

Clients with Complex Needs at Appeals Court

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DISCLAIMER

Nothing we say in this presentation should be construed as legal advice. This is simply for information purposes only. Please consult with a lawyer if you need legal advice.

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Agenda

- How did we get here?
- While we were getting here...
- Where exactly are we?
- Where to next?
- Responding to clients in the following 5 situations:
 - Seeking a mythical lawyer, pseudo-legal litigants, seeking justice that cannot be delivered, injury to dignity, other issues that prevent them from accessing the legal system
- Considerations for clients where capacity is a concern:
- Referring out / referring in
- Questions



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Doing justice and dignity

- The legal system is often done to people – no one really chooses to go to court, even if they are the ones making the application
- People are choosing to have more control over their lives
- People are choosing to reclaim loss
- Courts are not designed for people, let alone people who have barriers and/or oppressions
- We also continued to live in a still deeply unjust society.
 - The last residential school in Canada closed in 1996
 - 1 in 3 women experience abuse
 - Violence against LGBT2S+/Indigenous/racialized/and other oppressed groups



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How did we get here?

- In 1979 – Legal Aid Society/Legal Services Commission combine to create Legal Services Society
- 1980's Legal Aid covered most poverty, family and criminal legal issues faced by individuals who could not afford a lawyer
- In 1993 – strict financial eligibility for legal aid
 - If you were not poor enough, we could not help you
- 1995-1997 – budget freeze – limited advice services or referred to other organizations
 - If you had a serious loss of home or income we could not help you
- In 2002 – 40% cuts to Legal Aid – (end of poverty law) & elimination of Human Rights Commission
 - Unless you were extraordinarily poor and faced a breach of your charter rights or extreme risk of abuse, we could not help you and you were (mostly) on your own for human rights representation
- Since 2002 there have been a number of pilot projects but nothing that replaced the services that were provided under the more comprehensive programs in the 1980s and 90s. We continue to have among the lowest legal aid funding per capita in Canada.



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While we got here

- As we cut access to legal aid, we never cut the requirement or need for legal counsel
- We conflated legal counsel with legal advice
- We created a myth that all legal advice was created equal



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While we got here

- As we cut access to legal aid, we never cut the requirement or need for legal counsel
 - We created the "mythical lawyer"
- We conflated legal counsel with legal advice
 - Lawyering is highly technical work - it is not just the advice and the argument, it **IS** the implementation
- We created a myth that all legal advice was created equal
 - We do not talk about substantive legal advice versus procedural legal advice
 - We ignore that substantive advice is extraordinarily challenging to get



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Where are we?

- We have created a system that is now full of myths about what law is, how to access it, what lawyers do, what legal advice is.
- We have seen a rise in pseudo-law
- We have seen an increased focus on courts for lay litigants
- We have been watching an increase in a frustrated judiciary



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Where are we?

- We have created a system that is now full of myths about what law is, how to access it, what lawyers do, what legal advice is.
- We have seen a rise in pseudo-law
 - Meads versus Meads
 - Mak Parhar/Corduroy Restaurant
- We have seen an increased focus on courts for lay litigants
 - Civil Resolution Tribunal
 - Early Resolution
- Judges regularly adjourn matters directing litigants to duty counsel or legal aid even for those who may have already been unsuccessful in applying for help



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Where are we?

- We have created a situation where for a (not insignificant) number of people:
 - They believed in the mythical lawyer, and because that mythical lawyer did not help them, they feel abandoned by lawyers or do not trust them.
 - They have found solidarity with freemen, natural citizens, and other pseudo legal groups.
 - Lay litigants, without substantive assistance through the process, feel that important pieces of their stories were unheard or missed – that *if only* those details were heard, there would be a different outcome.
 - And often they are treated without dignity, or even as a nuisance by the system. Their fight is not just about the claim, but becomes against the system itself.



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So now what?

- We will work to change the system, but for now we'll change our approach to clients.
- We can walk and chew gum at the same time. We can be an officer of the court and engage in dignity-doing work.
- We can have candid and thoughtful conversations about the limitations of law, and the legal system.
- We can believe in a concept of justice that is more expansive than the legal system, a concept of justice in all of us, and in our day-to-day interactions.



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How to assess their situation

- They feel abandoned by the mythical lawyer
- They are engaged with the pseudo legal community
- They are seeking justice in a legal system that cannot provide it
- There has been an injury to dignity that needs to be repaired
- They have other issues that make it difficult for them to be able to access the legal system in a meaningful way
- They have issues that are expansive beyond their legal issue



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Abandoned by the mythical lawyer

They say things like:

- "no one cares", "nobody understands this", "I've talked to so many people", "this lawyer took all my documents and then told me I don't have a case"

What they are often feeling:

- That they are alone in this,
- that if they just keep searching someone will understand them,
- that if you are not with them than you are like the others.



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Abandoned by the mythical lawyer

Remedies you may offer:

- Take the time you need with this client to help them to not feel abandoned.
- Talk to them honestly and earnestly about the mythical lawyer and acknowledge that in a just society that they should be able to get someone to really look at this important issue.
- Ask them to collect summary advice memos from other services and review them.
- Get permission to speak with lawyers they've consulted - particularly ones who have possibly reviewed the documents.
- The only real salve to being abandoned by the mythical lawyer is to address the myth head on and help to make sense of what the lawyers did before in an effort to reduce the feelings of abandonment.



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They are engaged in the pseudo legal community

They say things like:

- Nonsensical arguments based on something a friend/expert has done "I want to apply to have my child deemed property", "I am a sovereign citizen so this law does not apply to me", "I sign my legal name with a colon and my family name, so the law will only apply to my legal self, not my natural self."

What they are feeling

- A sense of control or power over their situation.
- A sense of community with their legal issue.



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They are engaged in the pseudo legal community

Remedies you may offer:

- Really listen to what they are saying and don't just dismiss it outright, and don't demean it.
- Explain how that order could be possible, or why it may not be impossible.
- Do not argue validity of systems – if they want to try something else, that is on them, and you would like to hear back either way.



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They are seeking justice in a legal system that cannot provide it

They say things like:

- “if the judge just hears me”, “I just need to appeal this and then the truth will come out”, “If only they saw this one important piece”. They conflate their opinion with evidence and/or they dismiss any evidence that is against them.

What they are often feeling:

- A profound sense of injustice
- A desire to be truly heard



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They are seeking justice in a legal system that cannot provide it

Remedies you may offer:

- Honesty about the legal system, and that it does not always equate with justice.
- Hear their issue, beyond looking for advice or solutions, really hear what they have to say, acknowledge the challenges they faced and that it wasn't fair that they went through that
- Talk about how the things are really important to people are not always considered important by the law.



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There has been an injury to dignity that needs to be repaired

They say things like:

- "This was so wrong", "I need people to see this", the reiterate pieces that are not meritorious or focus on impossible outcomes, they want an apology

What they are often feeling:

- They are angry for good reason
- They are hurt and they are wanting that hurt undone
- They are wanting accountability



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There has been an injury to dignity that needs to be repaired

- See the past indignity that has been done
 - Label it as injustice - label it as harm - label it in the ways your client does
- Be honest about what the system can and cannot do
 - The system cannot repair, it cannot fix, it cannot force epiphanies nor accountability
- Recognize the resistance or resilience your client has shown
 - Everyone resists oppression
 - We can walk and chew gum at the same time



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They have other issues that make it difficult for them to be able to access the legal system in a meaningful way

They say things like:

- I'm being followed by the police. They are tapping my phones. They are surveilling my internet. I am a targeted person.

What they are feeling:

- Very real fear - no matter the situation, this fear is real.
- Dismissed by virtually all they talk to.
- A complete lack of safety - particularly if they feel that police/military are targeting them.



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They have other issues that make it difficult for them to be able to access the legal system in a meaningful way

Remedies you may offer:

- Regardless of how it sounds – there can be real fundamental truth in it that needs to be attended to.
- People can be mentally unwell and be oppressed/unsafe
 - just because you're paranoid doesn't mean they're not out to get you.
- Focus on the details that are easiest to explain and that might be easiest for others to believe.
- Be generous and candid in spirit.



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They have issues that are expansive beyond their legal issue

They say:

- They have other crisis happening
- They are not able to focus on the issue at hand
- They are very focused on the issue at hand and urgent resolution

They are feeling

- In crisis
- That the system/OP/you don't care or don't understand

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They have issues that are expansive beyond their legal issue

- Talk to them about their legal issue – even if they clearly need other resources
- If this other thing really needs to be addressed first, tell them you are going to talk to them about their legal issue at a specific point, but that you really want to help with this issue first
- Get their permission to use their time that they have been waiting for to address this other issue
- If you really want to insist, explain how it will impact their legal issue if they do not.
- Be okay with no
- Call 211, have them call 211, call 211 together to find other resources.



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An unexpected mix

- As lawyers we expect that the person who has booked an appointment with us is there for legal assistance. However, we often find that the issues are mixed requiring not only legal advice (which are trained to give) but needs for emotional support/social support/referrals/crisis intervention which we feel ill equipped to give.
- People with mental health issues can be among the most vulnerable members of society – depending on their circumstances it is often challenging for them to communicate clearly in the language that is required by larger social systems like law and as a result they are often dismissed without anyone taking the time to fully canvas their issues.



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Clients aren't necessarily "difficult"... but they don't "fit" into the legal system

- Clients who feel ignored or abandoned by the system and have unrealistic expectations but are not otherwise suffering from extreme or observable mental illness.
- Clients with substance abuse and addictions which can impact current capacity as well as their ability to follow through with court orders or tasks.
- Clients with mental illness (ie schizophrenia, bipolar disorder. These clients may present very differently when they interact with you depending on whether they are currently engaged in treatment. They may be able to give you clear instructions some days but not others.
- Clients with permanent cognitive deficits – for example those associated with FASD or dementia. These deficits cannot be "cured" although they may be managed.
- All of these categories may, and frequently do, overlap.



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Dealing with the person that presents

- In many cases clients won't come to you with an assessment or diagnosis.
- Where they do, these may be biased or unhelpful.
 - There is a significant body of research indicating that psychological testing may penalize survivors of domestic violence by confusing psychological distress caused by domestic violence with personality disorder or psychopathology.
 - In 2018, the Canadian Psychological Foundation and the Psychology Foundation of Canada released a report responding to the Truth and Reconciliation Commission of Canada's report. Describing the situation as "dire" they stated "[w]e lack the tools, training, understanding of culture, and appropriate recommendations to consistently provide meaningful helpful psychological assessments to Indigenous Peoples."
 - Many of the psychological tests themselves have been found to contain cultural biases in their results, with some researchers arguing that while some differences may be the result of psychological distress resulting from historical oppression and present adversity they may also reflect a divergent worldview.



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Diminished Capacity

- BC Code of Professional Conduct, 3.2-9 and commentary [1-5]
 - 3.2-9 When a client's ability to make decisions is impaired because of... mental disability... the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.
- [Comment 1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience, and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. The key is whether the client has the ability to understand the information relative to the decision that has to be made, and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision.
- [Comment 2] A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity only to the extent necessary to protect the person until a legal representative can be appointed. A lawyer undertaking to do so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.



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Capacity is assessed in the context of the decisions that need to be made

The following needs to be assessed on an ongoing basis:

- Does the person appear able to understand the decisions that they need to make?
- Does the person appear able to appreciate the reasonably foreseeable consequences of their decision (or their failure to act)?
- Does the person appear to be acting under their own free will?
- Are there any specific common law tests (ie making a will) or statutory tests (ie signing an enduring power of attorney under the Power of Attorney Act) you need to apply?



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There is no single or obvious or objective factor (for example a diagnosis) that indicates that capacity has been lost.

"[t]here is no possibility of mistaking midnight from noon, but at what precise moment twilight becomes darkness is hard to determine."

Boyse v Rossborough (1857), 6 HLC 2 at 45, 10 ER 1192 (CA)



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Fitness / NCRMD

- Finding an accused fit to stand trial is an extremely low bar – it requires only "limited cognitive capacity to understand the process and to communicate with counsel" (R. Whittle (1992), 32 CR (4th) 1 (SCC at 15). It is not a prerequisite that the accused be capable of exercising analytical reasoning in deciding whether to accept counsel's advice. The inquiry is whether the accused can recount the necessary facts in a way that counsel can prepare a defence. It is not necessary that the accused be able to act in their own best interests. (Taylor (1992), 77 CCC 93d 551).
- Note that in appropriate cases the defence of NCRMD can be raised at the appeal level. So for example, an accused who was charged of murdering her two sons did not raise the defence at trial. While incarcerated she was diagnosed with paranoid schizophrenia and with the help of medication her condition improved, and she realised she should have raised the defence at trial. The Court of Appeal allowed this as fresh evidence and found her not criminally responsible. Justice Goudge found that "given the appellant's medical condition at the time, the psychiatric evidence could not have been adduced at trial by due diligence." (R v IEM [2003] OJ No 953).



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Clients may have variable communication skills

- If mental illness is present communication, it may be more difficult to follow what your client is telling you and how the information they're providing connects to legal issues.
- Some conditions are known to be cyclical, but regardless of their particular diagnosis, clients experiencing mental illness or more general mental health concerns are likely to have "good days" and "bad days"
- Medication can have a significant impact on your client's ability to instruct counsel – both positive and negative.
- If your client has been detained in custody, or has had their child apprehended, or has suffered other impacts through their interaction with the legal system, these stressors are likely to exacerbate any pre-existing issues with your client's mental state.
- Some mental health issues, such as dementia, are often accompanied by poor hearing, failing eyesight, mobility issues etc.



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Communicating and taking instructions - location

- Consider where you will meet with the client. In some cases, meeting in a safe or familiar environment might result in a more productive meeting.
- Pay attention to noise - background noise can be distracting for some clients, and it can also sometimes cause problems for people with hearing loss.
- Ask your client for input on where they would feel comfortable meeting or if there are certain times of day that work better for them.
- Be prepared to schedule more and shorter meetings if necessary.
- If there are any safety concerns, consider leaving the door ajar or having a colleague walk past. Ensure both you and the client should have access to the exit.



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Communicating and taking instructions - tone

- Nonverbal and paraverbal communication (volume, tone of voice, speed of talking) are extremely important.
- Speak calmly and slowly; don't point or make abrupt movements.
- If you're in person sitting slightly angled away instead of facing the client can be helpful with some clients.
- Be patient, kind, and listen (expect that this will take longer than usual).



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Communicating and taking instructions – social responses

- Avoid being judgmental or dismissive – clients with complex problems or who have a hard time managing details often aren't taken seriously and it can be hard for them to get substantive help with their issues.
- Response-based practice – positive social responses can have a long-term impact beyond this case.



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Communication and taking instructions

- Redirect clients away from distractions/triggers and back to the issues that need to be addressed.
- Don't challenge clients on irrational beliefs; rather "reality orient" - for example, you may need to explain that you need specific evidence to advance a claim and if there isn't any it means that you can't use the court system.
- Ask open-ended questions to confirm whether clients really understand as many people are good at giving the illusion that they are agreeing or following.
- Wherever possible, give clients choices and options about how they want to proceed.
- Be honest and direct if you can't help - "you've spoken to me a couple of times now, and it seems I'm not able to help you."



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Communication and taking instructions – writing things down

- Take notes of your meetings and of any responses that might be relevant in case someone raises the issue of capacity later.
- Provide drafts of documents prior to meetings so client can read ahead of time. Your client may benefit from large font or double spacing.
- Provide written summaries of any instructions you've given the client.
- Where possible use plain language (note that courts can write bail conditions and other orders in plain(er) language if requested).
- Offer clients a choice of whether they want to read documents or have them read to them.



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Communicating and taking instructions – court and other hearings

- Court is possibly the worst possible way for clients experiencing mental health issues to absorb information so prepare then before court and leave time to debrief after.
- Be prepared to address the question of how mental health might impact evidence or the ultimate determination of issues.



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Ethical concerns

- Lawyer control model v cooperative model with joint decision making.
 - Make a strong effort to carefully explain why certain strategies should be rejected and what type of strategies will succeed. Deal with irrational instructions as early as possible and on an ongoing basis.
 - You can't disregard final instructions, but you may have a duty to withdraw from the case. But remember that withdrawing may end the client's ability to access the court system.
 - If you decide to proceed, get instructions in writing, including a detailed explanation of consequences for not following your advice.



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Credibility

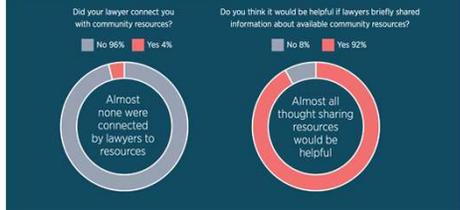
- Client may provide you with incorrect or variable information because they have genuine memory deficits or delusions. In some cases, clients will confabulate – this is not lying.
- This presents serious challenges for counsel since regardless of the motivation this can create real concerns about the integrity or reliability of your client's evidence.
- You may need to take more time to fully understand your client's evidence and take extra steps to make sure that your client's evidence is reliable. You need to balance this with your obligations to the court.
- Consider the best and most reliable way to present your client's evidence.



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Referring out / in

Survivors want referrals to community resources from their lawyers



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Referring in

- Clients and lawyers will often benefit from working cooperatively with community support workers:
 - Planning for meetings, helping clients manage their schedule, and assisting with transportation to and from meetings
 - Taking notes at the meeting and helping with implementation of legal advice
 - Cultural awareness and support
 - Specialised knowledge of client needs, particularly where they have a specific diagnosis
 - Safety planning/ accessing supports/ accessing benefits



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Perceived barriers to working with referrals

- Authorizations to communicate about client's file
- Loss of privilege, as privilege extends only to private communications between lawyer and client
- Improper influence / interference with instructions



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Protecting privilege

- If the community support worker is necessary to facilitate communication of legal advice, privilege likely extends to their communications with the lawyer and client.
 - To the client: Do you need this person to be here to help you with this appointment?
 - To the third party: Are you here to assist the client and for no other purpose?
 - To the third party: Do you agree to keep what is said confidential?



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Improper influence – possible scenarios

- Community support worker tries to give instructions or evidence "over top of" the client
- Community support organisation takes a particular position on certain issues (ie mediation should never be used in cases of family violence, clients with mental illness should not take medication but should receive alternative treatments)
- Acting in client's best interest versus advancing client's instructions.



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THANK YOU!

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