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The Joys of Receiverships: If the Stress Does Not Kill You, Angry Victims Might

By Wayne Klein

The Practitioner's Corner is a regular feature where NAFER members can contribute their personal perspective on issues facing receivers.

Receivers are called upon to parachute into distressed situations and are expected to sort out and resolve problems caused by others. Like emergency room physicians, we must quickly diagnose problems, devise and implement solutions and then proceed as if we already are experts in the industry of the company placed in receivership.

The stresses faced by receivers are myriad and overwhelming:

1. Ignorance. You are appointed to take over a company where the government agency, the defendants, the employees

of the company and the victims all know more than you do about the company and the underlying fraud.

2. Hostile Takedown. You must take control of a company and its operations when the defendants oppose you. You need to interview and sometimes even fire most or all of the employees.

3. Where are the Operations and Records? You have to take control of all offices, warehouses and storage units and secure all records relating to the company's operations. Locks need to be changed, landlords notified and utilities changed into your name.

4. Prevent Remote Access. If the

defendants are accused of fraud, they are racing to delete or hide records. You need to deprive them of the ability to remotely access any records or facilities.

5. Freeze Bank Accounts. Do you know the location of all bank accounts used by the defendants? Are there brokerage accounts, PayPal accounts or cryptocurrency? Have all the financial institutions been served with the order appointing the receiver?

6. Recovering Physical Assets. Where are all the assets? Who owns the vehicles the promoters are driving, flying and sailing? What safe deposit boxes exist?

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About The Author



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What real estate is owned? What assets were paid for by the fraudulent scheme, but used and claimed by others?

7. Keeping Legitimate Businesses Operating. At the same time that you are terminating the fraudulent operations, you must identify business operations that are legitimate and take steps to keep them operating. What employees should you keep and who will manage them? How do you make those decisions quickly?

8. Victim Anger. The promoter or sometimes even the company CEO is telling victims that if you had not taken control of the assets, the promoter would be able to pay them back their investment plus profits. “You,” he says, “are the reason they will lose their money.” The victims demand assurances that you will return their investments. Some are in desperate need of a distribution.

9. Will I Get Paid? As you send people to find and seize assets and as you decide what businesses and employees to keep, your mind can't help asking the questions: “Is the reason this Ponzi scheme stopped paying investors because it ran out of money and assets?” “If so, how will we get paid?”

The Effects of Stress

If you are still reading this article, you are thinking: “Now I am going to get a lecture about my health and avoiding stress.” You are only partially right, but you are getting ahead of me.

Some professions seem to regularly face extreme stress: litigators, emergency room physicians, police, firefighters, paramedics, soldiers—and parents. But not all stress is necessarily harmful. Niki Irish of the D.C. Bar's Lawyer Assistance Program, recently made this point at NAFER's annual conference. Stress, she said, can have positive effects on our bodies. The challenge is how to cope well in stressful situations. Unmanaged stress, however, adversely affects the quality of our decision making. When we are under extreme stress, we use a limited number of thinking centers in our brains. This causes us to misinterpret what is going on, make errors in judgment or ignore important factors. We often feel very strongly about our positions and conclusions, only to later realize how limited our perspective really was.

Compensating for the Effects of Stress

So, if receivers cannot avoid stress and if we are at high risk of making major errors in judgment, how do we compensate?

No matter how stressful the situation, we should be very clear about what *not* to do: 36.4% of all lawyers responding to one survey qualified as problem drinkers.¹ The California Bar estimates that 30-50% of its bar discipline cases result from substance abuse.² Oregon's professional liability fund reported that more than half of attorneys admitted to its alcoholism treatment program have been sued for malpractice.³

Instead, there are steps we can take to reduce stress levels and increase resilience—other than self-medicating. The crucial

first step is acknowledging when we are experiencing high stress levels. Stress will not go away and its negative effects won't disappear by pretending there is no stress.⁴

Call From the SEC

Let's start with a scenario, the reading of which alone may induce stress. You get a call from the U.S. Securities and Exchange Commission advising you that ten minutes earlier, the U.S. District Court appointed you as receiver on a case you know only enough about to have conducted a conflicts check. The SEC said the court unsealed the complaint and a temporary restraining order, so the defendants now know that you will be trying to seize bank accounts, assets and records. As an aside, your daughter has a dance recital this evening and your spouse is out of town.

Does the mere reading of this scenario elevate your blood pressure? Do you feel your heart rate increasing? Does your mind automatically begin listing the stressful tasks you will face: assembling a team, serving orders on banks, conducting a takedown of multiple business locations, interviewing employees, securing assets, getting court approval to hire your team and identifying other judicial districts where you need to file notices?

Again, the first step is to acknowledge that you are facing stress-inducing events—“stressors.” The next step is to identify the stressors that you face. Acknowledge them. List them. Now, evaluate them. What is in your control? What is not in your control? For the things that are in your control, how can you mitigate the stressors? How should you view the things not in your control? How can awareness of your feelings and mindfulness help you cope?

The Phone Won't Stop Ringing

Immediately after your appointment, you are besieged with call from victims asking how you will help them pay their mortgages (which they took in order to invest in the scheme you just closed down). Others report that monthly distributions from the scheme were paying for their cancer treatments and they want your assurances they can continue treatment. Some investors threaten to attack you on social media if you don't return their funds immediately.

In your new mindfulness state (acquired after reading this article), you are now acutely aware that you are not the only one facing stressors. Others who are stressed include your team, victims, the defendants, regulators and the judge. How will your decisions affect them? How will the stressors that *they* are feeling impact how they interact with you? Will they make bad decisions too? Do you need to worry not only about your own stress but the stress of others?

How are the victims feeling about the revelation that they invested in a fraud? How does your appointment make them feel? Is their initial reaction that they have lost control and that you are now in control? Does that make them feel better or worse? How



Mental Health Resources

National Directory of Lawyer Assistance Programs:
https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/

National Suicide Prevention Line: 1-800-273-TALK (8255) or #988

SAMHSA Helpline: 1-800-662-HELP (4357) (mental illness, addiction)

Crisis Text Line: Text HOME to 741741 (crisis support via text message)

Veteran's Crisis Line: 1-800-273-8255 #1 (veterans and families)

Trevor Project: 1-866-488-7386 (LGBTQ youth)

Mental Health First Aid: skills-based training course:
<https://www.mentalhealthfirstaid.org/>

Mental Health Coalition Resource Library (coping skills, support):
<https://www.thementalhealthcoalition.org/resources/>

will your ability to show empathy to them influence whether they help you or treat you as an enemy?

There are things you can do to help victims feel less stress. Clearly communicating what is happening, listening to them and showing empathy will help them regain a sense of control. Explaining your plan to recover assets, make distributions and keep them informed, will help the victims create a plan to move forward. To fulfil our roles well, we need to show sensitivity to the trauma suffered by victims during a time the victims are blaming us for their losses. Over time, as we help them progress through the stages of grief, we can turn them into cheerleaders for us.

Where is My Excavator?

In a high stakes profession like ours, everything will not always go as planned. You will make decisions that turn out to be suboptimal. Events outside your control will affect the success of the receivership. Nonetheless, everyone is counting on you to deliver success. How do we cope with setbacks such as: (i) victims are blaming you because a business you allowed to keep operating is losing money; (ii) an expected boost in recoveries is thwarted by a defendant's bankruptcy, after you refused a settlement offer; (iii) you learn that \$2 million in a defendant's cryptocurrency wallet vanished a month after your appointment because you did not know it existed; or (iv) a court ruling rejects your primary legal theory against fraudulent transferees and you now have no prospects for getting paid—let alone recovering funds for victims?

Here is where I confess one of my failures. I was given control over a construction company located in a small town of close-knit people who had a history of not being cooperative with the government. The receivership's claim to ownership of a warehouse and construction yard was murky. Deposition testimony said it was owned by the receivership entity. But property records said it was owned by another person and still another company paid the utilities for the property. I seized control of the warehouse. I expelled the single person there (who said he worked for an entirely different construction company), changed the locks, took inventory and posted notices on the doors that all assets at the

warehouse were under the control of the federal court. The next morning, I returned to the property with a security company to evaluate how best to secure the premises, the equipment and the supplies in the yard. I found that, overnight, someone had stolen a \$100,000 excavator.

How was I feeling? Not good. An asset disappeared after it was put under my control. Who would the government and victims blame for the disappearance? How might this damage my reputation? I instantly thought of dozens of actions I wish I had taken the day before. I could have spent the night watching the warehouse (or hired someone else to do that). I could have put tracking devices on the valuable pieces of equipment. I could have chained up the equipment to make it harder to steal. How do I explain this to the government? Do I omit this asset from the inventory list so no one would know the asset had ever existed?

At that moment, I acknowledged to myself that I was feeling stress. I knew I was feeling a lot of it. If I had implemented stress coping skills (which I did not do at the time), I would begin by asking myself: Now that this has happened, what is in my control? What is not in my control? For things in my control, what actions will I take?

What did I do? I immediately called the government enforcement attorney and told her. She had been struggling with members in this community for ten years and was not surprised. I told her that I wanted to try and convert this into an opportunity. If I could find the stolen equipment, we might be able to get criminal charges filed—something the government attorney wishes had been in her arsenal. I filed a police report and met with deputy constables. They promised to increase the frequency of their patrols near the warehouse. They put the VIN on the National Crime Information Center database, so if someone is ever pulled over while hauling that excavator and the VIN gets checked, the driver will be arrested for possession of stolen property. In every deposition I took after the disappearance, I asked about that stolen excavator—sending the message that I was obsessed with finding the equipment and identifying the

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person who stole it. I reported the theft in my initial status report, reminding the court of the disregard of the court's asset freeze and I referenced the theft when I sought contempt sanctions and moved to bring other entities into the receivership estate. These were things in my control.

Could I have done more to prevent the theft? With hindsight, yes. Is every receivership going to run just the way we hope and plan? No. Will we collect the full amount of every judgment we win? Sadly, no. Will our judgments about which businesses to keep operating or which employees to trust be always prescient and accurate? Stop lying to yourself about your infallible wisdom. Assets will disappear. Records will be destroyed. We will not win every motion we file. We will discover—after the fact—that there were simple actions we could have taken that would have avoided setbacks, significantly improved our recoveries, or lowered expenses charged to the receivership.

When these setbacks occur, it is natural to feel stress. Stress, it seems, permeates the entire receivership. There will be setbacks in our attempts to maximize potential recoveries. We will have to inform unhappy investors that their distributions will not resume or that the distribution methodology we will implement will exclude them. This stress affects you and every member of your team. It affects how victims react to you. It affects how defendants respond to your recovery efforts. Because stress affects everyone involved in receiverships, *everyone* is at risk of making bad decisions.

What can we do? Experts have identified coping strategies that can ameliorate the negative effects of stress that we face. And the resources that NAFER can provide are additional valuable stress reducers.

Ten Coping Strategies

I share here ten coping strategies – personal actions – that you can use to reduce stress. These are strategies that you should always be ready to implement; they should become as automatic as the checklist you employ on appointment day:

1. Recognize stress. This one may be the most important. You cannot employ coping mechanisms or counter the risks of making bad decisions if you do not first recognize that you are facing stressors.
2. Avoid controllable stressors.
4. Plan ahead to manage the lifestyle changes of a new receivership.
5. Be sensitive to stresses of team members and victims.
6. Realize your limitations.
7. Prioritize.
8. Improve your communication with team members and victims.
9. Cultivate a positive attitude. Have compassion on yourself for inevitable mistakes (remembering that when we are under stress, our decision making is impaired).
10. Share your feelings with someone trustworthy.

And now, for the added bonuses. Attending NAFER conferences improves your skills and provides a network of friends who want to help. The NAFER Members Community is an amazing on-demand stress-reducing tool. There, you can access a community of experts who understand intimately the difficulties and stresses you face. They want to help and can suggest actions that have worked in their cases, share legal briefs and solve practical challenges. E.g., if you're looking for a cybersecurity expert in Indianapolis or a trustworthy real estate agent in Tampa or perhaps a forensic CPA in San Francisco. Use the online ListServe to save time, make better decisions and receive confidential advice, assistance and sympathy.

Seven Strategies for Completing the "Stress Cycle"

As receivers, we can't avoid stress. What we can do is: first, cope with the temporary effects of stress (using the coping strategies just discussed) and second, heal our bodies by completing the biological stress cycle—moving from a state of stress to a state of relaxation. That is when our decision making and empathy will normalize. As two researchers noted, "The good news is that stress is not the problem. The problem is that the [coping] strategies that deal with stressors . . . [do not heal] the psychological reactions our bodies have to those stressors."⁵ What this means is that it is not enough to merely compensate for the effects of stress. We also need to shift our physical state from a state of stress to a state of relaxation. Making this physiological shift gives your body a physical sign that you are safe. The "stress cycle" is completed as we shift from stress back to a state of normalcy or even a state of relaxation.

There are seven evidence-based strategies that help us "complete the stress cycle."⁶

1. Physical activity is the most efficient and effective means of completing the stress cycle. Physical activity is what tells your brain you have successfully survived the threat and now your body is a safe place to live. Aim to move your body 20 to 60 minutes a day. If you are short on time, turn on some music and dance it out for the length of one song. Do a quick set of jumping jacks.

2. Breathing deeply and slowly reminds your body that it is not under attack from predators. An easy method is 4 X 4 "box breathing": inhale through your nose for the count of four, hold your breath for a count of four, exhale through your mouth for the count of four and hold your breath for a count of four. Then repeat.

3. Laughter, particularly with someone else, helps reinforce social connection and regulate emotions. Deep belly laughter is a way to release and express the emotions we are keeping inside. Merely recalling a funny story that made you laugh in the past is enough to complete the stress cycle.

4. Positive social interactions, even superficial ones, help complete the stress cycle. Because humans are wired for connection, positive social interaction reassures your brain that the world is a safe place.

5. Crying it out is one of our body's methods for releasing stress and completing the stress cycle. There is no shame in crying; it is a fundamental part of being human. Set aside some time: try playing music, watching a television show, or reading an article or book that might trigger a good therapeutic cry.

6. Affection, whether physical or emotional, is another great tool to complete the stress cycle. The goal is to connect with a loving presence to remind your body that it is safe. Give a

20-second hug. Have a 6-second kiss. Don't have a person to hug or kiss? Pet a dog or cat until you feel your body relax.

7. **Creative expression** can allow you to complete the stress cycle. Because the arts create a context that tolerates, even encourages, big emotions, your emotions can be processed and explored. Creative expression may be playing an instrument, dancing, painting, sculpting, poetry or journaling.

Whatever strategy you select to complete the stress cycle, it should be based on what you need and what you can access in that moment.

Conclusion

Stress is an unavoidable byproduct of our work as receivers. It heightens the risk of making bad decisions. There are strategies that help us recognize the danger and cope with the stressors. Employing those strategies can enable us to make fewer mistakes, compensate for the stressors facing our team members and give us empathy for the victims. Use them. 🏠

ENDNOTES

¹ <https://www.americanbar.org/groups/journal/articles/2021/as-lawyer-stress-escalates-during-pandemic-lap-agencies-see-sig/>

² <http://www.nylat.org/documents/CourseinaBox.pdf> at 4.

³ *Id.* at 7.

⁴ *Id.*

⁵ Emily Nagoski and Amelia Nagoski, *Burnout: The Secret to Unlocking the Stress Cycle*.

⁶ *Id.*