figure 7, below, can still produce results when a client is consumed with wandering thoughts:<sup>194</sup>

- Sit comfortably and close your eyes. Then take three deep breaths to calm down and clear your mind.
- Breathing easily, inhale. Now exhale, silently saying, “fifteen.”
- Inhale again. This time while exhaling, silently say, “fourteen.”
- Continue inhaling and counting down a number with each exhale.
- After you reach zero, take a few gentle breaths, all the while noticing how you feel. When you are ready, open your eyes.

**Fig. 7. Miller’s Steps to “Quiet the Mind”**

For examples of other valuable relaxation techniques, the attorney can consult a number of publications with step-by-step instructions.<sup>195</sup> Furthermore, if the attorney is uncomfortable guiding a client through a relaxation technique, she can also use audio recordings to supplement legal counseling.<sup>196</sup> Attorneys who have these recordings loaded on an iPod or MP3 player can simply ask the client to take a short break with an exercise when needed.

Although the concept of directed breathing may, at first, seem foreign to an attorney, those familiar with military service can easily find official recognition of its benefits in marksmanship (trigger squeeze),<sup>197</sup>

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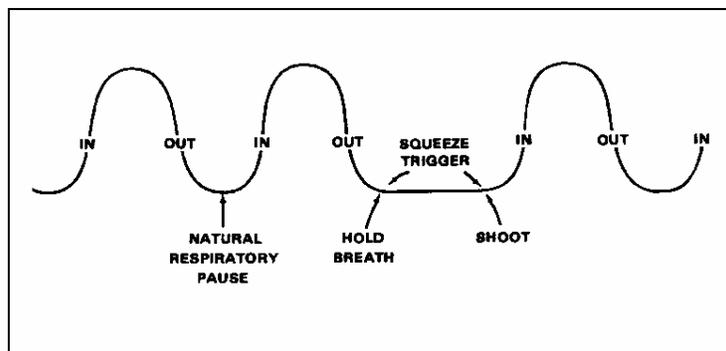
<sup>194</sup> MILLER, *supra* note 190, at 23–24.

<sup>195</sup> *E.g.*, MATTHEW MCKAY ET AL., TAKING CONTROL OF YOUR MOODS AND YOUR LIFE: A THOUGHTS AND FEELINGS WORKBOOK 57–64 (1997) (discussing relaxation techniques specifically designed for patients with dysfunctional thoughts); MILLER, *supra* note 190; MARK THORNTON, MEDITATION IN A NEW YORK MINUTE SUPER CALM FOR THE SUPER BUSY (2004); C. ALEXANDER SIMPKINS & ANNELLEN M. SIMPKINS, MEDIATION: FROM THOUGHT TO ACTION (1998) (reviewing over forty exercises); MARTHA DAVIS ET AL., THE RELAXATION AND STRESS REDUCTION WORKBOOK (5th ed. 2000).

<sup>196</sup> Many books not only describe relaxation techniques but include CD’s with guided meditation exercises. *E.g.*, SIMPKINS & SIMPKINS, *supra* note 195.

<sup>197</sup> *E.g.*, U.S. DEP’T OF ARMY, FIELD MANUAL 23-35, COMBAT TRAINING WITH PISTOLS AND REVOLVERS ¶ 2-5, at fig.2-7 (3 Oct. 1988) [hereinafter FM 23-25] (addressing “Breath Control”: “The firer must learn to hold his breath properly at any time during the breathing cycle if he wishes to attain accuracy that will serve him in combat . . . . To hold the breath properly the firer takes a breath, lets it out, then inhales normally, lets a little out until comfortable, holds, and then fires.”).

physical fitness (oxygen intake),<sup>198</sup> and warfighting.<sup>199</sup> The sophisticated pistol firing cycle depicted below, in Figure 8, is not so different from techniques that can be used in the attorney's office during counseling.



**Fig. 8 Breath Control, Firing at a Single Target<sup>200</sup>**

Recognizing the value of such exercises, the Army's *Leaders' Manual for Combat Stress Control* recommends, "[e]veryone should learn at least two relaxation techniques (and preferably more),"<sup>201</sup> and outlines "brief or progressive muscle relaxation," "visual imagery self-relaxation," "abdominal breathing," and "breathing meditation" as methods to mitigate stress responses, "steady the nerves," and "refocus attention."<sup>202</sup> Ultimately, whether breathing exercises occur at the firing range, on the running track, in combat, or in the attorney's office, these techniques can enhance individual performance and counter the physiological effects of stress.<sup>203</sup>

<sup>198</sup> E.g., U.S. DEP'T OF ARMY, FIELD MANUAL 21-20, PHYSICAL FITNESS TRAINING 2-10 (10 Oct. 1998) (describing the benefits of "increased maximum oxygen consumption (VO<sub>2</sub>max)").

<sup>199</sup> E.g., DAVE GROSSMAN & LOREN W. CHRISTENSEN, ON COMBAT: THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY CONFLICT IN WAR AND PEACE 39-43 (3d ed. 2008) (explaining how "[o]ne additional tool to control physiological response is the tactical breathing exercise" and providing several examples).

<sup>200</sup> FM 23-35, *supra* note 197, fig.2-6, at 2-7.

<sup>201</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 22-51, LEADERS' MANUAL FOR COMBAT STRESS CONTROL ¶ 11-3, at 11-2 (29 Sept. 1994).

<sup>202</sup> *Id.* at 11-2 to 11-3.

<sup>203</sup> E.g., Fines & Madsen, *supra* note 10, at 982 (addressing the effects of stress in impairing the reception of an attorney's advice).

Another group of audio resources has emerged in response to EMDR. In recognition of the therapeutic benefits of stimulating both hemispheres of the brain, clinicians have composed music to achieve this objective.<sup>204</sup> Robert Yourell's audio composition *Evolucid*© is commonly used by therapists to enhance work with traumatized patients.<sup>205</sup> The client is encouraged to listen to the music at a low volume and let his mind wander prior to any exercise that requires deep personal insight.<sup>206</sup> Attorneys can experiment with *Evolucid*© or similar bilateral sounds<sup>207</sup> to enhance the effectiveness of legal counseling in numerous ways. For example, clients could listen to the recording prior to a meeting in which they must discuss the basis for a guilty plea, before writing a letter of remorse, or before discussing a particularly unsettling experience that relates to a legal topic.

#### B. Cognitive Behavioral Therapy Worksheets and Exercises

The raw elements of CBT involve pen and paper exercises and specifically-tailored worksheets.<sup>208</sup> Among these worksheets, the "Thought Record" is a simple, efficient, and brief method to identify clients' thoughts, emotions, and underlying beliefs related to any troubling aspect of litigation. The example below highlights the ease

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<sup>204</sup> Robert A. Yourell, *Sounds to Set you Free* (insert distributed with Robert A. Yourell's audio materials), at 1 (describing the benefits of the recording in therapy and noting that it "improves the experience of EMDR-inspired methods, mental rehearsal, awareness work, and guided visualization").

<sup>205</sup> E.g., Interview with Sandra Ward, LCSW, DCSW, Family Advocacy Program Specialist, Supreme Headquarters Allied Powers Europe, in Garmisch, F.R.G. (Apr. 29, 2009) (describing the benefits of *Evolucid* in assisting Soldiers with PTSD, particularly in reducing their headaches and clarifying thoughts during the course of therapy); see also *EVOLUCID: EVOLVING BILATERAL SOUND* (Robert A. Yourell 2000).

<sup>206</sup> Yourell, *supra* note 204, at 1–2.

<sup>207</sup> See, e.g., UPLEVEL: EMDR-INSPIRED STABLE BILATERAL SOUNDSPACE (Robert A. Yourell 1997); BIOLATERAL CD-1: BY INTUITION (David Grand 1999); CALM AND CONFIDENT: BASED ON EMDR (Mark Grant n.d.).

<sup>208</sup> In the language of CBT these "homework" assignments "help clients better understand the roots of the problems for which they sought help; the effects of the problems on themselves and others, and the contribution their environments make to the form, intensity, and frequency of the problems." MICHAEL A. TOMPKINS, USING HOMEWORK IN PSYCHOTHERAPY: STRATEGIES, GUIDELINES, AND FORMS 4 (2004); see generally *id.* (presenting several examples of homework assignments).

with which a defense client's faulty and destructive litigation-related belief can be replaced with a productive one.<sup>209</sup>

In this realistic, yet hypothetical, example, First Sergeant Dale Davis is an active duty Soldier with twenty-two years in the Army, during which he has deployed to combat four times. First Sergeant Davis has been charged with a sexual offense that would require sex offender registration if he is ultimately convicted. The trial defense attorney, Captain Ben Dewig, must necessarily plan a sentencing case as part of First Sergeant Davis' defense. In initial discussions, Captain Dewig notices great hesitation from First Sergeant Davis to discuss any matters related to sentencing. When he raises the issue directly, First Sergeant Davis explains, "Sir, if I get convicted, and registered as a sex offender, my life will be over—plain and simple. There is nothing more to talk about at that point." Captain Dewig understands that First Sergeant Davis is exhibiting several signs of distorted thinking. At the very least, this includes polarized thinking and catastrophizing.<sup>210</sup> Captain Dewig uses a modification of the Thought and Evidence Worksheet from a recommended self-help text, *Taking Control of Your Moods and Your Life*, to assist First Sergeant Davis in identifying the hidden assumptions associated with his distorted thoughts.<sup>211</sup> The headings for the seven-column form appear immediately below in Figure 9.

<b>Situation</b> When? Where? Who? What Happened?	<b>Automatic Thoughts</b> What were you thinking before the feeling?	<b>Feelings</b> One-word summaries Rate 0-100%	<b>Evid. For</b>	<b>Evid. Against</b>	<b>Balanced or Alternative Thoughts</b> Rate 0-100%	<b>Re-rate Feelings</b> 0-100%
<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>7</b>

**Fig. 9. Thought and Evidence Worksheet**

<sup>209</sup> While this example involves a criminal case, Professor Robin Wellford Slocum offers a different line of cognitive inquiry attorneys can use to help divorce clients identify the "relationship between . . . thoughts and emotions" and the source of their distorted and distressing thoughts. Slocum, *supra* note 35, at 534–48.

<sup>210</sup> For definitions of these and six other common forms of distorted thinking, see Seamone, *supra* note 1, fig.2, at 174.

<sup>211</sup> MCKAY ET AL., *supra* note 195, at 54.

Captain Dewig first orients First Sergeant Davis to the worksheet, explaining that he is neither a psychologist nor a trained therapist but that he believes it would be helpful for First Sergeant Davis to explore his comment in greater detail because it is likely to come up repeatedly as long as the charges are pending.<sup>212</sup> After obtaining consent from First Sergeant Davis to proceed with the exercise, Captain Dewig asks First Sergeant Davis to think about specific situations that have led him to believe his life will be over if he is convicted and registered as a sex offender. After some time, First Sergeant Davis remarks that he has these thoughts most often when he helps his business partners, three other Noncommissioned Officers, to promote music concerts, a financial venture they have undertaken on their off-time. First Sergeant Davis also experiences such thoughts when he goes on outings with his three children.

Captain Dewig identifies these two situations, “promoting concerts with business partners” and “outings with children,” under the heading “Situation” in column 1. In the second column, “Automatic Thoughts,” Captain Dewig directs First Sergeant Davis to write “If I get convicted my life will be over” as one automatic thought and “If I am registered as a sex offender, my life will be over” as a separate one. Captain Dewig next seeks to identify the feelings related to these two thoughts, and the intensity of each separate thought. He inquires, “First Sergeant Davis, I want you to think about the first thought, ‘If I get convicted, my life will be over.’ What emotions do you feel when you think of this statement?” First Sergeant Davis states that he feels anxious and depressed. Later, when asked to rate the intensity of these two emotions, he indicates in Column 2, “Feelings,” that he feels anxiety at a level of 100% and depression at a level of 95%. First Sergeant Davis goes through the same process in rating the intensity and emotions associated with the second thought, “If I am registered as a sex offender my life will be over.”

Armed with these responses, Captain Dewig moves to Column 4 of the worksheet, asking First Sergeant Davis to consider evidence that supports each of his statements. Sergeant Davis considers the first statement, “My life will be over if I am convicted,” and indicates the evidence supporting the statement, “I will not be able to get a job on the outside,” “I will shame my family and my friends,” and “No one will

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<sup>212</sup> For sample model language, see *infra* Appendix B.

take me seriously.” The three sections of the worksheet addressing employment concerns appear in Figure 10, below.<sup>213</sup>

<b>Situation</b> When? Where? Who? What Happened?	<b>Feelings</b> One-Word Summaries Rate 0-100%	<b>Automatic Thoughts</b> What were you thinking before the feeling?	<b>Evidence For</b>
Promoting Concerts with Business Partners	Anxious (100%) Depressed (95%)	If I get convicted my life will be over.	I will not be able to get a job on the outside.

**Fig. 10. 1SG Davis's Thought and Evidence Worksheet (Partial)**

In a respectful and empathic manner, Captain Dewig reminds First Sergeant Davis that their function in completing this exercise is a lot like a panel's function during a court-martial, which is to put First Sergeant Davis's "thoughts on trial" and see what evidence supports and does not support them.<sup>214</sup> To perform this role, Captain Dewig encourages First Sergeant Davis to think of evidence that does not support each of the statements. They talk for several minutes about each statement, during which time Captain Dewig relates information from his experiences as a trial attorney.

For example, when First Sergeant Davis talks about his statement, "I will not be able to get a job on the outside," Captain Dewig explains that a panel or a judge does not necessarily have to sentence a convicted Soldier to a punitive discharge.<sup>215</sup> He further explains that if the Soldier is retained, it is unlikely the command will separate the Soldier for a

<sup>213</sup> To conserve space, only the first issue of joblessness is previewed in the examples that follow.

<sup>214</sup> Cognitive Processing Therapy trainer Todd L. Benham recommends using the analogy to a trial as an effective means of communicating with patients about this methodology. Todd L. Benham, Psy.D, Address at the Garmisch, F.R.G., Cognitive Processing Therapy Course (Apr. 29, 2009).

<sup>215</sup> *E.g.*, United States v. Phillips, 52 M.J. 268, 273 (C.A.A.F. 2000) (Effron, J., dissenting) (distinguishing between homosexual conduct mandatory discharge provisions and all other criminal offenses, which do not have such provisions). "In the Armed Forces . . . [t]here is no requirement to discharge service members who engage in adultery, heterosexual sodomy, fraternization, sexual harassment, or child abuse." *Id.*

court-martial-based offense with a characterization of less than a General Under Honorable Conditions discharge.<sup>216</sup> While Captain Dewig points out that he cannot guarantee any results, he identifies the fact that senior noncommissioned officers with years of service and families pose different considerations than privates, and panels or judges are obligated to look at these factors when making determinations about whether or not to sentence the Soldier to a punitive discharge.<sup>217</sup>

Captain Dewig also takes time to address the fact that Soldiers who are punitively discharged often do obtain employment, despite the stigma of a punitive discharge and the limitation of employment options. To this end, Captain Dewig asks First Sergeant Davis to consider his part-time job as a concert promoter, and whether being in the Army or serving honorably was a prerequisite to his employment there. First Sergeant Davis responds that these were not considerations. Captain Dewig then asks First Sergeant Davis whether he would be capable of working that same part-time job on a full-time basis. First Sergeant Davis responds that he could do it.<sup>218</sup> The resulting evidence against the original automatic thought is: “I am still qualified to work as a concert promoter,” “Jobs like concert promotion are open to me even if I get convicted and punitively discharged,” and “I could be retained, in which case I would be administratively discharged under honorable conditions.” After obtaining similar ratings for the second comment on sex offender status, Captain Dewig then goes back to the automatic

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<sup>216</sup> AR 635-200, *supra* note 99, ¶ 14-3b, at 94 (“When the sole basis for separation is a serious offense resulting in a court-martial that does not impose a punitive discharge, the Soldier’s service may not be characterized as under other than honorable conditions unless approved by HQDA . . .”).

<sup>217</sup> *See, e.g.*, U.S. DEP’T OF ARMY, PAM 27-9, MILITARY JUDGES’ BENCHBOOK ¶ 2-6-11, at 99–100 (15 Sept. 2002) (providing standard instructions for court-martial panel members that they must consider a host of sentencing factors, including “[t]he accused’s good military character,” “[t]he accused’s (record) (reputation) in the service for (efficiency) (bravery),” as well as the combat record and behavioral disorders of the accused).

<sup>218</sup> Redacted from this account for the sake of brevity is the Socratic dialogue resulting in these responses. When attorneys use these exercises, the goal is not to force an answer on the client, but rather for the client to discover the answers for himself, thus opening-up the prospect of valid alternative viewpoints. *E.g.*, TAYLOR, *supra* note 192, at 180 (“[T]he Socratic approach encourages patients to do most of the work in questioning their beliefs and in coming up with alternatives. The goal is not to provide the patients with all the answers, but instead to help them think for themselves.”). Any attorney who has graduated law school is more than familiar with the Socratic concept, and should employ an empathic version of it when addressing responses to CBT homework assignments such as this. Professor Taylor provides detailed examples as well. *Id.* at 180–81.

thoughts on the worksheet and asks First Sergeant Davis to re-rate the intensity of the emotions he originally indicated.

With the benefit of considering alternative accurate statements, First Sergeant Davis now arrives at an alternative/balanced thought for the statement that his life will be over: "I will have to work hard to get a job if I am convicted, but there are still opportunities open to me," which he rates with 92% level of belief. He then rerates his anxiety at 10% and depression at 50%. The conclusion of his worksheet is displayed in Figure 11, below:

Evidence Against	Balanced or Alternative Thoughts Rate 0-100%	Re-rate Feelings 0-100%
<p>I am still qualified to work as a concert promoter.</p> <p>Jobs like concert promotion are still open to me if I get convicted and punitively discharged.</p> <p>I could be retained, in which case I would be administratively discharged under honorable conditions.</p>	<p>I will have to work hard to get a job if I am convicted, but there are still opportunities open to me.</p> <p>(92%)</p>	<p>Anxious (10%)</p> <p>Depressed (50%)</p>

**Fig. 11. 1SG Davis's Thought and Evidence Worksheet (continued)**

After using the worksheet for 40 minutes and exploring the accuracy of thoughts and related feelings, Captain Dewig and First Sergeant Davis are able to discuss sentencing aspects of the case with much greater ease. During discussions of a piece of evidence, First Sergeant Davis, in fact, asks if he can use the Worksheet to explore his feelings about it.

The present example is one of many CBT exercises that can be adapted by legal assistance and trial defense attorneys to effectively approach cognitive distortions related to PTSD. While CPT contains

similar worksheets, attorney exercises do not require the exposure elements of CPT, which require clients to repeatedly revisit the traumatic experiences responsible for causing PTSD. The attorney's CBT worksheets and exercises recommended in this article are published in self-help handbooks like *Taking Control of Your Moods and Your Life*, which have been vetted for public and unsupervised consumption by the trained clinicians who authored the text. *Taking Control of Your Moods and Your Life* can be adapted to address everything from obsessive worry, panic attacks, and challenging core beliefs with visualization. Similar books offer worksheets and tests for self-help with PTSD-events, specifically. In *Courage After Fire*, for example, specific techniques are offered to deal with the problem of intrusive images, a situation commonly experienced by veterans with PTSD that can easily interfere with essential preparation for trial.<sup>219</sup> Attorneys who are not familiar with measures to address this condition can easily exacerbate it because merely suggesting "avoid[ance] [of] uncomfortable images or memories tends to strengthen them."<sup>220</sup>

Worksheets and exercises that have special appeal in addressing activated litigation triggers include procrastination cost-benefit analyses,<sup>221</sup> risk assessments for worry,<sup>222</sup> the "Responsibility Pie" method to apportion responsibility for an event causing guilt or shame,<sup>223</sup> thought stopping,<sup>224</sup> and stress inoculation.<sup>225</sup> Attorneys should carefully review the CBT workbooks and other resources to determine which techniques and worksheets would be particularly useful in individual cases.

Inevitably, there are psychological issues beyond the capabilities of even the most well-meaning attorney.<sup>226</sup> The key becomes recognizing

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<sup>219</sup> ARMSTRONG ET AL., *supra* note 104, at 75–77.

<sup>220</sup> *Id.* at 75.

<sup>221</sup> DAVID D. BURNS, *THE FEELING GOOD HANDBOOK* 184–95 (rev. ed. 1999).

<sup>222</sup> MCKAY ET AL., *supra* note 195, at 67–71.

<sup>223</sup> DENNIS GREENBERGER & CHRISTINE A. PADESKY, *MIND OVER MOOD: CHANGE HOW YOU FEEL BY CHANGING THE WAY YOU THINK* 201–05 (1995).

<sup>224</sup> MCKAY ET AL., *supra* note 195, at 76–81.

<sup>225</sup> *Id.* at 119–34.

<sup>226</sup> *E.g.*, PORTNOY, *supra* note 113, at 48 (explaining that a family law attorney who confronts a client with mental illness and emotional dysfunction is "neither a diagnostician nor a mental health provider, and . . . should not expect . . . to provide those services").

when consultation or referral is necessary.<sup>227</sup> Consultation with mental health professionals can surely enhance the attorney's use of these tools. The completion of a PTSD Trigger Awareness Plan will go a long way to identify issues for follow-up by mental health practitioners. Rather than adopting a generic approach, the information permits the clinician to address PTSD psycholegal soft-spots in an individualized way that can improve the attorney's communication with and representation of the client. Potential benefits will be maximized to the extent that the attorney is willing to consider the clinician's input and the clinician is willing and able to address psychological matters linked specifically to the litigation process. Attorneys must be mindful that unique considerations related to issues of privilege or confidentiality may prevent the potential for full collaboration.<sup>228</sup>

Attorneys with knowledge of the therapeutic tools used by the clinician at the time of the legal representation can explore the potential of specific therapeutic techniques to aid the legal representation.<sup>229</sup> If the client is undergoing EMDR therapy, the attorney could request that the therapist address the most distressing images related to the trial or the crime to improve communication during pretrial preparation. Attorneys could also identify valuable exercises they could use with clients in their offices. For example, some physical exercises can create EMDR benefits without the supervision of a therapist. Clinicians offer the following guidance on self-directed eye movement: "By interlocking your hands, placing them behind your head so that [your] elbows are in your respective right and left visual field, it is possible to begin an eye movement desensitization routine yourself."<sup>230</sup>

With knowledge of effective techniques that do not require clinical supervision, the attorney can develop her own assortment of tools to address cognitive impasses during the course of legal counseling and decision-making. With knowledge of the client and his particular success with the therapy, the therapist can guide the attorney to effectively use the method, thereby satisfying the attorney's obligation to

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<sup>227</sup> *Id.* (observing that the attorney's "awareness that a client has symptomatic markers of a disorder helps [the attorney] know when to refer to a trained professional").

<sup>228</sup> Seamone, *supra* note 1, Part III.

<sup>229</sup> *Id.* at 180 (discussing the benefits of using A-B-C worksheets related to the litigation).

<sup>230</sup> HART, *supra* note 151, at 31. *See also* FRED FRIEDBERG, DO-IT-YOURSELF EYE MOVEMENT TECHNIQUES FOR EMOTIONAL HEALING 6 (2001) (providing EMDR and eye-movement-technique exercises for self-direction that are not associated with "unique dangers and risks" that would require the guidance or supervision of a clinician).

abide by Rule of Professional Conduct 1.1 or its civilian analogue. Such collaboration can also occur in the context of PE or CPT therapy.<sup>231</sup>

## VI. Conclusion

This article explored the need and obligation for military attorneys to (1) identify impediments to the representation of clients with PTSD and (2) implement psychological interventions to remove such impediments. Although this article encourages attorneys to conduct some work of a psychological nature, it respects the boundaries surrounding social workers and other trained clinicians. It complies with the restrictions of psychology licensing statutes that permit members of nonpsychology professions to use psychological techniques.<sup>232</sup> By grounding all recommended interventions in self-help workbooks and guides approved for unlimited use, the attorney should feel confident in her implementation of these recommendations. Use of the notice contained in Appendix B should also eliminate any misapprehension on the client's part that the attorney is anything but a counselor *at law*.<sup>233</sup> Whether in the form of PTSD Trigger Awareness Plans, relaxation exercises, CBT worksheets, or referral to a qualified mental health practitioner, military and civilian attorneys must be proactive in identifying likely PTSD triggers and maximizing the client's well-being throughout the course of the representation. Not only can an attorney conduct triage as a first responder to PTSD, but, in many cases, she may be able to render life sustaining first-aid in the front lines of her office or the courtroom.<sup>234</sup>

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<sup>231</sup> An example of a counseling model in which the attorney shares responsibility with the clinician in the use of psychological techniques may be found in Astrid Brigden, *Dealing With the Resistant Criminal Client: A Psychologically-minded Strategy for More Effective Legal Counseling*, 38 CRIM. L. BULL. 225, 237-42 (2002) (exploring how attorneys can benefit from the use of "stages of change" and "motivational interviewing," therapeutic techniques, when counseling defensive clients).

<sup>232</sup> See *supra* Part II.C (reviewing statutes).

<sup>233</sup> See *infra* Appendix B (providing a script to effectively inform a client about the limitations of the attorney's counseling role when using a psychological technique).

<sup>234</sup> This approach embodies the concept recently emphasized by General (Ret.) Frederick Franks, Jr., that attorneys are not only "stakeholders in the disability evaluation system," but their duties encompass the mandate "never [to] leave a fallen comrade." GENERAL (RET.) FREDERICK FRANKS, JR., I WILL NEVER LEAVE A FALLEN COMRADE: FINAL TASK FORCE RECOMMENDATIONS TO BETTER FULFILL THE ARMY'S DUTY IN MEB/PEB, at 1, 27 (29 Apr. 2009).

## Appendix A

### DSM-IV-TR Criteria for Posttraumatic Stress Disorder<sup>235</sup>

Diagnostic criteria for 309.81 Posttraumatic Stress Disorder

**A. [Traumatic Stressor:]** The person has been exposed to a traumatic event in which both of the following have been present:

- (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others
- (2) the person's response involved intense fear, helplessness, or horror.

**Note:** In children, this may be expressed instead by disorganized or agitated behavior

**B. [Reexperiencing:]** The traumatic event is persistently reexperienced in one (or more) of the following ways:

- (1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. **Note:** In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.
- (2) recurrent distressing dreams of the event. **Note:** In children, there may be frightening dreams without recognizable content.
- (3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur upon awakening or when intoxicated). **Note:** In young children, trauma-specific reenactment may occur.
- (4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event
- (5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event

**C. [Avoidance and numbing:]** Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:

- (1) efforts to avoid thoughts, feelings, or conversations associated with the trauma

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<sup>235</sup> DSM-IV-TR, *supra* note 1, at 467–68. Bold titles in brackets reflect the description and emphasis provided by TAYLOR, *supra* note 192, at 5. Reprinted with permission from the *Diagnostic and Statistical Manual of Mental Disorders, Text Revision, Fourth Edition* © 2000 American Psychiatric Association.

- (2) efforts to avoid activities, places, or people that arouse recollections of the trauma
- (3) inability to recall an important aspect of the trauma
- (4) markedly diminished interest or participation in significant activities
- (5) feeling of detachment or estrangement from others
- (6) restricted range of affect (e.g., unable to have loving feelings)
- (7) sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span).

**D. [Hyperarousal:]** Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:

- (1) difficulty falling or staying asleep
- (2) irritability or outbursts of anger
- (3) difficulty concentrating
- (4) hypervigilance
- (5) exaggerated startle response

**E.** Duration of the disturbance (symptoms in Criteria B, C, and D) is more than one month.

**F.** The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

*Specify if:*

**Acute:** if duration of symptoms is less than 3 months

**Chronic:** if duration of symptoms is 3 months or more

*Specify if:*

**With Delayed Onset:** if onset of symptoms is at least 6 months after the stressor

## Appendix B

### Sample Client Notification for Work of a Psychological Nature

This script uses the “thought record” as an example for sufficient client notice.<sup>236</sup> Attorneys may substitute other suitable techniques in its place.

I would like to use a form called the “thought record,” to help you make a better decision about the legal choices you have to make. Before I do this, I want to make sure you understand that I am your lawyer and I have a responsibility to make sure you understand your legal options, choices, and decisions. I am not trained as a psychologist or a social worker. I do not have any license, training, or certification that qualifies me to practice psychology like a person working in a mental health facility.

I want to use this form as a tool to help you understand the law, and only for that purpose. If this looks similar to something you may have seen from a licensed mental health professional, I do not have the training to use the “thought record” for a clinical purpose.<sup>237</sup> In fact, I am using a form that comes from a book designed for self-help use that you could buy in a bookstore if you wanted. I am using this book mainly because I don't want to cross over into an activity that requires the expertise or supervision of a mental health professional.

If it is uncomfortable to use the “thought record,” we don't have to use it and you can stop at any time.

With all of this in mind, do you want to use the “thought record?”

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<sup>236</sup> For a description of the “Thought Record,” see *supra* Part V.B (providing detailed descriptions and examples).

<sup>237</sup> Reference to products clients may have seen during clinical treatment should assist in eliminating inferences that the attorney is qualified to practice psychology or a related mental health discipline that requires licensing.

## Appendix C

PTSD Checklist—Military Version (PCL-M)<sup>238</sup>

Patient's Name: \_\_\_\_\_

Instruction to patient: Below is a list of problems and complaints that veterans sometimes have in response to stressful life experiences. Please read each one carefully, put an "X" in the box to indicate how much you have been bothered by that problem *in the last month*.

No.	Response	Not at all (1)	A little bit (2)	Moderately (3)	Quite a bit (4)	Extremely (5)
1	Repeated, disturbing <i>memories, thoughts, or images</i> of a stressful military experience from the past?					
2	Repeated, disturbing <i>dreams</i> of a stressful military experience from the past?					
3	Suddenly <i>acting or feeling</i> as if a stressful military experience were <i>happening</i> again (as if you were reliving it)?					
4	Feeling <i>very upset</i> when <i>something reminded</i> you of a stressful military experience from the past?					
5	Having <i>physical reactions</i> (e.g., heart pounding, trouble breathing, or sweating) when <i>something reminded</i> you of a stressful military experience from the past?					
6	Avoid <i>thinking about or talking about</i> a stressful military experience from the past or avoid <i>having feelings</i> related to it?					
7	Avoid <i>activities or situations</i> because they <i>remind you</i> of a stressful military experience from the past?					
8	Trouble <i>remembering important parts</i> of a stressful military experience from the past?					

No.	Response	Not at all (1)	A little bit (2)	Moderately (3)	Quite a bit (4)	Extremely (5)
9	Loss of <i>interest in things that you used to enjoy?</i>					
10	Feeling <i>distant or cut off</i> from other people?					
11	Feeling <i>emotionally numb</i> or being unable to have loving feelings for those close to you?					
12	Feeling as if your <i>future</i> will somehow be <i>cut short?</i>					
13	Trouble <i>falling or staying asleep?</i>					
14	Feeling <i>irritable</i> or having <i>angry outbursts?</i>					
15	Having <i>difficulty concentrating?</i>					
16	Being " <i>super alert</i> " or watchful on guard?					
17	Feeling <i>jumpy</i> or easily startled?					

<sup>238</sup> PCL-M, *supra* note 120. The PCL-M, as reprinted in this appendix, is a "Government document in the public domain." *Id.*



### 3 Question DVbic TBI Screening Tool<sup>240</sup>

1. Did you have any injury(ies) during your deployment from any of the following? (Check all that apply):

- A.  Fragment
- B.  Bullet
- C.  Vehicular (any type of vehicle, including airplane)
- D.  Fall
- E.  Blast (Improvised Explosive Device, RPG, Land mine, Grenade, etc.)
- F.  Other specify: \_\_\_\_\_

2. Did any injury received while you were deployed result in any of the following? (check all that apply):

- A.  Being dazed, confused or "seeing stars"
- B.  Not remembering the injury
- C.  Losing consciousness (knocked out) for less than a minute
- D.  Losing consciousness for 1-20 minutes
- E.  Losing consciousness for longer than 20 minutes
- F.  Having any symptoms of concussion afterward (such as headache, dizziness, irritability, etc.)
- G.  Head injury
- H.  None of the above

**NOTE:** Endorsement of A-E meets criteria for a positive TBI Screen

**NOTE:** Confirm F and G through clinical interview

3. Are you currently experiencing any of the following problems that you think might be related to a possible head injury or concussion (check all that apply):

- A.  Headaches
- B.  Dizziness
- C.  Memory problems
- D.  Balance problems
- E.  Ringing in the ears
- F.  Irritability
- G.  Sleep problems
- H.  Other specify: \_\_\_\_\_

Schwab, K.A., Baker, G., Ivins, B., Sluss-Tiller, M., Lux, W., & Warden D. (2006). The Brief Traumatic Brain Injury Screen (BTBIS): Investigating the validity of a self-report instrument for detecting traumatic brain injury (TBI) in troops returning from deployment in Afghanistan and Iraq. *Neurology*, 66(5) (Supp. 2), A235.

<sup>240</sup> 3 Question DVbic TBI Screening Tool, *supra* note 127 (reprinted with permission of the Defense and Veterans Brain Injury Center). For further questions regarding this tool, the direct phone line for the DVbic is (202) 782-6345. See also Karen A. Schwab et al., *Screening for Traumatic Brain Injury in Troops Returning from Deployment in Afghanistan and Iraq: Initial Investigation of the Usefulness of a Short Screening Tool for Traumatic Brain Injury*, 22 J. HEAD TRAUMA REHABILITATION 377 (2007).

## Appendix E

PTSD Competency Worksheet for Lawyers<sup>241</sup>

## A. OBSERVATIONAL SIGNS

Cognitive Functioning	Examples
<b>Short-term Memory Problems</b>	<ul style="list-style-type: none"> <li>• Repeats questions frequently</li> <li>• Forgets what is discussed within 15-30 min.</li> <li>• Cannot remember events of past few days</li> </ul>
<b>Language/Communication Problems</b>	<ul style="list-style-type: none"> <li>• Difficulty finding words frequently</li> <li>• Vague language</li> <li>• Trouble staying on topic</li> <li>• Disorganized</li> <li>• Bizarre statements or reasoning</li> </ul>
<b>Comprehension Problems</b>	<ul style="list-style-type: none"> <li>• Difficulty repeating simple concepts</li> <li>• Repeated questioning</li> </ul>
<b>Lack of Mental Flexibility</b>	<ul style="list-style-type: none"> <li>• Difficulty comparing alternatives</li> <li>• Difficulty adjusting to changes</li> </ul>
<b>Calculation/Financial Management Problems</b>	<ul style="list-style-type: none"> <li>• Addition or subtraction that previously would have been easy for the client</li> <li>• Bill paying difficulty</li> </ul>
<b>Disorientation</b>	<ul style="list-style-type: none"> <li>• Trouble navigating office</li> <li>• Gets lost coming to office</li> <li>• Confused about day/time/year/season</li> </ul>
Emotional Functioning	Examples
<b>Emotional Distress</b>	<ul style="list-style-type: none"> <li>• Anxious</li> <li>• Tearful/distressed</li> <li>• Excited/pressured/manic</li> </ul>
<b>Emotional Lability</b>	<ul style="list-style-type: none"> <li>• Moves quickly between laughter &amp; tears</li> <li>• Feelings inconsistent with topic</li> </ul>

<sup>241</sup> In this Appendix, the author modified portions of the “Capacity Worksheet for Lawyers” from *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, by the ABA Commission on Law and Aging and the American Psychological Association © 2005, at pages 23–26 (DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 29–33 (LexisNexis® version)). The author modified “Ways to Address/Accommodate” and “mitigating/qualifying factors” in Part A and Parts B and D of the original worksheet. Permission was granted by the American Bar Association to reprint the copied portions of the Capacity Worksheet for Lawyers.

Behavioral Functioning	Examples
<b>Delusions</b>	<ul style="list-style-type: none"> <li>• Feels others out “to get” him/her, spying or organized against him/her</li> <li>• Fearful, feels unsafe</li> </ul>
<b>Hallucinations</b>	<ul style="list-style-type: none"> <li>• Appears to hear or talk to things not there</li> <li>• Appears to see things not there</li> <li>• Misperceives things</li> </ul>
<b>Poor Grooming/Hygiene</b>	<ul style="list-style-type: none"> <li>• Usually unclean/unkept in appearance</li> <li>• Inappropriately dressed</li> </ul>

#### Other Observations/Notes of Functional Behavior

#### Other Observations/Notes on Potential Undue Influence

Mitigating/Qualifying Factors Affecting Observations	Ways to Address/ Accommodate
<b>Stress, Grief, Depression, Recent Events affecting stability of client</b>	<ul style="list-style-type: none"> <li>• Ask about recent events, losses</li> <li>• Allow some time</li> <li>• Relaxation Exercises</li> <li>• CBT Exercises (if related to legal matter)</li> <li>• Refer to mental health professional</li> </ul>
<b>Medical Factors</b>	<ul style="list-style-type: none"> <li>• Ask about [sleep], nutrition, medication, hydration</li> <li>• Refer to a physician</li> </ul>
<b>Time of Day Variability</b>	<ul style="list-style-type: none"> <li>• Ask if certain times of day are best</li> <li>• Try a different appointment from usual meeting time</li> </ul>
<b>Forensic Stress</b>	<ul style="list-style-type: none"> <li>• Use of a Litigation Workbook</li> <li>• Conduct PTSD Psycholegal Soft-Spot Planning</li> <li>• Relaxation Exercises</li> <li>• CBT Exercises</li> <li>• Refer to mental health professional</li> </ul>
<b>Educational/Cultural/Ethnic Barriers</b>	<ul style="list-style-type: none"> <li>• Be aware of race and ethnicity, education, long-held values and traditions</li> </ul>

**B. RELEVANT LEGAL ELEMENTS – The legal elements of capacity vary somewhat among states and should be modified as needed . . .**

Legal Factors	Notes on Client's Understanding/Appreciation
<p><b><u>Criminal</u></b>  <b>Does client understand the nature of the offense?</b>            1. How s/he came to be charged.            2. The reason why such acts are criminal.            3. The strength of the evidence against the accused.            4. Existence of a defense.            5. The strength of evidence supporting a defense.            6. The potential sentencing exposure.            7. Factors in mitigation or extenuation.</p>	
<p><b><u>Civil</u></b>  <b>Does client understand the nature of the action?</b>            1. How it came that resolution is contemplated through legal action.            2. The opposing rights and remedies at stake in the legal action.            3. The evidence supporting the client's cause.            4. Existence of any causes/ defenses.            5. The strength supporting causes/ defenses.            6. The potential financial or other loss if applicable.            7. Impact on third-parties, such as beneficiaries, spouses, children, etc.</p>	

**C. TASK-SPECIFIC FACTORS IN PRELIMINARY EVALUATION OF CAPACITY**

The more serious the concern the following factors. . .

The higher the function needed in the following abilities. . .

Is decision consistent with client's known long-term values or commitments?	<ul style="list-style-type: none"> <li>• Can the client articulate reasoning leading to this decision?</li> </ul>
Is the decision objectively fair? Will anyone be hurt by the decision?	<ul style="list-style-type: none"> <li>• Is client's decision consistent over time?</li> <li>• Are primary values client articulates consistent over time?</li> </ul>
Is the decision irreversible?	<ul style="list-style-type: none"> <li>• Can client appreciate consequences of his/her decision?</li> </ul>

**D. PRELIMINARY CONCLUSIONS ABOUT CLIENT CAPACITY – After evaluating A, B, and C above:**

<input type="checkbox"/> <b>Intact</b> – No or very minimal evidence of diminished capacity	<b>Action:</b> Proceed with representation and legal cause.
<input type="checkbox"/> <b>Mild Problems</b> – Some evidence of diminished capacity	<b>Action:</b> <ol style="list-style-type: none"> <li>(1) Proceed with representation/legal cause, or</li> <li>(2) Consider medical referral if medical oversight is lacking, or</li> <li>(3) Consider consultation with a mental health professional, or</li> <li>(4) Consider referral for formal clinical assessment (including R.C.M. 706 sanity board) to substantiate conclusion, with client consent.</li> </ol>

<p><b>[ ] <u>More than mild Problems</u> – Substantial evidence of diminished capacity</b></p>	<p><i>Action:</i>  <b>(1) Proceed with representation/legal cause with great caution, or  (2) Medical referral if medical oversight is lacking, or  (3) Consultation with a mental health professional, or  (4) Referral for formal clinical assessment (including R.C.M. 706 sanity board), with client consent.</b></p>
<p><b>[ ] <u>Severe problems</u> – Client lacks capacity to proceed with representation and legal cause.</b></p>	<p><i>Action:</i>  <b>(1) Referral to mental health professional (including R.C.M. 706 sanity board) to confirm conclusion.  (2) Seek assistance from the court; do not proceed with case; or withdraw, after careful consideration of how to protect client’s interests, depending on type of action; or  (3) Consider protective action consistent with Rule 1.14(b).</b></p>

## Appendix F

### Muscle Relaxation Exercise for Clients with PTSD Excerpted from Armstrong et al.'s *Courage After Fire*<sup>242</sup>

Another useful relaxation drill is called *Muscle Relaxation*. This exercise is especially helpful for reducing muscle tension and worry. It involves tensing different sets of muscles in your body and then relaxing them. The goal is to become aware of the difference between tension and calmness in your body. This drill will help you learn first to detect tension in your body and then to reduce anxiety before it rises to higher levels.

Read the following script aloud, or ask someone else to do it and tape record it. Decide whether you want to use your voice or whether you'd be more relaxed listening to someone else's voice on the recording. Then play the tape to guide you through the drill.

While listening to the tape, envision a state of relaxation spreading throughout your body, step-by-step, from your feet up through your stomach, your chest, and finally to your face. This drill will take about 20 to 30 minutes to complete. For each muscle group, first focus for 10 seconds in a tensed state, then focus for 20 seconds in a relaxed state.

1. Get into a comfortable sitting position where your head leans back against a wall. You can choose to close your eyes or keep them open, whichever is most comfortable for you.
2. Rate your level of anxiety on a scale of 0 to 10, where 0 is feeling totally calm and 10 is feeling extremely anxious. . . .
3. Take a few moments to get focused.
4. First, focus on your breathing. Make sure it's slow and smooth. Breathe in smoothly and say, "1." Breathe out easily and say, "Relax." Focus on your breaths. Breathe in and say, "2." Breathe out and say, "Relax." Continue this smooth and easy breathing. Feel the cool air as you breathe in and the warm air as you breathe out.

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<sup>242</sup> ARMSTRONG ET AL., *supra* note 104, at 45–49. This relaxation exercise originally appeared in *Courage After Fire: Coping Strategies for Troops Returning From Iraq and Afghanistan and Their Families* © 2006, authored by Keith Armstrong, LCSW, Suzanne Best, Ph.D., and Paula Domenici, Ph.D. Ulysses Press granted permission to reprint these contents.

5. Now focus on the muscles in your lower legs and feet. Concentrate intensely on this set of muscles for a few moments. Now build tension in your lower legs by flexing your feet and pulling your toes up towards the ceiling. Hold this position for 10 seconds. Feel the tightness and tension spreading throughout your toes, feet, ankles, shins, and calves. After 10 seconds, release the tension by deflexing your feet and letting your legs relax comfortably onto the chair. Focus on the difference between the state of tension you felt when you flexed and the state of relaxation now moving through your feet and lower legs. Enjoy the sense of warmth, heaviness, and comfort spreading through your feet and lower legs, for 20 seconds.
6. Next move to your upper legs. Concentrate intensely on the muscles in your upper legs for a few moments. Now build tension in your upper legs by pulling your knees together and lifting your legs off the chair or couch. Hold this position for 10 seconds. Feel the tightness and tension spreading through your upper legs. After 10 seconds, release the tension by letting your legs drop down onto the chair. Focus on the difference between the state of tension you felt when flexing and the state of relaxation now moving through your upper legs. Enjoy the sense of warmth, heaviness, and comfort spreading through your upper legs, for 20 seconds.
7. Continue to move up your body, to the muscles in your stomach and chest. Concentrate intensely on this muscle group for a few moments. Now build tension in your stomach and chest by taking in a deep breath and holding it as you pull your stomach toward your spine. Hold this position for 10 seconds. Feel the tightness and tension spreading throughout your stomach and chest. After 10 seconds, let go of the tension by releasing your stomach. Focus on the difference between the state of tension you felt and the state of relaxation now filling your stomach and chest. Enjoy the sense of warmth, heaviness, and comfort spreading throughout your stomach and chest, for 20 seconds.
8. Now move to the muscles in your shoulders. Concentrate intensely on the muscles in this area for a few moments. Now build tension in your shoulders by pulling them up as close to your ears as you can. Hold this position for 10 seconds. Feel the tightness and tension spreading through your shoulders. After 10

seconds, release the tension by dropping your shoulders down and letting them droop comfortably. Focus on the difference between the state of tension and the state of relaxation now moving through your shoulders. Enjoy the sense of warmth, heaviness, and comfort spreading through your shoulders, for 20 seconds.

9. Next move your attention to your hands and arms. Concentrate intensely on the muscles in your hands and arms for a few moments. Build tension in your hands and arms by making fists with both your hands. Bend your wrists up to pull your fists up. Hold this position for 10 seconds. Feel the tightness and tension spreading through your hands and arms. Now release the tension by letting go of your fists and unbending your wrists. Focus on the difference between the state of tension and the state of relaxation emerging in your hands and arms. Enjoy the sense of warmth, heaviness, and comfort spreading through your hands and arms, for 20 seconds.
10. A sense of relaxation is spreading more and more throughout various muscles in your body. Let's move on to the muscles in your neck. Concentrate intensely on those muscles for a few moments. Build tension in your neck by pulling your chin down toward your chest as far as you can. Hold this position for 10 seconds. Feel the tightness and tension spreading through your neck. After 10 seconds, release the tension and let your head rest against the wall. Focus on the difference between the state of tension and the state of relaxation emerging in your neck. Enjoy the sense of warmth, heaviness, and comfort spreading through your neck, for 20 seconds.
11. Now focus on different parts of your face. First, attend to your mouth and jaw, concentrating intensely on those muscles for a few moments. Build tension by clenching your teeth together tightly for 10 seconds. Feel the tightness and tension spreading through your mouth and jaw. After 10 seconds, release the tension, unclenching your teeth and letting your mouth and jaw drop. Focus on the difference between the state of tension and the state of relaxation now moving in your mouth and jaw. Enjoy the sense of warmth, heaviness, and comfort spreading through your mouth and jaw, for 20 seconds.

12. As a state of relaxation spreads around your face, focus on your eyes. Concentrate intensely on the muscles around and behind your eyes for a few moments. Build tension in your eyes by squeezing them tightly together. Hold this position for 10 seconds. Feel the tightness and tension spreading through your eyes. After 10 seconds, release the tension by relaxing your eye muscles. Focus on the difference between the state of tension and the state of relaxation now moving around and behind your eyes. Enjoy the sense of warmth, heaviness, and comfort spreading through your eyes, for 20 seconds.
13. Continue to relax the muscles in your face by focusing on your upper forehead. Concentrate intensely on those muscles for a few moments. Build tension in your upper forehead by raising your eyebrows up as high as possible. Hold this position for 10 seconds. Feel the tightness and tension spreading throughout your upper forehead. After 10 seconds, release the tension by letting your eyebrows down. Focus on the difference between the state of tension and the state of relaxation now moving in your upper forehead. Enjoy the sense of warmth, heaviness, and comfort spreading through your forehead, for 20 seconds.
14. At this point, relaxation has spread throughout your whole body. Starting with your feet and legs, relaxation then moved to your stomach and chest. Next, the relaxation spread into your hands and arms, then to your neck, and to your face. Let your whole body become more and more relaxed. Let *all* the tension leave your body. If you feel remaining tension in any muscle, envision it floating away. Sink deeper and deeper into a state of peace and warmth, with relaxation deepening further and further throughout your body. Feel heaviness and comfort filling each of your muscle groups more and more. Enjoy this state of deep relaxation. Continue to focus on your breathing. Make sure it's slow and smooth. Feel the cool air as you breathe in and the warm air as you breathe out.
15. Now, counting from 1 to 10, you will gradually become more awake and alert. When you reach the number 10, sit up and open your eyes in a wakeful, alert state.
16. Now, rate your level of anxiety on a scale from 0 to 10, where 0 is feeling totally calm and 10 is feeling extremely anxious. . . .

17. Having completed this exercise, reflect on how it was for you to do this muscle relaxation procedure:

- Were there any particular muscle groups that were hard for you to relax?
- Do you feel more relaxed after this exercise than before?
- Did you find it hard to concentrate on certain sets of muscles?

Practice this drill at regularly scheduled times, at least once a day, for at least one week, using the tape to guide you until you get good at it.

In a journal or notebook, keep track of when you practice this drill by recording the date and time . . . Over time, you should notice a reduction in your anxiety ratings.