

“Would I Lie to You?” : How to Spot When Clients Lie and Why

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Throughout this paper I will be referring to the works of Bill Eddy, Mediator, Therapist, Lawyer. In particular I will refer to clients who have high conflict personality disorders or HCPs. I have included an Appendix at the conclusion of this paper which sets out some of the characteristics of the HCPs, the issues they raise for lawyers and how we might better cope when working with clients who exhibit these traits.

Truth? What is it?

We will explore what truth later in this paper is but I think it has been best encapsulated in the saying “There’s your truth, my truth and then real truth”. Family lawyers know this to be the case.

The Car Crash

Some of us like to use the analogy of the car crash to best illustrate why an absolute truth can be elusive.

If you were to take two people with the same line of sight and the same visual acuity and asked them within 20 seconds a car crash to write down what it is that they have observed, it would become perplexing to anyone reading their statements as it would appear that they have narrated two separate car crashes – not the same crash. Why is this? It has a lot to do with brain function and how we, as individuals and experienced the world up to that point in time and how that information has been received by our brains.

It may be that you believe older model cars are inherently dangerous so if there are two cars involved and one is an older model, your brain may lean towards the version of reality that it was the older car and its driver which was responsible for the accident. Others may believe that women drivers are safer drivers when compared with younger male drivers with P plates so if you observe there is a female driver and a younger male with P Plates, your version may be skewed in favour of the driver whom your personal experience tells you is the better driver. It does not make your version of the specific car crash correct. You are bringing your past to bear on the present and you are filtering the truth through a mesh of micro lenses born of past experience, prejudice, bias etc.

“Everyone Lies”

This phrase was made famous by the character of Dr Gregory House in the TV series of the same name.

When I have presented on this topic previously, it was interesting to note how the Judicial College cautions judges on this topic. Judges are taught not to try and spot the lie. There is no value in working out if someone is giving truthful evidence or is lying out the side of their mouths. The only verifiable assessment of the truth or otherwise of statements made in Court

is the evidence and the nature and quality of that evidence. Judges are taught that even if they believe they can detect if someone is lying or not, they must park that intuition or feeling and rely only on the evidence.

For the uninitiated client or the lawyer who is simply the parrot of their client, simply accusing the other party of being a liar and that their version should be preferred, is not enough. Evidence must correlate and support a client's version of events. The worst assumption you can make is what your client has told you is "true" without reading primary discoverable documents which support your client's contentions. You should always read the documents your client is seeking to rely on – do not just make them available for inspection by the other party, assuming that what your client has told you is borne out by the documents.

I have deliberately used the term "primary" when referring to discoverable documents. I would not trust anything received by email which is a copy of a document. I would want to see the originals. There are concerns in this day and age of scanners, printers and all manner of information being available on the internet that documents can and have been doctored and presented as being genuine. Think about the high quality printers being used to produce counterfeit \$100 note in Victoria. So even with what appears to be original documents – ensure that as a collection being produced to support a contention, that the documents as a whole make sense.

So House, if he is indeed right, puts us all on notice that we must treat all that we hear and see with skepticism. This quality, whilst not endearing you to new clients, will stand you in good stead in the representation of your client.

As you recall, House has no bedside manner. Hence others are sent in as his messengers. If he were to meet his patients, but for the fact he was at a training hospital, he would have no medical practice. It is unlikely that your firm functions like House's team. So you have to cultivate your bed side manner but at the same time, have an interrogative style that delivers you the actual truth of a case.

Of course in a first interview, you have to be extremely careful not to frighten your client by interrogating them or appear to not believe them from the beginning. Caution is urged to allow the client's story to unfold. It is also important not to be overly critical or judgmental of your client even if you believe they have been "caught out in a lie".

Family Law Clients Are the Biggest Liars

Now bear with me whilst I explain to you what I mean by this. It is a contention on my part, and for various reasons which we will explore, family law clients are amongst the biggest liars. I do not mean that they all intentionally or knowingly lie (although some do). It is due to the inherent nature of our jurisdiction and the subject matter which we explore that lies are an integral part of the family law narrative. The "he said"/"she said" phenomenon should ring a familiar bell with all of us. But what precisely does that mean? Why is that we get such variation in the stories which opposing parties tell? So how do you start off on the best possible journey to represent your family law client?

First interviews and the high wire act.....

A first interview with a client is akin to a high wire act. Your senses and skills must be in tip top shape for you to pull off getting the client to want your services enough to engage your firm. You cannot put a foot wrong. If you do, over you go and they head off to another solicitor who charms them, lulls them into a feeling of security, promises them a way forward that is more appealing than your offerings.

Knowing you only get one go at a first interview with a client, it would be prudent then to get it right. The first interview is akin to doing an audition for a play. You can't fumble it and then ask the director to forget what they have seen and re-emerge from the wings ready to do it a second time. Your ability to connect with the client, to adapt your personal style, to get the most from the client is essential if you are to sell your services to the client and for them to take a leap of faith in you as their family lawyer. As I have hinted, clients all have choice and may well have consulted other lawyers before you or may choose, depending on how you fare, to see others after you.

This however should not put you off going where you need to go with your client. Quite the contrary, you need to explore who is sitting in front of you and glean their version of reality v that of their former partner. A first interview with a new client can be extremely informative, if we know what we are looking for but challenging particularly if you do not know how to entice them to impart the information you need to be able to best represent the client.

It is stating the obvious to say that family law clients are amongst the most vulnerable users of family law services. They may have many preconceived and false ideas about how the family law system works and even greater distorted views about how that system may apply in their case. Those notions may not be on display in that first meeting. They may not be prepared to share with you their most deep seated fears and concerns. What do you do to elicit what is worrying them most? Do you get to the core of their concerns? Or do you try and impose your legal framework that has no real resonance with what matters most to them?

The First Impression Starts with the First Phone Interaction

Tip # 1: What Information Does your Firm Gather in the First Phone Call? What do you Screen For?

This paper will not permit time to talk about the importance of your support team and their training in being the face and voice of your organisation. Instead I want to focus on the intersection with Family Law.

Some lawyers elect to speak to all initial client enquiries. They view these as so important that they wish to have the first engagement with the client. So you can review your firm's policies and ask what tools your firm has when taking that first call. For example:

- If the support team speaks to potential clients do they have a script to use to elicit the requisite information from client enquiries?
- If the lawyers take the call, do they use the same script?
- Have you revised this script dependent on feedback from clients?
- What basics do you cover?
- How willing/unwilling are clients in sharing this information?

- Do you have a screening tool to assist identify client's issues?
- Do you screen for family violence? If so, what screening tool do you use?
- Do you screen for clients with high conflict personality disorders, drug addictions, gambling addictions, others?
- Do you ask them if they have or have had other solicitors acting for them? Do you ask about impending Court hearing dates and timing?

Based on past experiences, what else would you like to know about a client before you meet with them and what is a new client likely to find a tolerable threshold of enquiry prior to meeting a lawyer for the first time? In short, screening is balancing act between garnering sufficient information to know with whom you might be meeting whilst not putting the client off or without the task of making a first appointment too intrusive or labour intensive

One of the first tips to take back to the office is whether there is any form of screening done by your firm or organisation before you physically meet with your clients.

Has the client had more than one previous solicitor?

What has this got to do with lying? How a client presents and if they have been solicitor-shopping, you may have a harder time at getting at their "truth". They may well have adapted their information sharing with you to get you to commit to advice that had you known all the relevant facts, you would never had proffered. In short, a solicitor shopper wants to pin you to the wall and quote your advice back at you when your advice shifts as a result of becoming better informed.

"But you told me.....but you advised me.....but you said....." These are phrases you do not want the lying client to hurl at you later on when they get less than the result they had in mind (a personal "truth" they also failed to share with you: the truth about what they really wanted to have happen).

A knowing liar distorts the truth for immediate or longer term gain. Do not get caught in their web of deceit and ensure that if they present with a legal pedigree, that you explore this with them. Do not suffer from the arrogance and hubris that you have been able to "help them" when another colleague could not or fell short of the client's expectations.

The question about previous legal representation can be very telling. If they are prepared to tell you whom they have been represented by, this can be informative. If more than one solicitor, this can be extremely telling. Knowing who may have been representing them, this may alert you to the quality of advice received and therefore the degree of difficulty you may experience with this client.

If you are solicitor number 3 or 4, your concern meter should be high and extreme caution should be taken to first explore why the client is no longer engaging those practitioners. This is extremely hard to do without sounding cynical or suspicious. The advice here is to ask respectfully and listen carefully to the responses. Do not make assumptions and guard your physical reactions to what they say or tell you. You can acknowledge that there must have been reasons why things did not work out and it would be extremely helpful to you to know so you can try and avoid repeating the same pattern which led the client to lose faith in that solicitor. You do this respectfully and park your assumptions until the client explains why.

Also be wary of clients doing the rounds to knock you out of the picture on the basis of legal privilege and conflict of interest.

If your firm does not undertake any form of pre-screening other than a basic conflict check, what would you need to do to be able to put such prescreening in place?

Tip # 2: Are There Clients for Whom the Firm Will Not Act? Is Lying a Reason not to Act?

Apart from the obvious clients being ruled out due to a conflict of interest or inability to pay legal fees if in private practice, does your firm sometimes decide not to take on a client? Do decide there are clients for whom you will not act?

Just because you catch your client in a lie, is this reason enough to stop acting? What are your ethical obligations in relation to the lying client once caught?

Ethically speaking, it is clear as to what you cannot do in relation to family law clients who wish to lie. Your highest duty is to the Court and as an officer of the Court, you cannot put a proposition which you know to be a lie or allow your client to lie. So on occasion, a lying client, depending on the lie, is a reason to cease acting.

This brings me back to the earlier issue about inheriting clients who have had more than one solicitor. It may be that the solicitor ceased acting precisely because the client wanted to put a position to the court which the solicitor knew to be a lie and therefore came to the conclusion with the client that they could no longer act. As the solicitor has a duty of loyalty to that client, they cannot tell you, the would-be next lawyer why they are no longer acting. I would also take this one step further. I would consider it unwise to allow a previous lawyer to engage in conversation with me about a current client.

Having said this, for family lawyers, we would not have practices if we screened out clients who face challenges surrounding their marriages, relationships or separations or indeed if they have a distorted world view about their marriage.

Many of our clients may have been married to HCPs or be one themselves; usually undiagnosed. This is critical to remember. Most family law clients who have a diagnosable mental health issue may not have been diagnosed throughout their marriages or relationships. So don't be harsh on yourself if you also do not realise that the client with whom you have been working may in fact fit into a HCP category.

HCPs may well end up acting for themselves depending on their level of dysfunctional or if they present with a severe form of personality disorder. HCPs may not lie more than non HCPs but for some, their distorted sense of reality may bend the truth to the point whereby it is indeed a lie.

Tip # 3: Less Talking and More Listening: How to Get at Truth

I once met a Texan attorney who said we were given two ears and one mouth in that proportion for a reason. This means we need to do more listening and less talking. The idea is to have the client reveal themselves in the answers. Some professionals have a tendency to do a lot

of the talking in a new client meeting. They are trying to demonstrate to the client that they have the knowledge or skills with which to represent them and meet the clients' needs.

If this sounds like you, try changing this pattern by changing the first question you ask new clients. Think about a different way of starting a new client meeting by asking the very open ended question:

"What brings you here today and how do you think I can assist?"

Then let the client tell you in their words why they are there, what they expect you to do about it and in the process of answering that one question, they will start to reveal who they are and indeed, their expectations of you. Professor Tania Sourdin (Dean of the Law School at Newcastle University) often uses the funnel of information as a training tool to educate lawyers that not everything clients say is relevant to the legal issues that the lawyer might be focused on. In other words, lawyers have a tendency to sift out or ignore or play down the importance of information or concerns expressed by the client unless it fits into the legal matrix.

The lawyer, for example may be focused on the direct financial contributions made by each of the parties to the acquisition of the home. The client, a mother of 3 children under the age of 7, who has left paid employment to work full time caring for the children, is likely to be more concerned about where she and the children are going to live after separation.

The client is unlikely to share their innermost fears with you, especially in a first interview and especially if you as their lawyer have not been able to establish rapport with them. If the client feels that you are ignoring their needs or that you haven't listened to them, then they will feel dissatisfaction with you from the very beginning of the professional relationship. They just won't tell you that. They will realise that you have a different agenda to them and they will hide their feelings and their fears. So whilst you may think you are achieving great results for your client, in reality, you are not fulfilling their expectations.

Another tip with anxious clients is to invite them to bring an observer with them to a first interview. This is someone who can really listen for the client and take notes of the meeting so they can over what you have said later on.

Similarly, if your firm has a surfeit of paralegals/undergraduates working with you, and provided you have client permission, have the undergraduate sit in and take. When seeking permission, explain to the client it is so you can focus on what it is they are saying to you. You have to ensure that the client has an opportunity to refuse the request and if they do so, you must comply without hesitation or rancor.

If you do not have someone taking notes, make a point of putting down your pen and really focusing on what the client is saying to you. Have you ever noticed that clients in a first interview will open up as you put your pen down and close your notebook? Just as you are winding down the interview, standing up and getting ready to exit out the door, the client decides to share what is really on their minds? By virtue of being completely available to the client and what they are saying, you may well get further with the client by understanding what matters to them most, what is keeping them awake at night, what they feel they cannot share with a complete stranger in a first interview.

Much has been written about the importance of emotional intelligence and how lawyers sometimes lack this. In family law, it is nigh on impossible to practise law without it. Being able to empathise with the client and what they are experiencing is essential. The ability to empathise starts with listening.

Tip # 4: Be Non-Judgmental, Park Your Own Personality and Be Aware of Your Physicality

It is essential that you maintain a sense of neutrality about the instructions the clients are imparting lest an untoward inference is drawn by the client by virtue of your reactions. When you are imparting advice or information, you also do not want the clients to misinterpret what you are saying. There is no place for sarcasm or misplaced humour with any client. You must be very clear in your meaning and if you are not genuine in the room, a vulnerable client will pick up on this. With clients who are HCPs, anything other than complete emotional honesty from you will be detected and they will not react towards you in a way that helps you advance their matter.

It is critical to be self-aware. This tip is really about knowing what your basic personality traits are, how you come across with others and if you have the capacity to modify your behaviours to meet the mood or energy level of a client. This is not about mirroring body language. This is really about clueing into the client's physical self and not imposing your own physicality in the room but adapting your energy to meet theirs.

If your client is highly agitated, you need to try to reassure the client and engender a calm and professional demeanour, even when you are not feeling particularly calm. You don't meet hysteria with hysteria but nor do you come across as if you do not care what your client is experiencing by being so calm that it reads like indifference. You need to set the tone and the parameters of the first meeting because if you lose control of the client in the first meeting, you are unlikely to ever regain it later on. This is particularly true of clients who have high conflict personalities.

It is preferable to allow the client to unfold their story through guided questions. Do not however allow the client's entire life history to be presented or for you to feel emotionally hijacked by the client. If you are getting "Gone with the Wind" it may be prudent to suggest that they will have opportunity to let you have all the details at a later date but use phrases to refocus the interaction such as "in order to assist you better is it possible for you to tell me what your burning issues are?" or "can you explain to me the importance of that..." or simply, "Can you tell me more about that....." indicating a specific issue which may elicit more information from the client of a helpful or pertinent nature to you then being able to assist.

Tip # 5: Ask the Detailed/Curious Question

Rather than conducting a cross examination of your client, show interest in your client's summary of events by asking the curious question that calls for more details about your client's behaviour but also what they understand of the other party's behaviour. "Why do you think they did that?" Test your client to see what empathy they have or do not have for their former partner. Also get the clients to reflect on what particular situations were like prior to their relationship becoming difficult. "What did you do well together as parents" "How did you go about juggling the kids' routines when you were together? What did a given week in the life of your kids look like? How did you solve parenting problems then v now? What's changed? What do you think the kids want? What do you think the kids want from you as their parents?

Their answers will demonstrate what capacity they may have to engage in forms of ADR with the other parent.

You are also assessing what capacity your client has as a potential witness in their case from day one. You are assessing if they will be a credible witness and whether you find their version of events believable or not.

In other words, do not let the client make grandiose or vague statements without you drilling down into the detail. Given it is a first interview, it is imperative that you do this in a respectful and interested way.

Bill Eddy talks about clients who build cover stories to suit their own purposes and the only way to get at what may more closely approximate the “truth” is to ask the more detailed question from the outset. “Tell me more about that, in detail”. He gives the example of someone floridly responding by saying “She controls me”. The art is in going back and asking them to articulate that. “How is she controlling you? Can you give me some examples of that?”

Tip # 6: Never Collude

This is one of the best bits of advice when working with the lying client.

It is important that from the very first interview if your client makes grandiose or exaggerated statements, you should query your client by asking for more feedback from them: “Do you think the examples you have given are indicative of control? Could she have done this not to control you but to make it clear that she has left the marriage?” Avoid telling the client what you think. If you wish to express a thought, put it to the client by way of a question and make sure they answer it.

Furthermore as their lawyer, you need to be able to manage their expectations from the start. Therefore if you have colluded with them about their false or delusional fantasy of the law (I will be vindicated when I go before a judge) in order to get on side with them, you cannot hope to then disabuse them of that fantasy when it matters most i.e. as you are going to Court. It does not assist that the Family Courts are a place where the least unsophisticated users of the legal system intersects with our legal system and their knowledge is predicated on such unreliable sources as television.

Educating these clients from the beginning in an authoritative manner is likely to stand the lawyer in better stead in lawyer/client relations than simply allowing the client to continue to harbour unrealistic expectations as to outcome.

Yes, there are some lawyers who tell clients what they want to hear to placate them and keep them as clients. It relieves the lawyer because they have told the client what they think the client wants to hear. This is extremely dangerous with all clients but especially with those who are HCPs as they will punish you later on when they find out that the reality is different from their expectation and you did little or nothing to disabuse them of those notions. We are also bound by our ethics not to simply be the parrot of our clients. We are bearers of bad tidings. The art is in how we impart information that the client may not wish to hear but needs to hear in order to save them from their own unrealistic expectations.

“I understand that you believe that the judge will agree with you. However, this rarely happens that one party is 100% right on all points and the other conversely 100% in the wrong. The question is what if the judge does not agree with you? My job is to assist you evaluate those

aspects of your matter where the judge may agree and those where I have concerns your evidence may not support your arguments”.

In summary do not be one of the lawyers who believe it is easier to tell a client what they want to hear and allow the client their day in Court whilst alluding to the inherent discretionary nature of the jurisdiction. This is not easier particularly for the 3 to 5% of the separating population who proceed to a final hearing in the Family Courts. These are likely to be our more dysfunctional clients and are often in the high conflict personality categories. The HCP will punish the lawyer who does not adequately prepare them and support them throughout the litigation process. They are likely to report the lawyer to the Legal Services Commissioner or dispute the bill after the Court hearing or refuse to pay if the lawyer has not received payment into trust in advance.

Tip # 7: Disabuse the Client of Unrealistic Expectations

This is an elaboration of Tip #6. Although clients with high conflict personalities may not be strangers to litigation and indeed many already have orders pronouncing them as vexatious litigants in our or other jurisdictions, they may still harbour unrealistic expectations of outcomes.

They may have unrealistic, idealised concepts of what the Court will do.

“The Court will vindicate me! The Court will find him/her “guilty”! The Court will find in my favour”

As indicated above, television hasn’t helped. Even for those clients who are not high conflict, they will have false notions of what happens in Court. They will have lapped up all the stories of their friend and families who have been through a divorce. They will assume that all outcomes are the same and not realise that each case is determined on their own facts and that there are many facts which distinguish their matter from that of their friend/neighbour/relative’s case.

As we know but they do not, there are rarely those “ah ha!” moments in cross examination in Court or even discovery. Even if there are, they rarely amount to a clear “victory” to one and defeat to the other.

It is critical that you set the record straight from the get go. Eddy suggests that you do this with something akin to the following:

“The Court process is not like you see on TV. It is a long, drawn out and expensive process with many Court events in which your solicitor or barrister speak for you and you merely sit in court or out of court in a waiting room. You may be at court for many hours with nothing much happening. When you do get to a final hearing, judges rarely find one person “right” and the other “wrong” and even when clients “win” it rarely feels like a victory. A judge’s decision is but one option and it is an option over which you have no control and no say. It is imposed upon you and once imposed, it becomes enforceable. You may be better able to control what options suit you best by exploring those with me at first instance, work out which ones you would like to put to your former partner and then explore whether agreement can be reached in mediation”

If you fail to adjust your client’s thinking from the beginning and they perceive they have failed at a critical juncture in their matter, they may just think you are to blame and not the Court system. With a client who is a high conflict personality, they are likely to quickly change their

object of blame (as Eddy describes it) from their former partner to you. You will be considered the world's worst. You will be the reason their life is terrible. You are to blame for everything that has ever gone wrong.

A really handy tip for all clients is to ask them what does "success" look like to them?

As with all clients but especially with the HCP, get them to articulate this with as much detail as possible. The answers may be very informative and will help you manage those expectations better.

Tip # 8: Be Clear in Your Communication and Have Your Client Summarise Your Advice

This is actually a useful tip regardless of the client. Most family law clients come to us at a time of high stress in their lives. Their powers of logic and ability to retain information is likely to be at an all-time low. It is really important to put yourself in their shoes. Keeping your communication simple is essential.

With the HCP client, we need to be particularly clear in our communications and an invaluable way of measuring whether we have been understood is to have the client summarise their understanding of what we have said. If this client becomes a long term client, then we have the added benefit of confirming advice in writing.

A lying client will quote you or misquote you back if they decide you are an object of blame and this is why it is critical to protect your advice and make it clear what it is based on. In other words, leave yourself inviolable to attack should they decide to accuse you later of negligence in relation to your advice. If there is something which you do not know and without sounding Rumsfeldian, cannot be known, but rather relies on which witness the court finds more compelling in their evidence, then you must ensure your advice runs to this. In short, if there are chinks in the armour of your client's case, then you must make sure that the client understands the import of this and the inherent risks of those chinks.

Tip # 9: Confirm All Advice in Writing and Provide Resources

Be careful about legal advice or opinion until you know the facts of the case. That does not mean your client's version of the facts. That means independently verifiable facts supported by independent documentary evidence which may be relied upon at a mediation or in Court. If asked to do anything by your client before this available either resist or provide such overarching riders that allow you the opportunity to revisit the advice once such evidence is to hand.

It is highly desirable that with all clients you confirm your advice in writing. This is even more desirable with HCPs. Do not comply with the client who says, "I don't need you to repeat in writing what you have already told me. I am really conscious of costs and I am concerned about my legal bills so please don't send me any letters".

The difficulty with the spoken word is that what you have said v what the client hears and that could be two completely different things. Again, the brain's biases kick in and distort what has been heard and the import of what has been said.

Also do not agree to a client recording your oral advice. Some young lawyers have explained that this is hard request to deal with as they do not what to say to the clients to resist the request. Try explaining to them something like:

“All legal advice is based on the facts and circumstances at the time that advice is given. With additional information, that advice not only can change, it is likely to change. Therefore we would not want you to rely on something that was said that no longer applies in your matter and for you to be labouring under a misapprehension about how the law might apply in your case. Both our advice and our recommended strategies in your matter will very much depend on the changing circumstances of your case. What we can tell you is that once we know all there is to know, we will be able to give you an indication of the range of possible outcomes that a Court may order. That is all any lawyer can do given the broad discretion that the Family Court has”.

You can also say this is another reason why advice is confirmed in writing, so that you have an up to date opinion based on current information about your case. In short, all clients deserve to know why they are receiving written advice and you can deal with this in the opening text of your correspondence.

"You have raised an important issue of X with us and we understand why this is important to you. We have given you advice regarding X in conference/on the phone and we believe that you need to understand the reasons for that advice....."

Have your clients sign off on all significant written advice that they have read, had time to consider and have understood the advice and see Tip 10 regarding input from the MHCP before putting offers which may result in final orders or agreements.

With new clients think about bundling together resources both hard copy and on line resources that they can refer to after they leave your offices. If you create as many opportunities for the client to do as much work as they can in a meaningful way in their matter, either with their former partner in an ADR setting or in assembling the material for a court dispute, this also has the added benefit of empowering the client. Giving these clients homework is a strategy which Bill Eddy recommends.

Tip # 10: Get Written Authority from the Client to Speak to Their Accountant/Mental and Health Care Professionals

All clients need a lot of help and support throughout their matter and it is therefore essential that you understand what is happening for them and what they are really thinking. They may not always be willing to share this with you and you may not have the time or the skills to elucidate this.

You may wish to normalise how all your clients work with counsellors or psychologists during the process (negotiation/mediation/litigation) and how it is critical that as their matter approaches key stages that they are receiving the support and attention that they need. Again, if you normalise this for them, they may see this as standard operating procedure and not become overly sensitive about being seeing a psychologist or therapist throughout their matter or allowing you to speak to their health care professionals.

If your client has not been diagnosed then this could be an issue as any notes relating to work done with their MHCP can be subpoenaed. If you are the reason they agree to see an MHCP and the evidence jeopardises or is perceived by the client to jeopardise their family law matter, the client may well blame you for this advice. The reality is a Family Report is likely to reveal issues with your client depending on the nature of their presentation.

Be very careful about representing any client with a presentation of mental ill health entering into a negotiation that may result in final orders or agreements (Financial Agreement or Child Support Agreements) unless your client has been assessed as understanding the nature of offers or options they wish to put, the agreement reached, that they have understood the legal advice given, that they are not suffering from any disorder which would prohibit them from finalising their matter. As has been stated in a Supreme Court case in Victoria (brought by a client against his solicitor, barrister and accountant) when a new form of professional negligence evolved from this case; the judge concluded that assessing a client's capacity to provide instructions is not a daily exercise but for some clients, an hourly exercise and ultimately, something that the Court should weigh in on.

Goddard Elliott v Fritsch (2012) VSC 87 (14 March 2012)

I often think about this case in the context of "but for the grace of god, go I". It presents so many practice-challenges unique to lawyers, who are not trained in the very skills that the Court now requires us to be capable of possessing and applying in daily practice: assessing the mental capacity of our clients to provide instructions.

In this case, Justice Bell had to determine if Mr F was entitled to financial compensation based on an allegation of professional negligence in that his solicitors failed to provide legal representation in light of his diminished capacity to provide instructions. His Honour discussed the concept of **"capacity negligence" – and hence developed a new category of professional negligence.**

In this matter Mr F settled a long and particularly nasty property settlement with his wife at the door of court which was alleged to be significantly higher than the range in favour of the wife. Days after the settlement, he was admitted to a psychiatric facility.

Mr F sued his solicitors, accountant and barristers for negligence, stating that he did not have the mental capacity to make a decision and to provide instructions. There were further issues of delays and failure to prepare documentation. He settled with the barristers and accountant outside court. Mr F suffered from PTSD after surviving in the Vietnam War and also had a major depressive illness, cited by both his psychiatrist and a psychologist, who determined that he had the capacity to provide instructions at various points during the proceedings.

Mr F's solicitors Goddard Elliott were concerned about his capacity to provide instructions and sought frequent medical reports. The report determined that Mr F had capacity, however it was declining the longer the proceedings went on. They also wrote a letter regarding their concerns about his capacity.

On the day of the hearing, Mr F appeared to be in a highly stressed state, dishevelled and delusional, his hair was falling out and he was suicidal. It was determined by the Court that his lawyers should have been able to ascertain that their client's mental capacity had diminished on the day. His treating psychiatrist had determined that he should be in hospital and this should have been enough for the lawyers to determine that there was diminished capacity.

A previous medical report stated that Mr F was unable to make quick decisions and required time to think about and process information, this was prior to his rapid deterioration and eventual hospitalisation.

There was email evidence from Mr F's father which noted his concern about his son's inability to manage his own affairs.

Mr F agreed to settle for a much lower amount than was within the range the Court may have awarded – almost \$1million.

Letter to ethics committee from Goddard Elliott – noting their concerns about his ability to understand the advice given. The email to the committee noted Counsels being “in no way satisfied that he comprehends or appreciates the decisions he must make.”

The committee respondent “the committee notes the information that the medical reports indicate that the client is capable of giving instructions and again considers that this request does not raise an ethical issue.”

Justice Bell “if lawyers are in any doubt about the decision making capacity of their client, they must bring the matter to court for a ruling.” Not sufficient to rely on advice of treating psychiatrist.

HELD: by Justice Bell that Goddard Elliott was 75% responsible for failing to determine that their client did not have the mental capacity to be providing instructions in his matter and at the point when his family law matter was resolved. His Honour attributed 25% negligence to the barristers – but due to the concept of advocates' immunity, this provided both the solicitors and the barristers with a complete defence and thus protected Goddard Elliott in the claim by their client against them.

For the uninitiated (dare I say “non-lawyers”) this concept may seem unfair. How can a lawyer be held responsible for failing to ascertain capacity and go on to represent a client when they could not give instructions. For us however, this presents a real dilemma. If we stop and consider our area of law, family law, and the types of clients we mainly represent, then it is inevitable that we will act for those clients whose capacity is diminished in one way or another. Do we turn such potential risks away from our practices? How are they better off being self-represented? Does the Court of its own volition elect to have a self-represented litigant represented by a litigation guardian? Whilst it is open to the Court to do so, does it?

Further, we are not trained in psychology. We are not even trained in managing high conflict personalities or in how to detect mental ill health. Yet, we are forced daily to make assumptions about our clients' mental health and ability to provide us with cogent instructions.

In practice, you must continue to assess your client's mental capacity to provide you with instructions on a day by day basis or even hour by hour and this assessment must happen throughout the entire time that you are instructed to act for a client. It is not something you can palm off onto your barrister. Your exercise of caution must be higher if you are aware that your client suffers from a mental illness or disorder. A higher duty of care could be said to exist if you are aware of a given client's pre-existing condition or history of mental ill health.

“1145 Advocates' immunity operates in Australia to shield solicitors and barristers from liability for negligence (and other wrongs) occurring in the course of work leading to decisions about, or intimately connected with, the conduct of a case in court. After examining decisions of the High Court of Australia which bind me, I have decided that advocates' immunity supplies a complete defence to Mr Fritsch's claim for damages against Goddard Elliott. Its capacity negligence (as does its preparation negligence) falls within the immunity because it occurred in the course of work leading to decisions about, or intimately connected with, the conduct of

a case in court, which is a very wide test. By reason of the immunity, Goddard Elliott is not liable to pay damages for the loss which its negligence caused Mr Fritsch, a conclusion to which I am driven by the binding authorities and find deeply troubling.”

1146 Goddard Elliott must succeed in its claim for outstanding fees against Mr Fritsch. I will hear the parties in relation to the form of the final orders and costs.

Therefore Goddard Elliott succeeded in its claim for the payment of their outstanding fees.

In family law matters, even alerting the Court to a situation whereby a client's capacity is questionable, may have a deleterious effect on their case. It may bring you into direct conflict with your client to raise this issue. If it is a children's matter for example, to raise capacity may fatally damage the client's chances of co-parenting children or spending unsupervised time with their children.

In short, avoid entering into Heads of Agreement at a mediation on the day as you would need to ensure that the client is able to comprehend not just the events of the day and how offers and counter offers unfolded, but also what advice was given and why. It is preferable to negotiate to keep an offer open for a period of time to enable the client to see their mental health care professional, for you to obtain client's permission to speak to the MHCP about the client's understanding of the offers, you have the opportunity to confirm your advice, the client has time to consider the advice, that if Counsel was briefed, there be an opportunity for the client and you to confer with Counsel.

Speaking to a client's accountant will also provide you with some reassurance that what your client has told you regarding the financial state of their matter is accurate. In relation to grandiose statements such as "I am going to become bankrupt unless you sort this out for me!" is a warning bell for you and may be real or it may be a client venting their frustration that the time that has elapsed since separation and the unexpected expense of running two households is causing them financial concern.

Whilst I have mentioned the concept of reviewing documents earlier, it bears mentioning again here. In short, verify what your client is telling you about their financial situation by reviewing their discoverable documents. Never rely on what your client tells them about their financial situation. Given the other party and their lawyer and possibly a forensic accountant intend to review your client's financial documents at some considerable length, so should you. Do not simply pass these documents to your administrative staff to copy, collate and make available for inspection or exchange with the other side.

See if your client's documents support your client's instructions. Where they do not, have the conversation with your client about the holes in their evidence. Work out what further evidence you would need to adduce to support your client's version of events and if there are direct contradictions, allow your client the opportunity to explain. Again, go back to the first interview techniques about asking the curious question in a supportive manner and if the client is unable to satisfactorily provide explanations, park your attitude of disbelief and educate them as to the logical extension of what the ramifications are if they are not believed on a given point and if there is no evidence to support them on that point.

In short, give the client every opportunity to remedy the shortcomings in their case and in their instructions to you. Point out that an objective observer such as a judge may come to a

different conclusion to the conclusion they have reached about the same fact or same set of documents.

If they are extremely poor historians or you have caught them in an outright lie, allow them the opportunity to alter their instructions to accord with the documentary evidence you have reviewed but be prepared to give them the advice about what this means for their case and your ongoing ability or inability to represent them.

Remember our ethical duty to the court is paramount and that we cannot assist our client perpetuate a lie to the Court or something we know to be incorrect remain on the court record or in the mind of our opponent or their client. An error in fact must be remedied.

We also have an ethical duty to our clients regarding client confidentiality. If your client has not given you permission to divulge information to either the MHCP or the accountant, then you cannot share that information. I believe it is extremely fraught but not impossible to talk to those who are also assisting your client but caution and discretion must be paramount when doing so.

TIP # 11: Beware Clients Wanting You to Sort it and Beware Clients who Praise You!

Beware of those clients who want you to simply sort out their family law dispute for them and are content to be an ostrich in their own dispute. You will be able to spot the former because you will find yourself working on their matter harder than they are. They will become unavailable at critical times. They will not be able to come and see you when they need to give you instructions or settle documents. They will not apply themselves to their homework. Give these people very strict timetables to provide your office with instructions and documents and have a system of follow up in place. Ensure that they are made aware of the consequences if they are not compliant with provision of instructions for say preparation of responding material. Do not simply suffer in silence and panic about a looming Court deadline.

Beware of praise, particularly when you have done nothing yet. It is likely to lead just as quickly to criticism.

In Eddy's book "High Conflict People in Legal Disputes", he identifies the key features of those with borderline personality disorder, narcissistic personality disorder, antisocial personality disorder, histrionic personality disorder and enablers. In describing each HCP in turn, he says of each:

- borderline personality disorder: manipulative, attractive and seductive
- narcissistic personality disorder: ditto
- antisocial personality disorder: ditto
- histrionic personality disorder: can be very charming at first
- enablers (those who help others who are HCP): desire to be close friends with the HCP's lawyer

So any client presenting with one of these disorders is likely to try and praise you as part of their manipulation or seduction of you. It may be so subtle that you will fall for their

compliments without realising it. But have a care as their emotional tide is just as likely to turn against you. These people find it very difficult to sustain relationships in a balanced sense for any length of time and when you add to that the pressure of a family law situation, which can accelerate the “blame game”, then the praise period may be short lived indeed.

TIP # 12: Creating Boundaries and Setting Limits

Creating and maintaining boundaries when working with family law clients and especially those high conflict personalities HCP is critical. Once you blur those boundaries, it may become very hard for you to wind this back and reassert a more disciplined approach with your interactions with the client.

As stated above, many people who have a HCP can initially appear charming. You may be won over by them only to find that they recall everything you have said to them in minute detail and be prepared to wind the conversation tape backwards and quote or misquote you. They may not be fussed if they quote you out of context or indeed distort your meaning.

Boundaries may relate to behaviour or more mechanical aspects of your interaction with the HCP. Establishing communications during work hours is essential so do not be tempted to shoot a response to this client during your private time as you may find that once this pattern has been established, they will expect this treatment at all times. They will be hurt or angry with you that one time you choose not to respond on your time. They may not be obvious about their change of heart. They may choose to sabotage their relationship with you. They may elect to make complaint about you to your employer or others. They will try and split your professional team, side with your paralegal or assistant against you and seek their collusion. Again they may use charm with someone else on your team who in turn do not understand why you are struggling with this client.

Make it clear (in writing) what turnaround time you and your team will need in order to respond to them and ensure that those to whom you delegate work meet this client's expectations and if unable to, prior information is provided to avoid accusations being made against you. Make sure all members of staff working on the file are across the behaviours of the client and what your concerns are.

TIP # 13: Take That Call

The following may seem to directly contradict the preceding tip. You may meet with a new client and not realise initially that they belong to the HCPs. One sign that they may be an HCP is that immediately after a new client meeting, your firm may receive a phone call within say 5 minutes of the client leaving your office. This is quite common with a client who is histrionic or has a borderline personality disorder. The tip is that you should take that call. They are testing your reliability. They want to see if they can depend on you. In some instances, they also want to see if they can control you. You should however control the time you are prepared to spend reassuring the client and also make it clear what the next steps are and the timetable associated with those steps.

Tip # 14: Play the Ball not the Man

For those who follow AFL know, the best way to stay away from the Tribunal and keep playing the game is to adhere to the adage of “playing the ball not the man”. This tip will hopefully get you and your client to focus on the “issue” and continue to move the focus back to the issue

rather than personal attacks which is the clear preference of some litigants and indeed their lawyers.

If you get bogged down in the personality conflict with which your client or the other party is immersed, you will be seen by that client as aligning with their world view. There is nothing to differentiate you from them. They will think that you share the same opinion, even when you do not.

When litigating, it is also a useful tool to assist you resist collusion with your client about your colleague. Even if you believe the letters coming from the other party's lawyers are less than neutral or professional, resist collusion or the temptation to feed into a client's distorted view that the other lawyer is out to get them or hates them. You can explain that whilst you can speculate on why you are receiving such letters, such speculation is not helpful and the other lawyer is not the final arbiter of fact or decision making – that is the domain of the judge.

With clients with high conflict personality disorders, if you remain in the blame game, you will also not be able to shift the HCP away from the personality issue into the problem solving phase. They will remain stuck – venomous, angry, bitter. You will remain stuck there with them; out of ideas, unable to assist, getting impatient with them.

Once seen as aligned, you cannot educate them that the Court may hold a different view to theirs. You are no longer the independent voice of reason. You have become undifferentiated from their own voice inside their head and therefore unable to alter outcomes.

Part of this process of playing the ball is also to give the client tasks to undertake and realistic timeframes in which to do them. This also ties back in to creating boundaries and setting limits. This keeps the client on track and in a less emotional, less angry state and gives them something to focus on other than the anger or bitterness against their ex. It also gives you an anchor to redirect the client back to and an “out” for you if they have not done their homework.

“I would like to be able to give you advice at this juncture about your options and a range of possible outcomes but as I have not yet seen your chronology or your financial documents, I can't do that. Is there some way I can help you with assembling that information? Do you have an accountant I can talk to? Would it be more helpful if you were to come to our office and go over this chronology with us in conference? That may make it more expensive for you but some clients find this helpful. Alternatively, you may wish to make a good first attempt on your own and then come in and go over this together”.

In this way, you give them options, you allow them or empower them to decide but you also make it clear what you cannot do. You cannot give advice until they do their homework. There are consequences to their inaction.

Tip # 15: Remain Calm

There is a distinct difference between appearing unconcerned and remaining calm. I have mentioned this earlier. You must be authentic and interested and you can appear to be interested in your client's position and empathetic towards them without buying into all they say. This is an extension of playing the ball. With a calm demeanour you can then start to apply logic to an upset client's illogical expectations of what they think may happen in say a Court based outcome.

Once you lose your calm with a family law client, it is time to consider other areas of law, other coping techniques to manage your stress. Take them back to issues. Take them back to how they will be perceived if they are unduly upset or are unable to control their emotions in front of their children.

Having sympathy is not only unnecessary it is counterproductive as you are accessing your emotional responses instead of your logical self. Empathy allows you to apply your emotional intelligence whilst not losing sight of your problem solving skills and accessing that part of the brain that enables you to do just that.

Tone of Voice and Body Language

I attended a lunch where there was a panel of three speakers talking about family violence. The irony was that one of the panel members was so vociferous in his delivery and condemnation of certain institutions that it was the embodiment of a violent delivery. Tone and body language is crucial in conveying calm. Even if you are feeling apprehensive about your impending interaction with the HCP, it is essential that this not show. The wrong tone of voice can ramp up the other person and you will find your conversation deteriorating into conflict. A calm tone of voice may assist lessening the level of anxiety or anger being experienced by the HCP. Again, there is a fine line between appearing calm and coming across as superior or indifferent.

Tip # 16: Maintain Skepticism

This is a tip straight from Eddy's book "High Conflict People in Legal Disputes". I think it applies to all clients, not just those who present as HCPs. We should be in the business of testing our clients' evidence from the beginning of their matters and should not take anything they say as gospel. The difficulty with the person who suffers from a high conflict personality however is that they may have a distorted reality which is in fact a cognitive distortion. They truly believe their version of reality. If left untested by you their lawyer and if you start Court proceedings based on that distortion, their target of blame has to refute the allegations as they are patently untrue and unfounded. As the target of blame comes up with more facts to support their version of events, the HCP is likely experience a heightened sense of outrage and emotion but their instructions to you will be based in the emotional realm rather than the factual realm. Be on the lookout for the facts behind their instructions. If it is all about how outraged they feel that these allegations are being made and very little in the way of facts, then you will need to drill down to test their outrage:

"What facts do you have to support that? The Court will be interested to hear your version of events and more particularly what you say specifically went on that day.....Can you describe it to me in detail? Can you tell me specifically what became of the \$70,000 and what you say you spent it on? Did you keep receipts for those expenses?"

If they become defensive then you can explain the clear preference to obtaining instructions when the two of you have a modicum of control over how to put the facts to the Court as opposed to the other party's barrister asking questions in cross examination.

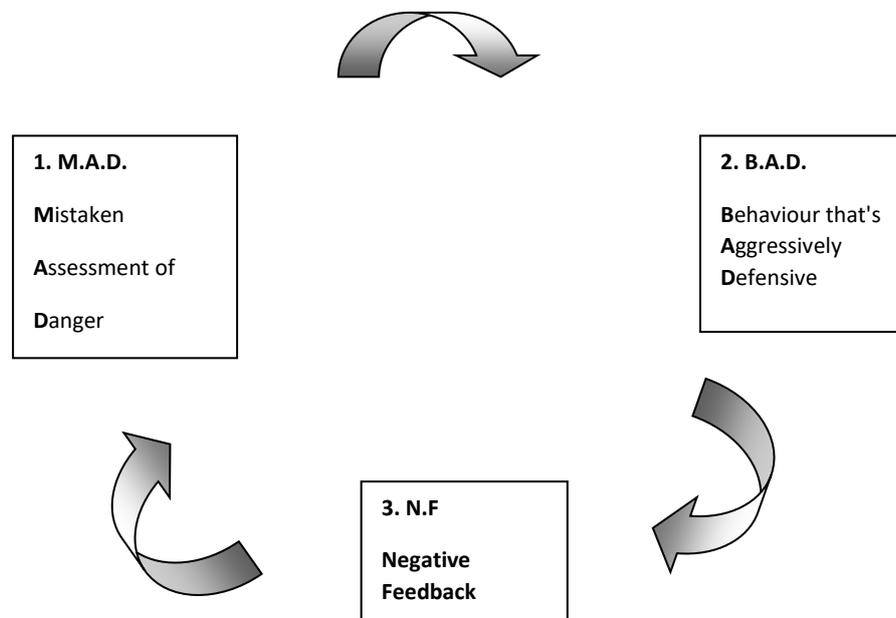
"I would much rather we look at the detail now than in court as this gives us both an opportunity to work out precisely what went on. In that way you will feel more confident about telling the Court what happened knowing you have looked at this beforehand."

It is difficult however to achieve this whilst also not giving what is referred to as "negative feedback" to a client who suffers from a high conflict personality. Negative feedback can result in you being perceived by the HCP as part of the problem and not the solution and you will quickly shift in their thinking from someone who is trying to assist them, to someone who is an object of blame in their eyes.

Overnight, you can go from having thanks and gratitude bestowed upon you to the following:

“The reason I am not seeing my children is not because I am an alcoholic or a non-compliant patient diagnosed with a mental health issue who may pose an unacceptable risk to my children, it is because you the lawyer didn’t represent me properly.”

Diagrammatically, it looks something like this:



So it is a combination of maintaining skepticism whilst asking the interested question of your client rather than conducting a cross examination of them. With HCPs, there may be a tendency for them to be sensitive to a line of questioning from their own lawyer that seems to doubt them. That is when the client moves into the MAD phase – Mistaken Assessment of Danger. They perceive that you, as their lawyer, is the source of that danger and that will quickly escalate into them becoming aggressively defensive with you. This is a self-perpetuating cycle and you are well advised to bring someone else into the situation to break the cycle. Any attempts by you to be the one who attempts to improve the situation will be met with the client’s increased aggression or them simply quitting the firm.

So provided your firm can avoid this escalation and when excising skepticism, you should take great care to explain to the client that the final arbiter of fact is a judge and therefore it is essential that there be a critical assessment of the facts from the very beginning to see where their case is stronger and where it is not so that additional evidence, if available, can adduced on the client’s behalf.

If the matter is proceeding to Court, with family law clients if you explain the context in which you are testing their evidence, most are satisfied with the explanation that you need to drill down and test their evidence before putting it into their material before the Court. You can also explain that it is far preferable to do so in the privacy of the solicitor/client privileged environment of your office than being cross examined by the other party’s barrister.

Tip # 17: Break the Cycle with E.A.R

EAR = Empathy Attention Respect

This is a tool that works well with all clients but is essential if you are working with someone who has a high conflict personality disorder. The more the HCP client reveals, the more critical it is that you continue to pay close attention to what it is that they are saying to you.

One of the tools that Bill Eddy recommends is using E.A.R. – Empathy Attention and Respect. This does not mean you agree with everything this client says.

You can suggest that it is really important that you understand what has brought them to your office and you can say as much to them. You can also repeat back to them with empathy and respect what they have said to you and a handy method of keeping their focus or the conversation going is to ask them to "tell me more about that" referring to a matter that appears to be of concern to them.

The worst thing you can do is be dismissive of a client who reports something that is of huge import to them but does not feature in your thinking as important to the professional role that you believe that you are being asked to perform. An HCP is unlikely to compartmentalise their issues neatly. There will be confusion and overlap in aspects of their lives because for many of them, they lead messy, complicated lives particularly those who are antisocial.

You must pay proper attention to what they find is important to them. You can use the information you glean from them, at a later time, to illustrate what is likely and unlikely to be of importance in your work with them.

Tip # 18: Be Self Aware

Do not speak to clients, especially HCPS if you are unwell or feel unable to cope with a given client on a given day. That does not mean become an ostrich on a file. It means ask someone else in your firm for help to deal with a tricky situation and remember personal leave exists for a reason. When we are unwell, our filters do not work as they should and when working with family law clients and HCPs we have to be on our mettle.

Tip # 19: Who are the HCP's Targets of Blame? Is There One or Many?

An HCP may share who are their objects of blame in their first meeting with you. In fact some HCPs are more likely than others to share this information. In the family law context you can bank on the client's former partner being an object of blame. The key here is to listen to who else they attribute blame to and to have the client explain in as much detail as they are prepared to share why that is.

You must however be careful as they may sense that you are being judgmental of them and they may become defensive and become increasingly difficult to obtain information from. If they sense that you are being critical, then you can quickly transform from being someone in whom they are investing heavily to someone who is also an object of blame. If you become an object of blame then someone other than you in your firm can use the EAR tool to save the relationship with this client but it is unlikely that you will work with them again.

Tip # 20: Would I Lie to You?

I realise that not all clients who lie suffer from mental ill health. Some have reconstructed reality to such a degree that they believe it (cognitive distortion). Some just lie. Some aren't forthcoming but is that tantamount to lying?

Some other questions about lies:

As lawyers, why is it important for us to know the "truth" from our clients?

Why is it important that our clients tell the "truth"?

Is there harm in a "white lie" in Court?

The liars may lie as they may have learned enough from friends to know that if they present in a certain way or give certain instructions to their lawyers, then they may end up with a certain interim result in court. We would hope, as officers of the Court that most people who lie in Court get caught.

The short term gain is simply not worth a lie given that the blot in the "client copy book" in Court is so great that their ability to give reliable evidence when it matters most is jeopardised and when it comes to contest of assertions or facts in dispute, the Court will find the testimony of the other party preferable to the lying client. Even a little lie.

A blot in the copy book of a lawyer who assists or is complicit in a client lying to the Court does not bear thinking about. Once your reputation is damaged, it is damaged for all time. For family lawyers, we are the most often reported against of our colleagues to the Legal Services Commissioner. This is due in no small part to the type of law we practise and the people whom we represent and in respect of whom we are opposed.

It goes without saying that a lawyer should not be privy to or part of a lie in Court no matter how small or seemingly irrelevant. For example, you would never assist the client who says they've agreed with their spouse to say they have been separated for 12 months even though they haven't so they can apply for an early divorce.

Some of the earlier tips will help you manage or be on the lookout for the lie. Maintain healthy scepticism. Ask the curious question. Drill the answers for details. Review your client's discoverable documents and see if they support the client's instructions. Do not rely on secondary documents. Review subpoenaed documents to ensure there is consistency across the tangible and concrete body of evidence to support that which your client contends.

Secondary documents are usually those which a client recreates from primary documents but I have also referred earlier to the outright lie of a reconstructed document using the internet or scanners to cut and paste a manufactured lie together.

Things like spreadsheets are not persuasive evidence and you should be pointing out to the client that whilst their spreadsheet has been helpful to you in understanding the overview of the assets and liabilities, you need to see all the documents that sit behind the spreadsheet. This is why having this client sign authorities to enable you to discuss this with the accountant is important. Conducting your own searches are also important. Even if your client instructs

you that their spouse is no longer a company director or the house is in joint names, conduct the searches in any event.

Beware the client who also provides financial documents in piecemeal fashion. It is frustrating enough when your opponent does this in a litigation context and you are constantly having to check and double check what you have asked for and what has been provided. When your client does it, you need to ask yourself why that might be and what is really going on.

These are prudent file management tips.

Another tell-tale sign is the lack of detail. A client who persists in providing vague answers when asked for detail or promises repeatedly to give you detail but never does is someone who should concern you. This is particularly true if they are also giving you inconsistent stories about contributions to the assets of the relationship.

Grandiose statements such as “I managed the money. He/she knows nothing about our finances. I earned it all and took care of all of our investments” should be tested. If this client has little recall about what the investments are or in whose name or when or how such investments were acquired may be misleading you.

Providing them with a copy of the Rules and pointing out the standard discoverable documents and the process of exchange with the other party may disabuse them about notions of being able to control the story of the money trail.

If they say that they have been responsible for growing wealth, ask them for specific details and get them to relate it particularly back to something they did rather than market forces i.e. capital growth in a primary place of residence which would have happened regardless.

“I am interested in knowing more about why you say you have grown the assets for the family when the main asset is the family home, to which you both contributed in your differing ways and which seems to have increased due to market forces rather than due to anything that either of you may have done during your marriage. Can you tell me more about what you say you have done to increase wealth in relation to your home?”

If someone maintains they have used investment skills to grow wealth, ask for details:

“You might need to provide more detail than to say you did the investing for the fund. The Court would expect you to be able to say precisely when and how these specific investments were acquired and on what criteria you based your investment decisions. It is okay to say if you engaged a financial planner and liaised with them and they acquired managed funds in your SMSF. That is not unusual for a lot of SMSFs. You cannot say to the Court though that you were the one doing the investing if in fact your financial planner has invested for the SMSF in managed funds. Can you tell me more about which it was for your SMSF?”

A lack of detail may however also be indicative of a client who is suffering from PTSD i.e. is a survivor of family violence. An inability to give a chronologically ordered set of facts with good detail is often a hallmark of a client who has experienced violence. They may appear sketchy in their details. This does not mean they are lying. It means they are emotionally ducking and weaving to save themselves from the pain that they have been habitually experiencing throughout their relationship. The clients who are often more adversely affected as those who

have suffered from psychological control. They will need time and therapy and you will need access to their MHCP to assist them give cogent instructions in their matter and for you to assess their legal capacity and their ability to give you instructions to enable you to represent them.

A client who presents you with documents that the other side does not even hint at having existed must be questioned at length. Particularly if the documents materialise in response to a specific line of questioning of you by the client. *“What if my parents loaned me the money and are now insisting on it back?”*

Educate the client before they go on a fool’s mission to “find” loan documents about how the Court considers loans from third parties such as one party’s parents, what evidence would be required, how such documents could not be created after the event, what both the documents and the facts would need to demonstrate to verify the loan’s existence and even then how it is open to the Court to relegate this to the category of a gift not a loan etc

Tip # 21: Recognising Cognitive Distortions

Eddy in his book “High Conflict People in Legal Disputes” talks about five of the most common cognitive distortions and how those dynamics play out in Court cases. Here is a summary of the five:

Emotional Reasoning

A woman feels abandoned by her husband. She tells you that he has cut her off emotionally and financially when he moved out of home and just stopped paying the utilities. She becomes highly emotional and cries about this.

In fact, he told her he was going to do this before he moves out and then kept paying them until his voluntary and generous spousal maintenance payments started to enable her to pay these for herself.

Due to her feelings of being abandoned, she believed she had been really abandoned. Her feelings became her facts even though they were not the facts.

Minimization

Perpetrators of violence minimize in their own minds the impact of the harm they have inflicted on their partners and children. They dismiss claims made against them saying the other person is lying and exaggerating for their own benefit. It is essential that lawyers fully explore a client who may be minimizing the role that they have played in a family violence context and not collude with their world view.

Exaggeration

Is the opposite to the previous distortion and this is where a party accuses the other of behaviour which is really a more apt description of their own. Beware of clients who exaggerate and who use terms like “always” and “never”. Drill down into the detail and wherever possible hold your opinions until you see the verifiable evidence to support or contradict this client’s more florid statements.

Personalisation

This is where a person will overreact to a seemingly benign set of behaviours or comments from another. They feel victimised whereas the other person is almost oblivious. Think about someone indicating and changing lanes in traffic and another driver being outraged. This can be a hallmark of narcissists who read too much into a busy duty judge's comments from the bench or a family report writer's general observations of a family dynamic intended to educate the family rather than condemn or accuse one of the parents.

Projection

This is a cognitive distortion whereby a person feels it so strongly but cannot identify with it but must do something with it. So they attribute the emotion or characteristic onto someone else. MHCP describe "projection as the unconscious process of seeing in others what is really going on inside oneself." (pg 217)

As the person suffering from this distortion cannot recognise their behaviour, they attribute blame to the other person in the dispute and they build a case sometimes based on noting other than the distortions but such is their conviction as to the emotional truth of the situation they bring others along ie family, friends, therapists, lawyers.

Tip # 22: How Do you Know your Client is Lying?

Eddy posits that there is little downside to lying in the court system (perjury in the USA where he practises) so lying is a frequent occurrence and people are rarely held to account. It sounds trite to say but the best foil to a lie is truthful information or obtain "substantial evidence of lying behaviour" (pg 219)

In her book "The Body Language of Liars" Dr Lillian Glass talks about how animals lie as a part of a survival skill and how small white lies have been imbedded in our religions and culture as part of our socialization. In short, she makes a distinction between small or harmless white lies and destructive lies, the former being about protecting people's feelings from the truth and those people who prey on others and using lying systematically to gain advantage to another's disadvantage – the scammers, the cyber abusers or internet trawlers.

Dr Lillian Glass

Some of the body language that Dr Glass refers to, in her book, which gives the lie away includes:

- Change in the liar's breathing. Not relaxed or from the abdomen but shallow involving chest and shoulders rising and falling – think Lance Armstrong and Oprah Winfrey
- Puffing cheeks out which is about oxygenating the body due to the nervous system working overtime
- Colour of skin changes and perspiration
- Pointing fingers – think of Bill Clinton denying any sexual wrong doing with Monica Lewinsky – "the body language of righteous indignation"
- Posture changes with shoulders becoming rigid
- Backing up – if caught in a lie Dr Glass refers to someone literally backing up as if their back is against the wall. They can jerk if caught out in a lie

- Sometimes they try and lean forward as it to ingratiate themselves on the person who is accusing them of the lie and to manipulate them. The problem is, as Glass sees it, they remain leaning forward for the entire interview, thus giving it a decided air of falsehood
- Fidgeting or staying too still: this is about the autonomic nervous system being triggered and is the hard wiring in us from primitive development of fight, flight, freeze. A liar will find having to answer to the lie to be uncomfortable so the primal self comes into play.
- Odd head movements: when caught in a lie someone's head will jerk backwards, tilted sideways, bowed down. It is marked and quite obvious.
- Neck touching: Dr Glass says that as the neck is a vulnerable part of the human body, when people cover it, this is an "automatic uncontrollable, protective gesture indicating vulnerability". And a liar feels vulnerable because they are operating outside what is acceptable when they are caught in the lie.
- Collar tugging: increase of body temperature, autonomic system in overdrive, hence need to loosen a collar
- The big gulp: easier to see in men because of the Adam's apple. Liars may stop midsentence to gulp as saliva production diminishes and they need to lubricate the throat to keep talking hence the gulp.
- Incongruence between shaking the head or nodding and what we say – this can be a big "tell" where the body tells the truth and the words are the lie
- Covering the mouth: when people don't want to deal with an issue, they cover their mouths and this is primitive and instinctual –think Lance Armstrong.- he revealed a lot but also held a lot back
- Covering vulnerable body parts – throat, chest, abdomen, genitals as in would be hopeful presidential candidate John Edwards covering his genitals when denying a relationship or paternity with
- Arm crossing torso shielding cold shoulder
- Itching and scratching: again body heats up, skin gets hot and itchy as the autonomic nervous system works up.
- Nervous fingers, picking, grooming, tapping
- Biting fingernails
- Playing with hair
- Palm inwards instead of open – protective or both - sending mixed messages
- Trying to hide hands: concerned that the hands will give you away
- Shuffling feet may be a telltale sign someone is not being truthful
- Lifting a heel may be part of the ingrained flight response
- Feet also pointing towards each other may indicate intimacy (Brad and Angelina in Mr and Mrs Smith promotion of their film, Brad hides his hands but their feet gravitate towards each other)
- A pigeon toed Katie Holmes standing next to Tom Cruise at the premiere of Ghost Protocol could mean he knew nothing about her intention to leave and she looks like a naughty child caught in a lie. (Except I went on line and looked at all of their photos together and she invariably would stand with her feet like this in order to minimise her height when standing next to the shorter Tom).

Scott Rouse

Scott often works with attorneys in the USA in relation to jury selection and is one of the countries recognised body experts. His You Tube videos are informative and fascinating. When he talks about micro gestures, I have to admit to not always being able to see what he sees. Even though he will often freeze frame a look or a mannerism, I am often unable to see what must be obvious to him. I guess that's what makes him an expert in his field and I am not. It also emphasises the point that judges make about the Judicial College's training and not to rely on what you think you have seen or observed in a witness giving testimony. Rely on the evidence and only on the evidence.

He does give us a clue about looking for a trio of movements to convey truth or a lie in body language. This helps when you start to look at the movements not in isolation but as a whole.

His famous video entitled "Lie Strong" which examines the lies that Lance Armstrong persisted with for years about drug cheating and resulted in him extorting millions in sponsorships and advertising, is an informative expose of an habitual liar. Lance ultimately justified why he did it on the basis that "everyone was doing it" – referring to drug cheating as being endemic in the field of cycle sports.

If the presentation of this paper does not allow time to review the footage of Lie Strong, take some time out to review this.

Tip # 23: How to Say Goodbye to a Client: Lying or Otherwise

If your client has caught you in a lie, your duty to the Court as I have said is paramount and you cannot be a party to a lie. You must cease to act. You must come off the record and solicitor/client professional privilege must be maintained even after your retainer is terminated.

If no lying is involved then despite your best endeavours, you won't be able to satisfy all the clients all of the time. This is especially true of HCPs. They are clients who are more likely than others to have multiple solicitors act for them. This is a phenomenon you can screen for provided the client is truthful about what they tell you. If you are solicitor number 3 or 4, warning bells should start to sound. This should tell you more about the client than about your colleagues.

Even if you have followed tips 1 to 20, you may be looking at saying goodbye to the client. There are better ways to say goodbye than others. Eddy makes it clear you should not simply cut them off. If you do their reaction will be disproportionate to your act of termination. Their anger will know no bounds and they are likely to want to continue to engage with you on an ongoing basis for the sake of reminding you of their existence. The harassment value for them will be high and they will treat this as their next major focus, until another comes along that is more engaging for them. With the HCP, that could be a very long, long time.

If the client has expressed dissatisfaction, you must take their concerns seriously and treat each aspect of their complaint about you or your firm with respect. If they do this in person, I suggest having someone else present to take notes. You can explain this to the client by saying:

“What you are saying to me is important and I want to make sure I have understood you correctly. I also want to focus on what you are saying so would it be possible if we have someone take notes of what you are saying and then I will have these typed up and sent to you to verify this is what was said?”

If they refuse, then you may want to suggest that they think about putting their issues in writing to you so you can deal with them in detail. You can say “I would not like to miss any of your concerns.”

If it becomes evident because of client conduct that the firm can no longer act, then this behaviour should be called out and the consequences made clear. This could be due to any number of reasons: client being abusive towards staff, their failure to follow advice, their refusal to comply with reasonable and timely requests by the firm to provide instructions or make prepayments, an inability to continue to act in the absence of cogent instructions to enable the lawyer to comply with Court deadlines or requirements. The evidence of the behaviour should be cited and an acknowledgement of what may be happening for the client.

“We appreciate that this is a very difficult situation for you and that you may be finding it challenging to: (provide instructions/meet our firm’s requirements in relation to prepayments/curb your anger in relation to your former partner) however it is unacceptable to: (be abusive towards our staff/not respond to our several requests for you to contact our office/not make prepayments as previously agreed etc)

If you conduct your practice in such a way that you always have money in trust and quote realistic estimates for work about to be undertaken, you may be at liberty to terminate the client retainer and usually you can quote the relevant sections of your agreement with the client as the basis on which you are terminating.

If no money in trust and if you wish to continue to exercise a lien over the relevant documents on your client’s file you may wish to say:

“It is evident that you no longer have faith in our firm and this makes our task of representing and advising you extremely difficult. We ask that you carefully consider your options and contact our office by return email as to what you wish to do about your file”

With an HCP you may want to go further.

“We realise that you believe we have not understood your needs and have not listened to your concerns. We pride ourselves on our ability to work well with our clients and can only apologise if you felt this was not the case when we worked with you. We also acknowledge that some clients work better with other lawyers and this may be true in your case.”

If you can include it without sounding disrespectful, you may want to allude to how many previous lawyers this client had worked with before you. Remember, this letter is written not just for this client in mind. This letter is likely to end up with the Legal Services Commissioner or at VCAT. The wording allows the client to save face, terminate the retainer, and exit the firm. It allows the solicitor to acknowledge the client’s complaint without making admissions.

Where a solicitor has concerns about making admissions with a difficult client, then they should consult the Legal Practitioners and Liability Committee and seek input and guidance. They may also wish to discuss with and seek assistance from the Law Institute of Victoria.

For some HCPs, litigation is like breathing and they are addicted to the drama of the court process and use litigation as a means of continuing the dysfunctional relationship with the object of blame. Therefore it would not matter what you do, what you say, how gracefully or cautiously you have acted or exited the relationship, you may not be able to contain the volcanic anger of an HCP scorned (to again paraphrase Bill Eddy).

APPENDIX 1

DSM V and High Conflict Personalities

Mental Health Care professionals (MHCPs) use a diagnostic tool Diagnostic and Statistical Manual published by the American Psychiatric Association (APA) and it is currently in its fifth edition - DSM V. Whilst I appreciate we are not psychiatrists, a basic working knowledge should assist us in our work, understand our clients better, help us understand MHCPs' reports better when they use the terminology set out in DSM-5. The following was compiled by Bill Eddy when DSM-4 was the relevant diagnostic tool but the essence of each disorder has not changed greatly between 4 and 5.

The following table provides a useful snapshot tool which can be used to identify and then know how to start working with those who are HCP.

Disorder	Common signs	Issues for Professionals	Common coping methods
Borderline Personality Disorder	<ul style="list-style-type: none"> • Dramatic mood swings • Impulsive, risk-taking and self-destructive behaviour • Sudden and intense anger even at benign events • Sometime suicidal, delusional, chemically dependent and violent 	<ul style="list-style-type: none"> • Preoccupation with fears of abandonment • Unstable relationships with extremes of idealization and devaluation • Manipulative, attractive and seductive • Pushing the limits • Splitting lawyer/staff against each other 	<ul style="list-style-type: none"> • Consistent and reassuring contact with lawyer/accountant • Provide structure and limits to relationship • Allow brief venting • Empathise with their frustrations • Avoid criticism and anger • Educate and include when appropriate
Narcissistic Personality Disorder	<ul style="list-style-type: none"> • Preoccupied with himself or herself • Arrogant, wants excessive admiration • Manipulative, exploitative of others • Lacks empathy • Frequent suggestions and demands 	<ul style="list-style-type: none"> • Manipulative, attractive and seductive • Expects special treatment, exceptions to the rules • Devalues and criticises lawyer • Frequent suggestions and demands 	<ul style="list-style-type: none"> • Reassuring their egos • Provide structure and limits to relationship • Allow brief venting • Empathise with their frustrations • Avoid direct criticism and anger • Educate and include when appropriate

			<ul style="list-style-type: none"> • Explain how it could be worse
Antisocial Personality Disorder	<ul style="list-style-type: none"> • Repeatedly breaks major rules of society • Repeatedly cons and deceives others • Irritable and aggressive • Cold, lack of empathy, lack of remorse, violent 	<ul style="list-style-type: none"> • Manipulative, attractive and seductive • Reckless, continually creating new problems • Tricks and challenges lawyer • Impulsive and uncooperative with planning • Projection of their own thinking or behaviour onto lawyer • Irresponsible, fails to honour financial obligations 	<ul style="list-style-type: none"> • Remain sceptical and cautious • Get help from family members • Provide structure and limits to relationship • Allow brief venting • Empathise with their frustrations • Educate about consequences of their behaviours.

<p>Histrionic Personality Disorder</p>	<ul style="list-style-type: none"> • Repeatedly wants to be the centre of attention • Highly emotional, jumping from topic to topic • Highly dramatic and sometimes fabricates description of events • Difficulty focusing on any task or decision 	<ul style="list-style-type: none"> • Can be very charming at first • Wants lots of attention • Difficulty getting to the point in a discussion • Often forgetful, easily distracted • Bad news triggers highly emotional and unfocused response • Has a hard time accepting assignments and following through 	<ul style="list-style-type: none"> • Avoid direct criticism and anger • Empathise with the client's feelings, not the dramatic details • Gently help client focus and stay on track in discussions • Schedule an hour for every 5 minutes of work with the client • Educate client and be very realistic about issues and expectations • Avoid temptation to give in to client to relieve emotional intensity • Draw out client's real skills and encourage their use • Acknowledge and build on small successes
<p>The Enablers</p>	<ul style="list-style-type: none"> • Compulsive efforts to protect difficult client • Anger and frustration with difficult client • Frequent threats to withdraw from helping client • May abandon client • May have own personality disorder 	<ul style="list-style-type: none"> • Desire to be close friends with lawyer • Efforts to direct and control legal case • Efforts to explain and justify client's behaviours • Obsessive need to talk to relieve guilt and anxiety about client 	<ul style="list-style-type: none"> • Provide structure and limits to relationship • Allow brief venting • Empathise with their frustration • Avoid criticism and anger • Educate and include when appropriate

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See also Scott Rouse: Your Body Language Mentor: his video "Lie Strong" and see his You Tube videos regarding the last presidential election

This paper cannot cover all the concepts contained in these works but given that we are likely to encounter family law clients who are in high conflict situations or people who have either been diagnosed with or suffer from high conflict personalities in our professional lives, I have focussed on those chapters and the suggestions made for dealing with HCPs.

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Counsel Family Lawyers: Better Families Brighter Futures