# SPECIAL CONSIDERATIONS
## IN
# REPRESENTING VETERANS[1]

BY BROCK HUNTER

Joe Raedle - Getty Images

"Attorneys working with troubled veterans are inescapably along for the journey, functioning just like squad members on patrol through the bombed and burning villages in the recesses of our clients' minds."

*Major Evan Seamone, U.S. Army Judge Advocate*

[1] These CLE materials provide a brief overview of the unique ethical issues in representing veterans with service-related disorders. They are drawn from THE ATTORNEY'S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT (Brockton Hunter & Ryan Else, eds., 2014)(hereafter DEFENDING VETERANS), a treatise published by the Veterans Defense Project (VDP), a non-profit dedicated to advocating and educating for veterans in the criminal justice system. For more information on the VDP or to purchase the DEFENDING VETERANS book, visit www.veteransdefenseproject.org.

# I. INTRODUCTION

For as long as warriors have returned from battle, some have brought their war home with them, bearing invisible wounds that haunt in the present. These echoes of war—manifested in self-destructive, reckless, and violent behavior—reverberate through society, destroying not only the lives of these heroes, but their families and communities.

A new generation of warriors is now returning home and there is good reason to believe more of them will bring their war home with them than ever before. Unlike previous generations of warriors, this one is relatively small, yet it will have fought the two longest wars in our country's history—simultaneously. Without the draft we relied on in past wars, the burden of the fighting falls on fewer shoulders, with many veterans of this generation serving multiple combat tours. We have also called on them to fight in the most hostile of environments—from the sweltering streets of Iraq, to the frozen, wind-swept mountains of Afghanistan—facing fanatical enemies prepared to die for their cause. Many of this generation will have survived combat injuries that would have killed them in the past, but will nonetheless bear the psychological scars of their brush with death. Their modern combat training and conditioning ensured that they killed when called on to do so, yet did little to prepare them for the emotional and psychological costs of taking human life.

While this generation of returning veterans has been called on to serve and sacrifice like none before them, our society has never been asked to serve—or sacrifice—less. Most Americans no longer follow news of the war in Afghanistan. Even at the height of the war in Iraq, when media coverage was ubiquitous, we were allowed only, as one of our veteran clients refers to it, "a Clorox bleached version of the war," carefully sanitized of all of its horror. We were not even allowed to see images of returning flag-draped coffins being unloaded from planes in the early years of the conflicts, out of concern it would impact our support for their continuance. It worked.

This disconnect between our society and our wars was best symbolized by a piece of graffiti left by an anonymous Marine on a concrete blast wall in Ramadi, Iraq at the height of that war:

**AMERICA IS NOT AT WAR**
**THE US MARINE CORPS IS AT WAR**
**AMERICA IS AT THE MALL**[2]

[2] Hector Matascastillo, author of Chapter 15 of DEFENDING VETERANS, personally observed this piece of graffiti. It was later reported in numerous media outlets.

Our veteran clients commonly echo this sentiment, reporting to us that no one knows what they have seen—what they have done—and no one cares, too absorbed in our everyday lives to even begin to understand. Whereas returning Vietnam veterans were notoriously spit on and called "baby killers," this generation is largely invisible – feeding their isolation and hastening a downward spiral for many.

The gulf between society and this generation of veterans will be increasingly dangerous in the coming years unless we find ways to bridge it. But where do we start? Author, Karl Marlantes, who served as a Marine infantry officer in Vietnam and earned the Navy Cross, our nation's second highest award for valor, among many other honors, provides us with hard-won wisdom here:

> There is a correct way to welcome your warriors back. Returning veterans don't need ticker-tape parades or yellow ribbons stretching clear across Texas. Cheering is inappropriate and immature. Combat veterans, more than anyone else, know how much pain and evil have been wrought. To cheer them for what they've just done would be like cheering the surgeon when he amputates a leg to save someone's life. It's childish, and it's demeaning to those who have fallen on both sides. A quiet grateful handshake is what you give the surgeon, while you mourn the lost leg. There should be parades, but they should be solemn processionals, rifles upside down, symbol of the sword sheathed once again. They should be conducted with all the dignity of a military funeral, mourning for those lost on both sides, giving thanks for those returned…Veterans just need to be received back into their community, reintegrated with those they love, and thanked by the people who sent them.[3]

The whole community must come together to bridge the gulf and properly welcome this generation of veterans. When they stumble and fall into the criminal justice system, as we know many of them will, we in the defense bar have a additional, solemn role to play, in helping them up and bringing them the rest of the way home.

As we prepare to defend those who defended us, we must first recognize that we in the criminal defense bar share much in common with our veteran clients. Like soldiers, our job is often gritty and thankless, our mission misunderstood by the general public. Like soldiers, ours is a proud warrior culture, a tight and insular community with an *esprit de corps* not found in many other professions or areas of the law. Above all, we, like our veteran clients, swore a

[3] KARL MARLANTES, WHAT IT IS LIKE TO GO TO WAR 195 (Atlantic Monthly Press 2011). Marlantes, a graduate of Yale University and a Rhodes Scholar at Oxford University, also authored the novel, MATTERHORN, one of the most powerful books on the Vietnam war – and all wars. *See* KARL MARLANTES, MATTERHORN (Atlantic Monthly Press 2010).

sacred oath to defend the rights and freedoms that make our system of government so special.

With proper preparation and execution, defending veterans can be among the most rewarding experiences a defense attorney can have. We can simultaneously help repay our nation's debt to these heroes for their service and sacrifice, uphold the special protections now afforded them in our justice system, and benefit society by helping turn them back into assets, not threats, to their communities.

# II. ESTABLISHING A HEALTHY AND PRODUCTIVE ATTORNEY-CLIENT RELATIONSHIP

Psychologically injured combat veterans can be extremely challenging clients. They are often distrustful of strangers, reluctant to talk about their military service, in denial about their psychological injuries, and unwilling to seek help. In order to mount an effective defense, we must first convince our veteran clients to drop their shields, open up about their trauma, and embrace needed care.

## A. The Initial Meeting

### 1. Identification

Obviously, identifying a potential or new client as a veteran is a necessary first step. These days, many of our veteran clients are referred to us because of our focus on veteran defense, advocacy, and education. They arrive on our doorstep, already identified as a veteran in need of help. Sometimes, they have even been diagnosed with a service-connected issue and are already engaged in needed treatment.

Other times, though, a potential client contacts us, making no mention of prior military service. We can usually spot these individuals as veterans, based on their haircut, wardrobe, or even just speech and mannerisms. Once in a while, though, a veteran evades even our detection.

The only way to ensure these "stealth vets" don't slip through the cracks is to ask all of our clients if they have ever served in the military. Notice, we do not ask them if they are "veterans" as that term carries different meanings to different people. Some younger veterans think of the term as applying only to past generations — the old men in the pointy hats, adorned with pins. Others,

particularly female veterans, will sometimes fail to identify themselves as "veterans" because they associate the title only with men who saw direct combat.

### 2. Building Trust

With senses honed by the life and death need to read others' character and intent, combat veterans tend to be very perceptive. Your new veteran client will be sizing you up from the first moment you meet, alert to any signs of fraud, insincerity, or disrespect. Building trust is a top priority.

If you served in the military, share that fact with your veteran client. Past military service provides an instant foundation of shared experience and culture. Be careful not to brag about or inflate your service, though. Humility and understatement go a long way in earning a fellow veteran's respect.

While prior military service will provide a leg up in building rapport with a veteran client, it is not required. Authenticity is more important than credentials. Tell your veteran client about any of your family members who have served in the military. Show the veteran that you sincerely care by demonstrating at least a basic understanding of the military, the conflict in which he or she served, and the issues that may be relevant in a veteran's case. The appendices of *Defending Veterans* are intended to provide those basics so you can begin speaking the same language as your veteran client. Chapters 14, 15, and 16 of *Defending Veterans* explore in depth the military, its warrior culture, and the unique perspective of women veterans.[4]

### 3. Looking for Visible Cues of Combat Trauma

The initial meeting is also your first opportunity to observe your veteran client, looking for any signs of mental health, brain injury, and/or substance abuse issues. You may be the first to identify an untreated invisible injury. Familiarize yourself with the diagnostic criteria for PTSD and TBI, as provided in Chapters 6, 7, and 8 of *Defending Veterans*.[5]

Start with physical appearance. Some veterans look every bit the part of a hardened warrior. One of our more memorable clients was a multi-tour Army sniper. A towering mountain of tattooed muscle, he looked like a character straight out of an action film. He also projected an air of menace, leaving no doubt that he had seen and inflicted a great deal of violence. Other veterans, however, are harder

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[4] DEFENDING VETERANS, CH. 14 —DAVID FARRIER, UNDERSTANDING AND DOCUMENTING YOUR VETERAN CLIENT'S MILITARY SERVICE; CH. 15 — HECTOR MATASCASTILLO, RUNNING HEAD: ENTERING INTO KINSHIP WITH THE WARRIOR; CH. 16 — TRISTA MATASCASTILLO, CATHERINE O'CONNOR, & MARY BOYCE, UNDERSTANDING WOMEN VETERANS.

[5] DEFENDING VETERANS, CH. 6 — DANIEL DOSSA & ERNEST BOSWELLL, POST-TRAUMATIC STRESS DISORDER: A BRIEF OVERVIEW; CH. 7 — ERNEST BOSWELL & DANIEL DOSSA, PTSD IN FORENSIC SETTINGS: ASSESSMENT, DIAGNOSIS, & CRIMINAL BEHAVIOR; CH. 8 — RONALD GLASSER & CHRISANNE GORDON, TRAUMATIC BRAIN INJURY: THE INVISIBLE INJURY.

to spot. Another veteran client, at first glance, looked as if he might still be in high school, his boyish, freckled face betrayed only by the eyes of an old man. We soon learned that he had served three tours in Iraq as a Marine infantryman, participating in some of the most intense battles of that war.

Mannerisms indicative of combat trauma can also vary greatly. One veteran client arrived at our office literally vibrating with energy. Hyper-vigilant, he constantly scanned his surroundings for potential threats, his eyes bulging from of their sockets. Sweat poured from his forehead, and he wiped it away with a fully-saturated bath towel he carried with him. Another veteran client was contrastingly stoic, his affect was flat, and dark rings under his eyes signaled sleep deprivation.

### 4. Addressing the Charges and Identifying Potential Defenses

We begin the initial meeting by talking with our veteran client about his or her pending charges, just as we would any client. We discuss the alleged facts, charged offenses, potential penalties, and the client's side of the story.

Note, some veterans facing criminal charges are simply not guilty. A calculating spouse may be falsely alleging domestic abuse in to gain the upper hand in a divorce and/or custody battle. A veteran charged in a barroom assault may have been legitimately defending himself from a local "tough guy," out to show he can take on the returning "war hero."

Note, also, veterans can be, both, innocent of the charged crime *and* suffering from combat trauma. A spouse falsely alleging domestic violence may even play up a veteran's legitimate psychological injuries in painting him as a monster. A veteran with PTSD may also have an enhanced self-defense claim, based upon his or her altered perceptions, as we detail in Chapter 17 of *Defending Veterans*.[6]

The Defense must carefully assess the State's evidence, the client's story, and any psychological injuries, in crafting the appropriate defense. In some cases, the client's veteran status and any invisible injuries will be completely irrelevant to the defense and may not even be introduced into evidence. In others, the client's military service and resulting trauma will be the focus of the representation, front and center, from start to finish.

### 5. Addressing Military Service

Initially, we only discuss our veteran client's military service in very general terms. We do not typically use a formal questionnaire at this point, as it could be a barrier to establishing trust.

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[6] DEFENDING VETERANS, CH. 17 — BROCKTON D. HUNTER & RYAN C. ELSE, LEGAL STRATEGIES FOR DEFENDING THE COMBAT VETERAN IN CRIMINAL COURT.

We start with the basic facts of military service: military branch, years of service, military occupational specialty (job), rank, duty stations, and any overseas deployments. Then we ask some open-ended questions about the nature of that service, paying attention to the emotions displayed as much as to the content of the answers. We allow the veteran client's comfort level guide us, careful not to push him or her too fast, too soon.

Depending on our veteran client's emotional state and the level of trust we feel we have established by this point, we sometimes probe further about the nature and extent of his or her exposure to traumatic experiences. This is very sensitive territory, so we are careful to tread lightly. Without going into too much detail, we inquire about service in a designated combat zone — receiving incoming enemy fire, returning fire on the enemy, contact with casualties, and exposure to explosive blasts — looking for fact patterns that could to contribute to invisible injuries.

#### 6. Addressing Symptoms of Combat Trauma

We next ask new veteran clients about whether they have been experiencing any symptoms commonly associated with PTSD. We do not mention "PTSD", specifically. We just inquire about symptoms. One favorite is to simply ask, "how are you sleeping?" A common answer among those experiencing PTSD, even when they are in denial about it, is, "Sleep? What is sleep?" We also ask about hyper-vigilant behavior, avoidance of crowded public areas, driving problems, nightmares, and alcohol and/or drug consumption.

Often, a veteran client is accompanied by a spouse, other family member, or close friend. If possible, we also ask that person about such symptoms.

## B. Overcoming the Stigma of PTSD

As we build trust and get to know our veteran client and his or her trauma, we begin to probe for any stigma he or she may attach to it. We may be the first to recognize potential combat trauma in a veteran client. We may also be the only ones capable of steering him or her to appropriate treatment and to opening up and actively assisting in his or her defense.

Though attitudes towards invisible injuries in the military are evolving, many suffering veterans are still very resistant to the idea that they have problems they cannot handle on their own. Military training and psychological conditioning, as described in Chapters 1, 4, and 15 of *Defending Veterans*,[7] instills the belief that a

[7] DEFENDING VETERANS, CH. 1 — BROCKTON D. HUNTER, ECHOES OF WAR: COMBAT TRAUMA, CRIMINAL BEHAVIOR, AND HOW WE CAN DO BETTER THIS TIME AROUND; CH. 4 — WILLIAM BROWN, SPINNING THE BOTTLE: A COMPARATIVE

soldier can, or should, accomplish any mission and never break down. Many of these veterans haven't been taught what the military's own studies of psychiatric casualties demonstrate — that every soldier has a breaking point.

Often, the most challenging step in the case preparation process will be getting your veteran client to open up about his or her service experiences and the effects that those experiences have had on his or her mental health or lifestyle. Due to the stigma surrounding mental health problems and the "Superman syndrome" of unreasonable expectations of perfection that pervades the military, it is very difficult for many veterans to admit that what they are experiencing is related to a possible mental health disorder or even to a physical injury.

In this context, we often borrow an analogy we learned from Don Elverd, Ph.D., author of Chapter 12 of *Defending Veterans*,[8] and ask our veteran clients to think about their brain and mind like they would any other piece military equipment. We confirm with them the importance of keeping their weapons or vehicles in top condition and repairing them after heavy combat use. We confirm the importance of keeping their bodies in top physical condition and seeking first aid when necessary to stay combat-effective. We then ask them why their brain and mind should be any different. We explain, for instance, that brain chemistry can be measurably altered by prolonged combat exposure – that serotonin, which acts as the brain's "shock absorbers," can become depleted — making every little bump in the proverbial road feel like a monster pothole. In this context, PTSD treatment becomes just a way to get their mental "shock absorbers" back into effective operation.

If the alleged crime is of a more serious nature, a veteran client may also experience guilt in having failed to act in accordance with the very high standards to which most veterans have held themselves throughout their military careers. In such a case, the veteran may not want to discuss his or her service in order to avoid bringing disgrace on his or her unit, preferring to accept the weight of responsibility as an individual.

In this context, a little education can go a long way. When we encounter a veteran client who appears to be in shame-based denial about a legitimate invisible injury, we provide him or her with a brief overview of the history of combat trauma and its ties to criminal behavior, as detailed in Chapter 1 of *Defending Veterans*.[9] It helps to tell the veteran that he or she is not alone and that many elite combat

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ANALYSIS OF VETERAN DEFENDANTS AND VETERANS NOT ENTANGLED IN CRIMINAL JUSTICE; CH. 15 — HECTOR MATASCASTILLO, RUNNING HEAD: ENTERING INTO KINSHIP WITH THE WARRIOR.

[8] DEFENDING VETERANS, CH. 12 — DONALD R. ELVERD, NON-WESTERN TRADITIONS IN COPING WITH PTSD: WHAT WE CAN LEARN FROM INDIGENOUS CULTURES.

[9] DEFENDING VETERANS, CH. 1 — BROCKTON D. HUNTER, ECHOES OF WAR: COMBAT TRAUMA, CRIMINAL BEHAVIOR, AND HOW WE CAN DO BETTER THIS TIME AROUND.

veterans throughout history, from Odysseus to Audie Murphy to Hector Matascastillo, have suffered invisible injuries resulting in criminal behavior. It also helps to tell the veteran that help is available and effective.

Sometimes, the shame of a criminal charge can actually help break through otherwise bulletproof "Superman Syndrome." In this context, we often ask, "okay, Stud, are you a criminal or do you need to get some help?" Most troubled veteran clients, despite feeling deep shame for their aberrant behavior, will ultimately come around to the idea that they might need some help.

To be clear, this discussion is *not* meant to coach the veteran client on malingering PTSD or other service-related trauma. It is intended for those cases in which we are reasonably confident our veteran client is in denial about legitimate injuries and needs to get help. Chapter 18 of *Defending Veterans* provides in-depth information on identifying and dealing with potential malingerers.[10]

## C. Guiding the Veteran Client to Appropriate Treatment

As we discuss our veteran client's charges and assess the role combat trauma may have played, we are also conscious that the charges themselves and associated stress may be triggering additional mental health issues. As Major Evan Seamone notes in Chapter 13 of *Defending Veterans*, criminal charges can be the final straw for a veteran already in psychological crisis.[11] We employ Seamone's "Lawyer as Counselor" tools, ready to administer basic psychological first aid to stabilize our client and guide him or her toward professional care. We are particularly alert to any signs of crisis or hopelessness that could signal a danger of suicide and require a more immediate intervention.

We encourage our veteran clients with potential invisible injuries to get professional screening and help, whether those injuries are relevant to our defense or not. It helps to have an established point of contact at the local VA Medical Center to help with the initial introduction to the system since it may seem overwhelming to a veteran who is already in crisis. The VA now has Veterans Justice Outreach (VJO) Specialists at each of the VA medical centers, tasked with serving as the point of contact to the VA for criminally-charged veterans.[12] VJOs can assist in scheduling a mental health assessment, securing a valid diagnosis, and establishing a treatment plan. With a properly executed "Request For and Authorization To Release Medical

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[10] DEFENDING VETERANS, CH. 18 — BROCKTON D. HUNTER & RYAN C. ELSE, PRE-TRIAL PREPARATION AND SEEKING RESOLUTION.

[11] CH. 13 — MAJ. EVAN SEAMONE, THE COUNTERINSURGENCY IN LEGAL COUNSELING: PREPARING ATTORNEYS TO DEFEND COMBAT VETERANS AGAINST THEMSELVES IN CRIMINAL CASES.

[12] VJO contact information is available at http://www.va.gov/homeless/vjo_contacts.asp.

Records or Health Information," VA Form 10-5345,[13] the VJO will also provide us with ongoing feedback and assistance in obtaining past and current VA treatment records. This document allows the VA to release records directly to us for up to a year.

The veteran client's treatment will be the starting point to any mental health-related defense or mitigation, so he or she must take it seriously. A successful track record in a treatment program while the case is pending can be very productive in showing the prosecution or the court that the veteran is not a public safety risk and poses a low risk of recidivism.

We also provide our veteran clients with a wide variety of resources, such as those outlined in Appendix E of *Defending Veterans*, which discusses the wide variety of veteran-specific services available.[14] We ensure that they are also aware of local resources, such a county veteran services, veteran-centric nonprofits, and veterans' employment and education offices.

## III. DIMENSIONS OF ENHANCED CLIENT-COUNSELING FOR COMBAT VETERANS[15]

One of the most uncomfortable discussions in the practice of law involves the extent of required counseling in legal representation. Most attorneys condemn the idea of the lawyer as a "psychologist" and revolt even at the modest suggestion that lawyers may sometimes engage in forms of "social work."[16] While professional conduct rules are extremely permissive,[17] there is a general perception that attorneys should be conscious of boundaries between clinical and legal counseling. The only problem with this restrictive interpretation is the absence of any

[13] Request For and Authorization to Release Medical Records or Health Information, VA Form 10-5345, can be accessed as an online PDF at http://www.va.gov/vaforms/medical/pdf/vha-10-5345-fill.pdf.

[14] DEFENDING VETERANS, APP. E — VETERAN SERVICES: RESOURCES FOR REINTEGRATING AND REHABILITATING YOUR VETERAN CLIENT.

[15] This section is drawn directly from DEFENDING VETERANS, CH. 13 — MAJ. EVAN SEAMONE, THE COUNTERINSURGENCY IN LEGAL COUNSELING: PREPARING ATTORNEYS TO DEFEND COMBAT VETERANS AGAINST THEMSELVES IN CRIMINAL CASES.

[16] Jane Aiken & Stephen Wizner, *Law As Social Work*, 11 WASH. U. J. L. & POL'Y 63, 81 (2003) ("[L]awyers often make efforts to distinguish themselves from social workers, and, in effect, will say, 'I'm not a social worker.'").

[17] MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009) [hereinafter ABA MODEL RULES] (permitting legal counseling on considerations besides solely the law, including "moral, economic, social, and political factors"). *See also* Bruce A. Green, *The Role of Professional Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 48 (1998) (noting the "considerable room for client counseling [that even] gives expression to the lawyer's moral and religious beliefs").

guidelines defining these very boundaries.[18] Too often, the attorney imposes needless and overly-restrictive limits in response to valid concerns.

Most attorneys label themselves nonprofessionals in mental health, voicing grave concerns for causing potential harm to a client if they step only a foot from the lane of substantive legal analysis. On closer examination, these barriers are largely artificial. Criminal attorneys, more than any other type, are *counselors* at law. Aside from the titles on their bar certificates, their professional responsibilities are far more extensive than that of a psychologist. Attorneys, unlike many therapists, cannot adopt nonjudgmental roles in client-counseling. They often must coerce and bully clients into considering legal alternatives. Most importantly, they must deal with client trauma as it unfolds during trial or in the aftermath of bad news, without the benefit of time for the client to process and consider events before consultation.[19]

The erection of artificial barriers by attorneys is not without consequence for veteran clients. In their aims to avert harm by refusing to respond to crisis, these lawyers only increase it among a client population at a high risk of suicide and more susceptible to forensic stress.[20] David Switzer, a pastoral counselor, aptly explains that issues of competence to address a client's emotional problems and the limits of a nonclinician "have usually been portrayed as a warning."[21] However, this is "not the whole story"; we overlook the "equally important" fact that "there's a certain space within that boundary mark."[22]

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[18] Carol M. Suzuki, *When Something is Not Quite Right: Considerations for Advising a Client to Seek Mental Health Treatment*, 6 HASTINGS RACE & POVERTY L.J. 208, 213 (2009) ("[L]awyers have no specific guidance on what to say to the client with a mental health problem about seeking its resolution."); Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339, 342 (2006) ("There may be no other profession whose practicioners are required to deal with so much pain with so little support and guidance [as law].").

[19] *See* Evan R. Seamone, *The Veterans' Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Posttraumatic Stress Disorder*, 202 MIL. L. REV. 185, 197–201 (2009).

[20] *See, e.g.*, ARTHUR FREEMAN & MARK REINECKE, COGNITIVE THERAPY OF SUICIDAL BEHAVIOR: A MANUAL FOR TREATMENT 177 (1993) ("Combat veterans suffering from PTSD constitute a . . . group that is at increased risk for depression, suicidal thoughts, and self-destructive behavior." ); Seamone, *supra* note 19, at 149–50 ("[A]ttorneys who fail to acknowledge the client's PTSD symptoms or counter the effects of stress responses can cause harm beyond their clients' legal cause. Chief among other potential harms, the compounded stress of litigation alone can increase the risk of suicidal behavior.").

[21] DAVID K. SWITZER, PASTORAL CARE EMERGENCIES 17 (2000).

[22] *Id*.

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*The paradox of harm aversion is that, in over-cautious attempts to **protect** the client, the attorney becomes blinded to the very signals that would indicate suicide risks and positions that are harmful to the client's legal interests.*

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Too often, the attorney encourages a muffled, suppressed dialogue with the client by holding out the law office as an ***in***appropriate place to address feelings and emotions.[23]

Truth be told, the general notion that attorneys should not—and do not—use psychological methods is a fictional concept, entirely detached from the reality of legal practice. Family lawyers— especially those representing vindictive and irrational clients—regularly use *clinical* counseling techniques.[24] But criminal defense attorneys use them more frequently. Even for clients who are *not* suffering from mental illnesses, defense attorneys have a duty to confront all clients' denial. In discussing "unrealistic expectations," "emotional reactions," and "psychological barriers to the client's consider[ation of] alternative possibilities," Professor Bruce Winick explains that "the lawyer ***must*** attempt to dispel [misconceptions] and provide the client with a new sense of reality."[25]

As a component of nearly every defense counsel's repertoire, the technique of asking a client to view evidence from a hypothetical jury's perspective[26] is a form of necessary "cognitive restructuring."[27] Along with several other counseling techniques, it is unabashedly and unashamedly a way to identify obstructions in the client's mental and perceptual frames. Here, the defense attorney sets goals that are

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[23] *Id*.

[24] *See generally* SANFORD M. PORTNOY, THE FAMILY LAWYER'S GUIDE TO BUILDING SUCCESSFUL CLIENT RELATIONSHIPS 68–71 (2000).

[25] Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 341, 347 (Marjorie A. Siver ed., 2007).

[26] *See, e.g.*, Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1309 (1975) (explaining how defense attorneys have a "duty to emphasize the harsh terms the force of the prosecution's evidence: . . . How the hell would you vote if you were a juror in your case?").

[27] Stephanos Bibas, *Using Plea Procedures to Combat Denial and Minimization*, *in* JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 165, 174 (Bruce J. Winick & David B. Wexler eds., 2003) (observing the defense counsel's indisputable function of "cognitive restructuring by confronting their clients with the incriminating evidence"). Professor Winick acknowledges that the lawyer's reality reorienting role has psychological foundations: "This can be seen as a task not unlike cognitive restructuring, a therapeutic approach used by clinicians in dealing with a variety of problems that bring their patients to the office." Winick, *supra* note 25, at 341, 347.

indistinguishable from the licensed clinicians who use cognitive therapy techniques.[28]

Cognitive restructuring, as a staple of effective legal representation, however, is not purely the practice of psychology, even though it adopts psychological methods. This is still, and foremost, the practice of law. As I have explored elsewhere, state psychology licensing boards have long confronted the issue of lawyers' inevitable "overlap" with clinical practice. For a simple reason, the great majority of jurisdictions permit attorneys to use psychological techniques without an additional psychology licensing requirement:[29]

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*Although the lawyer's counseling is partly psychological,*
*such characteristics are limited to that which is*
*necessary for effective* ***legal*** *advice and representation*.

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This point echoes most clearly in the joint efforts of the American Bar Association and the American Psychological Association to assist attorneys faced with the assessment of elderly clients for diminished capacity. Their handbook distinguishes between a permissible legal assessment and a prohibited clinical one, justifying the use of psychological tools for legal purposes when they enhance the attorney's effectiveness as a lawyer.[30] The same is true of assisting combat veteran clients.

## A. Limits on the Attorney's Counseling Role

Although professional rules provide a wide berth for attorney counseling techniques, companion rules require competence in their application.[31] Defense attorneys who counsel clients suffering from PTSD are largely failing to meet their

[28] *See, e.g.*, JULIA M. WHEALIN ET AL., CLINICIAN'S GUIDE TO TREATING STRESS AFTER WAR: EDUCATION AND COPING INTERVENTIONS FOR VETERANS 13 (2008) ("The primary goal of many cognitive approaches can be viewed as assisting individuals to formulate thoughts and beliefs that are typically more realistic and adaptive, and by addressing a broad range of maladaptive thinking patterns.").

[29] After reviewing the positions in multiple jurisdictions in the great majority of states, these boards exempt or except licensed members of professions like law from licensing requirements. Importantly, at least ten states, including California, Texas, and New York, have explicitly identify attorneys as persons who require no psychology license to use psychological techniques. Given the wide birth of Model Rule 2.1 and the conclusions of most state boards, there is no issue about whether attorneys have the ability to do what they are already doing. Seamone, *supra* note 19, at 202–06.

[30] ABA COMM. ON L. & AGING & AM. PSYCHOLOGICAL ASSN., ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS 9 (2005).

[31] *See, e.g.*, Seamone, *supra* note 19, at 197 (highlighting how the lawyer's ethical field is still populated by the requirements of competence, communication, client self-determination, and other requirements applicable to any and all legal counseling).

professional obligations by denying the critical role of trauma de-escalation in their counseling practice. "Teachers, doctors, *lawyers*, and other [professionals], must respond when [an] emergency explodes, whether they are prepared to do so or not."[32] Like most nonpsychologist professional counselors, attorneys often, by default, engage in counseling with a sense of ambivalence, suspecting that their innate reactions to client crises will somehow always result in success. There are reasons to doubt attorneys' uncritical and uneducated "gut reactions."[33] As Switzer further highlights,

> There are numerous expressions, often with high emotional intensity, of people under duress (panic-stricken, furious, depressed, suicidal, etc.) which are difficult enough for a well-trained and experienced person to respond to in highly facilitative ways. All of us have found ourselves at a loss of words at times. Unfortunately, in those moments, we may attempt to force something out in order to break the silence and take care of our own anxiety. Therefore, it's only by sheer coincidence that we come up with something which also speaks effectively to the needs of the [client] at this moment.[34]

Here, what a defense attorney "may do *naturally* or *intuitively* may simply miss or even reject the [client's] most immediate needs."[35] As another dimension of the harm aversion paradox, attorneys, through their avoidance of therapeutic measures, increase potential harm to the client by responding from an instinctual, rather than a planned, basis.[36]

The deployment of rudimentary psychological techniques to challenge defective thoughts and reduce stress reactions does not transform an attorney into a clinician:

> Lawyers need not *become* psychologists or social workers in order to practice law *affectively* or *effectively*, any more than a medical malpractice lawyer must go to medical school. But just as the lawyer needs to acquire sufficient knowledge about the human body, disease,

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[32] EUGENE KENNEDY, CRISIS COUNSELING: THE ESSENTIAL GUIDE FOR NONPROFESSIONAL COUNSELORS, at xi (1981) (emphasis added).
[33] Susan L. Brooks, *Using Social Work Constructs in the Practice of Law*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 53, 54 (Marjorie A. Siver ed., 2007) ("Most experienced lawyers have developed their own strategies for dealing with [clients in crisis]. But if they are honest, they simply follow their gut feelings.").
[34] SWITZER, *supra* note 21, at 17.
[35] *Id*.
[36] *Id*. at 21, 121–21 (describing the likelihood of missing important danger signals in the suppression of the client's expression).

> and medicine in order to effectively represent his clients, all lawyers need to know enough about the operation of emotions and the psyche in order to appreciate the ways in which these forces may enhance or impede their work.[37]

Yet, there *is* a line in the sand:

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*Defense attorneys should not help the client find meaning in combat experiences or life events, or aim for the client's personal or spiritual transformation.*

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Activities that focus on the client's universal wellbeing, but without regard to the law, detract from the attorney-client relationship, set improper expectations, and are better suited for clinicians; they otherwise mislead clients into believing that the attorney is a healer of *all* wounds.[38] Instead of therapy and behavior modification for *long-term* life adjustment, the attorney's role in proactive therapeutic counseling is to help the client deal with the immediate impact of litigation and minimize the impact of forensic stress and the triggers that can aggravate the underlying disorder. In line with these objectives, attorneys should use methods to enhance the effectiveness of their legal counseling. When absence of intervention will harm the client's legal interests, the attorney must act, either by personally using methods, or ensuring that the client will be able to obtain this assistance elsewhere. The following sections will address considerations for effective collaboration with other professionals and attorney-based techniques, in turn.

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[37] Marjorie A. Silver, *Emotional Competence and the Lawyer's Journey*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 5, 5–6 (Marjorie A. Silver ed., 2007). *See also* Robin Wellford Slocum, *The Dilemma of the Vengeful Client: A Prescriptive Framework for Cooling the Flames of Anger*, 92 MARQ. L. REV. 481, 512 (2009) ("Just as a corporate lawyer who advises a client about the tax consequences of a proposed business decision may not be a substitute for an accountant, so too, the lawyer who helps a client reduce the level of anger and frustration that is driving his decisions is not a substitute for a mental health professional.").

[38] SANFORD M. PORTNOY, THE FAMILY LAWYER'S GUIDE TO BUILDING SUCCESSFUL CLIENT RELATIONSHIPS 58 (2000) (distinguishing problems that arise when the attorney's counseling function goes beyond addressing the client's litigation-based "affective needs" to "having a primary objective of helping the client deal with his feelings and personal problems."). Defense attorneys often experience such role confusion when clients regularly visit their offices unannounced, merely to gain a sense of security or talk about life in general without any connection to the law. The problem is most evident when, despite the attorney's courteous requests, the client refuses to leave.

# IV. ATTORNEY-BASED ENHANCED TECHNIQUES FOR COUNSELING COMBAT VETERAN CLIENTS[39]

Because of the nature of combat-related trauma, the attorney will likely face a client who has long suffered with limited coping strategies, who intentionally avoids close relationships, who limits emotional vulnerability, and who very likely may have been traumatized by *his or her own involvement* in the perpetration of the charged offense, separate from combat trauma.[40] As depicted in Figure 1, below, because three levels of trauma often collide in the course of the representation—service-related, offense-related, and litigation-related—the lawyer should be prepared to prevent an overwhelming ambush on the client's legal decision-making.

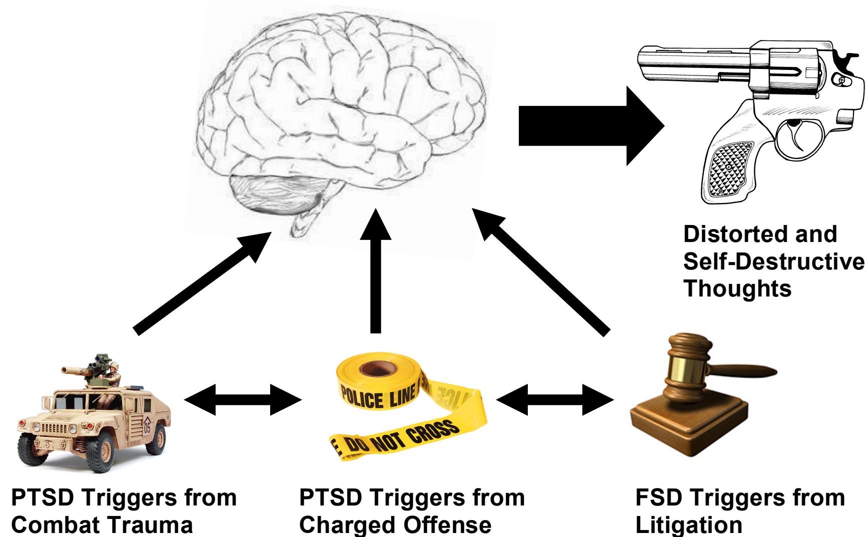


**Fig. 1 Colliding Forces That Defeat the Client's Legal Interests**

Psychological First Aid (PFA) best characterizes the attorney's counseling role in its most aggressive form where, under time-limited circumstances, without immediate access to a clinician, the attorney is the only person uniquely positioned to establish a lifeline with the client.

## A. Psychological First Aid

When a child falls from a bicycle and cuts her leg, we expect her parents to lift her up, to wash the dirt or bits of asphalt from the torn skin, to apply direct pressure to

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[39] This section is drawn directly from DEFENDING VETERANS, CH. 13 — MAJ. EVAN SEAMONE, THE COUNTERINSURGENCY IN LEGAL COUNSELING: PREPARING ATTORNEYS TO DEFEND COMBAT VETERANS AGAINST THEMSELVES IN CRIMINAL CASES.

[40] *See* J. Vincent Aprille II, *PTSD: When the Crime Punishes the Perpetrator*, 23 CRIM. JUST. 39, 39 (2009).

the wound, to treat the laceration with alcohol, and to apply a bandage. We do not expect parents to stand idly at the sidelines until a doctor arrives. If a parent did do this, the child's injury could become infected. Without the immediate and effective intervention of a layperson in responding to the inflicted harm, the situation could degenerate and limit the effects of eventual medical care from experts delivered at a later time. This scenario describes the philosophy behind the PFA concept:

> PFA . . . is more akin to the concept of first aid. First aid refers to preliminary physical care provided by members of the general population, not by medical professionals. In minor cases of physical injury, first aid may suffice to provide the care an individual needs for recovery . . . . PFA can be used to provide psychological support for experiences ranging from minor stressors in daily life to traumatic events. Just as physical first aid teaches participants how to know when an injury requires professional medical attention, PFA teaches providers when and how to make referrals for professional mental health care.[41]

Broadly understood as "a supportive and compassionate presence designed to reduce acute psychological distress and/or facilitate continued support, if necessary,"[42] PFA initially targeted non-psychologists who worked in the emergency response field, carving out special areas where such persons, as a matter of public health, were permitted to intervene in times of crisis to prevent psychological harm.[43] In time, clergymembers were included in the fold.[44] Most recently, experts such as George Everly, Jr. and Cherie Castellano, have recognized the value of administering PFA through the persons who supervise traumatized combat veterans, such as small unit leaders.[45] Like the disaster workers and civil defense personnel, these leaders are uniquely positioned to "deter stress and foster resilience."[46] Hence, on the same basis that the World Health Organization, Institute of Medicine, and U.S. Department of Health and Human Services has encouraged

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[41] Gerard A. Jacobs & David L. Meyer, *Psychological First Aid: Clarifying the Concept*, *in* PSYCHOLOGICAL INTERVENTIONS IN TIMES OF CRISIS 57, 59 (Laura Barbanel & Robert J. Sternberg eds., 2006).

[42] George S. Everly, Jr. & Rear Admiral Brian W. Flynn, *Principles and Practical Procedures for Acute Psychological First Aid Training for Personnel Without Mental Health Experience*, 8 INT'L J. EMERGENCY MENTAL HEALTH 1, 4 (2006).

[43] *See, e.g.*, Gerard A. Jacobs & David L. Meyer, *Psychological First Aid: Clarifying the Concept*, *in* PSYCHOLOGICAL INTERVENTIONS IN TIMES OF CRISIS 59-60 (Laura Barbanel & Robert J. Sternberg eds., 2006) (tracing the history of PFA intended to be delivered to trauma victims by nonclinicans).

[44] George S. Everly, Jr., *"Pastoral Crisis Intervention": Toward a Definition*, 2 INT'L J. EMERGENCY MENTAL HEALTH 69, 69 (2000) (proposing PFA as a method to achieve "the functional integration of psychological crisis intervention with pastoral care"). *See also* DAVID K. SWITZER, PASTORAL CARE EMERGENCIES 47 (2000)(applying the principle to pastoral counselors' responses to mental health crises).

[45] George S. Everly, Jr. & Cherie Castellano, *Fostering Resilience in the Military: The Search for Psychological Body Armor*, J. COUNTERTERRORISM & HOMELAND SECURITY INT'L, Winter 2009, at 12, 14 (recommending "[t]eaching psychological first aid . . . to NCOs [noncommissioned officers]").

[46] *Id*.

laypersons to prepare for direct roles in preventing psychological harm,[47] attorneys representing traumatized combat veterans have a compelling reason to address emotional influences occasioned by their clients' mental conditions.[48] The aggravating properties of Forensic Stress Disorder provide defense attorneys with an even greater incentive to intervene.

Psychological First Aid adopts some basic principles of crisis response and intervention, distinguishing between minor steps to assist the client, and major measures to stabilize a person for clinical care following acute emergencies. As in the legal realm, cognitive restructuring is a major component of PFA. While the Johns Hopkins outline of the PFA process is reproduced in Appendix A, Figure 2 depicts activities within the "Cognitive Behavioral Intervention" category that are administered to trauma victims by nonclinician "public health personnel as well as emergency services and disaster response personnel."[49]

Intervention – Cognitive-behavioral

- Education: Explanatory (Use "Fight-Flight") And Or Anticipatory Guidance
- Acute Cognitive/Behavioral Refocusing/Re-orienting
- Deep Breathing/Relaxation
- Cognitive Reframing
    - Correction of Errors in Fact
    - Disputing Illogical Thinking
    - Challenging Catastrophic Thinking
    - Finding Something Positive, Hidden Benefit
- Instillation of a future orientation . . . Hope
- Delay Making Any Life-altering Decisions/Changes
- *Caution! Do* Not Interfere With Natural Recovery

**Fig. 2 PFA's Cognitive Restructuring Components**

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[47] *See* WORLD HEALTH ORGANIZATION, MENTAL HEALTH IN EMERGENCIES: MENTAL AND SOCIAL ASPECTS OF HEALTH POPULATIONS EXPOSED TO EXTREME STRESSORS 4 (2003); U.S. DEP'T OF HEALTH & HUMAN SERVICES, MENTAL HEALTH RESPONSE TO MASS VIOLENCE AND TERRORISM: A PUBLIC HEALTH STRATEGY tbl. ES-2, at 14 (2004) (including the strategy "[d]esign and implement psychological first aid training"); INSTITUTE OF MEDICINE, PREPARING FOR THE PSYCHOLOGICAL CONSEQUENCES OF TERRORISM: A TRAINING MANUAL 35–36 & Overhead 21 (2003).

[48] Noting the adoption of PFA by various federal agencies to deal with the traumatic repercussions of hostage incidents, Dr. Everly agrees that "one potential application of PFA could certainly be attorneys for use with clients." E-mail from George S. Everly, Jr., The John's Hopkins Center for Public Health Preparedness, Bloomberg School of Public Health, School of Medicine, to Captain Evan R. Seamone, Assistant Professor, Administrative & Civil Law Dep't, The Judge Advocate Gen.'s Legal Ctr. & Sch. (Feb. 18, 2010, 0:29 EST) (on file with author, Evan Seamone).

[49] GEORGE S. EVERLY & JEFFREY T. MITCHELL, INTEGRATIVE CRISIS INTERVENTION AND DISASTER MENTAL HEALTH tbl. 10.2, at 173 (2008) ("The Johns Hopkins' Model of Psychological First Aid (PFA): RAPID PFA").

The following Parts explore specially-tailored methods for providing PFA to the legal client, which have proven effective in responding to combat veterans' stress responses.

***Special Note***: The following subsections recommend legal counseling techniques for assessment and cognitive restructuring that fall on the *conservative* end of the therapeutic spectrum. Although attorneys are free to use more complicated methods after study, all of the proposed therapeutic interventions below have been vetted by mental health clinicians and approved for public distribution. Furthermore, they are approved by trained clinicians for self-directed use, eliminating concerns that the techniques are improper to use outside of a mental health setting.

## B. A Common Analytical Framework

### 1. The Client's Survival As First Priority

Criminal defense attorneys have been identified by the United States Surgeon General as "key gatekeepers" in effectuating the *National Strategy for Suicide Prevention*:

> Attorneys involved in . . . criminal defense cases often work with clients who are in heightened emotional states, depressed, hopeless, and who may have lost important social support. Such individuals may be at increased risk for violence and suicide, and attorneys are in a position to identify the increased risk and refer them for specialized interventions.[50]

Like any squad member on patrol, the attorney on point must have a contingency plan to escape the danger of an overwhelming ambush. She must search vigorously for signals of suicidal ideation beneath the surface of otherwise normal interactions, if for no other reason than the combat veteran's heightened risk of suicide when confronted with criminal charges. This position recognizes that attorneys can often be "the last professional with whom distressed persons have contact before making a suicide attempt."[51]

The following subtle signals are included below because they are very easy to miss without deliberate attention and *active* listening. Any of the following comments require necessary exploration by defense counsel:

- "I really don't know how much longer I can stand it this way."[52]

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[50] U.S. DEP'T OF HEALTH & HUMAN SERVICES, NATIONAL STRATEGY FOR SUICIDE PREVENTION: GOALS AND OBJECTIVES FOR ACTION, at Obj. 6.7, 85 (2001).

[51] *QPR for Lawyers: A Basic Gatekeeper Training for Suicide Prevention Program for Lawyers*, *in* ABA COMM. ON LAWYER ASSISTANCE PROGRAMS ET AL., WHAT LAWYERS NEED TO KNOW ABOUT SUICIDE DURING A RECESSION: PREVENTION, IDENTITY AND LAW FIRM RESPONSIBILITY (2009), at Tab 4.

[52] DAVID K. SWITZER, PASTORAL CARE EMERGENCIES 17 (2000).

- "It doesn't seem worth the effort."[53]
- "Nothing seems to mean anything anymore."[54]
- "Sometimes I don't think anyone would miss me if I were gone."[55]
- "I feel like giving up."[56]
- "I'm just so tired, I just want to sleep."[57]
- "People would be a lot happier if I weren't around."[58]
- "It's too much."[59]
- "If this trial results in *X*, my life will be over."

As David Switzer passionately explains, "we can't afford to let statements such as these go by without asking 'What do you mean?' 'Tell me more about what that's like for you.' 'What feelings of yours are you expressing when you say this?'"[60] Equivocal responses require further clarification.[61] As awkward as it may seem to the attorney, she must also ask the ultimate questions, "Do you want to kill yourself?" "Are you planning to hurt yourself in any way?"[62] To this end, the Department of Veterans Affairs (VA) recommends a series of inquiries for comprehensive evaluation:

**ASK THE QUESTIONS**

***Are you feeling hopeless about the present/future?***

**If yes ask**

***Have you had thoughts about taking your life?***

**If yes ask**

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[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] David A. Jobes & Alan L. Berman, *Crisis Intervention and Brief Treatment for Suicidal Youth*, *in* CONTEMPORARY PERSPECTIVES ON CRISIS INTERVENTION AND PREVENTION 53, 59 (Albert R. Roberts ed., 1991).
[57] *Id*.
[58] *Id*.
[59] DIANA SULLIVAN EVERSTINE & LOUIS EVERSTINE, STRATEGIC INTERVENTIONS FOR PEOPLE IN CRISIS, TRAUMA, AND DISASTER 143 (2006 rev. ed).
[60] DAVID K. SWITZER, PASTORAL CARE EMERGENCIES 17 (2000) at 122.
[61] *Id*.
[62] David A. Jobes & Alan L. Berman, *Crisis Intervention and Brief Treatment for Suicidal Youth*, *in* CONTEMPORARY PERSPECTIVES ON CRISIS INTERVENTION AND PREVENTION 53, 59 (Albert R. Roberts ed., 1991)("[V]ague suicidal comments should *always* elicit a direct question . . . as to whether the client is thinking about suicide.").

***When did you have these thoughts and do you have a plan to take your life?***

***Have you ever had a suicide attempt?***

**Fig. 3. Progressive Questioning to Assess Suicide Risks**[63]

Although research has exposed the myth that directly asking the question will encourage suicide—concluding that it is far better to ask—attorneys should be conscious of how they pose the question. They should not ask, "You're not thinking about suicide are you?" or "You wouldn't do anything stupid would you?" or "You're just kidding about killing yourself, right?"[64] Artful approaches include, "Have you been so unhappy lately that you've been thinking about ending your life?" or "Do you ever wish you could go to sleep and never wake up?"[65] As indicated in the VA's recommended steps, aside from merely inquiring into suicidal desires or thoughts, the attorney should further probe whether the client has a plan to effectuate his departure: "We have to get at the hard facts of the case. We must not confuse suicidal thoughts with a suicidal plan. More than half of us have had suicidal thoughts; the thought of suicide by itself does not indicate that a person is truly a serious risk. The situation is far different for the person who knows just what they want to do and how to do it."[66]

Along with inquiry about plans, the attorney should probe whether the client has ready access to firearms, especially since many veterans can only feel secure by simulating the same protective posture they had when deployed. Many combat veterans with PTSD sleep with handguns under their mattresses, investigating the slightest noises at night, or carry concealed firearms throughout the day.[67] An experienced attorney shared an account of a criminal client with PTSD who had managed to transport live hand grenades back to his garage, where he kept them in a box just in case he might need to use them. The attorney recalls how the client had no awareness of the risks inherent in such an activity. With ready access to weapons, a veteran client may have more incentive to act upon suicidal ideation or carry out a plan.

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[63] U.S. DEP'T OF VETERANS AFFAIRS, RESPONDING TO SUICIDE RISK (n.d.).

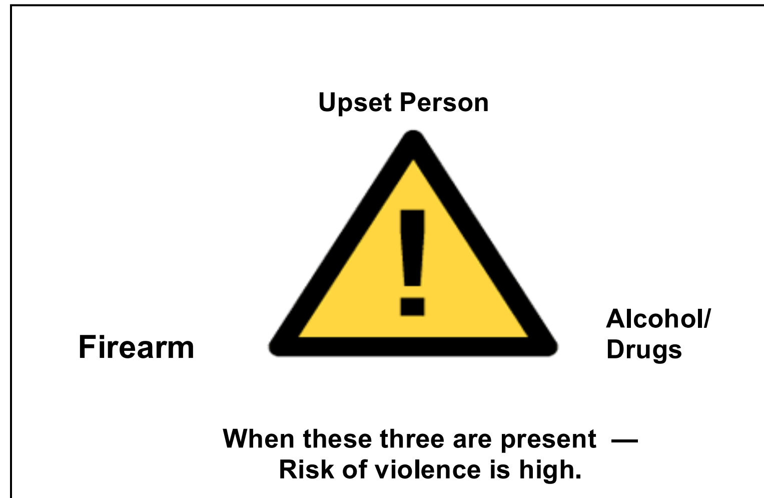
[64] DEBORAH DUNCAN ET AL., ASK A QUESTION AND SAVE A LIFE: SUICIDE PREVENTION & POSTVENTION 27 (2010), http://images.dcheetahimages.com/www.ctaafsc.org/ama/orig/Sessions/2010/Thu/Keller_Take_ Action.pdf.

[65] *Id*. at 25.

[66] EUGENE KENNEDY, CRISIS COUNSELING: THE ESSENTIAL GUIDE FOR NONPROFESSIONAL COUNSELORS, at 49 (1981).

[67] *See, e.g.*, THE GROUND TRUTH (Focus Features 2006) (highlighting the experiences of combat veterans who felt they required access to weapons after their return).

Suicide researchers identify a "lethal triad" of which attorneys should take special note:




In assessing these and other circumstantial indicators of suicide risks, common "danger signs" include situations where the client:

- Is involved in a mutually destructive relationship, or cannot let go of a damaging relationship from the past.
- Speaks in absolute terms about the other person, as in "She never did understand me" or "It's finished with us" or "I'll never escape from that man."
- Expresses frustration with people in general, describing them in cynical terms such as "People don't change" or "You can't trust anyone."
- Is frequently nostalgic, reminiscing about significant events in his or her life, or returning to places as if to say goodbye.
- Starts giving people advice about what direction their lives should take, as though he or she wouldn't be around to advise them later on.
- Insists on concluding business matters, such as finalizing a sale or transferring titles or setting up a trust fund for a child; and, of course makes a will when in perfect health.
- Begins to sort out short-term and long-term projects, keeping the ones that are "doable" and discarding ones that might take a while to complete.
- Calls an old friend with whom he or she has lost touch, or visits a grandmother for the first time in years.
- Becomes inexplicably generous, giving away possessions to people, much to their surprise.
- Expresses newfound religious convictions, or heatedly denounces religion as "worthless."

[68] DEBORAH DUNCAN ET AL., ASK A QUESTION AND SAVE A LIFE: SUICIDE PREVENTION & POSTVENTION 22 (2010), http://images.dcheetahimages.com/www.ctaafsc.org/ama/orig/Sessions/2010/Thu/Keller_Take_Action.pdf.

- Becomes, if vain supervain; or, if normally unconcerned about appearance, downright slovenly.
- Seeks to persuade people that the crisis in his or her life has passed, and that there is no further need for worry.
- Suddenly becomes silent when asked what he or she is feeling, changing the subject by "shutting-out" or becoming distant.[69]

When the client is suicidal, the attorney must naturally shift the focus of the relationship to address the imminence of the lethal threat.

Some attorney organizations have recommended use of the QPR (question, persuade, and refer) method developed by Dr. Paul Quinnett in response to suicidal clients.[70] Aside from asking about suicidal intentions and plans, the persuasion element of QPR aims to "reconstruct or alter the way someone sees something," and, in essence, "change one's view of reality" as it relates to suicide.[71] Attorneys using this technique aim to listen nonjudgmentally and then "offer hope in any form."[72] A second component of persuasion is obtaining a commitment from the client, by asking, "Will you go with me to get help?" "Will you let me help you get help?" or "Will you promise me not to kill yourself until we've found some help?"[73]

> In general, the referral element of QPR focuses on three potential solutions:
>
> The best referral involves taking the person directly to someone who can help. The next best referral is getting a commitment from them to accept help, then making the arrangements to get that help. The third best referral is to give referral information and try to get a good faith commitment not to complete or attempt suicide. Any willingness to accept help at some time, even if in the future, is a good outcome.[74]

However, lawyers face unique professional responsibility issues when a suicidal client does not want to obtain emergency care. The lawyer *may* be ethically obligated to seek help for the client in such case, which raises serious concerns about the evisceration of trust in the professional relationship and client perceptions of betrayal. The many complex ethical questions surrounding these decisions are beyond the scope of this chapter because their answers may differ depending on the attorney's licensing jurisdiction. Other articles address these concerns.[75] While the attorney should first endeavor to obtain the client's consent

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[69] DIANA SULLIVAN EVERSTINE & LOUIS EVERSTINE, STRATEGIC INTERVENTIONS FOR PEOPLE IN CRISIS, TRAUMA, AND DISASTER 146 (2006 rev. ed).
[70] For training materials, see generally WWW.QPRINSTITUTE.COM.
[71] DUNCAN ET AL., *supra* note 67, at 30.
[72] *Id*. at 31.
[73] *Id*. at 32.
[74] *Id*. at 33.
[75] *See generally* Suzuki, *supra* note 18.

to initiate emergency contact for his benefit, effective preparation means "hav[ing] ready access to emergency phone numbers for the police, emergency rooms, and poison control centers."[76]

Although combat-connected mental conditions do not always lead to suicidal ideations or attempts, the defense attorney should have a reliable plan with necessary responsive steps in the event of a serious enough threat. It is simply inexcusable to proceed from the common position, "This has never happened to me yet, so why should I care?"—especially when an estimated 18 veterans are taking their lives each day and another 1000 under the VA's care attempt suicide each month.[77]

### 2. Scales to Gauge Client Distractions

Attorneys often miss the fact that clients with unseen injuries also suffer from hidden emotional influences, some of which they know only as feelings because translation in words is too difficult or confusing. A client's lack of response to an attorney's comments often signals the presence of these subtle forces. Common "red flags" indicating the presence of an unseen enemy include occasions when the

- Client reacts in ways that inhibit the development of an important topic by getting testy or withdrawing or changing eye contact.
- Lawyer is doing most of the talking.
- Client is asking no questions.
- The Client talks in generalities without providing specific information.
- The lawyer is judging the client negatively.
- The client appears angry; or the lawyer is distracted and bored.[78]

When attorneys identify these signals, they have reason to probe beneath the surface in the quickest and simplest way. Scales far simpler than the PCL-M or the BDI-II provide defense counsel with feedback at any stage of legal counseling. The Subjective Units of Distress (SUDS) scale contained in the workbook *Strategies for Managing Stress After War*, is an indispensable tool for evaluating client stress levels at a given time:

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[76] Jobes & Berman, *supra* note 61, at 53, 59. The National Suicide Prevention Hotline's number is 1800-273-TALK (8255) (#1 for Veterans).
[77] Seamone, *supra* note 19, at 151.
[78] Susan J. Bryant & Jean Koh Peters, *Six Practices for Connecting With Clients: Habit Four, Working With Interpreters and Other Mindful Approaches*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 183, 220 (Marjorie A. Silver ed., 2007).

On a scale of 0–10, with 0 being the lowest amount of distress you can feel and 10 being unbearable distress or anxiety, what is your SUDS level right now? Please circle the number that best fits how you feel now.

Completely Calm Nervous

0 1 2 3 4 5 6 7 8 9 10

**Fig. 5 "SUDS Scale"**[79]

In this and other books designed for combat veterans, such scales are intended for use multiple times during a single meeting. Attorneys can easily use the scale to monitor the effects of events related to litigation. For clients with particularly high SUDS scores, lawyers can postpone or reschedule specific counseling tasks until clients are more receptive.

### 3. Surveillance Methods Outside of the Office

Attorneys, by virtue of their multiple obligations, have little time to monitor clients when they are not captive counselees in the office or courthouse conference room. This lack of visibility impairs situational awareness of clients suffering from mental disorders. First, there is a question of whether the client might reoffend based on the same factors that contributed to the initial charges. Second, there is another concern that the client could harm himself or herself without proper oversight. In fighting the guerilla war with the client's alter ego, attorneys must conduct long range reconnaissance; without a specific process to remotely monitor clients, defense attorneys too often find themselves juggling between check-up calls, reminders, and other outreach efforts to allay their fears that the office chair will become permanently empty. Attorneys who work with combat veteran clients can make two significant improvements. First, the defense attorney can establish an extended litigation support network for the client based on the client's identification of a primary and alternate trusted point of contact (TPOC). With the client's buy-in, the attorney can meet and indoctrinate TPOCs with responsibilities to observe and report significant information that will help the attorney in the representation. Through persons who are in the best position to know of the client's activities at a given time, attorneys can extend their presence beyond the walls of their offices.[80]

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[79] JULIA M. WHEALIN ET AL., STRATEGIES FOR MANAGING STRESS AFTER WAR: VETERAN'S WORKBOOK AND GUIDE TO WELLNESS 10 (2008) (adopting the scale from J. WOLPE, THE PRACTICE OF BEHAVIOR THERAPY (2d ed. 1973)).
[80] Seamone, *supra* note 19, at 224.

A second form of long-range reconnaissance occurs when the attorney enables the client to plan and organize litigation tasks, appointments, and thoughts in a single consolidated place, like a litigation notebook. Because clients with PTSD and TBI regularly face thinking impairments, they are easily confused by complex tasks of a legal nature. These clients easily miss appointments when they fail to write down reminders in an easily accessible location. They can also fail to obtain information requested by attorneys or fail to complete any number of essential tasks, simply based on the lack of a one-stop organizational resource.[81] It is certainly a valid concern that clients who are prone misplace items and forget information may lose the notebook, risking the revelation of privileged material. However, attorneys can take precautionary measures, such as limiting the type of information maintained in the notebook or instructing the client to store it in a secure location. The litigation notebook ultimately provides the attorney with a method to rapidly assess the client's receptiveness to legal advice and the need for cognitive interventions.

#### 4. Anticipating and Mitigating Psycholegal Soft Spots

In the legal counterinsurgency, psycholegal soft spots are the roadside burlap bags that beckon the passing convoys and foot patrols. We know that a police officer's testimony about how the client "flipped out" and resisted arrest is an occasion that could trigger a stress reaction in the client. Just as all bags on the road will not explode, not every event in court will "set off" a client. But the potential for a triggering event, in either case, requires investigation and precautionary measures. Clinicians who treat PTSD victims have learned that the client's identification of situations that previously generated acute stress can help prevent future stress responses.[82] In her navigation, a defense counsel who ignores the benefits of such planning enters the danger zone treating possible Improvised Explosive Devices (IEDs) as no more than speed bumps.

To assist defense counsel, I developed a litigation-centric "PTSD Trigger Awareness Plan" by adapting the analytical tools in the book *Courage After Fire*. The plan, depicted in Figure 7, below, asks clients to consider their past reactions and triggers in order to anticipate future ones.

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[81] *Id*. at 223–24.

[82] Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 296 (2000) ("The mere acknowledgement of uncomfortable feelings may suffice to render such feelings more manageable.").

**Litigation Trigger List**:

**(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)**

**Photographs (Specify) (Rate) (Physical Reactions) (Related Thoughts)**
**Letters**
**Content of Testimony**
**Seeing a Witness**
**Seeing a Spectator in the Court-Room**
**Discussions of Potential Defenses by Judge, Prosecutor, Plaintiff, Defendant, Attorney**
**Smells or Sounds**
**Anniversary Dates Expected During Representation**
**Mental Images Unrelated to Litigation Expected**

**Measures to Decrease Anxiety: 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).**

**External Factors**
**(List the Expected Frequency of Activities and the Expected Level of Adherence to Estimated Frequency 1–10)**

**Daily Hours of Sleep Planned (Specify) (Rate)**
**Types of Exercise Planned**
**Social Activity Planned**
**Participation in Group or Individual Therapy Planned**

**Fig. 7 "Trigger Awareness Plan"**[83]

The featured plan touches on numerous aspects of litigation that have the potential to trigger stress responses. Because each client has different susceptibilities to triggers, attorneys will benefit from learning about environmental factors in diverse areas that could be more damaging to a particular client. For example, the anniversary of the traumatic event underlying PTSD is often enough to impair the client's mental and physical functioning. The attorney therefore stands to benefit from exploring whether the client suffered an adverse anniversary response in the prior year. Any Trigger-Awareness Plan is adaptable to meet the attorney's and client's needs, as capital cases will raise entirely different concerns than low-level felony cases or diversionary treatment programs.

# V. BEWARE OF SECONDARY TRAUMA

Secondary trauma, according to one expert, is "the cost of caring . . . the stress resulting from helping or wanting to help a traumatized or suffering person."[84] Another expert defines the related term, vicarious trauma, as the "cumulative

[83] Seamone, *supra* note 19, at fig.5, 220 ("Prompts for PTSD Trigger Awareness Plan").

[84] CHARLES R. FIGLEY (ED.) COMPASSION FATIGUE: SECONDARY TRAUMATIC STRESS DISORDERS FROM TREATING THE TRAUMATIZED 7 (Brunner/Mazel 1995).

transformative effect of working with survivors of traumatic life events."[85] Elsewhere, the condition has been described as "disrupted spirituality, or a disruption in the trauma workers' perceived meaning and hope."[86]

While the secondary effects working with trauma survivors has long been recognized among mental health professionals and social workers, little attention has been paid to attorneys' exposure to these same issues. However, one study of vicarious trauma in attorneys working with victims of domestic violence and criminal defendants found that they demonstrated significantly higher levels of secondary traumatic stress and burnout, compared to mental health care providers and social workers.[87]

While working with any client who has experienced trauma can expose an attorney to secondary trauma, working with combat veterans often poses additional challenges. Veteran clients have often been exposed to significantly more trauma than the average civilian trauma survivor. Veterans will not only have been victims of violence, but will often be struggling with the trauma of having inflicted violence, sometimes a great deal of it. The process of bonding with them and hearing their, often unimaginable, stories of the horrors of war, can leave attorneys feeling the effects of that trauma, ourselves. As Major Evan Seamone vividly notes,

> "[a]ttorneys working with troubled veterans are inescapably along for the journey, functioning just like squad members on patrol through the bombed and burning villages in the recesses of our clients' minds."

Though the potential for secondary trauma in working with veterans is likely higher than with other clients, the remedies are the same. All involve awareness, balance, and connection.[88] One set of approaches can be grouped together as *coping* strategies, such as self-care, rest, escape, and play. A second set of approaches can be grouped as *transforming* strategies, which aim to help create community and find meaning through the work. Within each category, strategies may be applied in one's personal life and professional life.[89]

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**85** SAAKVITNE & PEARLMAN, TRANSFORMING THE PAIN: A WORKBOOK ON VICARIOUS TRAUMA 8 (Norton 1996).

86 *See*, http://en.wikipedia.org/wiki/Vicarious_traumatization.

87 *See,* Andrew P. Levin and Scott Greiberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245 (2003).

88 SAAKVITNE & PEARLMAN, TRANSFORMING THE PAIN: A WORKBOOK ON VICARIOUS TRAUMA 8 (Norton 1996).

89 *See,* Saakvitne, Gamble & Pearlman, RISKING CONNECTION: A TRAINING CURRICULUM FOR WORKING WITH SURVIVORS OF CHILDHOOD ABUSE (Sidran Press 2000); PEARLMAN & MCKAY, UNDERSTANDING AND ADDRESSING

As attorneys working with veterans and other clients who have experienced significant trauma, we must be vigilante for secondary trauma and actively address it when it arises. We owe it to our clients, our families and ourselves.

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VICARIOUS TRAUMA. ON-LINE SELF-STUDY MODULE (Headington Institute, Pasadena 2009), *available at* http://www.headington-institute.org/Default.aspx?tabid=2646; SAAKVITNE & PEARLMAN, TRANSFORMING THE PAIN: A WORKBOOK ON VICARIOUS TRAUMA 8 (Norton 1996).