

Adopting a Trauma-Informed Approach to Taking, Understanding, and Using Witness Testimony

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As a summer associate, I was asked to give a presentation on any topic related to law and legal practice. After stumbling across an article on using trauma-informed techniques when conducting workplace investigations,¹ I decided to run with that theme and found myself deep in studies of

trauma, its effect on the brain and memory, and ways to improve people's experience with social services institutions and the justice system through trauma-informed practices. Now, as a practicing attorney, I see the importance of adopting trauma-informed practices on a daily basis.

Defining Trauma

There are many definitions of trauma used for various purposes across professions. For thinking about trauma as it affects the legal system, I prefer the following definition: "Individual trauma results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being."² In discussions with colleagues, I asked them to give some examples of trauma. Most mentioned things such as a serious car accident, war, or sexual violence. While clearly falling into the above definition, these types of traumas are what many refer to as "Big T" trauma.³ Big T trauma is what typically falls into the DSM-5 definition of trauma: "actual or threatened death, serious injury, or sexual violence."⁴

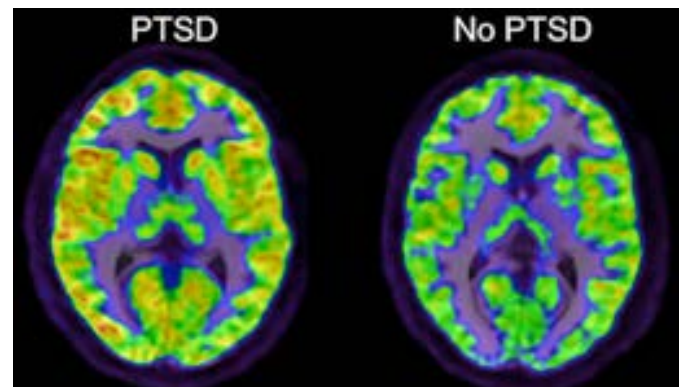
For our purposes, trauma is broader than that. "Little t" trauma widens the scope of the definition to include

highly distressing events that affect someone on a personal level but do not fall into the Big T bucket.⁵ For instance, the death of a pet, divorce, or things that accumulate over time, such as chronic illness or poverty, may be little t traumas. While not necessarily immediately life threatening, little t traumas can, like Big T traumas, be harmful and have lasting effects on a person's well-being and should be taken no less seriously.

Witnesses to others' direct trauma, such as a child who sees domestic violence in their home or someone who watched the twin towers fall on 9/11, can also experience trauma themselves.⁶ Witnessing or learning of trauma experienced by a loved one can even contribute to development of PTSD.⁷ Moreover, vicarious trauma can be experienced by professionals who are frequently exposed to traumatic narratives, such as therapists, nurses, and even attorneys.⁸

Effects of Trauma

All types of trauma—whether Big T, little t, witnessed, or vicarious—can have a significant impact on a person's life and well-being. Even without a scientific background, it is easy enough to see that trauma can affect the brain: In the image below, the brain on the left and the brain on the right have obvious differences.⁹



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PTSD and symptoms of trauma can come on over time and may not be immediately apparent after a traumatic event.¹⁰ In a study of combat veterans following Operation Desert Storm, researchers found that the veterans reported more severe symptoms of PTSD six months after returning home than they did one month after returning home.¹¹ Additionally, “most studies have shown a waxing and waning of symptoms, rather than a steady increase or decrease,” and at least one study found that where symptoms waned over time, they returned more strongly under stressful conditions.¹²

We also cannot assume that what is traumatic for one person is traumatic for another.¹³ Everyone’s experience with and response to trauma will be personal, and an attorney’s approach to gathering and using testimony from a traumatized person should reflect that personal nature. Trauma can present itself in a variety of ways, some of which may be obvious, and some not—particularly when working with a client or questioning a witness who you do not have a personal relationship with. A trauma response can affect someone’s behavior, psychological and physical states, and their cognition, including memory.

Why are Traumatic Memories Different?

In your brain, the amygdala is responsible for setting off an alarm when it recognizes danger, triggering a fight or flight response.¹⁴ It also encodes fear and other emotions that are attached to memories, making emotionally-charged memories, like traumatic ones, more salient.¹⁵ Generally, the hippocampus will simultaneously file away all of your memories so that you can consciously recall the specifics later.¹⁶ It learns about the context of the emotions that the amygdala encoded, like what time it was, the order of events, who you were with, what you said, etc.¹⁷

Though the amygdala is activated whenever emotion is experienced and processed, its activity is more pronounced during stressful and fearful experiences.¹⁸ At the same time as the amygdala essentially goes into overdrive under stress, the hippocampus loses some of its functionality.¹⁹ Together, these responses to stress explain why someone might remember the feelings they had during a stressful event or some specific flashes, but might say “it was a blur” when asked about the details. Essentially, the brain responds differently to stressful events than non-stressful ones, and memories of those events are thus encoded differently.

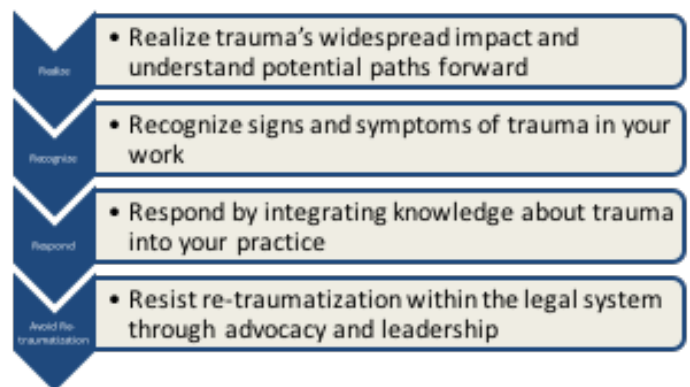
Why Do We Care?

Most people seek out attorneys when they are hurt. Under our definition of trauma, someone seeking legal advice could have experienced trauma in a variety of ways. Most obviously, personal injury, product liability, workers compensation, and similar claims typically involve physical injuries—what nearly anyone would think of as trauma. Plaintiffs in other types of cases likely have experienced trauma as well: A probate litigation case often involves the death of someone’s spouse or parent, a workplace harassment case may involve severe emotional trauma, and an eviction case may invoke the trauma that can come with ongoing financial insecurity, job loss, etc. Whether representing a plaintiff or a defendant, understanding that the parties may have experienced trauma is important for taking, understanding, and using their testimony.

It is also worth noting that a person’s trauma may not always be related to the case at hand, but could come into play nonetheless. For example, a party in a construction litigation case, where there are no apparent traumatic events, may also be a combat veteran who struggles with PTSD. Being mindful of each party’s and witness’ history will help you set up your interview, deposition, or trial to obtain an accurate and useful record and lessen a person’s negative experience with the legal system.

What Do We Do?

The Substance Abuse and Mental Health Services Administration set out four “R’s” for a trauma-informed approach: Realize, Recognize, Respond, and Resist Re-traumatization.²⁰ These can all be implemented in a legal practice.



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Realize: This is the step that this article hopes to achieve. By making yourself aware of what trauma is, how it works, and its widespread impact, you prepare to take a trauma-informed approach to your practice.

Recognize: In this next step, you take what you know about trauma and spot how it affects your own work. Have your clients had traumatic experiences? How might it be affecting their relationship with you? Do you see signs of trauma as they describe their case to you?

Respond: When you see that trauma affects your work, you can begin to take steps to lessen its impact. Some are obvious, but still worth mentioning: Show empathy. Be patient. These are things everyone involved in a case, regardless of their role, can do.

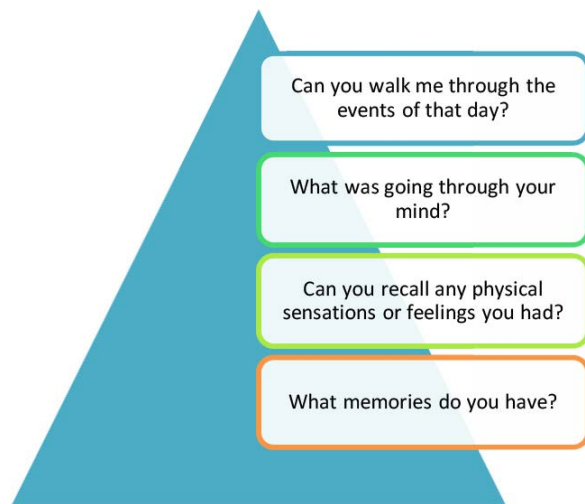
The prospect of testifying—and knowing that a witness will have to relive the trauma in that moment—can be a trigger that induces trauma symptoms (perhaps even more acutely than in the witness' everyday life). This could result in the witness being distracted by their traumatic memories rather than being centered on providing testimony. Simple things, many of which you probably already do, can help prioritize safety and elicit better testimony:

- Consider the setting – Would this witness feel more comfortable with a buffer in the room or with only as many people as are necessary? Should the witness testify virtually from their home, where they may feel more secure? Can we leave the door cracked to avoid making the witness feel trapped? Each case and each witness will have different needs, and the setting should reflect that.
- Start by asking grounding, non-patronizing easy questions – Would you like a glass of water? Can I take your coat?
- Be up-front about expectations – What kind of confidentiality (or lack thereof) can the witness expect?
- Explain everything – Tell the witness what types of things you will be asking them about, why you are asking them about these things, etc.

When you are ready to begin substantive questioning, you can ask preliminary questions to gauge the potential impact of trauma on the testimony you will receive:

- Can you remember the full story of what happened, from beginning to end?²¹
- Has your memory of this event changed over time? How so? ¹¹
- Do you remember this event similarly to the way you remember other events in your life? If it is different, how so?²³

You can also work from instincts to logic when trying to ascertain the facts of a traumatic event through questioning. Because the sensory, nonlinear part of the brain works overtime during stressful situations you should start there. The logical, linear, factual part of the brain does not work as well, so that should be the final part of your questioning. Thinking about the sequence of questioning as a pyramid—with the most instinct-focused questions on the bottom and the most specific factual questions on the top—can help you get the full picture of what your witness remembers.



Avoid Re-traumatization: Re-traumatization occurs when a person who has experienced trauma suffers additional trauma through interactions with professionals, such as lawyers, when going through the legal system and other fields.²⁴ To some extent, there is no avoiding trauma when taking witness testimony: to effectively take a case through the legal system, it is necessary to discover the facts. However, taking steps to acknowledge the trauma that a person has experienced—regardless of your position in the litigation—and taking the steps described above, can attempt to minimize potential re-traumatization.

The moral of the story is that we take testimony as part of a larger process to help our clients reach fair and just results. Obtaining better testimony helps us do that job better, and witnesses give better testimony when they feel safe, heard, and respected. Adopting a trauma-informed approach to taking, understanding, and using witness testimony is an easy way to improve your practice and to improve everyone's experience with the legal system.

Additional reading and resources:

- CHANEL MILLER, *KNOW MY NAME* (Viking Press 2019) – This memoir by a campus sexual assault survivor recounts her experience taking her rapist to court, the re-traumatization that occurred during that process, and the profound affects on her memory that a traumatic sexual assault had.
- Landy F Sparr, M.D., M.A., & J. Douglas Bremner, M.D., *Post-traumatic Stress Disorder and Memory: Prescient Medicolegal Testimony at the International War Crimes Tribunal?*, 33 J. AM. ACAD. PSYCHIATRY L. 71 (2005) – This article provides a case study on trauma and memory through the lens of an international war crimes tribunal case from 1998, which was the first time psychiatric experts were invited to offer opinions to the court about trauma and memory.
- *Coping With Traumatic Events*, NATIONAL INSTITUTE OF MENTAL HEALTH, https://www.nimh.nih.gov/health/topics/coping-with-traumatic-events#part_153960 (last reviewed May 2022) – This webpage from the National Institute of Mental Health provides a thorough overview of trauma warning signs, coping strategies, and other resources links.

ENDNOTES

- 1 Regina LaMonica et al., *10 Trauma Informed Techniques for Workplace Investigations*, LAW360 (June 7, 2021, 1:26 PM), <https://www.law360.com/articles/1390691/10-trauma-informed-techniques-for-workplace-investigations>.
- 2 SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, SAMHSA'S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH 6 (2014). This conceptualization was created by an expert panel for the Substance Abuse and Mental Health Services Administration, after review of existing definitions and discussion of the panel about creating a concept "relevant to public health agencies and service systems." *Id.*
- 3 Elyssa Barbash, Ph.D., *Different Types of Trauma: Small 't' versus Large 'T'*, PSYCHOLOGY TODAY (Mar. 13, 2017), <https://www.psychologytoday.com/us/blog/trauma-and-hope/201703/different-types-trauma-small-t-versus-large-t>.

- 4 Anushka Pai, et al., *Posttraumatic Stress Disorder in the DSM-5: Controversy, Change, and Conceptual Considerations*, 7 BEHAVIORAL SCIENCES, at 2 (2017).
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- 6 See Gaurav Patki et al., *Witnessing traumatic events causes severe behavioral impairments in rats*, 17 INT'L J. NEUROPSYCHOPHARMACOLOGY, at 2 (2014).
- 7 Patki, et al.; Pai, et al., at 2.
- 8 Patki et al.
- 9 Bill Hathaway, *New PTSD Study Identifies Potential Path to Treatment*, YALENEWS (July 17, 2017), <https://news.yale.edu/2017/07/17/new-ptsd-study-identifies-potential-path-treatment>.
- 10 Steven M. Southwick, M.D., et al., *Trauma-Related Symptoms in Veterans of Operation Desert Storm: A 2-Year Follow-Up*, AM. J. PSYCHIATRY 1150, 1151 (1995).
- 11 Southwick, M.D., et al., *supra* note 10, at 1151.
- 12 Southwick, M.D., et al., *supra* note 10, at 1150, citing D. J. Kinsie, *Posttraumatic effects and their treatment among Southeast Asian refugees*, in *International Handbook of Traumatic Stress Syndromes* (J. P. Wilson, ed.) (1994).
- 13 SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *supra* note 1, at 7.
- 14 Kayt Sukel, *Beyond Emotion: Understanding the Amygdala's Role in Memory*, DANA FOUNDATION (Mar. 13, 2018), <https://dana.org/article/beyond-emotion-understanding-the-amygdalas-role-in-memory/>.
- 15 *Where are memories stored in the brain?*, QUEENSLAND BRAIN INSTITUTE, <https://qbi.uq.edu.au/brain-basics/memory/where-are-memories-stored>.
- 16 *Where Are Memories Stored in the Brain?*, *supra* note 14.
- 17 *Where Are Memories Stored in the Brain?*, *supra* note 14.
- 18 Arash Javanbakht & Linda Saab, *What Happens in the Brain When We Feel Fear*, SMITHSONIAN MAGAZINE (Oct. 27, 2017), <https://www.smithsonianmag.com/science-nature/what-happens-brain-feel-fear-180966992/>.
- 19 Eun Joo Kim, et al., *Stress Effects on The Hippocampus: A Critical Review*, 22 LEARNING MEMORY 411, 412 (2015) (noting that exposure to stress "impair[s] performance on memory tasks dependent on the hippocampus").
- 20 SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *supra* note 1, at 9.
- 21 Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 455 (2019).
- 22 Epstein & Goodman, *supra* note 20, at 455.
- 23 Epstein & Goodman, *supra* note 20, at 455.
- 24 Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 88 (2020).

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