



THE DELICATE TASK:

*CONDUCTING TRAUMA-INFORMED,
SURVIVOR-CENTERED INVESTIGATIONS*

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Today's Panel



Markus Funk | Partner
White Collar & Investigations



Gina LaMonica | Partner
White Collar & Investigations



Chris Wilkinson | Senior Counsel
Labor & Employment Law



Hon. Virginia Kendall
United States District Court ND IL



Patrick O'Rourke
University of Colorado Vice Chancellor & COO

Agenda

- Background: The “Trauma-Informed” Approach
- Preparing for the Investigation
- Conducting Trauma-Informed Interviews
- Delivering Findings: The Investigator’s Report
- Questions

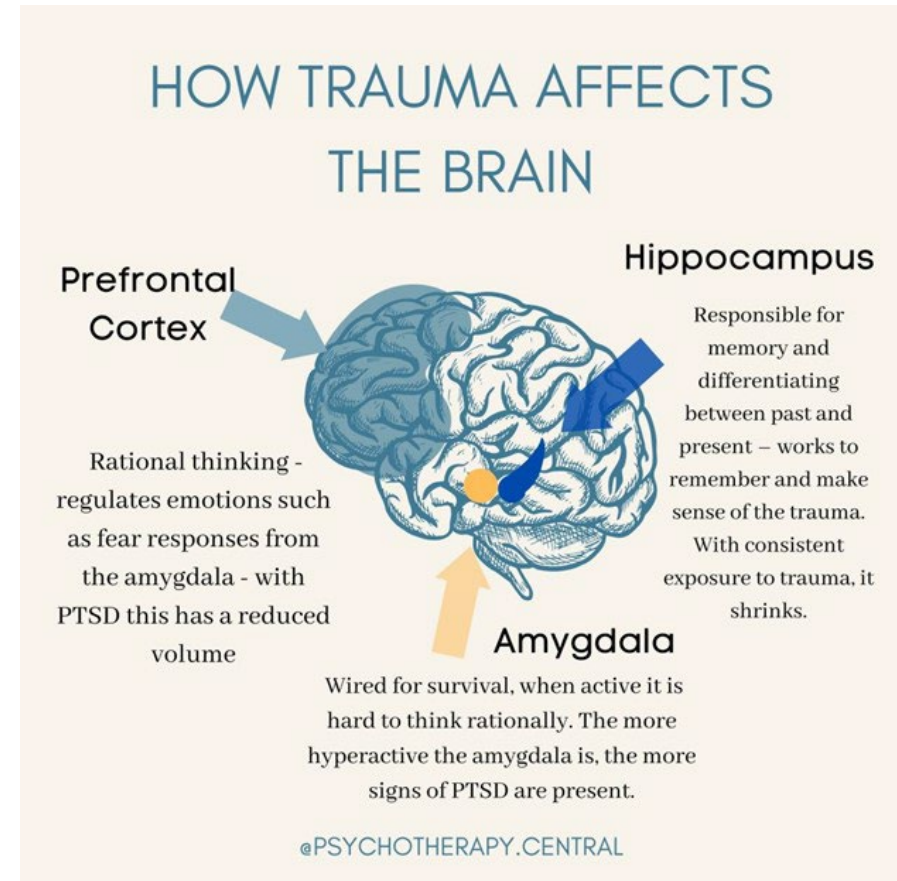


**BACKGROUND: THE TRAUMA-
INFORMED APPROACH**

Background

DEFINING “TRAUMA INFORMED”

- Terminology derives from social and behavioral sciences
- Reflects understanding that trauma may impact brain function and the ability of a witness to recall and recount an event
- Describes a method of interacting with witnesses in a professional manner that recognizes the potential impact of trauma



The Impact of Trauma

- Efforts to avoid thoughts on the traumatic experience
- Avoidance of reminders of the traumatic experience; triggers
- Inability to recall specific details or strange focus on one detail
- Inability to remain focused on the discussion; exhaustion
- Non-linear verbal explanations

The “Conventional Wisdom”

- Not *acting like a victim*
- Story *keeps changing*
- Seems *unsure* of themselves
- Not making *eye contact*, appears *nervous*
- Timeline not *adding up*
- *Suddenly remembers* new facts
- Fails to provide *details*

The Traumatized Witness

Trauma may make a witness appear:

- Unable to manage emotions (emotional *or* emotionless)
- Inconsistent
- Untrusting (of self and others)
- Non-linear and Non-chronological
- Vague
- Fragmented

Trauma Informed Investigative Practices

- Why Trauma-Informed:
 - Mitigate bias
 - Keep an open mind
 - Avoid making premature, inaccurate conclusions
 - Bolster credibility determinations
 - Minimize further trauma

Promote integrity and accuracy of the investigation

Where Does Trauma-Informed Apply?

Sexual Misconduct, Harassment, Abuse

Race and Gender-based Discrimination

Workplace Investigations

Cultural Assessments

Institutional Bias

Power-Based Harms

Integration of Trauma Informed Techniques

- U.S. Department of Education
 - Title IX Preamble instructs that institutions not precluded from “applying trauma-informed techniques, practices or approaches,” in an impartial and non-biased manner
- U.S. Department of Justice
 - Has endorsed trauma-informed care for victim’s rights; Office on Violence Against Women; Elder Justice Initiative; and National Strategy to Combat Human Trafficking
- Various state laws require or encourage trauma-informed training
 - Law enforcement
 - Educators, SROs
 - Mental health professionals

Case Study: The Trauma Informed Courtroom

- Recognize the victim needs possible protection
- The victim's identity should be shielded
- The victim should have a safe place to sit and wait for the court hearing
- Understand the trauma of being in front of the Offender
- The victim may need to take frequent breaks
- The victim needs to know and have access to services



**PREPARING A TRAUMA-
INFORMED INVESTIGATION**

The Basics

- **Guiding principle** for trauma-informed methodology: Respect the survivor's autonomy and control
- **Common (initial) reluctance** to report abuse/misconduct has many reasons (psychological, sociological, and practical)
- **Victimization operates on a continuum** – not an “on/off” switch
- **Each initial contact or interview** threatens to re-victimize the survivor - forces survivor to repeat and relive the traumatic experiences

The Trauma-Informed Approach



Transparency



Predictability



Control

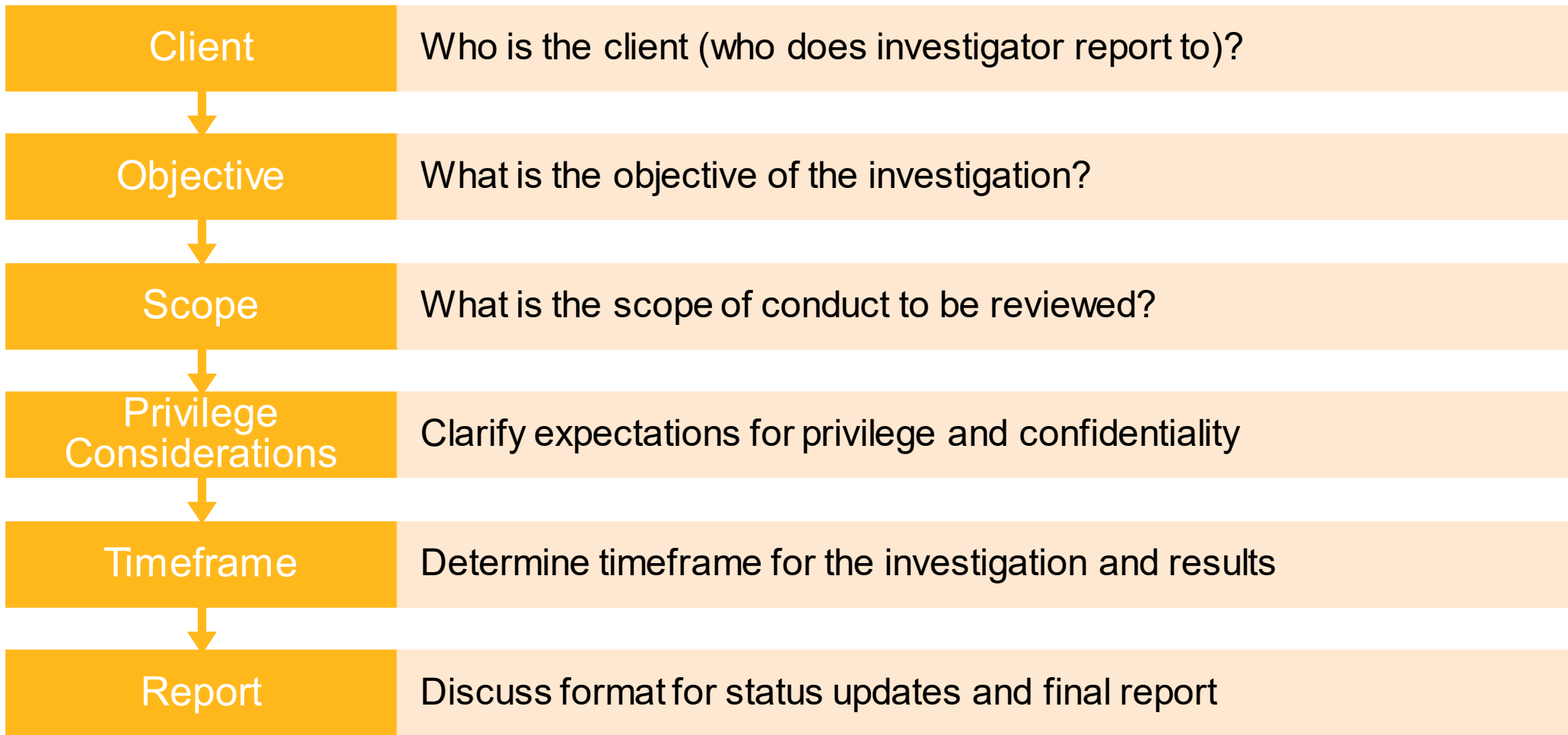


Reliability



Patience

Initiating the Investigation



Investigative Objectives

- **Balancing Act** – Need to harmonize survivor-centered approach with the need to conduct a factual investigation (and potentially prevent future/ongoing abuse)
- **To meet investigative mandate**, usually necessary to obtain detailed firsthand accounts from survivors
- **Particularly challenging** when misconduct is ongoing
- **Consider alternatives** to directly contacting witnesses that experienced trauma

Privilege Considerations

- “It is generally held that the **public disclosure** of a document—even a voluntary one—**does not waive the attorney-client privilege** as to the subject matter of the document itself, but, at most, to any privileged communications which are revealed in the public document.” *Waters v. Drake*, No. 14-cv-1704, 2016 WL 8118193 (S.D. Ohio 2016)
- “Baylor chose to publicly release a detailed summary of [outside counsel’s] investigation that disclosed, among other things, attorney-client communications. While the information contained in these summaries was previously confidential, **Baylor’s decision to prepare and release a summary** of those communications **indicates its intentional waiver** of that confidentiality.” *Doe v. Baylor*, 320 F.R.D. 430 (W.D. Tex. 2017)
- “**Defendants cannot have it both ways** and allowing Defendants to keep [outside counsel’s] materials confidential would be unfair given that Defendants were able to obtain that information under the guise that the investigation was “independent and external.” Interviewees, particularly current and former players, did not anticipate that their participation in the investigation and **the information they shared would ultimately be used in Defendants’ defense** of this lawsuit. *Wadley v. University of Iowa*, No. 20-CV-366, 2022 WL 18780000 (S.D. Iowa June 24, 2022)

The Limits of Trauma-Informed Techniques

- Trauma-informed practices should *not*:
 - Dispel credibility determinations
 - Misinterpret independent evidence
 - Replace or substitute for missing evidence
 - Unfairly impart a bias towards the truthfulness of a witness's statements

Trauma-informed is one technique, not the sole technique

Case Study: The *In-House* Perspective

- In-House Counsel Seeks to:
 - Advise relevant stakeholders (Board; Special Committee; Legal, etc.)
 - Protect independence/accuracy of the investigation
 - Harmonize institutional needs with outside counsel advice
 - Balance obligations to public
 - Appropriately address potential legal exposure



CONDUCTING TRAUMA- INFORMED INTERVIEWS

Guiding Principles

1. Respect the survivor's **autonomy and control**
2. **Identify** traumatization
3. **Adjust approach**/relationship accordingly
4. **Adapt strategy** to both prevent/minimize re-victimization while staying true to investigative objectives

Preparing for Witness Contact

- **Be intentional about first contact and framing**
- **Be compassionate**, present, and patient – and understand that not everyone reacts the same way
- **Remember** that trauma operates on continuum
- **Be affirming** and nonjudgmental – and be prepared to be flexible (logistics, breaks, etc.)
- **Validate** the survivor's feelings
- **Reassure** survivor that assistance is vital and appreciated
- **Explain** next steps in an honest and open way
- **Make follow-up plans**, discuss a safety plan, and provide contact information
- **Never overpromise** or minimize

Key Points Related to First Contact

- **Transparency:** Patiently and empathetically explain role, structure of engagement, and investigative mandate (whether criminal or civil)
- **Be prepared to address** any pre-conditions (seeing written questions in advance, copies of relevant documents, confidentiality, etc.)
- **Throughout interview** remind witness that:
 - Your help is incredibly important to us and to others
 - Uncomfortable questions play a role in fact-finding and remediation
 - Clarifying questions are not meant to place “blame”

Conducting the Interview

- Establish appropriate rapport
- Provide space for witness to tell their story
- Utilize open-ended, non-leading questions
- Ask about sensory observations (sounds, smells)
- Clarify through follow-up questions
- Corroborate with independent evidence where possible
- At all times remain engaged, present, empathetic, and non-confrontational

Interviewing Techniques

- **Remain aware** of any changes in demeanor in response to certain questions
 - Vague description of important facts/acts
 - Closed-off body language
 - Contextually inappropriate behavior (unusual emotional reactions, looking off into the distance or on the ground, not showing empathy towards other survivors, anger, resignation, false denial, flat affect, etc.)
- **Non-verbal expressions** may communicate more than language (but also keep cultural factors in mind – and prepare for them)

Interviewing Challenges

BE PREPARED FOR...

- **Witness's questions** about confidentiality and next steps
- **Indications** (including subtle ones) that witness fears retaliation/retribution, and stigmatization (studies show adults particularly reluctant to admit suffering from victimization)
- **Situations requiring** expert/medical assistance
 - Look for signs of PTSD, generalized anxiety disorder, major depression, substance abuse, physical maltreatment, etc.
 - Develop solid connections with trusted local resources/services for survivors



**DELIVERING FINDINGS: THE
INVESTIGATOR'S REPORT**

Reporting Findings

- What is the *format*?
- *Who* is the audience for the document?
- What is the *purpose* behind the document?
- How does the document get *used*?
- How does the document relate to *other documents*?

Additional Considerations

- Blaming vs Non-blaming statements
- Characterization as “Victim”
- Avoiding retaliation
- Witness safety
- Avoid re-traumatization

Putting It All Together

Privilege Considerations

Protecting Confidential Witness Statements

Conveying Sensitive Information

Dealing with Parallel Proceedings

Questions?

