



CLE: Trauma Informed Approach

Improving Lawyer Competence with a Trauma Informed Approach

Lawyers Mutual of Kentucky On-Demand CLE

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Approved for 1.5 CLE Ethics Credits in Kentucky

Lawyers often represent or interact with individuals who have been impacted by trauma. Understanding the psychological impact of trauma—and the resulting behavioral results—can help the client and the lawyer more successfully navigate the representation. Attendees will gain practical, easy-to-implement steps for representing trauma-impacted clients competently, including techniques for communicating effectively with such clients.

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Dorislee Gilbert, Esq.

Ms. Gilbert has been practicing law for 20 years. She was a felony prosecutor in Louisville for 15 years, and for two years she was the Executive Director of the Mary Byron Project. At the Mary Byron Project, Dorislee led a program providing expert appellate representation to survivors of intimate partner violence and created a program to train other lawyers to do the same. Dorislee has written on domestic violence and the law, sexual assault prosecutions, and other related topics.



Heather Risk, PsyD.

Dr. Risk has many years of experience working with victims of traumatic events, primarily children and adolescents who have experienced multiple forms of interpersonal trauma. After completing her undergraduate work and earning a Masters of Science degree in Clinical Psychology at Eastern Kentucky University, Dr. Risk continued her education at Xavier University where she earned a Doctorate of Psychology. Formerly the Project Director of a National Child Traumatic Stress Network (NCTSN) site (the Child and Adolescent Trauma Treatment and Training institute (CATTI) at the University of Kentucky, Center on Trauma and Children), she is currently the owner of Heather Risk PsyD and Associates, PLLC where she provides therapy, training, supervision, and consultation service. Dr. Risk is also an approved national Trauma-Focused Cognitive Behavioral Therapy (TF-CBT) Trainer and an Affiliate Member of the NCTSN.



Courtney Risk, Esq.

Courtney recently joined the Lawyers Mutual team after beginning her career in litigation. In addition to her role in client relationship management, she is focused providing relevant risk management resources. Courtney's experience includes litigation, both criminal and civil, as well as transactional work. Since 2014, Courtney has trained law enforcement and first responders on trauma-informed interview techniques to improve outcomes for victims of sexual assault and domestic violence. She continues to handle pro bono appellate cases on behalf of victims of intimate partner violence.

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Kentucky lawyers are representatives of clients, officers of the legal system, and public citizens “having special responsibility for the quality of justice.” SCR 3.130 (Preamble ¶ II). Lawyers serve their clients in various roles, including as advisor, advocate, negotiator and evaluator. SCR 3.130 (Preamble ¶ III). As an advisor, “a lawyer provides a client with an *informed understanding* of the client’s *legal rights and obligations* and explains their *practical implications*. *Id.* (emphasis added). “As advocate, a lawyer *zealously* asserts the client’s position under the rules of the adversary system.” *Id.* (emphasis added). “As negotiator, a lawyer seeks a result *advantageous* to the client but consistent with the requirements of *honest dealings* with others.” *Id.* (emphasis added). And “[a]s an evaluator, a lawyer acts by *examining* a client’s legal affairs and reporting about them to the client or to others.” *Id.* (emphasis added).

Lawyers must be “competent, prompt and diligent,” must “maintain communication with a client concerning the representation,” and must generally “keep in confidence information relating to representation of a client.” SCR 3.130 (Preamble ¶ V). “A lawyer shall use the law’s procedures only for legitimate purposes and not to harass or intimidate others.” SCR 3.130 (Preamble ¶ VI).

In addition to being guided by the Rules of Professional Conduct “a lawyer is also guided by personal conscience and the approbation of professional peers.” SCR 3.130 (Preamble ¶ VIII). “A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.” *Id.*

Lawyers often represent or are required as part of their duties to interact with individuals who have been impacted by trauma, including victims of crime. In carrying out the lawyer’s ethical duties to competently represent such persons, to communicate

effectively and efficiently, and to deal fairly and honestly with such persons, a lawyer is served by generally understanding how experiencing trauma impacts a person and might affect their behavior; understanding how interaction with the legal system can retraumatize survivors of trauma; and implementing practices that recognize the trauma experienced by survivors and intentionally strive to avoid retraumatizing the survivor or unnecessarily re-triggering trauma.

Trauma and the Legal System

Except for those who work there, most people enter courtrooms because something awful has happened to them—the death of a loved one, an injury, an unjust firing, or the loss of their livelihood. For many people, the cause of their journey to a courtroom is even more dire—witnessing or experiencing a murdered loved one, a violating sexual assault, or the intrusion of a home invasion burglary. Unfortunately, the system designed to bring “justice” in these circumstances often results in additional trauma for already traumatized individuals.

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

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

Id. The formal and adversarial methods of the court system can be retraumatizing for a survivor of trauma and a lawyer should be able to effectively communicate these risks to a client when formulating litigation strategy. For example,

Survivors benefit from telling their stories in their own way because it helps them to both reestablish control over their lives and to avoid exposure to specific reminders of the traumas they have faced. This is particularly the case for survivors who have PTSD or have repressed traumatic events as a coping mechanism. The formalism of our legal system, on the other hand, requires survivors to fit their narratives into specific rules and procedures that survivors have no control over and

which limit their ability to tell their own story as a meaningful narrative. In other words, our legal system requires survivors to go through the trauma of reliving their experience without the safeguards that mental health professionals recommend for limiting the retraumatization that can result from such retelling.

Id. at 107.

In criminal cases, it has been observed that “[t]he wishes and needs of victims are often diametrically opposed to the requirements of the legal proceedings.” Judith Lewis Herman, “Justice from the Victim’s Perspective, Violence Against Women, Vol. 11 No. 5. Indeed, it has been said that “if one set out to intentionally design a system for provoking symptoms of traumatic stress, it might look very much like a court of law.” *Id.* Consider this chart contrasting victims’ needs with court requirements:

Victims’ Needs

Social acknowledgement & support
Establish sense of power & control
Opportunity to tell their stories in their own way
Limit exposure to reminders of the trauma
Fear direct confrontation with their perpetrators

Court Requirements

Public challenge to their credibility
Complex rules and procedures where they have no control
Respond to a set of yes or no questions
Relive the experience
Face-to-face confrontation with their perpetrator

Id. Because the system’s requirements are often directly contrary to the victims’ needs, it may be impossible to prevent all retraumatization. However, effective, ethical practice, informed by an understanding of how trauma impacts people can minimize the trauma experienced by already-traumatized persons who enter the legal system.

The most effective representation of a client who has suffered trauma is trauma-informed. In other words, the lawyering “incorporates assessment of trauma and trauma symptoms into all routine practice” and “ensures that clients have access to trauma-focused interventions . . . that treat the consequences of traumatic stress.” *Id.* at 117 (internal quotations omitted). Trauma-informed lawyering “encompasses four hallmarks: identifying trauma, adjusting the attorney-client relationships accordingly, adapting an appropriate litigation strategy, and preventing vicarious trauma.” *Id.* at 118.

Competence

A lawyer must “provide competent representation to a client.” SCR 3.130(1.1). This requires “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” SCR 3.130(1.1). “Competent handling of a particular

matter includes inquiry into and analysis of the *factual and legal elements of the problem*, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.” SCR 3.130(1.1), Commentary, ¶ 5 (emphasis added). “The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.” *Id.*

Competence includes knowing the statutory or constitutional rights available to a traumatized client and how to invoke them; knowing and effectively using applicable court rules; and recognizing limits on the lawyer’s abilities. Some practical examples of ways that Kentucky lawyers can show competence in effectively representing traumatized clients include the following.

1. Know the rights accorded by Marsy’s Law, Ky. Const. §26A. These include the right to be heard and have safety considered in bail proceedings, the right to be present during trial, the right to notice of court proceedings and changes in custody status, the right to restitution, and the right to be heard at sentencing. These rights may be invoked by a crime victim personally, by their attorney, or by the prosecutor on the victim’s behalf. Invocation of rights can be as simple as asking the court to hear a victim impact statement from the crime victim. It can be as complex as an original action in an appellate court for a writ of mandamus to require a trial court to allow a victim to be present during court proceedings. The ethical duty to competently represent clients requires that attorneys representing crime victims be familiar with their rights and actively seek to secure them. A competent attorney would also recognize the availability of national resources like Marsy’s Law and the National Crime Victim Law Institute, which provide litigation assistance to help enforce crime victims’ rights.
2. Be familiar with KRS 421.350, which provides that when a compelling need is shown a child victim and witness of certain crimes who is under the age of 12 may testify outside the presence of the defendant via closed circuit television or recorded testimony. Ethical, competent representation requires knowing that a motion must be filed showing a “substantial probability that the child will be unable to reasonably communicate because of serious emotional distress produced by the defendant’s presence” (KRS 421.350(5)) and that the motion often requires expert testimony (see e.g., *Kurtz v. Com.*, 172 S.W.3d 409, 411 (Ky. 2005)). Know that even in cases where that burden cannot be met or where the child is older than 12, it may be possible to use “procedures” “to shield children from visual contact with [the] alleged perpetrator” during their testimony if KRS 26A.140 is invoked.
3. Consider other accommodations, especially in non-criminal cases, that might lessen the re-traumatization caused by testifying. For example, can the

deposition be taken remotely? Is an order sealing the deposition appropriate? Can the perpetrator's access to the video portion of the deposition be restricted?

4. Rape shield laws can be useful in helping minimize retraumatization. In Kentucky, KRE 412 can be used to limit evidence of other sexual conduct of the victim during the trial.
5. Effectively use the relevance and character evidence rules of evidence to protect victims from admission of evidence used to humiliate and blame them for victimization.
6. Know the limits and protect victim's psychiatric records. See *Com. v. Barroso*, 122 S.W.3d 554 (Ky. 2003).
7. Consider applying for a protective order under Civil Rule 26.03 to limit discovery or seeking to have parts of the public record sealed to prevent public access to sensitive information that could embarrass the trauma survivor.
8. Make referrals for other appropriate services. A competent attorney understands the limits of their own abilities. For example, in domestic violence situations, safety planning is vital, but few lawyers are equipped with the necessary skills to help a trauma survivor effectively safety plan. Competent lawyers must know the other resources available in their community and help facilitate contact with those agencies. Some of that information is provided along with these materials.

Communication

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

In representing trauma survivors, communication is vital not just to effective, ethical representation, but also to helping the trauma survivor avoid retraumatization

through the system. The following practical recommendations can be effective trauma-informed communication steps that will help a lawyer fulfill their ethical duties in representing a client.

1. Early communications setting expectations. Give realistic information about what the process of the case will look like, how often the trauma survivor can expect to hear from you, who they should contact if they have questions, etc.
2. Provide written information to aid the survivor who may have difficulty remembering the details.
3. Allow the trauma survivor some level of control. For example, consult with them about dates, equip them with information to make informed decisions, provide limited control as possible through trial and discovery process.
4. Avoid unnecessarily discussing the traumatic events, and when it is necessary to discuss them, provide advance notice to the survivor.
5. Know and share resources for trauma survivors to seek out information on their own. I.e., VINE. Adopt a no news policy, making contact with a client every month (or every 2 weeks or every 2 months) even if there is no news in the case.
6. Participate in and have all staff who will interact with trauma survivor clients participate in training about trauma and its impacts. The Crime Survivor Star Activity is one example of such training.

Conclusion

Lawyers have ethical responsibilities in service to their clients. Those responsibilities include competent representation and effective communication with the client about the representation. In cases where a client has suffered trauma those ethical responsibilities are best carried out with an understanding of how trauma impacts clients and through a trauma-informed approach to representation. Applying this approach can help lawyers avoid bar complaints, discipline, and other negative consequences that result when lawyers fail to ethically represent clients.