

## Representing the FASD Affected Client

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All lawyers should read the excellent article by David Boulding on this topic. I do not wish to repeat what he has already said. I wish to provide some suggestions for counsel who are representing FASD affected clients. Obviously I am not a medical professional, so the suggestions provided here are simply based on my own legal experience.

It is important you do not make assumptions about your client. You should not assume:

1. The client is aware (s)he is low functioning.
2. The parents, guardians, and/or Child Welfare workers are aware the youth is low functioning and may be FASD.
3. The parents, guardians, social worker, group home staff, youth workers, probation officer, prosecutor or judge are educated in FASD and really understand the limitations of the FASD afflicted youth.
4. If a parent, guardian, or social worker suspects FASD they are going to ensure an assessment is completed.
5. If a youth has been diagnosed with FASD (s)he will receive the necessary supports to assist her/him to be successful.
6. If a youth has been assessed and diagnosed with other conditions (s)he is not FASD. For example, I have been told that ADHD and ODD are commonly diagnosed on youth who are, in fact, FASD. Some professionals insist the diagnosis of ODD be removed once there has been a diagnosis of FASD.

7. The FASD client is ever going to be grateful for all of your hard work on his/her behalf.

You can expect to hear of several family members and professionals assisting the youth that they are frustrated. You can expect to be frustrated yourself.

The first issue counsel must consider is whether the client has FASD. If I have concerns about the level of functioning of my client, I will ask the parents, guardians, or social workers if the youth has ever been assessed, and if so, whether a diagnosis has been made. You do not have to specify FASD. While usually social workers will advise me at the outset if the client is FASD, that is not always the case. That is why I always follow up with them myself.

There are many types of behaviours that will cause me to be concerned about FASD. A non-exhaustive list is:

- number of failures to comply or failures to appear on the record
- number of Child Welfare AWAL's
- client is non-responsive and/or demonstrates ambivalence about the charges or their consequences
- use of alcohol or drugs – including attending court while under the influence (especially marijuana)
- failure of client to relate events in a linear fashion
- failure to explain breaches
- lack of involvement in productive activities (ie. Client does not attend school on a regular basis and is unable to hold down a job)
- client appears to be low functioning

- poor hygiene
- apparent lack of judgment or insight
- laughing inappropriately (for example, when you tell a client charged with murder she may be sentenced as a adult and receive a life sentence)
- facial features

Obviously these factors do not mean the client is FASD. It does mean, however, that I want to investigate this further. I will usually want to speak to family members or social workers about whether there is a history of substance abuse by one or both parents or whether there have ever been any concerns about FASD. Almost every time I have asked a social worker this - the response has been in the affirmative. Often the diagnosis of FASD is not made until after defence counsel seeks an assessment, even though it has been suspected for years.

Sometimes I have become concerned about FASD after reading the Pre-Sentence Report on a client. Some examples from a recent PSR:

*The writer did ask "YP" to attend to her office on October 6 to complete the interview. "YP" again failed to report. A second home interview was conducted on October 27 and PSR interview completed on that date. "YP" merely "shrugged" when questioned as to his failure to report. He showed complete ambivalence over the possibility of a custody and supervision order being imposed as a sentence in this matter.*

*His response to community supervision has been and continues to be very poor. "YP" has reoffended while bound by probation*

*orders. He has had considerable difficulty in reporting as directed . . . He has not complied with direction to attend school, attend counseling or reside in an approved residence.*

*“Mom” indicated that she and her husband had been having difficulty with “YP” for approximately one year. She states that around that time he began associating with a very negative peer group and was even associating with a known pedophile. “YP” denies ever having been sexually abused.*

*Placements attempted since May have been unsuccessful as “YP” refuses to remain in placements provided . . . “YP” offers virtually no explanation as to his refusal to stay in group care. Most recently he indicates he left the group home after being there only two hours, as the group home staff did not want him to have a cell phone.*

*“Aunt” expresses concern in regard to substance abuse by “YP’s” parents and their unwillingness to allow other people to assist “YP” to lead a healthy and productive lifestyle.*

*“Brother” is expressing concern over “YP’s” lack of involvement in any productive activities. He indicates that “YP” spends most of his days sitting around the house doing nothing.*

*Even though “YP” has only very recently turned 14 years old, he is not attending an educational program . . . “Teacher” (at last school attended two years before) states “YP” did present as fairly low*

*functioning. “Teacher” expressed concern over “YP’s” poor hygiene, the fact that he often attended school hungry and his general lack of motivation and effort . . . “YP” made it clear to the writer that he has absolutely no desire to attend school at the present time.*

*“YP” presents as a rather low-functioning youth. He frequently indicates that he does not understand, although this is questioned by his family members who believe he understands a lot more than he is indicating. Family members all indicate frustration at “YP’s” tendency to both lie and steal from the family . . . “YP” has frequently contradicted himself and even when given reminders has failed to follow through with direction in respect to counseling, reporting and school attendance.*

*“YP” acknowledges drug use, mainly marijuana, since twelve years of age. He indicates that he does smoke marijuana fairly regularly, however, denies a problem in this area . . . overall “YP” presents as emotionally unstable. The writer is concerned about his poor lack of judgment.*

After reading this PSR, which was largely negative, I asked the child welfare worker if FASD had ever been a concern and was advised that it had. The YP had gone through the process of charges, guilty pleas, and a PSR without anyone providing this information to the court. An assessment was ordered. The assessment concluded, among other things:

*Given the complications of his longstanding issues with attention/concentration and impulsivity condition and his lack of social skills, “YP” has significant barriers to effective problem solving and he does not seem to consider the consequences of his actions since he can only contemplate his own needs. These complications are consistent with the neuropsychological impairments typically observed in individuals with one of the FASD disorders and there is little chance “YP” understands the long-term effects of his actions or their impact on the alleged victim.*

If you are concerned about FASD, you can ask for an assessment. If the youth has child welfare status, I usually start by speaking to the social worker about having an assessment done. Failing that, you can apply for one under section 34 of the YCJA, or you can obtain one privately if you are able to access the funds. Legal Aid has been willing to pay for these assessments if the charges are serious enough.

If my client has a diagnosis of FASD, or suspected FASD (organic brain damage consistent with pre-natal exposure to alcohol), there are a number of other issues to consider.

### **Is Client Able to Provide Instructions?**

Fitness is always an issue when dealing with an FASD affected youth. Judge Whalen will be dealing with this issue.

## **Court Process**

The legal system is difficult for many who are not legally trained. This is particularly true of youth, and especially true for FASD affected individuals. I always ensure that I explain what is going to happen in court to my client before we enter the courtroom. I do not expect the client to follow what is going on while it is happening and therefore I always talk to them once we leave the courtroom. The exception to this is when the client attends with an adult who understands the client's disability.

Often the language used by the judge is technical and it is difficult for the youth to understand what is being said. If the judge directs comments to my client, I may have to take a moment with the young person to ensure (s)he understands what is being asked before (s)he responds.

## **To Plead or not to Plead**

In my experience, most FASD affected clients think the only available plea is guilty. They have a very difficult time with the concept that they do not have to plead guilty even if they are. When I know the crown may have a difficulty proving the case I may find myself arguing with my client because (s)he wants to plead guilty and does not understand why I want to set a trial date.

Another issue is that when I do set a trial date I have to consider whether my client will be an effective witness. FASD affected individuals are easily manipulated – they may agree with the crown on cross-examination and destroy their defence. In cases where the client has given a statement to the police, it may not be admissible even when the police appear to have complied with all the Charter/YCJA requirements. Most of these individuals will not understand the consequences of providing the statement. I have found that the

crowd is generally understanding of these issues and may not even try to put the statement in when they are aware the youth could not have fully appreciated the rights being waived.

### **Guilty Pleas**

When my client does enter a guilty plea, I NEVER go through the provisions of 606 in the courtroom. These are concepts that are very difficult to understand for someone who cannot think in the abstract. The courtroom can be a very stressful place even for normally functioning individuals. The consequences of a guilty plea must be explained in simple terms – I know this is not easy but it needs to be done. I usually ask the client to repeat what I have said in their own words to get some idea as to whether they actually understand. I do this even with clients who have been before the courts several times before, as I cannot expect them to remember from the last time.

### **Sentencing**

The difficulty with FASD and the justice system is that the justice system assumes that individuals will learn from their punishment and will therefore not re-offend. We know this is not true for FASD affected individuals. There is no such thing as a meaningful consequence for an FASD affected youth.

The more supports a youth has, the more likely that youth will be to comply with the sentence. If my client does not have much support, there are options. A referral to child welfare may be made under section 35 of the YCJA.

Unfortunately, this does not compel child welfare to become involved. Youth in Edmonton and Calgary have the benefit of the assistance of the youth workers in the YCDO.

In Edmonton we also have the FASD Justice Support Project for Youth. Bob Sinclair will be speaking about this. In my experience, the results of these conferences may not always be able to provide supports. They do, however, usually give the individuals administering the youth sentence a good idea of that youth's ability to comply. This may lead to lessening the expectations, which, in turn, leads to fewer failure to comply charges being laid.

Some people believe the intervention of the justice system can assist an FASD affected youth. That may be true in the short term, but the justice system is time limited. Long term support is needed. A probation order may not provide assistance to the YP – it will just be another set of rules and obligations the YP will have to remember. What support is provided will eventually terminate, and therefore proper integration between the justice system and the community is essential.

For example, a custodial sentence may provide some assistance to an FASD affected youth as it will provide a safe environment and structure, however at some point that structure will end. It is very difficult for FASD affected youth to go directly from the high structure of a custodial sentence to an environment that may have no structure at all.

The fact is many of our clients are going to be sentenced to custody. If that is the only sentencing option left, then try to structure that sentence in such a way as to provide integration. For example, in one case my client's probation officer took the time to meet with staff from Catholic Social Services open custody facility, who in turn met with the client at EYOC again in order to assist him to familiarize himself with what would be his new surroundings and caregivers, and when he was moved to the open custody facility he managed to successfully complete his stay there (after many previous failures).

Unfortunately this all broke down when there was insufficient integration between the open custody facility and the group home in which he was placed after his release.

Please keep in mind that the above suggestion is imperfect at best. There is never any guarantee the YP will have access to an open custody group home, and, as seen in the above example, the integration is an ongoing concern. Further, while in custody the YP can make connections with more functional individuals who will exploit the FASD youth's vulnerabilities.

In my experience, YP's with child welfare status may have access to structure, however generally a placement is not sought for the YP until just before the YP is scheduled to be released. As such, there is very little integration between custody and community placements. Again, this makes it very difficult for the YP to comply.

If the client is certainly going to be ordered to serve a period of custody, and that client does not have any supports and therefore is likely to breach any community sentence, I usually try to remand them until such time as I can justify a request for time served. For these youth, any community sentence, be it probation, community supervision or deferred custody is almost certain to be reached. There is no point in such a sentence – it will not prevent the YP from committing crimes and will ultimately serve to ensure that YP spends more time in custody than his non brain damaged peers.

When the YP is likely to receive a community sentence, try to keep the terms of that sentence simple and straightforward. I highly recommend a conference under section 19 with the FASD Justice Support Project for Youth. As said

previously, these conferences assist the probation officer in understanding the particular needs of the youth.

If the YP has a stable placement and custody is a potential sentence, it is important to stress to the court the consequences to the YP if (s)he is ordered to serve a custodial sentence, particularly if the community placement is available through child welfare. Child welfare beds close while the youth is in custody. Often the child welfare files close as well. Plans to reopen files/beds will not commence until shortly before the YP is released. Once the YP is released, it can be a struggle for that youth to regain the previous level of stability. The custody sentence will have done much more harm than good.

When conducting a sentencing hearing with an FASD affected youth, often the PSR's and assessments seem very negative. Again, bear in mind that the crown and the judge may not be educated in the limitations of an FASD affected individual. What I may see as an explanation for the YP's behaviour, the crown or court may see as extremely aggravating. For example, the excerpt from the assessment found on pages 3 and 4 could be seen as extremely negative and aggravating, instead of a diagnosis that concludes the YP is not willfully harming the public. When reports recommend the YP require structure, Courts and Crowns may jump to the conclusion that structure means probation. Probation is not structure, it is supervision, and what little structure that may be provided through a probation order is woefully insufficient to meet the needs of an FASD affected individual. Structure means the YP needs a stable residence, consistent caregivers, and an outside brain (among other things). These things cannot be provided in a probation order. Do not make the common mistake of asking for a probation order with a number of terms to "assist" the YP. This will not assist him – it will almost certainly guarantee his failure.