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SMALL CLAIMS COURT—2011
PAPER 1.1

Dealing with the Self-Represented Litigant: Challenges and Strategy, or Things I Wish I Had Known Five Years Ago

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DEALING WITH THE SELF-REPRESENTED LITIGANT: CHALLENGES AND STRATEGY, OR THINGS I WISH I HAD KNOWN FIVE YEARS AGO

> I am concerned about the cavalier disregard for a direction of a judge of this court by counsel, particularly where there are self-represented litigants on the other side. This practice puts the legal profession in a bad light because it leaves the impression that trial by ambush is fair and that the rules don't apply to the lawyers.
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> *Gilchrist v. Centre City Realty Inc.*, 2003 BCPC 0356

I once conducted a three day trial over less than $5,000. My client had provided branding services to a human resources consultant, who refused to pay her final bill. My client had carefully documented all of her interactions with the defendant, and had records of his approval of all of her materials, and her heroic efforts to accommodate him. We had discussed the cost and stress of litigation at length, and she was adamant that she could and would not allow her client to escape without paying her. The judge wrote the following:

> [8] At the trial, at every opportunity, the Defendant criticized the Claimant and her staff. The Defendant testified that he was never pleased with what she did for him. The Defendant stymied her work almost every step of the way by constantly requesting changes and at the end, blamed her for not doing the work properly or on time.

> [9] On the other hand, I found the Claimant to be extremely professional, competent, accommodating, calm and reasonable. The Claimant went to great lengths to satisfy the Defendant so that she could complete the contract and move on to other clients.
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> [10] I found the Claimant and her witness credible and I accept their evidence that the work which they performed was done properly, professionally and in accordance with the Claimant's obligations under the contract. I do not believe the testimony of the Defendant and do not accept his assertion that the Claimant breached their contract by providing incomplete and sub-standard work, nor do I accept his Claim that the delay in completing the contract was attributable to the Claimant's actions. The delay was attributable to the Defendant's own actions. I found that the Defendant's witness, Mr. Buchanan, did not present any significant testimony that bolstered the Defendant's credibility or trustworthiness. (*Burke v. Draegestein*, 2009 BCPC 0319)

The defendant tried every method to intimidate us. He threatened to report me to the Law Society. He declared that I was incompetent. He called me dishonest. He tried to tender witness statements without bringing the witness. He asked for adjournments whenever possible. Because I was prepared, none of this helped him.

Most junior lawyers will deal with self-represented litigants, and if they are careful and aware of their duties, they will find those interactions nerve-wracking. A self-represented litigant is vulnerable, frequently angry, sometimes volatile, and usually the less-informed person in the room. As a result, that litigant is capable of creating chaos, unless he or she can be either made to feel respected or managed very efficiently.

Some self-represented parties are not angry and defensive. However, even the most even tempered person is unhappy at trial, and may explode with accusations of evidence tampering and call on any failure of counsel as an explanation or justification for misbehavior.

Prepare to be accused of everything from lying, misrepresenting the evidence, being abusive to anything else imaginable. In one instance, I was accused of tampering with a document that had been in the defendant's control until it was entered into evidence.

I. Ethical Duties

Every lawyer has a duty to herself, to the courts, to her client, and to the state. We are (hopefully) all aware that we should not lie, cheat, or steal. Lawyers dealing with self-represented litigants should consider the following canons from the Professional Conduct Handbook:

> 2. TO COURTS AND TRIBUNALS
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> (1) A lawyer's conduct should at all times be characterized by candour and fairness. The lawyer should maintain toward a court or tribunal a courteous and respectful attitude and insist on similar conduct on the part of clients, at the same time discharging professional duties to clients resolutely and with self-respecting independence.
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> 3. TO THE CLIENT
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> (4) A lawyer should treat adverse witnesses, litigants, and counsel with fairness and courtesy, refraining from all offensive personalities. The lawyer must not allow a client's personal feelings and prejudices to detract from the lawyer's professional duties. At the same time the lawyer should represent the client's interests resolutely and without fear of judicial disfavour or public unpopularity.
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> (5) A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence which is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the

> bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any manner of fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety.
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> 5. TO ONESELF
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> (1) A lawyer should assist in maintaining the honour and integrity of the legal profession, should expose without fear or favour before the proper tribunals, unprofessional or dishonest conduct by any other lawyer and should accept without hesitation a retainer against any lawyer who is alleged to have wronged the client.
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> (6) All lawyers should bear in mind that they can maintain the high traditions of the profession by steadfastly adhering to the time-honoured virtues of probity, integrity, honesty and dignity.

These duties can be very much tested when dealing with a self-represented litigant. You cannot be canny, difficult or even as strategic as you might with opposing counsel. You must consider whether your actions will lead you or your client into a situation where a self-represented party will cry foul, or cry adjournment. The lawyer is trapped between her duty to obtain the benefit of every remedy and defence available for her own client, but at the same time, must be aware that a self-represented litigant may reveal information unintentionally, or fail to appreciate a defence (or remedy) available. The court may call the lawyer on her failure to address that remedy or defence at trial, so the lawyer must be prepared not only to argue her own case, but defend any possible issue raised by the court. As well, a court may decide that a self-represented litigant ought to be afforded an adjournment to deal with a matter or issue the self-represented litigant has failed to anticipate, causing delay and expense ... and the lawyer will want to head that adjournment off as quickly as possible.

II. Managing the Lay Litigant

The best way to manage any conflict between these duties is to adopt a course of identifying issues and rigorously informing a self-represented party of his or her obligations prior to any important date.

An *informed* self-represented party cannot complain that a lawyer has taken paltry advantage, and cannot complain that she has not had the opportunity to prepare and present her case. If there are timelines, remind the lay litigant of the timelines. If there is something wrong with their expert report, tell them early. The lay litigant may not believe what you tell them, but having a written record of your letters will make it harder for them to complain either about your conduct or to ask for a delay on the basis that they did not know what to do.

The court is comforted by documentation of the lawyer's efforts to advise a self-represented party of issues, and the course that counsel intends to take. Doing so avoids or reduces embarrassment, and allows the court to proceed more quickly. Essentially, counsel has two jobs: to try her case in the normal fashion and, to ensure that the opposing party is aware of the rules of the game, and what use counsel *may* choose to make of them.

III. Managing the Client

An unsophisticated client may be surprised to see their counsel not respond to every perceived slight or comment from the lay litigant, or wish to respond in kind. Counsel must remind their client that being prepared and professional will go much further in achieving their goals.

If your client objects to time spent managing a self-represented litigant, explain that the court and your professional obligations make that management necessary. If your client still doesn't understand, warn her, and at the very least follow the rules with attention to every detail. If you can't be more than civil, then be scrupulous about your professional obligations. If you can, be kind, or at least professional.

A judge will often deal with a self-represented litigant's inability to formulate acceptable questions and present evidence by asking questions and intervening more actively than counsel might prefer. A nervous client may perceive this as favouritism, and may want you to object. Upon reflection, objecting might be helpful once, but only if the intervention is such that the court has interfered with your client's ability to address the evidence, or if it is so truly outrageous that an appeal seems likely.

IV. Communications

Make dealing with a self-represented litigant a priority, and choose the method of communication that allows you to do that.

Letters or emails are best. Assume that whatever you write will end up in an affidavit. If you hate picking up the phone to deal with a litigant, script your calls and make sure you always, always take notes. You cannot expect a stressed litigant to remember anything you say accurately, and you should expect that you will be called to account for any flip or vague remark, real or imagined.

V. Pleadings

Pleadings in small claims are designed to set out the issues as clearly as possible. On the one hand, this means that all causes of action needed to be set out. On the other hand, judges have been known to strike pleadings that are too technical.

Consider amending pleadings carefully, and if an issue arises from mediation or at the pre-trial conference, amend so that all of the issues you intend to bring before the court are clearly set out in the pleadings. A self-represented party must know all of the elements of the case she has to meet.

A trial statement does not form part of the pleadings, and will not help you if an issue or a head of damages arises that were not set out in the pleadings themselves.

VI. Mediation

Mediation in small claims court is mandatory. Unlike Supreme Court, you don't pick the mediator, so you cannot expect the mediator to understand the area of law.

I have had mediators question the strength of my case. I have mediators allow witnesses attend the mediation.

Consider whether mediation will work and how much time to devote to it. A high conflict self-represented party may not be receptive to mediation, and frankly, two hours may not be enough time to make any head way. There are lay litigants who consider a fair settlement to be only when they get 100% of what they ask for.

In any event, be prepared to walk, and walk early, if tempers flare, or if the mediator begins to advise the self-represented party. If the mediator begins to discuss costs in front of both parties, implying that your client has a greater impetus to settle as she is paying a lawyer, it is a good idea to tell the mediator that the client is adequately informed as to costs, and that discussing the retainer is inappropriate and unnecessary.

VII. Obtaining Documents

We should all be sending requests for early disclosure, or, at the very least, a firm reminder or the dates for filing of trial statements, along with requests for the specific documents we believe are relevant.

The document request letters we are all issuing further to the new Supreme Court Rules are an excellent idea. Those letters can then be referred to at a pre-trial conference or an application. Counsel ought to use pre-trial conferences and settlement conferences as opportunities to seek all of the procedural orders they want, including dates for delivery of documents, reports and for any responses to same.

The goal here is twofold, one, to advise the self-represented litigant as to her obligations, and second, to lay the basis for an order at a pre-trial conference, or, in the alternative, for an application after a pre-trial conference. Generally, with a self-represented party, the rule is, tell them what you want, when you want it, what you will do if you don't get it, and follow through on everything, on the deadlines you have set. Counsel who can say "is there one thing I said I would do that I haven't done?" are in a much better position with self-represented parties.

VIII. Document Management for Trial

With respect to document management, it is always good practice to be the most organized person in the courtroom. Preparing identical tabbed binders of documents you intend to refer to is a good idea. Including the opposing party's documents may or may not be a good idea. You may not want all of those documents in evidence, but it seems more and more likely that a document appended to a trial statement will end up forming part of the evidentiary record, and as such, you may want to be able to identify and deal with those documents quickly, if only to discredit or disprove them.

This is one of the areas where it is easy to get caught between the duty to the court and the duty to the client. On the one hand, counsel ought to facilitate the speedy presentation of the case. On the other hand, counsel hardly wants to emphasize documents unhelpful to the client's case. That being said, counsel has no obligation to deal with or prove documents presented (or not) by the opposing party unless asked to do so by the court.

I recommend creating two binders for the parties and the court, one with all of the documents you intend to enter, and the other with all of the documents tendered by the parties. Enter the first as an exhibit, and advise the court that you have not entered the second, but that it is indexed and tabbed for ease of reference. Be prepared to find documents for the opposing party, and consider sending a letter setting out what documents you will be bringing to the hearing and how those will be organized. With respect to case law, I have made it a practice to try and provide cases in advance of argument, but that may not be possible.

If all else fails, at least you can inform the court that you have given the self-represented litigant every opportunity to address documents that are properly organized and accessible.

IX. Expert Evidence

Again, while it may be fun and exciting to wait and see whether your opposing counsel will remember that opinion evidence must be produced in accordance with the rules, springing an objection to evidence presented by a self-represented litigant without laying a foundation for that objection prior to trial may not endear you to the court.

Ideally, where expert evidence would normally be presented by the opposing party, the timing and nature of that evidence should be raised either before or at the pre-trial conference. Counsel should alert the self-represented party of the need to provide that evidence, and ask that it be produced within a set time limit, with an adequate period for response. Once the evidence is received, it may be necessary to advise the other party that you intend to object to it, and provide a brief outline of your reasons for doing so.

Appearing on the first day of trial and advising the court that the existence of opinion evidence and its admissibility is a major issue is much easier if there is a strong record showing that counsel had attempted to avoid the need for an objection in the first instance. An adjournment is far less likely, and a ruling that the evidence ought to be excluded is much more likely.

X. Avoiding Delay

Obviously a client prefers to have their lawyer make as few appearances as possible. If possible, email a copy of the notice of claim or reply to the opposing party, at the same time as attempting service further to the Rules. If the lay litigant is avoiding service, I would recommend obtaining an order for substituted service as quickly as possible, and, if possible, to ask for service throughout the action in that application.

Make sure you adhere to time limits scrupulously. Opposing counsel will hopefully afford you some room for error. An angry self-represented litigant will not, and the court will be less inclined to tip any decision in your client's favour. If you do miss a deadline, inform the opposing party and ask if she wants an adjournment. Do not proceed in the breach of any rule without giving the opposing party at least the chance to enjoy her full period for response. While counsel has a duty not to take any paltry advantage, the self-represented party does not.

For example, where an application is going to proceed, warn the opposing party that affidavit evidence is necessary, and warn that you will argue against the introduction of any other evidence. Do not simply appear and tell the opposing party that they cannot tell the judge their story. If you do not receive documents or an application in a timely fashion, or if the opposing party is unreasonable, tell the opposing party they have acted improperly and why. Give them notice that your argument will address their failures.

XI. Conduct at Trial

Counsel should document her efforts to prepare the self-represented litigant for trial with an eye to leading the court to the conclusion that the represented party came prepared, and the unrepresented party was given every opportunity to see the rules, canvass the issues, to prepare and that your client should not pay for any failure to prepare adequately for trial.

Evidentiary rules are problematic for self-represented litigants. Hearsay evidence is rampant. Documents are properly proved or put to your client. The rule in *Brown v. Dunn* lies trampled underfoot, and self-serving correspondence floats around like petals on the wind. Basically, you could object all day long, until the cows come home, and leave everyone in the courtroom bored to tears and frustrated beyond belief. Counsel is pulled between the duty to one's client to control the evidence being presented, and the chance to complete the hearing in the time allotted.

I suggest a single objection to each type of inadmissible evidence, and if the inadmissible evidence continues to flow, followed by a statement that the court is, of course, aware that the evidence is inadmissible, ought to set enough on the records to allow counsel to pursue an appeal, if all goes awry.

Given the limited time to conclude a hearing, objections, or observations regarding the evidence can be restated at closing. Constant objections will only fluster and annoy the opposing party, and will begin to frustrate and annoy the judge. Either of those results will mean that counsel has failed to treat the self-represented party in a manner which preserves her dignity. The self-represented litigant will often fall back on the argument that small claims is meant to be a less formal process, which is geared towards the self-represented litigant. Couching your objections in terms of fairness, and your client's right to address the evidence and cross-examine fully may go farther than a technical argument at that point.

XII. After Judgment

Your duties do not disappear after judgment is pronounced. You may find collecting on a judgment more challenging than trial itself. The same principles apply, and it is very important to emphasize to the opposing party that you will do everything necessary to collect, or to oppose garnishment or seizure. Be clear with the opposing party about the costs of collection and the potential for embarrassment if orders are not complied with.

Be prepared to garnish, and to issue an order for a payment hearing. Make sure, again, that you are in a position to carry out any threat that you make.

XIII. Avoiding Complaints

DOCUMENT EVERYTHING

Any time you have an interaction with a self-represented party—a telephone call, a discussion at the courthouse—make notes regarding that conversation or interaction. Self-represented litigants may threaten complaints. They are discouraged when reminded that counsel keeps records of interactions. My current policy is to tell an angry opposing party to go ahead and make the complaint, but that doing so will not cause me to remove myself, and will not affect my ability to defend or prosecute the case.

Put everything in writing. If you have said it and are not sure whether it was heard, consider putting it in a letter or email. Don't ever say anything you wouldn't want to see in black and white. There is no place for a casual or offhand remark with a self-represented litigant.

Consider referring the self-represented litigant for advice at every possible opportunity. In any letter where I advance any kind of argument or state a position, I remind the litigant of his or her ability to seek legal advice and ask that she or he discuss the letter with a lawyer. This also allows you to take the opportunity to remind the opposing party that you are not her lawyer and that she would benefit from legal advice.

When you get a letter from the Law Society of a Friday afternoon, you can go haul out the file, and congratulate yourself on the detailed and complete response you are able to write. You will be able to show that you fulfilled your duties to the court, your client and yourself.

XIV. Summary

Put very simply counsel must:

- follow the rules scrupulously;
- explain to the self-represented party that your job is to try the case, it is not a personal attack;
- if the self-represented party is difficult, first, be the bigger person;
- put everything in writing;
- expect to be called to account for any difficulty with presenting evidence;
- treat the self-represented party with all possible respect;
- be kind but firm;
- keep telling the opposing party that she will have to decide how to try her case, and to seek advice, as you act for your client alone; and
- DOCUMENT EVERYTHING.