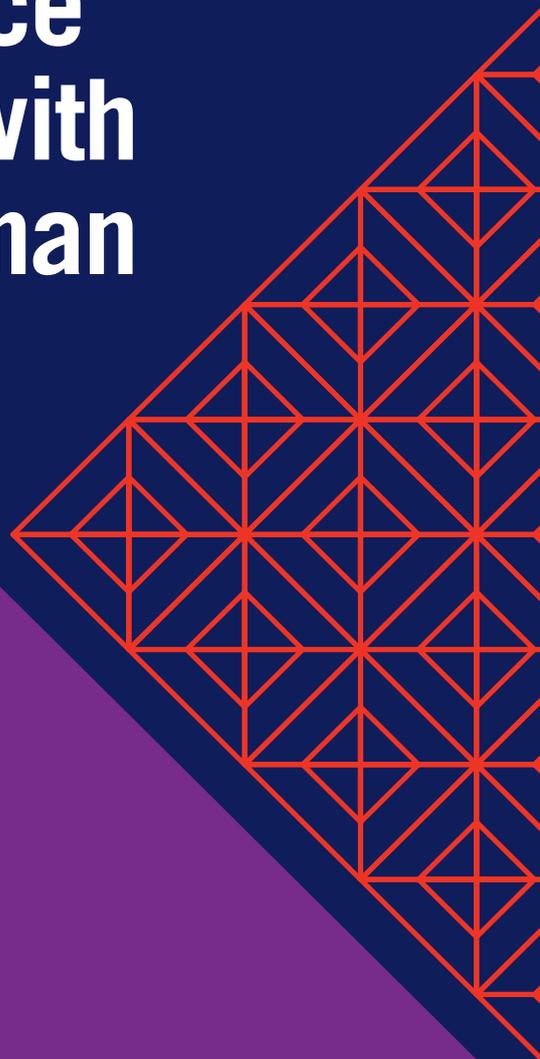




EHRAC European Human Rights
Advocacy Centre

Guidelines for trauma informed legal practice for lawyers working with adult survivors of human rights violations

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Contents

INTRODUCTION	3
<hr/>	
CHAPTER 1	
Understanding the impact of trauma on survivors of human rights violations	5
<hr/>	
What is trauma?	6
<hr/>	
How does trauma impact communities marginalised on the basis of intersecting identities?	7
<hr/>	
The impact of trauma on the brain	8
<hr/>	
The impact of trauma on memory	9
<hr/>	
The impact of trauma on behaviour	10
<hr/>	
CHAPTER 2	
The legal and ethical basis for working in a trauma informed way	11
<hr/>	
CHAPTER 3	
Organisational best practices	14
<hr/>	
CHAPTER 4	
Developing a trauma-informed lawyer-client relationship	16
<hr/>	
Conducting trauma informed meetings	17
<hr/>	
Communicating in a trauma informed way with clients	20
<hr/>	
Interviewing the client and gathering their testimony	22
<hr/>	
Explaining the legal process and seeking instructions from the client	23
<hr/>	
CHAPTER 5	
Supporting the client through the legal process	26
<hr/>	
Supporting clients through investigations	27
<hr/>	
Common harmful, discriminatory or other unlawful investigative practices:	29
<hr/>	
Supporting clients through medical examinations	31
<hr/>	
Sexual Assault Medical Forensic Examinations	31
<hr/>	
Psychological and psychiatric examinations	34
<hr/>	
Responding to harmful, discriminatory or other unlawful investigative practices	35
<hr/>	
Protecting your client's privacy interests	35
<hr/>	
Preparing and supporting clients through their testimony	37
<hr/>	
CHAPTER 6	
Understanding vicarious or secondary trauma	38
<hr/>	
CONCLUSION	39
<hr/>	

INTRODUCTION

Trauma Informed Legal Practice [‘TILP’] describes an approach to providing legal services that is responsive to the needs and experiences of survivors¹ of human rights abuses. Rather than a set of rigid rules for legal practice, TILP requires lawyers to develop a legal practice culture that takes into account the impact of trauma at all stages of service provision and seeks to prioritise client safety and agency throughout legal proceedings.²

Trauma is prevalent across society³ with higher incidences reported by survivors with intersecting marginalised identities. The high prevalence of trauma suggests that TILP is relevant to all lawyers regardless of their area of work and essential for human rights lawyers because you are most likely to work with survivors of trauma.

Practising in a trauma informed way has a number of benefits for survivors of human rights abuses as well as their legal representatives. TILP has been proven to reduce the long-term impact of trauma and increase a sense of wellbeing among survivors of human rights violations engaged in legal proceedings.⁴ When practised holistically, TILP can not only reduce the risk of re-traumatisation that is common for survivors engaged in legal proceedings, it can also empower survivors to seek the supports necessary for healing and building resilience.

TILP can ensure lawyers are meeting their ethical obligations to the client and the administration of justice. TILP can help lawyers ensure their clients are receiving legal representation that is of the highest standard and therefore most effective in protecting the client’s legal and other interests.⁵ Trauma informed approaches can achieve this goal by facilitating relationships of trust, equipping lawyers to improve communication with clients and understand the client’s experience of the traumatic event(s).

These Guidelines provide advice for how lawyers can integrate TILP into their work.⁶ The Guidelines outline the importance of understanding the impact of trauma on survivors of human rights violations and the prevalence of trauma among clients who experience human rights abuses. They seek to outline organisational and individual practices that can facilitate effective lawyer-client relationships with diverse communities of survivors. The Guidelines also provide a non-exhaustive set of recommendations for how lawyers can support survivors throughout legal processes to reduce the possibility and impact of re-traumatisation. Finally, they outline ways lawyers can identify and cope with secondary trauma.

These Guidelines should be viewed as an introductory resource for lawyers seeking to practise in a trauma informed way and should be supplemented with additional reading on the impact of trauma; cultural competency; best practices for investigations, prosecutions and medical examinations; and, comprehensive understanding of legal principles including the prohibition against discrimination⁷ and the obligation of state authorities to effectively investigate human rights violations.⁸ Throughout the Guidelines, we recommend a number of resources for further reading. We also recommend that you research and familiarise yourself with domestic resources relevant to the jurisdiction where you work as legal obligations, standards and practices can differ widely between jurisdictions.

1. Throughout this guide, the authors use the term ‘survivor’ to refer to people who have been subjected to human rights violations. We use this term for brevity though we recognise that not everyone identifies as a ‘survivor’ and some may prefer another term while some may prefer not to label themselves based on their experience of violence. We use the term ‘client’ to refer to survivors of human rights violations in the context of the lawyer-client relationship.

2. BC Provincial Mental Health and Substance Use Planning Council, Trauma-Informed Practice, Guide (2013) https://bccewh.bc.ca/wp-content/uploads/2012/05/2013_TIP-Guide.pdf accessed on 20 March 2022, p 11.

3. The American Psychological Association reports that 50% of all individuals will experience at least one traumatic event in their lifetime. American Psychological Association, Facts about Women and Trauma, <https://www.apa.org/advocacy/interpersonal-violence/women-trauma> accessed on 21 March 2022; see also Kessler Ronald C et al, Trauma and PTSD in the WHO World Mental Health Surveys, Eur J Psychotraumatol. 2017; 8(sup5): 1353383 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5632781/> accessed on 20 March 2022.

4. See e.g. Travis W. Hales, Susan A. Green, Suzanne Bissonette, Alyssa Warden, Josal Diebold, Samantha P. Koury, and Thomas H. Nochajski, Trauma-Informed Care Outcome Study (2019) 29(5) Research on Social Work Practice, <https://doi-org.ezproxy.mdx.ac.uk/10.1177/1049731518766618> accessed on 20 March 2022.

5. Sarah Katz and Deeya Haldar, The Pedagogy of Trauma-Informed Lawyering (2016) 22 Clinical L. Rev. 359 (2016), Temple University Legal Studies Research Paper No. 2016-29, <https://ssrn.com/abstract=2768218> accessed on 15 January 2022.

6. National Health Service Education for Scotland, ‘Transforming Psychological Trauma: A Knowledge and Skills Framework for the Scottish Workforce (2017) <https://www.nes.scot.nhs.uk/media/rgxngvqv/nationaltraumatrainningframework-execssummary-web.pdf> accessed on 21 January 2022.

7. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art 2 and 3.

8. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art 14, protocol 12 art 1.

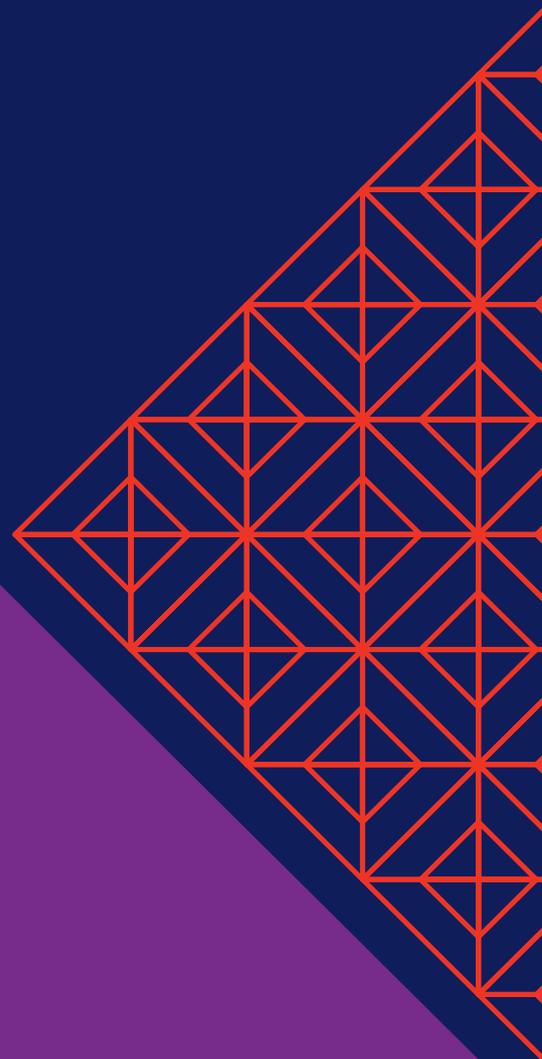
INTRODUCTION

These Guidelines are meant to be used primarily by human rights lawyers representing survivors of human rights abuses as victims, witnesses, complainants or civil parties. While the recommendations may be useful for defence lawyers working with marginalised defendants, this is not meant to be the primary audience of the toolkit. For aspects not covered by this Guide the following may be helpful: [European Human Rights Advocacy Centre \(EHRAC\) Guide to Litigating Cases of Violence Against Women: Domestic and Sexual Violence](#) and [EHRAC's Guide to Litigating Cases of Self-Defence in the Context of Violence Against Women](#).

These Guidelines were written by Elba Bendo (EHRAC Lawyer) with support from Jessica Gavron (EHRAC Legal Director) and Natalia Duminica (EHRAC Fellow). The Guidelines also benefited greatly from the input and review of our five expert advisers: Anna Arganashvili, Mari Davtyan, Tamar Dekanosidze, Veronika Lapina and Vivien Brassói. We are immensely grateful for their significant contribution. While lawyers are not equipped or expected to provide therapeutic services to clients, we have an obligation to our clients and the administration of justice to be aware of the impact of trauma so that we can effectively adapt our practice to support clients who have experienced trauma and advocate for our clients before other legal system actors.

CHAPTER 1

Understanding the impact of trauma on survivors of human rights violations



While lawyers are not equipped or expected to provide therapeutic services to clients, we have an obligation to our clients and the administration of justice to be aware of the impact of trauma so that we can effectively adapt our practice to support clients who have experienced trauma and advocate for our clients before other legal system actors.



TILP LAWYERS UNDERSTAND:

- ✓ WHAT TRAUMA IS AND WHAT CONSTITUTES A TRAUMATIC EXPERIENCE
- ✓ THE PREVALENCE AND MANIFESTATION OF TRAUMA AMONG COMMUNITIES WITH WHOM THEY WORK
- ✓ THE IMPACT OF TRAUMA ON BEHAVIOUR
- ✓ THE IMPACT OF TRAUMA ON MEMORY

WHAT IS TRAUMA?

Trauma is an emotional response to an event or experience that is deeply painful or worrisome.⁹ Traumatic experiences are highly subjective so what might be traumatising to one person may not be to another.¹⁰ However, trauma often appears where events undermine a person's ability to cope with the circumstances they face.¹¹ Traumatic events may have complex and lasting adverse effects on survivors' functioning, as well as their physical, social, mental, emotional or spiritual wellbeing.¹²

Traumatic events and circumstances can take various shapes. Some frequent forms of trauma impacting survivors of human rights violations include:

- ▶ **SINGLE INCIDENT TRAUMA** arises following a single overwhelming event such as a sexual assault, an accident, a sudden loss of a loved one, or witnessing violence.¹³
- ▶ **COMPLEX TRAUMA** occurs as a result of multiple traumatic experiences or ongoing abuse. This type of trauma often involves a control element and might be difficult to escape from particularly where it is perpetrated within personal relationships as is the case with domestic violence.
- ▶ **DEVELOPMENTAL TRAUMA** arises from exposure to early and ongoing trauma often involving abuse or neglect and can severely impact a child or young person's long-term development.¹⁴
- ▶ **COMMUNITY TRAUMA** refers to violence and atrocities that impact a communities' sense of safety and belonging and can involve systemic discrimination, structural inequality, organised or recurring violence against community members, and practices that seek to erode cultural practices and identities. Community trauma can include historical trauma which involves cumulative psychological wounding over generations related to mass group trauma such as genocide, colonialism, war or slavery.¹⁵
- ▶ **RE-TRAUMATISATION** occurs when survivors of human rights abuses are required to revisit the original trauma. Re-traumatisation often occurs when survivors seek services following a traumatic event and encounter service providers that are untrained in trauma informed practices. This form of trauma is a form of system-oriented trauma.¹⁶

9. American Psychological Association, Trauma, <https://www.apa.org/topics/trauma> accessed 12 January 2022.

10. Lori Haskell and Melanie Randall, The Impact of Trauma on Adult Sexual Assault Victims, (2019) https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf accessed on 20 March 2022, p 12.

11. Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror, Judith Herman, Basic Books, (United States of America; 1992), p 65.

12. Substance Abuse and Mental Health Services Administration, SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach (2014), https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf accessed 12 January 2022.

13. BC Provincial Mental Health and Substance Use Planning Council, Trauma-Informed Practice, Guide (2013) https://bccewh.bc.ca/wp-content/uploads/2012/05/2013_TIP-Guide.pdf accessed on 20 March 2022, p 5.

14. Center for Substance Abuse Treatment, Trauma-Informed Care in Behavioral Health Services (Treatment Improvement Protocol Series, No. 57, 2014), <https://www.ncbi.nlm.nih.gov/books/NBK207203/> accessed 13 January 2022.

15. BC Provincial Mental Health and Substance Use Planning Council, Trauma-Informed Practice, Guide (2013) https://bccewh.bc.ca/wp-content/uploads/2012/05/2013_TIP-Guide.pdf accessed on 20 March 2022, p 5.

16. Center for Substance Abuse Treatment, *Trauma-Informed Care in Behavioral Health Services* (Treatment Improvement Protocol Series, No. 57, 2014), <https://www.ncbi.nlm.nih.gov/books/NBK207203/> accessed 13 January 2022.

HOW DOES TRAUMA IMPACT COMMUNITIES MARGINALISED ON THE BASIS OF INTERSECTING IDENTITIES?

The relationships between trauma and marginalisation is complex and research on this topic is constantly evolving. However, it is generally well accepted that there are underlying links between trauma and marginalisation and that trauma disproportionately and differently impacts clients marginalised on the basis of intersecting identities.¹⁷ Some of the links between trauma and marginalisation that are most important for lawyers to consider include:

- ▶ Marginalised communities generally experience higher rates of traumatic events because of systemic inequality.¹⁸ For example, women, girls and gender minority communities experience disproportionately high rates of sexual violence;¹⁹ racialised communities experience disproportionately high rates of police brutality;²⁰ LGBTQI+ communities report high rates of violence and harassment related to gender identity, gender expression or sexual orientation.²¹ Systemic oppression including marginalisation from resources such as education, employment and housing can undermine family and community support networks leading to higher incidences of developmental trauma.²²
- ▶ Experiences of discrimination have been shown to impact mental and physical health and can undermine a person's ability to cope with traumatic events, making long-term recovery and immediate responses to trauma more complex.²³
- ▶ Experiences of community trauma including systemic oppression and historical trauma can impact clients' mental and physical health as well as their participation in legal proceedings. For example, community trauma can impact trust between community members and authorities. Conversely, community trauma can build strong community ties focused on "survival and growth versus loss and victimisation" and result in the creation of strong community supports that can fill the gaps of state programmes.²⁴
- ▶ Marginalised communities are more likely to experience re-traumatisation when engaging with justice sector actors which in turn impacts long-term recovery and access to justice.²⁵

In practice, this requires lawyers to:

- ▶ Understand the experience of the communities with whom you work including experiences with police, healthcare and the courts;
- ▶ Acknowledge the knowledge and expertise that exists within communities and strive to work in a collaborative way that engages existing support networks;
- ▶ Work to build trust with marginalised communities to overcome the adverse effects of trauma including the distrust that may exist between legal actors and community members;
- ▶ Be aware of relational power between you and your client as well as the client and the legal system and strive to recognise and challenge power dynamics; and,
- ▶ Critically examine your own biases and seek to understand and challenge stereotypes present in legal processes.

17. Matheson K. et al, Traumatic Experiences, Perceived Discrimination, and Psychological Distress Among Members of Various Socially Marginalized Groups, *Front Psychol.* 2019; 10: 416, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6403156/> accessed on 20 March 2022.

18. Matheson K. et al, Traumatic Experiences, Perceived Discrimination, and Psychological Distress Among Members of Various Socially Marginalized Groups, *Front Psychol.* 2019; 10: 416, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6403156/> accessed on 20 March 2022.

19. American Psychological Association, Facts about Women and Trauma, <https://www.apa.org/advocacy/interpersonal-violence/women-trauma> accessed on 21 March 2022. [Research indicates that women are twice as likely to develop PTSD, experience a longer duration of posttraumatic symptoms and display more sensitivity to stimuli that remind them of the trauma.]

20. Williams, M. T., Metzger, I. W., Leins, C., & DeLapp, C. (2018). Assessing racial trauma within a DSM-5 framework: The UConn Racial/Ethnic Stress & Trauma Survey. *Practice Innovations*, 3(4), 242–260. <https://doi.org/10.1037/pri0000076> accessed on 20 March 2022.

21. See e.g. Balsam, K. F., Huang, B., Fieland, K. C., Simoni, J. M., & Walters, K. L. (2004). Culture, trauma, and wellness: A comparison of heterosexual and lesbian, gay, bisexual, and two-spirit Native Americans. *Cultural Diversity and Ethnic Minority Psychology*, 10(3), 287–301. <https://doi.org/10.1037/1099-9809.10.3.287> accessed on 20 March 2022.

22. <https://www.frontiersin.org/articles/10.3389/fpsyg.2019.00416/full>

23. Shari McDaid and Antonis Kousoulis, 'Tackling social inequalities to reduce mental health problems: How everyone can flourish equally', (Mental Health Foundation, 2020), https://www.mentalhealth.org.uk/sites/default/files/MHF-tackling-inequalities-report_WEB.pdf accessed 14 January 2022.

24. Matheson K. et al, Traumatic Experiences, Perceived Discrimination, and Psychological Distress Among Members of Various Socially Marginalized Groups, *Front Psychol.* 2019; 10: 416, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6403156/> accessed on 20 March 2022.

25. Fair Trials, Uncovering anti-Roma Discrimination in Criminal Justice Systems in Europe, (2021) <https://www.fairtrials.org/articles/publications/uncovering-anti-roma-discrimination-in-criminal-justice-systems-in-europe/> accessed on 21 March 2022.

THE IMPACT OF TRAUMA ON THE BRAIN

Trauma has neurobiological effects which directly impact the survivor's immediate and long-term response to a traumatic event or circumstances. Neurobiological theories of trauma dominate the field of knowledge on trauma, providing invaluable insight into possible trauma responses and the best way to deliver services to survivors of trauma.²⁶ This insight can help legal actors understand why what may at first appear to be an unexpected or even “counterintuitive” response from a survivor of trauma is in fact behaviour that is highly consistent with the impact of trauma on the brain and nervous system.²⁷

When a threat is detected, the brain's defence circuitry is activated. Once this occurs, the brain, unless otherwise trained, will automatically switch to the defence responses of fight, flight or freeze.²⁸ In fact, freeze is often the most common reaction to a traumatic event.²⁹ When the defence circuitry is activated, the chemicals released can impair the prefrontal cortex function causing rapid and dramatic loss of our ability to reason, problem solve, plan and remember what happened to us.³⁰ The activation of the defence circuitry happens automatically and, often, subconsciously, that is without the person consciously registering the threat.³¹

In practice these findings mean:

1. It is common for survivors of trauma to freeze rather than run away or fight back during a traumatic event, so we should avoid placing expectations on the way a survivor reacted during a traumatic event.
2. Survivors of trauma may not know or be able to explain why they responded in the way they did and they should not be asked to explain or validate their response.
3. Survivors' immediate and long-term ability to make decisions including reporting the assault, seeking medical treatment or reaching out to support networks can be highly impaired so their judgment following an assault should not be put into question by legal actors or used to undermine the survivor's credibility.

Awareness of these common brain and nervous system reactions to trauma can help lawyers understand the types of questions that should not be asked of survivors. Accusatory questions about a survivor's immediate response or judgment following a traumatic event are not only unreasonable, they can also be re-traumatising. These types of questions can exacerbate feelings of guilt and self-blame that survivors experience following a traumatic event and therefore constitute a form of victim blaming. Because many survivors don't themselves know the impact the trauma had on their brain and nervous system, these forms of questions can also corner survivors into offering explanations for their behaviour that when challenged undermine their credibility, ultimately devaluing their testimony and possibly impacting the truth finding mission of the proceedings.

26. Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims*, (2019) https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf accessed on 20 March 2022, p 11.

27. Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims*, (2019) https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf accessed on 20 March 2022, p 8.

28. While these are the most common defence responses this is not an exhaustive list. See e.g. Council of Europe, *Effectively Investigating Prosecuting and Adjudicating Sexual Violence Cases: A Manual for Practitioners in Georgia*, (2021) <https://live-equality-now.pantheonsite.io/wp-content/uploads/2021/11/Effectively-Investigating-Prosecuting-and-Adjudicating-Sexual-Violence-in-Georgia-A-Manual-English.pdf> accessed on 21 March 2022, p 57 - 8.

29. Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims*, (2019) https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf accessed on 20 March 2022, p 13.

30. Arnsten, A. (2009). Stress signalling pathways that impair prefrontal cortex structure and function. *Nat Rev Neurosci*. 2009 June; 10(6): 410–422.

31. Ledoux, J. E., & Pine, D. S. (2016). Using Neuroscience to Help Understand Fear and Anxiety: A Two-System Framework. *American Journal of Psychiatry*, 173(11), 1083-1093.

THE IMPACT OF TRAUMA ON MEMORY

Trauma has a significant and complex impact on the way survivors record and remember traumatic events.³² Trauma impacts the way initial memories of the experience are encoded into the brain's long-term storage mechanism; a process that may take the brain as long as two full sleep cycles to complete.³³ Memories created when the body is under threat are often fragmented, poorly contextualised, non-linear and often consist mostly of primary sensory details related to smell, sound or imagery.³⁴

The hormones released as a result of the brain's response to a traumatic event impact the memory consolidation process. The flood of adrenaline can at first help survivors consolidate memories but later, as the brain floods with stress hormones such as cortisol, the memory coding part of the brain becomes temporarily impaired.³⁵ As a result, survivors of trauma are likely to have strong memories of the onset of a traumatic event and may have difficulty recalling details of the later part of a traumatic event, remembering the experience in fragments and reporting extended parts of the experience as a 'blur'.³⁶

When the brain's coding system is in 'fragmented mode', memories can be consolidated without contextual details. This means that details of the event that are most disturbing or important for the survivor may be registered without any peripheral details including the sequence of events, details of where the event occurred and details of what happened following the event. This may leave survivors of trauma with a narrative of the experience that is muddled and incomplete.³⁷

In practice, this means that, while there is no one way for survivors to recall traumatic experiences, there are some commonalities in memory recollection that should be kept in mind by lawyers seeking to work in trauma informed ways. These include:

- ▶ Survivors of trauma may not be able to recall the traumatic experience from start to finish;
- ▶ They may be able to recall some details quite clearly while being unable entirely to recall other details;
- ▶ Survivors may have to rely on sensory memory including smells, imagery and sound to help their recollection;
- ▶ The way survivors are interviewed will have a direct impact on their ability to recall experiences and the consistency with which they tell their story, with effective interview practices supporting the survivor in their recollection, and harmful practices likely resulting in increased inconsistencies.

32. Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims*, (2019) https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf accessed on 20 March 2022, p 23.

33. McGaugh 2000

34. Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims*, (2019) https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf accessed on 20 March 2022, p 24.

35. Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims*, (2019) https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf accessed on 20 March 2022, p 23.

36. See McGaugh, J. L. (2000). *Memory – A Century of Consolidation*. *Science* 287, 248-251.

37. Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims*, (2019) https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf accessed on 20 March 2022, p 25.

THE IMPACT OF TRAUMA ON BEHAVIOUR

Survivors of trauma may exhibit a multitude of complex behaviours related to their experience of trauma. It is important for lawyers to be sensitive to the trauma-related behaviour survivors exhibit and develop mechanisms for effectively responding to the survivor's needs in order to build relationships of trust and productive communication.

Some survivors may appear angry, anxious or distressed and may express irritability or frustration with the lawyer or the legal process. They may have emotional highs and lows, be hyper-vigilant and exhibit a need for control. Whereas other survivors may appear aloof, detached or unresponsive, they may minimise the event, express shame or self-blame or struggle to maintain contact with lawyers.³⁸ Some survivors of trauma may not exhibit any detectable behaviours which should not be taken to mean that they have not experienced trauma.

Other survivors of trauma may appear dishonest or unreliable either because they frequently change their mind, drop in and out of the process, recant their experience, make decisions that are counterintuitive to their legal interests and personal well-being, or because they can't seem to recall the events in question. Understanding the many different ways trauma may manifest can help lawyers effectively respond to difficult working scenarios that may arise in the lawyer-client relationship.

In practice this may mean:

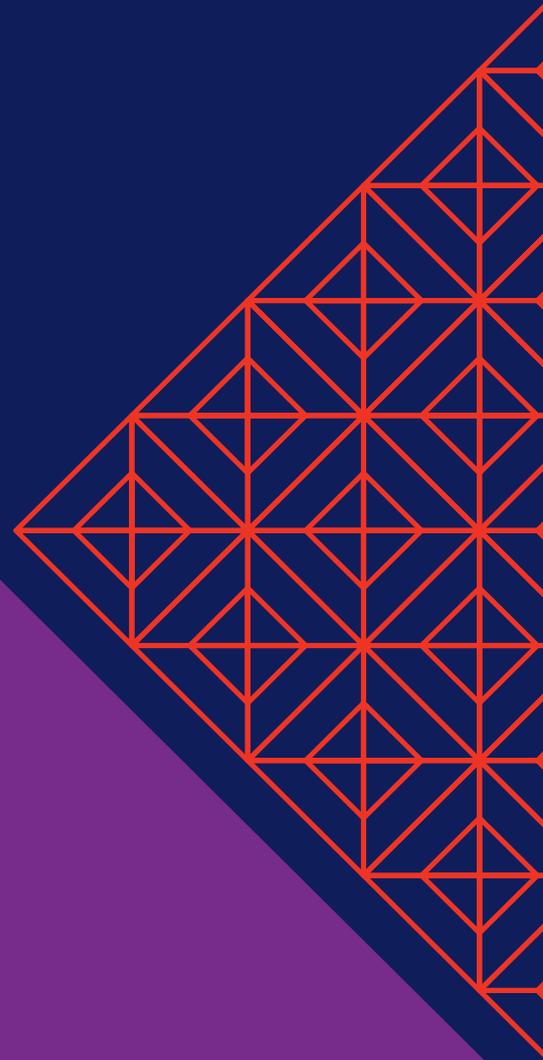
- ▶ Clients with experience of trauma may appear uncooperative or aggressive making working relationships difficult.
- ▶ Clients with experiences of trauma may seem dishonest and appear to be lying to you or the court.
- ▶ Clients with experiences of trauma may make decisions that are counterintuitive or contrary to their legal or other interests.

TILP calls on lawyers to respond to these trauma-related behaviours in an empathic, non-judgmental and thoughtful way, prioritising the client's safety and agency, the safety of others and the proper administration of justice. In Chapter 4 we provide practice guidelines for responding to these scenarios.

38. HL Littleton et al, Rape Acknowledgment and Postassault Experiences: How Acknowledgment Status Relates to Disclosure, Coping, Worldview, and Reactions Received From Others, *Violence and Victims* 21(6) (2010) 761-78.

CHAPTER 2

The legal and ethical basis for working in a trauma informed way



Lawyers have ethical, and, at times, legal obligations to practice in a trauma informed way. While professional codes of conduct differ widely among jurisdictions, there exist generally accepted **minimum standards and ideals for the legal profession**.

The United Nations Basic Principles on the Role of Lawyers³⁹ define the essential duties lawyers must undertake as members of the legal profession, these include:

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.

The International Bar Association, International Principles on Conduct for the Legal Profession⁴⁰ outline generally accepted minimum standards for legal conduct. Some of the most relevant principles and corresponding explanatory notes for the purpose of TILP include:

2. Honesty, integrity and fairness

A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.

Explanatory note: Lawyers have an obligation to be professional with clients, other parties and counsel, the courts, court personnel, and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.

3. Conflict of Interest

A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorisation.

Explanatory note: In upholding the interests of clients, lawyers must not allow their own interests to conflict with or displace those of their client. A lawyer must not exercise any undue influence intended to benefit the lawyer in preference to that of a client

4. Confidentiality/professional secrecy

A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.

Explanatory note: The right and duty of a lawyer to keep confidential the information received from and advice given to clients is an indispensable feature of the rule of law and another element essential to public trust and confidence in the administration of justice and the independence of the legal profession.

The principles of confidentiality and professional secrecy have two main features. On the one hand there is the contractual, ethical and frequently statutory duty on the part of the lawyer to keep client secrets confidential. The statutory duty is sometimes in the form of an evidentiary attorney-client privilege; this differs from the lawyer's obligations under applicable rules of professional conduct. Such obligations extend beyond the termination of the attorney-client relationship. Most jurisdictions respect and protect such confidentiality obligations, for example, by exempting the lawyer from the duty to testify before courts and other public authorities as to the information the lawyer has gathered from clients, and/or by affording lawyer-client communications special protection.

39. United Nations Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx> accessed on 21 March 2022.

40. International Bar Association, International Principles on Conduct for the Legal Profession, 2011, <http://www.ibanet.org/Document/Default.aspx?DocumentUid=1730FC33-6D70-4469-9B9D-8A12C319468C> accessed on 21 March 2022.

5. Clients' interest

A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.

Explanatory note: This means that lawyers in all of their dealings with the courts, by written or oral form, or by instructing an advocate on the client's behalf, should act with competence and honesty.

Lawyers should serve their clients competently, diligently, promptly and without any conflict to their duty to the court. They should deal with their clients free of the influence of any interest which may conflict with a client's best interests; and with commitment and dedication to the interest of the client. A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures may be required to vindicate a client's cause or endeavour.

Lawyers should maintain confidentiality. They should also provide all relevant information to their clients, in order to protect their clients' interests and advise them competently, subject to any contrary law or ethics rule

9. Competence

A lawyer's work shall be carried out in a competent and timely manner. A lawyer shall not take on work that the lawyer does not reasonably believe can be carried out in that manner.

Explanatory note: As a member of the legal profession, a lawyer is presumed to be knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf or to procure that somebody else either in or outside the law firm will do it.

Competence is founded upon both ethical and legal principles. It involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied, and includes competent and effective client, file and practice-management strategies.

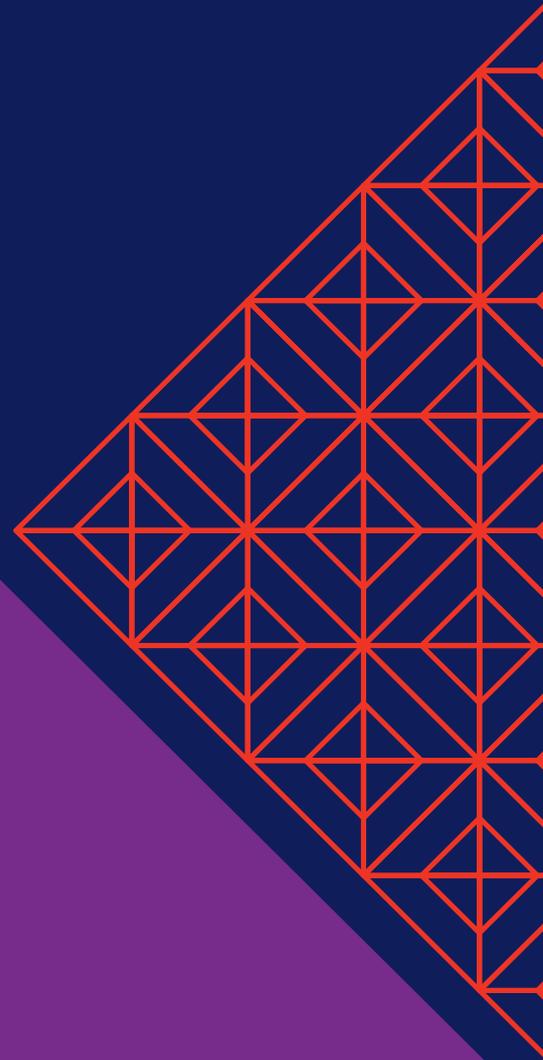
A lawyer must consider the client's suggestion to obtain other opinions in a complex matter or from a specialist, without deeming such requests to be a lack of trust.

Consider ways TILP may engage the above legal practice standards:

- ▶ By understanding the impact of trauma on memory and relying on trauma informed interview methods, lawyers can support clients in communicating their testimony thereby promoting the proper administration of justice and ensuring the client's interests are effectively served;
- ▶ By understanding the impact of trauma on behaviour and developing practices to build trust and effective communications with clients, lawyers can ensure they are effectively assisting clients through the legal process;
- ▶ By understanding the experiences of marginalised communities with legal actors and how these experiences undermine access to justice for diverse clients, lawyers are abiding by the obligation to competently represent clients; and,
- ▶ By understanding and respecting the client's need to have support persons present in lawyer-client meetings, lawyers can begin to develop legal practices that can effectively protect lawyer-client communication.

CHAPTER 3

Organisational best practices



Legal organisations including non-profit organisations have a role to play in facilitating an environment where legal professionals can effectively integrate trauma-informed approaches into their practices.

We recommend legal organisations consider:

Building strong networks with the communities they represent

This requires legal organisations to employ diverse staff who represent the communities where the organisations work. It requires that legal organisations get to know local service providers that service their clients' communities including anti-violence centres, housing supports and shelters, medical experts and counselling. Accessible services should be low-barrier, inclusive and trauma informed. Legal organisations should get to know these services and the experiences of the clients who use them and make sure they are referring clients to suitable services.

Building strong networks also requires legal organisations to have a presence in the communities where they work. This may mean attending important community events such as cultural celebrations, Pride events, protests or being present at mass evictions or other important moments for the community.

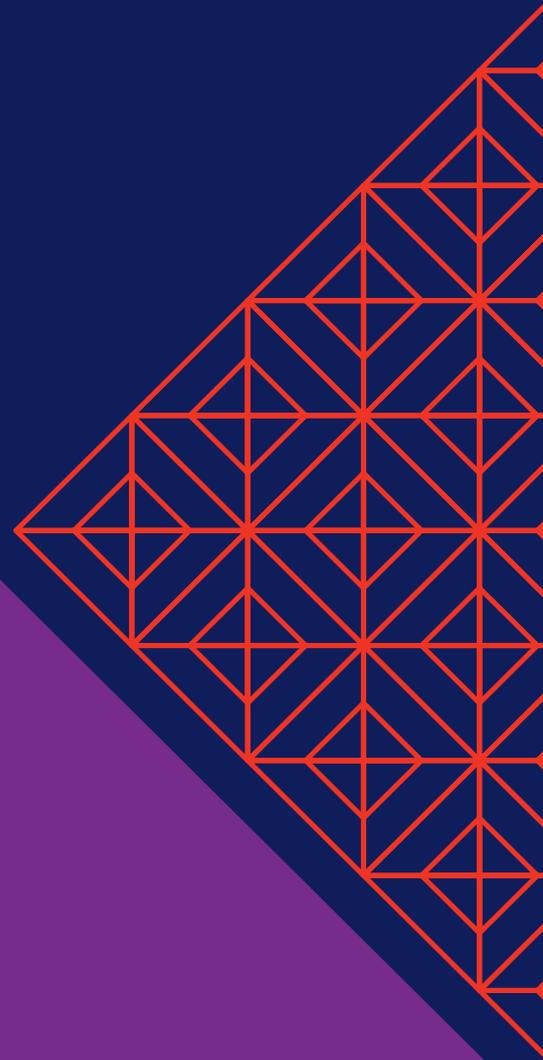
Facilitating through policies, training and funding environments in which lawyers can engage in TILP

Policies aimed at reducing caseloads and increasing time allocation per case allow lawyers to spend the requisite amount of time providing trauma informed services. Training can help lawyers develop TILP, cultural competence and the skills to represent diverse clients. Funding should be set aside for clients who may need financial support to access meetings, send documents or participate in legal proceedings. These costs should be built into organisational budgets.

Safeguarding and contingency planning

Safeguarding and contingency planning can help lawyers navigate difficult scenarios that may arise when working with clients with diverse needs. For example, legal organisations should have frameworks in place for when safeguarding concerns are reported to staff to ensure that staff are responding within the remit of their professional obligation while also ensuring the protection of the client's interests and wellbeing. Legal organisations should also develop internal feedback and complaints processes that allow for clients to raise concerns and seek a change in legal representation.

CHAPTER 4
Developing a trauma-
informed lawyer-client
relationship



Consultations, meetings and communications between lawyers and clients are often experiences of great emotional impact for survivors. It is essential for lawyers to engage clients in a trauma informed way, striving to always striving to affirm a sense of safety and agency. Practices that centre safety can significantly reduce the likelihood and impact of re-traumatisation. Whereas practices that centre the client's agency can return a small sense of control to the client that was likely lost as a result of the traumatic event. In this chapter we outline ways to integrate safety and agency into your legal practice. It may not be possible to apply all recommendations in your practice, the aim of this section is to turn your mind to some of the proven ways to make legal representation more supportive of clients who have experienced trauma.

CONDUCTING TRAUMA INFORMED MEETINGS

Get to know the client and their circumstances

Lawyers have an obligation to be prepared for client meetings including knowing the contents of the client's file, the legal issues that arise in the client's case and information about the client's journey through the legal process. For survivors of trauma it is even more important that lawyers show up prepared to meetings to affirm a sense of safety and control.

Determine the best way to communicate with the client

It is important for lawyers to be thoughtful about the best ways to communicate with clients to ensure that you are actively considering the survivor's specific needs and, in particular, their safety. Clients should always be asked how they want to be reached and their choice respected. You should always check and never presume that emails, phone calls and voicemails are a safe and comfortable option for communicating with your client. You should avoid speaking with clients in the presence of others unless, as set out below, the person is a part of the client's circle of care. You should not share your client's story or details of your client conversations with colleagues unless it is relevant to the progress of the case. This is particularly harmful when the story is shared for humour, entertainment or complaining about the client for example to colleagues or friends. Whenever possible, try to use encrypted messaging systems like Signal or ProtonMail. You may also want to consider sending messages that self-destruct upon reading.

Arrange meetings with the client's needs in mind

When setting up meetings with clients, consider the client's needs and whether there are barriers to accessibility. The best way to do this is to ask the survivor well in advance of the meeting whether there are any adjustments that need to be put in place to help facilitate a comfortable meeting space. Whenever possible the first meeting should be in person.

Some common barriers to accessibility include:

Safety

Clients may be worried about coming to a meeting space either because the space itself is unsafe for them or because they may be worried about getting to the location safely and without notifying abusers or authorities.

Accessibility of space

Clients may not be able to access the meeting space because it does not meet their needs, for example the space may not be accessible for people with limited mobility. Consider whether there is wheelchair access, the number of steps it takes to get to the office, the distance between the entrance and the meeting room. Meeting spaces should also have accessible facilities for diverse communities, for example, gender inclusive washrooms and areas for prayer.



RESOURCE

Consider undertaking an accessibility audit. You can use online tools such as the [Radical Access Mapping Project's Accessibility Audit Template](#) to undertake an audit of your space. Remember that even small adjustments can demonstrate a welcoming space for your clients.

Communication barriers

Clients may face communication barriers that impede access to adequate legal services. Clients may not speak the same language as the service provider, may struggle to understand the legal terminology used or face difficulties communicating related to a physical or intellectual disability.⁴¹ Lawyers should familiarise themselves with each client's needs and seek to reduce communication barriers. As a general rule, lawyers should seek to use clear and simple language to ensure clients understand the information being provided. It may be a good practice to provide key information in written and verbal form allowing the client time to process the information.



PRACTICE TIP

Overcoming communication barriers

Interpreters – When engaging interpreters it is important to ensure that the client is comfortable with the interpreter you have chosen. You can pre-empt concerns by creating a network of interpreters who you trust and ensuring that they are using the right terminology and are trauma informed and culturally competent. You should pay attention to your client's non-verbal signs during the interpretation and, if you feel that the client is not openly communicating with you, consider changing interpreters for your next meeting. Where a relative who can act as an interpreter is involved, you should always check whether the client is comfortable with their relative acting as interpreter.

Clients with intellectual disabilities – When working with clients with intellectual disabilities you should strive to take all necessary measures to ensure that the client can communicate priorities and instructions. Accommodation, communication aids and support persons should be engaged to encourage the client's free participation in legal processes, they should not be resorted to as a general practice or in order to ease the burden on the lawyer of understanding the client and her priorities.⁴² Consider practicing the following:

- ▶ Demonstrate a calm and quiet presence respecting the client's interpersonal space;
- ▶ Listen actively and pay attention to your client's verbal as well as non-verbal communication. You should try your best not to interrupt the client. Give the client time and space to answer questions and be prepared that sometimes it may take the client a few seconds or even minutes to respond;
- ▶ Provide the client with the opportunity to take frequent breaks;
- ▶ Keep sentences short and simple and try to communicate one message at a time. It may help to pause between key ideas/phrases to allow the client time to process. You should avoid asking abstract, metaphorical or rhetorical questions. It is also important to avoid sarcasm or exaggeration as communication may be taken literally. It may help to use visual clues or aids (ie videos, images);
- ▶ Include specialists who may be able to help you understand how your client is communicating and the best way to engage them; and,
- ▶ Be careful when you are engaging support persons. You should refrain from speaking directly to support persons. You should always direct communication to the client and never ignore the client even if the support person is doing most of the talking on the client's behalf. You should also ensure that there is no conflict of interest between the client and their support person. (See also Engaging Support Networks).

Resource-related barriers

Resource barriers may include a lack of access to a phone or internet making communication difficult; lack of access to a car, remoteness of the client's home or lack of funding to take public transportation; financial barriers including lack of access to food, clothing, sanitation facilities. Lawyers should be aware of the barriers their clients face and how these barriers may limit the client's participation in the legal proceedings. Legal organisations should account for this additional costs in their budgets and try their best to support clients with financial and other resource related barriers. Make sure the client knows that any financial or other support provided does not limit their ability to continue with litigation or change legal representation.

41. We use the terms physical disability, intellectual disability and mental health disability in these Guidelines to refer to people whose physical, intellectual or mental health needs are often unmet in society. We understand these terms to be the most widely accepted terms but recognise that terminology is regularly evolving and these terms may not be used by some people marginalised on the basis of disability.

42 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, article 12, paragraph 3.

Social norms and obligations

Barriers related to social norms and obligations may be difficult to assess particularly if the lawyer is not a member of the client's community. It is important for organisations to retain diverse staff to ensure there exists diverse experiences and expertise within an organisation and to train all staff on the experiences of the communities with whom the organisation works. While social norms and obligations vary from community to community, some commonly arising barriers related to social norms include:

- ▶ It may be taboo for clients, particularly women, to meet alone with a lawyer from a different gender. To support clients who may face this form of barrier try providing the client choice. Where it is not possible to let the client choose the lawyer with whom they want to work, let the client know who their lawyer will be and who will be in the office when they join. Perhaps have someone of the same gender present to greet the client and say that they can join the meeting if the client feels more comfortable. You may also want to let them know they can have a support person join if they wish or that the meeting can be held somewhere more public. This practice is essential for cases involving sexual violence or other power-based crimes.
- ▶ Meeting times and locations may prove particularly difficult for clients with childcare and family care responsibilities, the vast majority of whom are women. It is important to provide options for meeting times to work around clients' family and other obligations and also to create space for clients to bring along children, though make sure children can spend the duration of the meeting somewhere where they cannot hear the nature of the conversation between you and the client.

Comfort

A meeting space that is uncomfortable can make it difficult for survivors of trauma to feel safe and in control and can impact the survivor's ability to share their story and recall the traumatic events. Legal organisations and lawyers should try to create comfortable and welcoming meeting spaces with comfortable sitting areas, some tea, coffee and snacks. Meeting spaces should be tidy, with client files securely put away. You should remove religious symbols that may make clients feel unwelcome.



PRACTICE TIP

You may want to consider having meetings outside your office. You may want to find a place where the survivor can be most comfortable, like their home or a community-based clinic. For long interview days, you may also want to consider how best to make the day as comfortable as possible by sitting down for lunch with the survivor and providing for regular and long breaks (including allowing the client to relax/take a nap).

Clearly communicate the details of the meeting

Once the meeting details have been set it is important to clearly communicate the information to the client. Provide the client information about the meeting time, location and duration. If possible, walk the client through what you will cover in the meeting and the purpose of the meeting. You may need to provide clear details of how to get to the location or, if meeting online, how best to connect to the virtual meeting space. If safe, provide written information about the meeting.

Engage support networks

Lawyers should encourage involvement of existing networks by inviting clients to bring along to meetings and other legal processes family members, kinship relations, and community support workers. You should also be prepared to connect clients with accessible and culturally competent support services that can help the client access housing, counselling and other services. You should regularly consider the use of counsellors during meetings and legal proceedings.



PRACTICE TIP

Effectively engaging support persons

While engaging support persons is an essential part of TILP, lawyers should be alive to the scenario that a person joining the client at meetings may not be acting in the client's best interest. We recommend you get to know the client and the person who is joining them before starting to discuss the client's case. If you have any doubts about the role of the support person, you should seek to, in the most subtle way possible, create space for the client to speak with you without the support person around. You can let the client know that it is entirely up to them whether they want to have the support person present at meetings and that you will take the lead from them and help them in the most sensitive way possible. If you are worried about the client's safety or wellbeing you should, with the client's consent, connect the client with services.

When engaging support networks it is also important to consider that most jurisdictions have a principle that protects communications between lawyers and their clients. This is a right held by a client to prevent the disclosure of the contents of communications between lawyers and clients in various circumstances – primarily if legal advice is being given, or if litigation is being contemplated.

Legal professional privilege may be waived in a number of circumstances, including if the contents of the communication are divulged to a third party. In these instances, where privilege has been found to have been waived, the parties (including the lawyer, the client or the third party) may be compelled to disclose the contents of the communications. However some jurisdictions have devised exceptions to this general principle of waiver, including that privilege is maintained when there is a 'common interest' in the legal advice or litigation or if the third person is aiding the cause of the litigation and there is an expectation of confidentiality.⁴³

Civil law jurisdictions do not generally have the principle of legal professional privilege, but instead, communications between lawyers and clients are covered by a lawyer's duty of professional secrecy, which may include obligations of professional confidentiality and the right to refuse to give testimony or give over documents. The situations where secrecy can be waived can be much more strict than in common law jurisdictions (that is, professional secrecy is difficult to unintentionally waive and in some situations may be impossible to even intentionally waive).

We recommend you get to know the rules of lawyer-client privilege in your jurisdiction and develop approaches for maximising the engagement of support networks while ensuring the client's interest in having lawyer-client communications protected. For example, you may want to ask support persons to step out of the room when providing legal advice or discussing commencing litigation.

Be reliable

Do your best to stick to the time, date and content you told your client you would cover and apologise if you are running late to a meeting. Remember that, while this may be just another client meeting for you, it is likely a very monumental moment for your client who may have prepared for weeks for the meeting. If you need to change the meeting date, time, location or objectives, provide ample notice to the client.

COMMUNICATING IN A TRAUMA INFORMED WAY WITH CLIENTS

Make an effort to bridge the lawyer-client gap

As legal professionals, lawyers may be viewed by some clients as unapproachable and distant. There may exist power dynamics between the lawyer and client that, while unknown to the lawyer, are apparent to the client and undermine the trust and safety that could be developed between lawyers and clients. Consider how you show up at client meetings and make an effort to appear approachable, relaxed and present yourself on equal footing with the client. This can be done by wearing demure clothing, sitting beside the client rather than behind a desk and reflecting the client's body language. You may also want to be open about what you don't know. You may want to emphasise that the client is the expert and is in charge of the case, you are there to support them through it.

⁴³ See e.g. *State v. Sucharew*, 205 Ariz. 16 (Ct. App. 2003) where a parent, who had paid for legal representation and had an obvious parental and advisory role, was present with a meeting privilege was found not to have been waived. Similarly, when a daughter for an elderly client chose the law firm for her mother, transported her to the meetings, and put her at ease so she could communicate with her lawyers, was present, privilege was found to have not been waived (*Stroh v. Gen. Motors Corp.*, 213 A.D.2d 267 (1995)). On the other hand, when a daughter was present at a meeting but had no role in conveying information or protecting the mother's interest, privilege was waived (*State v. Shire*, 850 S.W.2d 923 (Mo. Ct. App. 1993)).

Listen actively and without interruptions

Working with survivors of trauma will often take more time and emotional labour than working with clients who have not experienced trauma. Survivors may take longer to recall events or may need time to process their feelings. Part of the process of working effectively with survivors of trauma is being there to listen for long periods of time. It can be harmful to look at your watch or cell phone, appear disinterested, cut meetings short or try to move the client along before she is ready. It is important lawyers build additional time into their schedules to be there for clients who have experienced trauma. If you have to end a meeting emphasise the importance of what the survivor is saying and be honest about the reason for ending the meeting. Let them know you will be able to pick up where you left off at your next meeting.

Use appropriate and inclusive language

The terminology you use should be up-to-date and chosen by the community you represent. Some terms that are commonly used may be considered offensive for some communities. The best way to get to know the appropriate terminology to use is to develop relationships of trust with the community you represent. However, you may also want to research commonly used terms and make sure they are appropriate. In some cases it may be best to ask the client whether a term is appropriate or if there is a better term you can use.



PRACTICE TIP

Inclusive language considerations

- ▶ It is essential that lawyers working in languages where there exist gendered pronouns use the right pronouns for clients. Lawyers should not presume their client's pronouns. Purposefully or negligently mis-gendering and mis-naming clients can amount to discriminatory conduct and is always harmful for the client's wellbeing. Instead of asking clients for their pronouns and name consider sharing your own pronouns and the name by which you want to be referred. This indicates to the client that it is a safe space for them to share their pronouns and name. If a client does share their pronouns and name it is essential that this information is not disclosed to anyone without the client's express consent. Outing a person who identifies as a member of the LGBTQI+ community is discriminatory, harmful and can have serious consequences for the person's wellbeing including their physical safety.
- ▶ Transgender clients may use terms unfamiliar to you to refer to their anatomical parts. Take the lead from your client in referring to anatomical parts and, if unsure, describe the need to clarify what they mean by the term.
- ▶ You may want to consider the terms you use to refer to homes/community spaces/protests or other environments important to your client and their community. For example, the term 'settlement' to refer to the communities where Roma clients live may be offensive to some, you should try to use the terms communities or neighbourhoods instead.⁴⁴



RESOURCE

- ▶ [Stonewall glossary of terminology](#)
- ▶ [Council of Europe Descriptive Glossary of terms relating to Roma issues \(2012\)](#)

Practise empathy

Lawyers should recognise their role as a key support person in the client's care circle. While lawyers are not trained to provide emotional support and should make their best effort to connect the client with services, there may also be a need for lawyers to be a listening ear for clients. Lawyers should be prepared to empathise with their clients, allowing space for clients to vent and speak about the impact the traumatic event has had on their lives. While you can and should recognise the client's feelings you should refrain from saying that you understand what the client has been through. You may want to share your experience of a similar situation but you should always recognise that this does not mean that you fully understand how they are feeling – the client's experience, no matter how similar, is only their own.

44. Adam Wiess, Stop calling places where Roma live "settlements", European Roma Rights Centre (2017) European Roma Rights Centre, <http://www.errc.org/news/stop-calling-places-where-roma-live-settlements> accessed on 21 March 2022.



RESOURCE

World Health Organisation, [Psychological first aid: Guide for field workers](#) (2011)

Create a non-judgmental environment

Recognising the impact of trauma on behaviour means challenging yourself to constantly remain non-judgmental and welcoming to your client's needs even if they appear inconsistent or counterintuitive.



PRACTICE TIP

Navigating challenges in the lawyer-client relationship

Clients who seem uncooperative or aggressive; dishonest; make decisions that seem counterintuitive; are hard to reach; or drop in and out of legal proceedings may be facing barriers to accessing justice including experiencing re-traumatisation, having to respond to ongoing complex or community trauma or fearing the consequences of taking legal action (ie retaliation, violation of their privacy). It is important to remain non-judgmental and respect the challenges that these clients may be facing. Try your best to keep your door open for these clients and, if you have to close their file, make sure you communicate with them in a compassionate, clear and simple way any upcoming deadlines in their case, the reasons why you are closing their file, the legal implications, and that they can come to you if they need help in the future or if they change their mind. If safe, you may want to communicate this information in verbal and written form to ensure it has been understood. You should always explain that your intention is not to pressure them but to make sure they have all the information they need to make the right decisions for themselves.

INTERVIEWING THE CLIENT AND GATHERING THEIR TESTIMONY

In addition to the general practice approaches set out above, lawyers should incorporate additional trauma informed approaches when conducting interviews with survivors of trauma. Before you begin an interview recall that:

1. trauma impacts memory;
2. trauma impacts communication; and,
3. TILP interview practices can help survivors' recall and communication.

When conducting trauma informed interviews:

1. **Whenever possible have a short introductory meeting first** then arrange a longer meeting a few days or weeks later to gather the client's testimony.
2. **Do your best to limit the number of times the client has to tell their story.** Speaking about traumatic experiences can lead to re-traumatisation. Even the most well facilitated interviews can be harmful for a survivor's recovery. Lawyers should always try to limit the number of times their client has to tell their story.
 - ▶ Is there already a statement in the file that you can review and expand on?
 - ▶ Could you, instead, ask them to write a statement or keep track of incidents in a way that is supportive of their emotional and other needs?
 - ▶ With the client's consent, you may want to make a recording so you can review it rather than asking the client to repeat certain information.
 - ▶ If more than one staff member is working on a case, consider asking the client if they would want to participate in a collective interview attended by various staff members from your office, the survivor and their support person(s). This can create a circle of support around the survivor as they are reliving the traumatic experience and can work well when staff members are from the same community as the survivor.
3. **Engage support networks and counselling professionals.** Understand the rules of lawyer-client privilege in your jurisdiction and ensure that as much as possible the survivor can have a support person present in meetings with you and other legal actors.
4. **Always prioritise the client's wellbeing.** Pay attention to the client's verbal and non-verbal cues and suggest taking breaks or even returning to the interview at a later time.

5. Apply **The Forensic Experiential Trauma Interview (FETI)**⁴⁵ method:
- ▶ The interview should be seen as an opportunity for the survivor to express their full experience including the impact it has had on them. It is important for survivors to speak about the emotional and physical impact the event had on them and identify any sensory memories they can recall.
 - ▶ The interview should allow for an uninterrupted narrative, led by the client and told in her own words;
 - ▶ Interview questions should be open ended and facilitating of the impact of trauma on memory.
 - ▶ Interview questions should not try to confuse the survivor or impose linear recall.
 - ▶ Interview questions should not be accusatory.

INTERVIEW QUESTIONS DOS AND DON'TS

DOs	DON'Ts
✓ What are you able to tell me about what happened?	✗ Tell me what happened from start to finish?
✓ Where do you want to begin with your story?	✗ What was the first thing that happened?
✓ What stands out to you most? What can't you forget?	✗ Can you tell me the story in reverse?
✓ What were your thoughts and feelings when...?	✗ Why did you not ...? / Why did you choose to ...?
✓ Did anything in particular cause you to tell us about the incident today?	✗ Why didn't you report until today?



RESOURCE

Successful Trauma Informed Victim Interviewing, International Association of Chiefs of Police.

EXPLAINING THE LEGAL PROCESS AND SEEKING INSTRUCTIONS FROM THE CLIENT

Trauma informed legal practice calls on lawyers to thoroughly understand the client's diverse needs, priorities and concerns and actively engage the client in making decisions about their legal interests. A number of challenges may arise when explaining the legal process and seeking instruction from clients. The client may not at first be open about the remedies they desire. This can be because of a lack of understanding of what is available, a lack of trust in the legal system including their legal representatives or the client may be worried about risks and outcomes they are not openly communicating with you.

In order to overcome these barriers and provide the client with quality advice:

Try your best to **understand the client's priorities** and challenge your own presumptions about what clients may want out of a given process. Understanding client priorities involves asking open-ended questions and listening attentively as well as getting to know your client and their experience. If safe try to understand:

- ▶ What is your client's living situation? Do they feel safe and comfortable at home?
- ▶ Do they have dependents?
- ▶ Does the client have any concerns about safety or risks for themselves or their dependents?

45. Russell W Strand, The Forensic Experiential Trauma Interview (FETI), <https://www.mncasa.org/wp-content/uploads/2018/07/FETI-Public-Description.pdf> accessed on 21 March 2022.

- ▶ Do they face any financial barriers? Are they worried about losing their job or income stream?
- ▶ Have they had experience with the legal system and, if so, how do they feel about that experience?

Try to **undertake research before providing** advice on all available legal avenues and consider all elements of the legal proceedings including:

- ▶ Would the client have standing in a particular proceeding?
- ▶ Are there any admissibility barriers that may arise in the proceeding?
- ▶ What type of evidence would the client have to give and how would this impact their wellbeing or privacy interests?
- ▶ What remedies does each proceeding provide and what remedies are not available?
- ▶ What is the process for ensuring implementation of the decision?

When discussing the likelihood of success for each legal avenue try to **outline legal as well as practical considerations**.

Legal considerations:

- ▶ What is the likelihood that you will win the case and get the remedies the applicant wants? Consider the judicial bodies' track record in ordering certain remedies; legal and admissibility hurdles you will have to overcome and the likelihood of success; the type of evidence that needs to be given and the difficulties you will face in securing or communicating the evidence.
- ▶ What is the likelihood that the case will be appealed and what are the success rates on appeal?
- ▶ What is the likelihood that the authorities will implement the judgment? Consider the steps you and your client will need to take to ensure implementation of the judgment.

Practical considerations:

- ▶ Length and cost of the process including appeals and implementation;
- ▶ Safety considerations including the safety of dependents and, for some clients, consider the safety of any pets with which the client holds a close relationship;
- ▶ Stress and other emotional impact including re-traumatisation or disappointment in the outcome of the process;
- ▶ Privacy interests including challenges arising from the rules of evidence (ie cross examination, disclosure of medical reports) and any potential adverse social stigma, negative publicity or harassment if the litigation is high profile.

Try to **understand the broader social, economic and legal context that may be impacting your client's choices** and experiences to target recommendations effectively. This practice is particularly important for lawyers working with survivors of gender-based violence, racialised communities, LGBTQI+ clients and clients who are criminalised or without immigration status.

- ▶ Understand the ways marginalisation may legally or practically limit your client's choice.
- ▶ Try to find ways around the limitations by prioritising safety and agency.
- ▶ Provide practical advice outlining the risks associated with choosing a particular legal avenue.
- ▶ Connect the client to support services that may meet some of their needs alongside or in lieu of a justice or legal system response.



RESOURCE

[Equality and non-discrimination in Russia: Best Practice Guide for Lawyers, Equal Rights Trust \(2017\)](#)



PRACTICE TIP

Working with criminalised clients

Clients who experience criminalisation related to their engagement in sex work, use of criminalised substances or immigration status face additional access to justice barriers. Working with criminalised clients requires lawyers to provide practical and realistic advice to the client on the impact reporting a crime or being involved in legal proceedings may have on them. Lawyers should:

- ▶ Be honest and clear with clients about the legal challenges they may face;
- ▶ Provide practical advice on how clients can access justice without placing themselves at risk of criminalisation including what information to share with police and information to withhold and, if optional, the process for third party or anonymous reporting.⁴⁶ Your advice should centre on meeting the client's needs. For example:
 - If the survivor is worried about her safety, you may want to focus your efforts on helping her get a protection order which may be a more low barrier, timely response than criminal prosecution. You should walk her through the process of seeking a protection order and explicitly outline how she can report without disclosing information that may place her at risk of criminalisation (ie substance use, nature of the relationship with the perpetrator);
 - You should consider whether in your jurisdiction survivors can get victim status without filing a police complaint. Victim status can help survivors receive financial support, wellbeing services, shelter and other necessary services for fleeing violence⁴⁷;
 - You may also want to explore alternative reporting methods such as anonymous reporting or the filing of third party reports; and,
- ▶ If your client is unable to access state services, you should do your best to connect her with community services that can meet the survivor's unmet needs.



RESOURCE

Tamar Dekanosidze, [Gender-based violence against sex workers and barriers to accessing justice: International Standards and Experience in Georgia](#) (2018)

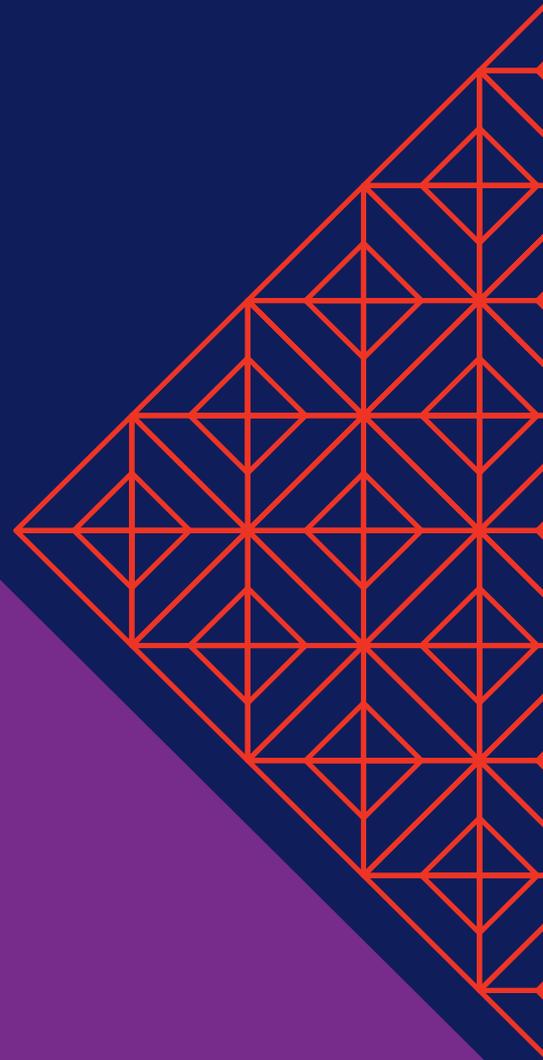
Respect the client's decision even if the case has significant strategic value. Your role is to provide the client with the relevant information to make a decision, it is up to your client to make the right decision for them.

46. Council of Europe, The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence , November 2014, ISBN 978-92-871-7990-6, article 55.

47. Council of Europe, The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence , November 2014, ISBN 978-92-871-7990-6, article 18(4).

CHAPTER 5

Supporting the client through the legal process



A cornerstone of trauma informed approaches is to facilitate environments where survivors are not subjected to further traumatisation. As outlined above, re-traumatisation within legal proceedings is common for survivors of trauma and increases with intersecting forms of marginalisation. This is in part because harmful legal practices are often rooted in stereotypes about survivors of human rights violations related to the survivor's gender, race, religion, disability or LGBTQI+ identity. Lawyers can play an important role in protecting clients' safety, agency and legal interests by actively advocating for the client throughout legal proceedings from investigation to implementation of judgments.

SUPPORTING CLIENTS THROUGH INVESTIGATIONS

Investigations, particularly criminal investigations, can be a key place of re-traumatisation for survivors of human rights violations. This is most likely where there exists distrust between the survivor's community and the police or other investigative body and where stereotypes and bias permeate the investigative proceedings. Lawyers representing survivors of human rights violations can play a significant role in advocating for clients throughout investigative processes, prosecutorial decisions and at trial.

In this section we focus on ways lawyers can advocate for clients during investigations because of their particular negative impact on survivors of trauma. However, lawyers should recognise that similar practices and approaches appear in other parts of legal proceedings, including prosecutorial decisions and during trials. Lawyers should develop approaches, adapted to the contexts they work, for effectively advocating for their clients' interests.

In order to do effectively support clients through investigations, we recommend you:

1. **Are always present** when your client is engaging with legal system actors whether police, crown prosecutors, judges or medical professionals. We recommend that, with your client's consent, you advocate for attendance at all of the following processes:
 - ▶ Reporting of a crime
 - ▶ Interviews with police
 - ▶ Information sessions with police
 - ▶ Review and signing of witness statements
 - ▶ Interviews with prosecutors
 - ▶ Medical assessments and examinations (where appropriate)
 - ▶ Settlement discussions
 - ▶ Hearing dates (including where you are not representing a party to the proceedings i.e. common law criminal process)

You should try your best not to leave the client alone at any stage of the process. If you have to step out of the room during an interview you should insist the interview is paused and your client does not remain in the presence of a police officer. If you have to leave the room for physical examinations, you should remain nearby and ensure that the survivor can reach you at any point in the examination. Ideally, you should remain within earshot of the examination.

2. **Understand your client's rights, investigative best practices and the challenges your client is likely to face** when engaging with different institutions.

You should understand your client's rights in domestic legal instruments as well as international legal instruments.

- ▶ Familiarise yourself with international human rights that must be protected by all states (e.g. the prohibition against torture).
- ▶ There are nine core international human rights instruments⁴⁸. What are the relevant instruments to your clients case? Has the state ratified the relevant instruments? What rights does your client have under the

48. United Nations, The Core International Human Rights Instruments and their monitoring bodies, <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> accessed on 21 March 2022.

relevant instruments? What obligations do state authorities have? What general comments have been developed by oversight bodies that outline the obligations arising under human rights instruments?

- ▶ Which of the nine human rights treaty bodies has the state where you work agreed to provide authority to for adjudicating individual complaints? (see optional protocol ratification for each treaty)
- ▶ What regional instruments has the state party ratified (ie the European Convention of Human Rights)? What rights and obligations do these instruments confer?

In addition to knowing your client's legal rights as they arise in legal instruments and case law you may also want to consider whether there exist:

- ▶ Codes of conduct for registered occupations such as psychologists, nurse examiners, lawyers, doctors, mediators/negotiators etc.; or,
- ▶ Complaint procedures for police, medical professionals or legal professions.

You should be prepared to refer to these documents requiring that they are followed and, where necessary, file complaints against legal and medical professionals.

Where domestic standards are insufficient, you might also want to familiarise yourself with international best practices in order to encourage domestic actors to follow best practice standards.



RESOURCE

- ▶ The [International Association of Chiefs of Police](#) contains a repository of resources on investigative and policing best practices for a variety of crimes including sexual assault and hate crimes.
- ▶ The [Crown Prosecution Service of the United Kingdom](#) has made its guidance documents publically accessible. The Prosecution Guidance outlines best practices on a variety of issues that may arise when working with victims of trauma.
- ▶ American Psychological Association, [Ethical Principles of Psychologists and Code of Conduct](#) (2003 with amendments in 2010 and 2017)

Lawyers should try to understand the access to justice barriers the communities with whom they work face. The best way to do this is to get to know the community and participate in community activities. You can also understand more about the community's experience by reading reports by non-governmental organisations or asking your clients about their experience. In particular, we recommend you consider whether:

- ▶ there are reports of discrimination or violence by authorities against a particular community;
- ▶ crimes reported by community members are effectively investigated, prosecuted and implemented;
- ▶ there are stereotypes, misconceptions and prejudices about the community within society that are reflected in the conduct of legal actors; or,
- ▶ reporting a crime would place the client at a risk of criminalisation or violence by the authorities.



RESOURCE

European Roma Rights Centre and Fair Trials, [Justice Denied: Roma in the criminal justice system](#) (2021)

3. **Intervene whenever investigators are relying on harmful or re-traumatising practices.** While investigative practices differ significantly between jurisdictions and based on the victim and the crime, below we list some common harmful practices that require lawyers to intervene to protect clients' legal interests and wellbeing.

COMMON HARMFUL, DISCRIMINATORY OR OTHER UNLAWFUL INVESTIGATIVE PRACTICES:

Investigators **refuse to open or undertake an effective investigation**. State authorities have a legal obligation to undertake an effective investigation whenever there exist reasonable grounds to suspect a crime has been committed.⁴⁹ In cases of gender-based violence states have an obligation under international law to act with due diligence to prevent, investigate and punish perpetrators.⁵⁰ Under the European Convention on Human Rights, states have a specific duty to prevent hatred-motivated violence and investigate discriminatory motives whenever there exists a prima facie basis that the violence had a hateful motive.⁵¹

The obligation to undertake an effective investigation requires authorities to promptly initiate an investigation, interview the injured parties, investigate the crime scene, interview witnesses and, if known, the accused person, and thoroughly analyse and evaluate all the evidence collected.⁵² The following practices may be in violation of the obligations on state authorities to effectively investigate⁵³:

- ▶ Refusing to initiate an investigation because there is a lack of physical evidence or a lack of corroboration by witnesses of the injured party's complaint;
- ▶ Refusing to initiate a complaint because the investigators deem the impact of the crime to be insufficient to merit an investigation;⁵⁴ or
- ▶ Playing the role of mediators and advocating for survivors of violence to forgive the perpetrator (ie forcing survivors of domestic violence to return to the abusive partner).⁵⁵

Investigators are using **discriminatory or non-inclusive language**. Language is discriminatory when:

- ▶ the terminology used is deemed derogatory for a particular community;
- ▶ suggests inferiority or relies on historical or ongoing stereotypes;
- ▶ fails to consider the way the survivor identifies including their chosen name and pronouns.

Investigators **are engaging in humiliating or harassing behaviour** including:

- ▶ Retaliating against a complainant or their family for filing a complaint;
- ▶ Conducting or allowing a search to be conducted in a humiliating or insensitive manner. Searches can be humiliating when they are in a public space, the person being searched is asked to be fully nude for long periods of time, the person being searched is not given the choice to select the gender of the person searching them, the search is aggressive or unnecessarily intrusive;

49. See *Assenov and Others v. Bulgaria*, European Court of Human Rights, Application no. 24760/94, 1998, para. 102.

50. N Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), 1992, A/47/38, para 9.

51. See e.g. *Sabali v. Croatia*, European Court of Human Rights, Application no. 50231/13, 2021, para 105.

52. See e.g. *X and Y v. Georgia*, Communication No. 24/2009, UN Doc. CEDAW/C/61/D/24/2009 (2015); see also *V.P.P. v. Bulgaria*, Communication No. 31/2011, UN Doc. CEDAW/C/53/D/31/2011 (2012), para 9.5 [The Committee finds that in the present case the State party failed to take positive measures under article 2 (b) of the Convention to adopt adequate criminal law provisions to effectively punish rape and sexual violence and apply them in practice through effective investigation and prosecution of the perpetrator.]; UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, 2005, para 11. [The competent services should be instructed to receive the victims of acts of racism in police stations in a satisfactory manner, so that complaints are recorded immediately, investigations are pursued without delay and in an effective, independent and impartial manner, and files relating to racist or xenophobic incidents are retained and incorporated into databases.]

53. See generally Tamar Dekanosidze, *The Administration of Justice on Crimes of Sexual Violence Against Women in Georgia*, Council of Europe (2020) <https://rm.coe.int/sexual-violence-research-eng/1680a17b78> accessed on 21 March 2022.

54. See *V.K. v. Bulgaria*, Communication No. 20/2008, UN Doc. CEDAW/C/49/D/20/2008 (2011); See also *Isatou Jallow v. Bulgaria*, Communication No. 32/2011, UN Doc. CEDAW/C/52/D/32/2011 (2012).

55. See e.g. *Angela González Carreño v. Spain*, Communication No 47/2012, UN Doc. CEDAW/C/58/D/47/2012, (2014) para 9.4 [The Committee observes that during the time when the regime of judicially determined visits was being applied, both the judicial authorities and the social services and psychological experts had as their main purpose normalizing relations between father and daughter, despite the reservations expressed by those two services on the conduct of F.R.C. The relevant decisions do not disclose an interest by those authorities in evaluating all aspects of the benefits or harms to the child of the regime applied. [...] All of these elements reflect a pattern of action which responds to a stereotyped conception of visiting rights based on formal equality which, in the present case, gave clear advantages to the father despite his abusive conduct and minimized the situation of mother and daughter as victims of violence, placing them in a vulnerable position. In this connection, the Committee recalls that in matters of child custody and visiting rights, the best interests of the child must be a central concern and that when national authorities adopt decisions in that regard they must take into account the existence of a context of domestic violence.]

- ▶ Forcing detainees to shave their head or make other bodily alterations;
- ▶ Prohibiting the use of gender-affirming items and treatment;
- ▶ Forcing detainees to undertake STI examinations,
- ▶ Asking inappropriate questions about a survivor's sexual history, personal life or life choices. Inappropriate questions could include asking a survivor about their anatomy, surgical procedures or sexual behaviour unless it is necessary to establish the elements of the crime that occurred.

Investigators are **relying on myths and stereotypes** when interviewing survivors. The types of myths that permeate investigations are multiple and varied depending on the type of crime, jurisdiction and identities of the survivor. Gendered myths and stereotypes have been recognised as harmful, discriminatory and a barrier to the proper administration of justice. Judicial bodies have recognised that gender-based stereotypes are unlawful and have noted the importance of actively dismissing stereotypes.⁵⁶ Lawyers should become familiar with commonly held myths and be prepared to challenge them as they arise in investigative processes. Consider the following commonly occurring myths that arise in sexual assault cases:

- ▶ **The survivor implied consent through flirtatious behaviour, dress or agreeing to go to the perpetrator's house/agreed to previous sexual activity.** This myth engages in victim blaming and imposes gendered expectations on how survivors should behave. It also assumes that someone cannot change their mind or feel differently about different sexual activities.
- ▶ **A 'real' survivor of sexual assault would have fought back.** This myth is grounded in misinformation and a lack of knowledge of how trauma impacts the brain. It implies that all survivors of sexual assault react the same and relies on the 'ideal victim' narrative which suggests that survivors of sexual violence have to appear, act and respond in a socially-acceptable way to be believed.
- ▶ **A survivor that is unable to describe the details or sequence of the assault is lying.** This myth is also grounded in a lack of knowledge of how trauma impacts memory.



RESOURCE

Rape and Sexual Offences – Annex A: Tackling Rape Myths and Stereotypes, Legal Guidance Sexual Offences, UK Crown Prosecutors Service (2021)

Investigators are asking survivors to **participate in harmful investigative practices**. Harmful investigative practices include:

- ▶ Subjecting survivors to **polygraph examinations** or other “truth telling devices”. Polygraphs or lie detector tests are intimidating and can cause re-traumatisation. These investigative methods contribute to a survivors' concerns that legal actors may not believe their experience of trauma. In many jurisdictions, legislation prohibits investigators from requesting survivors of sexual abuse to participate in a lie detector test.⁵⁷
- ▶ Requesting that **survivors attend the scene of the crime** to demonstrate where the incident occurred or taking photos pointing to where the incident occurred. This practice can be highly re-traumatising for survivors of trauma and should only be used in the most exceptional of circumstances where specialised medical expert advice has been sought and adequate supports are engaged throughout the crime scene visit.
- ▶ Being subjected to an **unnecessary psychological examination** or forensic medical examination following a sexual assault. (See Supporting Clients through Medical Examinations)

56. See e.g. *R.P.B. v Philippines*, Communication No. 34/2011, UN Doc. CEDAW/C/57/D/34/2011 (2014) where the CEDAW Committee affirmed that myths and stereotypes in judicial proceedings affect survivors' right to a fair trial and called on the state to ensure all sexual assault criminal proceedings are free from gendered stereotypes; see also *Konstantin Markin v. Russia*, App. No. 30078/06 (ECtHR, 22 March 2012), para 142-143; *Karen Tayag Vertido v. the Philippines*, Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (2010) [In this regard, the Committee stresses that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.]

57. See e.g. National Sexual Violence Resource Centre, Legislation Regulating Polygraph Use, <https://www.nsvrc.org/legislation-regulating-polygraph-use> accessed on 21 March 2022.

- ▶ Requesting **overly intrusive disclosure of medical or other private files**. (See Protecting Your Client's Privacy Interests)

Investigators are **failing to consider the impact of trauma** when conducting interviews. Investigators fail to consider the impact of trauma when:

- ▶ Requiring survivors to undergo numerous interviews often by different investigators;
- ▶ Asking the survivor to repeat their narrative multiple times, recall the events in chronological order or repeat them in reverse order;
- ▶ Forcing the survivor to continue answering questions even when they are in distress;
- ▶ Failing to provide regular breaks or other necessities;
- ▶ Asking questions designed to confuse the survivor in order to check the validity of the statement; or
- ▶ Allowing perpetrators to be present during the interview or to confront the survivor.

Investigators are **amending the survivor's witness statement**. It is essential that you review the statement with the survivor before they sign it and challenge any amendments, inconsistencies or gaps in the statement (e.g. minimising the incident or its impact on the survivor).

Investigators are failing to **communicate regularly and effectively with the survivor**.

SUPPORTING CLIENTS THROUGH MEDICAL EXAMINATIONS

Medical examinations can be useful in legal proceedings when they are undertaken in a trauma informed way and in line with leading medical practice. Where medical examinations are unnecessary, used to undermine the survivor's experience, overly intrusive or humiliating they can be another point of re-traumatisation in the legal proceedings. These types of medical examinations are also unlawful and may violate human rights including the prohibition on torture, degrading or inhuman treatment and the prohibition of discrimination.

In these Guidelines we outline some of the most important ways lawyers can advocate for their clients to ensure sexual assault forensic examinations and psychological examinations are only undertaken when necessary, are undertaken with the highest standard of care for the patients, and their findings are used effectively by legal actors. It is beyond the scope of these Guidelines to provide a detailed overview of best practice in conducting medical examinations. However, all human rights lawyers should be familiar and up to date on medical best practice in order to effectively advocate for their clients.



RESOURCE

[Indiana Guidelines for the Medical Forensic Examination of Adult and Adolescent Sexual Assault Patients \(2019\)](#)

SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS

When should sexual assault medical forensic examinations ('SAFE') be requested?

- ▶ SAFE should be requested on a case-by-case basis and there should never be a general rule of requiring SAFE without considering the survivor's specific experience;
- ▶ SAFE should only be requested once the survivor has been clearly explained the purpose of the examination;
- ▶ SAFE should generally not be requested if three weeks or more have passed since the assault. In some jurisdictions SAFE are not requested where more than 7 to 9 days has passed since the assault;⁵⁸

58. There is divergence in research on the time limit for obtaining forensic medical evidence of an assault. Many jurisdictions place the limit on 72 hours following the assault, however some experts suggest that biological evidence could be gathered up to three weeks following an assault. For an overview of the research see e.g. Joanne Archambault, Time Limits for Conducting a Forensic Examination: Can Biological Evidence be Recovered 24, 36, 48, 72, 84 or 96 Hours Following a Sexual Assault? <https://evawintl.org/wp-content/uploads/SAR10-3-1TimeLimitsforConductingaForensicExamination.pdf> accessed on 21 March 2021; see also Indiana Emergency Nurses Association et al, Indiana Guidelines 2019, (2019) <https://icesaht.org/wp-content/uploads/2019/08/IndianaForensicsGuidelinesE-7.pdf> accessed on 21 March 2022, p 23.

- ▶ Where the main issue in dispute between the parties to a proceeding is whether the survivor consented to the sexual activity and the survivor did not complain of pain, bleeding, burning, or tenderness or make any suggestion that physical force was used, SAFE may be unnecessary. You should try to understand the exact evidence the investigators are hoping to collect and reference medical best practice manuals to assess whether this is evidence that can in fact be collected through SAFE; and,
- ▶ In some contexts, where there is sufficient evidence to support all elements of the crime, it may not be necessary to subject the survivor to SAFE.

How should SAFE be conducted?

Informed consent

The survivor should never be forced to undertake a SAFE and should not be threatened or coerced by investigators or lawyers. Survivors should be explained the purpose of each examination procedure in clear and simple language and be offered the opportunity to provide ongoing consent during each procedure.⁵⁹ Informed consent requires investigators to explain clearly that the survivor has the right to withhold consent and is not legally required to undertake a SAFE.

There are many reasons survivors of human rights violations may refuse to submit to a SAFE or other examination. These include: disrespectful or judgmental conduct by medical examiners/negative engagement with medical professionals, cultural stigma, religious beliefs, fear of re-traumatisation, shame or a lack of trust in medical practitioners. Lawyers should be prepared to challenge adverse inferences drawn by investigators and legal actors about a survivor's refusal to participate in a medical examination. The survivor's refusal should never be the reason an investigation is terminated, a charge is not laid or the survivor is deemed as not credible.

Confidentiality

Survivors should be clearly and simply explained how the information gathered will be stored, shared and when it will be destroyed. Survivors should clearly understand the limits of confidentiality including where examiners may have to disclose confidential information with third parties.⁶⁰ This information may not be proactively provided by investigators and lawyers should actively seek to understand how the information will be shared.

Practitioner Expertise

SAFE practitioners should be trained and authorised to undertake forensic examinations and practice in a trauma informed, culturally sensitive way. We recommend you do your best to build networks with trauma informed medical experts in your region and advocate for the use of specific medical experts by investigative authorities.

- ▶ Survivors should be able to choose the gender of the practitioner. Where a practitioner of the survivor's chosen gender is not available to undertake the examination, survivors should be informed well before the examination in order to give informed consent.

Support

Survivors should be able to have a lawyer and a support person present if they choose.

Timing

SAFE should be undertaken as soon as possible following an assault. When undertaken in a survivor-centred way SAFE can contribute to the survivor's healing process.⁶¹ In some cases the survivor may need some time before agreeing to participate in a SAFE. Lawyers can, in a trauma-informed way, communicate to the survivor the importance of having the examination done as soon as possible. Ultimately, you should respect the survivor's choice and provide her with information on how to minimise loss of evidence in case she later decides to participate in a SAFE.

59. Indiana Emergency Nurses Association et al, Indiana Guidelines 2019, (2019) <https://icesaht.org/wp-content/uploads/2019/08/IndianaForensicsGuidelinesE-7.pdf> accessed on 21 March 2022, p 16.

60. Indiana Emergency Nurses Association et al, Indiana Guidelines 2019, (2019) <https://icesaht.org/wp-content/uploads/2019/08/IndianaForensicsGuidelinesE-7.pdf> accessed on 21 March 2022, p 16.

61. Indiana Emergency Nurses Association et al, Indiana Guidelines 2019, (2019) <https://icesaht.org/wp-content/uploads/2019/08/IndianaForensicsGuidelinesE-7.pdf> accessed on 21 March 2022, p 7.

Space

The space should be clean, comfortable and private.

Communication

SAFE practitioners should communicate with survivors in a trauma-informed way. Particularly when asking about the assault or the survivor's history of consensual sexual activity, practitioners should ask open ended questions, clearly communicate their reasons for requesting information on the assault or the survivor's sexual history.

Personal information

Examiners should not ask personal information that is not relevant to the examination such as the type or place of work of the survivor, the survivor's immigration status, the survivor's relationship status or the survivor's use of substances. This information is irrelevant, stigmatising and can pose access to justice barriers for survivors who are refugees or migrants, engage in sex work, use criminalised substances and some LGBTQI+ survivors.

Photography

Taking photographs during an examination may be a necessary part of the examination but it can also be re-traumatising for survivors. In order to limit the impact the experience examiners should explain the purpose of the photographs, how they will be used and stored and that the survivor retains the right to rescind consent of the use of photos.⁶² The examiner should also do their best to reduce discomfort by allowing the patient to cover parts of their body for privacy.⁶³

Collection of urine and blood samples

The collection of urine and blood samples should only occur when there are indicators that the assault was facilitated by drug and alcohol use as in contexts where there was a loss of consciousness, memory lapse or where the survivor reports feeling more intoxicated than their normal response to a certain type or amount of a substance.⁶⁴ These tests should also not be conducted when more than 96 hours has passed since the assault. Allowing examiners to conduct regular collection of urine and blood samples without these indicators can act as an access to justice barrier for survivors who use criminalised substances.

Gender affirming examination practices

Examiners should conduct an organ inventory to assess appropriate examination methods and treatments including contraception.⁶⁵ Examiners should also understand the gender affirming treatment survivors are receiving and respect that survivors may decline to give up for evidence items used for gender affirming care such as chest binders.⁶⁶

Sexually transmitted infection ('STI') testing

STI Testing and treatment should only be provided with the survivor's express consent and on a case-by-case basis. Survivors should not be subjected to STI testing as a general practice or for discriminatory reasons such as history of engaging in sex work. Survivors should be expressly told the reasons the STI testing is recommended and given the opportunity to provide informed consent.

62. Indiana Emergency Nurses Association et al, Indiana Guidelines 2019, (2019) <https://icesaht.org/wp-content/uploads/2019/08/IndianaForensicsGuidelinesE-7.pdf> accessed on 21 March 2022, p 30.

63. Indiana Emergency Nurses Association et al, Indiana Guidelines 2019, (2019) <https://icesaht.org/wp-content/uploads/2019/08/IndianaForensicsGuidelinesE-7.pdf> accessed on 21 March 2022, p 30.

64. Indiana Emergency Nurses Association et al, Indiana Guidelines 2019, (2019) <https://icesaht.org/wp-content/uploads/2019/08/IndianaForensicsGuidelinesE-7.pdf> accessed on 21 March 2022, p 35.

65. Indiana Emergency Nurses Association et al, Indiana Guidelines 2019, (2019) <https://icesaht.org/wp-content/uploads/2019/08/IndianaForensicsGuidelinesE-7.pdf> accessed on 21 March 2022, p 11.

66. Indiana Emergency Nurses Association et al, Indiana Guidelines 2019, (2019) <https://icesaht.org/wp-content/uploads/2019/08/IndianaForensicsGuidelinesE-7.pdf> accessed on 21 March 2022, p 11.

Purpose of examination

Examinations should never be conducted to reach findings rooted in stereotypes and myths. For example, while examiners may want to visualise and record findings about a survivor's hymen as part of a SAFE,⁶⁷ they should under no circumstances undertake a 'virginity test' or use the findings from the visualisation of the hymen to make a determination about a survivor's virginity. The World Health Organisation has called for 'virginity testing' to be entirely eliminated, finding the practice to be in violation of human rights, discriminatory and "unscientific, medically unnecessary and unreliable".⁶⁸

How should the findings from SAFE be used?

SAFE findings can be used to supplement other evidence but, when the SAFE does not produce physical or biological evidence of the assault, the findings should not be used to dismiss the case or for investigators to conclude the sexual assault did not happen. Instead, investigators and lawyers should undertake a balanced assessment of all the relevant evidence considering whether each piece of evidence is relevant, admissible, credible, reliable and how important it is in relation to the issues that arise in the case.⁶⁹

SAFE findings should never be used by investigators or other legal actors to reach conclusions unsubstantiated by medical evidence.⁷⁰ For example, the existence of a stretched or torn hymen should only be used as evidence to corroborate injury from sexual assault and not for any other purpose including the drawing of inference about the survivor's sexual history.

PSYCHOLOGICAL AND PSYCHIATRIC EXAMINATIONS

- ▶ Psychological or psychiatric examinations should be requested on a case-by-case basis and should not be regularly resorted to for specific cases or for survivors with mental health or intellectual disabilities;⁷¹
- ▶ Psychological or psychiatric examinations should be used to assess the ways survivors can participate in legal proceedings and the types of support and accommodation that needs to be put in place to facilitate the survivor's maximum participation;
- ▶ Examiners should not be asked to make findings of witness credibility. It is the responsibility of the judge to make assessments of credibility based on all the evidence before them. Examiners can provide information on:⁷²
 - The nature and extent of the survivor's condition;
 - The nature of the symptoms including any triggers/alleviating or aggravating factors;
 - The impact of medical conditions on a survivor's perception, comprehension, recollection; and,
 - The measures that can be put in place to facilitate participation particularly with reference to witness interviews and questioning and ability to communicate priorities.
- ▶ Psychological or psychiatric examinations should be weighed carefully with other available evidence and should not be presumed to be objective or conclusive.⁷³

67. Indiana Emergency Nurses Association et al, Indiana Guidelines 2019, (2019) <https://icesaht.org/wp-content/uploads/2019/08/IndianaForensicsGuidelinesE-7.pdf> accessed on 21 March 2022, p 33.

68. Indiana Emergency Nurses Association et al, Indiana Guidelines 2019, (2019) <https://icesaht.org/wp-content/uploads/2019/08/IndianaForensicsGuidelinesE-7.pdf> accessed on 21 March 2022, p 5.

69. Crown Prosecution Service, Rape and Sexual Offences - Chapter 2: Applying the Code for Crown Prosecutors to Rape and Serious Sexual Offences, (2021) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-2-applying-code-crown-prosecutors-rape-and-serious> accessed on 21 March 2022; see also Council of Europe, Effectively Investigating Prosecuting and Adjudicating Sexual Violence Cases: A Manual for Practitioners in Georgia, (2021) https://live-equality-now.pantheonsite.io/wp-content/uploads/2021/11/Effectively_Investigating_Prosecuting_and_Adjudicating_Sexual_Violence_in_Georgia_-_A_Manual_-_English.pdf accessed on 21 March 2022.

70. Council of Europe, Effectively Investigating Prosecuting and Adjudicating Sexual Violence Cases: A Manual for Practitioners in Georgia, (2021) https://live-equality-now.pantheonsite.io/wp-content/uploads/2021/11/Effectively_Investigating_Prosecuting_and_Adjudicating_Sexual_Violence_in_Georgia_-_A_Manual_-_English.pdf accessed on 21 March 2022.

71. Mind, Achieving justice for victims and witnesses with mental distress A mental health toolkit for prosecutors and advocates https://www.mind.org.uk/media-a/4325/prosecutors_toolkit.pdf accessed on 21 March 2022, p 26.

72. Mind, Achieving justice for victims and witnesses with mental distress A mental health toolkit for prosecutors and advocates https://www.mind.org.uk/media-a/4325/prosecutors_toolkit.pdf accessed on 21 March 2022, p 26..

73. Mind, Achieving justice for victims and witnesses with mental distress A mental health toolkit for prosecutors and advocates https://www.mind.org.uk/media-a/4325/prosecutors_toolkit.pdf accessed on 21 March 2022, p 27; for data on the shortfalls of medical examinations see <https://journals.sagepub.com/stock/default-domain/10.1177%2F1529100619888860+-+FREE/pdf>

- ▶ Survivors should be given the opportunity to choose the examiner of choice and, whenever possible, the examination should be undertaken by someone who knows the survivor's condition and is involved in their care.⁷⁴

RESPONDING TO HARMFUL, DISCRIMINATORY OR OTHER UNLAWFUL INVESTIGATIVE PRACTICES

We recommend you take the following steps immediately upon becoming aware of investigative practices that may pose harmful to the survivor:

1. Requesting that the investigator/medical examiner change their practice;
2. If the investigator/medical examiner does not change their practice, speaking to a senior member of the investigative/medical examination team;
3. If there is no internal change in practice, recommending to the survivor that they withdraw their participation in the process until the practice can be changed and supporting them in the interim by connecting them with community services; and,
4. Filing a formal complaint with an oversight body or court of law.

PROTECTING YOUR CLIENT'S PRIVACY INTERESTS

Survivors of trauma hold important privacy interests in medical and other types of records that are commonly sought in legal proceedings.⁷⁵ Consider the following:

- ▶ A survivor of sexual violence may be afraid to seek support after an assault out of fear that her medical records will be disclosed to the defendant.
- ▶ A survivor of a homophobic or transphobic hate crime may not report the abuse out of fear that their history on dating applications or private communications will become public, perhaps outing them to members of their family or community or placing them at risk of harassment by police.
- ▶ A survivor of harassment in the workplace may fear a mental health condition is disclosed to their employer during a civil suit.

Survivors of trauma may hold privacy interests in a variety of private records not limited to medical records. The main consideration should be whether the record contains personal information over which there is a reasonable expectation of privacy.⁷⁶ This may include:

- ▶ Medical records including psychiatric, counselling or therapeutic records;
- ▶ Employment records;
- ▶ Records of education;
- ▶ Child protection or social service records;
- ▶ Diaries or journals; and,
- ▶ Text messages, emails, phone records.

Lawyers have an obligation to their client and to the administration of justice to actively protect their client's privacy interests. We recommend you consider the following:

1. **Understanding competing interests** in record disclosure and educating legal actors on best practices for disclosure.

74. Mind, Achieving justice for victims and witnesses with mental distress A mental health toolkit for prosecutors and advocates https://www.mind.org.uk/media-a/4325/prosecutors_toolkit.pdf accessed on 21 March 2022, p 26.

75. United Nations, CEDAW General Comment No 33 on Women's Access to Justice, CEDAW/C/GC/33, para 17(f).

76. Criminal Code [Canada], C-46, 1985, s 278.

As a general rule: the initiation of legal proceedings, whether civil or criminal, should not lead to an open-ended disclosure of personal information.⁷⁷

While disclosure is an important part of legal proceedings, disclosure must be limited by the rules of evidence of each jurisdiction. Lawyers should know these rules well and, where the rules of evidence are in contradiction or contravention of international principles surrounding access to justice for complainants, lawyers should advocate for the rules of evidence to be amended by challenging disclosure requests in court proceedings and undertaking out of court law reform advocacy.

While the process for disclosure varies among jurisdictions and even between legal processes within a jurisdiction, disclosure processes should allow for a thoughtful consideration of competing interests providing an opportunity for the holder of the privacy interest to challenge the disclosure request.

Ideally **disclosure request processes** should involve:

- ▶ A written submission by the party requesting disclosure that sets out explicitly and specifically the reason for requesting the disclosure. It is essential that the request is specific in order to avoid sweeping and intrusive requests and to allow for decision makers to make a proper assessment of the request.⁷⁸
- ▶ An opportunity to challenge the disclosure request preferably in a closed hearing and have the challenge heard by a competent decision maker with the requisite authority; and,
- ▶ A detailed decision setting out the boundaries of the disclosure including any publication and transmission of the contents of the disclosure application, the arguments made by the parties to the disclosure request and the discloser granted.⁷⁹

Disclosure decisions should be governed by:

- ▶ The relevancy of the evidence to the legal issues arising in the proceeding; and,
- ▶ A balancing of the value of the disclosure and the private and societal interests, if any, that are impacted by the disclosure.⁸⁰

Assessing relevancy of the evidence may involve tackling myths and stereotypes. Lawyers should know the types of stereotypes that arise in legal proceedings and be prepared to challenge the relevance of the disclosure sought.

Balancing interests at stake is a complex exercise that is context specific. In some jurisdictions, legislation expressly sets out the interests that should be considered when assessing disclosure requests. For example, in Canada, courts are legislatively required to consider the following competing interests when assessing disclosure requests by defendants of confidential information in sexual assault trials:⁸¹

- ▶ Interests of justice including the right of the accused to make a full answer and defence;
- ▶ Society's interest in encouraging the reporting of certain crimes such as sexual assault or domestic violence;
- ▶ Society's interest in encouraging victims to receive treatment following a violent offence;
- ▶ The need to remove from the fact-finding process any discriminatory belief or bias (ie who the survivor is/sexual history is irrelevant)
- ▶ The potential prejudice to the survivor's personal dignity and right to privacy.

77. Crown Prosecution Service, Victims and witnesses who have mental health issues and/or learning disabilities: Prosecution Guidance, 'Medical records – the duty of disclosure' and Annex B (2010) <https://www.cps.gov.uk/legal-guidance/mental-health-victims-and-witnesses-mental-health-conditions-and-disorders> accessed on 21 March 2022. See also Crown Prosecution Service, Guidance Booklet for Experts. Disclosure: Experts' Evidence, Case Management and Unused Material, (2010), <https://www.cps.gov.uk/legal-guidance/cps-guidance-experts-disclosure-unused-material-and-case-management> accessed on 21 March 2022.

78. See e.g. *R v Goldfinch*, 2019 SCC 38 para 69.

79. See e.g. Criminal Code [Canada], C-46, 1985, article 278., s 278.95.

80. For example in Canada, section 276(2) of the Criminal Code prohibits an accused from leading sexual activity evidence unless the evidence is a) was of specific instances of sexual activity; b) was relevant to an issue at trial; and c) had significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

81. Criminal Code [Canada], C-46, 1985, s 278.92(3).

Courts in Canada have also considered other factors such as whether the same argument could be made by means other than disclosure of confidential records.⁸²

Disclosure of personal records should always include redaction of all the information within the records that is not relevant to legal issues in the case. Lawyers working with survivors should thoroughly review all disclosure with the client and ensure all sensitive and irrelevant information is redacted.

2. **Regularly seeking anonymity** in proceedings involving survivors of trauma particularly where survivors may face any sort of social stigma from the public nature of the proceedings.⁸³
3. **Communicating openly and effectively with clients** about the ways legal proceedings may impact their privacy interests. Lawyers should address privacy concerns with their clients early on and be clear about what information may or may not make it into the public record, how information disclosed to the opposing party will be used and what elements of the disclosure the lawyer can control.

PREPARING AND SUPPORTING CLIENTS THROUGH THEIR TESTIMONY

As with investigations and medical examinations, legal proceedings can be a place of re-traumatisation for survivors. Preparing your client for the legal proceeding can help build a sense of safety and control over the process. Consider:

- ▶ Walking your client through the hearing process, the court layout, the role of the actors in the courtroom;
- ▶ Taking the client for a visit to the courtroom and telling them where each actor will sit;
- ▶ If you know the judge, lawyers and clerks who will be present you may want to say something about their demeanour and communication style; and,
- ▶ Explaining court rituals such as taking of the oath.

If your client is a party to the proceedings, you should actively advocate for their wellbeing during the proceeding by paying attention to their verbal and non-verbal signs and requesting breaks when the client needs them and regularly objecting to aggressive cross-examination practices. Otherwise, you may want to flag your concerns with the prosecutor.

It may also be important to secure accommodation for your client to protect their right to safely and effectively participate in legal proceedings.⁸⁴ Accommodation should be sought for survivors of trauma who may be at risk of re-traumatisation by participating in legal proceedings without proper accommodation or to facilitate the full participation of persons with disabilities in legal proceedings. Accommodations should be tailored to each client's needs and may include:

- ▶ Allowing the client to testify virtually, in a different room from the accused or behind a screen;
- ▶ The removal of the public from the courtroom;
- ▶ Reliance on independent intermediaries and facilitators to assist with communication needs; and,
- ▶ Adjustments to the pace of proceedings or modifications to the method of questioning.

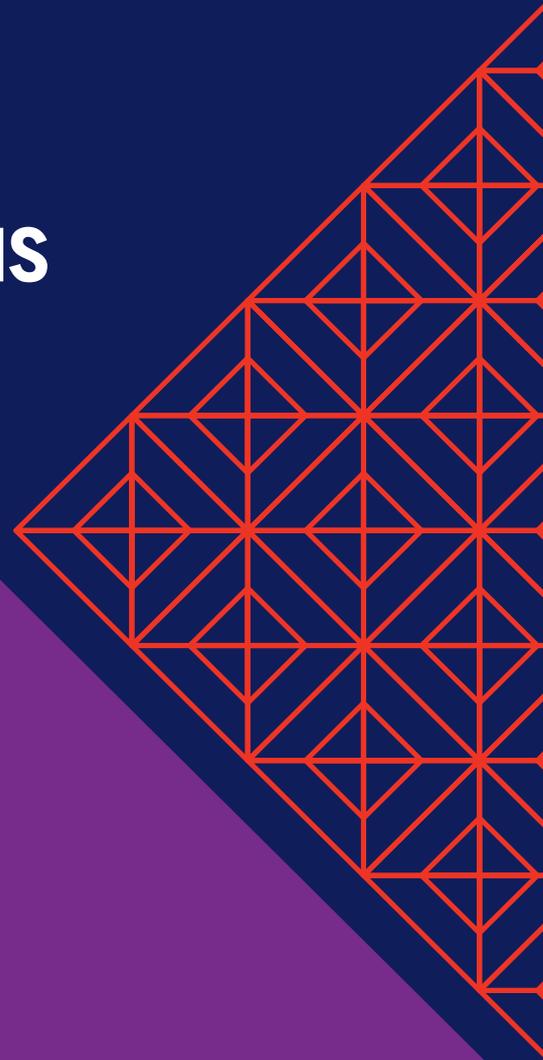
Accommodation should not be resorted to as a general rule for persons with disabilities. Instead, clients should always be actively engaged in any conversations about their accommodation needs, their wishes should be respected and lawyers should reject overreliance on medical opinion over the client's wishes. It is important to structure accommodation in the way that provides the greatest amount of safety and agency for your client.

82. *R v Goldfinch*, 2019 SCC 38 para 69.

83. United Nations, CEDAW General Comment No 33 on Women's Access to Justice, CEDAW/C/GC/33, para 17(f). [When necessary to protect women's privacy, safety and other human rights, ensure that, in a manner consistent with due process and fair proceedings, legal proceedings can be held privately in whole or in part or that testimony can be given remotely or using communications equipment, such that only the parties concerned are able to gain access to their content. The use of pseudonyms or other measures to protect the identities of such women during all stages of the judicial process should be permitted. States parties should guarantee the possibility of taking measures to protect the privacy and image of victims through the prohibition of image capturing and broadcasting in cases where doing so may violate the dignity, emotional condition and security of girls and women.]

84. See UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106*, article 12, paragraph 3.

CHAPTER 6
**Understanding vicarious
or secondary trauma**



Lawyers working with survivors of trauma should be aware that, as a result of hearing about and working on cases that involve traumatic experiences, you may be at a heightened risk of secondary or vicarious trauma.⁸⁵ Secondary or vicarious trauma can have a significant impact on your physical and mental health and behaviour. We recommend you understand the signs of secondary trauma, develop strategies for reducing the impact of secondary trauma and, where needed, access professional support.

Some common signs of vicarious trauma include:

- ▶ Difficulty managing emotion, feelings of emotional numbness, anger, or irritability;
- ▶ Becoming overly involved or emotional with clients;
- ▶ Experiences of bystander guilt or shame;
- ▶ Fatigue, feeling easily distracted or feelings of hopelessness;
- ▶ Withdrawal from friends and family, increased interpersonal conflict;
- ▶ Harmful substance use.

Some strategies for reducing the risk of vicarious trauma include:

- ▶ Increasing self-awareness by charting signs of stress, anxiety or burnout;
- ▶ Engaging in self-care, hobbies and soothing activities;
- ▶ Maintaining a healthy work-life balance including reducing your case load;
- ▶ Engaging in exercise or sports;
- ▶ Seeking support from colleagues, friends, family or community programmes.



RESOURCE

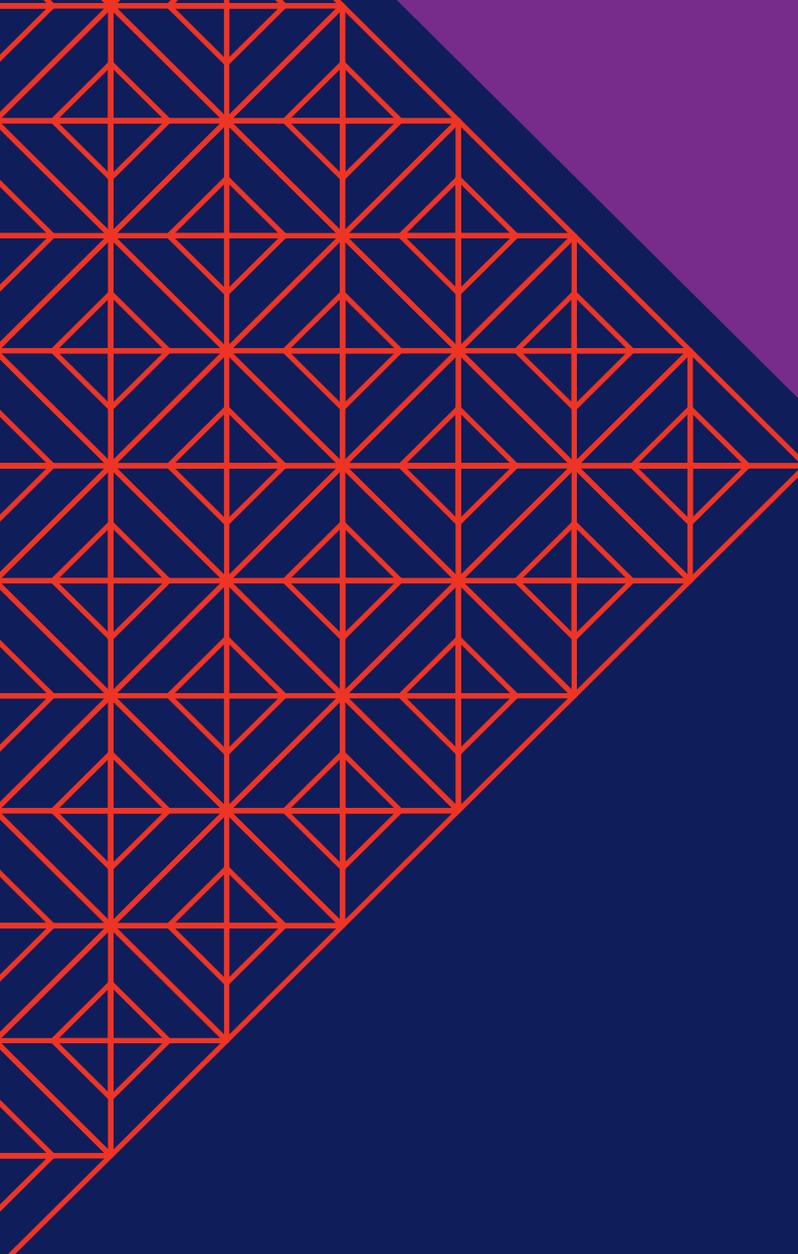
[International Federation of Red Cross and Red Crescent Societies Reference Centre for Psychosocial Support, The well-being guide: reduce stress, recharge and build inner resilience \(2022\)](#)

If you feel that you may be experiencing vicarious trauma you should not ignore it. You could try to develop a self-care plan either on your own or with a wellbeing professional. You may also want to access professional support.

CONCLUSION

These Guidelines have outlined the importance of incorporating trauma informed approaches into your legal practice. The methodology and extent to which lawyers will be able to apply the recommendations set out within will vary based on jurisdiction among other factors. However, the general principles underlying TILP can be adapted to all legal contexts. Namely, TILP calls on lawyers to develop a legal practice culture that takes into account the impact of trauma at all stages of service provision and seeks to prioritise client **safety and agency** throughout legal proceedings. Central to TILP is also the principle that lawyers should see themselves as an actor in the survivor's care circle and work actively to engage existing support networks, connect the survivor to new support networks and act as a check on the legal system to reduce the likelihood and impact of re-traumatisation.

85. Office for Victims of Crime, What is Vicarious Trauma, <https://ovc.ojp.gov/program/vtt/what-is-vicarious-trauma> accessed on 21 March 2022.



EHRAC European Human Rights
Advocacy Centre

Middlesex University
The Burroughs Hendon
NW4 4BT
Tel: +44 208 411 2826
www.ehrac.org.uk
ehrac@mdx.ac.uk

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