

## Understanding the Traumatized Witness

by Laurie Hood, M.S.



**O**NE OF THE BIGGEST challenges lawyers face is witness examination. You know your job, you have done the preparation and yet, somehow, at some point, your witness seems to transform right in front of your eyes. You know the story. Witness “X” has presented in your office as thoughtful, credible, and in control of his or her faculties and when the witness becomes stressed through the process of being questioned, he or she falls apart. Not the “break-down, cry, I need a minute” kind of fall apart, but the “morph into what seems to be a totally different person” kind of fall apart.

The once thoughtful and articulate person suddenly stops finishing sentences or completely loses the train of thought. The pitch of the witness’ voice goes up and their speech becomes rapid, pressured, and choppy. The witness may become overly defensive and appear aggressive or say things that seem to come out of the blue. What is going on?

### “How Did My Witness Suddenly Become a Complete Train Wreck?”

If your witness has transformed into a different person right

before your (and the jury’s) eyes, you could be dealing with someone who has unresolved trauma. And while it’s not your job to diagnose trauma, it *is* your job to present your case.

It helps to understand what happens physically, psychologically and physiologically when unresolved trauma is activated. It also helps to have a few of the terms psychologists and trauma-informed researchers and therapists use:

1. **Trigger:** Something that sets off a **memory** or flashback transporting the person back to the event of her/his original **trauma**.
2. **Trauma:** Something that overwhelms an individual’s ability to cope and produces a sense of helplessness and/or fear of devastating loss or death.
3. **Flashback:** a sudden recollection of the past which can involve any of the senses. The key is that the person *relives* the experience and is unable to fully recognize it as a memory.

4. Reptilian brain: The oldest and most primitive parts of the human brain and is shared by all reptiles and mammals, including humans. It is responsible for coping and unconscious and survival functions.

When an individual's prior trauma is activated (I prefer the term "activated" over "triggered"), their fight or flight response hijacks their brain and body. Cortisol and other stress hormones flood their system and their reptilian brain takes over. Depending on the circumstances and degree of the trauma suffered, a person may become mildly agitated and distracted or completely unable to function.

### **"How Can I Help My Witness Regain Composure and Focus?"**

While each person is unique, most people will respond positively to the following thought processes and actions from you:

1. Realize that your witness is triggered
2. Focus first on *yourself*
3. Take a slow, deep breath
4. Slow your speech
5. Lower the pitch of your voice
6. Lower the volume of your voice

If you are well trained or have a consultant who is trained in trauma informed work to support you, you can try the following:

1. Move closer (if appropriate)
2. Make eye contact (if appropriate)

Let's take each of the above actions one by one and begin to build an understanding of how and why they might impact your witness.

1. Realize that your witness is triggered: Just by recognizing that your witness may be experiencing the triggering of unresolved trauma, you will shift your perception. Most of us feel compassion for others when we realize they are hurting or struggling. It is also helpful to understand that if your witness is truly triggered, their reaction and perceptions are largely, if not completely unconscious and out of their control.
2. Focus first on *yourself*: While this seems counterintuitive to most of us, it is one of the most powerful tools avail-

able to you. First, it is truly the only thing under your control and second, your level of tension, intensity or stress—what I call "rev" (as in revving an engine), has an impact on those around you. So, even if you are happy and positive, if you are all revved up, you will likely add to a person's level of angst if they are triggered. So, focus on yourself and try to lower your intensity (rev).

3. Take a slow, deep breath: One way to lower your rev is by taking a deep, slow breath. I am talking about a letting go, relax *your* body kind of breath. If you are able do this so that it is obvious (to your witness), it will almost certainly help to relax him or her. Much like a contagious yawn, when one person takes a slow, deep and cleansing breath and releases their own tension and anxiety, those around him or her unconsciously relax as well.
4. Slow your speech: When someone is already feeling overwhelmed, whether by the stress of being on the witness stand or by truly being triggered by past trauma, anything that adds to that feeling of overwhelm, is unhelpful. By slowing your speech, you give your witness the additional time necessary to think and process his or her thoughts, bodily sensations and signals and emotions.
5. Lower the pitch of your voice: The same thing goes for lowering the pitch of your voice. Most humans respond to and read (correctly) that a voice that is higher in pitch due to strain or stress is the sign of a person being less in control of themselves or stressed. People who are less in control are more threatening. When you lower the pitch of your voice (especially in conjunction with slowing your speech) you signal to your witness that you are calm and in control (translation = safe).
6. Lower the volume of your voice: Lowering the volume of your voice (within acceptable limits in a courtroom setting) will have a similar effect as slowing your speech and lowering the pitch of your voice.
7. Eye contact: One of the most powerful things you can do to help your witness calm down and find their balance is to gain and maintain eye contact with them. We are social beings and have evolved to connect with others. When we make eye contact with another person, our frontal lobes (our higher order thinking centers), become engaged. And, at this point you can probably guess what happens. When an individual begins to engage their frontal lobes, they are no longer operating out of their reptilian brain. This should only be attempted if you have received actual training or support from a trauma informed consultant. Done without this nuanced training or support could wind up making matters worse.
8. Move Closer: This works the same way as eye contact and can go just as wrong. Please only attempt this if you have appropriate training and/or support.

Obviously, you won't be able to do all of these things all of the time and they won't all work 100% of the time. However, think of them as skills that you can hone. Practice seeing and attending to different aspects of each of the above skills or tools outside the courtroom. Watch people *closely*. Watch *yourself closely*. Try to approach these skills and understandings of human behavior and psychology with some curiosity and experiment with them. Learn to watch for signals that someone may be triggered. What does it look like? What feelings are elicited in you? The better you are at reading and understanding people and the more aware you are of your own responses and reactions, the more powerful you will be as a litigator.

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*Katherine James responds:*

### ***Plan A Is to Practice and Practice and Always Have a Plan B Just in Case!***

Ms. Hood points out a very traumatic moment in the life of any attorney. She offers a very useful list of "what to do when this happens to you." What she very kindly does not offer is what I offer here.

If this happens to you because you have a third party witness on the stand, that is, someone with whom you have not been allowed to meet before the trial, follow Ms. Hood's instructions to a "T".

If, however, your own client or a witness you have had the opportunity to prepare has a breakdown like this I must say, "Shame on you." Why? It is part of your job to figure out if this witness has a predisposition to this kind of melt down. Especially when you have been working with a client.

### ***How Do You Discover This Predisposition?***

If you have role-playing as the major cornerstone of your witness preparation practice, you are much more likely to realize that somewhere along the line of questioning you are hitting some odd nerve--or that the witness is presenting "emotionally" in a way that you don't expect. Not only does this require that you role-play, but that you are open to dealing with your client beyond the simple "four squares" of the case.

I love lawyers. I love lawyers so much that I have worked with them almost every working day of my life for 39 years. Heck, I love them so much I gave birth to one. That being said, most lawyers get so caught up in the nuts and bolts, facts and law, timeline and theory of any case that they forget that the human being in front of them isn't just a repository of logically ordered testimony that neatly fits into their perfectly orchestrated case.

They prepare their witnesses in a lecture form, going over documents, timelines and events in a barrage of information. This is like reading a lengthy impenetrable brief loudly at someone. Without ever bothering to look up and how it is being received and experienced by the poor, barraged listener.

Role-playing at least gives an attorney a shot at observing what experience the witness is having in role. For example, as you are practicing you notice that the witness stops breathing, their voice goes up in pitch, all words desert the witness, the witness can't repeat what you've just said...in other words, exhibits even in a small way the symptoms that Ms. Hood describes.

THIS IS YOUR HEADS UP THAT THERE IS SOMETHING GOING ON HERE THAT MIGHT NOT HAVE ANYTHING TO DO WITH THE CASE.

Human beings have had experiences in life that are traumatic, deep-seated, and can leap up and grab your witness by the throat if you don't figure out what's go-

ing on in the "safe" space of your office conference room. For example, some people have wounding experiences during which some person in authority has been asking them questions. Sounds a lot like testifying, doesn't it? However, those experiences involved everything from parents demanding, "Do you want me to hit you again? Is that what you want?" to rapists seething, "Or I'll kill you." Ms. Hood is right. You aren't a psychologist. But, you are someone who can teach the witness to breathe, how to mirror your slowed down speech, how to look to you and trust you. In other words, set up a "Plan B" for if the witness gets triggered on the stand.

What is "Plan A"? That is the plan where you have worked through the issues enough to put the witness on the stand without needing "Plan B". Where the witness trusts and believes in you and has come to rely on you to be the port during their internal storm.

The moral of Ms. Hood's story for me remains: Really prepare the ones you can and have Ms. Hood's wise advice in your back pocket for those you can't.

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*Elaine Lewis responds:*

## **The Importance of Listening, Teaching a Witness the Rules, and Practicing Responses**

I commend the author for choosing to offer guidance on the under explored topic of how to help a traumatized witness regain composure. The issue is certainly fertile ground for helpful input.

Unfortunately I find the author's premise, that an attorney can be blindsided at trial by his own witness suffering an unexpected total meltdown, to be unlikely, unless trial preparation has been meager to non-existent. Meltdowns tend to occur before trial, when the witness is being prepared for direct examination, or in deposition when the witness is asked questions by the opposing attorney. It's hard to imagine that the triggers and flashbacks responsible for a meltdown had been benign in practice and suddenly activated at trial, unless the triggers had no relevance to the testimony to be presented.

In order to be sure my experiences with traumatized witnesses are not somehow unique, I made calls to a few litigators for whom I have prepared witnesses, to ask if they ever had a witness surprise them by unexpectedly falling totally apart at trial. Every attorney I spoke with reported this had not happened to them, nor had they any recollections of it happening to other attorneys at trial. Among the voices weighing in was Joel C. Bender, a highly regarded matrimonial attorney from New York. As you can imagine, the field of matrimonial law is particularly fraught with the potential for traumatized witnesses. Mr. Bender, a Fellow of the American Academy of Matrimonial Lawyers, has been a litigator for more than 40 years and has taught trial techniques at CLE programs run by the American Bar Association. He too said an attorney finds out about any testifying problems his client may have when preparing the client for trial – not during trial. Before trial is when to deal with a traumatized witness. Either the problem gets fixed then, or “you damn well better figure out how to settle the case.”

## **It Seems the Advice Offered in This Paper Addresses a Very Narrow Problem.**

But let's assume, as does the paper, that for some reason there has been no hint to an attorney that he might be faced with a traumatized witness at trial. The author offers a list of 8 actions an attorney should take to calm his witness. In reviewing the list, my reaction is that some of the recommendations would be intuitive to a good litigator, and some not workable in a trial.

Surely any litigator faced with an incoherent babbling witness recognizes a problem whether or not it's caused by trauma, and will do anything in his power to help his witness. The advice to attorneys to focus on themselves first, take slow deep breaths, and lower vocal pitch, all assume an attorney would exhibit uncontrolled readable stress. I believe good litigators would be good actors in another life. The last thing they would reveal to their witness in trouble is stress or tension.

The directions to slow down speech, and lower volume, seem unnecessary. In direct examination an attorney has little reason to fire questions at his witness or raise his voice. He is there to be supportive, not challenging.

Moving closer to the witness may not work for a number of reasons. Often the closer an attorney stands to a witness, the more intimidated and nervous a witness can become. Further, the option may not even be available because where an attorney stands in relation to the witness is often a courtroom rule.

As to the direction to make eye contact with the witness, I find myself wondering where the attorney would be looking in the first place if not at his witness.

I don't doubt the author's expertise in dealing with trauma. Perhaps the techniques are helpful and effective in the quiet of a therapist's office, but I question their usefulness to an attorney in the middle of trial. The list of actions to take might have been more persuasive had the article included examples of the

successful application of the advice. As it stands, the impression is that the 8 steps are unproven theory.

I have prepared quite a few traumatized witnesses during my more than 20 years as a consultant. Not atypical of traumatized witnesses is Brooke, an articulate, highly educated woman, accustomed to speaking before large groups, who suddenly became totally incoherent at her deposition. The questions she was asked didn't seem to register. She couldn't focus. Her answers made no sense. She would lose track of what she was talking about. She dissolved into a puddle of tears so often that the deposition day was filled with endless exits from the room so her attorney could try to get her back on track. She was never able to pull herself together that day, although her attorney was kind and sympathetic, and tried to help. It was after this I was called into the case. When I met Brooke, she was still so distraught she burst into tears immediately after “hello.”

I approached the task of turning this traumatized witness into someone who would be able to string complete sentences at trial in the same way I work with all similarly suffering witnesses. I didn't start with rules. I didn't start with practice. I listened to her. I let her talk and cry and tell me all the things that were upsetting her. She wanted sympathy and I gave it. She told me how her husband of 14 years, with whom she was deeply in love, had out of the blue served her with divorce papers. Just 20 days prior to serving the papers, on her 42nd birthday, he had written her a note saying, “Every year with you is a gift. I love you.” To make matters worse, as soon as the papers were served, he left the marital home to live with the ex-wife of one of his frat buddies, who Brooke learned was carrying her husband's child. Another looming assault was the husband's threat to seek custody of their 10-year-old son. The husband, a hedge fund professional earning more than \$10 million dollars in the final year of the marriage, had plenty of money with which to go to war. This much of the story is only the tip of the iceberg. The case details would fill a novel. At any rate, I allowed Brooke

to go on and on until the flood of tears ran down.

Then I slowly introduced the idea that in spite of how hard all of this was for her, I was going to give her techniques for answering questions that would help her get through testifying at trial without a repeat of her tortured deposition experience.

Most witnesses I work with are grateful for help. Testifying is stressful, and particularly so for traumatized witnesses. Once a witness learns there are rules and techniques to follow I find their fighting spirit returns. They become motivated and focused.

My method is to begin by teaching the differences between direct examination and cross examination. I explain the rules attorneys must follow when examining their own witness and the rules they follow when cross examining the opposing attorney's witness. Full understanding of when to talk and when it's best to keep answers short is very empowering to a witness – especially a traumatized one.

I don't just talk about rules for testifying. I make sure the witness has a lot of practice.

For practice on direct examination I take the witness through the story over and over again until the sensitive parts begin to lose their power to activate trauma. Repeating the story many times is not about memorizing anything. The purpose of the repetition is to help the witness become comfortable discussing material mined with potential trauma triggers. A side benefit of all the work on direct is that the story becomes more organized and clear.

Although one can't be certain what questions will be asked in cross examination, it's important for a witness to get enough practice answering the types of questions that could be posed. There is no memorizing of specific answers to anticipated questions. The practice on cross is to make sure the witness can answer appropriately, whether or not a question had been expected.

Traumatized witnesses are especially sensitive, so I try to build up their confidence by praising something they have done well before making any corrections. I feed criticism slowly. I have learned that giving a witness a long list of mistakes all at once can activate additional trauma or trigger some other unknown insecurities.

Eventually Brooke was able to handle herself quite well in practice sessions with her attorney. The real test was trial. As it turned out, Brooke was called first by the husband's attorney. At the end of the day of testimony, her attorney phoned me, almost giddy, to tell me that not only had Brooke been calm, she had been so effective he chose not to rehabilitate. He was even considering not doing a direct examination with her because she had been so good. All the hours of preparation paid off.

It takes much more time to prepare a traumatized witness for trial than it takes to prepare the garden-variety poor witness, or the uncooperative witness from hell. There is no short-term magic approach that I am aware of, such as the actions the writer offered for use at trial. It takes many hours of practice to desensitize a traumatized witness from triggers.

Although I am not a psychologist I manage to have good luck preparing traumatized witnesses. I know what works for me, but I also know there is more than one road to Rome.

The topic of dealing with a traumatized witness is a good one. What would have been more helpful than what is offered in the author's paper, is specific techniques used by trauma specialists that could be employed by attorneys during trial preparation of a traumatized witness. Lawyers rarely have much time for hand-holding. Most are not particularly interested in what is causing the problem. They only want to know what to do to fix it.

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*with testifying issues that threaten the successful presentation of the case), helps to develop case themes, and works with attorneys on opening statements and closing arguments.*

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*Amy Hanegan responds:*

### ***There Is No Quick Fix with a Traumatized Witness***

What I believe the author is trying to communicate is that to be a better lawyer, one must identify the traumatized witness, understand that something in his or her past is causing the trauma, whether it is the facts of the case or personal history, and that a kinder, gentler approach is appropriate once a witness is unable to testify further. I do not believe that if this is the intent, this article meets the objective.

If the intent of the article is to truly understand the traumatized witness, then I would like a more thorough analysis of why a witness is traumatized, why the trauma or "falling apart" only surfaces when the witness is testifying and why it is important for anyone preparing witnesses to understand the traumatized witness may actually be incapable of testifying. That the sentinel event that brought him or her to the witness chair may be too overwhelming in that moment, and that the witness' testimony may have to be rescheduled or cancelled altogether. Other than very short definitions of Trigger, Trauma, Flashback and Reptilian Brain the article does not really address the physical, psychological and physiological response to trauma that it outlines. And I believe that, other than the reptilian brain, most readers know these definitions, so I am not sure what we are gaining by just seeing the definitions.

The action steps were somewhat limited. Taking a breath, using a quiet voice, a slower cadence and good eye contact; basically being gentle and kind in one's response to the traumatized witness, is a good approach, but the author fails to comment on how these steps are going to aide the traumatized witness. A more thorough discussion that these steps may make a witness feel "safe" would be great,

if the witness truly is not feeling “safe”. And often a traumatized witness may be able to communicate this, but often not. That may not be the problem. The witness may feel safe, but just cannot find the courage to testify.

Though the action steps seem to be common sense, it is never a bad idea to remind those in authoritative positions (attorneys) that a kinder, gentler approach is appropriate, even when their case may rest on the testimony of the traumatized witness. Being stern, loud and distant or thinking that wood-shedding the witness is going to turn them around is incorrect and should be completely avoided. This will only make things worse. It should also be understood that none of the eight steps suggested by the author may actually work in getting the witness back on track if the witness is truly traumatized and the testimony may have to be abandoned. Once a traumatized witness is identified, the lawyer may have to lower his or her expectations as to the intended outcome should it be determined that the witness will not be able to testify or continue testifying.

The article also does not identify in what situation the testimony is being presented. Is the witness testifying at deposition or trial? Is there a jury present? Is this a criminal or civil matter? Does it matter to the author’s premise?

### ***My Own Approach to the Traumatized Witness***

With almost thirty years experience of working with witnesses, I have seen many traumatized witnesses in witness preparation sessions. It happens more often than one might think. Preparation of the witness is key; and more than one preparation session is required when working with an obviously traumatized witness. Working multiple times may bring the witness around and it may not. What I have found is that if the lawyer and consultant can gently bring the witness to a point of sharing what is most difficult for them, it is only a first step in understanding whether the witness is truly capable of testifying or whether they are not. And what a lawyer must understand is that it is up to the witness

to make this determination. The 8 action steps identified in the article are to get to this point.

And one should be clear that just because you have a client who is a professional, such as a doctor, nurse or company executive, their trauma has no less impact on their life than a victim in a criminal matter. When one finds his or her professional integrity being challenged, it is often traumatizing.

Here are a few steps I have incorporated many times when I am faced with the traumatized witness:

1. Give the witness a chance to cry or show their upset without saying anything. You want to, but just wait. Be patient. The witness will usually start apologizing for their behavior and be quite embarrassed. It is at this time when you just let them speak. Nod your head. Provide tissues. And very quietly say, “it’s okay”. After a few moments, encourage the witness to express what is causing the response to the questioning. Being able to express what is overwhelming them may not be possible as it often the sentinel event or the entire lawsuit that is traumatic. However, with encouragement, it is my experience that most witnesses will be able to express themselves. Again be very patient. Nothing is more important to you, than this witness, at this moment.
2. Once there is relative calm, help the witness focus on the facts of his or her testimony: what they did, how they did it, why they did it, and if possible, they did it right. Re-focus and limit the witness to the most important aspects of their testimony. And don’t overdo it. Don’t spend an inordinate amount of time talking about their trauma. At this point the witness needs direction.
3. Ask the witness if he/she is willing to try again. Give it a try. Practice the questions and the answers.

Don’t talk about them, do it. Have the witness focus on the answers, not everything and everyone surrounding their answers.

4. Should things improve, and you believe the witness will be able to testify, it is wise to check in with them in the interim to find out how they are feeling and whether they believe they can move forward with their testimony. On the day of their deposition or trial testimony, it is critical to meet with the witness directly before they testify and have them practice answering questions, getting them back in their role as a witness.

Further, if in working with a witness, one discovers that the witness is traumatized, it might be best to discuss with the witness whom he or she might feel most comfortable speaking with to address the trauma. The witness may need to seek counseling from a professional. This may be the best “counsel” a lawyer can provide.

I believe the article should stress that should one encounter a traumatized witness, there is no quick fix. The witness will need several preparation sessions to see if he or she can meet the challenge of cross-examination. If the witness is on the stand, their testimony may need to be continued, or abandoned. It is unlikely they will be able to continue.

In summary, either a more comprehensive study of the traumatized witness needs to be explored or in the alternative what one should do once one recognizes that the witness is traumatized and unable to move forward. I believe the author has ideas on both topics but needs a more comprehensive approach to both topics.

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***The author replies to the trial consultant responses:***

The intention of this column was to introduce the readership of The Jury Expert to a trauma informed perspective and to highlight the benefit to attorneys of using trauma experts in witness preparation; as such, it was not assumed that witness preparation was conducted in collaboration with a trauma informed expert. It is beyond the scope of the current column to provide a complete treatment of this topic, however, based on the feedback and response, the need to understand this topic at a deeper and more nuanced level is apparent. Lorie Hood writes frequently about specific areas relevant to attorney training and witness preparation from a trauma informed perspective. For further information about this topic, academic book chapters, articles and blog posts written by Lorie Hood, please visit: <https://hoodgrouptrialconsulting.wordpress.com/>