

Section One: Interviewing

Do Not Exacerbate the Harm or Risks

Lawyers working with survivors who are experiencing trauma and other mental health-related challenges should aim to ensure that their representation does not exacerbate the harm done to a client or create additional harms. Every domestic violence survivor faces risks. Some risks are batterer-generated; some risks are life-generated.⁴ Survivors who are experiencing trauma or other mental health challenges may face additional risks when they come in contact with systems and individuals who are ill equipped to address their particular mental health needs. Thus, attorneys must take steps to ensure that their relationship with the client does not exacerbate the risks or further harm the mental health of the survivor.

Be Aware of the Signs of Trauma

Lawyers working with survivors of domestic violence should be aware of signs of trauma and mental health challenges, such as:

- ◆ The client does not talk about her experience(s) in a linear manner. She may go off on tangents or her speech may not seem coherent.
- ◆ What would seem to be highly emotional facets of her experience are expressed with little emotion both in terms of facial expression and body language, and in terms of the tone of her voice (sometimes referred to as “flat affect”). She may be intellectually present but emotionally detached.
- ◆ The client develops a deep, blank stare or an absent look during meetings with her; this could be a sign that she is dissociating.
- ◆ The client is unable to remember key details of the abuse.

If you notice any of the above signs, you will want to take steps to avoid triggering feelings that are disruptive to your client as you work together on her case. While an attorney cannot ensure that an individual remains present and does not dissociate or otherwise disengage, there are steps you can take to remove as many barriers as possible to help your client be psychologically present for her own advocacy.

⁴ See Jill Davies, Eleanor Lyon, and Diane Monti-Catania, *Safety Planning with Battered Women: Complex Lives/Difficult Choices* (Sage Publications 1998).

Survivor-Defined Representation When the Client is Living with Trauma-Related or Other Mental Health Conditions

Survivor-defined advocacy requires that attorneys tailor their advocacy approach to meet the individualized needs of survivors. For survivors facing mental health challenges, this means that lawyers must:

- ◆ Gain an understanding of the ways in which *this client's* challenges impact her ability to engage in the advocacy process, and
- ◆ Tailor interviewing and counseling approaches to meet the needs of and maximize the self-determination of each individual client.

Survivors facing mental health challenges will often require more time and resource-intensive advocacy than other survivors. To use their time and resources wisely, lawyers must consider how to tailor their advocacy approach to be responsive to the issues and needs of survivors experiencing trauma related conditions and mental health concerns.

Begin a Dialogue about the Survivor's Mental Health Needs

The lawyer should begin a dialogue with the survivor about her mental health needs as it relates to the lawyer/client relationship. This type of conversation provides a space for the survivor to explain her circumstances and for both lawyer and survivor to develop strategies for accommodating those challenges in the course of their relationship.

Lawyers need not, and should not, try to gather the client's entire mental health history at this stage in the process. Rather, these preliminary conversations about the client's mental health should focus upon how any mental health challenges affect her functioning. To get this conversation going, lawyers might ask, "Is there anything that I should know to help us work better together?" Or, "How can I, as your lawyer, accommodate what you need in this process?" For example, if the lawyer's office creates too much sensory stimulation or causes sensory overload, your client might suggest meeting somewhere else. If she has difficulty focusing for long periods of time, the attorney might suggest taking several breaks or scheduling shorter appointments.

It is best practice for lawyers working with survivors to take the time necessary to build relationships and trust with their clients. Trust is key to developing the type of lawyer-client relationship required for effective representation. There are times, however, when lawyers have a limited amount of time or are meeting clients just before a hearing. In these situations, you need to gather as much information as possible, as quickly as possible, in preparation for your case. It is important to know that, when working under such tight deadlines, your client may not feel comfortable enough yet to disclose details about trauma

and mental health conditions. In those situations, you are not likely to get complete and accurate information about this from your client. Under such circumstances, you may want to partner with an advocate who has been working with the survivor to assist in gathering this information and to provide you with the context necessary to understand and advocate for the comprehensive and individual needs of the survivor.

Techniques for Building Trust and Ensuring Informed Consent with Survivors Who Experience Trauma and/or Mental Health Symptoms

Survivor-centered interviewing skills are critical to providing comprehensive, individualized advocacy to survivors of domestic violence, whether or not a survivor has experienced trauma or mental health concerns. First, by offering a survivor the space to tell her own story, from her own perspective, an attorney can begin to lay the foundation for building trust. Second, when an attorney actively listens to a survivor's story, she gains a more comprehensive, contextual understanding of the survivor's needs. This rich understanding, when combined with a working relationship based on trust and respect for survivor agency, forms the basis of an effective survivor-attorney partnership that can work toward the expressed goals and objectives of the survivor.

Oftentimes in the lives of survivors, people were abusive or let them down, service providers responded ineffectively to them, and/or systems ignored or added to their pain. Each survivor has a unique perspective of these realities and lives with the effects of these negative experiences. A survivor's cultural background will also impact the way in which she perceives her prior experiences.

Many survivors who have experienced violence from an intimate partner and/or have trauma related concerns are often likely to accommodate what they think you want. This can play out in different ways. A client may ask you directly, "What do you think I should do?" Or, a client may intuitively pick up from your discussion with her what she believes you want her to do. You may think the survivor is making an informed decision when in fact she is trying to do what she thinks you want.

To overcome the distrust that survivors who are dealing with trauma-related or other mental health symptoms experience, lawyers must take steps to nurture a respectful working relationship with them. Lawyers should:

- ◆ Develop a basic understanding of trauma-related and mental health conditions that survivors may experience;
- ◆ Be skilled in listening and asking questions to understand a survivor's perspective and needs; and
- ◆ Know how to decide what information and options to offer to meet those needs.

It is within the context of a respectful relationship that lawyers can provide opportunities for survivors experiencing trauma and mental health challenges to access the resources they need and to exercise more control over their own lives.

Jill Davies has crafted a list of the ways in which advocates can offer concrete assistance to survivors who have experienced trauma resulting from multiple victimizations. Attorneys for survivors who are dealing with mental health challenges can assist clients by:

- ◆ Recognizing that survivors may be unable to access all of the details;
- ◆ Providing options and the time and space for survivors to make fully-informed decisions;
- ◆ Validating the survivor's feelings throughout the process;
- ◆ Being responsive to a survivor's requests for information and support, even if she asks for the same information several times;
- ◆ Partnering with survivors to identify alternative coping strategies, when they are engaging in self-harming behaviors;
- ◆ Finding supports for developing alternative or additional coping strategies;
- ◆ Connecting survivors who are experiencing a mental health crisis with a trusted mental health referral/resource; and
- ◆ Offering support to survivors who are using alcohol and/or drugs by safety planning and strategizing to the greatest extent possible at the time (including assessing risks and developing strategies that mitigate the risks posed by alcohol and drug use) and encouraging them to contact you again.⁵

⁵ Adapted from Jill Davies, *Helping Sexual Assault Survivors with Multiple Victimitizations and Needs, A Guide for Agencies Serving Sexual Assault Survivors* (July 2007).

Section Two: Client Counseling

Survivor-centered advocacy is based upon a partnership between the attorney and the survivor. The partnership draws upon the experience and knowledge of the survivor and the skills and resources of the attorney. The goal is to combine the expertise of both survivor and attorney to devise strategies that address the particular and comprehensive needs of the individual survivor. This partnership can proceed in three steps: (1) analyzing the risks, (2) reviewing previous/current safety plans, and (3) devising legal strategies.⁶

Work With The Survivor To Gain An Understanding Of Batterer-Generated And Life-Generated Risks.

Lawyers cannot begin to devise legal strategies for an individual client without gaining an understanding of the batterer-generated and life-generated risks she faces.

Trauma-informed legal advocacy takes time, but in the long run, it leads to more efficient, more effective legal advocacy for survivors. Here are some pointers for gathering the critical context:

- ◆ Be sure to schedule adequate client meeting time for you to gather this critical context.
- ◆ Give the client space to tell her story, so that she can identify her concerns as she prioritizes them.
- ◆ Use open-ended questions to facilitate information sharing.
- ◆ Listen more than you talk.

It is common for an abuser to attempt to use information about the mental health of a survivor to further the abuse and to gain advantage in a legal case. Develop an understanding of the ways in which the battering partner has used the survivor's mental health history in the past to further his power and control.⁷ Examples might include a batterer:

- ◆ Using a psychiatric diagnosis to silence his partner (e.g., "Who will believe a woman who is bipolar?").
- ◆ Threatening to sue for custody of the children and use her mental health history against her during the custody proceedings.

⁶ Jill Davies, *An Approach to Legal Advocacy with Individual Battered Women* (2003).

⁷ See Mary Malefyt Seighman & Erika Sussman, *Interviews with Survivors of Domestic Violence Who Have Experienced Trauma or Mental Health: Reflections on Their Experiences in the Justice System: Summary and Recommendations* (2010).

- ◆ Using a survivor's mental health history to convince systems (e.g., law enforcement, courts) that the survivor is not credible, that she is not a fit parent, that she needs to be institutionalized, etc.

Engage the client in analyzing the batterer-generated mental health risks that she faces now and in the future. Analysis of mental health risks may be complex. For example: a survivor who has suffered depression and anxiety as a result of her partner's abuse may suffer additional risks if her partner continues to abuse her upon her departure.

Battered women who lived with mental health conditions before they were with their partner may find that they have limited options available to them. For example: a survivor may face a greater risk of losing custody of her children, and she may be more vulnerable to future physical attack.

Partner With The Survivor To Devise Legal Options That Fit Within The Broader Context Of The Survivor's Safety Plan (Including Both Short And Long Term Goals)

The process of legal strategizing with survivors must take place within the broader context of safety planning. That context is what makes legal advocacy on behalf of survivors challenging; this is certainly true for survivors who are experiencing trauma-related and/or other mental health concerns.

Functionality and the Americans with Disabilities Act

Trauma-informed legal advocacy for domestic violence survivors requires that the lawyer work with the survivor to ensure that she can participate in the process fully. The Americans with Disabilities Act (ADA) is a critical piece of federal legislation that can assist survivors in accessing full participation.⁸

The ADA entitles individuals to protections stemming from their disabilities—related both to one's physical health as well as mental health.⁹ Lawyers should think with their clients about how the ADA can assist a survivor in the course of the legal advocacy process. Clearly, just because an accommodation is available does not mean that a client will want to avail herself of the accommodation. Therefore, the lawyer and client must dialogue about

⁸ Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§12101 *et seq.* (1990).

⁹ Under the ADA, an individual with a "disability" is a person who has a physical *or mental* impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment. Under Title II of the Act, no qualified individual with a disability shall be unreasonably discriminated against, or excluded from participation in or benefits of the services, programs, or activities of state and local government, including the judicial branch.

the challenges she anticipates during the course of advocacy and in the courtroom and consider the risks and benefits of requesting particular accommodations.

Exploring Legal Options

Jill Davies suggests the following process to engage survivors in exploring the legal options that a survivor may have available.* Attorneys who have more recently begun working with survivors of domestic violence may especially wish to review this list.

Options—Consider the various legal remedies that are available to address the survivor's circumstances. For example: civil protection order, custody order, criminal charges, public benefits, VAWA self-petition, etc.

Requirements - Examine whether the survivor meets the legal requirements for the remedy. Who is eligible? What does the person need to prove to be eligible?

Legal Process - Know the legal process required to access the option. Which court? What forms are required? When is the court open? Are there unique requirements established by local court or judge?

Additional Considerations—Know about other considerations. Will the legal option enhance her safety and that of her children? Could seeking this legal option make things worse for her? Does she have control over whether to initiate the court case or is the case in the hands of someone else (i.e., a prosecutor)?

Examine each of the above steps in partnership with the survivor. The answers to many of the questions will have a direct impact upon the survivor's life and her safety plan. She will need to know about the specific practical realities so that both she and you can: identify the barriers, craft solutions that address the barriers, and determine whether the remedies can address and meet her individual risks and needs.

*Jill Davies, *An Approach to Legal Advocacy with Individual Battered Women* (2003).

Examining Accommodation Strategies

Engage in a nuanced conversation with your client about how her ability to function will come into play during a courtroom proceeding. The key question is: *does your client feel that she can participate in the litigation process?*

The answer to this question will depend greatly upon the challenges that your client anticipates and the types of accommodation strategies you and she develop together to address those challenges. The following are some ideas to consider:

- ◆ Practice direct and cross-examination of your client to help her feel more comfortable with the process.
- ◆ Bring a support person to the hearing or trial (family member, friend, therapist, advocate, etc.).
- ◆ If your client begins to dissociate or to look like she's shutting down, request a recess from the court.
- ◆ If you do take a recess, work with your client to explain what happened and re-orient her to where she is.
- ◆ If your client is unable to recover that day, connect her with a mental health practitioner who can help her to re-enter the courtroom space with less trauma and equip her with strategies to help her get through her testimony and fully participate in the process to the best of her ability.

Attorney Self-Assessment

All lawyers doing this work should partake in an honest self-assessment to determine whether they are prepared and able to address the particular needs of a survivor facing trauma and mental health challenges. It may be helpful to ask yourself the following questions:

- ◆ Do I have the desire, patience, temperament needed to advocate for survivors who are struggling with trauma and mental health challenges?
- ◆ Do I have the skills needed to support survivors when they find themselves triggered by the legal advocacy process?
- ◆ If I don't personally possess all of those skills, who can I collaborate with to ensure that my client is getting the accommodations and support that she needs to fully participate in the process?

When Your Client is Unable to Testify

Under some circumstances, courts may consider a person to be "unable to testify" under the rules of evidence, and therefore entitled to an out-of-court deposition. Such a deposition allows a witness to contribute her testimony while avoiding the trauma of testifying in the courtroom. It is generally permissible provided the testimony meets the

other applicable rules of evidence. Some state courts (e.g., Ohio and Rhode Island) have developed special provisions that allow for out-of-court testimony by victims of sex crimes, abuse, and neglect who live with mental disabilities, thereby helping them to avoid retraumatization in the courtroom.

Assessing the Risks and Benefits of Accommodations

Lawyers will want to discuss with survivors the pros and cons of requesting accommodations. At the very least, a request for accommodations requires that the litigant disclose her disability.

Pros of Requesting Accommodations:

- ◆ If your client anticipates that mental health will be raised during the course of the trial, disclosure may carry little risk.
- ◆ Accommodations may help your client to participate more fully in the proceedings by reducing the potential negative impacts of participation (e.g., triggering of the effects of trauma).

Cons:

- ◆ If mental health is unlikely to be raised otherwise, the risk of stigma or unwarranted prejudice may be greater.
- ◆ Disclosure may result in mental health or trauma being raised as a substantive issue by the opposing party.
- ◆ In a custody case, this additional attention drawn to the mental health of your client may influence the weight given to this factor in the best interest consideration.

The calculus has real implications for your client and the way that she will experience the legal process. Therefore, she must be involved in analyzing and ultimately making this important decision.

Collaborating with Trauma- And Domestic Violence-Informed Mental Health Professionals to Address The Survivor's Range Of Legal And Mental Health Needs

Even the most seasoned domestic violence lawyers cannot know all there is to know about mental health issues facing survivors. Nor can attorneys take on the role of mental health professionals. For these reasons, it is critical to develop relationships with qualified mental health providers. Note that it will be important, prior to taking on any one case, to identify individual mental health practitioners who understand the political and individual context of coercive control and have expertise in trauma-related mental health conditions. During the course of your representation, you may consult with this mental health provider in crafting safety plans, in identifying remedies, and, when needed, to serve as an expert

witness. As with all collaborations that an advocate builds, you must obtain the informed consent of the survivor prior to sharing any information with the mental health provider. Be sure to be specific with your client about the scope, content, and time frame of the consent she is providing.

Encouraging Survivor-Driven Decision-Making

Many survivors who have experienced violence from an intimate partner and/or have trauma related concerns are often likely to accommodate what they think their attorneys want. As the attorney of a survivor living with trauma, you may experience this in several ways. Your client may ask you directly, “What do you think I should do?” or, from your conversation, she may intuitively pick-up on what she *thinks* that you want her to do.

As a result, you may think the survivor is making a decision for herself, when in fact she is trying to do what she thinks you want her to do. This is a problem that many lawyers (and other “helping professionals”) face. We are often asked what we think the client should do. We believe it is our job to answer this question. However, it is critical that we resist the temptation to tell our clients what to do. Knowing the law is not enough. You do not know the survivor’s life circumstances well enough to make this judgment. Even you did, it is the survivor who will have to live with the consequences of the decision. Lacking such context, you may suggest something that is not safe for the survivor. Or the survivor may not be able, for other reasons, to take the steps that you are recommending; she may then lose trust in you. Indeed, she may stop working with you altogether, without explanation.

In any of these situations: If a survivor is trying to accommodate what you have suggested without thinking through how it impacts her own circumstances, then she is not determining the course of her legal advocacy.

To avoid this, and to promote her active decision-making, you might try the following:

- ◆ Do not present legal options until you have had time to gather a contextual understanding of your client’s life circumstances and the abuse she has experienced.
- ◆ Make sure that you thoroughly discuss the choices. Do not move forward based upon a simple yes or a nod.
- ◆ When you present an option, engage your client in analyzing both the risks and the benefits, based on her individual life circumstances, as she anticipates them. You might ask:
 - ❖ If you were to do X, what about it might cause you to worry? What negative consequences can you foresee? What are the possible benefits?

- ◆ Once you have identified specific risks related to particular legal strategies, work closely with the survivor to create options that mitigate the risks she has identified. Then, engage her in considering the risks and benefits of those solutions.
- ◆ Give the survivor time outside of your meeting to make decisions, so that she can consider the options with the support of her family, friends, or an advocate.