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**The CSSA "Cap" in
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By Lee Rosenberg
Editor-in-Chief

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A Is for Alienation: Tips on Litigating Parental Alienation in Custody Battles

By Ashish Joshi

Family law is one of the top three highest risk areas of practice for attorneys in terms of malpractice exposure.¹

Within family law, cases involving parental alienation (PA) pose some of the unique challenges for a practitioner. In Amy J. L. Baker's survey, *Even When You Win You Lose: Targeted Parents' Perceptions of Their Attorneys*,² the targeted parents—the parents who are victims of alienation—were asked about their attorneys' handling of their case. The survey results provide us with a bleak outlook on how targeted parents viewed their attorneys' handling of their court cases. One targeted parent reported:

None of the attorneys involved in my custody case understood the impact of PA. . . . how it doesn't go away as the children get older! They kept telling me, 'Once the divorce is over, they will come back to you' . . . they had NO IDEA!

Other targeted parents reported that the lawyers were "in it" only for the money and lacked "any compassion or concern for the clients." One parent reported, "I feel like he couldn't care less about custody/access/visitation/parenting time. All he wanted to do was his paralegals and himself bill as many hours as possible." Yet another reported that the lawyer "told me to give up fighting for custody" and "tried to convince me to settle before all of my concerns were heard." The vast majority of attorneys who represented the targeted parents were perceived as not preparing their clients for the myriad professionals that become involved in cases involving PA, including guardians ad litem, minor's counsel, forensic evaluators, court-appointed therapists, and child protective service workers. Adding to the targeted parents' frustration was their outrage that their lawyers did nothing to enforce their rights or to hold the alienating parent accountable.

Lawyers who litigate PA cases can vastly benefit from proper training and education. It is imperative that these lawyers take the time to study the phenomenon of PA, carefully evaluate the facts of the case for evidence of alienation, and discuss with the client (if necessary, with input from experts in the area of behavioral sciences) the appropriate legal and mental health interventions to remedy the situation. Having litigated PA cases in a variety of jurisdictions all over America, and internationally, I offer the following tips to my professional colleagues.

(1) One of the oldest heuristics in medicine is *primum non nocere*—First, to do no harm. PA cases are not only notoriously difficult to litigate but *profoundly* counterintuitive. Before accepting such cases, a lawyer should go through a mental checklist. Ask yourself: are you competent to handle the assignment? Do you have

a solid understanding of PA? Do you understand the difference between PA and *Parental Alienation Syndrome*? Are you familiar with the myths of the PA theory? Are you prepared to debunk these myths in court? Do you keep up with the legal and mental health literature on the topic? And last but not least, are you willing to put in the *significant* time and energy that will undoubtedly be required on your part to competently represent your client in such cases?

(2) Check for and challenge your biases. It is critical to be aware of cognitive heuristics or biases and how they affect one's perception, thinking, and ability to frame and present a PA case. For instance, consider the heuristic of the *Fundamental Attribution Error*—concluding that a behavior is dispositional, when it is situational. Say, your client, a targeted parent-mother, sits before you. You can clearly see that she is angry. Very angry. She is angry about how her children mistreat her and disrespect her. She is angry about her ex, the father of the children, consistently undermining her as a parent, bad-mouthing and ridiculing her in front of the children. She is angry about how her parenting time is repeatedly violated, with zero consequences for such violations. She is angry about how "no one gets it." As an observer, it is quite likely that you, the lawyer, may think that your client has a characterological or dispositional flaw rather than looking at her behavior as situational. You may think, "I can see how angry she is in general. No wonder she is having problems with her kids and her ex. Perhaps, therapy can help her deal with her anger. In fact, I know just the right therapist who can help her." But just because a person is angry about a *specific* situation does not mean she is an angry person in *general*. You could find the rejected parent off-putting because she is anxious or assertive. This could make you susceptible to an argument of estrangement—i.e., your client's rejection by her children is legitimate or justified. And if that's how you frame the case for litigation, it may result in a totally inappropriate outcome and an incorrect ordering of priorities. You, the lawyer, have now made a bad case of PA far worse.

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(3) Keep yourself abreast of the latest research, publications, and peer-reviewed literature on PA.

Get ready to debunk the myths and fallacies that surround the theory of PA. For instance, be prepared to educate the court that despite the commonly held belief, it is a myth that adolescents' stated preference should dominate custody decisions, especially if the adolescent has been alienated. It is also a commonly held, but false, belief that courts cannot enforce orders for parent-child contact against an alienated teen's wishes. Or that children who irrationally reject a parent but thrive in other respects (such as in school or with sports) need no intervention. These false beliefs have been repeatedly debunked in professional literature and judicial opinions.

(4) Frame the case properly. The primary goal in a PA case must be to protect the child from ongoing abuse. Professional literature makes it clear that causing severe PA is a form of child psychological abuse. Therefore, it is critical that the number one priority in such cases is to protect the child from further abuse. Instead, lawyers often ignore the abuse and instead focus on the child's relationship with the targeted parent. The failure to properly frame the case shifts the focus from child protection to superficially repairing the relationship between the child and the targeted parent. Instead of taking urgent and appropriate measures to ensure the child's safety and mental health, the court and the professionals now begin discussing "reunification therapy." This is a striking example of a misunderstanding of legal and clinical priorities.

(5) Challenge the fallacy of the "high conflict" model. The model *assumes* that both parents are equally or significantly responsible for the family dynamics. It also *assumes* that a child's rejection of or resistance to one parent cannot be traced to primary contributions from the other parent. It is, of course, plausible that this indeed may be the case. That upon a forensic investigation, one could determine that the case is "hybrid"—with both parents contributing to the family dynamics and the child's rejection of or resistance to a parent. But it would be a mistake, and a huge one at that, to simply *assume* from the outset that a case is a "high conflict" case simply because the parties appear to be hostile to each other. The high conflict model fails to consider the possibility that one parent might be the alienator and the other might be defending to save the parent-child relationship.

(6) Litigating PA cases requires meticulous and careful preparation. It is critical to provide the tools to the trier of fact to get the appropriate intervention. One of the effective ways to prove a PA case in court is to present the evidence using the five-factor model, which requires the proponent of PA to show: (1) the child actively avoids, resists, or refuses a relationship with a parent; (2) presence of a prior positive relationship between the child and the now rejected parent; (3) absence of abuse or neglect or seriously deficient parenting on the part of the now rejected parent; (4) use of multiple

alienating behaviors on the part of the favored parent; and (5) exhibition of many of the eight behavioral manifestations of alienation by the child.

(7) Learn to manage the clients. PA cases are notoriously difficult and extremely stressful to litigate. Often, they produce an alarming number of false allegations of physical, emotional, or sexual abuse by alienating fathers or mothers manipulating and indoctrinating their children into believing and making false allegations. Targeted parent-clients experience a host of emotions including frustration, outrage, bewilderment, anxiety, and fear caused by being falsely accused of heinous crimes or terrible behaviors on one hand and being rejected by their children on the other. They suffer from what psychologists call "ego-dystonic incongruity," a life-threatening form of stress with physical and psychological ramifications. Clients undergoing such stress cannot sleep, think, or aid their lawyers. Think about getting professional help to manage such clients. Remember, you are a lawyer, not a therapist.

(8) Think about using a parenting coach to help the client. Alienated children are not easy to parent. As one parent described her children, "I no longer recognize my kids. It's like the spark has gone out of their lives. As soon as they see me, they put in their earphones on or go into their room and close the door. No hi, no hello. . . . nothing." Targeted parent faces a dilemma: if she "truly" loves the children, she should, as the children (and the alienating parent) asks, "leave them alone" and "walk away." But if she does that, the children may be alienated for good and the relationship gone. If she refuses to "walk away," the children retort, "You don't get it! It's all about you." It's the classic damned-if-you-do, damned-if-you-don't conundrum. In such scenarios, there is a danger of the targeted parent's frustration boiling over and engaging in behaviors that essentially play into the hands of the alienating parent. To avoid such situations, a lawyer should consider recommending that the client retain the services of a parenting coach. Parental coaching is a valuable tool in a litigator's toolbox. It helps the lawyer stay in her lane and focus on legal issues instead of giving parenting advice.

(9) Select the right expert. If a trial is in the cards—and in PA cases, it almost always is—you will need a good expert to effectively present a case in court. Expert testimony in PA cases should cover the three "S's" of parental alienation: symptoms of alienation in the child; strategies of alienators—and—the sequelae of parental alienation in the lives of the child affected. When making a decision on using an expert, a lawyer will need to decide whether the expert should function as a "general," education-only expert or as a "specific," education-and-case-specific expert. The former expert would not be privy to the underlying facts of the case and would not offer an opinion as to whether PA is present in that particular case. Such an expert would, however, describe the phenomenon of PA, the peer-reviewed scientific literature in support of the condition,

the five-factor model for determining whether it is present, typical behaviors of an alienating parent, typical symptoms of an alienated child, short-term and long-term sequelae of parental alienation, and, last but not least, why the court should intervene in cases involving PA, and intervene early rather than late. Such a general expert can also answer hypothetical questions from attorneys and/or judge, which can help link the educational testimony to the facts of the case. In contrast, the case-specific expert, in addition to the educational testimony, would also testify about the facts of the case, and would proffer an opinion as to whether PA exists in the case, and if so, what should be done about it. There are pros and cons associated with each kind of expert and a lawyer should weigh these carefully before making a decision.

records, police reports, child protective services reports, and a host of other kinds of materials. The exercise of putting together a package of materials for a forensic evaluator should be done carefully and with diligence. This is not a data dump. Do not expect an evaluator to comb through a mountain of haphazard documents and materials and find corroborating evidence to support the client's narrative. It's the lawyer's job to help the client present an accurate, complete, and organized narrative to a forensic evaluator.

(10) Prepare the client for a forensic evaluation. PA cases often involve forensic evaluations. Make sure that the client understands that a forensic evaluation is an investigation, *not* therapy. One of the sure-fire ways to tank a forensic evaluation is for a lawyer to counsel her client "to be herself" when meeting with the evaluator. Remember the Snickers commercial where a belligerent Joe Pesci turns into an affable young man after taking a bite of the candy bar? Sending an unprepared targeted parent-client to an evaluation is like sending in ornery Joe Pesci. A client who is distressed by her children's rejection, who is outraged by the repeated violations of her court-ordered parenting time, who is frustrated having been through several baffling and infuriating "therapy" sessions with her children, is a person who has undergone trauma. Without proper preparation, such a person, typically, is ill-equipped to present a coherent picture of the family dynamics to an evaluator. Unless the lawyer takes the time to ensure that the client understands the dynamics of a forensic evaluation, there is a high risk that the client will rush in and regurgitate the pent-up complaints and frustration and simply trash the alienating parent. She risks playing into the hands of the alienating parent who has or will portray her as "abusive," "angry," "authoritarian," "devoid of empathy," or simply difficult to deal with. Preparing the client for a forensic evaluation is a critical part of litigating parental alienation cases. If a lawyer does not believe that this is within the scope of the attorney-client relationship, he should alert the client to the need for preparation and make referrals or suggestions for such preparation.

(11) Help the client prepare a package of well-organized documents for the evaluator's review. Forensic evaluators' findings, recommendations, and opinions are only as good as the data that they are based on. An experienced forensic evaluator is always prepared to meet an examining lawyer's (or judge's) question, "Where'd you get that?" and explain her analysis. Record review is an important part of the forensic evaluation process. Evaluators review a wide variety of records—photographs, videos, audio recordings, letters, emails, greeting cards, affidavits, transcripts, court pleadings, school records, therapy notes, medical

(12) Counsel the client to follow court orders and show respect towards the court and the legal process. Targeted parents typically suffer from chronic frustration and an overwhelming sense of helplessness. When no relief is in sight and alienation continues, there is a risk that the targeted parent may want to "shake the things up." Often, a lawyer's refusal or failure to seek timely action adds to the parent's frustration and outrage. A frustrated client is likely to express her frustration in an unhelpful manner. She may speak out of turn at a court hearing, refuse to make a child support or alimony payment, and vent her frustration by posting unhelpful comments on social media. But a client who knows that her lawyer not only cares about the case but is also working diligently to execute a plan of action will not only be easier to deal with but will be an important ally in preparing the case for litigation. Some of my best outcomes in litigating parental alienation cases have been when the clients undertook the task of gathering and organizing a mountain of information for use in litigation. Encourage and empower the clients to help you help them.

(13) Understand that time is the enemy. In PA cases, delay only serves the alienating parent and can frequently allow the child to age out and be beyond the court intervention. Even if children don't reach majority, they frequently come of an age where judges simply assume that any decision related to reunification will be fruitless, or it is simply too late, or the children will reunite "on their own" as they get older. Lawyers who fail or refuse to act appropriately and in a timely manner end up causing a lot of frustration and harm, sometimes irreparable, to the clients and their relationship with their children.

Litigating cases involving parental alienation is challenging, often frustrating, and, on occasions, painful. It is gut-wrenching to see a targeted parent's grief over the loss of a child—a child who is biologically alive, but emotionally and psychologically dead to the parent. All we can do as lawyers who represent targeted parents is to promise our clients that we will represent them in a competent, diligent, and honest manner.

Endnotes

1. See, e.g., / / www.americanbar.org/news/abanews/publications/youraba/2018/april-2018/why-every-lawyer-needs-malpractice-insurance/.
2. The American Journal of Family Therapy, 38:292-309 (2010).