

Managing Clients in Life-Threatening Litigation

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High-conflict divorce and custody battles produce an alarming number of false allegations of child sexual abuse by alienating fathers or mothers manipulating their children into false ideas and allegations. Clients experiencing the bewilderment, fear, and anxiety caused by having been accused of doing something so terrible to children they love suffer from what psychologists call ego-dystonic incongruity, a life-threatening form of stress with physical and psychological ramifications. Clients undergoing it can become so overwhelmed by cascades of repeated stress that they cannot sleep, think, or aid counsel.

Stress management professionals (SMPs) can help lawyers to help clients navigate and survive the stress of protracted litigation. SMPs can be experienced mental health professionals at the master's degree level like social workers, junior-level psychologists, and licensed counselors. When we anticipate that the coming stress of litigation may be life threatening, we use adjunct SMPs working under the direction of the lawyers as part of the legal team.

In one case, our client was a teacher in the rural South accused by her ex of sexually assaulting their daughter. As the ex developed the case, he was joined by several mothers in the community, and soon our client was facing the possibility of life in prison after being charged with 22 felony counts involving three little girls. The client could not sleep or eat; she was frantically seeking confidants and talking to way too many people. We

retained an SMP to channel her manic energy into developing the science and the facts for her defense.

In another case, the client was a social worker with his own clinic. When he was accused by his soon-to-be ex of abusing their five-year-old, the state's board of social work suspended his license. With ex parte filings, and child protective services behind her, the wife got the home, the clinic building, and all of the bank accounts. The client's deep sense of betrayal brought him to the brink of suicide. We recruited an SMP to work under the direction of the firm as part of a team that demanded the client's participation in a detailed regimen of case fact development, physical exercise, diet change, and focused mental training.

What about confidentiality? Sometimes the attorney-client and work-product privileges come under attack in life-threatening litigation. Some argue that they are not as sacrosanct as we would like. Every attorney relying on an SMP as an important part of the litigation team must check the applicable jurisdiction's rules. A handy reference for this search is *The Attorney-Client Privilege and the Work Product Doctrine* by Edna Selan Epstein (4th ed. 2001), published by the ABA Section of Litigation. See also Fed. R. Civ. P. 26(b)(3)(A). In the two cases discussed here, we incorporated the use of SMPs into the retainer agreement and specified that their use, such as the use of a translator, was specifically for the litigation. We paid the SMPs for their time and made certain that the only documentation



they generated was a record of their time spent working with the clients and the law firm.

At the outset, both cases had the potential to overwhelm the clients and the lawyers, but the coping strategies we learned from the SMPs made the cases manageable and changed us forever. Here is what we learned.

SMPs describe four signs of stress:

- behavioral signs such as nervous habits (e.g., nail biting, pacing, rocking), using alcohol, cigarettes, or drugs to relax, isolating oneself from others, and procrastinating or neglecting responsibilities;
- emotional signs such as feelings of being overwhelmed, agi-

tation, inability to relax, moodiness, and irritability or short temper;

- cognitive signs such as poor judgment, anxious or racing thoughts, inability to concentrate, and memory problems;
- physical signs such as rapid heart rate, diarrhea or constipation, loss of sex drive, or frequent colds.

The Biochemistry of Stress

Short-term fight-or-flight responses come about through the sympathomedullary pathway. The hypothalamus activates the adrenal medulla to secrete epinephrine, which begins what

Illustration by Doug Thompson

scientists call the stress cascade. During the cascade, the respiratory rate increases to get more oxygen out of the air. The heart rate increases and blood pressure builds to supply the muscles more quickly. As the stress cascade continues, blood is re-routed, the skin becomes clammy, the pupils of the eyes dilate, and there is a diminished perception of pain. The cascade affects the limbic system that controls emotions, compromises memory, and suppresses the immune system. In circumstances of chronic stress, the hypothalamic pituitary-adrenal (HPA) system is activated as well. Stressors activate the hypothalamus, which stimulates the pituitary gland. The pituitary secretes adrenocorticotrophic hormone, which stimulates the cortex of the adrenal glands to produce cortisol. Over time, high cortisol levels are extremely damaging.

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What does this biochemistry have to do with managing clients in the stress of life-threatening litigation? SMPs sum it up in a word: half-life. All of these stress-released chemicals are metabolized differently and leave the system at different rates. Just as the client may be calming down from a difficult stressor, something else sets off the stress cascade, and then something else and so on. At any given time in litigation, the client will have the residual metabolites of previous stress activation on which the latest stressors build. In addition to suppressing the immune system and undercutting the codification and retrieval of memory, chronic stress and cortisol can lead to higher levels of heart-choking fat, according to researchers at Wake Forest University. Researchers at the University of California at San Francisco found that cortisol and chronic stress accelerate aging at the cellular level. With the HPA systems activated as well, the additive stress can kill.

Clients targeted in this type of litigation spend weeks, months, or even years in disbelief that the person who betrayed their relationship was capable of such action. When it finally settled in with the two clients discussed here that a loved one was capable of such an allegation, they became increasingly bewildered. With criminal sanctions hanging over their heads and with their professional licenses on the line, fear came next. Then, when the caustic feelings of shock and anger dissipated, we witnessed them begin to grieve the loss of the relationship with

their children and the loss of what they thought they had with their friends and former partners.

Sadness and depression are common in these experiences of betrayal. Clients who can't work out their feelings often slip into a more precarious state of clinical depression. Even if the allegations are seen for the fraud that they are, merely having been accused can produce a lasting stigma that may seriously diminish the client's sense of himself or herself and his or her business or other activities for decades. The stress of litigation like this ranks near the death of a loved one. If the accusation is the murder of a beloved child, the stress is overwhelming, but when the scurrilous allegations involve a living child who will be scarred for life, the stress on the falsely accused parent can be life threatening.

Our two clients were so stressed that they behaved erratically and interpreted normal events in a paranoid manner. They had difficulty listening, and they asked the same questions over and over again. In the early stages of the litigation, the clients were unable to reflect on the answers they got and repeatedly called the law firm with issues that had already been discussed or issues that could easily have waited for the next scheduled meeting. Often, they seemed to be falling apart. They manifested a profound sense of being undone, and they were seriously depressed, disorganized, and of little help in the litigation. This is where the SMPs began their work.

The Role of Stress Managers

Our adjunct SMPs knew that the clients had unrealistic expectations of the legal system in general and of their attorneys in particular. The SMPs reminded us that we were the clients' guide across treacherous terrain. They also reminded us that the United States is full of Ph.D. candidates searching for research projects. In the past two decades, enrollments in doctoral programs in forensic psychology have increased dramatically. Consequently, there's lots of research available about us. Studies suggest that although we know it's important to care about our clients, we often underestimate the significance of using client-relations skills to demonstrate this concern. Many of us are not good listeners. We can be short on time and somewhat impatient. We can tend to jump quickly to conclusions at the early stages of the attorney-client interaction and cut off dialogue because we see it as unnecessary.

Criminal defense subjects in these research projects reported that the ideal attorney would stand up for them and enforce their rights. One of the most frequently cited characteristics of an ideal attorney was that he or she would care about what happens to a client. With these research findings in mind, we worked to be sensitive to the client's psychological state, to be

supportive and nonjudgmental, and to convey empathy. With our adjunct SMPs, we worked to create a climate in which the client felt comfortable discussing highly personal and sensitive matters that provoked intense emotional reactions. The SMPs worked with law firm personnel to explain repeatedly the attorney-client privilege and the cloak of confidentiality that covered our communications.

Stress management research shows that the best way to set a cooperative and trusting tone is to allow clients to explain their situation as they see it. Researchers at Harvard recently learned that humans get a neurochemical reward from sharing personal information. Measuring brain chemicals, the researchers found that more reward chemicals were secreted in subjects' brains when they were disclosing personal information than when discussing information about others.

Research reveals that much of the distrust that clients harbor for attorneys stems from a lack of understanding of how the legal system functions and the various responsibilities of clients and attorneys. Social cognition literature shows that the unknown often inspires great fear and anxiety, and simply providing needed information plays a significant role in stress reduction. So to overcome distrust and encourage the clients' willingness to share personal information, our adjunct SMPs concentrated on "role induction," in which the responsibilities of both the attorney and the client were described again and again.

The attorney-client relationship by its nature is characterized by an imbalance of power. Such relationships inevitably invite transference, counter-transference, and misplaced emotional reactions. The SMPs worked with law firm personnel to build the attorney-client relationship on interdependence, because this allowed both the attorneys and the client to assume their appropriate responsibilities. An important part of role induction was to tell the clients how often they would hear from law firm personnel.

We learned that creating a climate of trust depended on our communication skills as well. Clients do not always say what they mean, so effective listening is essential. This means listening to the emotional undercurrent of what the client has to say. No, the lawyers were not SMPs, but we encouraged both clients to express what they knew and remembered. Law firm personnel learned to use speaking skills to encourage client trust as well, by, for example, referring to the litigation as "our case" rather than "your case" or "my case." A technique pioneered by psychologist Carl Rogers called "reflecting" was also helpful. Reflecting involved repeating to the client what we understood to be the client's perceptions and sense of the facts of the case.

Stress management research also informed us that law firm personnel could help with stress survival by making every effort to answer the client's telephone calls the same day, scheduling appointments as promptly as possible after a client's call,

and sticking to a schedule. Time structuring helped the clients deal with anxieties and stresses during litigation as well. The old business/new business format common in organizational meetings worked well. Clients came to rely on this format for meetings and gained a sense that we were on the same page.

After role induction and thorough discussions of law firm and client responsibilities, the SMPs and clients were urged to participate at all critical stages of the case, including working with experts. The SMPs and clients played a meaningful role in the selection of the legal strategy and were given the opportunity to participate in the design of opening and closing statements. When organizing years' worth of convoluted facts for many different witnesses, the "Clancy Method" was invaluable.

The Clancy Method is a trial planning and presentation methodology developed by Patrick Clancy of The Innocence Legal Team and this author. First, create a master document file, by scanning into an Adobe Acrobat (.pdf) file, every document, picture, witness statement, or transcript. The clients must be involved in scouring their memories, photos, old transcripts, and whatever they can get their hands on about any potential witness. Second, create a master chronology of three columns in a program such as Excel: in column 1, the date of each event of any significance to the case; in column 2, the who, what, how, and why do we care information about each significant event; and in column 3, the how do we prove information about the event. Column 3 holds the exact page and paragraph and line of the proof needed for trial.

In this way, with everything scanned, we can give our attention to the client and case. No more fumbling with boxes or yellow pads written out the night before. Next, create a master witness list of prosecution and defense witnesses with contact information, citations to relevant places in the master document and master chronology files, as well as a designation of which attorney on the litigation team will be responsible for that witness. When the master chronology is completed, create individual sub-chronologies for each witness. As all of the relevant facts and the witnesses involved in those facts are catalogued and interrelated, the client and attorney should create a "What do we need from this witness?" outline for direct examination, cross-examination, or both.

Stress Relief

We knew that in the stress of their life-threatening litigation, our clients needed to talk. Their need to process, and our potential unavailability, led one of them to Twitter and Facebook. We had to stop all of that because it was discoverable. Instead, the SMPs got them busy writing diaries and working on their finances using online software that facilitated their creation of

confidential and privileged communications with us, their lawyers. In this way, we channeled their need to talk and describe what was happening to them in a positive way that would not hurt their cases. There are several free diary programs available online, including *iDailyDiary*, *Efficient Diary*, and *Penzu*, which also offers an \$18-per-year version with powerful encryption. *Mint*, *PocketSmith*, and *YouNeedaBudget* are all simple personal finance programs with minimal cost. The SMPs worked with the clients to inventory their property as well. *MyStuff*, *Inventory*, *iKeepm*, and *OwnDepot* are simple personal property inventory programs. They're quick, easy, intuitive, and available at the free software-sharing site tu cows.com. We made certain that every document had "attorney-client privileged document" written on each electronic page.

When emotions are high, focus on time scheduling and task completion.

Our adjunct SMPs knew that clients in the stress cascade crave carbohydrates when they're feeling down. Processed carbohydrates send a spike of sugar to the bloodstream. Although the carbohydrates made them feel better in the short term, their mood soon plummeted, leaving them feeling even worse each time they gorged on them. When the clients had to have something sweet, SMPs encouraged them to have a piece of fruit because their body digested it more slowly. SMPs encouraged them to substitute low-sugar dark chocolate that was 70 percent cacao or higher for baked goods or candies. It's high in flavonoids and contains phenethylamine, a mood-enhancing chemical. The SMPs also knew that foods such as lake trout, salmon, and herring are rich in docosahexaenoic acid and eicosapentaenoic acid, two omega-3 fatty acids that restore heart function, boost serotonin levels, and can also help suppress the production of cortisol and adrenaline. SMPs also encouraged clients coming off the stress cascade to snack on nuts and seeds, which contain plenty of alpha-linolenic acid and are rich in omega-3 fatty acids. SMPs can try to help clients who smoke stop, with help from, for example, *eCigarette* or the American Legacy Foundation's Circle of Friends website containing a list of state telephone quit lines, as well other national smoking-cessation resources.

We learned to encourage our clients to seek out new forms of exercise. Researchers at Duke University determined that exercising four days a week has more benefits than being on antidepressants. Our SMPs explained that a regular exercise

program could be as simple as walking every day. Remember "half-life"? Chemicals secreted during the stress cascade tend to be stored in the musculature as they ebb away with varying half-lives. The skin is the largest organ of elimination, and simply breaking a sweat did wonders to speed up the removal of stress neurochemicals from our clients and law firm staff.

In these life-threatening circumstances, the last thing our clients wanted to hear was that they should sit quietly for a few minutes. But the SMPs pointed out that study after study proves the benefits of meditation. In fact, there are now meditation classes in the better business schools in the United States. The SMPs pointed us to the many guided meditation applications and meditation timers available, such as *iRelax HD* or *Mind* for iPhones and *Meditation Helper* or *eMa eMeditation Helper* for Android phones. We found that merely sitting quietly with one of these low-cost apps could help our stressed-out clients release the stress cascade chemicals.

Both our teacher and our social worker clients had trouble sleeping, making them cranky and less able to concentrate. We learned that the stress hormone cortisol drastically interferes with the serotonin/melatonin balance needed for sleep. In addition to some simple meditative exercises, the SMPs pointed out that clients can use electronic sleep aids such as *SBaGen*, *Gnatural*, or *Pzizz* to help them overcome the insomnia that the repeated stress cascades create. *Pzizz* for example (which runs on iPhones, Androids, PCs, and Macs), provides a soundtrack, customized with each delivery, that talks users into a deep sleep. Research shows that when clients couple these programs with a set of noise-canceling headphones, their sleep time and melatonin gradually increase.

Potential Problems

SMPs should not function as therapists. When therapy is needed, call the psychiatrists and doctoral-level psychologists. SMPs function as cheerleaders, coaches, and go-betweens for the clients and law firm. Even so, there are two psychological dynamics in life-threatening litigation that SMPs must deal with: denial and transference.

Psychologists tell us that denial is an unconscious defense mechanism resulting from the ego's need to remove or rescue itself from actual or perceived danger. Denial can serve as a buffer to shield an individual from unexpected, shocking news, such as the diagnosis of a terminal illness. It functions as a means to avoid anxiety through the disavowal of thoughts, needs, wishes, or other factors that would be consciously intolerable. Denial can be a healthy short-term coping mechanism with which we can limit anxiety and maintain self-esteem and a sense of control. In this way, it can be a protective personality mechanism that,

by reducing anxiety, allows us to function. But denial can also be unhealthy and distorting. It can prevent us from understanding reality and from dealing with it effectively. When clients in life-threatening stress are stuck in denial, it can prevent them from facing what has to be done, much like ignoring a growing breast lump over time can reduce the effectiveness of medical intervention later. In both our cases, the SMPs used the Clancy Method case fact preparation regimen to confront the client's denial processes. The SMPs dealt with the unwelcome facts that clients were having a hard time addressing indirectly at first and later directly, by discussing them head-on at attorney-client meetings covering case fact preparation. With the buffering role played by the SMPs, eventually the clients were able to pass through denial and move through their sticking points effectively.

The SMPs' buffering role is also essential when dealing with transference and counter-transference. Litigators know that sometimes what clients see in us or say about us isn't really about us at all. Sigmund Freud introduced the concept of transference in 1900 in *The Interpretation of Dreams*. Transference can be defined as the unconscious redirection of feelings from one person to another. The phenomenon of transference occurs in most human relations, but it is certainly present in relationships involving an imbalance of power. As Freud saw it in psychoanalytical treatment, the patient directs toward the therapist feelings of affection and hostility that are not accurately part of that relationship but can be traced back to the patient's unconscious fantasies.

Counter-transference was first defined by Freud in 1910 in *The Future Prospects of Psycho-Analytic Therapy* as a redirection of the analyst's feelings toward a client or as the analyst's emotional entanglement with a client. This can happen when we become the primary source of emotional comfort, satisfaction, or protection for the client. Here the SMP is invaluable. Our SMPs constantly reminded clients about what they learned in role induction concerning role specificity. When emotions were high, we focused on time scheduling and task completion. This gave the clients and law firm personnel time to wait out the emotions and get the tasks at hand finished.

The SMPs also helped law firm personnel with client over-identification, which played out as hating the alienating parent who created the fraudulent allegations or hating opposing counsel, losing objectivity, or becoming overly emotional. In circumstances of life-threatening stress, keeping the two phenomena of transference and counter-transference in mind helped the clients and law firm personnel more effectively sort out what the client was saying or feeling about the firm and the litigation.

When forensic psychologists researched attorneys working with clients in traumatic circumstances, one finding was that the attorneys also experienced significant symptoms of secondary

trauma and burnout. The attorney group studied demonstrated higher symptom scores in all areas of secondary trauma (intrusion, avoidance, and arousal) and burnout compared with mental health providers and social services workers. Attorneys in these studies reported that in addition to their high case loads, burnout was caused by their lack of education regarding the effects of trauma on their clients and themselves. The absence of forums for regular venting were significant contributors to the development of secondary trauma and burnout in the attorney groups. Even among mental health professionals with the advantages of education and supervision, secondary trauma responses are common. Litigators have to cope with secondary trauma all the time. Research into attorney effectiveness and burnout informs that when we have affiliations with adjunct professionals who can aid in these difficult circumstances, everyone benefits.

Adjunct professionals are not difficult to find, and they're not expensive. When searching for adjunct SMPs, stay away from psychiatrists or doctoral-level psychologists. They tend to be overbooked and too self-important. Search instead for experienced master's-level mental health professionals like social workers, junior-level psychologists, licensed counselors, and perhaps personal coaches. Good SMPs will be current on the research into coping with life-threatening stress and will be on call at all hours. Their skill will have been tested in the real world with clients, and they will have references. Check them and be sure to gauge the SMP's ability to maintain confidentiality as part of the legal team.

Don't overlook professionals already in the client's social network. Often, one can find an SMP who already has the client's trust. In both of the cases discussed in this article, an SMP was recruited from among the client's acquaintances. For our teacher, it was a master's-level professional who was a lay counselor at their church. For our social worker, it was a master's-level psychologist and personal coach he knew from college. In both of these cases when the SMPs began, their role was described as facilitative and supportive. By the time the cases went to court, the SMPs were invaluable emotional support.

Following a tense three-week trial, our teacher was found not guilty on all 22 counts. She went on to appear on several national news shows and is now entering her second year of law school. Our social worker, after three different court proceedings, won sanctions, had his license reinstated, recovered his house and clinic building, and was awarded sole custody of his daughter. Moreover, clients and law firm personnel alike emerged with a stronger skill set for dealing with life-threatening litigation. ■