

Unique Challenges of Representing Individuals with Serious Mental Health Issues

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Be Mindful of the Impact of any Legal Decision on the Person's Liberty Interest

Individuals with serious mental health issues are marginalized by society and exceedingly vulnerable during any contact with the law. Whenever a person with mental disorder faces legal proceedings, the potential consequences include a loss of liberty or autonomy.

In the civil context, the clients appear before the Consent and Capacity Board whenever they are subjected to involuntary detention in psychiatric hospitals or object to forced treatment with powerful psychiatric medications. In the Superior Courts, they struggle to maintain decision-making power in respect of their property or personal care. In the criminal courts, they assert either their fitness or take positions on whether or not they are criminally responsible for crimes they have committed.

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Before the Ontario Review Board, unfit and not criminally responsible accused face potentially indeterminate detention in a psychiatric facility or community supervision while under the Board's jurisdiction. Because any and all of these types of proceedings engage Charter-protected liberty interests and the right to autonomy, security of the person and bodily integrity and because of the disability the client is experiencing, our professional obligations as

lawyers representing these clients are heightened. We must adhere to the highest standards of professionalism and ethical conduct; however, rising to this challenge can present a minefield of issues. We touch only upon the basics here.

Be Mindful of Client Instructed Advocacy: Not (always) in Their Best Interest

During our representation of clients who are experiencing mental health issues, we often encounter tension between what the client instructs be done and where the client's best interests would lie. In both the civil and criminal law context, our job is to advocate for the client according to his or her instructions rather than attempting to act in the client's best interests. We must give a voice to the concerns and objectives of clients with mental health issues in order to minimize the impact of the justice system on their life and liberty. Although we all have our own personal beliefs as to what is in our client's best interests clinically or therapeutically, we must strive to leave our biases and prejudices outside of the interaction with the client.

Be Mindful of Existing Influences on the Client: Advance the Client's Own Voice

Clients with mental health issues are often under enormous pressure from their family, treatment team, and service providers to adhere and "comply" with a specific medication regime and to stay in hospital. Often, we as lawyers are the first people to really listen to our clients and take their instructions. We cannot waiver from this approach. If we hear from family members who want us to sympathize with their position, we can certainly express our understanding of their frustration and concerns; but we must never forget who the client is. We must refrain from pass-

ing judgment on our client's choices, however unreasonable we believe those choices might be.

Be Mindful of Society's (and Potentially Your Own) Inherent Prejudices

There are many stereotypes of the seriously mentally ill person embedded in society's approach to people with mental health disabilities. In the media, mental illness is often linked to violence, sometimes it is thought to result in cognitive impairment, and many presume that symptomatic mental illness renders an individual incapable of meeting his or her basic daily needs. All of these prejudices and presumptions are false. Despite a diagnosis of a serious mental disability/disorder, the individual cannot and ought never to be presumed to be globally incapacitated or inherently dangerous. The person may well be capable to make his or her own decisions about a whole host of



issues, including his or her own treatment of the mental disorder, managing her own property or financial affairs, making Powers of Attorney for Personal Care or Property, deciding who they want to represent them at hearings, and / or any combination of these things. The individual is presumed fit to stand trial in the criminal context, unless proven and found to be unfit. And just because an accused was suffering from mental disorder at the time of the commission of an offence, this in itself does not vitiate the individual's mens rea or criminal responsibility for the criminal offence(s) committed.

Be Mindful of the Need to Provide Full and Fair Information: Set out All Options / Advice

It is imperative that clients with serious mental health issues are given all their options, the potential consequences and implications of each option, and advised as to

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the most reasonable outcome, based on the circumstances. As counsel, our job when advocating for clients with mental health issues is to ensure that our advice is understood by, accessible and useful to them. Despite obvious manifestations of symptomatic mental disorder, it is helpful that in the civil context, the client is deemed to have capacity instruct counsel at least in proceedings of the Consent and Capacity Board. But even in circumstances where capacity to communicate with counsel is in issue, such as matters of fitness, our obligation to provide necessary information to which the client is entitled is not diminished. Arguably, in fact, it is enhanced.

Be Mindful of Confidentiality, Privilege and Privacy Issues in the Hospital Setting

Clients with serious mental health issues are no less entitled to rely on the protections of solicitor-client privilege—they must be given the benefit of total confidentiality of the information they impart to counsel. Counsel must be uniquely alive to this professional conduct rule in the context of representing hospitalized clients. It is important to bear in mind that everything we or our clients say will be charted in the client's health record. We must therefore not engage in unauthorized conversations about our clients with staff, nor discuss anything with our clients within earshot of staff. We must, rather, insist on a private space to meet and privacy for telephone conversations with our client. This in itself can prove to be challenging at times.

Be Mindful of the Client's Socio-Economic Vulnerabilities and their Practical Reality

In our interactions, we will need to have empathy and a genuine sensitivity towards our client's circumstances and

his or her quality of life. Often, clients with mental health issues face poverty and may be without appropriate housing, employment and psycho-social support networks. For instance, we may find that clients with mental health issues may not be reachable by telephone – and have no fixed address – they may have to come in to your office on a regularly scheduled basis, simply so that you can provide them with information on their file.

Be Mindful of the Impact of Active Symptoms of Mental Disorder: Accommodate It

In communicating with our clients, we have to remember that sometimes our voice is not the only one they are hearing. When our clients are experiencing such hallucinations, raising our voice just a touch, and speaking slowly and clearly is helpful. We may have to repeat our question or information on a number of occasions. All client meetings take longer if the client is in crisis. The client may not be able to tolerate the length of the interview, without breaks, and without a cigarette. Something like 95% of this clientele smoke.


Representing individuals who have serious mental health issues presents unique challenges in accommodating the disability or condition and therefore the client while maintaining as ordinary a solicitor-client relationship as possible. The main emphasis must always remain on client-instructed advocacy despite family or other pressures on counsel retained by the person at the center of any legal controversy where mental disorder or capacity are in issue. Our clients deserve the best representation we can give them and our utmost professionalism. Our governing body expects no less of us nor should we settle for any less of ourselves. It's an interesting and rewarding area of practice, but it's also among the most challenging.

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