



Carol Cochrane

# Self-represented litigants: a survival guide

*Why do we all shudder on learning that our client's adversary is self-represented on a litigation file? So often we fail to appreciate opposing counsel – until we hear those dreaded words from our client: "You know, the other side won't be getting a lawyer." It is only then that we realize and appreciate the benefit of there being opposing counsel on a file.*

On a litigation file, opposing counsel can serve a number of important functions that can make our own role so much easier. Without opposing counsel there is no one on the other side to:

- give good, solid advice as to what the law is and how it is or can be applied;
- recognize the critical importance of full, complete and timely disclosure;
- encourage a negotiated resolution;
- draft concise and legible pleadings, briefs and affidavits;
- screen, or serve as gatekeeper, to the irrelevancies and non-legal issues;
- facilitate compliance with Rule-directed or court-ordered obligations, such as the timely completion of an accurate affidavit of documents, the fulfillment of the requirements for mandatory mediation under Rule 24.1 of the *Rules of Civil Procedure*, the delivery of an updated financial statement or the prompt consideration of a draft order provided for approval;
- conduct a trial, properly focused on the issues at hand; and
- discourage protracted proceedings, mindful of the ever-increasing costs of contested litigation.

In earlier literature on this topic,<sup>1</sup> a distinction has been drawn between self-represented litigants and unrepresented litigants. The latter would like to be represented by counsel but are unable to qualify for representation under the Ontario Legal Aid Plan, and do not have the financial resources to retain counsel for what may prove to be a protracted proceeding.

Conversely, self-represented litigants feel that they are capable of representing themselves, and do not feel the need to pay someone else to do what they believe they can do themselves. (After all, if you've watched enough reruns of "L.A. Law" or "Street Legal," have high-speed internet and a library card, that is enough, isn't it?)

Whatever the reason or cause may be for the self-representation, it becomes your reality to address. Below you will find some general pointers as to how to best deal with the situation of an unrepresented or self-represented litigant (referred to collectively as "SRL") on the other side of your file.

### **C**LEARLY SPELL OUT AT THE OUTSET OF YOUR DEALINGS THAT YOU WILL NOT GIVE ADVICE TO THE SRL.

Your first letter to the SRL must clearly indicate that you represent the adverse party and that you cannot, and will not, provide any advice to the SRL.

There is a very fine line between offering information and giving advice. Although it may be tempting to explain to a SRL what a document means or why something should be done a certain way, don't go there! Encourage the SRL to obtain independent legal advice. Offer the SRL the telephone number for the Lawyer Referral Service, or if the matter is a family law proceeding, suggest the SRL attend at the Family Law Information Centre. When you're asked questions, refer back to that initial letter of introduction and remind the SRL that he/she will have to obtain advice from someone other than you.<sup>2</sup>

### **O**NLY ALLOW COMMUNICATIONS BETWEEN YOURSELF AND THE SRL TO BE IN WRITING.

Write to the SRL as soon as you are retained to indicate that you will be limiting your communications with him/her to writing. There will be no meetings; there will be no verbal negotiations; there will be no telephone calls. Although this may sound overly restrictive, it is the only way to avoid misunderstandings. All of your dealings with the SRL should be recorded in writing, either through your written communications or by your discussions being on record in the courtroom.

When you are writing to the SRL, use plain, simple language. This does not mean to insult the SRL's intelligence or to be condescending; simply avoid the "notwithstanding" or "govern yourself accordingly" terminology that come too easily to us as lawyers.

If written communication is electronic, ensure that copies are printed and maintained on your file.

Always make sure that you respond promptly to communication you receive; if you cannot respond within a reasonable period of time, send a short note off to the SRL to acknowledge receipt of his/her correspondence and to advise that a considered response will follow shortly.

If communication cannot be in writing, limit your non-recorded dealings with the SRL, and if possible, have another person join you as witness, such as a junior or articling student. Follow up any oral communications with a letter of confirmation.

### **N**EVER TREAT THE SRL WITH ANYTHING LESS THAN THE UTMOST OF RESPECT.

Ensure that your tone is consistently professional and respectful. Our *Rules of Professional Conduct* direct us to treat unrepresented litigants with respect, in the same way you would treat another lawyer. I suggest that you take that even one step further, as you can rest assured that one or more of your letters will find their way to a judge as an exhibit to an affidavit, in a settlement

conference brief, in a document brief at trial, or better yet, as the attachment to a complaint directed to the Law Society! With that foresight, be sure your written communications are written and edited in such a way that they cannot be interpreted as overreaching, misleading, disrespectful, unreasonable or coercive.

Although you may be empathetic to the SRL's plight, (particularly those who are "unrepresented" versus those who are self-represented by choice), remain professional and respectful at all times. One thing I have tried to do to maintain that professional distance is to not address the SRL on a first name basis, but rather to refer to him/her at all times as Ms. X or Mr. Y.

### **T**AKE CHARGE OF THE FACT FINDING AND DOCUMENTARY DISCLOSURE THAT IS REQUIRED ON THE FILE.

The SRL may not know what information is required to allow the equalization issue to be resolved for instance, or may not be aware of what should be included in an affidavit of documents. Compile and organize early on all of the necessary corroborating documents that are required to allow you to outline in writing to the SRL what he or she must produce.

### **R**EMIND YOUR CLIENT THAT HAVING A SRL ON THE OTHER SIDE OFTEN DRIVES UP THE COSTS.

Negotiations with a SRL may not be helpful or results-oriented. Disclosure from a SRL may not be forthcoming. Your time may have to be spent reading numerous e-mails or letters, or you may be facing more case conferences or motions than if counsel were involved. You may have to recommend that court proceedings be initiated sooner than would otherwise have been the case in order to obtain some Rule-directed time lines, some judicial directives and/or genuine case management.

### **O**PEN YOUR EYES TO THE WARNING SIGNS THAT YOUR OWN OR YOUR CLIENT'S SECURITY MAY BE AT RISK.

Is the SRL's attitude towards you shifting (becoming suddenly charming or hostile)? Are the SRL's letters to you or to your client becoming blatantly or subtly threatening? Arrange for Court security to be available at any time you will be required to be with the SRL in that setting, and arrange to stay at the court house until the SRL is well on his/her way after the proceedings have concluded.

### **L**IMIT THE SRL'S PERCEIVED POWER OVER THE PROCESS.

Insist that the rules be followed – the *Rules of Civil Procedure* or the *Family Law Rules* with respect to pleadings, disclosure and time lines, for instance, as well as the rules of evidence.

Let the SRL know of your intention to seek an order of costs at each stage of the proceeding; if you successfully obtain such an order, pursue its enforcement. Limit the SRL from taking any fresh steps until such interim determinations are honoured [Rule 60.12 of the *Rules of Civil Procedure*; Rule 14(23) of the *Family Law Rules*].

Do not hesitate to rely on the provisions in the Rules that prevent a SRL from engaging in abusive or vexatious proceedings. Rule 37.16 of the *Rules of Civil Procedure* and Rule 14(21) of the *Family Law Rules* give the court the authority to limit a litigant's ability to bring further motions without leave being obtained in advance.

It is one thing for a presiding justice to de-mystify the court process to a SRL; it is not appropriate for the judge to over-accommodate to the prejudice of your client. In the courtroom, object where necessary if that line is crossed, and stress as strongly and respectfully as possible that the SRL is required to follow the rules, just like anyone else appearing in that courtroom.

## **C - O - N - T - R - O - L**

If you combine the first letter of each of the "tips" outlined above, you'll see that what they spell: **CONTROL**. And it is just that, **control**, that you want to maintain when you deal with a self-represented litigant. Only through demonstrating the necessary degree of control will you keep your frustrations at a manageable level, minimize the risks to your client (in both time and costs) and reduce your own exposure to liability.

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1 Thompson, D.A. Rollie "No Lawyer: Institutional Coping with Self Represented" 19 C.F.L.Q. 455; Thompson, D.A. Rollie and Reiersen, Lynn "A Practicing Lawyer's Field Guide to the Unrepresented" 19 C.F.L.Q. 529

2 For a very clear indication of counsel's professional obligations when dealing with a SRL, see Rule 2.01 (14) of the *Rules of Professional Conduct*