



Legal Ethics and Trauma-Informed Lawyering

By Beth Ribet, PhD, JD © 2017¹

The concept of “trauma-informed lawyering” has gained increasing recognition in recent years.² The term signals awareness among practitioners that ethical and competent lawyering involving traumatized clients can require particular skills. These include awareness of the context and manifestations of trauma, and strategies for communication and interaction with clients that account for and demonstrate sensitivity to trauma.³ In legal practice, the term initially gained traction among attorneys working in the area of child protection and youth advocacy.⁴ The potential applications of trauma-informed lawyering are more wide-ranging, and can essentially include any context in which the dispute or events giving rise to legal action include violence, deprivation, exploitation, major loss or harm, or vulnerability to abuses of power.⁵ Further, even when the basis for legal action does not involve some substantial traumatizing event, clients may be experiencing or recovering from trauma for unrelated or peripherally related reasons. In these instances, the client’s psychological state can prospectively affect attorney-client relations and communication, and in extreme instances can diminish capacity.⁶

Awareness of and sensitivity to trauma as it affects attorney-client relations, and client participation and experiences of legal processes, bears on the rules of ethical conduct that govern legal practice. This course explores the implications of trauma-informed approaches to legal ethics, as codified in sections 1.1, 1.4, and 1.14 of the American Bar Association Model Rules of Professional Conduct, respectively addressing competence, communications, and diminished capacity.⁷ The course also outlines some basic guidelines and recommendations for ethics and efficacy when working with traumatized clients.

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² See Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359 (“‘Trauma-informed practice’ is an increasingly prevalent approach in the delivery of therapeutic services, social and human services, and now legal practice.”)

³ See Julie Saffren, *Professional Responsibility in Civil Domestic Violence Matters*, 24 HASTINGS WOMEN’S L.J. 3, 17 (2013) (emphasizing the importance of meaningful communication between lawyer and client by describing it as a duty).

⁴ Appell, Annette R. *Children’s Voice and Justice: Lawyering for Children in the Twenty-First Century*. 6.3 Nev. L.J. 692, 723 (2006)

⁵ Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359

⁶ MODEL RULES OF PROF’L CONDUCT r. 1.14 cmt. (AM. BAR ASS’N 1983).

⁷ MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 1983).

What is Trauma-Informed Lawyering?: Definition and Applications

“Trauma” refers to the human physical and psychological response to events which cause extremes of fear, violation, humiliation, grief, instability, insecurity, or injury.⁸ “Traumatic stress” refers to the toll that experiencing trauma takes on mental and physical health, whether in the short-term, or over significant periods of time.⁹ Traumatic stress can, of course, vary in severity, based on variations in individual response, the context of events, and the degree to which circumstances allow for timely recovery or recuperation from traumatic events.¹⁰ Experiencing traumatic stress is a normative part of human experience, attending such events as the death of loved ones, illness, injuries or accidents, or even life transitions such as re-location, or major changes in employment.¹¹ It is also normative for individuals to be able to demonstrate at least some resilience in coping with a moderate degree of trauma; managing and coping with traumatic stress is a basic psychological skill that most people can demonstrate, to varying degrees.¹² However, many circumstances and structural factors can also strain the capacity of individuals, families and communities to cope with traumatic stress, particularly when trauma is severe, ongoing, involves multiple sources, and/or there are substantial gaps in medical, economic, and social resources available to enable recuperation.¹³ In these instances, traumatic stress can generate both physical and mental illness, and can complicate the ability of individuals to cope with stressful or adversarial situations, including but not limited to legal proceedings and interactions.¹⁴

Trauma-informed lawyering can, in simple terms, be understood as an approach to legal practice that recognizes client experiences of trauma, accounts for trauma when preparing legal representation and engaging in client communications, and attempts to manage and minimize

⁸ See Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 649 (2016) (defining trauma as “an experience that threatens a person’s life, safety, or well-being, overwhelming the ability to cope”); Lawrence Robinson et al., *Coping with Emotional and Psychological Trauma*, HELP GUIDE, <https://www.helpguide.org/articles/ptsd-trauma/emotional-and-psychological-trauma.htm> (last visited Mar. 7, 2017).

⁹ See Samantha Buckingham, *supra* at 649; *What is Traumatic Stress?*, INT’L SOC’Y FOR TRAUMATIC STRESS STUDIES, <http://www.istss.org/public-resources/what-is-traumatic-stress.aspx> (last visited Mar. 9, 2017).

¹⁰ See *Effects of Traumatic Stress after Mass Violence, Terror, or Disaster*, U.S. DEP’T OF VETERAN AFFAIRS: NATIONAL CENTER FOR PTSD, <http://www.ptsd.va.gov/professional/trauma/disaster-terrorism/stress-mv-t-dhtml.asp> (last visited Mar. 9, 2017).

¹¹ See Talia Kraemer & Eliza Patten, *Establishing a Trauma-Informed Lawyer-Client Relationship (Part 1)*, 33 CHILD L. PRAC. 197 (2014), http://www.americanbar.org/groups/child_law/what_we_do/projects/child-and-adolescent-health/polyvictimization/establishing-a-trauma-informed-lawyer-client-relationship.html (last visited Mar. 9, 2017). See also Samantha Buckingham, *supra* at 654 (2016) (noting that the most frequently experienced traumas among a Chicago population of arrested and detained youth were witnessing violence, being personally threatened with a weapon, or being in a situation where they or someone close to them was threatened with serious bodily harm or death).

¹² See *Effects of Traumatic Stress after Mass Violence*, *supra* note 9.

¹³ See Samantha Buckingham, *supra* at 650 (2016) (“When exposed to trauma in multiple facets of life, there is an increased risk for both chronic trauma and complex trauma.”); Saffren, *supra* at 9-10 (“It is important for attorneys to help their client obtain the medical and mental health services they may need, and to understand how the attorney role may change if their client is experiencing a mental health crisis where their decision-making may be impaired.”).

¹⁴ See Katz & Haldar, *supra*, at 364.

potentially traumatic aspects of legal encounters.¹⁵ Recognition and awareness of client experiences of trauma includes several components at minimum: a) awareness of the social context that produces trauma, b) attention to client narratives or communication about trauma, c) comprehension of the potential array of consequences of living with traumatic stress. Accounting for and incorporating information about trauma into legal representation and attorney-client communications potentially implicates a wide range of adjustments, strategies, or choices, including but not limited to providing extra time in client communications and preparation to fully identify the potential social, emotional and physical challenges involved in participating in legal processes. Planning for the aspects of legal interactions that may potentially aggravate existing traumatic stress is one of the most important aspects of trauma-informed approaches to legal advocacy, and may commonly require: a) increased preparation for adversarial proceedings, b) strategy discussions that enable clients to balance legal aims and desired outcomes relative to capacity to manage the traumatic stress potentially involved in pursuing those aims and outcomes, and c) coordination with or referrals to healthcare and social service providers, or other support systems.

The applications of trauma-informed lawyering are certainly substantive when working with clients who are victims of crime, violence, discrimination, or who are dealing with severe economic, social or physical vulnerabilities. Given this, trauma-informed lawyering should be recognized as relevant in fields including but not limited to criminal law, civil rights, labor law, human rights, immigrant and refugee advocacy, youth advocacy, family law, elder law, disability law, prisoner litigation, and other related areas of public interest lawyering. Applications of trauma-informed lawyering are also often appropriate in a range of torts cases, particularly in instances when clients have been physically or psychologically injured or suffered significant harms or losses. These examples are not exhaustive, but indicate some of the common areas where trauma-informed approaches to legal advocacy are likely to be useful. The next sections outline how these three imperatives – to recognize client experiences of trauma, to incorporate information about trauma into representation and communication, and to minimize or manage traumatic stress involved in legal encounters – interact with existing standards regarding legal ethics. As noted, this course engages three areas: competency in legal representation, attorney-client communications, and clients with diminished capacity.

Trauma-Informed Lawyering and Competence

The American Bar Association Model Rules of Professional Conduct, Rule 1.1. states:

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹⁶

When preparing rigorous representation, competency will generally, at minimum, require fluency in relevant doctrine, familiarity with the procedural rules relevant to a particular court or claim, the ability to prepare clients and other parties to effectively participate in advancing the client’s legal interests, and the capacity to effectively frame the relationship between fact patterns, issues at stake in the case, and

¹⁵ *Id.* at 361 (“[T]he hallmarks of trauma-informed practice are when the practitioner...puts the realities of the clients’ trauma experiences at the forefront in engaging with clients and adjusts the practice approach informed by the individual client’s trauma experience.”).

¹⁶ MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 1983).

governing rules of law in terms persuasive to judges, juries, and/or other legal actors.¹⁷

Trauma as it Bears on Legal Knowledge and Procedure

Clients' experiences of trauma can have at least some bearing on each of these four components of competency, though primarily on the latter two. Even relative to fluency in relevant law and procedural rules, the presence of more severe trauma, particularly if it generates identifiable mental illness, can bear potentially on questions of client capacity or can be a basis for equitable tolling of a statute of limitations or other modifications of procedure.¹⁸ In these instances, a trauma-informed approach can improve the competency of representation by better enabling an attorney to recognize that trauma is present -- whether through attention to client communication, or awareness of trauma as part of the social context bearing on a pattern of facts -- and by enabling that attorney to be part of the process (often in collaboration with clinicians) of assessing whether the psychological or physical effects associated with traumatic stress can, for the specific client, be a reasonable basis to make persuasive legal arguments, whether regarding capacity, culpability for behavior, modifications of procedure, or any other relevant questions.¹⁹

That is, awareness of and comprehension of trauma, deployed in tandem with awareness of relevant legal rules regarding capacity, mental state, and culpability, can potentially change legal outcomes. Attorneys who routinely work in areas such as criminal defense, or with clients with severe disabilities, will generally be comparatively more likely to be aware of the need to consider questions of client capacity or mental health as part of competent representation, though even in these areas, consideration of traumatic stress can be overlooked.²⁰ At times in these, and certainly in other legal fields, the failure to contemplate whether client trauma bears on legal rules or procedural norms can become a missed opportunity, and a deficit in legal representation.

Preparing Traumatized Persons for Participation in Legal Processes

Preparing traumatized clients or other parties (e.g. witnesses) to participate effectively in the legal process is one of the more critical areas of trauma-informed lawyering. Traumatic stress can significantly affect client stamina in coping with complex, tiring, lengthy, and/or conflicted legal processes.²¹ This does not necessarily mean that a traumatized client will certainly be unable to endure

¹⁷ MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. (AM. BAR ASS'N 1983).

¹⁸ See Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L. J. 271, 289 (1944) ("Severe trauma may produce shock and hysteria. All of these have a tendency to diminish or extinguish, at least temporarily, capacity for understanding.").

¹⁹ See Katz & Haldar, *supra* at 385; Buckingham, *supra* at 659 ("Trauma provides mitigation for culpability."); Saffren, *supra* at 17 ("A trauma-informed perspective is necessary for attorneys and enables greater sensitivity and understanding of the way trauma has impacted their clients.").

²⁰ See James A. Cohen, *The Attorney-Client Privilege, Ethical Rules, and the Impaired Criminal Defendant*, 52 U. MIAMI L. REV. 529, 583 (1998) ("[T]he information possessed by the criminal defense attorney permits her to make reasonable judgments about the client's capacity to rationally understand the charges against him and to assist in his defense."); Elizabeth Gilson, Book Review, 86 CONN. B.J. 286, 286 (2012) (reviewing BARRY R. SCHALLER, *VETERANS ON TRIAL: THE COMING COURT BATTLES OVER PTSD* (2012)) ("Justice Schaller vividly and meticulously outlines how combat trauma consistently has been overlooked, misunderstood, mismanaged, and stigmatized throughout warfare's lengthy history.").

²¹ See Book Note, *Environmental Activism and the Collective Action Problem*, 104 HARV. L. REV. 1705, 1709 (1991) (reviewing PHIL BROWN & EDWIN J. MIKKELSEN, *NO SAFE PLACE: TOXIC WASTE, LEUKEMIA, AND COMMUNITY ACTION* (1990))

difficult legal encounters. However, failure to prepare a traumatized client or other party (e.g. a witness) for her/his role in the legal process will often increase the likelihood that the client or other party will have more difficulty when for instance, giving a deposition or providing testimony, or will have more difficulty making informed decisions or communicating effectively.²² That is, under-preparation amplifies the risk of negative legal outcomes, as a traumatized person is vulnerable to becoming anxious or visibly distressed or disturbed in adversarial encounters, to compromised decision-making, or to lapses in memory or articulation during periods of increased agitation.²³ For this reason, failure to prepare a traumatized client or other party for the challenges of legal encounters can in essence, sabotage legal outcomes and diminish the effectiveness of legal representation. Even should it prove true that desired legal outcomes are ultimately achieved, a traumatized person who is not prepared for the stress of legal participation will be more likely to suffer adverse physical or mental health effects.²⁴ Therefore, anticipation of the stresses of legal participation and preparation of traumatized clients accordingly decreases the risk that a legal “win” will come at the price of degenerating client health.

The specific elements of preparation will necessarily implicate contextual and individual concerns to which an attorney should adapt; there can be no universal, comprehensive template for preparation applicable to all traumatized persons.²⁵ However, several general considerations are useful in developing an approach to trauma-informed preparation of clients and other parties.

- **Identification of Aims and Goals:**

A standard part of the attorney-client relationship involves identification of the client’s goals or primary interests in the legal process, whether it is a successful defense against civil suit or criminal prosecution, or success in pursuing a legal remedy through civil action.²⁶ It is also not unusual for clients to identify psychological goals involved in the legal process, such as “feeling heard”, “getting my day in court”, or “having the chance to fight back” against a perceived wrong. A trauma-informed approach will incorporate all of these potential considerations, and will also intentionally invite a client (or another party, such as a witness) to consider whether goals or aims related to trauma are or have been an implicit or explicit part of the client’s agenda. This may be obvious, if for instance, a client or witness is indicating, “I need to go to court, so I can stop feeling like a victim.” However, clients will not always have considered or articulated goals or aims beyond the pursuit of a specific legal outcome. While an attorney’s role is not synonymous with that of a trauma therapist, an attorney using a trauma-informed approach will ideally assist a client in considering goals or aims of participation in legal action thoroughly, potentially including identification of goals related to trauma, such as feeling more powerful, or getting validation from the legal process.

(“Most victims and their families will lack the stamina to wage these long battles for clean-up and compensation, as physical and emotional trauma sap them of energy, patience, and resolve.”).

²² See Kraemer & Patten, *supra* (explaining the importance of predictability when working with clients who have experienced trauma, especially children).

²³ See Katz & Haldar, *supra* at 390 (arguing that adequate preparation can minimize the risk of re-traumatization).

²⁴ See Kraemer & Patten, *supra* at 199 (explaining the need to repeatedly preview expectations and what is to come for client’s who have experienced trauma to help them feel safe).

²⁵ *Id.* (arguing that “trauma-informed lawyering is not a step-by-step formula” and that it requires lawyers to incorporate changes into their practice).

²⁶ MODEL RULES OF PROF’L CONDUCT r. 1.14 cmt. (AM. BAR ASS’N 1983).

This approach helps to ensure that clients, particularly those voluntarily pursuing legal action (as opposed to defending against a suit or prosecution, or responding to a subpoena) have a relatively realistic understanding of the legal process and the more likely outcomes of legal action. In some instances, there is no tension between goals related to the management or alleviation of trauma, and the explicit aims of legal action or participation; a successful judgment or legal outcome can be validating, cathartic, or provide a client (or witness) with closure, potentially. However, sometimes clients may imagine that a successful legal outcome will be emotionally or physically restorative to an extent that is unrealistic, or at least uncertain. For example, if a client imagines that all or most of the physical and emotional effects of traumatic stress will dissipate upon legal resolution, the client may be supposing that a legal “win” will in some manner undo or erase the events which precipitated trauma.²⁷ It can be important in this instance, to discuss client conceptions of “justice” and the limitations of legal proceedings. That is, a trauma-informed attorney may need to be explicit in communicating that even if the desired legal outcome is achieved, law does not generally have the power to erase past wrongs or thoroughly remedy their emotional or physical consequences. Though traumatized persons do not presumptively have to be discouraged from participating in a legal process (and in some instances, have no meaningful choice about involvement in a legal proceeding), competent lawyering should involve helping to ensure that clients are able to make informed choices, and at least are relatively able to anticipate the limits and genuine potential of foreseeable legal outcomes.

- **Disclosure of Risks:**

Aside from a negative legal outcome, there are certain risks and potential negative effects that may be associated with participation in legal proceeding, whether or not a client is dealing with significant trauma. For instance, legal processes can be expensive, time-consuming, potentially generate additional liability, are often stressful, impair privacy, and sometimes negate the possibility of less adversarial forms of conflict resolution.²⁸ In addition to the factors that may affect any client, the presence of substantial pre-existing traumatic stress can add and amplify risks.

Traumatic stress is as noted, never solely a psychological experience.²⁹ While unsurprisingly, there are variations in human responses to trauma, it is also normative that individuals experience certain physical responses to trauma, including both immediate traumatic events, and the memory or awareness of past trauma.³⁰ For instance, during moments of increased trauma, production of cortisol, a stress hormone increases.³¹ Stress hormones, as

²⁷ Gullette and Gullette (2005). *Difficult Clients--dedicated Attorneys: Practical Psychology for Effective In-the-trenches Representation*. Bradford Publishing Co.

²⁸ See Kraemer & Patten, *supra* (explaining the importance of transparency due to the potentially overwhelming nature of the legal process).

²⁹ See Susanne Babbel, *The Connections Between Emotional Stress, Trauma and Physical Pain*, PSYCHOLOGY TODAY (Apr. 8, 2010) (noting that trauma has been found to have a strong correlation to chronic physical pain).

³⁰ See generally JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY: FROM DOMESTIC ABUSE TO POLITICAL TERROR* 86-95 (2001) (explaining the various human responses to chronic trauma).

³¹ See Babbel, *supra* (“During a traumatic event, the nervous system goes into survival mode and sometimes has difficulty reverting back into its normal, relaxed mode again. If the nervous system stays in survival mode, stress

with any physiological response to challenge, fear or danger, have a potentially positive physical function in helping human beings physically adjust in particular moments to danger or emergency.³² Over-production of cortisol, as is normative during periods of extreme or prolonged trauma, causes a number of physical effects that can become dangerous, including weakening and suppression of immune system responses.³³ This problem is somewhat analogous to running a high fever for a long time. Though the fever is the body's response to an infection or illness, and is to a point, a helpful physiological response, running a high fever for too long without relief might cause dehydration, brain damage, or even death.³⁴ Similarly, the body's physical responses to traumatic stress, taken to extremes, can become toxic and dangerous.³⁵

As a result of this and some of the other physical effects of severe trauma, exposure to intense traumatic stress over time can substantially increase the risk of developing a range of potential serious or chronic illnesses.³⁶ For clients with severe, pre-existing traumatic stress, it is important to anticipate that the "ordinary" stresses associated with more than minor legal proceedings, can become a "last straw" or aggravating factor that triggers or escalates negative health consequences, including those that are long-term in duration or permanent.³⁷ Attorneys, of course, are rarely also trained healthcare providers, and are not qualified or fully able to counsel clients about the specific medical and clinical risks associated with stress. However, disclosure of the risk that -- for clients who have already been dealing with traumatic events or experiences -- the additional stresses associated with legal action could in some instances take a significant toll on physical and mental health, is certainly appropriate information to share, as part of the process of risk disclosure.³⁸

For attorneys with prior experience working with traumatized clients, it can be helpful to give general examples (without infringing on confidentiality rights of past clients) of some of the ways that clients have experienced the stress associated with legal disputes or processes, including for example, sleep deprivation, headaches, digestive difficulties, or severe fatigue.³⁹ Where traumatized clients have a choice about moving ahead with legal action (i.e. when clients are not defendants or are not otherwise compelled to participate), that decision should ideally involve being fully informed of the risk that legal action could adversely affect health. Whether

hormones such as cortisol are constantly released, causing an increase in blood pressure and blood sugar, which can in turn reduce the immune system's ability to heal.")

³² See *How Stress Affects Your Health*, AM. PSYCHOL. ASS'N (2013), <http://www.apa.org/helpcenter/stress.aspx>.

³³ See Babbel, *supra* note 30.

³⁴ See Peter Nalin, *What Causes a Fever?*, SCI. AM., <https://www.scientificamerican.com/article/what-causes-a-fever/>.

³⁵ See Babbel, *supra* note 30; Heather Forkey, *Medical Effects of Trauma: A Guide for Lawyers*, 34 CHILD L. PRAC. 97 (2015).

³⁶ See generally JUDITH LEWIS HERMAN, *supra*.

³⁷ See Saffren, *supra* at 17 (noting that domestic violence victims may be triggered by just being in proximity to their abuser while in court, which may negatively impact their access to the legal system).

³⁸ Strauss, Marcy. "Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy." 65.2 N.C. L. Rev. 315, 350 (1987)

³⁹ Schoenfield, Mark K., and Barbara Pearlman Schoenfield. "Interviewing and Counseling Clients in a Legal Setting." Akron L. Rev. 11 (1977): 313.

or not participation in the legal system is voluntary on the client’s part, risk disclosure is still helpful in prompting a client to consider specific strategies to mitigate that risk, including through self- or attorney referral to other providers, such as social workers or mental health providers, who can provide complementary resources to support client resilience during the legal process.⁴⁰

It is important to remember that even if a client has been dealing with severe trauma for some time and necessarily has a certain type of experiential “expertise” regarding the effects of living with traumatic stress, not all traumatized individuals will fully anticipate or have a conscious analysis of the toll that traumatic stress can take medically, and not all healthcare providers will provide their traumatized patients with such information.⁴¹ Therefore in at least some instances, an attorney may play a particular vital role in making sure that a client is at least given notice that risks to health are among the factors to consider when planning for legal action or participation. Clients will often be better able to imagine these risks, and to prepare for them, if attorneys are somewhat detailed and specific in describing what aspects of anticipated legal actions or proceedings might be stressful, or trigger painful reminders of past traumatic events, to the extent that such reminders can be predicted.⁴²

For instance, routine processes such as depositions can be difficult for some traumatized clients, because being questioned by an opposing attorney requires staying in a potentially prolonged interaction with someone who is “against” the client, or acting against his or her interests.⁴³ Although the interaction is not necessarily “personal”, meaning that the opposing attorney is doing her or his job, and may have no animus towards the client, a client might still experience the attorney as an aggressor, or someone who is trying to cause harm to the client. This type of experience can remind clients of past vulnerability to violence or other traumatic events, causing distress, anger, panic, dissociation, or the desire to flee or escape the situation.⁴⁴ Continuing the process of a deposition in this context, even if breaks are taken, and whether or not the client is overtly or visibly distressed, would be an instance where traumatic stress could be potentially very draining or difficult, psychologically and physiologically. Similarly, any overtly adversarial moment in the legal process, including but not limited to negotiations or various courtroom scenarios, can potentially amplify a traumatized client’s

⁴⁰ Seamone, Evan R., *The Veterans’ Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans With Posttraumatic Stress Disorder* (January 1, 2009). *Military Law Review*, Vol. 202, 2009; Mississippi College School of Law Research Paper. Retrieved: <https://ssrn.com/abstract=2456051> or <http://dx.doi.org/10.2139/ssrn.2456051>

⁴¹ See generally Grant Wood Geckeler, *The Clinton-Obama Approach to Medical Malpractice Reform: Reviving the Most Meaningful Features of Alternative Dispute Resolution*, 8 PEPP. DISP. RESOL. L.J. 171, 192 (2007) (arguing that emotional trauma is exacerbated by “less-than-full disclosures from healthcare providers”).

⁴² See Katz & Haldar, *supra* at 366 (“For many individuals who have experienced trauma, specific conditioned stimuli may be linked to the traumatic event such that re-exposure to a similar environment produces recurrence of fear and anxiety similar to what was experienced during the trauma itself.”).

⁴³ Kraemer, T. and Patten, E. (October, 2014, Vol. 33 No. 10). *Establishing a Trauma-Informed Lawyer-Client Relationship*. Retrieved from http://www.lsc-sf.org/wp-content/uploads/2015/10/Article_Establishing-a-Trauma-Informed-Lawyer-Client-Relationship.pdf

⁴⁴ See Kraemer & Patten, *supra* at 198 (warning that dissociation, harder to recognize than hyperarousal, can present challenges when trying to build attorney-client relationships).

experience of vulnerability, fear or inability to maintain safety or control.⁴⁵

Aside from directly adversarial interactions, a number of other routine aspects of legal proceedings can generate or escalate traumatic stress. For instance, confusion when navigating legal jargon, prolonged delays waiting for short-term or final legal outcomes, and vulnerability to the stereotypes, choices, or actions of strangers (including judges and juries, or law enforcement) can all tap into client experiences of instability, intense frustration, or lack of control. And of course, the fear of specific legal outcomes, whether in criminal or civil proceedings, can become a substantial source of traumatic stress. The responsibility of a trauma-informed attorney is not necessarily to discourage legal participation despite these risks, even in those instances where clients have a choice in the matter. Traumatized persons possess varying degrees of resilience, and some may have meaningful coping strategies to manage even very difficult legal encounters.⁴⁶ Improved awareness of the potentially traumatic aspects of legal processes is generally an asset, even in instances where a client is certain of the decision to proceed or has no choice in the matter, because being able to plan for or anticipate stressful challenges can in many instances help clients manage or mitigate that stress, or remain relatively more calm or focused while experiencing it.⁴⁷ In addition to the prospect of protective effects for client health, clients who are better able to prepare for traumatic stress can potentially act more effectively in their own interests, when participating in discovery, negotiations, testimony, or other processes, since advance awareness of the risk of traumatic stress sometimes reduces the likelihood that distress will interfere with articulation, decision-making, or various areas of self-presentation.⁴⁸

- **Validation of Traumatic Responses:**

In addition to assisting clients or other traumatized persons (including witnesses) in anticipating potentially traumatic or stressful aspects of legal processes, one of the more important things that any advocate, including but not limited to legal practitioners, can do when working with a traumatized client is to acknowledge the validity and relative “normalcy” of experiencing traumatic stress.⁴⁹ Persons dealing with severe traumatic stress will quite commonly experience discomfort, embarrassment, shame, anxiety, numbness or dissociation, anger, or frustration about being unable to manage or to avoid visibility displaying the distress

⁴⁵ See Lynette M. Parker, *Increasing Law Students’ Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163, 176 (2007) (warning against re-traumatization of clients).

⁴⁶ See generally *Effects of Traumatic Stress after Mass Violence, Terror, or Disaster*, U.S. DEP’T OF VETERAN AFFAIRS: NATIONAL CENTER FOR PTSD, <http://www.ptsd.va.gov/professional/trauma/disaster-terrorism/stress-mv-t-dhtml.asp> (last visited Mar. 9, 2017) (explaining the various coping responses to trauma).

⁴⁷ See Katz & Haldar, *supra*.

⁴⁸ See Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 648 (2016) (“Trauma-based reforms must be fashioned with a special eye towards protecting, rather than exacerbating, the unique vulnerability to overly harsh punishment that plagues youth of color due to inherent racial bias.”);

⁴⁹ See Buckingham, *supra* at 652 (explaining that children in all communities experience trauma and that some traumatic experiences are “more or less common along color lines”); Katz & Haldar, *supra* at 367 (explaining that trauma is “a common human experience”).

or other symptoms associated with trauma.⁵⁰ Although it actually takes substantial psychological strength and physical resilience to cope with severe trauma and still navigate legal institutions at all effectively, many individuals will understandably focus on or be intensely frustrated at feeling weakened, vulnerable, compromised, or disabled by trauma.⁵¹ While it would be presumptuous for advocates (legal or otherwise) to automatically assume clients are having this experience in any given moment, it is generally useful to anticipate that at some points most if not all clients will experience substantial social discomfort about being a traumatized person, and further, to expect that not all clients will readily be able or willing to acknowledge or discuss this discomfort, as it may amplify a sense of vulnerability or weakness.⁵² Ethno-racial, religious or gender norms will often complicate or inform the likelihood that an individual is able to express vulnerability, admit to feeling “weak”, or discuss or even admit to the emotional experience of being traumatized.⁵³ Attorneys should therefore be mindful that there will likely be a very wide range of communication styles and comfort levels among client populations.⁵⁴

A trauma-informed approach to lawyering in these instances can be enhanced by intentionally providing clients or other parties with the message that while there is no presumption about a client’s individual experience without more information, experiencing traumatic stress is or should be socially acceptable and is certainly “normal” when dealing with trauma.⁵⁵ Examples of how other clients or traumatized persons have experienced similar events, coupled with expressions of respect both for the validity of that experience, and for the ways in which individuals managed or responded to traumatic stress, can be very useful in giving traumatized persons the message that coping with traumatic stress during the legal process will not occasion judgment or stigma, at least from the legal advocate.⁵⁶ Although excessive personal disclosure by an attorney may be inappropriate or distract from a focus on a client’s needs and experiences, judicious use of personal disclosure or at least empathic identification with a particular traumatic experience can commonly be effective at mitigating embarrassment. That is, the message that “I’ve been there” (or somewhere similar), or “If I’d gone through that, I can easily imagine that I would be experiencing ____” strengthens the message that coping with

⁵⁰ See Kaarin Long et al., *A Distinction Without a Difference: Why the Minnesota Supreme Court Should Overrule Its Precedent Precluding the Admission of Helpful Expert Testimony in Adult Victim Sexual Assault Cases*, 31 HAMLINE J. PUB. L. & POL’Y 569 (2010) (describing fear, humiliation, shame and guilt as part of the typical feelings associated with traumatic experiences).

⁵¹ *Id.* at 593 (explaining the complex reactions to psychological trauma, including destabilizing feelings of fear, vulnerability and loss of control).

⁵² *Id.* at 587 (describing the difficulties of many rape victims when it comes to acknowledging their traumatic experiences and feelings).

⁵³ *Id.* at 593 (arguing that the psychological reactions to trauma are further complicated by culture, societal response, and internal feelings of fear and vulnerability); Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World*, 62 UCLA L. REV. DISCOURSE 140 (2014) (explaining that some clients may feel it is inappropriate to discuss certain events based on their cultural or religious beliefs).

⁵⁴ See Serena Patel, *supra* (asserting the importance of lawyers’ ability to adapt their communications style to facilitate communication with clients).

⁵⁵ See Katz & Haldar, *supra* at 364, 367.

⁵⁶ White-Domain, R. (2013). *Trauma-Informed Legal Advocacy: Practice Scenarios*. National Center on Domestic Violence, Trauma and Mental Health. Retrieved from <http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2014/01/Trauma-Informed-Legal-Advocacy-Practice-Scenarios-Jan2014v4.pdf>

traumatic stress does not have to be an experience of alienation or distancing from others, including the attorney.⁵⁷

Again, it is often vital to anticipate that demographic factors like race, ethnicity, religion, gender, or disability can shape how individuals experience or articulate the experience of traumatic stress. For instance, some men and boys may perceive acknowledgment of trauma as weakness, and therefore a threat to masculinity.⁵⁸ Or for instance, some people of color may be concerned about vulnerability to racist stereotypes that indicate that a distressed or traumatized person of color is out of control, “crazy”, and therefore dangerous and deserving of judgment or punishment.⁵⁹ For this reason, it is beneficial to be conscious of and avoid reifying stereotypes (sometimes by critically acknowledging them, if it seems helpful in context), while communicating that experiencing traumatic stress is comprehensible and is or should be acceptable across populations and communities.⁶⁰

- **Planning for Distress or Stress Management:**

Before discussing planning for distress or stress management as an aspect of providing competent legal advocacy with traumatized persons, it is helpful again to qualify and acknowledge that with few exceptions, attorneys are not also social workers or mental health clinicians, and will not generally be qualified or able to thoroughly assist clients in coping with traumatic stress during the legal process. That is, generally attorneys are not trauma therapists, and should not try to comprehensively replicate the role of a therapist, particularly since the ethical obligations of therapists and attorneys are not always presumptively compatible.⁶¹ However, legal counsel can appropriately play at least three roles in assisting clients and other parties (e.g. witnesses) in planning for and managing traumatic stress, as part of the process of preparing for legal actions or proceedings.

First, attorneys should be prepared to discuss general strategies for managing traumatic

⁵⁷ See Katz & Haldar, *supra* at 377.

⁵⁸ See Angela P. Harris, Book Review, *Beyond the Monster Factory: Gender Violence, Race, and the Liberatory Potential of Restorative Justice*, 25 BERKELEY J. GENDER L. & JUST. 199, 209 (reviewing SUNNY SCHWARTZ WITH DAVID BOODELL, *DREAMS FROM THE MONSTER FACTORY: A TALE OF PRISON, REDEMPTION, AND ONE WOMAN’S FIGHT TO RESTORE JUSTICE TO ALL* (2010)) (“[R]igid gender training...teaches little boys not to acknowledge their vulnerable feelings or express caring but to dominate others instead; through sexual, physical, and verbal abuse that imposes fear, shame, and the experience of intolerable powerlessness—masculine gender identity, especially when kindled by the trauma of abuse, plays an important role...”).

⁵⁹ See generally Sarah E. Redfield & Jason P. Nance, *American Bar Association: Joint Task Force on Reversing the School-to-Prison Pipeline*, 47 U. MEM. L. REV. 1 (2016) (arguing that implicit bias and stereotype threat will always be an issue, which requires specific measures to be taken, such as trauma-informed care and culturally specific care); Carolyn B. Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention*, 120 PENN ST. L. REV. 337 (2015) (criticizing feminist analysis of domestic violence due to its tendency to stereotype offenders and minimizing or denying the role of childhood trauma, poverty and other factors).

⁶⁰ See Katz & Haldar, *supra* at 364, 367 (explaining the normalcy of trauma and stress).

⁶¹ See Katka Werth, *Representing an Asylum Seeker Who Has Experienced Trauma*, 34 L.A. Law. 9 (2011) (explaining the importance of communication between the attorney and the client’s therapist for purposes of seeking advice, avoiding vicarious trauma, and effectively advocating for the client).

stress during the legal process, with attention to both the physiological and psychological aspects of traumatic stress.⁶² The attorney may not be able to fully assist a client or other traumatized person in fully planning for or solving particular problems; the attorney’s responsibility is primarily to be sure to alert the client to the potential need for additional resources and to encourage the client to explore resources that may be needed. It is important to include the physiological aspect, as traumatic stress tends to increase inflammation of nerves and cells, such that existing physical problems may become aggravated.⁶³ For instance, if a traumatized person has existing chronic back pain, increased inflammation would potentially significantly aggravate the degree of pain, and could interfere with the client’s ability to concentrate during meetings and legal processes, could require significant levels of medication which might make it difficult for clients to function normally, could make it difficult to sit still for prolonged periods, or could even cause delays in legal proceedings due to hospitalization or bedrest.⁶⁴ Therefore, it is in the client’s (legal and health) interests to consider whether extra preventative care is needed to reduce the likelihood that an existing condition will become debilitating when coupled with increased stress. Planning for management of traumatic stress essentially helps to maximize the chance that a client will be able to endure the stresses of a legal processes and to act in her/his own legal interests, while ideally minimizing adverse health effects.

Of course, clients will not always practically have access to optimal resources for alleviating traumatic stress, whether due to economic or time limitations, availability in a particular region, language or disability-based barriers, or because a client is unable to access some resources while incarcerated or institutionalized.⁶⁵ Ideally planning for participation in legal processes will work with those limitations, exploring what options are practically available, given the traumatized person’s specific circumstances. Clients may already have effective personal coping strategies for managing severe stress, such as exercise, debriefing with loved ones, creative expression, or recreational activities.⁶⁶ However, when clients are dealing with more severe trauma and are preparing for legal proceedings that are likely be to highly stressful

⁶² See Katz & Haldar, *supra* (explaining the importance of adapting appropriate litigation strategies when working with clients who have experienced trauma).

⁶³ See generally Tatiana Falcone, *Childhood Emotional Trauma Closely Linked to Problems in Adulthood*, CLEVELAND CLINIC, <https://consultqd.clevelandclinic.org/2014/11/childhood-emotional-trauma-closely-linked-to-problems-in-adulthood/> (arguing that emotional trauma causes neuroinflammation and other biological responses); Susanne Babbel, *supra* (arguing that chronic pain can be caused by trauma and stress); Julie H. Littky-Rubin, *So I Finally Understand the “Impact Rule” But Why Does it Still Exist?*, 82 FLA. B.J. 20 (2008) (explaining how physical injury can be caused by psychological trauma and its relation to the impact rule).

⁶⁴ See Dr. Brett C. Trowbridge, *The Admissibility of Expert Testimony in Washington on Post Traumatic Stress Disorder and Related Trauma Syndromes: Avoiding the Battle of the Experts by Restoring the Use of Objective Psychological Testimony in the Courtroom*, 27 SEATTLE U. L. REV. 453, 473 (2003) (arguing that expert testimony may be needed to explain a traumatized client’s behavior during proceedings).

⁶⁵ Zieva Dauber Konvisser, *“What Happened to Me Can Happen to Anybody” — Women Exonerates Speak Out*, 3 TEX. A&M L. REV. 303, 309 (2015) (arguing that one’s response to trauma “is determined by a complex interplay between psychological, behavioral, social, ecological, and biological factors, as well as by the internal and external resources they possess before, during, and after the trauma.”).

⁶⁶ *Id.* at 336 (describing the various ways in which victims of trauma respond to and cope with their trauma based on the resources they already have).

-- whether because of the subject of legal action, the issues at stake in a case, or the likelihood of lengthy processes – it is typically reasonable to assume that clients will need some kind of practitioner support, whether from mental or physical health providers, social workers, or other advocates. Examples of resources commonly used to manage traumatic stress and its effects include primary health care, mental health care, specialty care for management of pain, victims’ advocacy, complementary care or “body work” such as acupuncture, massage, or other alternative health resources, physical therapy or rehabilitation, occupational therapy, and other resources that support overall “wellness”, such as access to dance classes, gym equipment, or other fitness resources.⁶⁷

Second, particularly for attorneys who routinely work with traumatized clients, it is helpful to develop a referral network of social service and healthcare providers who are experienced in working with traumatized persons, and to be prepared when needed to work as part of an “inter-professional” team to serve the client’s interests. That is, successfully assisting a significantly traumatized person in navigating a substantial legal process, may require that the client have the support of a legal advocate, social service provider or victim’s advocate, and potentially several physical and mental health providers, who collaborate, sometimes in tandem with friends and family of the client, or members of the client’s religious or ethnic communities, to help the client approach the legal process with ample resources to support management of traumatic stress.⁶⁸ Some clients will have very minimal personal social networks, or may not be getting adequate support from those networks, and in these instances, the role of social service providers or mental health clinicians is often particularly vital.⁶⁹

Again, not all clients have the mobility, social skills, economic resources, time or stamina to pursue these resources independently. Therefore, a trauma-informed attorney will ideally familiarize her/himself with the breadth of resources available locally, including those available without cost to the client, and will attend to prospects for ensuring linguistic and/or disability access as needed.⁷⁰ The client’s complete circumstances should be factored into referral planning, such that for instance, a client who is a single parent might require access to low-cost or free childcare resources in order to be able to then utilize other services, or a client with mobility based limitations might need assistance securing free or low-cost disability accessible transportation in order to access particular resources.⁷¹ Ideally existing social service organizations will be able to guide legal counsel to the appropriate resources, but attorneys

⁶⁷ See generally *Effects of Traumatic Stress after Mass Violence, Terror, or Disaster*, U.S. DEP’T OF VETERAN AFFAIRS: NATIONAL CENTER FOR PTSD, <http://www.ptsd.va.gov/professional/trauma/disaster-terrorism/stress-mv-t-dhtml.asp> (last visited Mar. 9, 2017) (explaining the process of recovery from trauma, including positive actions to help with coping).

⁶⁸ See Jeffrey R. Baker, *Necessary Third Parties: Multidisciplinary Collaboration and Inadequate Professional Privileges in Domestic Violence Practice*, 21 COLUM. J. GENDER & L. 283 (2011) (explaining that collaboration among service providers is critical when working with clients who have experienced trauma, especially when the client may not have access to resources).

⁶⁹ *Id.*

⁷⁰ See Katz & Haldar, *supra*.

⁷¹ *Id.* at 389 (explaining the importance of communicating with clients who have experienced trauma when considering making referrals to other service providers).

should be prepared to be pro-active – at least to the extent that time and practicality allow -- in locating options, particularly when existing local infrastructure suffers from deficits. For clients who are incarcerated or institutionalized, attorneys may also need to be pro-active about advocating legally to enable client access to resources not typically available within institutions, including potentially through exercise of disability civil rights law, based on the understanding that post-traumatic stress disorder and related conditions can often be recognized as a legally protected disability under instruments such as the Americans with Disability Act.⁷² This strategy will not always be effective, and some clients may be uncomfortable identifying with disability, or any other legal argument that draws attention to traumatic stress.⁷³ However, attorneys should be prepared to explore and pursue this option where needed. Similarly, whether directly or in partnership with a colleague practiced in the area of disability civil rights, attorneys may be able to effectively advocate to increase the accessibility of existing resources in local communities, using disability civil rights law to address existing barriers that affect traumatized persons as such.⁷⁴

Third, attorneys should discuss with clients how to cope with the stresses of legal proceedings in the moment, including by asking for breaks if the client is starting to panic or is experiencing other severe effects.⁷⁵ Though it may seem like a minor or negligible courtesy, it is a helpful step to keep drinking water continually accessible to clients or other traumatized persons during meetings and legal processes, as staying well-hydrated can reduce some of the more toxic effects of producing stress hormones, and even in the immediate moment, may therefore help individuals stay calmer and more focused, while also reducing exhaustion over time.⁷⁶ Attorneys can also discuss whether any particular action, phrase, or other material item can be utilized by the client as essentially a psychological tool (referred to by clinicians as “self-soothing techniques”), to allow the traumatized person to experience comfort, or have a means to express anxiety or distress without public exposure or violation of social rules.⁷⁷ Asking in an open-ended way, “is there anything I can do to help you feel calmer or more comfortable as we proceed?” is also often critical, as clients will not always comfortably volunteer requests for assistance, without an explicit invitation to do so, or to brainstorm options.⁷⁸ In the event that a

⁷² See, e.g., *Adams v. Autozoners, Inc.*, No. 98-2336, 1999 U.S. DIST. LEXIS 14999 (E.D. La. Sep. 22, 1999) (holding that post-traumatic stress disorder could be a protected disability under the ADA if it was shown that the impairment limited a major life function).

⁷³ See Carrie Griffin Basas, *The New Boys: Women with Disabilities and the Legal Profession*, 25 BERKELEY J. GENDER L. & JUST. 32 (2010) (arguing that some people may be uncomfortable identifying with disability because of its erasure of appearing to be normal).

⁷⁴ Wisconsin’s Violence Against Women with Disabilities and Deaf Women Project (2011). *A Practical Guide for Creating Trauma-Informed Disability, Domestic Violence and Sexual Assault Organizations*. Retrieved from <http://www.disabilityrightswi.org/wp-content/uploads/2012/05/Trauma-Informed-Guide.pdf>

⁷⁵ See Katz & Haldar, *supra* at 390.

⁷⁶ See generally Eric G. Krause et al., *Hydration State Controls Stress Responsiveness and Social Behavior*, 31 J. NEUROSCIENCE 5470 (2011) (finding that drinking water may decrease reactivity to psychogenic stressors and facilitate social behavior).

⁷⁷ See Katz & Haldar, *supra*.

⁷⁸ See Katka Werth, *supra* (explaining that lawyers may need to take a proactive role in communicating with

client makes a request that the attorney cannot or is not willing to accede to, straightforward communication to that effect is generally needed to ensure that the client does not move ahead with expectations that won't be met. However, the attorney can brainstorm alternatives with the client where possible, in order to cushion a flat "no", and to maximize the likelihood that the client will continue to be comfortable discussing strategies as needed.

Trauma and Legal Argument

The last element of competent representation reviewed in this course involves the ability to persuasively frame facts, issues and applicable doctrine, to judges, juries, and other legal actors. A trauma-informed approach to making legal arguments requires that attorneys be prepared to explain trauma, or the social contexts or relations that generate trauma, where doing so will serve the client's legal interests. For instance, potential visible manifestations of traumatic stress can include verbal and non-verbal indicators of distress, anxiety, anger, disassociation, or confusion.⁷⁹ Depending on context, these indicators may reinforce stereotypes or stigma that damage client or witness credibility.⁸⁰ It then becomes the task of a legal advocate whether through direct intervention, or through expert testimony, to normalize traumatic stress responses as comprehensible in their social context, and to neutralize prospective narratives that frame the evidence of trauma as a basis to dismiss credibility, or to find the client (or witness) unsympathetic or unworthy of desired outcomes. In some instances, helping a judge or jury to empathize or identify with a traumatized person's experience, is particularly critical, in mitigating the likelihood that trauma will be used to dehumanize, stigmatize or diminish the credibility of that person.⁸¹ Even where the basis for trauma may have involved particular extreme experiences or vulnerabilities, appealing to broader human experiences of coping with exigency or crisis, managing physical or psychological injuries, or recuperating from harm may still be effective in creating improved identification with a traumatized person, on the part of judges, juries or other legal actors.⁸²

Similarly, trauma-informed lawyering may be particularly applicable in instances where courts and other legal institutions employ reasonable person standards in order to evaluate behavior. A trauma-informed approach will at times require that an attorney be prepared to intervene and uncover some of the assumptions underlying the idea of "reasonableness", to the extent that the conventional conception of a reasonable person in a given moment, conflicts with the responses of a traumatized person. For instance, traumatic stress responses can alternately involve heightened distress, fear or rage, or can account for numbness, confusion, or passivity, as well as for lapses in memory or distorted perceptions.⁸³ These responses might explain a number of facts that otherwise could be taken to

traumatized clients because the client's traumatic experiences may interfere with his or her ability to effectively communicate).

⁷⁹ See Rose Corrigan & Corey S. Shdaimah, *People with Secrets: Contesting, Constructing, and Resisting Women's Claims About Sexualized Victimization*, 65 CATH. U.L. REV. 429 (2016) (explaining that victims of trauma express their needs and effects of their traumatization in various ways).

⁸⁰ See Buckingham, *supra* at 668.

⁸¹ See *id.* ("Without an accurate identification of trauma indicators, a child cannot receive appropriate treatment, will be punished more harshly, and the system's intervention will ultimately miss an opportunity to promote growth....")

⁸² Katz, S. & Haldar, D. (2015). *Teaching Trauma-Informed Lawyering through Family Law Clinics*. Retrieved from <https://www.aals.org/wp-content/uploads/2015/06/Katz-Haldar.pdf>

⁸³ See sources cited *supra* note 138.

increase client culpability or liability, diminish client or witness credibility, amplify the client’s burden of proof, or detract from the liability or culpability of an opposing party.

For example, a client’s perception of threat, danger or hostility might seem unreasonable if a “reasonable” person is presumptively a person who is not dealing with traumatic stress, but perfectly reasonable for a person with a traumatic history of facing unexpected or repeated threats or harms.⁸⁴ In this instance, a trauma-informed approach could be deployed to help explain why a criminal defendant who had witnessed or suffered police misconduct and continued to experience traumatic stress might run from the police despite lack of culpability for a crime, why a prior victim of an accident or violent incident could “freeze up” and fail to communicate obvious or needed information in a situation that contained reminders of the past traumatic incident, or why a client might have failed to comprehend a warning or instruction while operating in “fight-flight” mode in response to a perceived danger.

As noted earlier, competent lawyering with traumatized persons will not necessarily be strictly limited to explaining an individual traumatic response, but also to educating courts or other legal actors about the social context that produces particular trauma. For instance, fully explaining a defendant’s decision to run from the police may require discussion and evidence beyond that individual’s history or psychological state, venturing into the dynamics of police brutality and structural racism that could make it especially comprehensible for some defendants, especially persons of color, to fear law enforcement.⁸⁵ Or, for example, explaining the decision of a domestic violence victim to return to a perpetrator may require broader evidence and explanation of common dynamics of gender violence, inclusive potentially of factors such as economic dependence or vulnerability, or cultural or religious familial pressures.⁸⁶ In essence, trauma-informed lawyering can require translation, into legally cognizable terms, of an individual traumatized person’s experiences, grounded in both individual psychology and socio-structural status or location. The term “cultural competency” is commonly used to refer to the requirement that practitioners and advocates (including but not limited to some legal practitioners) be familiar enough with a client’s cultural context to sensitively and competently serve the client’s interests.⁸⁷ A newer concept, “structural competency” addresses the need for practitioners and advocates to understand not just “culture”, but the structural forces, particularly structural inequities and vulnerabilities including but not limited to poverty, racism, and gender stratification, that can underlie individual experiences.⁸⁸ A trauma-informed approach will often if not always require some degree of structural competency, in order to ensure that traumatic stress is not inaccurately reduced to

⁸⁴ See, e.g., *O’Brien v. Eli Lilly & Company*, 668 F.2d 704 (3rd Cir. 1981) (Higginbotham Jr., J. dissenting) (arguing that the reasonable person standard applied has the potential to completely disregard the effects of emotional trauma).

⁸⁵ See Samantha Buckingham, *supra* at 651 (arguing that youth of color—over-represented in the juvenile justice system—“see that they are part of a group that is disproportionately punished” and may “feel that unfairness and it threatens their positive sense of what they can achieve.”).

⁸⁶ See Saffren, *supra* at (explaining the attorney’s difficult role in educating her client and the courts when her client—a victim of domestic violence—seeks to return to the abuser).

⁸⁷ See Saffren, *supra* at 17 (arguing that cultural competency is important part of attorney competency and that “[a] culturally competent attorney utilizes tools and training to interact with his or her client in a way that is non-judgmental, respectful, and that avoids stereotypes.”).

⁸⁸ See STRUCTURAL COMPETENCY: A NEW MEDICINE FOR THE INSTITUTIONAL INEQUALITIES THAT MAKE US SICK, <https://structuralcompetency.org/>.

a (solely) individual problem or pathology.

In addition to explaining a traumatized person's behavior or perceptions, an attorney may also need to be able to explain or delineate the significance of trauma, in order to most effectively establish justification for a remedy or damages. For instance, when a traumatized person is a plaintiff in a torts claim, or a civil rights action, explaining the breadth and substance of the consequences of living with traumatic stress can be critical in fully delineating the basis for remedy. There are of course challenges in establishing causation, where the effects of traumatic stress are complex, evolving over time, and have multiple points of origin not limited solely to the basis for legal action. That is, exposure to a tortious act, civil rights violation, or other legally actionable event might generate traumatic stress that over ensuing months and years is one of several contributing factors causing sleep deprivation, or development of a digestive disorder, or overall weakened immunity, as well as various potential psychiatric outcomes such as depression or anxiety.⁸⁹ These health effects might for example, interfere with job productivity, ultimately contributing to decreased economic opportunity and income, through loss of advancement opportunities or underemployment, or might ultimately increase vulnerability to age-related illnesses like heart disease and cancer.⁹⁰ It is difficult, if not impossible, to persuasively and accurately predict precisely the health, economic, familial, and social consequences that will emerge or escalate over extended time, and to estimate how much of those consequences can reasonably be attributed to the event generating legal action. This challenge is particularly attenuated by the fact that many consequences of traumatic stress can evolve slowly, beyond the statute of limitations in which a claim can even be advanced.⁹¹ However, the more thoroughly an attorney can comprehend and explain, if needed, using empirical evidence or expert testimony, the degree to which traumatic stress increases a person's *risk* of experiencing each of these effects, the stronger the prospective basis will be for establishing a more compelling claim for appropriate damages or other relief.

Traumatic stress can readily be present without it necessarily also being the case that a person is so psychologically compromised as to rise to the level of diminished capacity.⁹² Part of the work of trauma-informed legal arguments, in these instance, involves making sense of a traumatized person's behavior, as "normal" and intelligible in context, without requiring evidence of diminished capacity, whether because it is not applicable, or because arguing diminished capacity might also damage credibility, or might conflict with a client's need for privacy. A trauma-informed approach to legal argument in essence, will ideally incorporate the ability to educate legal institutions about trauma as it bears on immediate legal questions or the behavior or perception of clients and other parties, and where appropriate, will encourage and invite empathy and identification with traumatized persons and awareness of their social contexts, in order to reduce stigma or stereotyping, without minimization of the degree to which a traumatized person is to any extent, still functional or healthy in other respects.

⁸⁹ See Buckingham, *supra* at 653 ("Those who suffer with co-existing conditions are at risk for misdiagnosis of the underlying traumatic condition that has presented as a disorder.").

⁹⁰ See Robert T. Carter & Thomas D. Scheuermann, *Legal and Policy Standards for Addressing Workplace Racism: Employer Liability and Shared Responsibility for Race-Based Traumatic Stress*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 5 (2012) (explaining the short and long-term negative health effects of psychological and emotional impairment and race-based traumatic stress injury).

⁹¹ See generally Matthew O. Riddle & Leslie M. Whitten, *Notice and Statute of Limitations Issues in Repetitive Trauma Cases*, 22-May S.C. LAW. 34 (2011).

⁹² See Saffren, *supra* at 9.

Trauma-Informed Lawyering and Communications

As one of the core aspects of the attorney-client relationship, Rule 1.4 of the American Bar Association Model Rules of Professional Conduct provides basic guidance regarding attorney-client communications.⁹³ Two key concepts presented in Rule 1.4 include the mandate of providing information necessary to enable “informed consent”, and the expectation that clients will be kept “reasonably informed” about the status of any legal action or process.⁹⁴ In many instances, these concepts will not apply particularly differently to clients dealing with severe trauma as compared to those who are not. However, there are at least two considerations that should inflect a trauma-informed approach to compliance with Rule 1.4. First, there are several ways that the presence of substantial traumatic stress can shape, interrupt or alter a client’s experience of communication, and multiple potential strategies for ensuring that traumatized clients are to the extent possible, genuinely informed, and better able to make decisions regarding consent.⁹⁵ Second, trauma can complicate the experience of “informed consent”, both because additional information may be needed by traumatized clients, as already outlined in the prior sections, and because traumatic stress can disrupt or impair the ability of a traumatized person to make informed decisions, and can amplify the risk of coercion when decision-making.⁹⁶ Again, there are strategies available to trauma-informed attorneys to help minimize this likelihood, and protect the prospects for informed consent.

Trauma and Communication

Trauma can alter or disrupt communication in at least three ways.⁹⁷ First traumatic stress can, in some instances, disrupt concentration and “cognitive processing”, or the ability to make sense of, organize and retain information.⁹⁸ These dynamics are not constant, consistent or universal; they are at issue for some traumatized individuals, to varying degrees, and with varying frequency.⁹⁹ In the most extreme instances, an individual might not be able to reliably form short-term memories, meaning they might be unable to remember communication at all, even shortly after it occurs, or might be unable to make sense of words as they are spoken.¹⁰⁰ More commonly, a traumatized individual might have difficulty remembering some details, might confuse or misremember some information, or might have difficulty making sense of statements the first time they are communicated.¹⁰¹ In other instances, a traumatized person might have no difficulty at all remaining focused, forming short-term memories, and comprehending complex ideas, or else might be fully able to communicate well at one time, but not another.¹⁰² There should be no default presumption in any given instance that a traumatized person is

⁹³ MODEL RULES OF PROF’L CONDUCT r. 1.4 (AM. BAR ASS’N 1983).

⁹⁴ *Id.*

⁹⁵ MODEL RULES OF PROF’L CONDUCT r. 1.4 cmt. (AM. BAR ASS’N 1983).

⁹⁶ *Id.*

⁹⁷ Katz, S. & Haldar, D. (2015). *Teaching Trauma-Informed Lawyering through Family Law Clinics*. Retrieved from <https://www.aals.org/wp-content/uploads/2015/06/Katz-Haldar.pdf>

⁹⁸ See J. Douglas Bremner, *Traumatic Stress: Effects on the Brain*, 8 DIALOGUES CLINICAL NEUROSCIENCE 445 (2006).

⁹⁹ Katz, S. & Haldar, D. (2015). *Teaching Trauma-Informed Lawyering through Family Law Clinics*. Retrieved from <https://www.aals.org/wp-content/uploads/2015/06/Katz-Haldar.pdf>

¹⁰⁰ See generally Bremner JD et al., *Deficits in Short-Term Memory in Adult Survivors of Childhood Abuse*, 59 PSYCHIATRY RES. 97 (1995).

¹⁰¹ *Id.*

¹⁰² *Id.*

not able to fully communicate and receive information, as the unsupported assumption that a person is not understanding communication can feel insulting, patronizing or humiliating, as if that person's intelligence is being underestimated.¹⁰³ But since traumatic stress can impair communication, and since individuals will not always articulate or even consistently be aware that they are occurring, a trauma-informed approach requires that attorneys anticipate the possibility that trauma will interfere with a client's ability to process or retain information.¹⁰⁴

In practice, this means that the attorney should, where appropriate, take responsibility for ensuring that any particularly vital information is readily accessible or recorded for the client, so that the client has multiple opportunities to access or remember crucial information.¹⁰⁵ In some instances, there is no practical or ethical bar to providing clients with notes, memoranda, or other documentation to "back up" verbal communication, a strategy that can work well provided there are no obstacles based on language fluency, literacy, or disability. In other instances, creating a print, digital, or audio record might amplify the risk that privileged information could be accessed or disclosed inappropriately, and attorneys may need to explore other options.¹⁰⁶ In some instances, a third party who is directly consulting to or privy to attorney-client communication, whether a social worker, family member, friend, or other advocate may be able to help compensate for any deficits in cognition or memory, by taking in information alongside the client, and remaining available and pro-active about revisiting information as needed to ensure that the client has ample opportunities to become fully or at least reasonably informed.¹⁰⁷

If both of these options are either unavailable, inadequate, or pose excessive or significant threats to client confidentiality or privacy, then the attorney should take steps to ensure over repeat communications that any vital information has been retained and understood by the client, even where prior communication would otherwise normally be considered sufficient.¹⁰⁸ This does not mean that it is presumptively helpful to engage in gratuitous and uninvited repetition of all critical information in all circumstances, as this runs the risk of causing the client to feel overwhelmed, frustrated, or condescended to.¹⁰⁹ In many instances, it will be most helpful to question the client about whether

¹⁰³ MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. (AM. BAR ASS'N 1983) ("The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.").

¹⁰⁴ See Serena Patel, *supra* (asserting the importance of lawyers' ability to adapt their communications style to facilitate communication with clients); Katka Werth, *supra* (explaining the importance of communication between the attorney and the client due to the possibility of the client's traumatic experiences interfering with his or her ability to effectively communicate).

¹⁰⁵ See sources cited *supra* note 103.

¹⁰⁶ See generally Ashley S. Lipson, 1-6 *Art of Advocacy: Documentary Evidence* § 6.10 (2016) (explaining in detail when written documents are subject to the attorney-client privilege).

¹⁰⁷ MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. (AM. BAR ASS'N 1983) (explaining that clients who suffer from diminished capacity may wish to have third parties participate in discussions with the lawyer, but that the lawyer must keep the client's interests at the forefront and look to the client when making decisions on the client's behalf).

¹⁰⁸ See Saffren, *supra* at 12 (arguing that although the ABA Standards encourage attorney's to coordinate with other professionals, attorneys should obtain client consent and maintain standards of confidentiality).

¹⁰⁹ National Immigrant Women's Advocacy Project, American University Washington College of Law (July 2015). *Trauma Informed Approach to Attorney/Client Relationships and Collaborations: Strategies for Divorce, Custody, Protection Orders, and Immigration Cases*. Retrieved from <http://library.niwap.org/wp->

repetition is useful or desired, ideally by making sure that the client can re-state in her/his own terms the more vital information.¹¹⁰ When asked, “did you understand...”, a client may believe and therefore honestly state that the answer is “yes”, but may be unaware that some vital information was misunderstood or missed.¹¹¹ This can, of course, happen absent severe trauma; but, traumatic stress can increase the likelihood of confusion or misunderstanding. So inviting the client to reflect back her/his understanding of important information is generally a good failsafe, unless the client indicates verbally or through visible expressions of anxiety that being asked to explain or articulate is stressful or difficult.

A second way in which traumatic stress can disrupt or alter communication involves the prospect that traumatic memories will significantly distort perception or interpretation of information.¹¹² In these instances, the issue is not necessarily that a client is failing to comprehend or remember information, although in some instances both sets of dynamics are happening simultaneously. Rather, information is filtered through “traumatic narratives” involving particular fears, or sources of frustration, anger, grief, or despair, with the result that client predictions or ideas about potential actions or outcomes become skewed.¹¹³ This is not to suggest that perception is generally objective or value-neutral; all clients will filter information based on their own past experiences, value systems, priorities or norms.¹¹⁴ The only distinction here is that client perceptions may be *atypically* or more severely skewed, at times in ways that might interfere with healthy decision-making.¹¹⁵

So for instance, an attorney might describe a prospective negative legal outcome, and a traumatized person might associate the idea of loss, risk or defeat with prior traumas, leading to a more extreme aversion to accepting the risk of that outcome, or an exaggerated perception of its likelihood.¹¹⁶ An appropriate attorney response if it appears this dynamic is at issue needs to be determined carefully. For instance, any advocate may want to intervene if it appears, rightly or not, that a client is making a mistake. Nevertheless, it is particularly important that an attorney not put significant pressure on a traumatized person, as it is very easy for pressure to be experienced as coercion, potentially causing additional trauma, and impeding the prospects for genuine consent.¹¹⁷ The agenda of a trauma-informed attorney should not necessarily or presumptively involve attempting to persuade a client to change her/his mind, or to make a particular decision. Aside from the imperative to respect client autonomy as a premise of “informed consent”, one reason to avoid pressuring or pushing hard for a

content/uploads/Powerpoint-Trauma-Informed-Approach-to-AttorneyClient-Relationships-and-Collaborations-1.pdf

¹¹⁰ MODEL RULES OF PROF’L CONDUCT r. 1.4 cmt. (AM. BAR ASS’N 1983).

¹¹¹ *Id.* (explaining that in certain circumstances, it may be necessary to take further steps when trying to make sure a client understands something due to diminished capacity or age). *See generally* MODEL RULES OF PROF’L CONDUCT r. 1.14 cmt. (AM. BAR ASS’N 1983) (explaining that the typical ways of communicating may change when lawyers are working with client’s with diminished capacity).

¹¹² *See* Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. AIR L. & COM. 1421, 1464 (2001).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Katz, S. & Haldar, D. (2015). *Teaching Trauma-Informed Lawyering through Family Law Clinics*. Retrieved from <https://www.aals.org/wp-content/uploads/2015/06/Katz-Haldar.pdf>

¹¹⁷ Katz, S. & Haldar, D. (2015). *Teaching Trauma-Informed Lawyering through Family Law Clinics*. Retrieved from <https://www.aals.org/wp-content/uploads/2015/06/Katz-Haldar.pdf>

particular decision is that an apparent mistake in other circumstances might in fact be the best decision for a traumatized client. For instance, even if the risk of a particular negative legal outcome is relatively low, the social or psychological impact of that outcome might be more severe for an already traumatized client, such that avoiding the possibility may be a greater priority than it would be in other circumstances. And again, because an attorney is not generally also qualified or licensed to act as a mental health clinician, an attorney will not necessarily, at least not comprehensively be in a position to help the client work through the underlying trauma, even if such an intervention were invited and practically possible.¹¹⁸ However, it can be an appropriate and beneficial goal to attempt to offer the client more communication or information, in order to better ensure that the attorney's communication is understood as intended.

To this end, a trauma-informed approach will involve several steps, if it appears that a client may be misunderstanding attorney communication, based on a traumatic response. In determining whether this type of misunderstanding is occurring, potential cues include but are not limited to exaggerated descriptions of outcomes or potentialities, such as taking an event which is only a possibility and re-framing it as a definite eventuality, or as nearly inevitable, or adding more exaggerated or dramatic descriptions to the potential impact of a particular outcome. Once there is an indication that trauma may be skewing client perception, the following steps can guide attorney response.

Step 1: Revisit the basic information which triggered the traumatic response, stating the facts, factors or considerations in clear, lay language. Provide qualifiers or descriptors as needed, for instance indicating as accurately as possible how likely an outcome will be, or what the specific components will be of a particular event, outcome or process. Breaking down details, unless the client seems averse to listening, can be helpful, as it potentially helps demystify or remove the anxiety associated with an actual outcome, event, or process that the client is associating with a particular trauma-based fear or anxiety. If it seems appropriate, the attorney may indicate that s/he is re-stating the information to make sure the client has a good sense of the issues at stake.

Step 2: Invite client questions, and invite the client to share any concerns.

Step 3: Communicate respect and/or understanding for any client concerns, in essence communicating that the client is not being unreasonable for having her/his reactions. If it seems welcome or appropriate, the attorney may acknowledge that it would make sense for a traumatized person to react in this way, meaning by validating the traumatic response. For instance, an attorney might say: "If I'd been through what you have, I think it would be natural to be worried about this too."

Step 4: Affirm the client's right to make decisions about any issues at stake. It is not necessarily inappropriate to make a recommendation based on legal expertise as an attorney would with any other client. However, if the client appears at all anxious or uncomfortable, it may be important to couple that recommendation with a statement recognizing that the client is the person best able to make decisions for her/himself, particularly given that the attorney cannot be fully aware of the broader context of the client's experiences or needs beyond the particular legal claim or case at issue.

Step 5: Communicate or reiterate that the attorney is available to discuss the question further if needed, and if the client has support in managing traumatic stress or making decisions from other parties (e.g. an

¹¹⁸ See Katka Werth, *supra*.

advocate, mental health provider, or other support person), it can be helpful to indicate that talking the question through with that party or parties may be beneficial.

A third way in which traumatic stress can affect attorney-client communication involves a particular psychological coping mechanism that is sometimes, but not always, present to extreme degrees among traumatized clients. This coping mechanism, “dissociation”, is a basic element of human psychology.¹¹⁹ It refers to the practice, usually exercised without conscious intention, of disconnecting from emotion, information, sensation, or other aspects of experience that will otherwise cause some form of distress or trauma.¹²⁰ Human beings normatively dissociate, for instance by “zoning out” while bored, feeling numb when in shock, or “tuning out” pain or fatigue in order to focus on completing a task.¹²¹ However, during severe and repetitive trauma, a person will fairly commonly heavily rely on or over-use dissociative coping mechanisms, in order to try to manage pain, panic, or other feelings severe enough to feel devastating or impossible to handle in the moment.¹²² Over time, repeatedly using dissociation to cope with severe trauma can become the basis for a “dissociative disorder” or “dissociative disability”, a psychological condition in which a person can spend prolonged periods of time disconnected from major aspects of psychological experience.¹²³

There are many different ways to dissociate, and no singular template that will fit all persons with a dissociative disability or condition.¹²⁴ For instance, dissociation may be constant or intermittent, of relative severity or consistency, and might manifest as a client generally feeling emotionally numb, or might only be attached to a particular emotion, issue or type of event.¹²⁵ Rather than relating to emotion primarily, dissociation can also disconnect a person from fully experiencing or responding normally to physical pain or discomfort, a phenomenon somewhat more common among people who have been repeatedly physically tortured, and have become progressively numb to the extent possible to negative physical stimuli, as a means to try to minimize the impact of the experience.¹²⁶ People with dissociative conditions may or may not have ever been diagnosed, and may or may not be aware that the condition is in any way unusual, particular if trauma has been ongoing over the life course.¹²⁷ For this reason, a trauma-informed attorney should never assume that a client will be able to tell the attorney, “I am dissociating”, or “I have a dissociative disorder”, though very occasionally a client may actually be able to do so.¹²⁸

The discussion earlier in this section of traumatic stress potentially disrupting cognitive processing or the formation of short-term memory partially overlaps with the issue of dissociation, as one (though not the only) reason why traumatized persons may not fully process information is because

¹¹⁹ See Kraemer & Patten, *supra* at 198.

¹²⁰ *Id.*

¹²¹ See generally Judith L. Alpert et al., *Symptomatic Clients and Memories of Childhood Abuse: What the Trauma and Child Sexual Abuse Literature Tells Us*, 4 PSYCHOL. PUB. POL’Y & L. 941 (1998) (explaining the normal and pathological variations of dissociation).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 950.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

they are disconnected from the immediate experience, or distracted while dissociating.¹²⁹ However, dissociation may also have other consequences for attorney-client communication. For instance, a client's ability to comprehend the negative consequences associated with a particular course of action or legal outcome might be compromised or diminished because the client is dissociating from fully comprehending information that provokes fear or anxiety.¹³⁰ This does not mean the client does not hear the words spoken, or understand their literal meaning, but for instance, any aspects of the information that would otherwise provoke distress will "feel unreal" or negligible, or alternately, the client may comprehend them in theory, but will be unable to fully experience an emotional response to the information.¹³¹

One potential consequence in this instance is that a client's decision-making might be compromised, because the client is unable to fully experience or perceive the full impact of a risk, or anticipate how traumatic a particular outcome may feel.¹³² So for instance, a client who is dissociating might communicate that a particular process or exigency will be "fine", and that s/he feels fine accepting particular risks, when in fact the client is significantly underestimating the prospective traumatic stress associated with a particular choice. It is, of course, neither the attorney's responsibility or prerogative to try to manage a client's capacity for emotional experience, or ability to associate.¹³³ Just as an attorney should not attempt to persuade a client who is having an intense emotional response to ignore that response entirely when making decisions, an attorney also should not pressure a client who appears to be dissociated or emotionally "numb" to respond differently, particularly since the dissociative coping mechanism can be a vital aspect of the client's survival of severe trauma.¹³⁴ The primary concern in trauma-informed lawyering involves the attorney being aware of the possibility that dissociation could cause some traumatized clients to be less able to fully process the potentially traumatic implications associated with particular communication. While there are substantial limitations governing what an attorney can possibly do when this dynamic appears to be in play, a potential appropriate response includes more explicitly outlining the potential challenges at hand, with detail specifying where clients might commonly feel stress, or might find particular challenges difficult or traumatic. The goal in this instance is essentially to help remind and alert the client to these possibilities, to increase the likelihood that the client will be more fully able to understand and comprehend the communication with all its relevant implications, if s/he is willing and able to do so.

Dissociation can also often be short-term, such that clients will have delayed reactions, experiencing fear or anxiety or other difficult emotions after the attorney-client communication has taken place and the interaction has ended.¹³⁵ So it can be particularly helpful if a client appears to be so dissociated that they are not fully comprehending communication, to delay decision-making where

¹²⁹ See *generally Dissociative Disorders*, NATIONAL ALLIANCE ON MENTAL ILLNESS, <http://www.nami.org/Learn-More/Mental-Health-Conditions/Dissociative-Disorders> (last visited Mar. 17, 2017).

¹³⁰ See Kraemer & Patten, *supra* at 198.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Katz, S. & Haldar, D. (2015). *Teaching Trauma-Informed Lawyering through Family Law Clinics*. Retrieved from <https://www.aals.org/wp-content/uploads/2015/06/Katz-Haldar.pdf>

¹³⁴ See Jacqueline Kanovitz, *Hypnotic Memories and Child Sexual Abuse Trials*, 45 VAND. L. REV. 1185, 1205 (1992) (describing dissociation as a method of survival for children who have been sexually abused).

¹³⁵ See *generally Dissociative Disorders, supra*.

practically possible, inviting the client to “sleep on it”, consult with clinicians or other support persons, and have additional time to become more fully associated with the implications of communication.¹³⁶ Although in more extreme circumstances, a person who is dissociating appears obviously numb or “checked out”, an attorney should keep in mind that a person who is dissociating may appear “perfectly normal”, as dissociation can reduce the likelihood of visible distress, so that a client simply appears calm.¹³⁷ For this reason, even if there is no indication of either distress or dissociation, it can be helpful to reiterate to a client that if s/he reconsiders a decision in the short-term (assuming the final decision does not have to be immediate), or needs to revisit a particular subject through attorney-client communication, that this option remains open, once the client has time to think about his/her reactions or concerns.

Traumatic Stress and Informed Consent: Minimizing the Possibility of Coercion

The prior section describes several ways in which traumatic stress may affect decision making, and therefore a client’s experience of giving or withholding informed consent. The earlier section on trauma-informed lawyering and “competence” also notes the importance of disclosing risks associated with legal processes and traumatic stress, to the extent possible. One additional consideration bearing on the subject of informed consent involves the possibility that a traumatized person will feel vulnerable to or dependent on the attorney, and therefore less comfortable making decisions that the client imagines would upset, disappoint or displease the attorney.¹³⁸ This dynamic certainly is not at issue in all cases. For instance, some traumatized people express trauma primarily through expressions like rage, distrust, defiance, or attempts to assert control, and therefore are far less likely to be concerned with displeasing an attorney or other advocate.¹³⁹ Others may be fairly self-aware, assertive, or comfortable with independent decision-making, notwithstanding also coping with traumatic stress.¹⁴⁰

However, one of the potential consequences of severe trauma is that it can undermine the traumatized person’s ability to trust her/himself.¹⁴¹ That is, a person who has suffered one or more severely traumatic events may feel that since s/he could not prevent or protect her/himself from the traumatic circumstances or experiences, it is no longer possible to feel secure when making choices.¹⁴² Trauma tends to make individuals feel very vulnerable, and another potential consequence of severe trauma or prolonged traumatic stress for some individuals, is that trauma can make a traumatized person feel especially dependent, or frightened of being abandoned in difficult circumstances.¹⁴³ Individuals who have been traumatized by some form of victimization may experience an additional consequence of traumatic exposure – namely that the fear of upsetting anyone who has power or

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See Kaarin Long et al. *supra*.

¹³⁹ See generally Yxta Maya Murray, *Rape Trauma, the State, and the Art of Tracey Emin*, 100 CALIF. L. REV. 1631 (2012) (explaining the various ways in which rape victims express their experiences of trauma, including distrust, shame and skepticism); Rose Corrigan & Corey S. Shdaimah, *People with Secrets: Contesting, Constructing, and Resisting Women’s Claims About Sexualized Victimization*, 65 CATH. U.L. REV. 429 (2016) (arguing that victims are incorrectly expected to express and present their trauma in certain ways for it to be labeled as legitimate).

¹⁴⁰ See sources cited *supra* note 138.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See Kaarin Long et al. *supra*.

authority may be ingrained.¹⁴⁴ Any or all of these factors can contribute to a dynamic in which a client essentially is particularly vulnerable to coercion, regardless of whether the attorney has any intention to be coercive (i.e. coercion can be unwitting in some instances). That is, traumatized clients are in some instances, disproportionately vulnerable to coercion and therefore may be constrained when attempting to give or withhold consent.

A trauma-informed approach to soliciting informed consent relative to any and all decisions involved in legal representation therefore should be particularly sensitized to the possibility that the presence of traumatic stress could facilitate coercion of a client. Again, the underlying issue of traumatic stress is not the attorney's problem to solve. Although ideally, an attorney-client relationship may have "therapeutic" dimensions or involve psychologically helpful interactions, for instance through healthy communication and mutual respect, many of the broader issues at stake will require the support of clinicians or advocates who can work with the client in making sense of and working through the issues attached to decision-making.¹⁴⁵ Informed consent therefore is one of the areas in which the collaborative involvement of social workers, mental-health providers or other support people may be an essential resource for the attorney and client.

However, the attorney does have a responsibility to acknowledge the possibility of coercion, and to take action where possible to avoid contributing to a coercive dynamic. Useful strategies for minimizing the possibility of coercion can include, but are not limited to, a) overtly communicating that the attorney will be supportive of the client making whichever choice feels best to her/him, b) reminding the client that the attorney is making a recommendation (where applicable) based on the legal facts and issues at stake, but that the attorney cannot decide for the client how to balance that recommendation with other factors, such as the client's energy, family or personal responsibilities, health, or recovery from trauma, and therefore the client should feel free to make a decision that best reflects the client's own priorities, c) discussing how the client will potentially feel about making one choice, versus another, and d) reiterating messages that indicate that the attorney will support and be present for the client (assuming this is accurate), throughout the legal process, regardless of any particular decision the client makes regarding consent. This does not mean that an attorney should never express a strong legal opinion, or counsel a client about particular risks, if it appears the client is at substantial risk of harm based on a prospective decision. A trauma-informed attorney will need to balance the obligation to advocate for the client's interests diligently with the imperative to avoid communicating in ways the client could experience as coercive. Generally, these two imperatives will be compatible, but in a few instances, they may come into some tension. If this occurs, talking through the dilemma with the client can sometimes be helpful. Allowing the client additional time, whenever this is practically possible, to consider and weigh particular decisions, can potentially also be helpful with traumatized persons, as it helps to maximize the chance that the client will be able to work through traumatic reactions before making a choice.¹⁴⁶

¹⁴⁴ See, e.g., Jerry von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed Toward Women and the Impact on Child Witnesses*, 27 W. ST. U. L. REV. 111 (2000) (arguing that a history of multiple-victimizations can make a woman more susceptible to choose men with traits like those of the abusive due to being stuck in a pattern of psychologically self-destructive behavior).

¹⁴⁵ See Baker, *supra* (explaining the importance of collaboration among service providers).

¹⁴⁶ See Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 479 (2006) (arguing that trauma can distort the

Trauma-Informed Lawyering and Clients with Diminished Capacity

Trauma can affect an individual’s cognitive or psychological capacity or decision-making in a number of ways, many of which have already been reviewed in the prior section(s).¹⁴⁷ Although it is common for trauma to shape perception and behavior, for many if not most individuals dealing with significant trauma, this will not mean that capacity is “diminished” to the point where it would be appropriate for an attorney to take any steps that might infringe on the client’s autonomy.¹⁴⁸ The American Bar Association Model Rules of Professional Conduct, Rule 1.14 conceptualizes “capacity” as the ability to make “adequately considered decisions” regarding the subject and process of legal representation.¹⁴⁹ The guidance in prior sections regarding disclosure of risks, preparation, and communication are intended to support, to the extent possible, considered and informed decision-making as the client continues to manage or cope with traumatic stress. When possible, it is generally best to focus on implementing trauma-informed approaches to representation, preparation, and communication, in order to maximize prospects for informed decision-making by clients. Traumatized individuals may understandably have a negative experience of even well-intentioned efforts to circumvent their individual autonomy and efforts to engage in decision-making. Trauma is often attached to experiences of powerlessness, vulnerability, victimization, or loss of control.¹⁵⁰ Trauma recovery is often at least partially focused on re-building an individual sense of control and safety.¹⁵¹ For this reason, further interference with individual autonomy can very easily become re-traumatizing.¹⁵²

Notwithstanding these qualifiers, it is also true that there are instances when an individual is undeniably incapable of considered decision-making, or of acting in his or her own interests during a legal process. Model Rule 1.14(b) indicates that when diminished capacity is present and a client is at “substantial” risk of harm and cannot act in her/his own interest, the attorney is then able to take “protective action” – for instance through seeking the appointment of a guardian ad litem or other appointed representative, or through consultation with appropriate individuals or institutions.¹⁵³ In this scenario, a trauma-informed approach can still be employed, utilizing the following guidelines:

- First, whenever practical and possible, any individuals or organizations who are solicited or in a position to advocate for, represent, or make decisions for a client with diminished capacity should already possess some expertise or have prior experience working effectively and

effects of anxiety, fear and aggression by making people incapable of thinking and making decisions).

¹⁴⁷ *Id.*

¹⁴⁸ See Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735 (2002).

¹⁴⁹ MODEL RULES OF PROF’L CONDUCT r. 1.14 (AM. BAR ASS’N 1983).

¹⁵⁰ See Kaarin Long et al., *supra*.

¹⁵¹ See Michal Alberstein, *ADR and Collective Trauma: Constructing the Forum for the Traumatic Fuss*, 10 CARDOZO J. CONFLICT RESOL. 11 (2008) (arguing that safety is one of the first necessary conditions when victims of trauma are working toward recovery); Andrea E. Bopp Stark, *Posttraumatic Stress Disorder in Refugee Women: How to Address PTSD in Women Who Apply for Political Asylum Under Grounds of Gender-Specific Persecution*, 11 GEO. IMMIGR. L.J. 167 (1996) (explaining the need for victims of trauma to feel safe and to gain control in an effort to understand the traumatic event).

¹⁵² See Bopp Stark, *supra* at 191 (arguing that restoration of autonomy is necessary to help the victim feel a sense of self-control); Lynette M. Parker, *supra* (arguing that the legal process has the potential to re-traumatize clients by stripping them of control).

¹⁵³ MODEL RULES OF PROF’L CONDUCT r. 1.14 (AM. BAR ASS’N 1983).

respectfully with traumatized persons, or should be able and committed to receive training or information about working with traumatized persons.¹⁵⁴

- Second, in instances where the attorney is aware that a primary source of trauma has been abuse, victimization, or violence, it is extremely important to minimize or avoid involvement of people who the client has experienced or perceives as culpable or complicit in prior abuse, when soliciting the involvement of potential advocates, decision-makers or support people.¹⁵⁵ This might seem obvious, but is actually a common dilemma particularly when prior trauma has been inflicted by caregivers, partners or family members, who would otherwise be understood as likely candidates to be part of the client’s decision-making process.
- Third, it is important to give the client accurate information, in whatever terms are best intelligible and comfortable for her/him, about what decisions are being made, for what purpose, and with what potential consequences for the client. A common problem when a person has diminished capacity to the extent that another person has been given decision-making authority is that attorneys and advocates may fail to keep the individual informed about the nature of the choices being made. The right to be informed is covered under Model Rule 1.4 governing attorney-client communication and reinforced under Model Rule 1.14 addressing diminished capacity, which indicates that attorneys have a responsibility to treat clients with diminished capacity as normally as possible.¹⁵⁶ Failing to honor this right is therefore a violation of legal ethics. However this failure is not uncommon when clients have diminished capacity. This can be frustrating and infantilizing even for individuals who are not dealing with substantial trauma, and implicates additional negative effects for traumatized persons.¹⁵⁷ Again, because trauma often generates feelings of powerless or instability, when decisions are made with no explanation or consultation, it is likely that this dynamic will exacerbate feelings of being vulnerable or having no control.¹⁵⁸
- Fourth, it is important that attorneys be attentive to dynamics of power and difference when working with clients who are vulnerable on the bases of race, gender, disability, poverty or class status, sexual or gender identity, religion, ethnicity, age, or citizenship or nationality, when considering how to involve individuals in decision-making for traumatized persons. Even when all parties have positive intentions and some awareness of the common dynamics of traumatic stress, a client’s experience of alienation or vulnerability can be acute if those with power to make choices that affect her/him cannot connect with or comprehend his/her social circumstances, whether based on identity and experience, or through immersion in practice with the client’s communities of origin. For instance, it can become re-traumatizing if decision-making for a client who is a person of color devolves to people who have minimal understanding of the client’s experiences of racism and racial vulnerability, or if a client who is deaf finds that her/his decisions have been taken over by people with minimal comprehension of the experiences and needs of deaf people.¹⁵⁹ Aside from how the client perceives or experiences the

¹⁵⁴ See Saffren *supra*.

¹⁵⁵ *Id.*

¹⁵⁶ MODEL RULES OF PROF’L CONDUCT r. 1.14 cmt. (AM. BAR ASS’N 1983).

¹⁵⁷ MODEL RULES OF PROF’L CONDUCT r. 1.4 (AM. BAR ASS’N 1983); MODEL RULES OF PROF’L CONDUCT r. 1.14 (AM. BAR ASS’N 1983).

¹⁵⁸ See Kaarin Long et al., *supra*.

¹⁵⁹ See *generally* Katz & Haldar, *supra* (explaining the risk of re-traumatization); Saffren, *supra* (explaining the

relationship, there is also the risk that the person with legal authority will fail to act entirely in the client's interests, absent full understanding of the client's background, concerns, fears, or needs.¹⁶⁰ In essence, persons in any primary advocacy or decision-making capacity need to be able to demonstrate cultural and structural competency to work with the client in an informed, respectful manner.¹⁶¹

The guidelines above can serve as a preliminary roadmap in instances where diminished capacity clearly abrogates the possibility of client decision-making. However, it is also important to be mindful of the fact that diminished capacity falls along a spectrum of possibilities, and diminished capacity will not always or even commonly generate a scenario in which a client is entirely incapable of sound or considered decision-making, allowing for the proper supports.¹⁶² Given the risks associated with reducing the autonomy or independence of a traumatized person, a trauma-informed approach to lawyering will as a general rule promote caution and exploration of all alternatives, before committing to any course of action which makes the client legally dependent (for instance, based on a guardianship or conservatorship).¹⁶³ For instance, social workers and disability rights organizations have had some success in building a team, sometimes referred to as a "circle of support" around a person with diminished capacity, with the specific goal of enabling the individual with diminished capacity to be fully involved in his/her own decision-making, but with the support of a team of advocates, support persons, and professionals who can assist in areas where the individual with diminished capacity could not navigate more independent decision-making.¹⁶⁴ In instances where this type of alternative is practically possible and agreeable to the client, it can serve as a means to maintain a substantial degree of client autonomy, while still fulfilling the attorney's responsibilities to respond appropriately in instances where a client otherwise would be at risk of substantial harm, due to diminished capacity.¹⁶⁵

Concluding Recommendations for Trauma-Informed Practice

The applications of trauma-informed lawyering are likely to expand, as the legal profession becomes increasingly sensitized to the presence of significant trauma across a range of client populations. This course has engaged three sections of the American Bar Association's Model Rules of

importance of competency when working with clients who have experienced trauma).

¹⁶⁰ See generally Andrew L. Milne, *Sharia and Anti-Sharia: Ethical Challenges for the Cross-Cultural Lawyer Representing Muslim Women*, 57 S. TEX. L. REV. 449 (2016) (arguing that the risk of paternalism is endemic in lawyering); Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823 (1992) (explaining that lawyers may make high risk decisions against the client's interests).

¹⁶¹ See Saffren, *supra* at 15 ("The attorney's duty of competency requires awareness of the potent mental health dynamics affecting all family members, especially victims.").

¹⁶² See generally Barry Kozak, *The Forgotten Rule of Professional Conduct—Representing a Client with Diminished Capacity*, 49 CREIGHTON L. REV. 827 (2016) (arguing that attorneys must continually re-evaluate the client's mental capacity to determine whether a normal client-lawyer relationship is possible, and to determine whether the client has enough mental capacity to make legally binding decisions).

¹⁶³ See, e.g., Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735 (2002) (advocating for more limited guardianships to balance the needs of someone with diminished capacity while also respecting his or her autonomy).

¹⁶⁴ See Saffren, *supra* at 10 (arguing that a client's diminished capacity may impact his or her ability to make decisions independently).

¹⁶⁵ See 4 Franchelle C. Millender, *South Carolina Elder and Special Needs Law* § 1-2-E (4th ed. 2014); Symposium, *Joint Conference on Legal/Ethical Issues in the Progression of Dementia: Forward*, 35 GA. L. REV. 391 (2001).

Professional Conduct, regarding competence, communications, and diminished capacity.¹⁶⁶ Taking a comprehensive trauma-informed approach to legal practice will likely implicate additional ethical questions not already contained here. As the field of trauma-informed lawyering is still evolving and training opportunities are still somewhat limited, attorneys in contemporary practice may need to seek guidance or consultation from colleagues in law and related fields, who have similar expertise or concerns, in order to pinpoint dynamics of concern, and develop ethical and adaptable strategies for responding to those dynamics.

In addition to collegial interaction, and the specific strategies detailed prior, the following broad recommendations will likely assist trauma-informed attorneys.

Recommendation 1: Trauma-informed attorneys should develop personal or workplace strategies for managing “vicarious trauma”.¹⁶⁷ It is common, if not inevitable for professionals working intensively with traumatized persons to develop some manifestations of traumatic stress, through ongoing exposure to the trauma of those around them.¹⁶⁸ When it remains poorly managed, vicarious trauma tends to facilitate professional “burn-out”, and can compromise professional performance as a result of fatigue, resentment of or tensions with clients and colleagues, or deficits in concentration or acuity due to stress.¹⁶⁹ Aside from protecting the physical and mental health of legal practitioners, finding strategies to defuse and relieve vicarious trauma is therefore vital in ensuring that vicarious trauma does not ultimately compromise attorney competence or diligence. Resources regarding vicarious trauma are detailed in Appendix A.

Recommendation 2: Trauma-informed attorneys should be mindful that many sources of client trauma are inextricable from broader questions of social inequity, or dynamics of violence and victimization. Self-education on subjects related to subordination, racial, gender and economic inequity and social relations can be particularly beneficial for trauma-informed attorneys, as it tends to improve awareness and “structural competency” relative to many of the social dynamics that have contributed to client trauma. Improved awareness and sensitization can in turn increase the likelihood of “trust-building” with the client, which can be vital in trauma-informed practice.

Recommendation 3: Attorneys who are not already fluent or practicing in the sub-field of “mental disability law”, or disability law generally, but who are working regularly with traumatized persons, should either develop a working familiarity with some of the foundations of disability law, or should routinely consult with a disability lawyer, ideally with specific expertise in mental disability law. Since significant trauma will generally correspond to the development of “post-traumatic stress disorder”, and since traumatic stress can also contribute to the development of other forms of chronic illness or injury, it is important that attorneys working with traumatized persons be aware of the legal rights a traumatized person might be able to exercise, when traumatic stress is a basis for protection under one or more areas of disability law. This imperative should be managed with sensitivity to the fact that for some clients, the experience of trauma-related disability may be recent, and the client may not have

¹⁶⁶ *See supra*.

¹⁶⁷ *See Katz & Haldar, supra* at 368.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (explaining the relationship between vicarious trauma and burnout).

developed a relationship to the notion of disability as an identity or basis for self-description.¹⁷⁰ Even if the experience of injury or illness related to trauma has been long-term, disability – especially mental disability – is often stigmatized, and the question of asserting “disability rights” may provoke anxiety for some clients, because it requires claiming a relationship to the term.¹⁷¹ Therefore trauma-informed attorneys should ideally be familiar with some of the basic tenets of disability law, as well as the social dynamics attaching to disability, and should develop strategies to work with clients who have not previously identified as persons with disabilities.

Developing a trauma-informed approach to legal practice should be understood as a continuing effort, as the complexity of trauma, and the wide range of experiences and circumstances that can generate trauma can never be comprehensively captured in any one approach to training. Additional references are appended, and practitioners are also encouraged to create structured spaces for conversation with colleagues in law, social services, medicine and mental health, policy, and public health in order to identify best practices, and improved opportunities for inter-professional collaboration between attorneys and other practitioners.

¹⁷⁰ See Saffren, *supra* at 17 (“A trauma-informed perspective is necessary for attorneys and enables greater sensitivity and understanding of the way trauma has impacted their clients.”).

¹⁷¹ See Jasmine E. Harris, *Women, Social Policy, and the 2012 Election: Cultural Collisions and the Limits of the Affordable Care Act*, 22 AM. U.J. GENDER SOC. POL’Y & L. 387, (2014) (“As prevalent as mental disability is, deeply entrenched stigma and misunderstanding compel many to ignore the rights of persons with mental or psychological disabilities. Stigma exacerbates and perpetuates mental disability, operating ‘as both a cause and a consequence.’”).

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