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PROBLEM-SOLVING IN CANADA'S COURTROOMS

A GUIDE TO THERAPEUTIC JUSTICE



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PROBLEM-SOLVING IN CANADA'S COURTROOMS

A GUIDE TO THERAPEUTIC JUSTICE

Prepared for the National Judicial Institute by Susan Goldberg

IN MEMORIAM

On June 10, 2011, Canada's judicial system lost an unwavering advocate of therapeutic justice and the establishment of problem-solving courtrooms. Justice Paul Bentley was, most notably, a pioneer and a believer in the human spirit. He had an uncommon ability to truly connect with people; we saw this regularly in his ability to remove barriers between people and the court, and it spoke volumes of his work.

Facing significant hurdles, and treading in territory then largely unknown to Canada's justice system, Justice Bentley led the establishment of the Toronto Drug Treatment Court in 1998. This was, however, only a starting point in his efforts to diminish the cycles of reoffending he saw in his courtroom. He advocated the concept of problem-solving courts: multidisciplinary partnerships between the justice system and the community to promote offender accountability, and to address the underlying issues behind an offender's appearance before the court. Today, problem-solving practices are now common in Canada's courts. I am confident that this is due, in large part, to the visionary work of Justice Bentley.

On the following pages is the foreword crafted by Justice Bentley as published in the first edition of this book, *Judging in the 21st Century: A Problem-solving Approach*. His words have been reprinted here as a tribute to his belief in dignity and kindness, his confidence that those brought before the justice system could change their lives for the better, and his highly-respected efforts in advancing problem-solving practices in Canada's courtrooms and beyond.

Chief Justice Annemarie Bonkalo
Ontario Court of Justice
Toronto, July 2011

FOREWORD

The notion that judges should apply a problem-solving approach to the matters that come before them is not new. Mental health practitioners, for example, have long contended that mental illness is a health issue rather than a criminal law matter, and that the criminal justice system is ill equipped to deal with people who are mentally ill. In the 1980s, it was the turn of the addiction community to argue that incarceration alone did little to break the cycle of drug use and crime for substance-addicted offenders. More recently, agencies and practitioners who confront the daily realities of domestic violence have made the case that focusing only on guilt or innocence does little to stop the cycle of abuse or protect survivors of violence from further assault. Members of Aboriginal communities — over-represented in our courts and in our jails — have advocated for a justice system that both considers the complex social, economic, and cultural factors that cause Aboriginal people to be in conflict with the law and that takes a healing approach to sentencing.

All the above initiatives have resulted in the establishment of courts and courtrooms dedicated to addressing some of the root problems — mental health issues, addiction, limited anger- and risk-management skills, poverty, and social marginalization — behind criminal activity. Judges were often in the forefront of pressing for this paradigm shift, arguing that a new approach was long overdue for dealing with the multifaceted social and legal issues they struggled with each day in court. For many judges, the development of a problem-solving approach has permitted them to craft dispositions that reduce the likelihood of parties appearing in court in the future. By considering the issues through a problem-solving lens, judges have been able to devise people-oriented solutions that are acceptable to both litigants and the community.

My own interest in a problem-solving approach started with the Toronto Drug Treatment Court (DTC). Before the court started, I sat as a judge at the Old City Hall courthouse in Toronto, where wave after wave of sad and homeless persons paraded before me, many with severe drug addictions. As part of my sentences, I routinely imposed counselling for substance abuse as a component of a probation order. Invariably, weeks or months later, I would see the same offenders back before me on new charges. When I asked them about the effectiveness of the drug counselling they had received, I would be met with blank stares and comments to the effect that after serving sentence, they had received no counselling. I grew more and more frustrated with the recycling of criminally addicted offenders through our courts and jails and began looking for alternatives. The DTC model was the alternative that seemed to hold the most promise.

During the years I have presided in that court, I have become increasingly aware that the problem-solving approach of DTCs could be adapted to other courtroom situations. While criminal court matters quickly came to mind, I was particularly interested in employing the problem-solving approach in broader contexts: for example, to the trial judge presiding over a docket of civil and/or family matters. How could she apply the skills of problem-solving and therapeutic jurisprudence to her daily experience in the courtroom? How could a judge apply these skills in an appellate court, or at a pre-trial hearing?

This handbook is the culmination of a long process that started by attempting to answer this question. It has involved the collaboration of many people, including judges, the staff at the National Judicial Institute, and writer Susan Goldberg. I hope and anticipate that my colleagues will find this handbook useful and frequently choose to access its pages and consider its suggestions and advice. In addition, I would expect that there will be many readers who are not judges, who will find the concepts and ideas discussed in this handbook useful in their daily interactions with the court system. By understanding why judges are employing a problem-solving lens to arrive at their decisions, I would anticipate that these practitioners will be more likely to work with the judges in creating a more people-oriented system of justice.

Justice Paul Bentley
Ontario Court of Justice
Toronto, November 2004

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Prepared for the National Judicial Institute by Susan Goldberg

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“ I’ve obtained a lot of new skills in looking past the legal issues in front of me to the human beings I’m dealing with and understanding the broader human issues. ... I had been feeling that we were warehousing people and not much was changing, ...that it’s a system that just rotates human beings through it, and it’s extremely difficult for everyone involved, and yet the outcome is not very effective. ...To ensure an approach that can solve the underlying problems is a far more personally satisfying way to do my work and it achieves the objective of reducing recidivism in a more reliable fashion. ... [A problem-solving approach] provides hope for changes and positive outcome. ...I don’t know of a better justice system than ours, but this adds something of great value to an already good system.”¹

Judge Sharon Van de Veen, Provincial Court of Alberta

1. INTRODUCTION: VIEWING THE LAW THROUGH A THERAPEUTIC LENS

Over the past few decades, the law’s capacity to heal or to harm has been studied extensively as part of the evolving field of **therapeutic jurisprudence** (TJ). This theoretical framework posits that the justice system – and judges – take a *problem-solving approach*, one that seeks to maximize the law’s therapeutic values and minimize its anti-therapeutic consequences, without sacrificing due process or other judicial and legal values.³

“Judges want more and more to make a difference, not only to judge and decide.”²

Élizabeth Corte, Juge en chef,
Cour du Québec

A problem-solving approach to justice and judging proposes applying the tools of the behavioural sciences in Canada’s courtrooms, indeed, throughout the justice system, to make the justice system more relevant and effective for all the parties involved. It addresses the “complex, often overlapping, and sometimes intractable social and personal issues”⁴ – such as addiction, poverty, impaired emotional or anger-management skills, limited literacy, cognitive impairments (including fetal alcohol spectrum disorder), mental illness, or abuse – that underlie human causes of crime and criminal behaviour. It takes a non-adversarial, team approach to court processes, one that broadens the focus beyond the straight application of the law to give consideration to its effects on the stakeholders, including the offender, victims, their wider community, and the court itself. Success in the courtroom is measured less by compliance, or by the effective clearing of dockets, and more by therapeutic outcomes and the degree to which underlying problems are remediated. In so doing, a problem-solving approach aims to address the “revolving door” system that recycles repeat offenders through the criminal justice system.

In the past two decades, problem-solving courts, with a dedicated focus on problems such as drug addiction, mental health issues, and domestic violence, have been the most visible examples of therapeutic jurisprudence in action. But, as valuable as these courts are, a problem-solving approach has applications well beyond a few specific courtrooms within the criminal justice system. All judges in all courtrooms can use problem-solving strategies to make their courts and their decisions more relevant, collaborative, and effective.

Indeed, it is important to ensure that a problem-solving approach is not considered to be only applicable or useful in specialized settings; as one scholar has noted, somewhat ominously, “one of the defining features of ... specialized courts is the ease with which they can be dismantled.”⁵ Further, relegating TJ to only certain courtrooms places judges and courts in smaller and/or remote regions, and the communities they serve, at a distinct disadvantage,⁶ while depriving participants in all courtrooms of valuable tools and practices.

It would be naïve to suggest that taking a problem-solving approach in Canadian courtrooms will, on its own, alleviate the pressing, systemic socioeconomic problems at the root of so much of the conflict that brings people into contact with the justice system. A problem-solving approach does not take the place of – nor can be entirely effective without – adequately funded and staffed programs for medical care, education, policing, and other social services. Such an approach must be open to rigorous evaluation and adaptation in the face of ongoing research into best practices.

A problem-solving approach does not ask judges to be therapists or social workers. It does not ask judges to cure mental illness or addiction or to counsel court participants. It does, however, ask judges to be aware that such problems do exist, to be alive to their signs and symptoms, and to consider the effects they may have on people in court and on the activities that have brought them to court, and to think about how to address these situations so as to maximize therapeutic outcomes. For example, a judge familiar with research on addiction and recovery will be more open to the idea of recovery as a process, not a one-time event; he or she may understand relapses as part of the recovery process and not impose a “one chance” model. Similarly, a judge practising therapeutically might recognize an addicted offender’s apparent “bad attitude” as a symptom of addiction, not his or her “true” personality, or recognize signs of limited literacy skills in a defendant who appears uncooperative and non-committal.

Therapeutic jurisprudence asks all judges to recognize they can be important agents of change, and to acknowledge that their words, actions, and demeanour will invariably affect the people who come before them in the courtroom. Judges who recognize their potential impact, and who consciously strive to develop the interpersonal skills and empathy that are the foundation of therapeutic judging, are likely to become confident, more effective judges with improved outcomes.

TRADITIONAL AND PROBLEM SOLVING APPROACHES: A COMPARISON⁷

Traditional approach	Problem-solving approach
The goal is the resolution of the dispute	The goal is the resolution of the underlying problem
The focus is on a legal outcome	The focus is on a therapeutic outcome
Uses an adversarial process	Uses a collaborative process
Claim- or case-oriented	People-oriented
Rights-based	Interest- or needs-based
Emphasizes adjudication	Emphasizes post-adjudication, alternative dispute resolution
Interpretation and application of law	Interpretation and application of social science
Judge acts as an arbiter	Judge acts as a coach
Backward-looking	Forward-looking
Precedent-based	Planning-based
Few participants and stakeholders	Many participants and stakeholders
Individualistic	Interdependent
Legalistic	Commonsensical
Formal	Informal
Efficient	Effective
Success is measured by compliance	Success is measured by remediation of underlying problem

ABOUT THIS HANDBOOK

This handbook provides an introduction to problem-solving principles and practices, as well as practical suggestions and guidelines on how to incorporate them within and beyond the courtroom setting.

This book was designed primarily for judges. However, the success of problem-solving courtrooms and therapeutic justice techniques depends not only on judges but on the professionals who routinely work in and with the justice system. This large and diverse group of people, composed of lawyers, academics, social workers, corrections staff, and other professionals, also advance problem-solving practices on a daily basis. The intent of this handbook is to be as inclusive as the practices and principles detailed within it. Although the language is frequently directed to judges, this handbook is anticipated to be of use to a wide audience: those already working with therapeutic justice practices and in problem-solving courtrooms, and those who seek to do so in the future.

Section I: Canadian problem-solving courts and initiatives, provides some background information on dedicated problem-solving courts in Canada, as well as restorative justice initiatives. It identifies some common characteristics of problem-solving courts that can be applied in all courtrooms.

Section II: Problem-solving skills for judges, outlines a range of important elements of a problem-solving approach for judges in courts of general jurisdiction. In addition to communication skills (Chapter 5), this section discusses the impact of limited literacy in the courtroom and how judges can address it (Chapter 6), and the value of developing a non-adversarial, team approach (Chapter 7).

Section III: Problem-solving skills for other professionals, reviews relationship-centered lawyering, considerations for lawyers in civil, criminal and family law, lawyering with vulnerable clients, and the roles of case- and court workers (Chapters 8 and 9).

Section IV: Problem-solving sentencing, reviews principles that can guide judges in problem-solving sentencing (Chapter 10), with a particular focus on behavioural contracts and relapse-prevention plans (Chapter 11).

Section V: Problem-solving challenges and opportunities in different contexts, examines some particular challenges posed to judges in the justice system by self-represented litigants, and suggests some approaches to addressing those challenges (Chapter 12). Section V also covers some of the challenges and opportunities that judges and courts in smaller, rural, and remote regions face when thinking about incorporating problem-solving initiatives (Chapter 13).

Section VI: Resources and further reading, provides judges and interested parties with resources and references for information on therapeutic jurisprudence, problem-solving judging, and support for implementing such initiatives in the courtroom.

CANADIAN PROBLEM-SOLVING COURTS AND INITIATIVES

2. PROBLEM-SOLVING COURTS IN CANADA

In 1998, a drug treatment court and a mental health court were established in Toronto, Ontario. These two dedicated, problem-solving courts were the first of their kind in Canada. Today, problem-solving courts as categorized below can be found in almost every province and territory.

- **Drug treatment courts (DTCs)**, including those in Brantford, Calgary, Edmonton, Moose Jaw, Oshawa, Ottawa, Regina, Toronto, Vancouver, Waterloo, Windsor, and Winnipeg,⁸ which opt for a program of treatment for addiction, judicial supervision, and life-skills training over incarceration.
- **Mental health courts**, including those in Halifax, Kitchener, Ottawa, Saint John, Sudbury, and Winnipeg, which expedite assessment of mental illness, are sensitive to the potential impact of the court process on the mentally ill, and, where deemed appropriate, opt for treatment of mental health conditions over punitive measures. Youth mental health courts have been created in Ottawa and London.
- **Aboriginal courts**, including Toronto's Gladue Court, the Tsuu T'ina Peacemaking Initiative in Alberta, and the Cree and Aboriginal courts in Saskatchewan, which take into account the circumstances and cultural background of Aboriginal court participants, provide a courtroom environment sensitive to Aboriginal culture, and consider alternatives to incarceration for Aboriginal offenders.

- **Domestic violence (DV) courts**, including the DV court in Calgary, North Battleford, Regina, Saskatoon, and the Domestic Violence Treatment Option (DVTO) in Whitehorse, take into account the complexities of violence between intimates, provide rapid processing of DV cases, support victims throughout the process, and monitor offenders closely to ensure compliance with court orders for treatment and terms of contact with survivors of violence.
- **Community courts**, which seek to rehabilitate the offender through the betterment of his or her community. The Yukon Community Wellness Court (CWC) opened in 2007, and a community court opened in downtown Vancouver in 2008.

Youth courts in every province and territory try youth ages 12 to 17 charged with criminal offenses. Youth courts are specifically tailored towards teenagers, and sentencing is guided by the principles of the *Youth Criminal Justice Act*, which includes many therapeutic or problem-solving principles, including prevention, meaningful alternatives and consequences, rehabilitation, and reintegration. Many youth courts utilize problem-solving approaches such as restorative justice programs, sentencing circles, victim-offender sentencing conferencing, and case management conferencing. (See “Youth Courts,” page 14.)

Problem-solving initiatives can also encompass re-entry courts for offenders newly released from prison; integrated family courts that deal with all aspects of family law (including DV, divorce, child custody and abuse, and youth cases); and innovations such as the Intellectual Disability Diversion Program in Perth, Australia, aiming to divert people with intellectual disabilities from the justice system. This chapter describes some of the basic principles of the most common problem-solving courts.

The inner workings of individual problem-solving courts are often quite varied because they have been designed to address specific concerns of the community in which they were established, or because they have been based on more-established systems in other communities.⁹ For example, some problem-solving courts intervene pre-plea, while others require an admission of guilt before working with an offender. Some drug courts operate on a model of complete abstinence, while others may allow for methadone programs or gradual withdrawal. That said, problem-solving courts share many characteristics, including:

- the integration of treatment and social services to the court process
- judicial supervision of treatment and rehabilitation

- a collaborative team composed of professionals from a variety of domains including judges, counsel, court staff, community workers, health-care workers, social services professionals, probation, and others
- a collaborative approach to decision making
- interaction between litigants, the judge, and other team members
- holistic sentencing processes that use sanctions and rewards to promote pro-social behaviours and positive change.

DRUG TREATMENT COURTS¹⁰

Drug treatment courts (DTCs) were developed as a way to address the revolving-door pattern of offending that can be a result of drug addiction. Rather than resorting to incarceration, which alone does little to break the cycle of crime, DTCs typically impose mandatory drug treatment in conjunction with frequent testing and court appearances. By treating the addiction – and, often, addressing other issues such as employment, housing, interpersonal skill development, and education and vocational skill development – DTCs aim to eliminate or significantly reduce the criminal activity associated with drug addiction.

Most DTCs use a team-based approach to treatment, in which the judge, prosecution, defence, and treatment providers work together to govern offender compliance. Typically, rewards and sanctions are used as tools to encourage compliance and to deter noncompliance. “Graduation” from the program is usually based on completion of treatment, abstinence from illegal substance use, and other positive lifestyle changes.

MENTAL HEALTH COURTS

Mental health courts are based on the principles that the criminal behaviour of mentally ill people is a health issue rather than a criminal law matter,¹¹ and that the traditional criminal justice system is not an appropriate venue to best deal with mentally ill offenders, who are over-represented within it.¹²

Mental health courts focus on improved treatment for the mentally ill who encounter the criminal justice system. They seek to break the “revolving-door” cycle of mentally ill offenders who continuously transition between hospital emergency rooms, institutions, and the criminal justice system.¹³ By offering access to services and an alternative to incarceration – which can cost nearly double for mentally ill inmates¹⁴ – mental health courts help to address the issues underlying criminal activity in this population.

Mental health courts create a non-adversarial atmosphere that allows for prompt, specialized assessments of people with suspected mental illness and facilitate treatment of mental health conditions.¹⁵ All court staff are trained to deal with mentally disordered people. Rules of evidence, procedure, and courtroom etiquette are often relaxed to facilitate the participation of the mentally ill offender.

Identification and treatment are often the court’s first priorities.¹⁶ In the Toronto mental health court, for example, forensic psychiatrists, on-site duty counsel, court health workers, and social workers are available to work together to assess the accused’s mental state and fitness to stand trial immediately, thus eliminating delays in treatment that can have detrimental effects on the mentally ill offender.¹⁷ On-site mental health court workers with special knowledge of the social services available in the community help to ensure that the accused is properly directed to appropriate services, thus increasing compliance levels for treatment and court orders.¹⁸ Where appropriate, the accused’s family members are included in the dialogue, in recognition of the fact that family members are often the only ones with pertinent information about the accused required by the court.¹⁹ In the Ottawa mental health court, a doctor appears at the court once a week to conduct assessments, thus dramatically increasing the likelihood that offenders ordered to undergo a mental health assessment as a condition of bail will actually meet those conditions.

ABORIGINAL COURTS

Aboriginal courts (such as the Gladue [Aboriginal Persons] Court in Toronto, the Tsuu T’ina First Nation Court [also called the Tsuu T’ina Peacemaking Court], the Cree and Aboriginal courts in Saskatchewan, and the First Nations Court in British Columbia) were developed to respond to the requirements of the Supreme Court of Canada decision in *R. v. Gladue*, [1999] 1 S.C.R. 688, a case involving an Aboriginal

woman who entered a guilty plea to manslaughter after killing her common-law husband. In its decision, the Supreme Court carefully considered the provisions of Section 718.2(e) of the *Criminal Code*, which states that the court ought to consider alternatives to incarceration in every case, but especially in the case of Aboriginal offenders.

Aboriginal courts, therefore, facilitate the trial court's ability to consider the unique systemic and individual factors that contribute to an Aboriginal person's criminal behaviour. They seek alternatives to prison that are informed by Aboriginal understandings of justice. They are knowledgeable about and linked to the range of programs and services available to Aboriginal people in a particular community.²⁰ In the Toronto court, for example, Aboriginal Legal Services of Toronto provides designated court workers to identify Aboriginal people who may wish to (voluntarily) participate in the court, as well as refer them to treatment and other social services.²¹ Case workers prepare reports that provide a comprehensive picture of both the life circumstances of the Aboriginal person and the options available to the court in terms of sentencing.²² Detailed sentencing reports provide judges with the information they need in order to carry out *Gladue* directives. Further, the Court allows for the necessary time to deal with Aboriginal cases and engage in the detailed and often time-consuming examination of the causes of criminal behaviour in order to satisfy the Court's mandate of inquiring into alternatives to imprisonment.²³

Aboriginal courts incorporate First Nations culture and resources. For example, the Tsuu T'ina Peacemaking Initiative and Court opens with a smudge ceremony and includes burning of sage or sweetgrass. The judge, prosecutor, court clerks and workers, and probation officers are all Aboriginal people.²⁴ At the first appearance on criminal charges, cases in the court are adjourned to determine whether they are appropriate for the Peacemaking Program, a restorative justice tool that allows the victim, offender, community members and other stakeholders to speak at length about the issue and decide upon the appropriate restorative measures to be undertaken by the offender, as well as the ways in which the community can support both offender and victim. (See "Restorative Justice," page 17.) Once the peacemaking circle is complete, the matter is referred back to the court, which assesses whether the charge can be withdrawn; if it is not withdrawn, the peacemaking report can be used as part of the information the court uses in the sentencing process.²⁵

DOMESTIC VIOLENCE COURTS

Domestic violence courts recognize the unique characteristics of violence between family members, and also that domestic violence has specific characteristics that distinguish it from other problem-solving situations, namely that:

- it involves violence between individuals (including spouses/domestic partners, children, and the elderly) with complex emotional, social and economic ties to each other
- complainants under the influence of their abusers are usually isolated, particularly vulnerable, and reluctant to participate in the prosecution
- there is usually a power imbalance between the offender and the complainant²⁶
- domestic violence is usually repetitive in nature.²⁷

Domestic violence courts emphasize the importance of early and effective intervention in abusive situations in order to increase victim safety, highlight the severity of the offence, and allow for a greater chance of offender rehabilitation. These courts work with social service agencies and workers to provide support services for victims and require offenders to take responsibility for their actions, not only through regular legal sanctions, but also through monitoring and counselling.

A problem-solving approach to domestic violence also recognizes the need for timely and efficient communication between different courts. In domestic violence, where criminal and family law often intersect, orders from different courts may conflict; similarly, one court may not have information (e.g., about an accused's criminal activity) that may be pertinent in the other (e.g., custody and visitation, or no-contact orders). Therefore, DV courts and problem-solving initiatives may adopt information-sharing protocols to be better equipped to accommodate the needs, interests, and safety of the family unit.²⁸ The Integrated Domestic Violence Court in Toronto, for example, brings criminal charges in Family Court proceedings before a single judge to provide a more holistic and coordinated court involvement.²⁹ (For more information on information-sharing between courts, see "Partnering with other courts," page 53.)

COMMUNITY COURTS

Community courts shift the focus of criminal justice from case processing to community minding.³⁰ These courts are a relatively new form of problem-solving court in Canada, with initiatives recently developed in Vancouver and Yukon.

The guiding principle of such courts is that, since crime negatively affects the community, sentencing should aim to improve the community while rehabilitating the offender through psychosocial interventions such as drug treatment and job training.³¹ Ultimately, the hope is that this approach serves as both a deterrent to offenders and a much-needed boost to the community.³² Community courts often focus on shrinking the scale of operations from large, centralized court systems to small, neighbourhood-based community courts. These courts create relationships and work with local businesses, schools, service providers, law enforcement officers, citizens, and other stakeholders.³³

CASE STUDY

VANCOUVER DOWNTOWN COMMUNITY COURT

Vancouver's Downtown Community Court (DCC) first opened its doors in September 2008, and was created on the recommendation of a 2004 task force looking at ways to address street crime often caused by the complex challenges facing the community, namely alcoholism, drug addiction, mental illness, homelessness, and poverty. The DCC deals with approximately 1,500 cases per year with the qualification that it is not a trial court; if a trial is needed, the case will usually be transferred to the nearby Vancouver Provincial Court.³⁴

The DCC takes an integrated approach which involves working with partner health and social service agencies in order to assess and manage offenders, and it has a defense lawyer available at all times to ensure accessibility. The court also maintains important connections with the community. In fact, one of its principal characteristics is to sentence offenders to make reparation to the community, compensating for the harm caused by their criminal activity. Finally, the DCC prioritizes a timely court process to reduce the impact to victims and witnesses, and to quickly match offenders with resources to help them change their behaviour.³⁵

An interim evaluation of the DCC found that the average length of stay in pre-trial detention for DCC accused was 16 days, lower than the 32-day average for the province. Also, statistics show that there has been a significant decrease in the volume of cases at the Vancouver Provincial Court since the DCC opened.³⁶

YOUTH COURTS

Canada's youth courts serve young people between the ages of 12 and 18 who have been charged with a criminal act. The introduction in 2003 of the *Youth Criminal Justice Act (YCJA)* has in many ways expanded the scope of Canada's youth courts to be problem-solving courts.

The *YCJA* embodies a broad range of problem-solving approaches, many of which are intended to reduce the use of courts – and Canada's overreliance on incarceration for young offenders – and increase community-based responses to youth crime.³⁷

- The *YCJA*'s declaration of principles states: “The purpose of the criminal justice system is to prevent crime by addressing the circumstances underlying a young person’s offending behaviour, rehabilitate young persons who commit offenses and reintegrate them back into society, and ensure that a young person is subject to meaningful consequences for his or her offenses, in order to promote the long-term protection of the public.”³⁸
- The *YCJA* increases the number of extrajudicial measures available, such as police warnings, conferencing, referrals to restorative justice agencies in which the offender must face his or her victim and the victim’s family, and deferred custody orders, whereby a young person can avoid incarceration by showing good behaviour.³⁹
- The *YCJA* reintroduces the concept of Youth Justice Committees, groups of citizens whose purpose is to develop community-based solutions to youth offenses, such as restitution, arranging community support for youth, or arranging meetings between the victim and the young offenders.⁴⁰
- The *YCJA* establishes that the court process is reserved for more serious offenses. Police must consider all other options, such as warnings or making restitution, before laying charges.⁴¹
- The *YCJA* makes provisions for reintegrating youth in custody back into society.⁴²

The structure and specific practices of each youth court will vary according to provincial jurisdiction, the community it serves, and the individual judge presiding.

CASE STUDY

YOUTH PROBLEM SOLVING AND RESTORATIVE JUSTICE: THE RESTORATIVE CIRCLES INITIATIVE IN SASKATOON

Judge Sheila P. Whelan, Provincial Court of Saskatchewan (Saskatoon)

The *Youth Criminal Justice Act* (YCJA) provides an excellent framework for problem solving and restorative justice. Whether or not the opportunities are embraced depends upon the initiative of the participants, who include the lawyers, the judge and the provincial director (youth worker). This applies equally to structured programs and individual cases.

The conference, which may be convened pursuant to s. 19 of the *Act*, is one of the most important initiatives that may be taken to assist in decision-making. In Saskatoon, the Restorative Circles Initiative (RCI) facilitates pre- and post-sentencing conferences under the YCJA. Conferences are frequently requested by counsel, but most often are suggested by the presiding judge.

Conferences respond to a number of principles mandated under the YCJA, including those pertaining to the needs of aboriginal young persons and those with special needs. They also involve the offender, victim, family, and community in the young person's rehabilitation and reintegration. It's a significant departure from the traditional approach to sentencing, in that the conference contemplates a greater level of community and victim participation in the sentencing process. Typically, conferences are conducted for the purpose of sentencing and with one or two goals in mind: promoting understanding between the victim and offender, and planning for rehabilitation and restoration.

In the Provincial Court in Saskatoon, youth justice conferences are conducted with the assistance of a facilitator employed by the RCI. It begins with a referral to the RCI and a request to investigate and report on the feasibility of conducting a conference. Once the decision is made to proceed, the facilitator continues to work with the proposed participants to promote understanding of the process and meaningful contribution. The conference is then conducted in the manner dictated by the judge. While consensus is a potential outcome, ultimately the judge remains charged with making the decision.

My colleagues and I have conducted many conferences under the YCJA, principally for the purpose of sentencing. While they can tax all of one's skills, when properly prepared, such as with the assistance of the RCI, they can be tremendously informative, inspiring, and cathartic. Despite the many resources available to a traditional youth justice court sentencing, the increased level of information sharing and commitment, often from surprising avenues, contributes greatly to the goals of the YCJA, most importantly, addressing the underlying circumstances of the young person's offending behaviour.

The Provincial Court in Saskatoon has a circular courtroom containing movable furniture, a ceiling to floor curtain and a carpet depicting a stylized version of the medicine wheel. Roughly 30 conferences are conducted there under the *YCJA* each year, and the courtroom is available for traditional proceedings as well as adult sentencing circles. Priority is given to booking youth conferences.

The RCI came about largely due to the work of Judge Bria Huculak and a community organization of which she was a member. Initially funded by the federal government with the introduction of the *YCJA*, it has since become a provincially funded program.

“ In the face of crime and conflict, restorative justice is a philosophy and an approach that views crime and conflict principally as harm done to people and relationships. It strives to provide support and safe opportunities for the voluntary participation and communication between those affected (victims, offenders, and community) to encourage accountability, reparation, and a movement towards understanding, feelings of satisfaction, healing, safety and closure.”⁴³

Restorative Justice Division, Correctional Services of Canada, 1998

“ When you hold a mediation between the accused and the victim, you realize the impact on the victim as well as the accused. In one case, the victim wrote me a long letter, thanking me. He explained that, after meeting with the accused, he better understood the justice system and that he appreciated more the responsibilities that the judge had and the factors the judge had to weigh before making the decision.”⁴⁴

Juge Anne-Marie Jones, Cour du Québec

3. RESTORATIVE JUSTICE

Restorative justice (RJ) is a response to conflict that brings together survivors of crime, wrongdoers, and the community to collectively repair harm and address the needs of all parties involved.⁴⁵ In every province and territory in Canada, and in many Aboriginal communities, a wide variety of RJ initiatives work on the assumption that crime violates all parties in a relationship, and aims to repair the damage and promote healing and growth.⁴⁶ For example, youth court proceedings frequently use RJ initiatives. (See "Case Study: Restorative Circles Initiative," page 15.)

Restorative justice programs attempt to divert defendants from jail. They can be lengthy processes that require significant participation from the accused, victims, their friends and families, and members of the larger community. In each, the aim is to resolve conflict, facilitate healing for victims and rehabilitation for offenders, and to strengthen communities and work toward preventing future dysfunction. All RJ initiatives are based on similar premises that highlight the importance of community.

1. A criminal offense represents a breach of the relationship between the offender and victim, as well as offender and community.
2. The stability of the community depends on healing such breaches.
3. The community is best positioned to address causes of crime, which are often rooted in its social or economic fabric.⁴⁷
4. The victim is central to an active process of defining the harm and how it may be repaired.⁴⁸

RJ processes may include variations on victim-offender mediation (VOM), community conferencing, or peacemaking circles. Generally, all RJ initiatives provide multiple opportunities for participants to speak about the impact of the offence and to offer suggestions for its resolution, as well as address larger issues, such as the impact of

crime and dysfunctional behaviour on the community. Offenders and victims are offered support before and throughout the process. Offenders are generally required to accept responsibility for the offence and to perform agreed-upon acts of restitution and healing.

In VOM, the victim and offender interact with the assistance of a neutral mediator; meetings can be face-to-face, exchanges of videos or letters, or with the mediator acting as a go-between. In community conferences or peacemaking circles, participants generally sit on the same level, in a circle, to symbolize their equality within the setting; in sentencing circles, for this reason, the judge may remove his or her robes. In Aboriginal settings, culturally specific ceremonies, prayers, and/or dress link participants to their heritage.

The offender's progress is monitored by support groups, community justice committees, probation, and by the court. The circle or court will meet, often in a celebratory manner, once an offender has completed his or her tasks. The case can then be referred back to a judge within a provincial or Aboriginal band court, who can decide to discharge the case or to impose sentence while taking into account the restorative process. With elder panels, clan leaders sit with the judge on the bench and the judge defers to them on sentence.

Research has suggested that a restorative approach increases the effectiveness of justice responses by reducing recidivism and increasing the likelihood that offenders will comply with the agreements they make with the victim, such as paying restitution. Research also indicates that many victims and offenders prefer restorative approaches over traditional criminal justice approaches, and that RJ may reduce posttraumatic stress among victims, and have a positive impact on the physical and psychological health of victims and offenders.⁴⁹

DOMESTIC VIOLENCE AND RESTORATIVE JUSTICE: A NOTE OF CAUTION

Restorative justice initiatives aim to restore damaged relationships between victims, offenders and communities, and to encourage reconciliation between parties. In the case of domestic violence, however, these goals can be problematic. The survivor may not wish to restore the relationship, and reconciliation of the partners may be dangerous.⁵⁰

Further, domestic violence challenges the essential component of RJ theory that suggests that a community knows best how to handle the criminal behaviour of its members: in fact, folk wisdom about abuse often predominates on a community level, reinforcing myths about the causes of, and best treatment for, domestic violence. For example, communities may blame the victim, minimize the abuse, or explicitly or implicitly ignore or condone domestic violence.⁵¹

In remote Aboriginal communities, judicially convened sentencing circles may not provide adequate recognition of Aboriginal women's experiences of violence or their protection from recurrent intimate violence in their homes and communities.⁵²

Judges should use caution when considering restorative justice practices, in particular community sentencing circles, as an intervention in domestic violence cases. "If restorative justice is to be taken seriously as a valuable intervention in cases of domestic violence," write Alan Edwards and Jennifer Haslett of the Victim Offender Mediation program at the Mediation and Restorative Justice Centre (MRJC) in Edmonton, "it will only be as a result of informed practitioners demonstrating the thorough understanding of the risks (and also the benefits) involved in doing this work: including the ability to take meaningful steps to maximize victim safety and choice, and create opportunities for offenders to reflect on the actions and make new choices."⁵³ When choosing to bring survivors of domestic violence together with their offenders for restorative dialogue sessions, Edwards and Haslett recommend doing so only after ensuring that:

- the victim's participation is well-informed and genuinely voluntary
- the victim has the desire, strength, and feeling of safety to represent her own needs and talk honestly and in depth about her experience of abusive behaviours, and also feels safe terminating the sessions (thereby sending the case back to court) if she is not hearing sufficient remorse or responsibility-taking from her partner

- the victim feels safe, physically and emotionally, outside of the sessions
- the offender is taking meaningful responsibility for his (or her) actions, is showing remorse, wants to be able to make different choices in any similar situations in the future, and is open to hearing about her experience of his actions and the impact they have had.⁵⁴

One way to address these concerns is to invite a representative from a local women's shelter or a similar organization that works with victims of domestic violence to participate in any restorative justice activities and act as a liaison between the court and the victim.

“ Legal rules, legal procedures and the roles of lawyers and judges constitute social forces that, like it or not, often produce therapeutic or anti-therapeutic consequences. Therapeutic jurisprudence proposes that we be sensitive to those consequences and that we ask whether the law's anti-therapeutic consequences can be reduced, and its therapeutic consequences be enhanced, without subordinating due process or other justice values.”⁵⁵

**Professor Larry N. Chartrand, LL.M.,
and Ella M. Forbes-Chilibeck, LL.B.**
The Sentencing of Offenders with Fetal Alcohol Syndrome

4. WHAT MAKES A COURT PROBLEM-SOLVING?

Judges in all courtrooms have daily opportunities to engage in problem-solving activities, and many judges in many courtrooms do. Judges may choose therapeutic or problem-solving approaches for a variety of reasons: because of previous experiences in specialized courtrooms, because such approaches fit with their own personal and professional approaches to their work, because they have found problem-solving strategies effective, or because they have been exposed to a therapeutic jurisprudence approach through judicial education programs or by their colleagues.

While many problem-solving strategies will require considerable time, effort, and financial resources to implement, judges and non-specialized courts can make use of several efficient, low- or no-cost tools and approaches to implement problem-solving activity. This chapter discusses some of the problem-solving practices most commonly and easily transferred from specialized to general courtrooms. Many of these strategies are discussed in greater detail in the following chapters.

Problem-solving approaches range from the broad – taking a collaborative approach to justice that seeks to address the root causes of criminal behaviour – to the very specific:

- considered approaches to judicial demeanour and language
- strategic sentencing
- working with offenders to craft individualized relapse-prevention plans.

Problem-solving approaches can be adopted on a court-wide basis. For example, courts can provide daycare, clear signage, plain-language and/or translated court forms and instructions, enhanced assistance for self-represented litigants, comfortable waiting areas, victim advocates, support for jurors, efficient scheduling, direct access to social services and information, and more.⁵⁶

In April 2011, the Canadian Council of Chief Judges released the following Therapeutic Justice Resolution, encouraging the application of therapeutic jurisprudence principles in the courts.

THERAPEUTIC JUSTICE RESOLUTION
CANADIAN COUNCIL OF CHIEF JUDGES
APRIL 2011

Whereas, judges are expected to deal not only with disputed issues of fact and law but are also being asked to resolve a variety of human and social problems that contribute to offending behaviour,

Whereas, Therapeutic Justice is characterized by active judicial involvement and the explicit use of judicial authority to motivate individuals to accept needed services and to monitor their compliance and progress in addressing the underlying criminogenic factors which brought them into conflict with the law,

Whereas, it is desirable that judges apply the principles of Therapeutic Justice whenever it is appropriate to do so, including but not limited to, within the context of Problem Solving Courts,

Whereas, education of judges is necessary in order to deliver Therapeutic Justice,

And whereas, it is necessary to develop best practices and to effectively evaluate the results of Therapeutic Justice,

It is therefore moved:

1. That the Canadian Council of Chief Judges endorses the principles and purposes of Therapeutic Justice as set out above and encourages their application in the courts whenever it is appropriate and feasible.
2. That the Canadian Council of Chief Judges provides leadership in the understanding and promotion of the principles and purposes of Therapeutic Justice.
3. That the Canadian Council of Chief Judges considers it necessary that education in Therapeutic Justice be made available to all judges with particular emphasis on the education of new judges.
4. That the Canadian Council of Chief Judges supports the development of evidence-based best practices in Therapeutic Justice and the dissemination of that information to all judges.
5. That the Canadian Council of Chief Judges supports the development of a standardized and effective evaluation mechanism in respect to Therapeutic Justice.

The New York-based Center for Court Innovation has identified several key, no- or low-cost, strategies that judges and courts can most easily transfer from problem-solving to general courtrooms. Many of the following strategies were identified by New York and California judges who had sat in both drug-treatment, domestic-violence, and other dedicated problem-solving courtrooms as well as in courts of general jurisdiction.^{57, 58}

1. **A proactive, problem-solving orientation of the judge:** This orientation leads judges to seek creative solutions to problems and to treat court participants as individuals worthy of respect and attention.
2. **Direct engagement with participants:** Courts can engage in clear communication to litigants, enhancing their understanding and confidence in court proceedings. For example, judges and other court staff can ask litigants whether they have questions. They can make direct eye contact, address litigants directly, and speak courteously. Direct engagement is a prerequisite for effective behaviour modification, and enables judges to motivate and influence defendants to make progress in treatment, while identifying parties' crucial needs and laying the groundwork for positive solutions. Courts can also solicit litigant feedback (in comment boxes or via a website).⁵⁹
3. **Individualized screening and problem assessment:** The court screens or assesses potential litigants for key circumstances, including drug and alcohol use, mental illness, literacy and language difficulties, and prior or concurrent court involvement (e.g., criminal court and Family Court).⁶⁰
4. **Sentencing therapeutically:** Judges can involve offenders in crafting sentences to include risk-management strategies, relapse-prevention plans, and goals, and that incorporate specific rewards and sanctions for compliance and meeting those goals. Combined with ongoing judicial supervision (see point below), problem-solving sentencing can dramatically increase compliance and the likelihood of addressing or ameliorating some of the underlying causes of criminal activity.
5. **Ongoing judicial supervision:** Ongoing supervision – such as having defendants report back to court for treatment updates and judicial interaction – keeps judges informed and offenders accountable, and allows judges to tailor sentencing provisions according to an offender's progress or relapse. Such reviews demonstrate to defendants and litigants that the court watches and cares about their behaviour, while providing ongoing opportunities for the court to communicate with litigants and defendants, and respond to their concerns and circumstances.⁶¹
6. **Establishing links and partnerships with social services agencies, and integrating social services into sentencing and courtroom procedures:** By establishing direct links and relationships with such agencies, judges and counsel can more effectively and efficiently refer offenders to appropriate and available services, increasing the likelihood of compliance. Such partnerships and referrals are especially useful when dealing with defendants having addiction, mental illness, or vocational/educational needs.

7. **Tracking service mandate compliance:** Courts can track the number of litigants assigned or recommended to social services – including drug treatment, mental health treatment, domestic violence programs, education initiatives, parenting classes, etc. – each year and monitor the compliance rate.⁶²
8. **Prompt information sharing:** Courts can provide up-to-date information, forms, and instructions to litigants and family members in order to ensure that they understand the process and to help them prepare and file necessary paperwork. Courts can routinely collect and update relevant case information.⁶³
9. **A team-based, non-adversarial approach** with lawyers, social service agencies, and other court actors.
10. **Courthouse training and education:** Courts can educate staff about the context of offending, problem-solving strategies, and socioeconomic contexts that can underlie criminal behaviour and conflict through informal and formal trainings. Such training sessions can take the form of brown-bag talks, lectures from outside experts, or participation in out-of-court judicial education programs.⁶⁴
11. **Community outreach:** A court's presence in the community can be bolstered by hosting site visits from community groups, expanding court information available online and in libraries, schools and other public centres, and encouraging transparency in how courts operate.⁶⁵

CASE STUDY

THE IMPACT OF PROBLEM-SOLVING COURTS: ONE PARTICIPANT'S STORY

Joe E. was a crack cocaine addict who supported his \$1000-a-day addiction through shoplifting, drug-dealing and other crimes. His addiction and involvement in criminal activity placed him at constant risk. He was shot at, stabbed, and often homeless. On the few occasions he was arrested, he felt a sense of relief, because jail would provide him with food and a place to sleep. He had never seriously tried to get sober until his last arrest, at the age of 39.

Just before Joe's last arrest, he had heard news reports about a new drug treatment court in his city. This time, he decided to try to change his life. He called his lawyer and asked if he could get into the drug treatment court program. After a lengthy assessment, he was accepted.

Joe was released from jail into a community residential facility operated by the John Howard Society, and reported daily to an addiction services treatment centre. Twice a week, he appeared at the drug treatment court (DTC) where the presiding judge asked him whether he had consumed drugs or alcohol, whether he had put himself in any high-risk situations, and if there were any issues he would like to talk about. He says the accountability and structure imposed by the program made it possible for him to finally achieve sobriety: "Coming in to the courtroom twice a week and having the judge ask those three questions ... those are all opportunities for me to stand up and be Joe, to stand up and be accountable. Knowing that those three questions were going to be asked was the biggest thing that kept me from either thinking I could get away with using, or thinking I could get away with breaking any of the rules."⁶⁶

One year after that last arrest, Joe became the first graduate of the city's drug treatment program. He received one day of probation on the day of graduation, "so the very next morning, I awoke a completely free man. For the first time in my adult life. Free from drug use. Free from alcohol. Free from conflict with the law. And most importantly, free from the darkness that had been my existence for so many years."⁶⁷ The graduation ceremony was a celebration of the graduating participants' achievements, and Joe received accolades from the judges, Crown attorney, and duty counsel. "The judges stepped down from the bench," said Joe, "and offered to shake my hand ... That is huge for anyone who has stood on this side of the bar, and had to face the inherent shame and guilt that goes with standing before the law. The only reason we stand before the law is because we were caught doing something. This time, I got caught doing something well ... It is an experience unlike any other."⁶⁸

Joe recently celebrated five years of sobriety and now works for a homeless shelter. When asked how his life might be different today if he hadn't become involved with the drug treatment court, his answer is immediate: "Had I not entered drug treatment court, I honestly believe that I would either have overdosed, or upset the wrong people and been killed. I have already been shot at, I've been stabbed, I've been lucky. I don't think my luck would have continued ..."⁶⁹

Many of the people Joe works with at the shelter have benefitted from the same drug treatment court program that he went through. He is grateful that the drug treatment court program was available to him when he was ready to ask for, and receive, help. "We all want to see everybody succeed. The truth is, not everyone will. Many people will trip and stumble along the way ... if we can keep our eyes on the process, and not on every individual misstep, we will see many more little successes, and the little ones add up to big ones."⁷⁰

“ The prevailing litigant might look back upon a recent court experience and say, ‘Yes, I won the case, but I don’t know if it was worth it. It cost me too much, the judge wouldn’t let me speak, I didn’t understand what the judge was talking about, I was treated like dirt. I hope I never have to go through that again.’ On the other hand, an unsuccessful litigant can leave the courtroom saying, ‘I lost my case but I had my day in court, I was treated fairly, I can move on.’”⁷¹

**Judge Roger K. Warren (ret.), Scholar-in-residence,
California Superior Court**

PROBLEM-SOLVING SKILLS FOR JUDGES



A problem-solving orientation relies heavily on court participants' sense of a just and relevant judicial process. Research shows that when participants feel they are fairly treated and have a sense of being given a voice, their respect for, and trust and confidence in the court is enhanced, as is the likelihood of their compliance with its orders.⁷² The psychology of procedural justice, in fact, suggests that the court process itself can be more important than the outcome with respect to people's satisfaction with the proceedings and willingness to comply with decisions.⁷³

What constitutes “a fair, relevant judicial process”? For court participants, this can include:

- being treated with respect and dignity
- having a sense of voice and opportunity to tell their story
- being treated as individuals, rather than numbers on a docket
- being treated fairly and consistently
- being able to understand and play an active role in the proceedings.

This section outlines how judges can enhance court participants' sense of procedural justice – and therefore maximize successful outcomes – by communicating effectively. The following chapters focus on:

- enhancing interpersonal skills
- crafting behavioural contracts and relapse-prevention plans
- developing a non-adversarial, team approach
- sentencing therapeutically.

“ The *Criminal Code* states that before imposing sentence I’m required to ask the offender if he or she has anything to say. That conversation is now different after my experience in the Toronto Drug Treatment Court. I ask more questions and get more information. If the offender has a gap in his or her record, I ask about that. ‘Why were you clean and out of trouble for five years? What do you need to do to get back to that state now?’ Or, I look at the offences on the record: if there is a telltale pattern of addiction, I will wonder out loud if there’s a problem with drugs or alcohol. Often, the offender will say there is.”⁷⁴

Justice Peter Hryn, Ontario Court of Justice

“ What are the personal circumstances? Often, counsel has provided all kinds of background information about the circumstances of the accused. Rather than scolding them about bad behaviour, I’ll try to use that information to make a personal connection. I often ask if the person has children of their own. Sometimes, I can say, ‘You understand better than anybody what it’s like to grow up without a father,’ or, ‘You understand better than anybody here what it’s like to grow up with an alcoholic parent.’ I try to have them consider the impact of their own behaviour today on their children, and what they have to do differently so that their own children don’t grow up under the same circumstances.”⁷⁵

Associate Chief Judge Janice leMaistre, Provincial Court of Manitoba

5. COMMUNICATING EFFECTIVELY

Direct interaction between a judge and court participants is a foundation of problem-solving judging, and a prerequisite for effective behaviour modification and change. When judges speak directly to court participants – and, in turn, listen to them – they can inspire trust, motivate change, give participants a sense of voice and dignity, enhance progress and healing, and make court procedures more relevant to participants’ lives. Meaningful and effective interactions are characterized by:

- empathy
- respect
- active listening
- a positive focus
- non-coercion
- non-paternalism
- clarity

EMPATHY

Empathy is the quality of relating to other people’s feelings, perspectives, and world view. Empathy involves finding some common ground upon which to establish a relationship with another person. Judges can adopt the following approaches to establish empathy.

“ Often, people can resist changes in the criminal justice system when they’re thinking in terms of ‘other’: that’s somebody out there that this is going to happen to. It’s not me, it’s not mine. Taking hold of the fact that you are dealing with human beings who are often very damaged themselves, and thinking in terms of human beings you might care about, really ups the humanity quotient. We start to let go of the rigidity of why it should be punitive rather than rehabilitative.”⁷⁶

**Judge Jocelyn Palmer,
Provincial Court of British Columbia**

“ One of the prevalent emotions in Family Court is fear. So it is important to understand what the fears are and to be able to address those fears in a meaningful manner with everybody. A father may be afraid that he’s not going to have a relationship with his child, or that he won’t survive financially. So he makes a custody claim, when really what he wants is a relationship and to develop access. The mother might be afraid that the father’s going to take the child away from her. That will undermine her relationship with the child. There might be fears of physical security. And then she sees the custody application and her defences go up and we can’t move forward on access.

Let’s say that the mother is the primary caregiver and she has that fear, you might look at her and say ‘Gee, based on this evidence, it looks like you’re a really, really good mother.’ You can see her visibly relax. You say to the father, ‘It looks to me what you really want is a relationship with the child. You’re not trying to take the child away from the mother.’ And he says, ‘No, I’m not.’ And then we work on things. That is the type of problem-solving approach we would take as opposed to just saying, ‘You tell me what you want, you tell me what you want, here’s the decision, see you later.’”⁷⁷

Justice Stanley Sherr, North Toronto Family Court

- **Asking questions of court participants that indicate an interest in their position.** “One of the things I will do is talk directly to [the defendant],” says Deputy Judge Heino Lilles, of the Territorial Court of Yukon (now retired). “I’ll ask him about his psychological assessment: ‘How did you feel about it? Did you have a good exchange? Have you read the assessment? Are there any facts you feel it’s gotten wrong? Do you think [the psychologist] missed something that should be there?’ Talking to him about it gives him ownership of the report: it becomes his.”⁷⁹
- **Relating events to court participants’ lives.** For example, in a domestic violence context, instead of talking about a “cycle of violence” or “intergenerational violence,” a judge can ask a defendant if he or she has children. “I regularly tell offenders that their children will model their behaviour, and I’m sure they don’t want to see that happen,” notes Judge Sharon Van de Veen of the Calgary Domestic Violence Court. “You see fear in their eyes that their sons might grow up to hit their wives and their daughters will let themselves be hit. It’s a very personal conversation, and I personalize it whenever I can: ‘I see you have a five- or six-year-old. I wonder if you’ve realized what will happen here.’”⁸⁰
- **Acknowledging not only the facts of a case, but people’s emotional responses to cases or court events** (e.g., “I can see that this situation upsets you/makes you angry/is frustrating,” “I am confused by what happened here,” or “It makes me quite sad to see how things have turned out.”)

- **Conveying a sense of caring, compassion, and respect for all court participants.** “It starts with being kind,” says Justice Stanley Sherr, of the Toronto North Family Court. “You want to project that you’re fair and that you care about people and that you want to make sure that everybody is heard, and that you want a good result for their family. So you are prepared, you’ve read the file ahead of time. You try to personalize it: I keep notes on every single file, so even though I might have a thousand files, I have a page on every single family that comes in front of me. So if the father said last time that the day we’re coming back to court is his birthday, I’ll wish him a happy birthday. Or they’ve mentioned one of the kids’ soccer games, I’ll ask them how the soccer is going. Just a little connection that can see that I’m attuned to their family and they’re just not another file. Validation is extremely important.”⁸¹
- **Acting in a trustworthy, credible manner** (e.g., treating all court participants fairly and consistently, respecting due process rights, being prepared, following through). “I’ll say to a parent, ‘Look, if you can exercise your visits, come on time, and not act out, then I’m going to increase your visits from two hours to a full-day visit,’” says Justice Sherr. “Well, when he comes back and has done all those things two months later, I have to be there to follow through and remember what I said to him. That’s why I keep notes. And I do follow through, and then everyone can see that that is consistent.”⁸²

- **Being aware of their own biases and predetermined ideas.** In youth court, for example, notes Judge Janice leMaistre of the Provincial Court of Manitoba, judges have a heightened sensitivity to the attitude – not to mention the fashion sense – of adolescents: “Kids come in wearing clothing that would drive their parents insane. You know, the girl that comes in the skin-tight white jeans with the thong poking out the back and the skin-tight T-shirt that says ‘Baby’ on it. She has gone through her wardrobe and looked for the thing that is the most special for her. A lot of youth court judges get that. It’s not so much a relaxation of standards. It’s just a realization that the people that you’re dealing with have a different outlook from what you might expect of adults. The youth court judges will understand that they’re actually wearing their best stuff.”⁸³

“ In youth protection mediation sessions, I usually start off with talking about the child. I’ll ask if anyone has a photograph of the child, so that we can see who we’re talking about. To set the parents at ease, I’ll get them talking: what’s the child’s name? What does it mean? What are his or her greatest qualities? Favourite colour?”⁷⁸

Juge Anne-Marie Jones, Cour de Québec

“ The judge has to set the tone. So if the judge is agitated they are going to be agitated. People do not know how to behave in court if all they do is watch *Judge Judy* and/or *Jerry Springer*. If they watch the judge, and the judge sets the tone and sets the stage for a reasonable dialogue, well then they buy into that. In fact, I keep it very formal in court. I wear the robes. I wear the sash. I bow every time I come into court, because I want them to know this is a special and serious place. It is really interesting the way everyone will start to mimic that and buy into it.”⁸⁴

Justice Stanley Sherr, Toronto North Family Court

RESPECT

Effective communication and a problem-solving approach are characterized by a judicial respect for the dignity of all people in a courtroom. Respect is dynamic: a judge's respect for a defendant can in turn generate that defendant's respect for the judge and courtroom. This mutual respect can be the foundation on which to create a judge-defendant relationship that in turn can positively influence a defendant's progress and outcomes.⁸⁵

To foster mutual respect in their courtrooms, judges can use the following techniques.

- Speak slowly, clearly and loud enough to be heard by everyone (not only lawyers).
- Refer to defendants as “sir” or “ma’am,” or by title and name (e.g., Mr. Smith; Ms. Jones), rather than by first name, the word “defendant,” or by case number.
- Pronounce names correctly; when in doubt, ask court participants for guidance in pronouncing names.
- Speak in words and tones that convey concern for the defendant as a person, “without pity, disdain, or obvious condescension.”⁸⁶
- Refrain from rushing or interrupting court participants.
- Refrain from sarcasm.⁸⁷
- Have high expectations: hold defendants accountable for their words and actions; expect them to be on time; refuse to accept excuses, inconsistent information, or “cognitive distortions” (see page 82).
- Treat all participants consistently and fairly, allowing all defendants and observers to see that they are treated “the same as everybody else.”
- Pay attention to body language: sit up straight; make and maintain eye contact with defendants while they speak and while speaking to them (rather than looking down at a stack of papers or only at lawyers). Judges should also take into account that members of some cultural groups may refrain from making eye contact with authority figures as a sign of respect and/or deference.
- Encourage dialogue rather than making speeches.⁸⁸

- Model appropriate language and behaviour. “We redirect like crazy,” says Justice Sherr. “A husband in Family Court will call his wife a lousy so-and-so and you say, ‘Thank you sir, I can see you are very concerned about the fact that she has been coming home late and that you are very concerned that it’s going to impact on the relationship with your child.’ When we do these things, it teaches them that this is the way to approach these problems. We are teaching them problem-solving techniques. Instead of yelling and screaming, we are showing different ways to frame the discussion. And an interesting thing develops. You may have people who start off on a first case conference that are extremely emotional, and by the fourth or fifth case conference they are not that emotional any more. They learn your behaviour.”⁸⁹

“ It comes down to three words: Listen. Listen. Listen.”⁹⁰

Justice Michel Shore, Federal Court of Canada

ACTIVE LISTENING

Active listening – to all court participants – is a crucial element of therapeutic judging. By actively listening to people in their courtrooms, judges give participants a sense of voice and the opportunity to tell their stories. A judge’s active listening enhances participants’ sense of fair procedure and thus fosters the court’s credibility and relevance, making it more likely that people will respect court decisions and orders.

“ This openness, this empathy, this ability to listen, this ability to convey to the person that he or she is being heard, is what will give the justice system its credibility. Because we know, now more than we’ve ever known before, that most of the time the process counts more than the results.”⁹¹

Élizabeth Crote, Juge en chef, Cour du Québec

Active listening also involves engaging with the offender. It may also involve listening for what’s not said and, where appropriate, inquiring about obvious gaps or inconsistencies in his or her testimony. Often, important information surfaces when judges and counsel take the time to ask.

Judges listen actively when they:

- give participants the opportunity to speak, listen attentively, refrain from rushing speakers, and seldom interrupt
- ask clarifying questions and make comments that acknowledge they want to know about and understand a person's position
- refer to that person's position in their reasons for judgment⁹³
- repeat (or "echo") a litigant's last few words to reinforce that they are listening and understand what litigant is saying
- acknowledge and validate the victim's experience when this is communicated to the court⁹⁴
- invite the victim to speak
- listen for and address "cognitive distortions" and passive language that may prevent offenders from taking responsibility for their actions (e.g., "Someone gave me some heroin" not "I used heroin") (see page 82 for more on the process of "cognitive distortion")
- read verbal and non-verbal cues, such as facial expressions, body language, and/or tone of voice, that could signal a participant's discomfort, confusion, or emotional state
- maintain active, attentive body language: eye contact, upright posture, focusing on the speaker
- ask court participants if they have any questions.

“ During sentencing I might have a conversation with an offender who has pled guilty to theft under. The two lawyers may have agreed on a joint submission of 30 days in jail. The conversation might go like this: ‘So what was going through your mind that day?’ ‘My mother was dying and I was very depressed. I took the item but I can't really say why.’ ‘Crown, does that change your position on sentence?’ The answer is often yes and we look to a community sentence. It is surprising how often the circumstances of the accused (or the victim) are unknown in the process. They are almost the forgotten people.”⁹²

**Associate Chief Justice Peter D. Griffiths,
Ontario Court of Justice**

Judges should also be aware of the importance of nonverbal communication in establishing an environment conducive to open exchange, which they can foster by adopting the following approaches.⁹⁵

- Be aware of the power of one's voice: tone and vocal inflections are key components in conveying respect.
- Consider the impact of facial expressions. A so-called "neutral" expression can come across as more severe than intended due to the drawing together of the eyebrows in concentration. To look open to communication but still impartial, lift the eyebrows slightly and relax the mouth.
- Show that they're listening by taking notes (and telling listeners that's what they are doing if eye contact is limited), asking questions or paraphrasing.

“ My practice is to talk to people very directly when I'm imposing sentence and to acknowledge the things I think they should be proud of. I make it very clear that this work is the basis on which I'm allowing a conditional sentence order. For example, one woman had managed to get herself off heroin and methadone while in custody. She was extremely motivated and I granted a conditional sentence order on that basis.”⁹⁶

Judge Jocelyn Palmer, Provincial Court of British Columbia

“ I always try to leave a young person whom I am sentencing with a positive message. Youth will listen more effectively when you say positive things and when you’re encouraging. Judges have the opportunity to leave them with something to hang onto in what may seem a hopeless situation. If we can focus on the positives, perhaps we will in a small way help reduce the chance of recidivism. The alternatives are demonstrated daily in youth court where angry and hurting youth have lashed out, hurting themselves and others.”

**Judge Sheila P. Whelan,
Provincial Court of Saskatchewan**

“ In child protection especially, validation is so important because the people coming to court are extremely vulnerable. They’ve been castigated as bad parents, which is about the worst thing you can be in our society. Their children have been taken away from them. Emotionally, they are basket cases. Basically everyone in authority has told them they’re worthless, so if we can set simple goals and they can start moving toward those goals and they get validation from someone in the robes, well, that has tremendous effect. I see time and time again when they come back they want to please the person in authority who is willing to look at them as a human being, and they do much better.”⁹⁷

Justice Stanley Sherr, North Toronto Family Court

A POSITIVE FOCUS: PRAISE AND CONSTRUCTIVE CRITICISM

Judicial approval carries considerable weight with ex-offenders intent on establishing the authenticity of their reform. Seeing their accomplishment reflected in the words and actions of others, especially authority figures like judges, reinforces pro-social behaviour.⁹⁸

Praise – in the form of words and applause – is a commonplace and effective strategy for drug-treatment and other dedicated problem-solving courts and judges. In drug-treatment courts, graduation ceremonies are standard practice.⁹⁹ Such ceremonies, which acknowledge a former offender’s progress, may themselves contribute to that progress through the reinforcing nature of praise.¹⁰⁰

While formal graduation ceremonies may not be easily incorporated into conventional courtrooms, judges can take advantage of the opportunities for praise afforded by regular judicial supervision or court-ordered review (see page 87).

As important as praise is, it is equally important to address court participants' negative and anti-social behaviour. Confronting an offender about such behaviours also affords therapeutic possibilities, and judges can maximize these opportunities by employing the following tactics.

- **Refraining from condemnation:** Judges can direct their disapproval at a person's criminal acts, not the person him or herself. Judges can confront anti-social and criminal behaviour without condemning a person.
- **Contrasting an individual's anti-social behaviour with his or her good qualities and long-term goals:** "Look carefully at the report and relate the good parts of that report, and then compare that to why they're there. You can show them that they can get to the other side," says Judge Sharon Van de Veen. "Underline to them they've done well in certain parts of their life, but not this one."¹⁰¹
- **Expressing continued hope and faith in a person's ability to become a law-abiding citizen.**
- **Focusing on the future:** Instead of dwelling on past wrongs and criminal acts, judges can focus on a defendant's future and the potential it holds for pro-social, law-abiding, and healthy behaviour.

NON-COERCION

A person is more likely to succeed when she or he is internally, rather than externally, motivated. Individuals in court who perceive that their choices are non-coerced tend to function more effectively and with greater satisfaction than those who feel coerced, and may respond negatively.¹⁰²

As discussed above, treating individuals with respect and empathy, listening actively, and focusing on the positive all lend themselves to an environment of non-coercion. Invoking the following stances will also help judges to reduce feelings of perceived coercion.

- **Favouring positive pressures**, such as persuasion and inducement, over negative pressures, such as threats and force; balancing negative with positive pressures.
- Wherever possible, **fostering participants' sense of autonomy and responsibility** by soliciting input into terms for conditional and postponed sentences, parole, behavioural contracts, treatment and risk-management plans (all discussed below), and other terms and obligations imposed by the court.
- Fostering self-efficacy and motivation to change by helping individuals define goals, and understand how to overcome barriers in the way of attaining those goals.¹⁰³
- **Highlighting discrepancies between an individual's current behaviour and his or her goals** by asking open-ended questions, listening reflectively, expressing affirmation and support of the goals, and eliciting self-motivational statements. For example, "if the individual wishes to obtain or keep a particular job, the judge can ask questions designed to probe the relationship between her drinking or substance abuse and her poor performance in previous employment that may have resulted in dismissal."¹⁰⁴
- **Avoiding arguing** with the individual, which can create defensiveness and be counterproductive; rather than becoming confrontational, judges can listen with empathy and allow an individual "to remain in control, to make her own decisions, and to create solutions to her problems."¹⁰⁵

“ After being in mental health court and drug treatment court, you start getting some understanding of the issues, but I think it would be dangerous for a judge to think he or she could make a diagnosis or treat these conditions. It’s taken me to a point where I may now better understand an offender’s problem and that there are professionals who can help.”¹⁰⁶

Justice Peter Hryn, Ontario Court of Justice

“ Righting a wrong itself is therapeutic. And if you ensure that individuals can understand how the wrong was made right, it’s doubly therapeutic.”¹⁰⁷

Justice Michel Shore, Federal Court of Canada

NON-PATERNALISM: RECOGNIZING YOUR LIMITS

In many cases, a judge – especially one attuned to searching for the underlying causes of criminal behaviour or civil disagreement – may suspect or be aware of a problem promoting criminality, such as an addiction or mental illness. A paternalistic attitude, however, is unlikely to facilitate an individual’s recognition of such problems, nor will it solve the problem. Such an approach – preaching to an offender, telling him or her what the problem is and what to do about it, or condescension – can be offensive, reinforce denial, foster resentment, and cause a judge’s efforts to backfire.

Problem-solving judges operate under the assumption that individuals must confront their own problems and assume the primary responsibility for solving them. Heeding the guidelines above on reducing perceived coercion will help judges avoid paternalism. With the support of treatment staff, where available, judges can also help individuals to identify and build upon their “own strengths and use them effectively in the collaborative effort of solving the problem.”¹⁰⁸

THERAPEUTIC JUSTICE AND JUDICIAL FULFILLMENT

A survey entitled “Judicial Satisfaction when judging in a Therapeutic Key”¹⁰⁹ concluded that working therapeutically is beneficial for the litigants and the judicial officers who preside over these courts, and enhances the quality of justice as a whole. In particular, it found that problem-solving judges were more likely to respond that:

- they admired the efforts of the litigants to solve the problems that had brought them to court
- their current judicial assignment had a positive emotional effect on them,
- they feel that the litigants in their courts are more motivated to try and solve the problems that brought them before the court
- litigants appearing before them were being respectful
- litigants expressed gratitude for the help they had received from the court.

6. CLARITY: LITERACY AND PLAIN LANGUAGE IN THE COURTROOM

The Canadian justice system, characterized by complex and highly specialized language and legal documents, poses specific challenges for – and is in turn challenged by – those with limited literacy. The majority of people who appear before judges – accused, offenders, witnesses, jurors, litigants, victims, and defendants – may not read and write well enough to fully understand complex legal documents and language. According to the John Howard Society of Saskatchewan, approximately 65% of the incarcerated population has literacy limitations.¹¹¹ Only about 20% of Canadians have the literacy skills to fully understand complex legal documents and language, and even fewer Canadians have the literacy skills necessary to navigate the criminal justice system.

In its survey of members of legal and literacy communities, the Canadian Bar Association Task Force on Legal Literacy found that “virtually all legal material is written, and it is written in a manner peculiar to the legal system,” creating “formidable obstacles for people with limited literacy who try to use the system. ... Adults with limited literacy are intimidated by the legal system and avoid initiating legal action,” and “do not perceive that lawyers and the legal system are there to help them.” Most people with limited literacy, concluded the task force, “do not see the legal system as a place where they can defend or ensure their rights.”¹¹²

“As a judge, the words ‘entering into a recognizance’ almost never cross my lips in speaking to an accused. I invariably tell the accused that he or she is required to sign a piece of paper promising the court to do certain things and I outline the consequences if those promises are not kept.”¹¹⁰

**Judge Susan V. Devine,
Provincial Court of Manitoba**

When court participants clearly understand what has gone on in a courtroom, their sense of the court's relevance is enhanced. When defendants and offenders clearly understand the terms of conditional or postponed sentences, restraining orders, parole, and other agreements (e.g., enrolling in a treatment program, reporting back to the court on a certain date, etc.), they are more likely to comply with those terms.

Judges can foster greater understanding in the courtroom by being aware of the extent of limited literacy and its impact on the justice system and adopting methods to increase understanding.

SIGNS OF LIMITED LITERACY

People may try to hide literacy problems by:

- saying they cannot read a document because they forgot to bring reading glasses
- claiming to have lost, discarded, forgotten, or not to have had time to read documents
- asking to take home forms “to read later”
- claiming to have a hurt hand or arm and therefore be unable to write
- glancing quickly at a document and then changing the subject, or becoming visibly upset, quiet, or uncommunicative when faced with a document
- hesitating when asked to read a document, and/or reading it at an excessively slow speed
- appearing to read a document very quickly, although they are unable to summarize its contents.

Other possible markers of limited literacy include:

- a person who has not completed high school or has difficulty speaking English
- a person who has filled in a form with the wrong information or has made many spelling and grammatical errors
- a person who claims to go to Legal Aid every day, but states that he or she doesn't have time to fill in the relevant forms
- a person who seems not to relate to or understand questions about particular times, dates, and places
- a person whose writing and speaking styles don't match
- a pre-sentence report that indicates that an individual left school at a young age, and/or before completing Grade 10; or that chronicles a history of unemployment or refusal of job training, promotion, or reassignment.

People with limited literacy skills may attempt to cope with feelings of fear, embarrassment, or inadequacy by behaving in ways that can appear flippant, dishonest, indifferent, uncooperative, belligerent, defensive, evasive, indecisive, frustrated, or angry. These emotional markers of limited literacy may appear on the surface to be markers of a “bad attitude.”

MAKING IT EASIER TO UNDERSTAND

There are a number of techniques judges can use to more effectively communicate with people with limited literacy skills in the courtroom.

Judges can be proactive and

- educate themselves about literacy in Canada and in the courtroom
- be aware of their own biases relating to literacy
- break the silence by asking if a court participant has any difficulties reading or writing
- provide/offer written/visual materials (e.g., handouts, DVDs) to be taken home to be reviewed with someone who can read them. Briefly explain the content of the material so that the person knows what they are receiving.

Judges can speak clearly

- Make it easier for people to understand by:
 - slowing down
 - doing as much orally as possible
 - speaking clearly and repeating important information
 - supplementing oral information with a written note that can be taken away and mulled over in private
 - previewing or reading aloud documents in the courtroom.

Judges can address literacy in sentencing

- Keep literacy in mind when sentencing: consider literacy training as part of rehabilitation; keep in mind that most rehabilitative programs (job skills training, anger management, substance abuse, spousal abuse, etc.) are literacy based.

Judges can adapt language levels

- Use plain language instead of “legalese.”
- Translate specific legal terms when they do come up.
- Repeat important information, even if it seems redundant.
- Ask court participants whether they understand and ask them to repeat back in their own words what was just said (e.g., “You are required to sign this paper promising the court that you will do certain things. If you do not keep your promise, the consequences are _____. Since this is important, I would like you to tell me in your own words what you have agreed to do.”).¹¹³
- Adopt informal spoken language.
 - Use short sentences and clear language.
 - Use contractions (e.g., *it’s* as opposed to *it is*).
 - Use words consistently.
 - Use the active rather than the passive voice (e.g., *We understand* as opposed to *It is understood*).
 - Avoid strings of synonyms (“all and every”; “authorize and empower”).
 - Use informal connectors (And..., Now..., Then..., So...) to link thoughts and sentences.
 - Use first and second person (I, you) more than third person (one).

Judges can invite questions¹¹⁴

- Ask frequently if court participants have any questions. **Pause** for three or more seconds to allow listeners to process the question and formulate their own. Count silently if necessary to make sure the pause long enough.
- Use nonverbal behaviours to indicate openness to questions: establish eye contact, pause, sit up straighter, lean forward slightly, tilt your head a little to one side, use a nonthreatening vocal tone, gesture with open hands.
- Watch the listeners' body language to see if they have questions but are hesitant to ask them. This is especially important for people who speak English as a second language or others who might be confused or intimidated by the surroundings and the process. Be aware that people of different cultures are likely to have different norms than you're used to (e.g., they might be less comfortable with eye contact or be less likely to ask questions of authority figures).
- Answer likely questions even if your listeners don't ask them, if the information is important. ("A question people often have is ...")

For more information, please see the National Judicial Institute's handbook *Literacy in the Courtroom: A Guide for Judges*.¹¹⁵

7. DEVELOPING A TEAM APPROACH

A problem-solving approach to justice is an avowedly interdisciplinary enterprise. Legal problems don't simply have legal origins. They also stem from multiple human, socioeconomic, educational, health-related, and psychological sources. Given the multidisciplinary origins of legal problems, it makes sense to take a multidisciplinary approach to address them.

Dedicated problem-solving courts (typically criminal courts) have as cornerstones a team-based approach: a coordinated strategy among judge, prosecution, defence, and treatment providers to govern offender compliance and promote rehabilitation and healing. Each representative provides input from his or her unique perspective and expertise, and, at the same time, can gain skills and insight into the therapeutic potential of the judicial process.

A non-adversarial, team-based approach is easily transferable to courts of general jurisdiction. Judges interested in taking a problem-solving approach can benefit from the cooperation and input of a skilled team that could include lawyers representing all parties (Crown, defense, parents' counsel and/or child protection counsel in family cases, and children's counsel where applicable); parole and police officers; social workers and social services agencies; addictions, domestic violence, and mental health professionals; victims' services personnel, shelter staff, and other representatives of victims; addiction treatment centres; court staff; mediation professionals; community outreach representatives; and – not least of all – litigants and offenders themselves. Different courts – for example, family and criminal court in the case of domestic violence – can also work together to share information and thereby better accommodate the needs and interests of the people and families involved.

Court staff can also play a key role in creating a therapeutic environment in the court through their treatment of defendants and the tone they set in the courtroom. Judges can encourage court staff to treat defendants with respect and to facilitate court participants' understanding of the process.

PARTNERING WITH COMMUNITY RESOURCES

A key factor in taking a multidisciplinary approach to legal problems is to utilize diverse community partners. Judges taking a problem-solving approach can learn about resources available in their communities and refer defendants and other court participants to them.

“ You need to know about the resources that are there so that you can access them. As a prosecutor working with the domestic violence court, I probably learned most in a multi-disciplinary group that brought together prosecutors, probation, child and family services, victim services, social assistance, policing, corrections, etc. We met regularly to talk about cases and brainstorm how to best manage these individuals. I learned about the dynamics of these cases and understood much more about the various roles of the different agencies at play. When I was appointed to the bench, I think I initially made life difficult for prosecutors, because I had this knowledge and I could ask them, ‘Have you thought of this? Have you contacted this agency? Is the victim still living in the family home? Is she recanting?’ It had a trickle-down effect: after a while, the prosecutors knew what to expect from me, and they would come prepared with this information.”¹¹⁶

Associate Chief Judge Janice leMaistre, Provincial Court of Manitoba

“ In Ottawa, when somebody seemed to have a mental health problem short of fitness, a standard condition of bail would require the offender to attend at the Royal Ottawa Hospital to make an appointment for an assessment within 48 hours of release. Two-thirds never made it to the hospital with resulting charges for failure to comply. They don’t do that anymore. A doctor now attends the courthouse once a week to see those who are fit and criminally responsible but have mental health issues. They can be quickly assessed and followed up in the community rather than sitting in jail on remand.”¹¹⁷

Associate Chief Justice Peter D. Griffiths, Ontario Court of Justice

CASE STUDY

In the face of new child-protection legislation, Justice Lucy Glenn of the Ontario Court of Justice in Chatham, Ontario, spearheaded a simple but effective problem-solving initiative designed to link the court and its clients with community services – and, in the process, keep families together. Justice Glenn summarizes the experience as follows.

PARTNERING WITH SOCIAL SERVICES: ONE JUDGE’S SOLUTION

The volume of child protection cases has gone up dramatically in recent years. At the same time, new rules stipulated that cases had to go through in 120 days. Then, in 1999, the Child and Family Services Act mandated that children under the age of six should not be held in care for more than 12 months – two years for kids over age six – at the end of which time, basically, they were to go back to their parents or be made Crown wards.

As a result of these developments, we were swamped with cases, often involving children under age six. They’d be taken into care, and six months would pass, and when I asked on status review about the parent’s progress, often everyone would shrug their shoulders and say, “I don’t know,” or “Nothing.”

I’ve always thought that child protection law and proceedings should be remedial: you’ve got a family with a problem and you’re trying to help them fix it. Sometimes you can’t fix it. But I don’t think it is good enough for a court to look at a parent and say, “You’ve got a problem, we’re taking your kids; come see me in six months and we’ll see if it’s any better.”

The child-protection legislation talks about putting forward a plan. How can you be an effective lawyer for this kind of client if you don’t know where to draw on for help? Parents, lawyers and courts need plans for solving problems. They need social services, and we didn’t know what was out there. I realized that this was my community: I practiced here for 17 years before I became a judge, and I didn’t know what social services were available. If I didn’t know, how could parents? How could lawyers? If we knew, maybe we could do more to help parents get their children back.

“ I suppose a starting point for any judge [who wants to practise therapeutically] would be to become more familiar with what’s available in the community by way of resources, and to know what exactly can be accomplished in and outside a custodial setting, what exactly probation can accomplish. ... They may need to find a way to figure out how to access that knowledge, perhaps making a request of the Crown to do some inquiries, or asking defence counsel. The Crown, for example, can do a background check into which recovery houses are doing a good job. The judge can then refuse bail for certain houses.”¹¹⁸

Judge Jocelyn Palmer, Provincial Court of British Columbia

Social Services Fair

I called the head of the Children's Aid Society (CAS), the head of the Family Service Bureau, and the Crown and CAS lawyers, and I asked them, "What do you think about us having an exposition where we find out what's out there?"

So we rented a hotel meeting room for a morning and organized a social-services "fair," funded by CAS. We invited all the agencies that served the area. A lot of them had all sorts of supports that we didn't know about. The child-protection workers didn't know what the other branches of their agency offered. We found a service that would provide school lunches for children, another that would provide kids with bicycles. We discovered services to help with transportation and clothing. One public housing agency offered a support system that ranged from simply providing a cup of tea to emergency child care. These were crucial: when you're trying to make a decision about whether to return a child to a single mom with a lot of issues, one of the questions you ask is, "Does she have a support system?"

Filling In The "Grid"

Once we knew what was available, we needed to find a way to ensure that we could create realistic plans and put them into action. Because everyone in the system was so stressed, I developed the belief that if we didn't have it organized before people walked out the courtroom door it wasn't going to get organized at all. So we developed what we now refer to as "the grid" (see page 52).

It's a simple document: a set of questions about what services parents need and what they need to do to work toward getting their children out of protective custody. If they need anger-management counselling, where will they get it? Who's going to facilitate it? Is there a cost, and if so, who pays? How are they going to get there? What if there's no bus? When is it going to start, and when will it end? What if a parent needs child care during counselling? We go through these questions for every element of a parent's plan – there are often three or four elements. A number of people are filling in the blanks: the CAS lawyers, the client's lawyers, and the client him- or herself.

At first, the resistance was unbelievable, but lawyers swung around quickly because they saw the benefit: everybody walks out of the court with clear expectations, and they all know what needs to be done. It forces everyone to look at the logistics of a plan. You can scan it and realize if the expectations are realistic. It's not realistic, for example, for a single mom on welfare with no car and two kids at home to travel at night down a country road with no public transportation. It makes sure that we aren't just holding these kids in suspension for 12 months.

Sometimes, we'll come back very early on in the review – say, 30 days in. We've only got 12 or 24 months to fix the problem, so my attitude is, "let's not waste time". I'll start with the grid: is the plan still working? Sometimes it is, and sometimes things have fallen apart for good reason, so you adjust the plan if you need to. I'll even take a break in the middle of the conference and send someone out to phone the agency to see what's available. You try to pull the thing out of the ashes right from the very beginning. We still have cases where parents simply don't carry through, and that speaks volumes. But it's pretty rare that things fail to happen because they fail to get organized, and that happened all too often before.

A lot of judges would say, "That's a social worker thing. I'm not going to get into that," but the reality is that six or eight months from now, you may be asked to take the kid away permanently. I personally am more prepared to come to grips with those kinds of decisions if I've even done the basic work in trying to set up a plan to remedy the fault that I found in the first stages of the proceedings. It's fine for me to say the kid is in need of protection because parents lack the ability to manage their resources, or their anger, or because of domestic abuse. It's not acceptable to make those findings and come back later to find that nothing's happened. It's not that difficult to figure out what's out there and create a plan. And with a plan, there's a much better chance that change can occur.

It's not rocket science. It's a question of taking a much more active role in fixing the problem.

“ Now and then, I've brought together [members of] the defense bar and the crowns and probation and people representing various community services and mental health services and school people for a 'get to know each other' session, where we talk about how we all fit together. The people learn about each other and exchange business cards. And, for a little while at least, things function more holistically. Courts can take the lead in doing that.”¹¹⁹

Justice Miriam Bloomenfeld, Ontario Court of Justice

“The Grid”: Service Plan Agreement

Type of service. For whom?	Name and location of service provider	Who will make the arrangements?	How will the client get there?	Is there a cost for this service?	Who will pay for this cost?	When will it start?

CAS: _____
 PARTY: _____
 PARTY: _____
 PARTY: _____
 WITNESS: _____

“ We have to collaborate; we can’t do the job alone. We have to be with the lawyers; with court services. This doesn’t mean becoming social workers. It doesn’t mean that we are taking the law and putting it aside. We just add to it. We add the humanity and the empathy and the understanding that the people who come to court have needs that are not met all the time. We are in a position to bring people together. Judges are not in a position to do it by ourselves, but we are in a position to influence the course for everybody to participate.”¹²⁰

Élizabeth Corte, Juge en chef, Cour du Québec

PARTNERING WITH OTHER COURTS

When a person is involved in more than one court system, a lack of information sharing and cooperation between the systems can create confusion and can result in conflicting orders.¹²¹ Cases of family violence or sexual abuse are often accompanied by family law proceedings. Unfortunately, in many jurisdictions, police and child protection authorities, and family and criminal counsel, do not communicate effectively.¹²² This can result in conflicting family and criminal orders, delays in one or both proceedings, issues regarding disclosure, and other difficulties.¹²³ For example, information about abuse that resulted in criminal charges is often unknown when custody and access decisions are made in Family Court, while custody and access provisions are sometimes unknown when criminal court decisions are being made regarding bail sentencing. This lack of communication between the different courts could result in a “no-contact” order in criminal court and a “shared custody” order in Family Court. Such conflicts could result in further abuse, could negatively affect the child (for example, by cutting off their contact with a parent altogether when supervised contact might be appropriate), and can undermine confidence in the justice system.

Because criminal law comes under federal jurisdiction, any order made by criminal court will take precedence over a Family Court order. In reality, the two systems are integrated and have separate and overlapping features to, typically, protect the mother and the children. Neither system by itself offers the optimal protection of the mother and children; only a blend of the two systems and proceedings can optimize protection.¹²⁴

In recognition of these issues, courts such as the Integrated Domestic Violence Court in Toronto and the Yukon Domestic Violence Treatment Option (in which child protection workers are involved in recommending treatment plans) were created. In the absence of formal specific initiatives, however, judges dealing with concurrent family and criminal proceedings can better share information and maximize both the effectiveness of their orders and the safety and well-being of the family unit by considering the following guidelines.¹²⁵

- The criminal court can request accurate information regarding the state of any current or pending family law proceedings before making an order of judicial interim release. This information can be provided by the Crown or through information-sharing protocols between the courts themselves. For example, Lanark County, Ontario, has created a formal protocol for domestic violence cases involving criminal and family courts.¹²⁶ Because Family Court orders are frequently varied, up-to-date information should be sought at each appearance of the criminal matter.

- Termination of contact between parents and children can seriously – and often detrimentally – affect their lifelong relationship. No-contact orders can also impede counselling or other efforts to address the underlying issues facing the family, and can prevent any meaningful assessment of whether regular contact is in the child’s best interest. Further, it can be very difficult to change release conditions once they are made; no-contact bail orders can remain in place for a year or more in some cases, despite every effort of child protection agencies to change them. For these reasons, judges may prefer to craft conditions of release that allow for child protection authorities and/or family courts to determine whether access should occur and under what circumstances.
- Judges can direct the Crown to ensure that child protection authorities have complete information about the history of domestic violence and/or other issues relevant to the safety of the child, in order to assist the Family Court and child protection authority in taking a position on contact. To ensure that the agency and Family Court are aware of any relevant charges, the criminal court judge can specifically direct the child protection agency and/or Family Court to consider the criminal charges when making an order for contact.
- Where the criminal court has serious concerns about contact in the immediate future, the court can impose conditions of release providing for no contact for a limited time, followed by access as determined by the child protection authority and/or Family Court, in consideration of all charges.
- Judges can direct that orders for interim release and probation orders be provided to child protection agencies to ensure that they are informed of all relevant conditions. If the order contains restrictions on contact with a child, the court can include a provision prohibiting the defendant from applying for a variation in custody or access to that child except on notice to the local child protection agency.
- Judges and parties in both family and criminal proceedings can come together in joint settlement conferences to find solutions that work for the family while protecting children and victims of abuse.

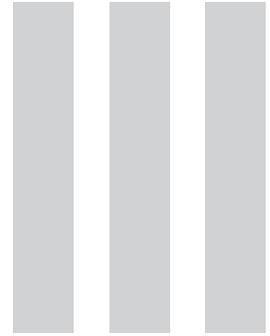
WHAT MAKES A JUDGE PROBLEM-SOLVING?

Researchers identified an international group of approximately 50 judges who took a problem-solving approach to judging, and asked them to complete the statement: “One way that I practise TJ in my courtroom is ...”. The following statements summarize their responses.¹²⁷

- Speaking directly to the defendant in language and a tone of voice I think he or she will understand.
- Finding something positive to say about the defendant; praising positive steps toward recovery; identifying and building on any indications or demonstrations of willingness to try to effect positive change.
- Learning as much as I can about each defendant; trying to understand where a defendant is coming from – educationally, socially, psychologically – so they feel that I know and care about them.
- Taking into account the impact of police and court processes to date.
- Viewing the case as a primarily emotional, not legal, event.
- Not allowing therapeutic/anti-therapeutic considerations to trump legal considerations.
- Communicating to the parties that I understand their plight and the emotions involved.
- Considering any cultural/linguistic factors that have an effect on a defendant’s understanding of communication in the courtroom.
- Using research-based decision making.
- Working in a collaborative fashion with lawyers, health care professionals, probation officers, and community organizations to provide a comprehensive treatment plan.
- Looking at each defendant’s support system and utilizing that system in the treatment plan.
- Listening carefully to each person who comes before me.
- Being mindful of the impact of my words and actions on all participants.
- Explaining my decisions to all parties.
- Trying to schedule all of my contested cases for a case management conference so everyone appears informally and expresses their position. By doing so, often the problem can be resolved.

- Using any influence I might have to encourage the client to get services he/she needs to be well.
- Always asking an offender, when they say that they will not offend again, what they are going to do to ensure that they do not offend and what supports they have in place.
- Getting a defendant to explain what he/she has agreed to do and to explain how he or she is going to do it.
- Asking defendants to explain why they think they offended: "What made you do it?"
- Insisting on participation by all family members who are present at the disposition stage for an offender.
- Being absolutely open about discussing underlying problems.
- Constructively incorporating psychological or psychiatric assessments with the parties and their lawyers as a step toward problem-solving.
- Treating clients/defendants with respect.
- Letting clients ask questions and report positive progress.
- Requiring treatment and medication compliance as conditions of release.
- Setting status hearings to monitor court orders.
- Using incentives (e.g., applause, positive affirmations/reinforcement, encouragement) to reward compliance, and sanctions (e.g., increasing release restrictions) for non-compliance.
- Educating myself and parties about mental-health and substance-abuse disorders, treatment, and available community resources.
- Believing that people can change.
- Recognizing that you can't punish people to make them get better.
- Viewing the person as a whole instead of seeing only the parts of them that committed a crime.
- Determining what would be in the best interest of the community.

PROBLEM-SOLVING SKILLS FOR OTHER PROFESSIONALS



“ Visitors [to the drug court] often can’t tell who is the Crown and who is the defence. We get into a team approach and sometimes the Crown has a more charitable view than the defence counsel. We try to problem solve and to come up with a plan that will move the client that much further towards a positive goal. By engaging the group, the usual roles drop away.”¹²⁸

Associate Chief Judge Clifford Toth, Provincial Court of Saskatchewan

8. LAWYERS IN PROBLEM-SOLVING COURTS

In his autobiography, Mahatma Gandhi described a case in which he represented the plaintiff in a civil claim. His client won judgment, but the defendant was unable to pay the entire amount. Gandhi explains the resolution they reached, and the effect it had on his career, as follows:

There was only one way. [My client] should allow him to pay in moderate instalments. He was equal to the occasion, and granted [the defendant] instalments spread over a very long period. It was more difficult for me to secure this concession of payment by instalments than to get the parties to agree to arbitration. But both were happy over the result, and both rose in the public estimation. My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul.¹²⁹

Problem-solving courts rely on the willingness of lawyers and other professionals to alter – to some extent – their traditional adversarial role in favour of a more team-based, collaborative approach. Adopting a team-based approach requires that all members of the team be willing to adjust their outlooks and work in a coordinated fashion. Crown and defence lawyers, for example, must be able to see themselves as members of the team with the common goal of the best outcome for both the accused and society.

The shift toward a problem-solving approach to lawyering across the legal profession – family, criminal and civil – has been called the **comprehensive law movement**.¹³⁰ The two uniting principles of this movement are the focus on a positive result for the individual or individuals involved beyond the legal outcome (such as personal healing and change) as a key part of the resolution of a case, and the integration of considerations beyond legal rights and obligations (such as psychological matters, human development, and community well-being).¹³¹

RELATIONSHIP-CENTRED LAWYERING

The increasing interest in problem-solving approaches in the legal profession is part of a shift in the concept of the lawyer's role and the understanding of what it is to be an advocate.¹³³ This development is evident in the increasing incidence of professional development courses related to dispute resolution and other non-traditional forms of

lawyering, the growing emphasis in the law schools on problem-solving skills development, and in the literature about lawyers and lawyers' roles.¹³⁴ For example, the University of Ottawa Faculty of Law and the College of Law at the University of Saskatchewan have mandatory courses on problem-solving skills for first-year law students and build on those with advanced electives for upper year students.¹³⁵

Professionals in the fields of social work and law have developed a framework for the lawyer-client relationship based on the goals of the comprehensive law movement, known as **relationship-centred lawyering**. The framework focuses on three areas of competency for lawyers: understanding the client's context, including culture, family, and community, from a social science perspective; process-oriented perspectives which focus on both justice and effectiveness (such as navigating between the criminal justice system and systems involved in the delivery of social services); and affective and interpersonal perspectives, including emotional intelligence and cultural competence (which require the lawyer to empower the client, focus on the client's strengths, be non-judgmental, and appreciate and manage the client's emotions in the manner which will most assist the client to meet her goals).

This approach is designed to allow the lawyer to relate to the client in the client's particular context, with a focus that includes not just the legal issue at hand, but issues related to culture, family, community, and the systems with which the client interacts.¹³⁶

“ The ideal of a therapeutic interaction in the legal context is not confined to that between the judicial officer and the participant. There is a growing understanding of the need for a therapeutic interaction between lawyer and client not only in relation to lawyers practicing in problem-solving courts but also those in practice in other fields of law.”¹³²

Michael King and Julie Wagner

This form of lawyering, which is not new and is practiced by many lawyers intuitively, can have the following positive outcomes:

- improved professional relationships with clients
- improved client well-being
- improved relationships with legal decision makers
- improved relationships with other interested parties and witnesses
- improved well-being for the helping professional.¹³⁷

Many of the techniques used by problem-solving judges listed below may also be adopted by counsel.

- Active listening
- Using clear language
- Empathy
- Focusing on the underlying problem rather than the legal result.
- Fostering the active participation of their client in devising proposed solutions such as probationary plans, rather than thinking for the client.
- Being aware of community partners, groups, and resources that could be of assistance to clients.
- Becoming familiar with the psychological and social causes of anti-social behaviour. For example, criminal justice professionals are used to a system of escalating sanctions, in which defendants are punished more severely each time they fail; they may benefit from the expertise of treatment professionals, who expect relapses and understand that they are a normal part of the rehabilitation process.¹³⁸

Some of these approaches are being recommended by law societies and bar associations in Canada, as the following examples illustrate.

- The Barreau du Québec suggests that its members use a checklist with new clients in civil and family law matters to explore their beliefs on how much the process will cost, how long it will take, how familiar they are with alternative dispute resolution options, whether they would be willing to use mediation or other out-of-court processes, and what they hope to achieve through the process.¹³⁹

- The Barreau also provides members with a clear language guide for use with clients.¹⁴⁰
- The Law Society of British Columbia provides members with a criminal procedure checklist that suggests lawyers be alert to cultural and communication differences, become familiar with their client’s background and community, assess available resources when preparing for sentencing, and provides references for practicing with Aboriginal clients. The checklist also recommends that lawyers obtain information on whether fetal alcohol spectrum disorder or fetal alcohol effect has been diagnosed.¹⁴¹

FAMILY LAW

Many family law practitioners have moved away from the traditional adversarial approach toward collaborative family law, in which the parties and their counsel commit to cooperative, constructive negotiation, with the goal of avoiding court altogether. A lawyer using the traditional adversarial approach may not encourage mediation or settlement with an angry client focused on litigation; the relationship-centred lawyer, in contrast, may advise the client on the non-legal consequences of continued litigation, such as the impact on the children, and will “try to gain a better understanding of the basis for the client’s anger... such that [the anger does not] interfere with the client’s ability to focus on the true interests related to the legal matter at hand, such as the children’s needs.”¹⁴²

Collaborative family law organizations are now in existence in most provinces.¹⁴⁴ Members have special training in the collaborative process. Their clients are required to sign an agreement committing themselves to resolve their issues without resorting to court. If agreement is not reached, the spouses will retain new counsel and go forward with litigation. The Collaborative Family Law Group in Victoria, B.C., describes the role of the lawyer as follows. “Each spouse’s lawyer advises and advocates for their own client, but is also committed to working with the collaborative team to help the spouses create solutions that are in the best interests of the family as a whole. Collaborative lawyers know from experience that the collaborative process is more efficient in time and cost and is more rewarding to the spouses that resolution through the courts.”¹⁴⁵

“ A good litigation lawyer should be practical, child-focused (in custody and access cases), and settlement-oriented. Look for solutions, not problems. Encourage clients to focus on the future rather than rehash the past. Lawyers can be major role models in teaching clients to adopt mature attitudes and behaviour.”¹⁴³

**Justice Harvey Brownstone,
Ontario Court of Justice,
*Tug of War***

CIVIL LAW

In private law matters, extensive procedural reform and the emergence of newly savvy clients seeking problem-solving and value for money has changed the model of client service. “This role is moving away from the provision of narrow technical advice and strategies that centre on litigation and fighting toward a more holistic, practical, and efficient approach to conflict resolution,” notes Professor Julie McFarland.¹⁴⁶ She describes the “new lawyer” as one who, while not totally different from the traditional civil litigator, recognizes that the vast majority of her cases will settle, and assumes – and assists her client in realizing – that direct negotiation is possible. The new lawyer also understands that conflict is often not strictly about rights and entitlements, but that “these are conventional disguises for anger, hurt feelings, and struggles over scarce resources.” She focuses clients on their interests as opposed to what they believe they deserve. The key characteristics of the new lawyer are: an elevation of negotiation, as opposed to litigation, skills; the elevation of interpersonal rather than courtroom communication skills and emotional intelligence as well as analytical ability; and a belief that in all but exceptional cases, the client is a partner in problem-solving.¹⁴⁷

CRIMINAL LAW

The requirements of the *Gladue* decision and other restorative justice initiatives have also changed the way some criminal defence lawyers approach litigation to focus on rehabilitation and ensure that they are familiar with the treatment options available to their clients. In many problem-solving courts, both Crown and defence counsel receive specialized training in the specific issues affecting the community and in the importance of addressing the underlying cause of the defendant's involvement with the justice system.

Some Crown counsel may be led to adopt a problem-solving approach for the same reason many judges do: they realize that the traditional approach may not be effective in reducing recidivism, and decide to explore other means of addressing the underlying factors leading to the defendants' involvement in the criminal justice system. Rupert Ross, a former assistant Crown attorney who practiced in northern Ontario, describes asking himself where all the violence in these communities came from. He eventually began educating himself about the history of residential schools in Canada, and the resulting post-traumatic stress disorder affecting many people in Aboriginal communities.

This knowledge led Ross to the conclusion that “absent effective ‘de-traumatizing’ programs..., jails will only serve to do further psychological harm, and put tiny communities further at risk. In my own view, we should be sending as few people into that environment as we safely can....” He also laments the views he held prior to gaining this understanding of the challenges facing the communities he worked in. “Despite my 23 years working in this environment, it is only in the last few years that the cause-and-effect relationship between initial traumatising and perpetuated complex PTSD has finally been made clear to me. That means that I too have regularly misinterpreted much of the behaviour of aboriginal people labouring under complex PTSD, and have come to judgments about them that are as harsh as they are mistaken.”¹⁴⁹

“ We go over the files, asking, ‘How are they doing? How do we stop them from relapsing?’ Pre-trial discussions in a traditional court do not have the same atmosphere ... You have to change your mindset from: ‘They’re on that side and want my client to face this penalty,’ to: ‘They’re suggesting this because they think it’s going to help the client.’”¹⁵⁰

Shellie Addley, duty counsel, Toronto Drug Treatment Court

THE CHALLENGES OF ADOPTING A TEAM APPROACH

There are challenges in moving toward a more therapeutic approach to lawyering. However, the key elements of the traditional adversarial approach, such as the defence lawyer’s concern for due process, and the Crown’s concern for public safety and the comfort of the victim (see page 88), are not incompatible with therapeutic justice. Indeed, it has been suggested that ensuring due process through zealous and caring representation is a form of “process-oriented therapeutic jurisprudence,” while encouraging clients to seek treatment or engage in other problem-solving approaches to address the underlying issue is “outcome-oriented therapeutic jurisprudence.”¹⁵¹

“ ... It is rewarding to work with clients, Crown counsel, judges and non-legal participants to develop solutions to some of the compelling problems that clients face. These problems are less likely to be addressed in the conventional courts.”¹⁵²

Edward Kelly, barrister and solicitor

Edward Kelly, a Toronto lawyer who has represented clients in the DTC, points out that lawyers are obligated to attempt to obtain and follow the instructions of their clients: “I must not prevent my client from accessing the conventional adversarial mechanisms against his or her wishes even if I believe that his or her interests would be better served by involvement in a problem solving court. Even where my client agrees to involvement in a problem solving court, I must continuously evaluate his or her willingness to continue to participate. It is particularly important to ensure that the client continues to consent expressly to the disclosure of information and/or counselling and treatment conditions.”¹⁵³

It is essential for counsel to adopt a non-adversarial approach in negotiations with the Crown. The defense should speak candidly about his or her client's personal circumstances and particular challenges in order to ensure that the Crown is in possession of sufficient information to be willing to consider alternatives to conventional prosecution. "I must also seriously consider the perspective of non-legal parties who are already involved with my client or who are willing and able to provide support." As Mr. Kelly highlights, family members and friends, psychiatrists, psychologists, counsellors, court and community support workers, and others, can provide valuable information and assistance in formulating practical and creative rehabilitative strategies. "Court processes and orders can encourage rehabilitation but it is far more likely to occur with community-based therapeutic and instrumental support in place."¹⁵⁴

LAWYERING WITH VULNERABLE CLIENTS: THE EXAMPLE OF FETAL ALCOHOL SPECTRUM DISORDER (FASD)

Lawyers adopting a problem-solving approach consider it their responsibility to understand the common issues and challenges confronting their client population. Crown attorneys and child protection counsel who have a problem-solving approach will similarly try to understand the underlying causes of the accused's or parent's difficulties. Their approach with the individual, both in terms of direct communication and the position they take in court, will be informed by this understanding. We use the example of clients with fetal alcohol spectrum disorder to demonstrate the need for lawyers to go beyond strict consideration of legal issues in order to effectively represent their clients.

“ FASD is a problem that is not going away. Lawyers and judges will increasingly have to deal with its implications.”¹⁵⁵

Professor Kent Roach and Andrea Bailey

“ The cognitively challenged are before our courts in unknown numbers. We prosecute them again and again and again. We sentence them again and again and again. We imprison them again and again and again. They commit crimes again and again and again. We wonder why they do not change. The wonder of it all is that we do not change.”¹⁵⁶

Judge C. J. Trueman, Provincial Court of British Columbia

It is suspected that a large number of individuals involved in the criminal justice system have diagnosed or undiagnosed FASD, a range of impairments caused by exposure to alcohol *in utero*.¹⁵⁷ People with FASD may have impaired judgment, poor impulse control, aggression, inappropriate sexual behaviour, and are extremely resistant to change – all characteristics which make them at risk of being involved with the justice system. At the same time, they have traits which present unique challenges to lawyers and judges: for example, they tend to make false confessions, cannot understand consequences, have memory problems, and may be easily manipulated by leading questions.¹⁵⁸

The inability of the traditional criminal justice system to deal effectively with the realities of criminal behaviour becomes strikingly apparent when the offender has FASD: “The traditional principles of sentencing emphasizing punishment and deterrence have little or no effect on such individuals because the organic nature of [the disorder] impedes the individuals’ ability to adapt their behaviour.”¹⁵⁹

Identifying FASD

An understanding of these challenges is essential to effective representation and effective problem-solving for clients with FASD, yet most people with FASD do not display any noticeable signs of the disorder. Having a proper diagnosis of FASD is important at all stages of a case – plea comprehension, trial fairness, judicial interim release and community sentencing plans. Screening mechanisms have been devised to assist non-professionals in detecting possible FASD, which suggest that the following symptoms may indicate FASD:

- adaptive behaviour problems
- language problems and information processing difficulties
- attention deficit problems
- reasoning problems (an inability to learn from experience, connect cause and effect, or appreciate the impact of their behaviour on others)
- memory impairment.¹⁶⁰

Lawyers in criminal defence practices can ask their clients about any FASD-related diagnoses, or about their childhood, in order to assist them in determining whether the client may in fact have FASD if no diagnosis has been made. The key question for diagnosis is whether the individual's mother consumed alcohol during her pregnancy. However, this is a sensitive question and will require a non-judgmental, non-threatening approach to confirm, either with the mother herself or with reliable family members. Medical and child protection records may also provide useful information. An FASD diagnosis requires an assessment by a medical practitioner and a psychologist, as an assessment by a psychologist or other expert may be necessary for planning for long-term support and supervision. Many individuals may resist providing the information necessary for a diagnosis out of concern that the information will be used against them. If handled correctly and at an early stage, such as in youth court proceedings, a diagnosis can be the first step in an approach which is more appropriate to the individual's needs and strengths.

Working with clients who have FASD

Lawyers and other professionals with experience working with clients who have FASD have made the following suggestions to work effectively with these clients.

- When under stress the first language will be the language for best comprehension. Use a translator for the appropriate language. Ask for a support person to sit with the person with FASD.
- Flexibility is helpful for people with FASD, who usually have trouble with dates, times and appointments.
- Adjust how you speak if you know or suspect the client has FASD. The main principles are to keep language simple and to avoid abstract concepts. Keep the environment quiet and calm, with not too many things on the walls – not too stimulating or overwhelming. Be prepared to listen and learn from the client.
- Reducing distractions in the court room aids in communication (e.g., no fans, put the pens in drawers, move the chairs closer to the judge to reduce the extraneous stimulation). Decrease the amount of stimulation within the court room or law office to assist with focusing on the task of communication.

- People with FASD respond well to a counsellor or advocate who provides clear feedback on the consequences of their behaviour, followed by helpful suggestions. Decisions for FASD-affected offenders should be realistic and practical.
- People with FASD struggle to learn and need to be given time to digest new things and change their behaviour. It may take time, even months or years, for important messages to reach an FASD-affected offender.
- People of all ages with FASD tend to be suggestible and easily influenced by peers; one of the main characteristics of FASD is the mimicking of maladaptive behaviours. The most effective techniques for reducing these behaviours are based on positive (supportive) rather than negative (judgment and punishment) modes of behaviour change.
- Minimizing the number of tasks an FASD-affected person has to do and taking FASD into consideration where there is a breach of conditions will also facilitate overall compliance and success. Courts and parole boards can be creative in crafting dispositions for FASD-affected offenders and all relevant court personnel should be trained on FASD.¹⁶¹

Understanding the legal implications of FASD

Lawyers who represent individuals with FASD need to be familiar with the developing jurisprudence in this area; FASD considerations may be particularly relevant in the following.

- Ability to understand and exercise the right to counsel. According to Roach and Bailey, the Youth Criminal Defence Office in Calgary provides young people with FASD cards which deny consent for searches and interrogations. This is an effort to address the tendency of people with FASD to waive their rights when confronted with authority.¹⁶²
- False confessions and voluntariness of statements.¹⁶³
- Fitness to stand trial and mental disorder defence.¹⁶⁴

- *Mens rea*¹⁶⁵
- Sentencing
 - Obtaining assessments
 - judicial notice of FASD
 - considering culpability
 - FASD as an aggravating and/or mitigating factor
 - dangerous offender applications
 - crafting conditions.¹⁶⁶

Lawyers who know or suspect their clients have FASD may at times need to recognize that the disability prevents their clients from properly instructing counsel.¹⁶⁷ There are also strategic implications for counsel considering seeking a finding that their client is not fit to stand trial, or disclosing the FASD in hopes that it will be considered as a mitigating factor.¹⁶⁸

FOR MORE INFORMATION ON PROBLEM-SOLVING PRACTICES FOR LAWYERS:

- International Academy of Collaborative Professionals: www.collaborativepractice.com/practiceGroupByCountry.asp?country=Canada
- Cutting Edge Law: www.cuttingedgelaw.com

FOR MORE INFORMATION ON FASD AND THE LEGAL SYSTEM:

- Fetal Alcohol Spectrum Disorder and Justice: <http://fasdjustice.on.ca>
- David Boulding: www.davidboulding.com

“ ... There is a need to evaluate how the criminal law can respond to the challenges of dealing with significant numbers of people with FASD who come into and may remain in the criminal justice system. Ignoring FASD will only make the problem worse and contribute to the increasing number of mentally disabled and Aboriginal people that are incarcerated. At the same time, those who advocate greater recognition of FASD in the criminal law should be careful to ensure that the solutions themselves do not impose greater harms on people with FASD.”¹⁶⁹

Professor Kent Roach and Andrea Bailey

9. COURT STAFF: RESOURCE COORDINATORS, CASE-, AND COURT WORKERS

Problem-solving courts can employ specialized staff to keep track of sentencing and rehabilitation options, help judges find a best match between an offender and a treatment program, cultivate and maintain networks with the partner community and social agencies, and assist the offender in navigating the court process. Court resource coordinators at the Midtown Community Court in New York City, an early example of such a role, sit in the courtroom and are integrated into the case processing system. The resource coordinator also links criminal justice and social services professionals with the court and offenders.¹⁷⁰ Specialized case-workers have significant roles in many Canadian problem-solving courts. They are often employed by partner agencies, but work in the court.

VANCOUVER DOWNTOWN COMMUNITY COURT (DCC) TEAM

In addition to the judge, sheriff, counsel, and court staff, the DCC team consists of a forensic psychiatrist, a nurse, health-justice liaison workers, employment assistance workers, a victim services worker, a B.C. Housing support worker and a native court worker. The DCC team aims to reduce recidivism by assisting offenders in locating social, health and corrections services so they may take control of their problems.¹⁷¹

ABORIGINAL PERSONS COURT IN TORONTO

The Aboriginal court workers assist Aboriginal offenders and their families by explaining their legal rights and obligations as well as the court's processes. Court workers also help to find counsel and prepare release plans for bail or sentencing purposes.¹⁷²

The caseworkers are responsible for compiling a “*Gladue* report” on the accused’s childhood, family, education, discrimination, and addictions for the court to consider.¹⁷³ In order to gather this information, the caseworker interviews the client, family members and other people who know the offender. Other interviews may be conducted with individuals who can put the circumstances of the individual’s home community into context. In addition to putting the offender’s situation into the Aboriginal context, the report provides valuable information which will assist the court in crafting a sentence that is appropriate, proportionate, and emphasizes rehabilitation where community safety is not at risk.¹⁷⁴

DOMESTIC VIOLENCE TREATMENT OPTION, WHITEHORSE

The DVTO court coordinator pays attention to the process of growth, evaluation and education at the DVTO. The coordinator acts as both advocate and facilitator. His responsibilities include coordinating the large and diverse team of the DVTO Court, providing information to court participants and members of the community regarding the operations of the Court, maintaining cooperative relationships with partner agencies and providing workshops and training to members of the community.¹⁷⁵

PROBLEM-SOLVING SENTENCING

IV

“ One of the biggest concerns in [therapeutic] sentencing has to be rehabilitation. You can’t accomplish deterrence without rehabilitation. In practical terms, that comes into play in looking at the viability of conditional sentence orders... We are keeping an eye out for the protection of the public but allowing for some sort of rehab that will hopefully be more effective than what would be offered in a custodial setting.”¹⁷⁶

Judge Jocelyn Palmer, Provincial Court of British Columbia

The criminal sentencing process is an opportunity to problem-solve. The terms of a sentence can provide an offender with the means to confront wrongdoing and to begin (or continue) a process of change and healing.

This section provides more information and ideas for judges on therapeutic sentencing.

10. CANADIAN SENTENCING PRINCIPLES¹⁷⁷

In September 1996, the Canadian Parliament passed Bill 41, which enacted comprehensive changes to the sentencing provisions of the *Criminal Code*.¹⁷⁸ These revisions, as interpreted by the Supreme Court of Canada, have incorporated some therapeutic aspects into the criminal justice system and have helped judges adopt a problem-solving approach to sentencing.¹⁷⁹ Specifically, the legislation embraces the concept that prison ought to be a last resort in sentencing, focuses on the restorative rather than punitive goals of sentencing, promotes a sense of accountability, and attempts to rehabilitate or heal the offender.¹⁸⁰

- **Section 742.1** contains a **conditional sentence** option. This option permits judges to allow the sentence to be served in the community rather than in prison. A conditional sentence may be ordered where the court is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing in ss. 718 to 718.2 of the *Criminal Code*. A conditional sentence is not available in instances, such as murder, where the offence provides for a mandatory minimum term of imprisonment. In 2007, the section was amended so that conditional sentences cannot be ordered for violent crimes. This amendment has significantly limited judges' ability to impose conditional sentences.

Other provisions of the legislation embrace the concept of therapeutic or community-based sentencing.

- **Section 717** allows for “alternative measures” programs for eligible offenders, subject to the sentencing purposes and principles set out in section 718. Alternative measures programs are the models used primarily by provincial and territorial governments in administering restorative justice through conventional criminal justice systems. Alternative measures must be authorized by the Attorney General or the Attorney General's delegate, and the person considering whether to use the measures must be satisfied that they are appropriate to both the needs of the offender in the interests of society and of the victim. The offender must accept responsibility for the offence.¹⁸¹

- **Section 718.2(d)** incorporates the notion that no person ought to be deprived of his or her liberty if less-restrictive sanctions may be appropriate.
- **Section 718.2(e)** specifically states that all alternatives to incarceration ought to be considered by the court in every case, but especially in the case of Aboriginal offenders.
- **Section 720** states that “A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed.” *If both the Crown and the defendant agree*, however, a judge may postpone sentencing, allowing the defendant the opportunity to put in place or complete a treatment plan or fulfill other conditions before sentencing. A judge may then grant a conditional or non-custodial sentence.

In *R. v. Proulx* (2000),¹⁸² the Supreme Court considered the new sentencing legislation generally and the conditional sentence provision in particular. It held that a conditional sentence is available in principle for all offences in which the statutory prerequisites are satisfied. As well, the Court noted, failure to consider this option may well constitute reversible error.¹⁸³ The Court went further to say that whenever both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration.

- Delaying the imposition of a sentence might be useful in cases where a judge isn't certain about the advisability of a non-custodial disposition (such as probation or imposing a conditional sentence). During this period, the court can obtain the information it needs to make a more informed decision or set conditions that allow the offender to demonstrate improved behaviour.¹⁸⁴ For example, a judge might say to a defendant, “The Crown has recommended that you go to jail. If you agree, however, I'd like to delay sentencing you. I'd like you to come back before me in two weeks with a treatment plan. If I find the plan to be reasonable and realistic, I will allow you to engage in the treatment program. While you are in treatment, I will require you to appear before me once a month to report on your treatment progress. If you successfully complete the program, and do not breach any other terms of your bail, then I will impose a non-custodial sentence, which will probably be a suspended sentence and probation. If, however, you breach any terms of your bail, your bail may be revoked and I may agree to the Crown's request that you be sentenced to jail.”

- Some treatment facilities will not take clients who are in custody. Delaying sentence, therefore, may facilitate getting an offender into treatment. Alternatively, a judge may grant bail for a day or a few hours while an offender is interviewed for treatment, thus allowing the offender to meet the treatment facility's requirements. A judge's familiarity with treatment options and social services in his or her community can inform decisions about sentencing.

Other sections of the *Criminal Code's* sentencing provisions empower judges who wish to monitor an offender's progress and compliance, and to impose certain conditions upon sentencing. For example, the condition may state that the offender must attend treatment or counselling, or that the offender must appear before the court whenever the court requires it. Relevant sections include the following.

- **Section 732.1(3)(h)** allows the court to impose "such other reasonable conditions as the court considers desirable ... for protecting society and for facilitating the offender's successful reintegration into the community."
- **Section 732.2(3)** allows for the early termination of successful probationary sentences upon application to the court.¹⁸⁵
- **Section 742.3(2)(f)**, regarding conditional sentence orders, states similarly that the court may impose reasonable conditions "for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences."
- **Sections 742.4(1) and 742.4(5)** allow supervisors, offenders and prosecutors to give written notice of proposed changes to the optional conditions of a conditional sentence order. When the offender or prosecutor gets such notice, a court hearing must be held within 30 days of the court's receipt of the notice to determine whether to grant the changes sought. When the supervisor gives the notification, however, a court hearing need not be held unless requested by the offender, prosecutor or the court of its own initiative. If no such request for a hearing is made, the change to optional conditions proposed by the supervisor becomes effective.¹⁸⁶
- **Section 742.4(3)** specifies that, upon hearing of any application for changes to the optional conditions of the conditional sentence order, the court must either approve or refuse the proposed changes, and may make any other changes deemed appropriate. "Therefore, in the case of conditional sentence orders, if defence, prosecutors and supervisors became more knowledgeable about the relevance of the principles of therapeutic jurisprudence, applications for changes to the optional conditions could be done more frequently and the method of having the supervisor submit the notice to all parties and the court could be utilized to simplify the process."¹⁸⁷

11. BEHAVIOURAL CONTRACTS AND RELAPSE-PREVENTION PLANS

“ The plain-talking judge who takes a personal interest in the offender and what he or she has to say, who elicits suggestions from the offender, is accepting of the offender, treats the offender respectfully, and so forth, will probably engender compliance compared to the judge who is distant, cuts off the offender, criticizes, blames, moralizes, uses legal jargon, and does not explain the order he or she is making.”¹⁸⁸

Judge Tom Smith (ret.), *Criminal Sentences That Work*

“ We have to realize that justice is to law what healing is to medicine. If someone is misunderstood or not heard, it manifests itself as injustice, which is, in fact, a form of illness. Both justice and medicine require a return to harmony.”¹⁸⁹

Justice Michel Shore, *Federal Court of Canada*

In a medical context, **behavioural contracts** are specific agreements with health care providers in which patients agree to follow certain protocols, such as exercising, quitting smoking, and/or taking medications appropriately. Patients who sign such contracts are more likely to comply with medical advice than patients who do not. Further, if family members are aware of the patient’s promise, the patient is again more likely to adhere to the agreed-upon conditions.

Judges can adapt the principles underlying behavioural contracts to increase compliance with court orders.¹⁹⁰ For example, judges can conceptualize conditional sentences or probation orders as behavioural contracts with the offender, and create formal, signed agreements outlining specific goals and conditions, with appropriate rewards and sanctions.

The terms of a behavioural contract can form the basis of an offender's **relapse-prevention plan**. These plans are geared to teaching problem-solving skills that can interrupt the cycle of events that often leads to relapse: to curb impulsive behaviour, for example, or to anticipate and proactively cope with high-risk situations.¹⁹¹ By creating a relapse-prevention plan, an offender in essence creates his or her own conditional sentence or probation conditions.

Since such plans will involve probation authorities, it is important that they understand the problem-solving approach taken by the judge; probation may have to establish links with the necessary community resources in order to refer offenders for such counselling. Training for probation authorities can be helpful in this context.¹⁹²

GUIDELINES FOR CRAFTING BEHAVIOURAL CONTRACTS AND RELAPSE-PREVENTION PLANS

Judges can do many things to enhance the effectiveness of the orders they craft. According to Judge Tom Smith, effective orders focus on addressing an offender's "criminogenic needs" (i.e., impulse control, antisocial attitudes, associates, personality) and avoid interfering with his or her positive social activities (e.g., work, positive social networks, sports).¹⁹³ Before including a term in a probation order or conditional sentence, suggests Judge Smith, consider the following questions.

1. **What do I want to achieve?** Effective orders aim to:
 - change antisocial attitudes and beliefs
 - increase self-regulation of anger
 - help the offender recognize situations that get him or her into trouble and formulate a plan to deal with them
 - encourage the offender to replace bad habits with positive ones
 - reduce stressors such as poor accommodation
 - promote association with positive role models.

2. **What do I want to preserve?** Effective orders protect bonds to people and situations that are positive influences (e.g., employment, volunteer work, education).
3. **What do I want to avoid?** Effective orders identify and incorporate high-risk people and situations, and aim to limit an offender's exposure to these triggers.
4. **Is this term necessary?** What will it accomplish? Effective orders are as simple and focused as possible, zeroing in on problematic attitudes or behaviours in an effort to minimize their impact. Offenders often require assistance with substance abuse, family and marital dysfunction, unemployment, accommodations, peer problems and criminal thinking patterns. Dealing with too many conditions leaves less time for probation to address offenders' most pressing needs.

When crafting orders, judges can take a problem-solving approach by considering the following guidelines:

- involve the offender
- identify and incorporate high-risk situations
- make informed decisions
- insist upon responsibility
- set specific goals
- set specific rewards and sanctions
- encourage participation of family and community members
- treat the offender with dignity and respect
- word orders positively
- schedule regular review hearings/judicial supervision.

INVOLVE THE OFFENDER IN CRAFTING THE PLAN

By actively involving the offender, a judge increases his or her ownership of the plan and creates intrinsic, rather than external, motivation for success. At the outset, then, judges should encourage an individual's active involvement in the negotiation and design of the behavioural contract or rehabilitative plan, and provide as great a degree of choice (e.g., location of treatment facility) as possible in the circumstances. For example, a judge can ask an offender, "If I put you on probation would you agree to take substance abuse counselling?¹⁹⁶ Do you have a preferred treatment centre or counsellor?"

“ Giving offenders the respect of involving them in the sentencing process can make a huge difference in their willingness, their success. An offender's public acknowledgement is important: getting his approval to the plan; stating openly in court that he sees the need for it and is willing to make it work. Now he or she has agreed to do it publicly and is part of the plan.”¹⁹⁵

Judge Sharon Van de Veen, Provincial Court of Alberta

People are much more likely to comply with orders they understand.¹⁹⁸ Involving the offender increases the likelihood that he or she will understand the terms and can identify any that may be difficult to comply with. It can also help a judge to identify pro-social aspects that may contribute to rehabilitation. "I never have a probation order without asking the accused, 'Do you understand the conditions and is there anything with which you can't comply?'" says Associate Chief Justice Peter Griffiths, Ontario Court of Justice. "And often there are impediments to compliance that come out of that inquiry. The accused with a house arrest condition might say something

“ Have the person explain things in his or her own words. If the conditions of probation are read to the accused, I will ask that he or she repeat three of those conditions. I ask, 'What happens if you do not respect these conditions?' This way, I can see if the accused truly understands the conditions and also what stands out for him.”¹⁹⁷

Juge Anne-Marie Jones, Cour de Québec

like, 'I visit my mother in the hospital every day – can I have permission to keep doing that?' And that exception can be added to the order.”¹⁹⁹

IDENTIFY AND INCORPORATE HIGH-RISK SITUATIONS

Judges can help offenders learn how to manage risk by asking them to identify:

- high-risk situations
- how to negotiate or avoid such situations in order to avoid relapse and possible re-arrest
- how this plan is different from past efforts to avoid relapse.

For example, “I realize that I am at highest risk for criminal behaviour when I party with Joe on Friday nights. I will therefore stay home and rent a DVD on Friday nights.”²⁰⁰

By creating a relapse-prevention plan, an offender gains insight into the chain of events that can lead to criminality. In essence, an offender creates his or her own conditional sentence or probation conditions – and thus is more likely to regard them as relevant and fair, and therefore comply with them.

MAKE INFORMED DECISIONS

Judges need to collect and consider the relevant background information necessary to make informed, problem-solving decisions. Pre-sentence reports (PSRs), psychological assessments, victim impact statements, police and parole reports, and criminal records provide crucial background information that may help illuminate some of the causes behind criminal behaviour – such as addiction, substance abuse, mental-health issues, or psychological trauma – that may well respond to or benefit from treatment. Where possible, judges should avail themselves of these resources and use them to make informed choices when sentencing. Relevant background information might include the following information about the offender.

“ People’s records are very telling. If someone appears before me whose record shows an addiction or alcohol problem, assaults and drive impaireds, I will generally send them for an assessment. I tell them that I can’t tell them whether they have a problem or not but the circumstances suggest that this might be the case and certainly it would be to both our advantages to know.”²⁰¹

Judge Susan V. Devine, Provincial Court of Manitoba

- Criminal record
- Family
 - Is there a support system in place?
 - Are there vulnerable children in the home? A spouse/partner?
 - In the case of domestic assault, is the victim pregnant? If she is, this may increase the likelihood of domestic violence, as well as her vulnerability in such a situation.²⁰²
- Employment situation
- Health problems (including addiction problems and mental health concerns)
- Education (including skills, literacy status)
- Motivation
 - Has the defendant accepted responsibility for his or her actions?
 - Is there a relapse-prevention plan?
 - Has the defendant taken any actions toward rehabilitation or restitution?
- Progress in treatment
- Compliance with other court orders (as well as the existence of any new court cases).²⁰³

For Aboriginal offenders, the sentencing judge must also take into account the unique systemic and background factors of the offender, and to consider how the offender has been affected by those factors.

Where formal PSRs are not available, judges can scan an offender's record for mentions or signs of problems that may respond to a more therapeutic approach. If an addiction problem is not specified, signs of substance abuse can include the following.

- Multiple theft charges
- Multiple charges of impaired driving
- A criminal record that begins in mid-to-late adulthood: "When I look at a person's record, the [sign] that's most telling for me is when the accused is 44, and there are no problems until 10 years ago. What happened? Often, that's when the addiction started: they got involved in crack cocaine at age 34," notes Justice Peter Hryn of the Ontario Court of Justice.

Judges can also look for signs that a defendant has coped successfully with substance abuse in the past, and therefore may be able to again. “I look at a gap in a criminal record and ask why it’s there,” says Justice Hryn. “Often I’m told there’s an addiction but that during the gap the offender received treatment, stopped using, became involved in a good relationship and got a job. When he lost the relationship and the stability that provided, he relapsed – and then the job also went and the record started over again.”²⁰⁴

When in doubt about addiction or other possible causes of criminal behaviour, judges can simply ask defendants about the reasons behind the events. “Just ask, ‘Why did you do this?’ [An offender will] usually have said to me, ‘I’m sorry, I apologize.’ But if you ask why, you often get something about addiction or other stresses in his life – for example, he’ll say, ‘That was a time when my mother passed away, and I got drunk and got in a fight.’”²⁰⁵

INSIST UPON RESPONSIBILITY

A key first step in healing and accepting treatment is taking responsibility for one’s actions. Yet, people with substance-abuse problems frequently deny the extent of their addictions (“I can stop whenever I want”), while individuals who commit acts of domestic violence or sexual molestation frequently deny responsibility for, minimize, or otherwise distort the seriousness of their acts (“I didn’t do it/I did it but it wasn’t my idea/She made me hit her/I did it but it wasn’t sexual,” etc.).²⁰⁶

Unchallenged and unaddressed, such “cognitive distortions” can impede healing and lead to recidivism. Judges practising therapeutically, therefore, play a critical role in helping offenders confront their cognitive distortions.

- **Refuse plea bargains or other compromises that allow offenders to escape responsibility:** Judges should keep in mind the potentially anti-therapeutic effects of such arrangements. “‘No contest’ pleas in the American context²⁰⁷ and peace bonds in the Canadian context reinforce distorted thinking by allowing the offender to avoid full responsibility for his [or her] behaviour.”²⁰⁸
- **Require offenders to recount what happened, in their own words:** To force people to take ownership of the event and minimize chances of them later denying a problem, judges can request that a defendant admit that he or she committed the offence and explain what happened – in his or her own words and not through counsel. The transcript of this detailed description can also be helpful if, later on, the offender relapses and denies participating in the offence.²⁰⁹

- **Query passive language** that removes the offender from the violent situation (“When you say, ‘She got hurt,’ what do you mean? How did she get hurt? Who hurt her?”).
- **Be aware of body language that may subtly reinforce a person’s anti-social behaviour or cognitive distortions**, such as nodding, smiling, beckoning, or verbally agreeing (“Uh huh,” “Yes, yes ...”) with a defendant.
- **Take victims’ healing into account as part of the therapeutic process:** As one judge notes, “Where there’s a victim impact statement, I will read paragraphs from that statement to [the defendant] in court. I want to make sure that he really appreciates the degree of emotion and harm done to the victim. That does a number of things: it’s therapeutic to the victim, for the community as a whole, for the gallery, for the media there who report on it, and hopefully notwithstanding the anxiety of being in the courtroom, the offender as well.”²¹⁰

SET SPECIFIC GOALS

Setting specific goals is a key aspect to the success of a formal or informal behavioural contract. The setting of goals – which “structure and guide performance, provide direction, and focus interest, attention, and personal involvement”²¹¹ – is itself a significant factor in their achievement.

Goals will be tailored according to an offender’s specific circumstances and may include:

- entering into treatment for substance use or addiction, anger management, parenting skills, depression, etc.
- avoiding certain triggers or high-risk situations, such as associating with specific people or going to certain bars or restaurants
- developing strategies for dealing with such triggers and high-risk situations;
- finding stable and appropriate housing
- acquiring education and vocational skills (e.g., GED, high school diploma)
- maintaining employment
- finding suitable housing
- having a sponsor in the community²¹²
- being current in all financial obligations, including drug court fees and child support payments²¹³
- restorative components, such as apologizing to victims and making restitution, where possible and appropriate, for criminal and/or abusive acts.

SET SPECIFIC REWARDS AND SANCTIONS

Rewards and sanctions can be incorporated into behavioural contracts as motivating factors. These factors are generally the logical consequences of an individual's behaviour and do not need to be elaborate. Judges can consult with offenders to create appropriate and motivating rewards and sanctions.

Public judicial praise, as discussed above, is a very effective reward, as are more formal recognitions of success, such as graduation ceremonies. Judges can reward compliance by eliminating or reducing restrictions, such as curfews or number of court appearances. A judge can also promise a non-custodial sentence if a person successfully completes a treatment/counselling program and does not breach any term of his or her bail. Judges are required to mention in their reasons for sentencing both aggravating and mitigating factors; mitigating factors can be personalized while aggravating factors can be mentioned in a manner that is an objective statement of facts.

It was once thought that what judges say doesn't really matter, but research shows that judicial behaviour can influence accountability on the part of the offender. Because judges represent the society as a whole, or the state, their words of condemnation or rejection of an offender can easily cause that person to believe they are on the outside of the society to which they will ultimately return once their sentence has been served. The objective of restoring that individual to that very society is made more difficult by such condemnation. As earlier mentioned, condemning the act without condemning the person is a valuable skill for judges.²¹⁴

“ I never appreciated what a powerful tool clapping was. Often, when I talk about drug courts, it's to a roomful of professionals who have all done well in school: they have degrees, they have houses, they have success in their careers, they're used to getting accolades. But the people who are in treatment court, they've failed at almost everything in life. And for someone in extreme authority to commend them, to encourage them – to clap – is so powerful. Most professionals don't appreciate that. But it is for some of them, the most important thing in a whole week. They want to get themselves out of the situation they're in and they want to have the judge say something positive about them, and when they have done well, to applaud. And it's far more effective than the threat of remand, which they can just blow off.

**Associate Chief Judge Clifford Toth,
Provincial Court of Saskatchewan**

Rewarding positive behaviour tends to be more effective than sanctioning negative behaviour. That said, building in sanctions lets the offender know that she will be held accountable for failing to comply with the agreed-upon orders. Sanctions may include:

- more mandatory activities, such as increased community work or restorative justice projects
- increased drug and alcohol screening
- increased monitoring, including more frequent attendance before the judge and/or probation officer
- more stringent restrictions, such as earlier curfews and house arrest
- revocation of bail.²¹⁵

ENCOURAGE PARTICIPATION OF FAMILY AND COMMUNITY MEMBERS

Compliance is likely to be enhanced when family and community members can witness the creation of a behavioural contract, rather than when the contract is privately made. Such witnesses can encourage the offender to stick to the terms of the contract and provide another layer of psychological reinforcement to comply.²¹⁶

Community involvement is especially relevant in smaller centres, where criminal acts often affect a large proportion of the population, and where community disapproval can carry proportionally more psychological weight.

TREAT THE INDIVIDUAL WITH DIGNITY AND RESPECT

Offenders are more likely to comply with an order they believe was arrived at fairly, and if they feel they were heard and treated with dignity.²¹⁷ The medical literature on compliance suggests that:

if the physician appears to be distant, distracted, reads case notes, uses professional jargon, asks questions calling for brief ‘yes’ or ‘no’ answers, fails to allow the patient the opportunity to tell her story in her own words, describes the treatment plan imprecisely or in technical terms, acts paternalistically, or is abrupt with the patient, compliance with the health care professional’s treatment recommendations will be less likely.²¹⁸

Following on the medical context, in a problem-solving context, judges can increase compliance by:

- acting concerned rather than distant
- providing the individual with undivided attention during conversations
- avoiding jargon and ensuring the individual clearly understands the terms of the agreement
- allowing the individual an opportunity to voice concerns and ask questions
- avoiding paternalism.²¹⁹

WORD ORDERS POSITIVELY²²⁰

Positive statements are more effective than negative ones. The brain finds it easier to process and understand a positively worded statement (“Stay away from alcohol”) than a negatively worded one (“Don’t drink alcohol”).²²¹ Further, a negative message – “Don’t drink” – can often leave the listener wondering, “Well, what am I supposed to do instead?” Often, offenders aren’t good at figuring out what to do instead; a positively worded order can guide them.

Judges can use this fairly simple guideline when wording orders: say what you want the person to do, rather than what you don’t want them to do. Instead of saying, “You are not to be outside of your residence between the hours of 9 p.m. and 6 a.m.,” say, “You must stay in your home from 9 in the evening to 6 in the morning.”

Similarly, judges can include positive terms in the order, such as reporting volunteer work or positive interactions to probation. Probation officers report that these kinds of requirements can help build harmonious relationships with clients: instead of focusing on problems, they are focusing on positive things happening in the client’s life.

SCHEDULE REGULAR REVIEW HEARINGS OR JUDICIAL SUPERVISION

Research indicates that compliance with court orders significantly increases in circumstances where court-ordered reviews are included in the terms of the initial order.²²³ Regular reviews build rapport between the judge and the offender; research shows that this rapport and the judge's encouragement are powerful motivators.²²⁴

Review hearings:

- keep the judge informed of changes in defendants' circumstances
- remind defendants that they are still accountable to the court
- foster a relationship between defendant and judge
- provide an opportunity for judges to administer motivating rewards and sanctions.²²⁵

“ I have had people come back for review, once a month or at regular intervals, so that they maintain some sort of connection, so that they know they aren't just going out the door or to an overworked conditional sentence manager. When people know that the judge is keeping an eye on them and is expecting progress and knows that they're capable of progress ... they follow through.”²²²

**Judge Jocelyn Palmer,
Provincial Court of British Columbia**

Judges should consider setting review hearings even when they are not especially worried about an offender's lack of compliance. Review hearings scheduled when all is going well can, in fact, contribute to the reduction of criminal activity, as a judge positively reinforces an offender's efforts. Further, review hearings monitor not only the offender's compliance, but also monitor whether probation, treatment, and other services are holding up their end of the bargain.²²⁶

Scheduling review hearings may also improve fairness. Judges traditionally make decisions – for example, setting conditions of release, establishing bail, issuing restraining orders – based on predictions about the offender's future potential for abuse. These decisions, however, tend to be based on a static, “dangerous or not” model that does not account for the ongoing, dynamic factors in an individual's life: relationships, housing, employment, addiction, treatment, etc.²²⁷ Judicial supervision, on the other hand, provides both judge and offender with a dynamic forum in which to make decisions based on ongoing behaviour, progress, and/or relapse. (Resources such as the *Manual for the Spousal Assault Risk Assessment Guide* also provide a more refined set of tools for judges to make predictions about re-offence. See page 115.)

At review hearings, judges can identify and comment favourably on aspects of an offender's progress, including such factors as impressive meeting-attendance logs, letters or testimony from members of society, employment, education efforts, and a healthy or tidy appearance. If an offender is doing well, probation may apply to have certain probation conditions (e.g., curfew) changed.

Note: Some appellate courts, such as the Court of Appeal for Saskatchewan, have placed limits on the ability of judges to conduct review hearings.

DOMESTIC VIOLENCE SENTENCING PRINCIPLES

Domestic violence (DV) cases are distinct from other types of cases, such as those involving addiction or mental health issues, as follows.²²⁸

- Domestic violence involves violence between people who know each other and may or may not want to continue to have a relationship after court involvement has ceased.
- The victim may feel emotional, familial, cultural, social, and/or economic pressure to reconcile with the offender.
- The victim may live with the offender; they may be married or living in a common-law relationship. The offender may return to live with the victim.
- The victim may have children with the offender. The children may also be victims of abuse.
- The victim may be economically dependent on the offender and may suffer financially if the offender goes to jail.
- There is usually a power imbalance between victim and offender.
- All the above factors increase the possibility of further contact and violence between victim and offender, even after the justice system has intervened and no-contact orders have been put in place.²²⁹
- Domestic violence is often repetitive in nature, and tends to escalate over time.

- Victims may have already found that the criminal justice system did not respond to their needs and/or re-victimized them. They may be afraid of retaliation from their partners, and do not trust that the criminal justice system can protect them. They may be reluctant to lose control of the process once initiated, and feel that they have little opportunity to influence the outcome.²³⁰
- When victims do call police, they often do not follow through with their complaints, resulting in stayed or dismissed charges.²³¹
- There is very little evidence to suggest that mandatory arrest or increased penalties alone will deter offenders; in fact, punishing violent offenders may make them behave more violently in the future.²³²

For all the above reasons, domestic violence demands “a faster response, more effective monitoring and justice system responses that will reduce the risk of further violence,” writes Deputy Judge Heino Lilles, of the Territorial Court of Yukon. “At the same time, the response must meet the victim’s needs or otherwise she may feel re-victimized and be unwilling to access the justice system in the future.”²³³

Specialized domestic violence courts and domestic violence treatment options take into account and address the above factors through a process that focuses on offender accountability and treatment, comprehensive and ongoing victim support, and the support of a multidisciplinary team that includes police, victim services, counselling and treatment services, and community partners, among others.

Outside of the specialized domestic violence courtroom, judges can still do a great deal to address the underlying causes of abuse between intimate partners, while supporting victims and their families. Judges can keep in mind some of the following problem-solving guidelines²³⁴ when they encounter DV cases.

- While the therapeutic focus for addicted and mentally ill defendants is on rehabilitation, in DV cases the key therapeutic and judicial priority must be **offender accountability and the safety of the abused partner and any children**, with only a secondary focus on offender rehabilitation.
- Judges can expand the traditional judicial role to include development and maintenance of working relationships with other community agencies that address domestic violence and victim’s services.

- Judges can order that the offender attend batterer intervention treatment programming as a condition of bail orders, conditional sentences, and probation. Judges can seek the advice of community and social workers, and experts on domestic violence, for the appropriate program.
- To ensure the offender understands that the court takes its orders seriously, judges can **schedule regular, post-sentencing reviews**, without cause, to monitor compliance. Judges can reinforce compliance by modifying restrictions on an offender, and impose graduated sanctions – including incarceration – in the case of non-compliance. Court appearances can include DV treatment providers, victim advocates, and probation officers.
- While relapse is seen as a normal and expected part of the process of recovery from addiction or in controlling a mental health issue, the court cannot tolerate a return to violent behaviour or a breach of court orders by a DV offender.
- Alcohol and substance abuse often play a role in DV, and judges should be alive to the possible role of addiction in such cases. They can ask perpetrators and survivors of violence about substance use/abuse, and consult police reports and criminal records for signs of addiction. Treatment for substance abuse can be part of a conditional sentence or probation agreement.
- A problem-solving judge must confront the batterer’s **cognitive distortions** – the denial or minimization of violence and responsibility, and/or the blaming of the victim for the abuse. Judges can respectfully insist that offenders take responsibility for their own violence by requiring the offender to explain, in his or her own words, exactly what happened, and querying statements that minimize or deny responsibility, or blame the victim.
- Judges can also **query passive language** that removes the offender from the violent situation.
- Offenders are most open to accepting responsibility immediately after a violent incident. As time passes, cognitive distortions can set in. Therefore, a therapeutic approach involves **acting as soon as possible** after an offence or breach, and judges **should discourage delays in processing**.
- Judicial demeanour toward defendants and survivors of violence can increase compliance with court orders and have therapeutic effects. Judges can make survivors “feel welcome, express empathy, and mobilize resources for them. With offenders, judges can be respectful while insisting that offenders take responsibility for their violence and acknowledge the court’s authority over their behaviour.”²³⁵

- **Sentencing should not involve excessive fines**, as payment may be unrealistic and can jeopardize the wellbeing of the offender, the survivor of violence, and any children involved.
- Judges can “**flag children at risk and initiate appropriate referrals to child advocacy and child welfare agencies.**”²³⁶ To minimize conflict and repetition – and to ensure that orders in both cases create the best possible outcomes for the victim, any children, and the offender – judges can also seek to coordinate DV cases with other cases occurring at the same time that may involve the perpetrator, victim, or their family members.



PROBLEM-SOLVING CHALLENGES AND OPPORTUNITIES IN DIFFERENT CONTEXTS

12. SELF-REPRESENTED LITIGANTS: A PROBLEM-SOLVING APPROACH

Self-represented litigants present the justice system with many challenges, and in turn are challenged as they attempt to navigate that system without benefit of counsel. Even with a problem-solving approach, self-represented individuals present a significant challenge to judges: being impartial decision-makers while assisting one party. When one party does not have counsel, a fair trial may be an illusory goal. Yet that goal is forced upon the responsible trial judge.²³⁷

Overall, self-represented litigants require an understandable system that responds to their needs, and provides the information and advice necessary for resolving problems, making and responding to claims, and preparing and presenting their cases.²³⁸ Judges need strategies for addressing these needs while maintaining a fair, ordered and at least somewhat efficient courtroom and trial process. Judges and self-represented litigants, as well as the opposing party and their counsel and other court actors, can benefit from strategies to minimize stress and tension that can result when one party does not have a lawyer. A problem-solving orientation can provide judges with many tools and approaches to more effectively address the challenges posed by the self-represented. This chapter discusses several such strategies.

At the same time, judges need to use caution when taking a problem-solving approach with the litigant who appears without counsel, particularly when that litigant may be vexatious. Any relaxation in due process or judicial intervention, however well intended or materially helpful, can also be interpreted as biased. It is also important to acknowledge that the justice system is a highly specialized, complicated world and those without specific training or representation in that world will simply not fare as well as those with training or representation. The assistance judges may provide unrepresented parties is not a substitute for capable representation; in most cases, the best and most obvious solution is to assist the individual in obtaining counsel (with the caveat that many self-represented parties have chosen to represent themselves rather than have a lawyer, and that lawyers are simply not available or affordable for a large number of people who do not qualify for legal aid). Further, while individual judges can certainly do many things to problem-solve and help ensure equitable access to justice and a fair(er) outcome, in the end they can do only so much. The issue of self-represented litigants is systemic and must be addressed by a coordinated approach at all levels of the justice system and beyond.

**FOR MORE INFORMATION ON SELF-REPRESENTED LITIGANTS
AND THE JUDGES' ROLE IN GENERAL:**

- *Bench Book for Sitting Judges* (National Judicial Institute)

CASE MANAGEMENT FOR SELF-REPRESENTED LITIGANTS

A case management approach offers many advantages when dealing with the self-represented. In case management, the judge's role is one of assisting and facilitating, as opposed decision-making.²³⁹

Judges can hold case, settlement, or pre-trial conferences with the parties. Although these approaches require more upfront effort by judges, these early interventions may result in a smoother and more efficient process, help avoid a highly acrimonious or adversarial trial, or may resolve the issue and avoid going to trial altogether.²⁴⁰ The purpose and goals of a case or settlement conference can include the following.

- Ensuring that the self-represented litigant is aware of the drawbacks and potential consequences of proceeding without counsel, and encouraging him or her to retain counsel.²⁴¹
- Discussing the possible costs or consequences of unsuccessfully pursuing or defending a claim or unduly prolonging litigation. Many self-represented litigants consider themselves immune from any cost consequences because they are not paying for a lawyer.²⁴²
- Identifying, settling, or narrowing the issues to be decided.²⁴³
- Exploring ways to resolve the disputed issues, including alternatives to trial.²⁴⁴
- Exploring options for how the court might decide the case.²⁴⁵
- Considering any other matter that may help in a quick and just conclusion of the case.²⁴⁶
- Identifying witnesses and other evidence to be presented at trial if the case is not settled.²⁴⁷
- Ensuring disclosure and noting admissions;²⁴⁸ it is very important that the self-represented litigant understands that the evidence or facts being referred to in submissions must be stated in one or more of the affidavits filed. It may help to explain that fairness requires this, so that both parties will know the case they have to meet and will have the opportunity to reply to it before the motion is argued.²⁴⁹

- Estimating the time for trial and scheduling the case for trial, and setting a specific timetable for the next steps in the process.²⁵⁰ Judges can ensure that the self-represented litigant leaves the conference with a clear understanding about next steps and what he or she is specifically required to do between now and then: “Just so we know that we’re on the same wavelength, please tell me what you need to do before your next court appearance. When will you do that? What do you expect the other side to do?”²⁵¹

Similarly, a pre-trial conference can help organize the parties for trial. This conference is a further opportunity to explore the chances of settling the case. If the trial is to go forward, however, it can be very useful for the self-represented individual, as it provides them an opportunity to properly prepare for the trial, and understand the principles of documentary evidence and witnesses who will testify. If judges are alerted to legal and evidentiary issues, they can outline for the self-represented litigant problems that he or she may face during the trial, and steps that he or she must take to address those problems.²⁵² For example, in a pre-trial conference, a judge might consider the following approaches.²⁵³

- Address each issue raised by the self-represented litigant, and focus on the proof or evidence that will be necessary for the party to succeed. This can help focus preparation. It may also enable the party to acknowledge that, if they cannot obtain evidence, the court will not be able to rule in their favour on a particular point.
- Ask the parties if they are aware of a leading or recent case on point and if not suggest that they read it. It can be helpful to advise self-represented litigants as to whether the law is favourable or not to their position. Many individuals are more readily able to accept the idea that the law is not in their favour than the sense that they are being individually judged.
- Attempt to manoeuvre – but not push – self-represented litigants into more reasonable positions. Putting things in neutral language and explaining that the law is either for or against them may be of assistance.
- If consent is reached, verify the self-represented litigant’s understanding. Repeat the fact that they have a right to counsel.
- Write a detailed endorsement to assist the next judge.

Courtroom and trial procedures, as well as the judge's role, must be explained before the trial. The following topics can be defined and explained (often with the help of legal education materials) during a trial conference:²⁵⁴

- the order of events
- how to object to the evidence
- common rules of evidence (e.g., hearsay, the requirement for notice, report of expert evidence).

CASE STUDY

SELF-REPRESENTED CASE MANAGEMENT IN CRIMINAL PROCEEDINGS IN SASKATOON

Judge Sheila P. Whelan, Provincial Court of Saskatchewan (Saskatoon)

Self-represented case management (CM) began in response to an overriding concern for fairness, and several specific concerns, including:

- self-represented persons presenting at trial unprepared and overwhelmed
- delayed decision-making
- poorly managed applications for court appointed counsel
- lost court time due to last minute guilty pleas.

Generally, it operates as follows, with some individual variation among my colleagues.

- All self-represented persons appearing in docket who plead not guilty, seek court-appointed counsel, or appear to need assistance with decision-making, are adjourned to judge-conducted CM.
- The accused is given a one page information sheet about the CM process and directions for obtaining the Crown's disclosure. If they seek court-appointed counsel, they are given additional instructions.
- We offer CM dates within two weeks of the docket appearance as we use trial time that has come available due to late-breaking decisions.
- At the CM, a judge presides with a court clerk and deputy sheriff. The Crown assigns a prosecutor with strong negotiation skills. The judge explains the two-fold purpose of CM: voluntary discussion of the case with a view to resolution, and trial preparedness.

- The judge invites the Crown to give a summary description of its case and sentencing position. The CM may be adjourned to obtain information that may facilitate a resolution.
- Accused persons are advised that discussion of their case is voluntary and that the Crown has given an undertaking that it will not use any information conveyed without his/her permission.
- Individual styles vary, as some judges become more directly involved in persuading the parties to come to a resolution. When the accused indicates a desire to plead guilty, after the usual safeguards and cautions, the court takes the plea on the record and proceeds to sentencing.
- If a resolution cannot be achieved, the court discusses trial preparedness, including: the number of witnesses, court time required, potential applications, and any special needs. Advice and assistance is offered regarding defence witnesses being properly subpoenaed.
- Statistics kept over a two-year period show a very high success rate – we ultimately set matters for trial or hearing in less than 25% of the cases.
- The real success is measured by the response of the participants. Taken out of a busy docket and given an opportunity to “tell a judge their story” without the complexities of a trial, many accused persons respond with gratitude and relief. Prosecutors come away with a feeling of “good will.”
- Judges appreciate having presided over a less formal process in which the self-represented person experienced a greater sense of familiarity and control over the outcome.

EFFECTIVE COMMUNICATIONS WITH SELF-REPRESENTED LITIGANTS: TOOLS AND TIPS

Set ground rules up front

It is far easier for people to follow the rules when they know what the rules are. Self-represented litigants are often intimidated by the process and unsure of if and when they will be allowed to speak; setting up ground rules helps address these fears. Ground rules might cover courtroom protocol (appropriate clothing, standing when the judge enters the courtroom, not interrupting, who speaks and when, where to sit, etc.). These may be available in written form or conveyed by a court attendant or bailiff.

Maintain order

When a self-represented litigant speaks out of turn or otherwise behaves inappropriately, judges can refer back to the ground rules. Other ways to respond to inappropriate interactions include the following.

- Tone of voice: keep your voice level and take the volume down a notch or two.
- Silence with a direct, somber gaze.
- Use the litigant's name (with appropriate title) a couple times in a row if necessary, while maintaining direct eye contact.
- Use strong gestures, such as palms down, stop sign, or pointing (if absolutely necessary).
- Respectfully redirect the rambling litigant by briefly paraphrasing what he or she said and then telling him or her what you need now.

Be civil, patient, and professional

Remember that the majority of self-represented litigants do not choose to be in this situation. Don't fall into the trap of resenting that the person has no lawyer and taking out your resentment on the person.

Use plain language instead of “legalese”

Be aware of your level of language, and adapt it so that it is accessible to those listening. When you do have to use a specific legal term that the parties may not understand, provide a brief, clear explanation of the term. Adapting your language level to the participants is particularly important for moving cases with self-represented litigants forward efficiently and effectively. (See Chapter 6 for more information on adapting language levels; much of the information on adapting communication for limited literacy levels is relevant when communicating with self-represented litigants.)

Preview, signpost, transition, and summarize

- **Preview:** Give court participants a “mental map” of what’s ahead. After each major stage, let them know where they are in the process and what comes next. Clearly announce your determination at the end of each step. For example: “The first thing I need to find out is whether this court has jurisdiction – that is, the right to decide this case. Then I need to find whether the financial situation of the parent who does not have custody has changed, and if it has, I need to decide what change in monthly support would be appropriate.”
- **Signpost:** Use verbal signposts and flag important information that would help the listener keep track of the message. (e.g., “The first point is...”; “The second point is...”; “It is especially important that...”)
- **Transition** between segments of a proceeding or categories of a topic by making it clear how the parts connect (e.g., “Now that I’ve heard from the Petitioner, Mr. _____, I will listen to the Respondent, Ms. _____’s, evidence.”)
- **Summarize** what’s been said/done at relevant points (after major segments and at the end, for instance). At each stage, provide a brief overview of what point you’re at in the process and what the next stage is.

Treat all parties in as equivalent a manner as possible

Self-represented litigants are often very vigilant to any perceived judicial bias. Try to give all parties equivalent amounts of eye contact and attention. When you must pay more attention to one party than the other, be transparent about the reasons (“I have already reviewed Ms. Brown’s motion for [action requested]. Now I need some information from Mr. Adams regarding...”).²⁵⁵ Similarly, avoid any dialogue with counsel that could possibly be interpreted as a reflection of some personal relationship or friendship. Jokes, smiles of recognition or even a nod in greeting can be interpreted by the self-represented litigant as bias.

Acknowledge the impact of emotions without getting hooked by them

People representing themselves are often emotional: the personal stakes are high and the environment can be intimidating. The emotions might seem like the most important part to them, even if they can’t be part of the decision. Acknowledging the emotions can help the litigants move on. You can say, “Clearly you are upset by what’s happened. What I need from you now in order to make the fairest decision I can is ...” After acknowledging any obvious emotions, help the litigant engage the rational part of the brain by:

- having the litigant paraphrase (understanding of an important point, etc.)
- having the litigant write something down (questions for later, notes, etc.)
- separating into small steps what he/she needs to pay attention to or do.

Use visual supporting materials when appropriate

Presenting information visually as well as orally increases the chances that people will understand and remember. Complex and lengthy information is often best provided in written form, ideally with oral summaries and/or a question-and-answer section. Much written material can be provided in advance of the court proceedings by the clerk, through websites or self-help kiosks. Review written information orally, and give the same information to both parties, even if only one is self-represented.

Make clear your intentions

People pay closer attention if there's a clear reason to listen (ideally a benefit for the listeners, but a consequence can also work). State the overall goal and/or the common ground of everyone involved in the interaction near the beginning, and touch back on it if litigants lose focus (e.g., "In order to reach a fair decision ...", "Of course, we're here to try to determine what ..."). Be transparent about your reasons:

- "The procedures we follow are used to make sure that each side gets a fair opportunity to be heard. I want both sides to be able to meaningfully participate in this hearing. Because some of the ways the hearing process works might be unfamiliar to you, I'm going to go over the rules now."
- "Excuse me, I have to interrupt you since you're drifting too far from the information I need to make a decision, which is why we're here today."
- "I have already explained my reasons for ruling on that point. Now we have to move on."

Explain the reasons for your judgment

At the end of the trial, do your best to ensure that self-represented litigants believe they have had a fair hearing, especially if they lose. Explain to the losing side why they lost, and let them know that you did hear and understand their point of view, even if you did not find in their favour. Most self-represented litigants appreciate an oral decision. It may be helpful to reserve and have the parties return for your oral judgment.²⁵⁶

13. PROBLEM-SOLVING JUDGING IN SMALLER REGIONS: CHALLENGES AND OPPORTUNITIES

Problem-solving judging need not be relegated only to large, urban courtrooms with access to sophisticated resources. Although smaller, more remote communities may have fewer resources – judges, dedicated courtrooms, social services, treatment facilities – than their urban counterparts, their judges and courts have many opportunities to practise therapeutically, and in fact may have several advantages over their “city cousins.” The very nature of smaller, remote, and/or isolated communities can make them ideally suited to TJ practices that may be less effective in larger, urban centres.

This section explores some of the specific challenges and opportunities that a problem-solving approach in smaller regions can present, including:

- fewer judges vs. increased autonomy
- broader jurisdiction vs. increased understanding of the community
- fewer treatment resources vs. increased community support and buy-in.

FEWER JUDGES VS. INCREASED AUTONOMY

“ Teslin, a remote community two hours southeast of Whitehorse, thinks extremely highly of the Whitehorse Court’s Domestic Violence Treatment Option (DVTO) program and uses it frequently. The treatment program and the community contributed money to hire a mini-bus to bring Teslin residents into Whitehorse for the DVTO.

Now, the group that comes in from Teslin has some of the best results. They spend two hours on the bus to Whitehorse, discussing the program, and another two hours debriefing on the way back. It’s so useful that we’ve joked about driving local participants around town in a bus for a few hours before and after court appearances. Then the bus driver comes and volunteers for the program, after listening to these men for so long.²⁵⁷

Deputy Judge Heino Lilles (ret.), Territorial Court, Whitehorse, Yukon

Being the sole judge, or one of only a handful of judges, in a region speaks to smaller populations and a lack of resources. The situation, however, may also allow judges more autonomy and flexibility in terms of initiating therapeutic practices. As one of a handful of judges in the Yukon, for example, Deputy Judge Heino Lilles had the freedom to practise therapeutically, without the need to establish consensus in a large courthouse. Deputy Judge Lilles has initiated the Whitehorse Court’s Domestic Violence Treatment Option (DVTO) and has worked with Aboriginal communities to establish a sentencing circle and elder panels.

Increased autonomy levels, however, mean that TJ initiatives depend on judicial preferences and attitude. If a problem-solving judge leaves or retires, his or her initiatives and practices may cease.²⁵⁸ For this reason, consideration should be given to institutionalizing TJ initiatives where possible, to ensure that they will survive beyond a specific judge’s tenure.²⁵⁹

“ I spent three years on circuit in a remote, northern fly-in community. Early on, we became engaged with a woman who lived there who took the time to give us a tour of the community and show us where different people lived. She’d come to court every month just to say hello and to update me on community affairs. She talked to us about the community’s economic, social, and practical concerns: for example, there had been talk of building a permanent road to the community, which was both exciting but also potentially problematic in terms of trafficking. The recreation centre had burned down, which meant there was no place for kids on probation to do community service work. So we began to work with the community to build a community garden: I started bringing seeds, plants, and tools with me so that I could sentence youths to working in the garden.²⁶⁰

Associate Chief Judge Janice leMaistre, Provincial Court of Manitoba

BROADER JURISDICTION VS. INCREASED UNDERSTANDING OF THE COMMUNITY

Judges in rural and remote areas tend to be generalists rather than specialists, exercising a broader jurisdiction than metropolitan judicial officers. A typical session in a circuit court, for example, may encompass adult criminal cases, child and/or youth matters, family law, and other civil cases – all of which may involve several members of the same extended family.²⁶¹ This broader jurisdiction means that judges get a better sense of the overall picture of how judging affects families, communities, and community health.

This kind of familiarity with a community, notes Deputy Judge Lilles, may influence a judge’s approach. After 17 years of circuit court in the same community, Deputy Judge Lilles says he sees the impact of his decisions and thus gets direct feedback on their effectiveness and on his performance. As he notes:

I think that a significant portion of [judges] think they’re making a difference and that their intervention was positive, when in fact it’s not. Once a reasonable, dedicated professional realizes that what they’re doing isn’t really helping – and sometimes it’s actually hurting – then they’re open to changing the way they practise. Otherwise, they’re going to continue as they have all along, and it won’t lead to change.²⁶²

Judging on circuit and/or in smaller communities may also allow judges to more easily use therapeutic strategies such as judicial supervision. Whereas a circuit judge with a dedicated schedule and in-depth knowledge of a community can arrange to review an offender's progress at regular intervals, the same option may not be open to judges in urban centres, who may not have autonomy over their schedules or whose schedules may not be predictable.²⁶³

FEWER TREATMENT RESOURCES VS. INCREASED COMMUNITY SUPPORT AND BUY-IN

Judges in smaller communities can often face difficulties in finding treatment for addicted offenders, those with mental-health issues, and offenders (and victims) struggling with issues such as domestic violence.

When sentencing, judges serving these communities must frequently weigh the therapeutic and anti-therapeutic aspects of ordering a shorter sentence in a local jail facility – often without treatment facilities — or a longer sentence, further away, at a federal institution with treatment facilities. The former may offer the offender increased family and community support, while the latter may offer much-needed treatment, and/or may remove the individual from potentially toxic family or community conditions. To make an informed decision, the judge benefits from knowing as much as possible about an offender and his or her community. As discussed above, pre-sentence reports, victim impact statements, and a well-developed understanding of the community in which they practise can aid judges in making such decisions.

While smaller communities often have fewer material resources than urban centres, they may be at an advantage in terms of community buy-in and support. The close-knit nature of smaller communities may give them more influence over offenders' behaviour. As Judge Susan Devine notes, "In situations in which you have a community court, the impact of the shame of wrongdoing can be significant. In Winnipeg, by contrast, there is no common group observing and passing judgment ... there are very few community-specific deterrents in a large urban courtroom."²⁶⁴

CASE STUDY

A VARIATION ON A THEME: THE YUKON COMMUNITY WELLNESS COURT

Judge Karen Ruddy, Territorial Court of Yukon (Whitehorse)

The Yukon Community Wellness Court (CWC), established in 2007, is the result of an effort to develop a problem-solving court to address a broad range of issues in a large jurisdiction with a low population density.

As we simply did not have the offender population to support a specialized drug-treatment or mental health court, we decided to build the CWC around the four issues which we see presenting most frequently in our courts – alcohol and drug abuse, mental illness, and fetal alcohol spectrum disorder (FASD) – in an effort to most effectively coordinate and utilize the limited resources available. Individualized wellness plans are developed for each participant, tailored to their particular presenting issues and needs. The CWC also aims to engage families and communities in the healing of offenders. The court makes efforts to work collaboratively with Yukon First Nations, which make up 25% of the territory's population, to develop culturally appropriate justice programs.

While community courts are generally defined by urban geographical boundaries, the dispersed population of Yukon mandated a flexible approach (the Territorial Court sits in 14 communities and serves a population of 35,000). The CWC can be described as a variation, or amalgamation, of the principles and processes found in the more common types of problem-solving community courts.

AFTERWORD

We have reached a tipping point. Twenty years ago, pioneers in our court faced with the challenge of addressing recidivism started holding sentencing circles, opened problem-solving courts and began to use therapeutic justice techniques in their courtrooms to more effectively address criminogenic issues that brought offenders to their courts.

It is no longer “cutting edge” to utilize therapeutic justice in our courts. Domestic violence, drug and mental health courts, mediation, sentencing circles, etc., are mainstays of our judicial system.

We have learned a lot in the last two decades. We have, within the Canadian context, learned to apply evidence-based practices that are effective and produce a better resolution for everyone.

Excellent training through judicial education is readily available to all of our judges.

Many judges have told me – and it has been my personal experience – that therapeutic justice results in some of the most moving and personally satisfying courtroom experiences of our careers.

For example, consider this excerpt from domestic violence court.

I want to emphasize that the Alternatives to Violence Program was the best thing I've ever done in my life, in regards to personal improvement. I learned a lot about myself. I learned, first of all, that I hurt a lot of people by my actions, specifically, assaulting my partner on May 22, 2010, but not limited to that. Throughout the course of our relationship I used multiple tactics of abuse. I came to learn and accept that. I came to learn that I had multiple thinking errors. Once I let down my guard and ... and stopped being so defensive, I came to reap great benefits from the program. I ... I ... I feel I developed the skills to ensure that nothing like this happens again.

My method of communication in all of my interpersonal relationships has certainly improved; relationships with my child, friends, and family. Also, the relationship between my ex-spouse, Cathy, and I. It's, from a certain point of view, is probably the best that it's ever been, in that it's ... it's very respectful and that allows us to raise our child to achieve his full potential. I'm very thankful for the opportunity to have gone through the Alternatives to Violence Program.

The real challenge for the next decade is for our judges to broadly and effectively expand the use of therapeutic justice in their courtrooms, to apply wherever it is feasible the principles and effective practices we have learned, and in so doing change the way justice is rendered.

Associate Chief Judge Clifford C. Toth
Provincial Court of Saskatchewan
Regina, July 2011

RESOURCES AND FURTHER READING



ONLINE RESOURCES IN THERAPEUTIC JURISPRUDENCE

International Network on Therapeutic Jurisprudence (INTJ)

www.therapeuticjurisprudence.org

The International Network on Therapeutic Jurisprudence, housed at the University of Puerto Rico Law School and directed by Professor David Wexler, serves as a clearinghouse and resource center on the topic. The Web site provides a comprehensive TJ bibliography, regularly gives news of upcoming activities and meetings, and sponsors a TJ mailing list.

Canadian Association of Drug Treatment Courts

www.cadtc.org

The CADTC assists in the operation and planning of existing drug treatment courts and the start-up of new courts. It also synthesizes information on the effectiveness of drug treatment courts and provides a forum for best practices.

Toronto Drug Treatment Court

www.tdtk.ca

The Toronto Drug Treatment Court (TDTC) program provides court-supervised treatment for people charged with drug offences. While in treatment, the Court keeps track of an offender's progress, through such means as drug testing and special court sessions held just for TDTC clients.

Center for Court Innovation, New York (United States)

www.courtinnovation.org

The Center for Court Innovation helps the justice system aid victims, reduce crime, strengthen neighbourhoods, and improve public trust in justice. The site includes an extensive array of publications on TJ and problem-solving courts available for download, as well as streaming videos on topics specific to TJ.

Center for Court Solutions (United States)

<http://solutions.ncsconline.org>

A resource for courts interested in developing and implementing solutions in the areas of diversity, emergency management and security, family and juvenile justice, *pro se/pro bono* services, and sentencing alternatives.

National Center for State Courts (United States)

www.ncsc.org

www.ncsc.org/Services-and-Experts/Areas-of-expertise/Problem-solving-courts.aspx

Cutting Edge Law

www.cuttingedgelaw.com

TJ section: <http://cuttingedgelaw.com/page/therapeutic-jurisprudence>

RJ section: <http://cuttingedgelaw.com/page/restorative-justice>

ONLINE RESOURCES IN RESTORATIVE JUSTICE

Correctional Service Canada

Restorative justice website

www.csc-scc.gc.ca/text/rj/index-eng.shtml

Restorative Justice Online

Prison Fellowship International Centre for Justice and Reconciliation

www.restorativejustice.org

Centre for Restorative Justice

Simon Fraser University

www.sfu.ca/restorative_justice

The Centre for Restorative Justice, in partnership with individuals, the community, justice agencies and SFU, promotes restorative justice through research, education, training, and evaluation.

International Institute for Restorative Practices

www.iirp.org

The IIRP provides education, consulting and research in restorative practices around the world in the areas of criminal justice, schools, child and family welfare, and workplaces.

Restorative Justice: A Program for Nova Scotia

Nova Scotia Department of Justice

www.gov.ns.ca/just/rj

PROVINCIAL INITIATIVES

Criminal Justice Reform

British Columbia Ministry of Attorney General

www.criminaljusticereform.gov.bc.ca

The Criminal Justice Reform website contains extensive information regarding pilot projects to reduce recidivism, lower crime rates, and increase the efficacy of the criminal justice process. The Vancouver Downtown Community Court is explained in detail, and streaming videos describe how it operates.

Justice Reform Initiatives

British Columbia Ministry of Attorney General

www.ag.gov.bc.ca/justice-reform-initiatives

This website serves as a good jumping-off point for many initiatives underway or being considered in British Columbia. It includes topics under civil and criminal justice areas, as well as reports recommending a unified family court system for B.C.

Community Safety and Crime Prevention

British Columbia Ministry of Public Safety and Solicitor General

www.pssg.gov.bc.ca/crimeprevention/justice/

Small Claims B.C. Simplified Court Pilot Project

Justice Education Society of B.C. / Provincial Court of B.C.

www.smallclaimsbcc.ca

Territorial Court of Yukon

www.yukoncourts.ca/courts/territorial.html

The Territorial Court of Yukon website contains detailed information on the Yukon Community Wellness Court and Domestic Violence Treatment Option Court.

Provincial Court of Saskatchewan

www.sasklawcourts.ca/default.asp?pg=provincial_court

The Provincial Court of Saskatchewan website contains detailed information on the Cree Court, Family Services Court, Regina Drug Treatment Court, Domestic Violence Court, and Youth Justice Court.

Integrated Domestic Violence Court

Ontario Court of Justice

www.ontariocourts.on.ca/ocj/en/idvc/brochure.htm

TOOLS AND RESOURCES

Participatory justice and conflict resolution

Barreau du Québec

www.barreau.qc.ca/avocats/justice-participative/index.html?Langue=en

Le langage clair : Un outil indispensable à l'avocat (in French only)

Barreau du Québec

<http://www.barreau.qc.ca/avocats/praticien/langage-clair/index.html?Langue=fr>

Fetal Alcohol Spectrum Disorder and the Criminal Justice System: A Poor Fit

John Howard Society of Ontario

http://johnhoward.on.ca/pdfs/FactSheet_26_FASD_and_the_Criminal_Justice_System.pdf

CANADIAN COMMUNITY AND SOCIAL SERVICE REFERRAL SERVICES

Canada Alcohol and Drug Rehab Programs

Sunshine Coast Health Centre

www.canadadrugrehab.ca

This website is a list of social, health, and addictions treatment services agencies across Canada.

Provincial drug and alcohol treatment referrals and resources

- St. John's, NL, Addictions Services: (709) 752-4919; www.getuponit.ca
- Charlottetown, PE, Provincial Addictions Treatment Facility: (902) 368-4120
- Fredericton, NB, Addiction Services: (506) 452-5558
- Moncton, NB, Addiction Services: (506) 856-2333
- Halifax, NS, Addiction Prevention and Treatment Services: (902) 424-8866; www.cdha.nshealth.ca
- Montréal, QC, Drug Help and Referral Line: 1-800-265-2626
- Ottawa, ON, Canadian Centre on Substance Abuse: (613) 235-4048; www.ccsa.ca
- Ontario, Drug and Alcohol Registry of Treatment (DART): 1-800-565-8603; www.dart.on.ca

- Winnipeg, MB, Addiction Foundation of Manitoba: (204) 944-6200; www.afm.mb.ca
- Regina, SK, Sask Health Alcohol and Drug Addition Services:
www.health.gov.sk.ca/treatment-services-directory
- Edmonton, AB, Edmonton Adult Counselling and Prevention Services:
(780) 427-2736
- Vancouver, BC, Alcohol and Drug Information and Referral Service: 1-800-663-1441
- Whitehorse, YT, Alcohol and Drug Services: 1-800-661-0408
- Yellowknife, NT, Mental Health and Addiction Services: (867) 920-6522
- Iqaluit, NU, Nunavut Kamatsiaqtut Help Line: (867) 979-3333
- www.211.ca: 211 has been designated the information number in Canada for all social service listings. Listings for British Columbia, Alberta, Ontario, and Québec were available at the time of publication (2011). Nova Scotia will be added in 2013.
- Kaiser Foundation: www.kaiserfoundation.ca
- Cross-Canada listings of addictions and treatment services:
www.kaiserfoundation.ca/publications/index.php

GUIDELINES FOR ASSESSING VIOLENCE AND PROPENSITY TO RE-OFFEND

“Actuarial” approaches to assessing and predicting the likelihood of recidivism have provided judges with a more refined set of tools – rather than relying on intuition – to make predictions about re-offence. A range of books and manuals that set out professional guidelines for assessing violence risk are available.

- *SARA: Manual for the Spousal Assault Risk Assessment Guide (2nd Edition)*, which measures risk for spousal violence.
- *SVR-20: Manual for the Sexual Violence Risk-20: professional guidelines for assessing risk of sexual violence*
- *Risk for Sexual Violence Protocol (RSVP): structured professional guidelines for assessing risk of sexual violence*
- *HCR-20: Assessing Risk for Violence (Version 2)*, which assesses risk for violence committed by people with serious mental illnesses or personality disorders.
- *Stalking assessment and management guide (SAM)*
- *Checklist for Child Abuse Evaluation (CCAЕ)*

These manuals are available through the SFU Mental Health Law and Policy Institute (www.sfu.ca/mhlpi), Psychological Assessment Resources Inc. (www.parinc.com), or ProActive ReSolutions (www.proactive-resolutions.com).

The author and editorial committee have endeavoured to ensure these references are correct and up-to-date as of July 2011.

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