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A A R E B C

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■ Bulletin # 221 The Challenges of Self-Representing Litigants

The growing presence of self-representing litigants (“SRL”) is a reality in most courts across the country. By some estimates, in excess of 50% of all litigants are representing themselves in Canadian courts at all levels.

Dr. Julie MacFarlane, Professor at the Faculty of Law at the University of Windsor has researched the motivations and experiences of SRLs. She notes that SRLs are often frustrated by the process, often unable to afford to retain or continue to retain counsel, confused by the rules and the procedures, working hard to enforce their rights and tired of being disrespected by those within the system.

The final report from Dr. MacFarlane’s research provides an eye-opening glimpse into the litigation process as often experienced by the SRL. While courts say that fairness is to be the touchstone in dealings with self-represented litigants, more often than not, the self-representing litigant is disappointed by the legal system’s response to their presence in the courtroom. Through their eyes, there is no fairness in a system that appears to them to favour those with the most connections and the most resources.

Most often, the influx of self-represented litigants in court and other legal proceedings is described as a challenge or burden upon the profession.

In the by now infamous decision of Justice Rooke in *Meads v. Meads* (2012 ABQB 571), the court commented at length on the issues raised by SRLs described as Organized Pseudolegal Commercial Argument (“OPCA”) litigants. While relatively few SRLs achieve the extremes identified in *Meads*, Dr. Julie MacFarlane has commented that:

My fear is that Justice Rooke's meticulously researched judgment will be used to conflate OPCA's with the large number of ordinary, overwhelmed and often traumatized self reps who are struggling to navigate the system.

The challenge for lawyers

While the experience of self-representing is challenging for the SRL, it is also challenging for lawyers opposing SRLs. As Chief Justice Beverley McLachlin noted in a 2007 speech:

“It is not only the unrepresented litigants who are prejudiced. Lawyers on the other side may find the difficulty of their task greatly increased, driving up the costs to their clients. Judges are stressed and burned out, putting further pressures on the justice

system. And so it goes.”

For lawyers, opposing an SRL typically makes managing a file more challenging in a number of ways. Extra effort is required in communicating with the SRL, case management, as well as managing your own client’s expectations and costs.

Taking extra care is essential as an SRL creates additional risk for the opposing lawyer. Not only is the SRL on the other side of the file more likely to report you to the Law Society, they are also more likely to file a malpractice claim against you.

Communication challenges

Communications with an SRL may be rife with difficulties. It is essential that you ensure that all your communications with the SRL are respectful, courteous and professional in tone, no matter what the tone of the communications you receive or how aggravated you may be feeling.

It is best to advise the SRL you will only communicate in writing and then make sure you do so to the greatest extent possible. Whether using email or letter mail, ensure that there is a record of all your communications to the SRL.

Prepare all your written communications with the SRL in clear and plain language, written at a reading level appropriate to the SRL. Do not use Latin terms and legal jargon that can confuse.

In your written communications with the SRL:

- Encourage them to obtain legal advice;
- Clarify that you are not protecting their interests and are acting solely in the interests of your client (you may want to repeat this in every communication); and
- Consider providing information on pro bono legal services, low cost legal services, public legal education providers, and legal aid, as well as providing information about and phone numbers of lawyer referral services.

If you must communicate with an SRL in person, it is a good idea to have a witness present and to later confirm the key points of the discussion in writing.

In some cases, the SRL may also have mental health challenges. Where these are evident, you should take even more care in preparing and documenting your communications with the SRL.

Procedural challenges

Another significant challenge for opposing counsel is that SRLs may be unfamiliar with and even unaware of litigation procedures and

therefore fail to take necessary steps on a timely basis.

When opposing an SRL it is best to insist upon strict adherence to the rules of procedure by all parties, including your own client. You may also want to take an early lead in the processes such as document and evidentiary disclosure so that you are able to outline for the SRL exactly what the rules require they produce and when. While it is not your role to teach court procedure to the SRL, it may be to your client's benefit to provide some information about process in order to keep the matter moving forward.

Across the country, there are numerous helpful resources to which you can refer SRLs. Court websites often have FAQs, glossaries of legal terms and specific resources for SRLs. In some courtrooms, duty counsel may be able to provide support and assistance to the SRL. Administrative tribunals often have prepared packets of information available to assist SRLs. Every province has at least one public legal education and information (PLEI) program. These organizations typically offer plain language information materials and other supports that could be useful to SRLs.

Libraries are another good place to refer SRLs for information, whether public libraries, law school libraries or courthouse libraries. Librarians can also be an excellent resource to SRLs seeking plain language legal information and assistance.

Client challenges

You'll also need to pay extra attention to your own client in this process. Opposing an SRL necessarily drives up legal costs, as extra steps are often required to manage the file.

Let your client know that you expect to do a disproportionate amount of the work - you will be drafting documents and orders that normally might be the job of opposing counsel. You may want to include a clause to this effect in your retainer letter.

Your client relationship may benefit from frequent communication on this issue and reminders that these steps are being taken in pursuit of your client's own interests.

Personal challenges

Finally, don't forget to pay attention to your own responses to the SRL. It is easy to become frustrated by the extra work you need to do to manage a file with an opposing SRL. Don't allow your stress or aggravation to impact your judgment or negatively affect your behaviour with either the SRL or your own client. Find an outlet for your frustration, whether through physical activity or "debriefing" sessions with a colleague.

Though it may take longer than a typical file, remind yourself that this matter too will ultimately come to an end and the day will come when you'll be able to close your file and move on. Until then, take extra care in everything you do on the file.

Further Resources on SRLs:

- For more information on self-represented litigants in Canada see Dr. Julie MacFarlane's research at: <http://representingyourselfcanada.com/>
- You can find a list of PLEI organizations in Canada at: <http://www.acjnet.org/help/orgcanada.aspx>
- A useful tool to provide to the SRL is *Coping with the Courtroom: Essential Tips and Information for Self-Represented Litigants*: <https://representingyourselfcanada.files.wordpress.com/2014/03/nsrlp-coping-with-the-courtroom-2014-06.pdf>

■ Bulletin # 222

Screen your clients and cases.

One of the most effective ways to avoid a malpractice claim is to carefully evaluate the potential client before you take the case.

ASK THESE QUESTIONS FIRST:

- Do you have a potential conflict of interest?
- Do you have the expertise to handle the matter?
- Is the case worth taking? Can you afford to take the case? Can the client pay?
- Does your current caseload allow you enough time to handle the case?
- Can you meet any impending deadlines?
- Could the case create case law that might adversely affect existing clients?

Legal malpractice claims often result from an attorney-client personality conflict or from an overly demanding or overly emotional client. You will need to rely more on intuition than logic in this phase of screening. Recognize which personality types you can't handle and avoid them. Develop and then use criteria for evaluating cases and clients.

WARNING SIGNS INCLUDE:

- A case that has been declined by another attorney
- A client who changes lawyers frequently or in the middle of a case
- A client with a history of lawsuits – you may be next
- A client concerned only with the "principle of the matter"
- A dishonest client
- A client shopping fees or only concerned with the price
- A client wanting to do too much of the work to save money
- A client who "knows the law" and wants to run the case
- A client who will not listen to your advice
- A "gut feeling" not to accept the case

Stop...before accepting a case, remember that every client could file a malpractice claim against you. When in doubt, decline the case! In the long run, a malpractice claim can cost you more than a lost fee.

*(Originally published at:
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