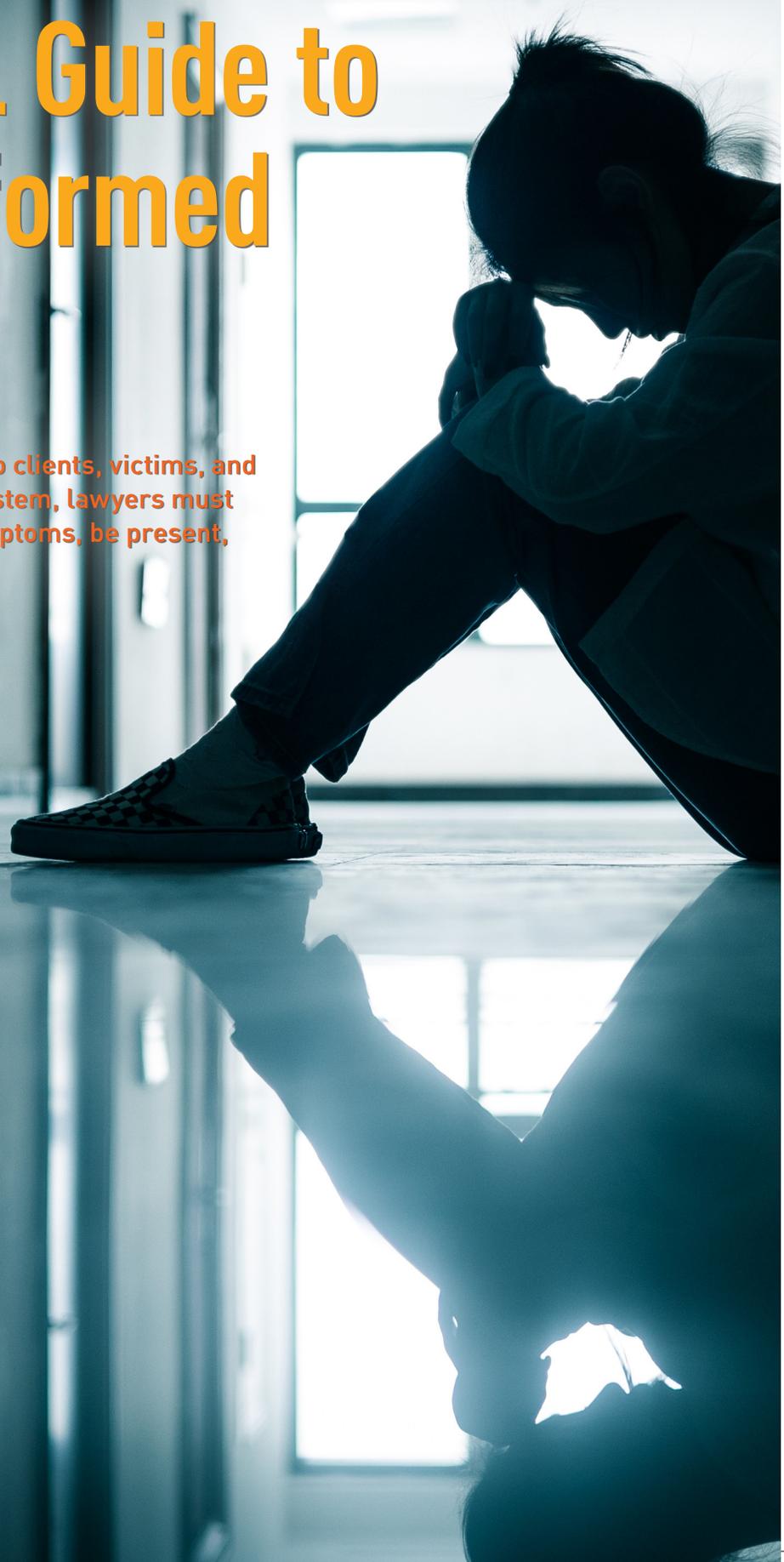
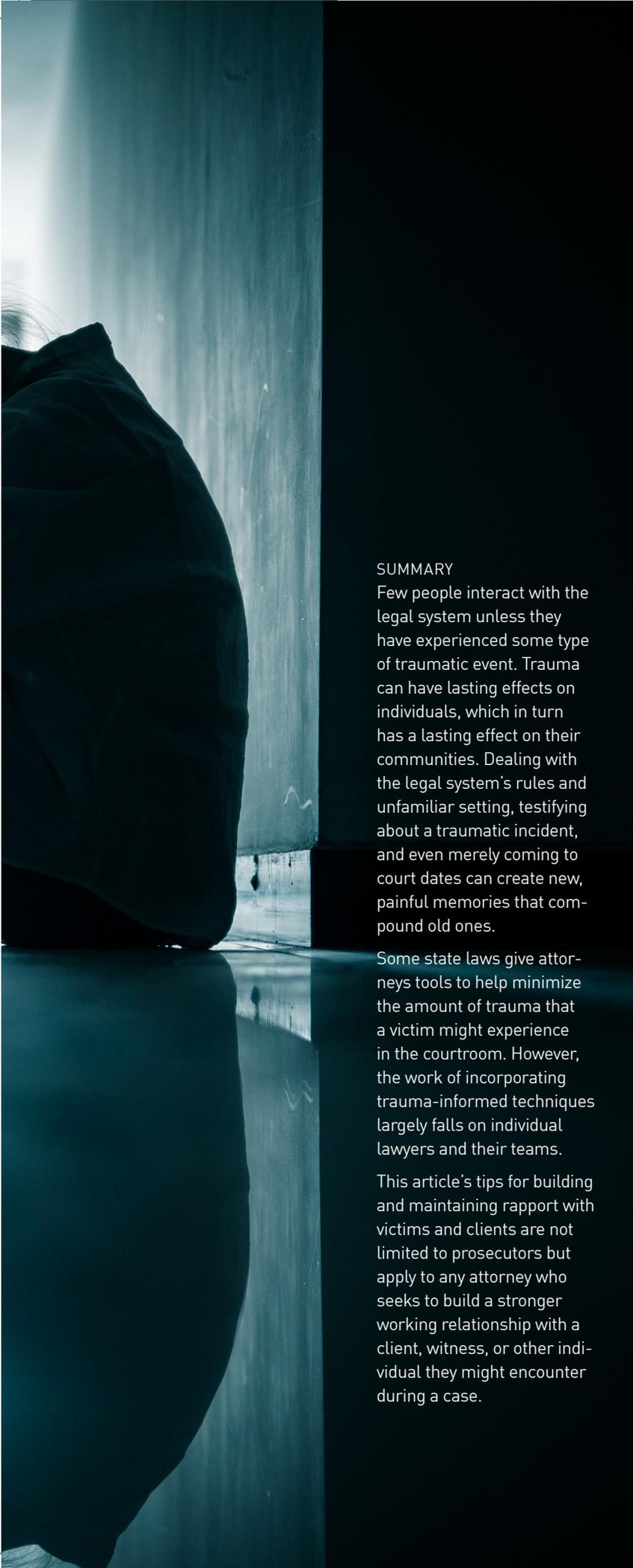




A Practical Guide to Trauma-Informed Lawyering

To provide trauma-informed service to clients, victims, and other people involved in the justice system, lawyers must recognize trauma's existence and symptoms, be present, offer choices, and share knowledge.





SUMMARY

Few people interact with the legal system unless they have experienced some type of traumatic event. Trauma can have lasting effects on individuals, which in turn has a lasting effect on their communities. Dealing with the legal system's rules and unfamiliar setting, testifying about a traumatic incident, and even merely coming to court dates can create new, painful memories that compound old ones.

Some state laws give attorneys tools to help minimize the amount of trauma that a victim might experience in the courtroom. However, the work of incorporating trauma-informed techniques largely falls on individual lawyers and their teams.

This article's tips for building and maintaining rapport with victims and clients are not limited to prosecutors but apply to any attorney who seeks to build a stronger working relationship with a client, witness, or other individual they might encounter during a case.

BY KIMBERLY A. HARDTKE

Working with crime victims is not for the faint of heart. As representatives of the state, prosecutors carry the burden of both advocating on behalf of the community and working with victims and other key witnesses without *representing* them. Countless words have been written and spoken about the power wielded by prosecutors and their exercise of discretion, and the best prosecutors do not carry this burden lightly. The best prosecutors likewise eventually learn how to navigate the difficult terrain of working with victims who might be still experiencing the aftereffects of a traumatic event. This is an often unrecognized, undervalued skill but is one that every lawyer who works with clients or witnesses should seek to develop.

As a rule, attorneys deal in facts, in carefully crafted legal analysis and argument, in rules that govern both inside and outside the courtroom. From the first day of law school, students are taught to “think like a lawyer,” which often means setting aside emotions in favor of a more analytical, calculated way of approaching a problem. But as experienced attorneys know, attorneys are also in the “people” business. And those people – crime victims, witnesses, clients – have often been through extraordinary trauma.

Very few individuals have reason to interact with the legal system unless they have experienced some type of traumatic event. Be it a crime, a divorce, an injury, or a stressful financial situation, the trauma that arises from these events can have lasting effects on individuals, which in turn has a lasting effect on their communities. Dealing with the rigid rules and unfamiliar setting of the legal system, testifying about

a traumatic incident, and even merely coming to court dates can “create new, painful, and traumatic memories that compound older pain.”¹ Attorneys guide these lay individuals through a system that might be foreign to them, often while they are still deep within the throes of whatever traumatic situation brought them to the courthouse. This is true not only for prosecutors but also for criminal defense attorneys, civil attorneys, family law attorneys, and any lawyer who interacts regularly with members of the public.

Being trauma informed should be more than the latest buzzword. It requires attorneys to invest time and attention when dealing with people who are not attorneys. Time and attention are perhaps the scarcest resources any individual attorney has. However, adopting trauma-informed principles into our practices can reduce the amount of re-traumatization that individuals experience during their interactions with the legal system.

What is Trauma-Informed Lawyering?

In this article, “trauma-informed lawyering” refers to ways to use trauma-informed principles to enhance interactions between lawyers, people who are not lawyers, and law enforcement officers and court-system employees. Trauma-informed principles can and should also be used in substantive ways – many of these techniques can be effective when collecting statements, eliciting testimony, or arguing a particular position during



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a court proceeding. For example, much research has been done in the field of trauma-informed interviewing with the goal of maximizing the effectiveness of interviews between law enforcement officers and crime victims.² These substantive techniques are important because they form the foundation of a strong, trauma-informed case.

Attorneys can then build on this

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foundation using similar trauma-informed principles to help minimize the effects of additional trauma, created or exacerbated by activities like speaking with investigators, going to court proceedings, or testifying. Doing so can result in more effective communication with victims or clients and ultimately achieve better outcomes. Returning to the example of the criminal prosecutor, attorneys who work with crime victims in a trauma-informed way can help victims feel heard about the victims’ experiences and thereby ultimately increase trust in the criminal justice system. Again, many of the tips for building and maintaining this rapport are not limited to prosecutors but apply to any attorney who seeks to build a stronger working relationship with a client, witness, or other individual they might come into contact with during a case.

Recognizing the Trauma Response

Learning how to mitigate the effects of trauma requires a basic understanding of the effects of trauma on people’s bodies, including their brains. As a general principle, there is no one way that any given crime victim will respond to a traumatic event.³

A human body’s response to a traumatic incident is, in the most general of

terms, caused by hormones that flood through the body when a brain senses danger. This stress response affects the brain’s executive functioning, the encoding (and ultimately retrieval) of memories related to the event, and the person’s behavior while experiencing the traumatic incident.⁴

In the short term, symptoms of trauma can manifest as shock, fear,

anxiety, confusion, or withdrawal from normal activities and routines. An individual still experiencing the effects of a traumatic incident might present in a variety of ways – from hyperarousal or hypervigilance, to severe and abrupt mood swings, to dissociation from or denial of the incident. They might experience chronic fatigue, have poor concentration, or engage in high-risk coping or avoidance behaviors. For some victims, these effects of trauma are relatively short in duration, with many experiencing a reduction in symptoms within a few months. Others might continue to struggle with the aftereffects of a traumatic incident for years. Some commonly recorded victim responses to trauma include the following:

- Depression or suicidal ideation
- Use of alcohol, drugs, or both
- Eating disorders
- Posttraumatic stress disorder (PTSD)
- Relationship difficulties
- Physical symptoms

The individual’s longer-term response will vary based on a variety of factors, including the nature of the traumatic incident, environmental conditions, the individual’s attributes, and the availability of social support and resources.

In practice, this means that attorneys might notice that a victim abruptly

cancels or is a “no show” for scheduled phone calls, meetings, or court hearings. It might seem as though the victim is unable to focus during a meeting or to retain information that is conveyed. A victim might seem to experience extreme emotional swings, become defensive, or fixate on seemingly non-relevant issues. In some situations, the idea of continuing to participate in the legal process seems too large a burden and will result in a victim disengaging entirely. While none of these behaviors is evidence proving that a traumatic incident occurred, recognizing them as potential symptoms of trauma can help put counterintuitive, sometimes frustrating, victim behavior into context.⁵

Laws and Their Limits

Although the adversarial jury-trial system has many features that are inherently re-traumatizing for litigants, Wisconsin’s legislature and courts

have taken some steps to attempt to minimize re-traumatization while still protecting the rights of participants. A particularly compelling example can be seen in the development in the last several decades of laws related to the rights of crime victims.

Since 1980, Wisconsin law has codified the rights of victims and witnesses of crimes, resulting in the laws that are now enumerated in Wis. Stat. chapter 950. While there have been various updates to the “basic bill of rights for victims and witnesses” since it was first passed, even the earliest iterations of the law guaranteed such rights as the ability to be informed about the final disposition of a case, to be protected from harm related to cooperation with law enforcement agencies, to speedy disposition of the case, and to be made aware of available services.⁶ Wisconsin’s robust victims’ rights laws were further modified in April 2020

with the amendment of the Wisconsin Constitution to include article 1, section 9m, colloquially referred to as “Marsy’s Law.”

These laws afford crime victims important rights and protections, designed in part to reduce the amount of additional trauma that a victim might suffer when going through a legal proceeding. Perhaps the most basic example of this is the right “to be treated with dignity, respect, courtesy, sensitivity, and fairness.”⁷ Notably, this provision is not limited to judges, prosecutors, and law enforcement officers but is broad in scope and should apply to any individual who interacts with a crime victim during a criminal case. Other important rights aimed at reducing the trauma that victims might experience in the courtroom include the right to privacy, to “timely disposition of the case,” to “reasonable protection from the accused” throughout the case, and to “be

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heard in any proceeding during which a right of the victim is implicated.”⁸

While these rights are important, they are also necessarily limited. While criminal justice system partners should strive to consider and accommodate victims whenever possible, there are some instances when a victim’s rights can – and should – be superseded by other constitutional or statutory considerations. Although every effort should be made to minimize re-traumatization of victims by the criminal justice system, the rights of a crime victim “may not supersede a defendant’s federal constitutional rights or to afford party status in a proceeding to any victim.”⁹ For example, a fundamental tenet of our criminal justice system is the accused individual’s right to confront their accuser. Although testifying in court will undoubtedly be traumatic for most crime victims, prosecutors must be held to their burden to prove the case beyond a reasonable doubt before serious consequences such as the loss of freedom may be imposed. In that situation, the defendant’s right to make the state prove its case outweighs the consideration of minimizing the victim’s re-traumatization.

Similarly, the statutory rights of crime victims are limited in that they “shall not be construed to impair the exercise of prosecutorial discretion.”¹⁰ While a victim has a right to give input to the prosecutor including on issues such as whether charges are filed, how a case is resolved, and what the sentencing recommendation should be, the prosecutor has an independent duty to evaluate the case and act in the best interest of the community as a whole.¹¹

Laws such as chapter 950 and “Marsy’s Law” give attorneys tools to help minimize the amount of trauma that a victim might experience in the courtroom. However, the work of incorporating trauma-informed techniques largely falls on the individual lawyer and their team who interact with victims outside of court, prepare them for different types of proceedings, explain litigation options, and listen to a victim’s input as to the outcome of the case. Performing these tasks in a trauma-informed way helps build rapport but also helps victims feel empowered throughout the entire time that the case is making its way through the court system.

Fortunately for attorneys who want to adopt a trauma-informed approach

when working with victims, many of the ways to reduce re-traumatization are relatively easy to implement and cost next to nothing. When a traumatic event causes a victim to feel a loss of control and to feel confused as to what is happening to them, attorneys can help victims feel empowered by offering choices and by taking the time to thoroughly explain what to expect during each step of the process.

Offer Choices

Attorneys like to be in control. Especially when attorneys have full calendars and overwhelming caseloads, it is often the attorney who chooses the location, duration, and topic of a meeting with a client or a victim. Prosecutors, for example, schedule on their calendars first and then allow victims some (limited) choices depending on the prosecutor’s availability. This is often unavoidable.

Often, however, crime victims have been through an experience that caused them to lose a sense of self-efficacy. There are ways to give power back to victims by giving them choices as to how meetings unfold.

Attorneys should consider offering choices as to the mechanism by which the meeting will be held. Some people prefer to meet in person, some prefer telephone. With the expanded availability of virtual meeting platforms since 2020, a victim or client might prefer to meet by videoconference. Honoring the victim’s preference whenever possible helps assure the victim that the attorney is comfortable meeting in the way that the victim is most comfortable.

Similarly, going to the courthouse or an attorney’s office can be re-traumatizing for some individuals. Is a neutral meeting site, such as an advocate’s office where the victim is already comfortable, an option? If the victim must go to the attorney’s office, the attorney should offer them the opportunity to choose where to sit in the meeting room, let them know that it is

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acceptable to ask for a break if needed, and allow them to have appropriate support people present when possible. Each of these small actions can demonstrate that the attorney is thinking about the victim as a person, not as a case.

Knowledge is Power

Many victims' first personal encounter with the legal system will be when they meet with a prosecutor. Courthouses are imposing buildings, and judges and lawyers sometimes seem to be operating under a secret code and language that can be difficult to decipher for the uninitiated. Taking the time to explain the process in a way that the victim can understand, but that is not demeaning or patronizing, can make all the difference when the victim does enter the courtroom to observe the proceedings.

Because trauma can affect a victim's ability to retain information, it is usually best to focus on one hearing or issue per meeting. The amount of information that an individual will be able to retain in a meeting will depend on many factors, including how recently the traumatic event occurred. The attorney should be open, however, to responding to the victim's questions or concerns. If there is something that the victim is worried about or particularly wants to address, it may be easiest to deal with that topic first so that the victim is not distracted while covering the items that the attorney wants to talk about.

Along the same lines, providing honest, accurate information is key. Overpromising results or overly sugar-coating bad news will only serve to

destroy any credibility or trust the attorney has previously built with the victim. Attorneys should be clear about their boundaries and those in the courtroom, be forthright about challenges, and offer possible solutions.

The Importance of Being Present

The world is rife with distractions. Effective multitasking is an important skill for attorneys, but it is not appro-

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appropriate during meetings with victims or clients. No matter how many open cases an attorney has, during meetings the victim should feel as though they are the most important person in the room – because they are. Attorneys should avoid checking their phones or computers unless necessary and be transparent with the victim if they need to do so and why. When time is limited, the attorney should set those expectations at the outset of the meeting so the victim does not feel cut off or rushed when time runs out.

Perhaps the most important skill any attorney can practice is active listening. Hearing what the victim says, and observing their body language and demeanor, can go a long way toward understanding what is most important to the victim at that time. Being allowed to

vent frustration or other emotions can help the victim process the traumatic incident and feel as though their input matters and is being taken seriously.

Conclusion

For many attorneys, these trauma-informed techniques for working with victims (or clients) are obvious or intuitive. That said, understanding the neurobiology of trauma can help at-

torneys understand *why* some of these simple steps can go such a long way to help build relationships and ultimately better our practices.

When resources are scarce and case-loads are high, it can be very challenging to devote the time and attention necessary to create a meaningful connection with a crime victim, witness, or client. Recognizing signs of trauma and integrating a few simple trauma-informed techniques can go a long way to help reduce re-traumatization of victims, witnesses, and clients and even to produce better outcomes in individual cases. **WL**

ENDNOTES

¹*State v. Hineman*, 2023 WI 1, ¶ 63, 405 Wis. 2d 233, 983 N.W.2d 652 (Karofsky, J., concurring) (quoting James Marsh & Margaret Mabie, *Trauma-Informed Advocacy*, Trial (Aug. 2022) at 38).

²See, e.g. Kimberly A. Lonsway, Jim Hopper & Joanne Archambault, *Becoming Trauma-Informed: Understanding and Appropriately Applying the Neurobiology of Trauma*, End Violence Against Women International (Dec. 2022), https://evawintl.org/wp-content/uploads/2019-12_TB-Becoming-Trauma-Informed-Trauma-to-Victim-Interviews-1.pdf.

³Nicole P. Yuan, Mary P. Koss & Mirto Stone, *The Psychological Consequences of Sexual Trauma*, VAWnet (March 2006), <https://vawnet.org/material/psychological-consequences-sexual-trauma>.

⁴Jim Hopper (2020). *Important Things to Get Right About the "Neurobiology of Trauma" - Part 1: Benefits of Understanding the Science*, End Violence Against Women International (Sept. 2020), <https://evawintl.org/wp-content/uploads/TB-Trauma-Informed-Combined-1-3.pdf>.

⁵*Id.*

⁶Wis. Stat. § 950.04 (1979-80); see also 1979 Assemb. B. 1043.

⁷Wis. Const. art. 1, § 9m(2)(a).

⁸Wis. Const. art. 1, § 9m(2)(b), (d), (f), (i).

⁹Wis. Const. art. 1 § 9m(6).

¹⁰Wis. Stat. § 950.01.

¹¹See Wis. SCR 20:3.8. **WL**