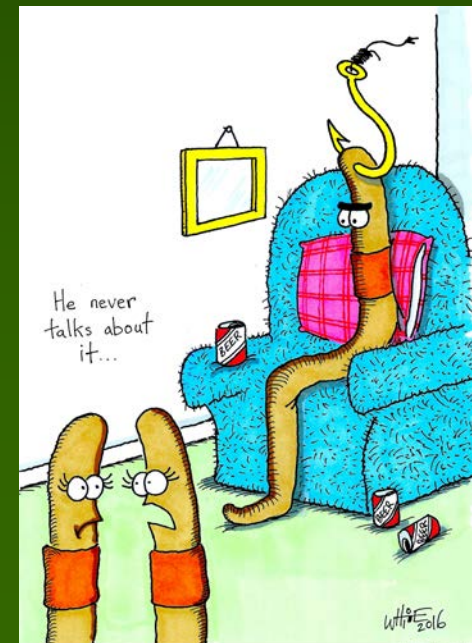


# Evaluations of Veterans for Change of Status or Disability by Psychiatrists/Psychologists

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# Forensic Expert vs. Treating Professional-

## Is there a Difference? Vets v SSI

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- ❑ Objectivity conflicts
- ❑ Use of Collateral Information
- ❑ Malingering Testing
- ❑ Do no harm-Problem if the treater disagrees with the patient about the degree or cause of the disability
- ❑ Atty. says you would have won but your expert was terrible-threat to Rx.

# Special Rules for Experts & Problems

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An Expert can:

- ❑ Offer opinions
- ❑ Rely on hearsay and other inadmissible evidence
- ❑ Belief that experts can over-influence juries and judges
- ❑ Daubert (1993), Joiner (1997), Kuhmo (1999)

# Advocacy v. “Objectivity”

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- The essential problem critics identified is that attorneys seeking expert witnesses are not interested in pursuing expertise wherever it leads, but instead search for an expert willing to support the litigants’ position. Expert testimony in the US is therefore subject to adversarial bias

# Bias in experts

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- 3 types--hired guns; team players; sincere views
- Conscious bias - expert tailors evidence
- Selection bias - choosing experts whose views are known
- Unconscious bias – not intentionally misleading court but influenced by psychological attachment to his “side”

## AMA Policy-Re Expert testimony

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- CEJA Opinion E.9.07: a physician as a citizen and as a physician with special training and experience has an ethical obligation to assist with the administration of justice

# AMA BT Report 5-A -98

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- \* As a citizen and as a professional with special training and experience, the physician has an ethical obligation to assist with the administration of justice,
- \* The medical witness must not become an advocate or a partisan in the legal proceeding,
- \* The medical witness should be adequately prepared and should testify honestly and truthfully,
- \* The attorney for the party who calls the physician as a witness should be informed of all favorable and unfavorable information developed by the physician's evaluation of the case, and
- \* It is unethical for a physician to accept compensation that is contingent upon the outcome of the litigation

# AMA Policy

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- I-1997: Resolution 221-called upon the AMA to adopt policy that physician expert witness testimony be considered the practice of medicine subject to peer review
- Asked for a Committee to study mechanisms by which such peer review could be conducted



# B of T Report 18-I-98

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- ....others-seemingly motivated by financial gain- do not adhere to ethical or professional standards and, in fact, foster the introduction of “junk science” into the judicial system.

# B of T Report 18-I-98

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- Sanctions: The medical society may expel the member from membership. Such action would be reported to the National Practitioner Data Bank, but may not serve as a sufficient deterrent to prevent inappropriate testimony. Medical societies, may not take action with respect to a physician's license.

# B of T Report 18-I-98

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- American Association of Neurological Surgeons (AANS)-reviewed 50 MDs over 15 years and censured, suspended, or expelled 10 members, and has had one legal challenge.

# DOs & DON'Ts

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- Delineation of the ? to be addressed v. just do a psych evaluation
- Review all the records, police reports, prior treatment
- Look out for attorneys hiding information- bad facts
- Mutual education- law v medicine
- Draft reports-review by atty.? –change the report

# DO's & DON'T's

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- Meeting to review testimony- Hard to ask good questions
- Taping of interviews
- Attorneys sometimes call for an expert and say I have been working on the case for 3 years and the trial is in 2 weeks –
- Don't do an MMPI—it might show – antisocial PD

# Issues arising around evaluations

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- Off the record comments—
- Role of psychological testing
- Why it can take 2 months or more for an evaluation
- Remember MH experts are mandated reporters of child abuse

# Expert's Credentials

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- Ask for a CV. If the expert has testified in the past they should keep a record of the testimonies they have done for at least the past four years
- Does the expert currently work for a VA (including moonlighting). This is usually a conflict of interest.

# Types of Questions

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- Does X have a family history of schizophrenia? Does X have a current dx of Schizophrenia? If so, whether the symptoms of schizophrenia were manifest to a degree of ten percent within one year of him/her being honorably discharged from Marines.



# Types of Questions

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- Does Y suffer from a psychiatric illness because of trauma experienced in military?
- Was the misbehavior related to a mental disorder or combat exposure?
- Did the condition preexist to time in service

# Types of Questions

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- Does Z's history and present symptoms indicate the presence of a psychiatric/psychological illness or disorder?
- To determine the link, if any, between Z's current symptoms and incidents, injuries, or events during his/her time in military service?
- The extent to which Z's mental health issues prevented him/her from holding gainful employment or maintaining meaningful relationships

# Types of questions

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- What is your opinion as to Z's diagnoses and prognosis?

# Forensic Reports and Evaluations

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- These evaluations are not paid for by health insurance, as they are for legal purposes and not for treatment.
- At the outset of each interview-the confidentiality status of the evaluation should be stated to the evaluatee. In most of these evaluations the expert should say:

# Confidentiality Disclosure

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- Your attorney has requested this evaluation and therefore what we discuss is initially protected under the attorney-client privilege or work product rule. If your attorney does not think that my conclusions are helpful, he/she will not ask for a report and what we have talked about remains confidential. If a report is requested and used, then what we have talked about is no longer confidential and may become evidence in your case and I may be asked to testify.

# Evaluation Expectations

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- Review of past military records
- Interviews with the evaluatee - The norm is to conduct the interviews in 2-4 hour time blocks. A one hour interview alone generally will not be taken as substantial by a court. Minimally 2.5-6 hours should be considered a reasonable range for most evals.

# Evaluation Expectations

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- Review of past medical and psychological records
- Find out who are good/available collateral sources of information that can describe some of the evaluatee's behavior and confirm or fill in gaps.

# Report Writing

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- It takes longer than you think
- e.g. 3000-4000 pages of records
- Dictation of Interview notes
- Review of Records and significant quotes
- Collateral Interviews
- Psychological Testing



# Report Format

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- 1. Understanding of the Purpose of evaluation and Questions to be answered
- 2. Dates of personal examinations and length of interviews of evaluatee, collaterals, and other testing ordered e.g. neurological, psychological etc.

# Report Format

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- 3. Documents Reviewed with dates and identifiers
- 4. Confidentiality Statement
- 5. Past and Background Hx
- 6. Educational History
- 7. Substance use- Alcohol and drugs
- 8. Social and Sexual Development

# Report Format

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- 9. Military history
- 10. Post military history-work and relationships.
- 11. Past Psychiatric and medical hx
- 12. Medication hx- past and present
- Summary of psychological Testing

# Report Format

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- 13. Summary to include diagnostic impressions and answers to specific questions asked by the referring atty.
- References may be footnoted when relevant.

# How to deal with Draft Reports

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- ❑ State jurisdictions vary as to rules
- ❑ Attorneys can correct data that is incorrect and typos or legal procedures referred to
- ❑ Issues re wording may have legal consequences
- ❑ Attorneys may ask that information be included or not included in the final report.

# Draft Reports

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- What is essential to the report and what is arbitrary?
- Integrity of the report = expert's integrity. They have to justify what they included and what they did not.
- Cannot leave out unfavorable relevant data or data that is usually part of a standard evaluation. The wording is more optional.

# Special Thanks to

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- Yale Law School- Veterans Clinic
- Connecticut Veterans Legal Center

**University of Montana Law  
CLE/ -Panel**

**Forensic Mental Health Expertise  
in Veteran Assessments**

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***March 21 2019***  
**Yale SCHOOL OF MEDICINE**





# Disclosures

I have no financial interests, no corporate, government, or academic affiliations that give rise to a conflict of interest related to what I present today.

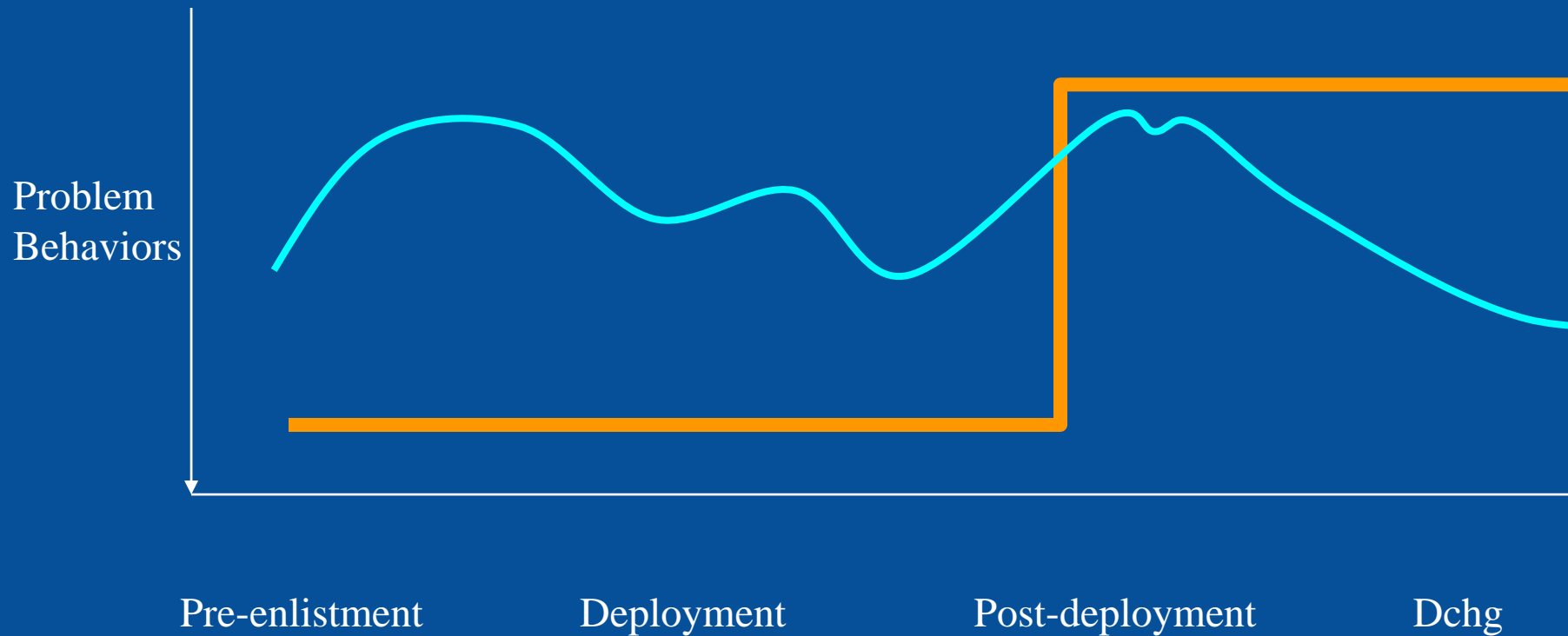
# Why Use Forensic Mental Health Experts (Psychologists/Psychiatrists)

- Diagnoses alone do not explain behavior; all upgrades deal with issues of behavior.
- Symptoms can interfere with attorney- client collaboration
- With diagnoses of PTSD, TBI, etc, the BCMR/BCNRs will seek DoD opinion before deciding. Forensic expertise can anticipate and address potential problem areas. For DRB cases involving deployed veterans with PTSD or TBI , a physician, psychiatrist or psychologist will be a voting member. (10 U.S.C. § 1553 (d)(1))

# Principles Relevant to Veteran Assessments

- Mental health disorders predate any diagnosis.
- Changes in function are best indicators of the presence of a disorder
- Psychiatric disorders have no biomarkers that confirm or negate a diagnosis
- Diagnosing a disorder requires time, accurate history, and collateral (if available).

# Behavior Trajectories as Diagnostic Aids



# Common Challenges and Red Flags

- Variation in disorders and responses to military-related stress
- Drug and alcohol use
- Functional decline, aggressive behavior
- Question of malingering

# How Diagnoses Are Made

- Diagnostic and Statistical Manual of Mental Disorders (DSM-V)
  - Guide to diagnosis to improve consistency and build consensus. There are no blood or imaging tests for psychiatry. History and behavior build the diagnoses.
  - Diagnoses depend on self-report, observation, collateral
  - No one behavior points to an exact diagnosis
- Diagnoses are hypotheses that guide treatment and change with new data
- Diagnoses also evolve as disorders change
- *Diagnoses are developed and used for medical treatment and not for the law – That is why a translator helps*

# Post-Traumatic Stress Disorder

- Clinical Dx: Cluster of symptoms in response to life threatening event
  - Re-experiencing
  - Avoidance
  - Emotional dysregulation
  - Dysfunction in daily life (vocational and social)
- Life Experience
  - **Drug and alcohol abuse**
  - Irritability and even aggression
  - Depression, suicidal behaviors
- **Can be misdiagnosed: Adjustment disorder, personality disorder**

# Traumatic Brain Injury

- In DSM-5: Major or Mild Neurocognitive Disorder due to Traumatic Brain Disorder
  - Significant or *modest* decline from a previous level of performance – complex attention, executive function, learning, memory, language, social cognition
  - Interference with daily activity
- For TBI
  - Event causing head trauma (including percussive injury) demonstrated by loss of consciousness, posttraumatic amnesia, disorientation and confusion, neurological signs
- Support for diagnosis: irritability, easy frustration, anxiety, personality changes – disinhibition, apathy, suspiciousness, aggression, sleep disturbance, ringing in the ears
- Translation into real life: drugs, alcohol, fights, new level of temper, impatience, relationship breakups, “changed son,” “not self”
- Overlaps with PTSD



# Personality Disorders

- Enduring and pervasive impairment in relationships, in work, in maintaining stability, in dealing with change and stress
- Rigidity, emotional inappropriateness or dysregulation, failed maturity
- Personality disorders cannot be diagnosed in one session: collateral is necessary
- Signs of personality disorders present from adolescence into adulthood, across situations

# Personality Disorders Most Problematic in Veteran Evaluations

- Antisocial personality disorder
  - Pervasive disregard for and violation of the rights for others since 15 years of age: criminal behavior with or without arrests, deceitful, **impulsive, irritable and aggressive, reckless** disregard for safety, **irresponsible**, lacks remorse
- Borderline personality disorder
  - Pervasive instability in relationships and affect with **impulsivity and recklessness**, self-harm behaviors, **suicide attempts**, emotional instability, intense anger, **temper tantrums**
- **Similar behaviors – but new not enduring, post trauma**

# Adjustment Disorder

- Development of emotional or behavioral symptoms in response to identifiable stressor
- Changes in affect and in behavior within 3 months of stressor and must resolve by six months post stressor
- Diagnosis for those who cannot meet PTSD because stressor not life threatening
- More temporary disruption
- May be useful as working diagnosis
- Cannot be used if other diagnoses can be made or if this is seen as exacerbation of previous diagnosis
- Often diagnosis made (incorrectly) without full collateral of the extent of trauma or extent of symptoms

# Military Sexual Trauma

- Complex construct; complicated assessment
  - Continuum from full rape with physical violence through subtle expectations with consequences for refusal, to sexual denigration
  - Effects determined by action, support, personal vulnerabilities
  - Trauma not limited to physical harm
  - Psychological harm and aftermath more related to symptoms
- Not gender specific
- Sexual trauma for men often harder to uncover
- May not meet criteria for PTSD but may have enduring effects

# Substance Use and Arrests

- Both incorrectly assumed to result from choice and intent
- Both can be symptoms of underlying psychiatric disorder, response to trauma, difficult adjustment
- Critical to assessment of drug use and arrests is the pattern – before, during, and after military or events in military

# Malingering

- Defined as the willful presentation of false symptoms for secondary gain. Faking to benefit
- Lack of diagnosis does not determine malingering
- Determination of malingering requires data
- Tests for malingering superior to brief observation
- Drug-seeking behavior does not determine malingering

# What Assessments Require

- Several meetings
- Adequate collateral
  - Past records – often beyond military
  - Contact with those who know client – best if knowledge before and after
- Psychological Testing
- Early discussions with attorney

# What You Get

- A valid report – an objective opinion that the expert can support on testimony
- A life-narrative that incorporates the facts and leads to a diagnostic formulation
- Consideration of the red flags and problem areas with logical arguments based on data that you can use to support an upgrade
- OR
- That the psychiatric/psychological findings do not support a helpful conclusion. Can alert attorneys to problem areas.