

Trauma Informed Advocacy

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Lawyers often represent or are required as part of their duties to interact with individuals who have been impacted by trauma, including intimate partner violence. In carrying out the lawyer's ethical duties to competently represent such persons, to communicate effectively and efficiently, and to deal fairly and honestly with such persons, a lawyer is served by generally understanding how experiencing trauma impacts a person and might affect their behavior; understanding how interaction with the legal system can retraumatize survivors of trauma; and implementing practices that recognize the trauma experienced by survivors and intentionally strive to avoid retraumatizing the survivor or unnecessarily re-triggering trauma.

Overview of Trauma

At its most basic level, trauma is "an event that combines fear, horror, or terror with actual or perceived lack of control. Trauma is often a life-changing event with negative, sometimes lifelong consequences." Christopher Wilson, Kimberly Lonsway, Joanne Archambault, and James W. Hopper, "Understanding the Neurobiology of Trauma and Implications for Interviewing Victims," EVAWI, P. 4 (November 2016), available at <https://vrnclearinghousefiles.blob.core.windows.net/documents/The%20Neurobiology%20of%20trauma%20and%20interviewing%20victims.pdf>. Trauma is "a fundamentally subjective event—what is traumatic to one person may not be for another, because what's fearful or terrifying to me, may not be for you. What I experience as a lack of control, you may not." *Id.*

The University of Northern Colorado's Assault Survivors Advocacy Program, provides the following useful summary of key concepts regarding neurobiology and trauma:

The **prefrontal cortex** is the decision-making/choice-making part of the brain; it's the part of the brain responsible for rational thinking, planning effective responses, remembering important information, etc. When a person is experiencing a traumatic event or experiencing extreme fear, their "**Fear Circuitry**" may kick in and the prefrontal cortex begins to function less effectively. This means that in the midst of trauma, a person may not be able to think through the situation and make decisions such as calling for help. It is not a matter of choice--their brain is in survival mode and the fear circuitry is bypassing their prefrontal cortex entirely.

Many people are familiar with the concept of "fight or flight," but research shows that there is a third response called "**freeze**." A common example is a deer in the headlights, and humans have this same fear response--in fact, freezing is the most common reaction to trauma or fear, rather than fighting back or running away.

In addition to freezing, some survivors may experience extreme survival reflexes such **tonic immobility** or **collapsed immobility**. If you've ever seen a possum go limp when it is scared, you are familiar with this brain response. Going limp, feeling "sleepy"

or passing out, or being completely unable to move or speak are survival mechanisms hard-wired into our brains--even apex predators like sharks have these responses! It is not a sign of weakness, nor is it a choice the person is making.

Survivors may also experience **dissociation**, which is a survival reflex where someone may feel disconnected from their body or may go into "**auto-pilot**" mode. In auto-pilot mode, a person is not using their prefrontal cortex to make decisions, but is instead relying upon habitual modes of being. Habitual responses are rooted in socialization--for example, women are socialized to be polite and pleasing, to "save face" or placate. This means that during an assault, a person might engage in sexual acts, say polite things, even smile, but they are not consenting; they are actually experiencing extreme fear and their brain is operating on auto-pilot as a survival mechanism.

Memories are encoded differently during a traumatic event. The brain does not encode memories in chronological order, there are gaps in memory, and whatever the "fear circuitry" in the brain focused attention on during the assault is more likely to be encoded into memory than periphery details. For example, a survivor may have a very clear memory of the smell of the perpetrator's cologne, but not have any memory of what the room looked like. Contextual information (e.g., the layout of a room) and time-sequence information (e.g., the order in which sexual acts occurred) are often poorly encoded. Again, this is not a conscious choice a survivor is making about what to focus on or remember during an assault; it is a common impact on the brain when the "fear circuitry" survival response kicks in.

These are all based in **normal brain processes** that occur during extremely stressful and traumatic situations. They can happen to police officers, soldiers – anyone who is attacked or fears for their life.

Available at https://www.unco.edu/assault-survivors-advocacy-program/learn_more/neurobiology_of_trauma.aspx#:~:text=Neurobiology%20of%20Trauma%20helps%20to%20explain%20many%20of,misconceptions%20and%20victim-blaming%20statements%20about%20%20sexual%20violence. The University also provides a three-page document that debunks common myths about sexual assault using the science of neurobiology. For example, it explains that contrary to popular opinion that if the victim was really being assaulted, they would simply have fought back:

During an assault, the brain's defense/fear circuitry can take over. It can quickly impair the thinking part of the brain (prefrontal cortex), responsible for rational and flexible responses, and instead trigger habit behaviors and survival reflexes that don't involve fighting or even struggling. These responses are automatic and normal in such situations. There are a few common reflexes that the brain falls back on during an assault situation. For example, a person may "freeze" when the attack is first detected. Some people space out and disconnect from their body, while others actually pass out from fear, or become paralyzed and unable to move or speak. These are all common brain responses to any type of life-threatening, fearful situation, not just a sexual assault. They are not a matter of choice for the person experiencing them.

Available at https://www.unco.edu/assault-survivors-advocacy-program/pdf/neurobio_trauma.pdf. The document also provides science-based answers to questions about why a traumatized victim might not call police, run away, or might seem to tell differing stories of the trauma over time. Knowing this basic kind of information can be vital for a lawyer to effectively provide ethical, effective representation to a survivor of trauma, including intimate partner violence.

Why Lawyers Should Care

Ethics

A lawyer must “provide competent representation to a client.” SCR 3.130(1.1). This requires “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” SCR 3.130(1.1). “Competent handling of a particular matter includes inquiry into and analysis of the *factual and legal elements of the problem*, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.” SCR 3.130(1.1), Commentary, ¶ 5 (emphasis added). “The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.” *Id.*

Assessment of Case

Consider, for example, this explanation of the false conclusions an uninformed lawyer could make that could negatively impact the lawyer’s representation of a client who has experienced trauma and could, thereby, prevent the lawyer from fulfilling the duty to provide competent representation, largely by being unable to thoroughly and reasonably prepare to provide skilled representation:

If you don’t know anything about dissociation, tonic immobility, or collapsed immobility, for example, you might wonder why a victim did not resist the assault—and question whether the sexual acts were consensual. Similarly, if you don’t understand the functioning of the hippocampus and the distinction between top-down versus bottom-up attention, you might question why the victim can’t remember what seems like basic or crucial details about the assault. If you don’t understand the hippocampus often lapses into a fragmented or refractory mode after an initial super-encoding (or “flashbulb”) mode, it won’t make sense when a victim is able to tell you a great deal about the initial moments of the sexual assault, but very little about “what happened next.” These dynamics explain victim behaviors that might not otherwise make sense, and this understanding can improve the way professionals respond to sexual assault.

Christopher Wilson, Kimberly Lonsway, Joanne Archambault, and James W. Hopper, “Understanding the Neurobiology of Trauma and Implications for Interviewing Victims,” *EVAWI*, P. 34 (November 2016), available at <https://vrnclearinghousefiles.blob.core.windows.net/documents/The%20Neurobiology%20of%20trauma%20and%20interviewing%20victims.pdf>.

Successful Representation

Consider the representation of a survivor of intimate partner violence in a protective order hearing. While these types of hearings and related representation might tend to be thought of as less complex, minor litigation, it is important to recognize that “what is at stake” in such hearings is critical.

The filing of a DVO petition has enormous significance to the parties involved. If granted, it may afford the victim protection from physical, emotional, and psychological injury, as well as from sexual abuse or even death. It may further provide the victim an opportunity to move forward in establishing a new life away from an abusive relationship. In many cases, it provides a victim with a court order determining custody, visitation and child support, which he or she might not otherwise be able to obtain. The full impact of EPOs and DVOs are not always immediately seen, but the protection and hope they provide can have lasting effects on the victim and his or her family.

Wright v. Wright, 181 S.W.3d 49, 52 (Ky. App. 2005). Securing this vital protection, of course, requires an attorney to be able to elicit and present the evidence necessary to establish that domestic violence and abuse has occurred and is likely to again occur in the future. KRS 403.740(1). To competently do so, a lawyer should understand the neurobiology of trauma.

A lawyer who understands the basics of the neurobiology of trauma, for example, will be more capable of putting forth the case of a traumatized client or victim. For example, the lawyer may understand that when a survivor mentions a seeing or smelling something indirectly related to the assault while the assault was occurring, proper questioning may help the survivor retrieve additional memories about the assault. Consider, a hypothetical situation in which a female victim of sexual assault mentions seeing a water bottle underneath the bed during the assault.

In this scenario, it’s natural to follow up on the statement about the water bottle with questions like: “What did the water bottle look like?” or “Exactly where was the water bottle under the bed?” However, these types of questions can be problematic for two reasons. First, the answers may be peripheral to the victim and could change over time. Because the victim proactively offered the memory of the water bottle, we can presume that it was a central detail in the victim’s experience, but there is no way to know if the answers to these other questions will also be central details. Second, these questions require the victim to think about the water bottle in a particular way, which may actually get in the way of the victim’s ability to retrieve additional memories that might be associated with the water bottle.

Consistent with neuroscience and forensic interviewing techniques, the most effective response would simply be to say, “Tell me more about the water bottle,” and then pause and wait for a response. For example, the victim may have a memory of something the suspect said while she was looking at the water bottle, or she may remember seeing it through a kind of tunnel vision (which would suggest a dissociative experience). Each memory may prompt another memory – from remembering the water bottle, to remembering something the perpetrator said or did. It is impossible to predict what may be associated with any particular memory. Therefore, the skilled interviewer will use simple prompts to keep the victim talking about central details which provides an opportunity to gather puzzle pieces that may not otherwise be collected.

Christopher Wilson, Kimberly Lonsway, Joanne Archambault, and James W. Hopper, “Understanding the Neurobiology of Trauma and Implications for Interviewing Victims,” EVAWI, P. 30 (November 2016), available at <https://vrnclearinghousefiles.blob.core.windows.net/documents/The%20Neurobiology%20of%20trauma%20and%20interviewing%20victims.pdf>. Understanding how trauma affects clients can be a vital part of lawyer’s effective, competent, zealous representation of a client who has experienced trauma, including intimate partner violence.

Effective Communication

A lawyer also has specific ethical obligations regarding communications with a client. Specifically, a lawyer must (1) “promptly inform” the client of decisions and circumstances which require informed consent; (2) “reasonably consult with the client about the means by which the client’s objectives are to be accomplished”; (3) “keep the client reasonably informed about the status of the matter”; (4) “promptly comply with reasonable requests for information”; and (6) “consult with the client about any relevant limitation on the lawyer’s conduct.” SCR 3.130(1.4)(a). The lawyer must also “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” SCR 3.130(1.4)(b). As part of these duties, the lawyer should ensure that the client has “sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.” SCR 3.130(1.4), Commentary ¶ 5. When it comes to litigation, the lawyer “should explain the general strategy and prospects of success.” SCR 3.130(1.4), Commentary ¶ 5.

In effectively carrying out the lawyer’s duties regarding communication with a client who has suffered trauma, it can be vital for the lawyer to understand trauma and the role the court system can play in retraumatizing a victim, especially when it comes to effectively consulting with the client about the means by which the client’s goals can be accomplished. Particularly, “the adversarial nature of our legal system can make seeking legal redress through the court system particularly traumatizing for survivors, even if they have the right support and are in a survivor-friendly courtroom.” Negar Katirai, “Retraumatized in Court,” 62 Ariz. L. Rev. 81, 102 (2020).

While survivors fear direct confrontation with their abusers, the adversarial system requires survivors to endure both face-to-face confrontations and to relive acts of victimization in specific detail. Testifying, confronting one’s abuser, and the presence of spectators—known and unknown—adds significantly to the psychological stress survivors feel during legal proceedings. This is particularly challenging for survivors with PTSD or those who have repressed traumatic events as a coping mechanism.

Id. See also Herman, J. L. (2005). Justice From the Victim’s Perspective. *Violence Against Women*, 11(5), 571-602. <https://doi.org/10.1177/1077801205274450>. The formal and adversarial methods of the court system can be retraumatizing for a trauma survivor of trauma and a lawyer should be able to effectively communicate these risks to a client when formulating litigation strategy. For example,

Survivors benefit from telling their stories in their own way because it helps them to both reestablish control over their lives and to avoid exposure to specific reminders of the traumas they have faced. This is particularly the case for survivors who have PTSD or have repressed traumatic events as a coping mechanism. The formalism of our legal

system, on the other hand, requires survivors to fit their narratives into specific rules and procedures that survivors have no control over and which limit their ability to tell their own story as a meaningful narrative. In other words, our legal system requires survivors to go through the trauma of reliving their experience without the safeguards that mental health professionals recommend for limiting the retraumatization that can result from such retelling.

Id. at 107.

The most effective representation of a client who has suffered trauma is trauma-informed. In other words, the lawyering “incorporates assessment of trauma and trauma symptoms into all routine practice” and “ensures that clients have access to trauma-focused interventions . . . that treat the consequences of traumatic stress.” *Id.* at 117 (internal quotations omitted). Trauma-informed lawyering “encompasses four hallmarks: identifying trauma, adjusting the attorney-client relationships accordingly, adapting an appropriate litigation strategy, and preventing vicarious trauma.” *Id.* at 118. One of the aspects of the attorney-client relationship that can and should be adjusted is the method and means of communication. For example, where a client has been traumatized by intimate partner violence, a lawyer might prevent retraumatizing a victim by involving the victim more in the decision-making in a case than the lawyer might ordinarily do. Because intimate partner violence typically involves undue control of the victim, providing the victim more input in the decision-making, even on routine decisions, might help empower the victim, prevent the victim from being re-traumatized, and aid in the victim’s healing and independence. A lawyer might also spend additional time explaining options to the client and should be particularly cautious about persuasive techniques used with the client as such techniques applied carelessly could trigger memories of coercive control used to perpetrate the intimate partner violence.

Moral Obligation

Self-Care

Practical Tips for Trauma Informed Advocacy

Helping Regain Control

Giving Choices

Informing

Simply, Honestly, About Process and Substance

Conferring Meaningfully

Dedicated time, Staff vs. Attorney, Throughout

Advocating Zealously

Know the law and rules that can help prevent retraumatization

Caring About Whole Person

Consider service referrals, safety planning

Don't forget self-care

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