

# TRAUMA-INFO ADVOCACY

For survivors of child sexual abuse, seeking justice can mean reliving old wounds—and suffering new trauma. But there are strategies to help these plaintiffs find their voice.

Lawyers representing victims of child sexual abuse must prepare still-healing clients to become their own best advocates. Representing these clients effectively requires having them recall and recount their victimization in ways that may trigger and re-traumatize them. Although your primary role is pursuing justice for your clients, take steps to mitigate the personal toll that litigation will take on them.

The experience of being a plaintiff is not healthy for victims of child sexual abuse. To successfully limit the negative impact, you must develop trusting and honest client relationships with realistic expectations that can withstand the emotional rollercoasters of litigation. By recognizing the stress clients face from repeatedly discussing traumatic events, you can serve as their best protection against a rigid system that often harms survivors.<sup>1</sup>

The profound, multifaceted, and lifelong impact of child sexual abuse

is often devastating and debilitating. You must recognize and mitigate this through every aspect of case development, damages, and client interaction.

## **The Impacts of Trauma**

Child sexual abuse is defined as a traumatic event under the DSM-5.<sup>2</sup> Trauma wounds from child sexual abuse look different depending on the intensity of the abuse, the frequency of the abuse, the age of the victim, the role of the perpetrator, the victim's age at the time the abuse is disclosed, the victim's social history, the victim's community and personal support system, and more.

According to CHILD USA, the average age to disclose child sexual abuse is about 52 years old.<sup>3</sup> For adult survivors of child sexual abuse, litigation is often mentally and physically discomfiting, invasive, and frightening in ways that leave plaintiffs feeling vulnerable to new kinds of adverse

impacts. Many abuse victims suffer from trauma-avoidance, which numbs them to certain emotional and physical stress because they are consciously or unconsciously overwhelmed by the impact of the abuse.<sup>4</sup> Retelling and reliving that abuse throughout the legal process can have broad negative repercussions on survivors, which they often cannot articulate or even understand.

Symptoms of stress for child sexual abuse survivors can vary.<sup>5</sup> Each individual survivor's coping mechanisms may have a different emotional, cognitive, motivational, and neurophysiological response. Survivors can experience acute short-term as well as long-term or chronic trauma adaptations (survival techniques, which can be positive or negative).<sup>6</sup>

Many survivors suffer from severe physical and mental health problems such as post-traumatic stress disorder (PTSD), anxiety, insomnia, eating

# RMED



By || **JAMES MARSH AND MARGARET MABIE**

disorders, substance abuse disorders, and physical symptoms of stress—trauma lives in both the gut and the brain.<sup>7</sup>

Whether the traumatic event causes a pathological or non-pathological (likely versus unlikely to cause a seriously debilitating condition) adaptation must be evaluated and determined by a mental health professional; this can be a critical component of proving damages related to future medical care and to hedonic damages and the loss of enjoyment of life.<sup>8</sup>

Children growing up with toxic stress may have difficulty forming healthy relationships.<sup>9</sup> Survivors of child sexual abuse also may have unstable work histories as adults and struggle with education, financial security, employment, and emotional connection throughout their lives.<sup>10</sup> Some demographic groups are disproportionately represented among trauma survivors and may be at increased risk for or exposed to particularly high rates of repeated victimization.<sup>11</sup>

Experiencing multiple layers of any traumatic experience, such as having to repeat and re-tell the abuse narrative, can make recovering from trauma more difficult, and survivors can pass on these effects to their own children.<sup>12</sup> All of this is relevant for your client’s damages, particularly related to loss of the value of life.

### **The Trauma-Informed Advocacy Approach**

Trauma-informed advocacy becomes especially crucial when dealing with victims of childhood sexual violence.<sup>13</sup> The primary goal is for attorneys and their staff to recognize and support the client’s basic need for physical and psychological safety. Trauma-informed client interaction requires active monitoring and constant awareness of your client’s mental and emotional state, including their reactions to words, behaviors, and posture.

Helping clients prepare authentic victim impact statements that capture their true voice can take a tremendous amount of time, patience, and empathy. Begin by acknowledging the traumatic experience and stress a survivor can be expected to feel. Tell your client that you and your firm are aware of trauma, that you have basic knowledge of some of the impacts of that trauma, and you are using your advocacy skills to help reduce the impact of that trauma during

moderate trauma invasions, if possible. For example, schedule calls so clients can anticipate them and plan their day around potentially triggering conversations. You might need to conduct an initial interview in separate parts or over several contacts. You also can mitigate re-traumatizing clients by using semi-structured interviews for collecting client information.<sup>17</sup> Traumatic events are rarely remembered or retold in a chronological narrative.

## **PAUSE FOR SIGNS OF DISTRESS, AND ENCOURAGE YOUR CLIENT TO MOVE AROUND BEFORE, DURING, AND AFTER RECOUNTING TRAUMATIC EVENTS.**

the course of legal representation.<sup>14</sup> For example, scheduling stressful meetings shortly before a client’s therapy session can often help manage stress.

Testifying in court, particularly for child sexual abuse survivors, likely will negatively impact the short-term healing process because it creates new painful and traumatic memories that compound older pain associated with the abuse.<sup>15</sup> Recounting the abuse experience, especially more than once, “triggers” survivors and can leave them feeling exhausted, fatigued, and defeated.<sup>16</sup>

Monitoring your clients’ train of thought, the pace of their voice, and their movements or physical state during interviews, deposition preparation, and trial preparation is a good way to help clients manage their stress response. For example, it may be useful to request a break when a client is fidgeting or speaking too fast. Pause for signs of distress, and encourage your client to move around before, during, and after recounting traumatic events.

Take small actions to attempt to

Be patient with clients who cannot remember details that may be critical. Some clients cannot tell their entire story at once, in one interview, or in a series of interviews.

One technique is to ask clients to reveal their traumatic memories using the “first, worst, and last” model so that they do not have to keep repeating every difficult detail of every experience. Similarly, clients might be asked to discuss the impact on their life as a child, a teenager, and an adult. By addressing the abuse and its impact as separate parts, we can give clients an opportunity to organize their often racing, disruptive, and disorganized thoughts. The fundamental goal is to foster client-directed comfort, safety, and control.

To help clients feel supported, take an active role in anticipating and supporting a wide range of emotions throughout the representation. Give your clients warm or cold drinks to hold during their interviews, encourage loud deep breaths, tell your client to get up and

walk around during interviews, and use heavy and cool crystals or multisensory objects to provide a tactile distraction. You also can use emotional support animals. The focus is on supporting the client's physical and psychological safety and to help keep them present.

Work in tandem with mental health advocates to address mental health concerns. Collaboration with clients' treating professionals in addition to expert evaluations can help you identify triggers, coping mechanisms, and what may be needed for a life care plan.

Don't overlook the many ways that vicarious trauma impacts you and your staff. You should use many of these same techniques to manage your own emotions and encourage your staff to do the same. Our firm has used multiple vicarious trauma training courses to help attorneys and staff recognize when they may be experiencing secondhand trauma.<sup>18</sup>

## Litigation Strategy and Legislative Reform

Overall, the judicial system was not built to support survivors of child sexual abuse. Plaintiff firms may need to make changes to accommodate the demanding needs of representing child sexual abuse survivors without causing irreparable damage in the process. Collaborating with mental health professionals to support client needs is often worth the challenge. Our practice ensures that each of our cases adheres to a protective order regarding confidentiality. We often move to limit invasive or duplicative discovery, and we provide affidavits from our clients and mental health professionals regarding re-victimization. Here are a few additional things you should consider.

**Using pseudonyms.** Representing a victim of child sexual abuse begins with understanding the client's realistic goals, expectations, and outcomes. One of the first steps to empower these

clients to regain control over their lives is to help them decide whether they want to proceed in court using a pseudonym. The Federal Rules of Civil Procedure do not explicitly authorize, nor absolutely prohibit, the use of fictitious names by plaintiffs or other parties. While the legal requirements vary by jurisdiction, the majority of federal and state courts weigh concerns about reasonable disclosure of matters of public interest against protecting survivors' privacy and dignity from the shame and stigma associated with child sexual abuse.

In *Does I Thru XXIII v. Advanced Textile Corp.*, the Ninth Circuit held that "a party may preserve his or her anonymity in judicial proceedings in special circumstances when the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity."<sup>19</sup> The Second Circuit also has endorsed this balancing of interests when determining whether a plaintiff may act under a pseudonym.<sup>20</sup>

Many child sexual abuse survivors don't report abuse due to various reasons, including the psychological impact of the abuse and the fear of exposure. A pseudonym motion or a motion for a protective order can be a critical first opportunity to educate the court on the fear, pain, and shame clients experience before beginning discovery.

**Provisions in reform laws.** Recent survivor-centered legislative reform gives traumatized clients greater access to justice. Previously closed avenues for victims of child sexual abuse are beginning to open due to statute of limitations and statutory damages reform. The reform to the discovery rule in "Masha's Law" at the federal level and the passage of the New York State Child Victim's Act of 2019 are just two of many trauma-informed law reforms in recent years.<sup>21</sup>

Masha's Law, for example, provides

victims depicted in child sexual abuse material with an option to seek liquidated damages as a statutory right, meaning these plaintiffs can often avoid depositions or extensive discovery by limiting the damages they seek. "Like a defamatory statement," child abuse images and videos injure a child's "reputation and emotional well-being"<sup>22</sup> and violate "the individual interest in avoiding disclosure of personal matters."<sup>23</sup>

In a very different way, the statute of limitations reform recognizes the shame survivors must overcome before reporting abuse and coming forward with their stories. Typically, statute of limitations reform extends the time to sue abuse perpetrators or enablers for civil damages or revives an opportunity for victims to sue within a limited window of time.

Meaningful reform like the New York State Child Victim's Act of 2019 also creates a mass reckoning, allowing victims to see just how many other survivors shared their fate.<sup>24</sup> This may cause survivors to feel institutional betrayal and collective trauma, which is relevant when assessing impact and evaluating damages because losing a sense of community can compound the loss of the value of life. Some non-public institutions can be liable for punitive damages for certain intentional conduct depending on the circumstances of the behavior that enabled the abuse.

**Tools for trial prep.** Eye Movement Desensitization and Reprocessing (EMDR), talk therapy, group therapy, art therapy, dance therapy, animal therapy, and related treatments are helpful tools for reducing the stressful experience of recounting traumatic events.<sup>25</sup> EMDR basically entails recalling a traumatic event in a controlled setting while engaging in bilateral stimulation (such as a pattern of left to right eye movement).<sup>26</sup>

Studies have shown a decrease of certain PTSD symptoms in many

patients treated after limited numbers of sessions.<sup>27</sup> This treatment can sometimes help trauma victims better control their emotions so they can withstand the turmoil of trial. But it may blunt the testimony's effect, and this trade-off must be discussed with the client.

EMDR is a valid trauma treatment and not to be understood as a tool for memory recollection. Any discussion of uncovering repressed memories by a treatment provider may be an indicator to use an alternative provider. While EMDR is not a memory treatment, be careful—if it's performed by an untrained mental health worker who is unaware of the client's memory of the trauma in advance of the treatment, this can call your client's testimony into question. Similarly, a contemporaneous record of the treatment must be kept.<sup>28</sup> A trained professional performing EMDR for therapeutic purposes (not to recover memories) should keep a contemporaneous record of the procedures used to show it did not negatively impact testimony.<sup>29</sup>

In our practice, we don't use EMDR when the problem is that clients don't remember the abuse.<sup>30</sup> We use it when the problem is that they remember it all too well, and they cannot tolerate questioning on it. We have an expert conduct a psychological evaluation beforehand and create an extensive record of the abuse well before any such treatment occurs. Often, the evaluation (which is for trial purposes, not treatment purposes) can be destructive for the client. Experienced professionals may monitor clients after their first EMDR session to determine whether the client is a candidate for future sessions.

Although handling these cases may be complex, we see much more strength than pain. We are always in the company of copious amounts of courage in this line of work—and approaching these clients with a trauma-informed mindset will help ensure their stories are heard. ■



**James Marsh** is a partner and **Margaret Mabie** is the managing associate at *Marsh Law* in New York City. They can be reached at [jamesmarsh@marsh.law](mailto:jamesmarsh@marsh.law) and [margaretmabie@marsh.law](mailto:margaretmabie@marsh.law).



#### NOTES

1. See generally Bessel Van der Kolk, *The Body Keeps the Score: Mind, Brain and Body in the Transformation of Trauma* (2015).
2. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 271 (5th ed. 2013). Any "actual or threatened death, serious injury, or sexual violence" constitutes a traumatic event.
3. CHILD USA, *Delayed Disclosure: A Factsheet Based on Cutting-Edge Research on Child Sex Abuse*, at 3, Mar. 2020, <https://tinyurl.com/2zjtzaxz>.
4. Beverly Engel, *Why Adult Victims of Childhood Sexual Abuse Don't Disclose*, *Psychol. Today*, Mar. 6, 2019, <https://tinyurl.com/4nbx3zee>.
5. Judith Alpert et al., *Symptomatic Clients and Memories of Child Abuse: What the Trauma and Child Sexual Abuse Literature Tells Us*, 4 *Psychol. Pub. Pol'y & L.* 941, 946 (1998) (citing J.P. Wilson, *Trauma, Transformation, and Healing: An Integrative Approach to Theory, Research, and Post-Traumatic Therapy* (1989)).
6. See Bruce D. Perry et al., *Childhood Trauma, the Neurobiology of Adaptation, and "Use-Dependent" Development of the Brain: How "States" Become "Traits,"* 16 *Infant Mental Health J.* 271, 272–73 (1995).
7. Van der Kolk, *supra* note 1, at 74.
8. *Sherrod v. Berry*, 629 F. Supp. 159, 163 (N.D. Ill. 1985), *affirmed*, 827 F.2d 195 (7th Cir. 1987), *reversed on other grounds and vacated*, 835 F.2d 1222 (7th Cir. 1988). See also Stanley V. Smith, *Hedonic Damages in Wrongful Death Cases*, 74 *ABA J.* 70 (1988).
9. Ctrs. for Disease Control & Prevention, *Fast Facts: Preventing Adverse Childhood Experiences*, Apr. 6, 2022, <https://www.cdc.gov/violenceprevention/aces/fastfact.html>.
10. *Id.*
11. Kristen Anderson Moore & Alysha N. Ramirez, *Adverse Childhood Experience and Adolescent Well-Being: Do Protective Factors Matter?*, 9 *Child Indicators Res.* 299 (2016).
12. See Penelope K. Trickett et al., *The Impact of Sexual Abuse on Female Development: Lessons From a Multigenerational, Longitudinal Research Study*, 23 *Dev. & Psychopathology* 453 (2011).
13. *Lopez ex rel. Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n*, 985 F.3d 327, 345 (4th Cir. 2021), *cert. denied sub nom.*, *Shenandoah Valley Juv. Ctr. Comm'n v. John Doe 5*, 142 S. Ct. 583 (2021) (citing U.S. Dep't of Justice, *Report of the Attorney General's National Task Force on Children Exposed to Violence*, Dec. 12, 2012, <https://perma.cc/G3F6-ACW2>). See also Buffalo Ctr. for Social Res., *What Is Trauma-Informed Care?*, Univ. at Buffalo, <https://tinyurl.com/3yd7bf4w>.
14. See generally Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 *Clinical L. Rev.* 359 (2016).
15. Jessica Liebergott Hamblen & Murray Levine, *The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying As Victim-Witnesses*, 21 *Law & Psychol. Rev.* 139, 170 (1997).
16. *Id.*
17. See generally Thomas Grisso, *Evaluating Competencies: Forensic Assessments and Instruments* (1986) (credited with developing the semi-structured interview techniques).
18. We have used seminars taught by Kay Saakvitne, Ph.D and Dr. Juna Bobby. CHILD USA and other nonprofit organizations offer CLEs on trauma-based advocacy taught by sociologists and mental health professionals.
19. 214 F.3d 1058, 1068 (9th Cir. 2000).
20. *Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 189 (2d Cir. 2008).
21. 18 U.S.C. §2255 (2018); S. 2240, 2019–2020 Leg. (N.Y. 2019).
22. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002).
23. *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982); *Doe v. Boland*, 698 F.3d 877, 880 (6th Cir. 2012).
24. N.Y. S. 2240.
25. Louise Maxfield, *Clinical Implications and Recommendations Arising From EMDR Research Findings*, 2 *J. Trauma Prac.* 61 (2003); Francine Shapiro, *Eye Movement Desensitization and Reprocessing: Basic Principles, Protocols, and Procedures* (2d ed. 2001).
26. Am. Psychol. Ass'n, *Eye Movement Desensitization and Reprocessing (EMDR) Therapy*, July 13, 2017, <https://www.apa.org/ptsd-guideline/treatments/eye-movement-reprocessing>.
27. See Steven Plitt, *The Claim Adjuster's Automobile Liability Handbook* §14:18 (2021).
28. See *Borawick v. Shay*, 68 F.3d 597, 607 (2d Cir. 1995); *United States v. D.W.B.*, 74 M.J. 630, 642–43 (N.M. Ct. App. 2015).
29. *Borawick*, 68 F.3d at 607.
30. The use of written EMDR workbooks, which are often sold online, may create intrusive discoverable information. Certain aspects of EMDR treatment may be better suited for the posttrial stages of the client's healing journey.