

## **CHAPTER 11: ADDRESSING LITIGANT MENTAL HEALTH ISSUES IN THE COURTROOM**

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# 11

## **Addressing Litigant Mental Health Issues in the Courtroom**

### **Introduction**

For many judges and court staff, the problems of dealing with self-represented litigants are exacerbated by the fact that some of them may be suffering from forms of mental illness, recognized or unrecognized. This is particularly apparent in criminal cases where litigants generally have the right to counsel and are choosing to represent themselves.

Judges and court staff are often deeply uncertain about how to deal with these litigants, fearful of a potential loss of control and sometimes even of actual physical risk. At a minimum, these litigants are seen as highly disruptive to court functioning.

This chapter discusses the dynamics of mental illness in the self-represented litigant context and suggests approaches to assist in addressing litigants' needs and to minimize disruption of court processes.

### **I. Current Scientific Perspective on Mental Health Problems**

## **A. The Roots of Mental Illness**

Historically, mental health problems were thought to be behavioral in origin and nature. Modern medical research has taught us that mental health problems are the result of biological brain disorders that are diagnosable and treatable. Effective treatment, however, is often difficult for many to access. Generally, the behaviors exhibited by those with mental problems are symptomatic of their brain dysfunction.

## **B. The Burdens of Mental Illness**

Litigants with mental health problems can be expected to carry significant psychological burdens as well. Some examples of such burdens are the following:

1. **Adjusting to the Disease.** Living with the disease is frightening. Mentally ill individuals are frequently misunderstood and isolated. They often feel like a disappointment or a burden to loved ones, and can also worry about harming them.
2. **Social Stigma.** Mental illness carries a social stigma that depletes a person's sense of self-worth. Mentally ill individuals often have been subjected to shaming, blaming, and guilt-inflicting behavior by others.
3. **Fear.** Litigants with mental health problems can be expected to be significantly fearful in the courtroom. How they exhibit this stress will vary from individual to individual.

## **C. Common Responses to Mentally Ill Litigants**

Judges working with mentally ill litigants are often highly motivated to be helpful to them. Cognitive neuroscience has found that the desire to help people in trouble is strong.<sup>74</sup> This normal interpersonal response

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<sup>74</sup> E. Kohler, C. Keysers, M. A. Umiltà, L. Fogassi, V. Gallese, and G. Rizzolatti, "Hearing Sounds, Understanding Actions: Action Representation in Mirror Neurons" (2002) 297(5582) *Science* 846-848; L. E. O'Connor, "Pathogenic Beliefs and Guilt in Human Evolution: Implications for Psychotherapy." In *Genes on the Couch*:

mechanism for human beings, as well as other highly social mammals, accounts for such things as our drive to hold our families together, to empathize with others whether or not we have consciously chosen to do so, or to commit acts of heroism entailing enormous self-sacrifice without much prior conscious analysis.

It also helps account for the varying levels of pain and discomfort, sometimes referred to as “survivor guilt,” that we feel when exposed to those less fortunate than ourselves. Examples vary all the way from the horror of witnessing an injury accident, to listening to the testimony of a person who has been brutalized, to avoiding a homeless person trying to sell papers on the street, to how we feel generally around sick people or while visiting in hospitals.<sup>75</sup>

Judges must be able to recognize feelings of discomfort they may have in dealing with a litigant’s mental health issues. Many people feel uncomfortable working with such individuals. (This can be just as true for mental health professionals as for lawyers and judges.) The “survivor guilt” response can account for much of this discomfort.

This feeling can arise fairly easily—prompted by the litigants’ appearance, speech, or demeanor, or some bizarre act on their part. A judge may be only vaguely sensitive to the feeling, particularly while working on a busy calendar, and will simply feel more pressured or will experience impatience or some other uncomfortable state. Unfortunately, the emotional defenses against these uncomfortable feelings are such things as anger, frustration, or blaming the litigant. These undesirable responses are particularly likely to appear when a judge is unaware of, or does not understand the reason for, his or her own discomfort and acts out on those feelings perhaps because of being distracted by a busy docket.

Judges are required to work with litigants with mental health problems in situations that can cause significant frustration. It is important that such feelings not get in the way of decision making.

Unfortunately, it is not always possible for the court to intervene in some way that will be helpful to a litigant. Litigants with mental health

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*Explorations in Evolutionary Psychology* (P. Gilbert and K. Bailey, eds., London: Brunner-Routledge, 2001), 276–303.

<sup>75</sup> L. E. O’Connor, J. W. Berry, and J. Weiss, “Interpersonal Guilt, Shame and Psychological Problems (1999) 18 *Journal of Social and Clinical Psychology* 181–203.

I was handling a case with a really resistant defendant who just wasn't complying with any of my orders. During hearings he would often fail to pay attention when I spoke to him, would not respond directly to questions, and seemed unwilling to cooperate with reasonable requests. I tried sanctioning him, but that didn't seem to make a difference.

In reviewing his file, I saw that his mother had only been 20 years old when he was born and had been repeatedly incarcerated for alcohol-related offenses. It occurred to me that he might be suffering from fetal alcohol syndrome and that maybe his failure to comply with orders was as a result of an inability to do so.

I changed my approach from treating him as willfully noncompliant to someone who was going to need coaching to make it through the legal requirements. I had him come to court more often and started praising him for anything positive that I could find that he had done. Lo and behold, he actually started following my orders. I'm not a doctor and don't know if that's really what his situation was, but realizing that there might be a physical cause for some of his actions helped me not take what he was doing so personally and helped me be more creative in how I responded to it.

—Judge

issues are more likely than most to ask the court for relief that is simply not available.

Being unable to help a litigant, or even to help him or her understand why the proceedings are going the way they are, is highly unpleasant for almost any judge. If this occurs frequently, judges can become vulnerable to withdrawing empathy from the litigant(s) altogether in an attempt to avoid the emotional stress of the situation.

Even when a judge is able to be helpful, litigants are not always able to acknowledge the help they are receiving. They behave in an argumentative or otherwise difficult manner toward the judge, which may add to the judge's frustration and ultimately create resentment.

There are numerous reasons why individuals with mental illness may not seek or accept treatment that has been offered to them. When litigants appear as if they do not want help, it will stem from one or both of two sources: either a negative prior experience with mental health treatment or their own symptomology.

Although improvements have been made, many antipsychotic medications have serious and permanent negative side effects. Many persons with serious chronic mental illness are simply not capable of keeping up a medication regimen and routinely making appointments on time, and so reasonable outpatient treatment is not feasible. Furthermore, they cannot cope with the social interactions necessary to manage handling a serious chronic illness on their own and often simply give up on the mental health system.

Some individuals with mental health issues, and often those addicted to drugs and alcohol, will not seek treatment because they have lost all hope of being able to recover. Often this is expressed as denial of the problem. This denial disappears quickly as the possibility of recovery becomes more of a reality.

The overlap with the lack of medical detoxification facilities is clear. When medical detoxification is available, the resistance to treatment declines considerably.

If a judge can communicate to litigants his or her genuine belief that recovery is possible, the effect can be dramatic in breaking through addict hopelessness and denial. Drug treatment courts have found coercive treatment to be effective for many addicts, particularly when conducted in treatment courts presided over by genuinely supportive judges who can communicate their confidence in the individual's ability to get and stay clean and sober.

Not as personally related to the litigants is the fact that the legal system has become a frontline of mental health treatment. People who are in trouble, who need help far beyond what the court has traditionally provided, are now appearing as self-represented litigants. Court staff, self-help centers, prisons, and county and state jails are charged with taking care of the chronically mentally ill, the suicidal and high-acuity mental crises, the drug addicted, and those without resources. There are simply not enough places to refer people for the help they need.

Unless they are abusing alcohol and other drugs, most people with mental illness are no more violent than people without mental illness.

Nevertheless, if feelings of discomfort rise to the level of fear, it is imperative to pay attention to that feeling. Judges must put their own safety, and that of their staff, above other considerations. A litigant

with mental health issues may act in a threatening manner simply to see how a judge will respond, hoping that the judge will remain calm and in control. Or the litigant may be threatening as a warning that they are about to actually go out of control. There is no way to know for sure. Security must be the priority.

## **II. Strategies for Responding to These Challenges**

### **A. The Importance of Case Specificity**

The following suggestions are generalizations and are given in hopes of being helpful; however, judges should understand that there are no formulas for dealing with litigants' mental health problems. What works well with one litigant may be completely ineffective or even harmful to another with the same disorder. While medical professionals have clustered mental health symptoms into patterns of diagnoses, there is no patient profile that predicts anyone's interpersonal reactions in any particular situation. The most important thing is to pay careful attention to each individual. Each case is different and requires the judge's specific attention and assessment.

### **B. Responding to Seriously Impaired Litigants**

Judges may be called on to make certain kinds of mental health judgments from the bench, even when not in civil commitment or other mental health court assignments. Progress of a case may have to be deferred until the mental health issue has been addressed.

1. Hospitalization. Most jurisdictions have similar criteria for determining whether a person should be taken involuntarily to an emergency inpatient facility.
  - a. Is the person a danger to himself or herself?
  - b. Is the person a danger to others?
  - c. Is the person so impaired as to not be able to tend to the basic necessities of life?
2. Law Enforcement. If a judge perceives that any of these factors is applicable to litigants in the courtroom, he or she may want to request the immediate assistance of local law enforcement. In most states, law enforcement officers are

trained in the assessment required for admission to an emergency psychiatric facility, or they know where to promptly obtain such an assessment.

3. **Adult Protective Services.** If the litigant is not going to fit the hospitalization criteria, but is still so seriously impaired as to prevent meaningful participation in the case, a call to the local Adult Protective Services might be helpful in getting services for the litigant—including legal services.
4. **Guardian Ad Litem.** A seriously disordered litigant may have a friend or family member who would be willing to serve as a GAL. The court should consult with local legal services programs, public defender offices, and local bar association pro bono programs to determine how to get qualified legal representation for guardians ad litem and to have review of the appropriateness of the proposed guardian. The court should not proceed with a guardian ad litem unless it is clear that the nature of the disorder prevents the litigant from proceeding on his or her own.
5. **Public Guardian.** A call to the public guardian might also result in assistance for the person, possibly through the provision of a GAL or a conservatorship proceeding.

### **C. Dealing With the Chronically Mentally Ill**

Often, persons suffering from chronic mental illnesses bring matters to the court. They are either asking for help from the court or are the subject of an action for relief by some other person. The following approaches may be helpful.

1. **Relieving the Litigant's Anxiety.** Judges might think of themselves as anxiety relievers for a chronically mentally ill person. A litigant may be suffering from a delusion or hearing voices, or may be in some other equally frightened state of mind.
2. **Seeking Help for Delusions.** Mentally ill litigants might ask the court to help them with their delusions. For example, they might ask the court to stop the government from implanting a microchip in their tooth; to restrain their neighbor from coming through the wall at night while they

sleep; or to offer relief from the poison the phone company has put into their air vents.

3. **Paying Respectful Attention to the Litigant.** The litigants will be paying close attention to whether the judge is trying to simply “get rid” of them. They have most likely had many experiences with people being frightened by them and trying to dismiss them as quickly as possible, and so are highly sensitive to this sort of treatment.
4. **Using Staff to Talk to Litigants.** If there are self-help support people available, they may be able to spend some time with the litigants, work with them, and help find useful resources for them.
5. **Sticking Strictly to Facts—and Being Honest.** The judge can say that the litigant’s story sounds unusual; that he or she has never heard of the government implanting chips before, and so forth. This can be done without directly dismissing the person’s own sense of reality. There is no need to verbally label the person as crazy or directly point out his or her mental illness. Point out what evidence would be needed to get the relief requested—is it possible to get an x-ray from a dentist showing the chip in the tooth? a photograph of the neighbor coming through the wall? or an analysis of the poison air from the vent? In asking for this proof, the judge is merely asking what he or she would ask of anyone. Once this is explained to litigants with mental illness, they generally accept this information as an indication that they are not being singled out.
6. **Making a Legal Service Referral.** If the litigant is making a request for relief from the court, a referral to a community legal services resource or the local pro bono program would be enormously beneficial. If the litigant is the subject of a request for relief by another, this referral becomes even more critical.
7. **Making a Social Service Referral.** If the person seems open to suggestion, it may be possible to make a referral to some local mental health resource. In making such a referral, the judge should make it clear that he or she wants to be helpful and is not being disapproving or punitive. For example, the judge might say, “I think you

might be able to get assistance at County Behavioral Health” rather than “I think you should go to . . . ,” as if the judge had diagnosed the litigant. The individual, however, may simply be too fearful to be open to such a suggestion.

#### **D. Excessively Frightened or Paranoid Litigants**

Most litigants are anxious about being in a courtroom. Self-represented litigants who are excessively frightened or even paranoid can be particularly challenging for judges because it can often be difficult to question them. A litigant may resist answering the questions the judge asks.

1. Not Pushing. Pushing for answers by the judge may make the problem worse.
2. Stepping Back. In stepping back rather than increasing pressure on the litigant, the judge can redirect the conversation or take a brief break and try again. Aggressive questioning is likely to fail and can lead to an increasing sense of struggle between the judge and the litigant. This type of courtroom tension is counterproductive for everyone.
3. Using Staff. If there are self-help support staff available, perhaps they can take time to work with the litigant while the judge proceeds with other matters.
4. Being Realistic. Judges should be prepared for the fact that they may not get the information they need from the litigant. The litigant simply may not be able to comply. Accepting and acknowledging this reality will contribute far more to courtroom control than protracted arguing.

#### **E. Argumentative or “Unhappy” Litigants**

Some litigants demonstrate their illness to the court by being completely incapable of acknowledging help. No matter what the judge does, it will be wrong. Regardless of the amount of help offered, such litigants may insist that they have not been helped at all. They may say things like the following:

1. "You aren't really helping me";
2. "You don't care at all, I'm just a number";
3. "If I don't get help soon . . .";
4. "So you are saying they can do anything they want . . .";  
and
5. "So you don't care if my children are safe."

Appropriate and helpful responses include the following:

1. **Not Taking It Personally.** Judges should not take comments such as these personally. Litigants tend to test judges the same way they test doctors, therapists, and other authorities to see how the authority will respond. These sorts of comments from litigants tend to make the recipient feel bad, like a failure, disrespected, defensive, or some other negative thing that the litigant himself or herself has repeatedly felt. It usually mirrors some experience that they have had in their lives that is beyond the inquiry of the court. The behavior is symptomatic of the illness and not a sign of personal disrespect.
2. **Relaxing.** When a judge can be aware of this dynamic, it makes a productive response far easier. A relaxed, calm, firm, and nonreactive or nondefensive response from a judge is the best reaction available.
3. **Engaging and Listening.** The litigant needs to know that the judge is listening and paying attention.
4. **Expressing the Desire to Help.** Litigants place a great deal of weight on their perceptions about a judge's motives toward them.<sup>76</sup> Judges should expressly show that it is the court's intention to help them and to be of value to them. A judge might say:
  - a. "How can I help you today?"
  - b. "I want to be helpful to you."
  - c. "I'm sorry—I just can't think of anything else to help you."

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<sup>76</sup> Tyler, *What Is Procedural Justice?* p. 103.

5. Being Firm. Litigants should not be allowed to escalate into angry or genuinely disrespectful behavior toward the judge or other courtroom staff.
6. Disengaging When Necessary. Do not hesitate to take a recess to stop or redirect unacceptable behavior. Sometimes a brief break is all it takes.

## **F. The Importance of Disengagement and of Saying “No” Calmly**

The ability of a judge to disengage from dysfunctional interactions with litigants cannot be overemphasized.

1. Trusting Oneself. Judges can rely on their own feelings and perceptions to tell them what is happening. If judges find themselves feeling uncomfortable during an exchange with a litigant, it is almost certain that the litigant is also uncomfortable. Something needs to be changed. Judges should make themselves feel as relaxed and comfortable in the courtroom as possible. When the judge feels genuinely comfortable, the chances are better that the litigants will, too.
2. Setting Limits Calmly and Firmly. Litigants do not really benefit from being allowed to go on endlessly, arguing with a judge. Certainly, giving litigants their “voice” in a hearing is central to any justice proceeding. However, when a litigant cannot refrain from repeating him or herself, arguing with or even verbally abusing the judge or opposing party, the judge must put a stop to it. In many cases, the longer that litigants are allowed to continue with this behavior, the more anxious and upset they get.

Judges actually help litigants by setting limits on unacceptable behavior. By keeping such behavior to a minimum, judges are reducing the chances that it might affect their decision-making process.

Judges are responsible for maintaining a calm and comfortable process for everyone else in the courtroom. Being able to relax and say “no” to an unhappy or angry litigant without becoming defensive or unkind

demonstrates to the rest of the courtroom that the judge is clearly in control of himself or herself, and of the situation.

Disengagement can be made in various ways, for example:

- a. "I'm sorry, but we are simply out of time."
- b. "I have to leave enough time for the other people here in the courtroom."
- c. "I would like you to talk with the (court staff) person while I move on to the next case."
- d. "I am going to take a short recess."

### **III. Community Resources**

Knowledge of available resources in the community and of those working with litigants' mental health issues helps the judge and the court as a whole manage these issues.

1. Resource Guides. Each court should have a guide for judges on what culturally competent and multilingual resources are available in the community to assist litigants with mental health and related issues.
2. Collaborative Courts. In some cases, it may be possible to establish specialized calendars, such as drug treatment court, mental health court, or domestic violence court, during which particular social service providers can be present to assist litigants in the courtroom.
3. Lack of Community Resources. If courts are located in communities without many legal service or social service resources, it is a good idea to locate the nearest place where services are available. Partnerships, supported by computer, telephone, and video-conference technology, may be able to help.

## **IV. Strategies for Coping With Difficult Cases**

### **A. Keeping Perspective**

One way that judges can become vulnerable to added stress is by losing perspective on the degree of power they actually have to help a litigant with mental health issues. If judges expect too much from themselves or from their roles as judges, or if they accept unrealistic expectations placed on them by the litigants, the result is increased stress and lower job satisfaction. While it is understandable that one would feel unhappy about matters such as those listed below, judges should not hold themselves responsible for fixing them. Feelings of guilt and frustration at not being able to change things over which they have no control can become a problem for judges if not recognized. It is useful to remember the following:

1. Judges will not always be able to be helpful to litigants.
2. Judges will not always be able to make litigants believe that the court cares about them, even when it does.
3. Judges cannot make up for the lack of mental health treatment services available in the community, but may provide impetus to further address the need. Seek help from the Judges' Leadership Initiative, a group of judges interested in mental health issues (<http://consensusproject.org/JLI/>).
4. Judges cannot make up for the lack of legal assistance services available in the community.
5. Often there may simply not be a good solution available to a judge.

### **B. Avoiding Isolation**

Isolation is a commonly cited factor in research on judicial stress.<sup>77</sup> Working with others in the courtroom is helpful in relieving courtroom isolation. Naturally, rigorous care must be paid to the constitutional safeguards for the litigants and protocols developed so as to avoid such things as *ex parte* communications. Self-help programs can place attorneys and other legal assistance staff in courtrooms to assist with

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<sup>77</sup> T. Ells and R. Showalter, "Work Related Stress in American Judges" (1994) 22(1) *Bulletin of American Academy of Psychiatry and the Law* 71-83.

procedural information, help parties reach settlements, and write up the court's orders. Having self-help staff in the courtroom to whom litigants can be referred works to relieve some of the isolation of judging. In the collaborative court models, often there are social service providers in the courtroom to whom litigants can be referred. This also helps relieve isolation. Studies have found that judges who are involved in community work outside the court report higher levels of job satisfaction.<sup>78</sup> Judges should try to participate in community activities, join professional work groups and committees, and communicate with family and friends.

## **Conclusion**

While mental health issues do indeed increase the challenge of serving the self-represented, both judges and court staff, when properly prepared and supported, can move toward resolving any legal issues and assisting in getting such litigants the help they need.

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<sup>78</sup> P. Fulton Hora and D. J. Chase, "Judicial Satisfaction When Judging in a Therapeutic Key" (2003–2004) 7(1) *Contemporary Issues in Law*. p. 19; J. P. Ryan, A. Ashman, B. Sales, and S. Shane-DuBow, *American Trial Judges* (New York: Free Press, 1980).