

Working with Vulnerable Clients

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1 Introduction

The role of Counsel can be a difficult one in any legal case but can become more so with a client experiencing mental health challenges. Counsel must be able to triage the situation as there are several paths the case can take. Counsel needs to consider whether the client can give instructions, is currently experiencing a mental health issue, or is under the influence of drugs or alcohol. The client may present differently day to day as their mental fitness fluctuates, and clients can decompensate quickly or be triggered by something that happens while involved in the legal system. Counsel has an obligation to the client, but also to ensure that they do not mislead the Court. If the client is unfit Counsel, in most circumstances, cannot proceed with the case knowing that the client does not appreciate the nature of the proceedings or cannot give instructions. At the same time, Counsel must uphold his or her duty of confidentiality owed to the client.

Counsel will benefit from gaining the client's confidence and trust and building a rapport with them. Clients may be both unwell and fit at the same time. They may give instructions that they know are not in their best interest, but despite that, if Counsel believes the client to be fit, they are obliged to follow those instructions, and the client is allowed to make decisions that are against their own best interest.

The more Counsel deals with vulnerable clients, the more quickly one learns that no two clients are alike. Approach each situation with a willingness to be flexible and without preconceived notions about who the client is and how they will respond to you.

By bringing a calm and reassuring demeanour to the interaction, Counsel can connect with the client and find ways to best serve their needs. Some clients will want the opportunity to explain what has occurred while others will prefer to listen until they are comfortable with Counsel. A client in custody may not understand their Counsel's role or

they may be unwell and unable to appreciate what you are saying and you may have to repeat yourself or explain your role more than once. Being able to explain the proceedings or options in plain language and without legal jargon is key. Explaining that all conversations are confidential and cannot be disclosed is also very important.

2 Assessing Fitness (In a Criminal Matter)

Counsel may need to assess whether the client is capable of giving instructions or if the issue of their mental fitness needs to be raised and addressed. In order to determine if the client is unfit¹, there are a series of questions that can be asked. Before going through these questions, take the time to thoroughly explain the Court process and roles of the parties to the client and, if possible, gather the client's background and history. This allows Counsel to understand the client's knowledge of the legal system and whether they have had prior dealings with the Justice System. If they have, they are more likely to understand the process, whereas if they are young or have had no prior dealings they may not be familiar with the criminal process or the key actors in the process.

If, once the interview begins, the client seems unresponsive, distraught, angry or unwilling to answer, consider the following:

2.1 Fitness fluctuates

It can change by the week, day or hour. Consider giving the client breaks and/or interviewing him or her later. Nourishment and physical comfort can make a difference. Consider asking if the client has eaten or had a drink recently or if they are too hot or cold. A willingness to help fix these small issues can make a big difference in developing

¹ Unfit to stand trial is defined in s. 2 of the *Criminal Code*, RSC 1985, c C-46, hereafter [CCC], s. 2: "**unfit to stand trial** means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to: (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings, or (c) communicate with counsel". The burden of proof is on the party raising fitness on a balance of probabilities: S. 672.22 CCC. One way to screen a person for fitness is to ask a set of questions, often referred to as the *Taylor Test Questions*, from the case *R. v. Taylor*, 1992, 77 C.C.C. (3d) 551.

rapport with the client so that you can meaningfully communicate with them about their case.

2.2 Collecting information from collateral sources

There may be family, friends, mental health workers, or other concerned parties who have attended Court to support the client. Collecting information from them about how the client has been doing may assist Counsel in advocating for the client. You have a duty of confidentiality and cannot disclose any information to others without your client's permission but, as their lawyer, you can collect information from these sources on their behalf. In some cases, the Court or Court Security may grant permission for a person to join you in the interview room to speak to the client if that would assist the client in speaking with you.

2.3 Additional time

Consider if the client would benefit from additional time before speaking with Counsel or after to consider their options and/or give instructions. Extra time may also allow for any needed medical care or treatments if desired.

These are just some of the considerations when dealing with a client who is unwell. An accused person is presumed fit² and, unless fitness is raised by the Crown, the person will be presumed to understand and be able to participate in the process.

It's important to note that many clients are fit and capable of giving instructions despite being affected by a mental disorder or experiencing active symptoms that make them unwell. In these cases, Counsel must keep in mind that the client is allowed to make decisions and give instructions that may not be in their best interest. Counsel's role is to explain the options to the client and give them advice about the process and their options, but ultimately the choice of how to proceed is up to the client. The decision to run a bail

² CCC s. 672.22: "An accused is presumed fit to stand trial unless the Court is satisfied on the balance of probabilities that the accused is unfit to stand trial".

hearing or not, pleading guilty or having a trial, deciding whether the issue of ‘criminal responsibility’ will be raised would generally be the areas where the client has the choice and would instruct Counsel.

3 Ethical Obligations

Counsel must advocate for their clients and their wishes. Each province has its own respective Law Society, governance, and rules of professional conduct to consider. Reviewed below is the federal standard, which is the model for all provinces - the Model Code of Professional Conduct³ - which provide the best practices and commentary for each rule. Counsel is also guided by the comments of the Court on what is expected of Counsel and what remedies will be afforded to an accused who is not given the opportunity to participate in the legal process. Counsel must be guided by the principles outlined in the seminal cases, that the client must only have a rudimentary understanding of the proceedings, and that they can choose to make decisions that are not (in Counsel’s view) in their best interest⁴.

3.1 Dealings with Clients with Diminished Capacity

3.2-9 When a client’s ability to make decisions is impaired because of a minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

[1] A lawyer-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.

³ Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2017, online at: <<https://flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf>> [FLSC Model Code] Although the model rules of professional conduct are discussed here, Counsel should consult the rules that govern their conduct in their jurisdiction of practice, and account for any regional differences.

⁴ See *R. v. Taylor* supra at 1.

A client may be mentally capable of making some decisions but not others. 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. Counsel will have to assess whether there are any impairments that will prevent the client from giving instructions or entering into binding legal relationships.

[2] A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer 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 only to the extent necessary to protect the person until a legal representative can be appointed. A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.⁵

In criminal law, there is no equivalent as in civil law where someone can be appointed a litigation guardian to assist with the person's decision-making - only the accused can make a decision about how to proceed.

The Criminal Code dictates that an accused person is presumed fit to make decisions unless the issue of fitness is raised and that presumption is rebutted. For this reason, a lawyer should not decline to act for a client they believe is unfit but rather assist them with navigating the Court process if the issue of fitness is raised.

3.2 The Solicitor-Client Relationship, Privilege, and the Duty of Confidentiality

3.3-1 A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:

- a) expressly or impliedly authorized by the client;*
- b) required by law or a Court to do so;*
- c) required to deliver the information to the Law Society; or*
- d) otherwise permitted by this rule.*

⁵ *Ibid*, at ch 3.2-9, commentary 1-2.

Commentary

[1] A lawyer cannot render effective professional service to a client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

[2] This rule must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

[3] A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

[4] A lawyer also owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer's professional knowledge, although the lawyer may not render an account or agree to represent that person. A solicitor and client relationship is often established without formality. A lawyer should be cautious in accepting confidential information on an informal or preliminary basis, since possession of the information may prevent the lawyer from subsequently acting for another party in the same or a related matter (see rule 3.4-1 Conflicts).

[5] Generally, unless the nature of the matter requires such disclosure, a lawyer should not disclose having been:

- a) retained by a person about a particular matter; or*
- b) consulted by a person about a particular matter, whether or not the lawyer-client relationship has been established between them.*

[6] A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure.

...

[10] The client's authority for the lawyer to disclose confidential information to the extent necessary to protect the interest may also be inferred in some situations such as when the lawyer is taking action on behalf of a client lacking capacity to protect themselves until a legal representative can be appointed. In determining whether a lawyer may disclose such information, the lawyer should consider all

circumstances, including the reasonableness of the lawyer's belief that the client lacks capacity, the potential harm that may come to the client if no action is taken, and any instructions the client may have given the lawyer when capable of giving instructions about the authority to disclose information. Similar considerations apply to confidential information given to the lawyer by a person who lacks the capacity to become a client but nevertheless requires protection.

[11] A lawyer may have an obligation to disclose information under Rules 5.5-2, 5.5-3 and 5.6-3. If client information is involved in those situations, the lawyer should be guided by the provisions of this rule.⁶

This passage is reproduced at some length for Counsel to consider. When Counsel is questioned by the Court or is raising the issue of fitness before the Court, Counsel must ensure that they are not inadvertently breaching the duty of confidentiality owed to the client, but must also take care not to mislead the Court. In situations where Counsel is appointed to act for the client because the client lacks capacity, Counsel must act in the client's best interest for that purpose.

This can be especially difficult when dealing with clients whose parents or family members retain Counsel for them, as they may want to receive information about the case and the well-being of their loved one. Counsel may need those family members to be sureties or assist with bail and cannot alienate the family. However, Counsel should not assume that the client wishes their information to be shared with his or her family or others, and must only do so if they receive express and written consent from the client.

3.3 Duty to Report Harm

Counsel may have an obligation to report that a client or other person is at risk of harm. Counsel would breach privilege and confidentiality in such a disclosure, and this should not be considered lightly. Counsel should note any discussions with the client, assess the context, and consider obtaining legal advice or ethical advice from Senior Counsel or the Law Society to which Counsel belongs. When working with vulnerable clients or clients

⁶ *Ibid*, ch 3.3-1, commentary 1-6, 10-11.

with mental health issues, Counsel should advise the client that if they say that they will self-harm, Counsel may have to disclose that information.

3.3-3 A lawyer may disclose confidential information, but must not disclose more information than is required when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

Commentary

[1] Confidentiality and loyalty are fundamental to the relationship between a lawyer and a client because legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, in some very exceptional situations identified in this rule, disclosure without the client's permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare.

[2] The Supreme Court of Canada has considered the meaning of the words "serious bodily harm" in certain contexts, which may inform a lawyer in assessing whether disclosure of confidential information is warranted. In Smith v. Jones, [1999] 1 S.C.R. 455 at paragraph 83, the Court observed that serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of the individual.

[3] In assessing whether disclosure of confidential information is justified to prevent death or serious bodily harm, a lawyer should consider a number of factors, including:

- a) the likelihood that the potential injury will occur and its imminence;*
- b) the apparent absence of any other feasible way to prevent the potential injury; and*
- c) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.*

...

[5] If confidential information is disclosed under rule 3.3-3, the lawyer should prepare a written note as soon as possible, which should include:

- a) the date and time of the communication in which the disclosure is made;*

b) the grounds in support of the lawyer's decision to communicate the information, including the harm intended to be prevented, the identity of the person who prompted communication of the information as well as the identity of the person or group of persons exposed to the harm; and

c) the content of the communication, the method of communication used and the identity of the person to whom the communication was made.

How and when disclosure should be made under this rule will depend upon the circumstances. A lawyer who believes that disclosure may be warranted should contact the local law society for ethical advice. When practicable and permitted, a judicial order may be sought for disclosure.⁷

As the commentary indicates, situations where Counsel must breach privilege will be rare. It is worthwhile to refresh oneself on the rules and duties owed to the client to guard against inadvertent disclosure, and to highlight the difficult client management and client relations situations that may arise. This is especially important because your previous instructions from a client may change if the person is unwell.

3.4 Duty of Candour – Be Honest with the Court

Counsel owes a duty to the Court to not mislead the Court as to the circumstances of the client's case. Counsel is wise to consider their ethical obligations both to the Court and to the client before appearing before the Court.

5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.

5.1-2 When acting as an advocate, a lawyer must not:

...

b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;

...

⁷ FLSC Model Code, *supra* note 2, at ch 3.3-3, commentary 1-3.

e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;

(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal;

...

(l) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation;⁸

3.5 Competence in the Area Where Requested to Act for the Client

Counsel has a duty of competence to the client and must have the necessary skills to take on the matter. Cases involving the litigation of a mental health issue, such as the defence of Not Criminally Responsible, can be difficult and involve substantial litigation. Counsel should consider their ethical obligations of competence before taking on such a case:

3.1-2 A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

[1] As a member of the legal profession, a lawyer is held out as knowledgeable, skilled and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

[2] Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To

⁸ FLSC Model Code, *supra* note 2, at ch 5.1-1 to 5.1-2.

accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practices.

[3] In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include:

- a) the complexity and specialized nature of the matter;*
- b) the lawyer's general experience;*
- c) the lawyer's training and experience in the field;*
- d) the preparation and study the lawyer is able to give the matter; and*
- e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.*

...

[5] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk or expense to the client. The lawyer who proceeds on any other basis is not being honest with the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.⁹

Counsel should also consider whether there is a mandatory obligation to withdraw from the representation of a client:

3.7-7 A lawyer must withdraw if:

- a) discharged by a client;*
- b) a client persists in instructing the lawyer to act contrary to professional ethics; or*
- c) the lawyer is not competent to continue to handle a matter.¹⁰*

⁹ FLSC Model Code, *supra* note 2, at ch 3.1-2, commentary 1 to 3.

¹⁰ *Ibid*, at ch 3.7-7.

Counsel should proceed with caution when they seek to be removed from the record in cases where a client has become unwell and is no longer in contact with Counsel. This is a frequent occurrence with the vulnerable client population.

Counsel should not include in an application to be removed any details that would prejudice the client or breach solicitor-client privilege. Counsel should review the seminal decision of *R. v. Cunningham*¹¹ for guidance on what to include in an application for the removal of Counsel from the record.

4 Taking Client Instructions and the Role of Counsel

Appellate Courts have considered and weighed in on the relationship between Counsel and the client and the decisions the client is entitled to make. Counsel must refrain from taking a “Counsel knows best” or paternalistic approach to the solicitor-client relationship.

Counsel must take instructions from a client, however, they are expected to assess the case and exercise independent judgment in making strategic and tactical decisions that are in the best interests of the client.

The appropriate role of Counsel has been touched upon by various Courts. In *Faulkner*, the Court relied on The Report of the Chief Justice’s Advisory Committee on Criminal Trials in the Superior Court of Justice,¹² which found that:

[C]ounsel is responsible for the conduct of the defence and counsel must exercise independent judgment as to what is in the client’s best interests and as to whether any particular course of conduct is consistent with counsel’s duties as an officer of the Court.

¹¹ *R. v. Cunningham*, [2010] 1 SCR 331 at pp. 47 - 56.

¹² The Report of the Chief Justice’s Advisory Committee on Criminal Trials in the Superior Court of Justice, *New Approaches to Criminal Trials* (May 2006), online at: <http://www.ontariocourts.ca/scj/news/publications/ctr/>

In *R. v. Samra*,¹³ the Court explained that the proper role of Counsel is not to be a “mouthpiece” for his or her client, and relied on the following address given by G. Arthur Martin Q.C.’s address to the Advocates Society, wherein he said:

*The defence counsel is not the alter ego of the client. The function of defence counsel is to provide professional assistance and advice. He must, accordingly, exercise his professional skill and judgment in the conduct of the case and not allow himself to be a mere mouthpiece for the client.*¹⁴

While Counsel does have relatively wide latitude with respect to strategic decisions concerning the defence, and while there is a presumption that Counsel’s conduct is adequate unless proven otherwise,¹⁵ the client should not be kept in the dark regarding tactical decisions. Counsel should seek input from the client and discuss the steps that will be taken by Counsel throughout the course of the client’s matter.

There are a number of decisions fundamental to the defence of the case that the client alone must make, and for which Counsel must obtain instructions.

Examples of decisions belonging to Counsel:

- Strategy
- Disclosure
- Charter issues
- Due process
- Dealings with the Crown
- Witnesses to call or not
- Conduct of the cross-examinations

Examples of decisions belonging to the client:

- whether or not to retain Counsel (unless appointed)

¹³ *R. v. Samra*, [1998] O.J. No. 3755 (On. CA) [*Samra*]

¹⁴ G. A. Martin, “The Role and Responsibility of the Defence Advocate” (1970) CLQ 376 at 382, cited in *Samra*, *ibid* at 30-33

¹⁵ *R. v. Kelly*, [1992] O.J. No. 314 (Ont. C.A.)

- pleading guilty or not guilty
- whether to advance a defence of insanity or a defence of Not Criminally Responsible
- whether to testify on their own behalf¹⁶
- the election as to the mode of trial
- having a preliminary hearing or proceeding directly to trial
- having a judge or a judge and jury trial¹⁷

There is some divide in the jurisprudence regarding the decision to call witnesses. In *R. v. Swaine*,¹⁸ the SCC held that an accused person has control over the decision of what witnesses to call¹⁹, whereas the Court in *DeTeresi* held that once an accused decides to plead not guilty, Counsel “should assume complete control and responsibility over the manner in which the defence will be conducted”, including “which witnesses will be called, whether a witness should be cross-examined, and the form such cross-examination should take.”²⁰

That being said, in *R. v. G.D.B.*²¹ the SCC held that,

*Where, in the course of a trial, counsel makes a decision in good faith and in the best interests of his client, a Court should not look behind it save only to prevent a miscarriage of justice...it is not the case that defence lawyers must always obtain express approval for each and every decision made by them in relation to the conduct of the defence.*²²

¹⁶ *R. v. Faulkner*, 2013 ONSC 2373, at 41 [*Faulkner*].

¹⁷ *Law Society of Upper Canada v. DeTeresi*, [2009] OJ No 582 (SCJ.) at 26 [*DeTeresi*].

¹⁸ *R. v. Swain*, [1991] 1 SCR 933 [Swaine].

¹⁹ *Ibid* at 36.

²⁰ *DeTeresi*, *supra* note 12 at 130.

²¹ *R. v. G.D.B.*, [2000] 1 SCR 520 [*GDB*].

²² *Ibid* at 34.

Failure of Counsel to seek instructions from the client on fundamental decisions may give rise to questions of procedural fairness and the reliability of the verdict²³ or a successful claim of ineffective assistance.²⁴

Counsel should get important decisions in writing, especially decisions against Counsel's advice, and have the client sign and date those instructions. Having written instructions is especially crucial in cases where the person may face a Not Criminally Responsible finding and spend an indeterminate time under the Review Board system. These types of proceedings can have an incredible impact on the client's welfare and may mean they spend longer in hospital than they would ever serve in custody for the same offence.

5 Interviewing Clients

The style and length of a client interview will be largely determined by whether Counsel has a history with the client. Assuming that no prior relationship exists, the initial client meeting is an opportunity to develop rapport and build trust.

Each client reacts differently to being charged with a criminal offence and being before the Court. The client may need the opportunity to explain their circumstances, frustration or displeasure with the situation or the charges they are facing. The experience can be stressful, bewildering and difficult. Imagine the client who experiences hallucinations and paranoia, and who believes everyone is watching them and listening to them. Now they are in custody, under surveillance, and being recorded. These kinds of experiences can often be a trigger for increased symptomology and decompensation. Clients who are arrested by the Police and placed in custody can decompensate quickly just from the stress of that experience.

²³ *Ibid* at 34

²⁴ See *R. v. Eroma*, [2013] O.J. No. 1411: appeal allowed; Counsel ignored the client's instructions that he wished to testify at trial, resulting in a miscarriage of justice

5.1 The Initial Interview

A key consideration in the initial interview is ensuring that the client understands Counsel's role, their options, and the process. In many cases, clients are reluctant to say that they do not understand. Clients who have been involved in the mental health system before may have a script of information that they can easily explain, but upon further questioning it becomes clear that they do not understand the process or their options. Ask questions and spend the time explaining concepts to ensure that the client has understood. Give the client time to consider their options or ask the client to repeat their options back to you.

Sometimes clients become upset recounting what happened or discussing the interactions surrounding their arrest. If the client becomes agitated or upset:

- ask if further explanation could alleviate the stress associated
- ask if they need a break
- consider changing the setting
- explain that solicitor-client interviews are not recorded
- listen to the client's version of what happened before making notes (or ask permission to make notes) and reassure the client that the notes are confidential

When commencing an interview with a client, ensure that you can understand each other. Canvass whether the client needs an interpreter, whether they can hear you, and whether they are comfortable. Approaching the client with care and without assumptions can reassure the client you are there to assist them and care about their welfare. Ensuring that the client is comfortable communicating with you, and the interview will be far more productive. If you have the client sign any forms, whether they be release of information or consent forms, ensure they understand them. Do not assume that the client can read and understand English, especially if it is not their first language, or if they have a learning disability or literacy issues. Many clients will not openly admit that they cannot read. You can offer to read the form to them to ensure that they understand.

Counsel will want to obtain as much background information about the client as possible, the circumstances of the client's arrest, whether the person made a statement, the circumstances of the making of the statement, whether they were given rights to counsel, whether they were able to exercise those rights, and their treatment in custody. Counsel should consider whether they want details about the offence in an initial interview that may limit Counsel in bringing potential defences at trial.²⁵ In some cases, Counsel may consider waiting until disclosure has been received before discussing the offence.

Approaching the client with questions that are not judgmental can open the door for discussion. Some examples of non-judgmental questions may take the following form:

- Have you been told what you are charged with?
- Did the Police or anyone show you the Police report? The Police write this report; you know that Counsel doesn't write this?
- Have you ever been told you had a mental health diagnosis? Who told you that? Do you agree with that assessment? When was that? What were the circumstances?

Not all questions will be relevant for every interview but developing a list of key questions to ask a client will help make Counsel's job easier. If Counsel knows the answers to the key questions early on, it can help inform what kind of bail plan can be created to assist the person and what kind of conditions they may be able to abide by.

Counsel may develop a template for an initial interview with a new client affected by mental health issues, which may include the questions outlined below. This is not meant to a comprehensive overview of all interview questions that may be asked but is a starting point that can be used for designing a template of interview questions that best suits Counsel's practice and needs. Counsel will know best their own client population and understand the types of questions that will be relevant to their practice.

²⁵ FLSC Model Code, *supra* note 2, at 5.1-1, commentary 9 to 10.

General Background Questions

- What is your full legal name? Any previous names? Ever change your name? How do you prefer to be addressed?
- What is your date of birth and where you were born (if known)?
- Where did you grow up?
- Where did you live before being arrested? Can you go back there?

Family

- Do you have any family? Parents, siblings, extended family? Who do you have contact with? Is there anyone who may attend Court to support you?
- Have you ever been married? Do you have any children?
- Are you or were you ever in care? From which ages? Are you still involved with any child welfare agencies? Do you have a caseworker?
- Did you speak to anyone while you were at the Police station?
- Does anyone know about the charge? Is there anyone you would like me to call?

School and Employment

- What is the highest level of schooling that you completed? Where did you go to school? How many credits do you need to complete your diploma/degree?
- Do you want to go back to school? Do you have any plans in this regard?
- Are there any barriers to you going back to school?
- How do you support yourself?
 - Have you ever received Government assistance?
 - If so, what kind? Do you know why you were eligible for that support?
- Do you work? What location?
- What hours do/did you work?
- What jobs have you had in the past?
- Do you have anyone that would be a reference for you or would have you back at work?

Immigration Status

- What is your immigration status in Canada?
- When did you come to Canada? What was your status when you came?
- Have you ever been the subject of a deportation order?
- What is the immigration status of your family?
- Do you have an immigration lawyer? Would I have your permission to speak to that lawyer if necessary?

Physical and Mental Health

- Do you have any health difficulties? Did a doctor tell you that was an issue?
- Do you take any medication? Did a doctor prescribe the medication? If so, when? Do you know your doctor's name?
- Are you suffering from any injuries? How were they sustained? Were these injuries documented at the Police Station? Did anyone take photos?
- Would you allow me to photograph your injuries?
- Have you ever been diagnosed with a mental health issue? By who?
- Do you work with anyone that helps you with that issue?
- Do you have any support from a family doctor, nurse, psychologist, treatment team, psychiatrist, or social worker? Do you know how to reach that person?
- Have you ever taken medication for mental health? If yes, do you know the name(s) of the medication?
- Have you taken any medication while you were in custody?
- Have the Police ever taken you to the hospital? How many times? When was the last time? Which hospital did you go to?
- Do you have a treatment team? If so, where are they?
- Have you ever been or are you currently on a Community Treatment Order? When does it expire?
- How are you feeling currently? Is there anything you need right now (i.e., food, medication, medical attention)?

Community Supports

- Are there any activities you are involved with in the community?
- Do you do any volunteer work?
- Are there any organizations in the community that assist you? Which ones? Do you have a point person that you normally deal with?
- Were you connected to any organization in the past that you might like to reconnect with?
- Were there any counselling or peer support groups you found helpful in the past? Would you go back?
- Were there any doctors or supports that you would not go back to? Why?
- Would you agree to sign a release to allow me to speak to any of your supports?

Past Dealings with the Justice System

- Do you have a prior criminal record? Do you know the charges? Outcome? Where and when did that occur?
- Are you currently on probation? Do you have a probation officer? How often do you see that person? Where is his or her office?
- Have you ever gone to the hospital before when you were charged? Do you remember when? What happened?

Substances

- Have you ever had any issue with drugs or alcohol?
- Do you think you have a problem with drugs or alcohol?
- What is your drug of choice?
- How often do you consume it?
- Have you ever experienced blackouts from drugs or alcohol? What happens?
- Do your friends consume drugs and alcohol?
- Have you ever received treatment for using substances? When? Was it helpful?
- Do you think you need assistance with this?

Sexual Identity

- How do you prefer to identify?
- How do you prefer to be addressed in Court?
- Is there any special considerations that should be given to your needs while in custody?

Previous Contact with Mental Health Court

- Have you ever been assessed for fitness before by the Court? If yes, where and when?
- Have you ever been on a treatment order, ordered to receive treatment by the Court?
- Have you ever been assessed for NCR before? What was the outcome?
- Have you ever been under the review board system? When? For how long?

5.2 Do You Identify as an Indigenous Person?

Historically, legal institutions have been used as a means to colonize Indigenous²⁶ people and land. Counsel should be aware that not all clients who are Indigenous will outright disclose this fact and should therefore ask questions to find out whether the client is Indigenous, while being open and honest about the nature of the inquiry. Counsel should also be aware that there are many distinct Indigenous cultures in Canada, and within those cultures, very different ways of life.

In 2015, the Final Report of the Truth and Reconciliation Commission of Canada was released, with Call to Action 27 specifically directed at the legal profession:

...to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal– Crown relations. This will require skills-based

²⁶ The term “Indigenous” is used in this book, notwithstanding that caselaw, earlier jurisprudence and academic writing often use the term “Aboriginal”.

*training in intercultural competency, conflict resolution, human rights, and anti-racism.*²⁷

Indigenous clients may also be wary of the adversarial nature of the legal system and the role of Counsel, which are often at odds with Indigenous cultural ways that focus on reconciliation and community and spiritual healing. Cultural competency is essential when working with Indigenous clients, and Counsel should be careful not to succumb to the common misconception of “pan-aboriginalism” – the tendency to assume that all Indigenous cultures are alike and that knowledge of one culture can be applied to others.²⁸ It is important for Counsel to seek cultural information from the client. It is equally important for Counsel to understand that a client who speaks primarily in their traditional Indigenous language might require a more in-depth explanation of the role of Counsel and the nature of the Criminal Justice System. Counsel should also be attentive to the need for an interpreter in order to ensure that the client fully understands the legal issues, their rights and options, and potential consequences of their legal matters.²⁹

Counsel should be alive to the fact that any mental health issues suffered by Indigenous clients may be a result of cultural discontinuity resulting from a history of colonialism, displacement, marginalization, and assimilation. Intergenerational trauma due to the client’s experience (or their family’s) with the Residential School System may also be a factor to consider.³⁰

²⁷ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, Calls to Action (Ottawa: Library and Archives Canada, 2015)

²⁸ Nora Rock, “Providing High-Quality Service to Indigenous Clients” *LawPRO Magazine* 15:1 (January 2016) at 6, online:

<http://www.practicepro.ca/LawPROmag/High_Quality_Service_Indigenous_Clients.pdf>

²⁹ The Advocates’ Society, The Indigenous Bar Association and The Law Society of Ontario, “Guide for Lawyers Working with Indigenous Peoples” (11 April 2018), online at: http://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Guide_for_Lawyers_Working_with_Indigenous_Peoples_apr11_2.pdf [Guide for Lawyers]

³⁰ *Ibid*, at 17: “Many self-destructive behaviours can result from unresolved trauma. Depression, anxiety, family violence, suicidal and homicidal thoughts and addictions are some of the behaviours [...] mental health therapists see when working with clients who have experienced direct or intergenerational trauma.”

In 2018, Aboriginal Legal Services produced a handbook for lawyers, authored by Dr. Lorna Fadden, entitled, *Communicating Effectively with Indigenous Clients*³¹. This handbook is essential reading for Counsel working with Indigenous clients and covers this topic in-depth and in means that are very accessible and useful to Counsel. The handbook encourages counsel to broach the subject with the client tactfully, and more broadly, before asking the client about issues they face and highlights strategies for Counsel interviewing Indigenous clients:

"A person's health is a sensitive matter, and not one that should be asked about immediately or bluntly. Rather, inform your client that in order to best represent them, it would be useful to know whether they have any health concerns that might affect their case more generally. The subject can be broached delicately, asking whether there is a household history of substance abuse, FASD, diabetes, etc., before asking more directly about the client's own conditions.

- *Is your client diabetic?*
- *Is your client experiencing drug withdrawal? Alcohol withdrawal?*
- *Does your client have epilepsy? Seizures?*
- *Does your client have mental health issues for which they are being treated? Issues for which they have not yet been treated?*
- *Is your client injured?*
- *Does your client have FASD?*
- *Is your client pregnant? Are they a new/nursing mother?*

*These are all issues that can affect your client's behaviour and attention to their case and hence have some bearing on it. At the very least, many of these conditions will have to be tended to and monitored while the client is in custody."*³²

It is important to ask these questions as Counsel may need to advocate for the client to receive medical care while in custody, or ask the Court to make an order for medical treatment. However, it cannot be stressed enough that the client needs to understand why this information is relevant and how it can benefit the client to provide that information. Counsel can also offer to obtain the client's records or other health

³¹ Dr. Lorna Fadden, "Communicating Effectively with Indigenous Clients", Aboriginal Legal Services, 2018, available online: <<https://www.aboriginallegal.ca/assets/als-communicating-w-indigenous-clients.pdf>>

³² *Ibid*, at 10. To obtain more information on Indigenous clients with FASD, see the FASD & Justice website, online at: <<http://fasdjustice.ca/>>

information if the client wishes Counsel to have that information and consents to Counsel obtaining it.

When it comes to programming available to Indigenous accused persons, it is important to consider each client's own individual needs. As mentioned, do not assume that because a client is from a certain area or community that they ascribe to the same views:

[T]he spiritual or religious background of such programs may be inappropriate for the client who is neither spiritual nor religious. The assumption that all Indigenous people subscribe to a traditional belief system is erroneous. Participation would be inappropriate for the Indigenous atheist, and alternatives should be sought. Further, some people may have adopted Christianity and may take solace in those traditions rather than Indigenous programs. While the inclusion of traditional Indigenous faith programs is a positive innovation, it may not serve everyone's spiritual needs.³³

Interview questions for Counsel when interviewing Indigenous clients may include (in addition to those discussed above):

- What Indigenous community are you from?
- What language do you speak?
 - Are you fluent in this language?
 - Would you prefer to have an interpreter for any Court appearances?
- I see that your last name is _____. How big is this family in your community?
 - How do you pronounce the name of the community in your language?
- What other communities belong to your culture?
- Do you have any supports within your community that you would like to be connected to?
- Were members of your family ever in care or residential schools?
- Would you prefer your case be heard in an Indigenous persons' Court (if one is available in the jurisdiction)?

³³ *Ibid*, at 14.

- Have you ever had a Gladue Report? If yes, when? If no, is that something you would be interested in doing?

6 Conclusion

Counsel may be the only person that allows vulnerable clients to have a voice and express their wishes in their interaction with the Justice System. This makes Counsel's role incredibly vital and impactful and there are many ethical, professional, and strategic considerations involved in acting for such a client.

Counsel should review their professional obligations to all clients, but especially those who are vulnerable, marginalized or operating at a diminished capacity to ensure that they are approaching the case appropriately and with the level of competence required to best advocate for the client. Counsel should consult resources that educate on best practices of cultural safety and competence, including resources from Continuing Professional Development, from the Law Societies, and from the community.

Some provincial governments have created strategies that outline programs and services to help the accused with mental health issues, including legal aid strategies. Legal Aid Ontario provides supports for individuals with mental health issues. For accused who are detained in custody or in a mental health facility, assistance may be sought from patient advocates or rights advisors in the mental health facility, and legal aid staff in the correctional facility.³⁴

Legal Aid Ontario also has its own mental health strategy, with a goal of "prioritizing, expanding and sustaining mental health rights and advocacy within Ontario's legal system."³⁵ Some initiatives include:

- a mental health training program developed in partnership with the Mental Health Commission of Canada and the Canadian Mental Health Association, Ontario

³⁴ Legal Aid Ontario, online at: <https://www.legalaid.on.ca/en/getting/type_civil-mentalhealth.asp>

³⁵ Legal Aid Ontario, "A Mental Health Strategy for Legal Aid" (2016) online at: <<http://beta.legalaid.on.ca/strategic/wp-content/uploads/sites/4/2016/03/MHS-Final-EN.pdf>>

- expanded legal aid certificate coverage for several mental health advocacy needs, as part of LAO's financial and legal eligibility increases beginning in June 2015
- expanded coverage for first-time accused so they are less likely to face serious secondary consequences of criminalization, such as loss of employment, a Police record or unrealistic bail terms
- a new mental health tribunals program to expand access to appeal rights while investing in the growth and experience of the mental health bar in communities across Ontario
- the creation of a formal mentorship and second chair program to help more lawyers gain experience and expertise in mental health law
- several pilot projects that place lawyers in drop-ins, shelters, community health centres and hospitals, ensuring continual and preventative access to a variety of advocacy options, and better linkages to other legal services³⁶

While an entire book could be devoted to best practices in advocacy for vulnerable clients, it is hoped that exposure to these resources and best practices will encourage Counsel to engage in continuing education and development in this key area of client service.

³⁶ Ibid at 8.