

CONTINUING LEGAL EDUCATION

COPING WITH SELF-REPRESENTED LITIGANTS IN SUPREME COURT

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INDEX

- I. INTRODUCTION**
- II. REMEMBER YOUR ETHICAL OBLIGATIONS**
- III. NEVER GIVE LEGAL ADVICE**
- IV. KNOW YOUR OPPONENT**
- V. PUT EVERYTHING IN WRITING**
- VI. UNDERSTAND THE COURT'S ROLE**
- VII. SECURITY RISKS**
- VIII. CHAMBERS PRACTICE**
- IX. CONSIDER SETTLEMENT CONFERENCES**
- X. USE CASE PLANNING CONFERENCES TO YOUR ADVANTAGE**
- XI. CONDUCTING THE TRIAL REQUIRES SOME CAREFUL THOUGHT AND PREPARATION**
- XII. CONCLUSION**

COPING WITH SELF-REPRESENTED LITIGANTS IN SUPREME COURT

I. INTRODUCTION

The legal system has experienced a proliferation of unrepresented litigants in recent years, causing challenges to Judges and lawyers as well as increased expense to those represented parties having to engage in litigation against them. This paper identifies some of the problems that lawyers face when dealing with lay litigants and offers some suggestions to follow that will hopefully assist in reducing your frustration level and the expense to your client.

II. REMEMBER YOUR ETHICAL OBLIGATIONS

There is no doubt that dealing with an unrepresented litigant can be a frustrating and trying experience. However, no matter how difficult and maddening the unrepresented litigant can be, the best and only approach to take is to remain calm and polite and always keep in mind our ethical duties.

It is a good reminder to review those ethical duties as outlined in the *Professional Conduct Handbook*, which starts with the introduction:

A Lawyer is a minister of justice, an officer of the courts, a client's advocate, and a member of an ancient, honourable and learned profession.

In these several capacities it is a lawyer's duty to promote the interest of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relation with other lawyers and demonstrate personal integrity.

We are officers of the Court and as set out in section 2 of Chapter 1 of the *Professional Conduct Handbook*:

(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.

(3) A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law and should not, either in argument to the judge or in address to the jury, assert a personal belief in an accused's guilt or innocence, in the justice or merits of the client's cause or in the evidence tendered before the court.

When we litigate against a represented party we are on a relatively even playing field and have some assurance that all of the relevant authorities will be placed before the Judge. However, that is not necessarily true when you are litigating against a non-lawyer who may not know anything about a particular legal point or of the relevant legislation. It falls to you to present the Court with all of the law, including those cases

which are important and unfavourable; but be armed to distinguish those case as you would with opposing counsel.

Our duty to conduct ourselves with dignity, courtesy and good faith is repeated throughout the *Professional Conduct Handbook*:

To The Client (Section 3 of Chapter 1):

(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.

To Other Lawyers (Section 4 of Chapter 1):

(1) A lawyer's conduct toward other lawyers should be characterized by courtesy and good faith. Any ill feeling that may exist between clients or lawyers, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. Personal remarks or references between lawyers should be scrupulously avoided, as should quarrels between lawyers which cause delay and promote unseemly wrangling.

(3) A lawyer should avoid all sharp practice and should take no paltry advantage when an opponent has made a slip or overlooked some technical matter. A lawyer should accede to reasonable requests which do not prejudice the rights of the client or the interest of justice.

You should remind yourself that a lay litigant is not bound by the same ethical duties and will often take things personally and will tell untruths to get what they want out of a Judge. Never condescend to that behaviour.

It is so important when you are dealing with an unrepresented party that you remain calm and always treat them with respect. Lay litigants often have the type of personality that that will be quick to Judge and even quicker to pick up the phone and call the Law Society. Keep in mind that every letter that you write to and every conversation you have with a lay litigant may end up being the subject of a complaint to the Law Society or attached to an Affidavit filed in Court.

As a lawyer, you need no more motivation to remain on your best behaviour than the possibility that your conduct could, in the worst case scenario, attract negative comment from the Court and no lawyer wants to be so embarrassed. For example, in *Kent v. Waldock*, 1995 CarswellBC 2479, counsel's conduct was described as "one would hardly hold up as a model of how to deal with an unrepresented litigant". During the trial, defence counsel called the self represented plaintiff "a cowardly thug" and admitted that he disliked him immensely. The trial Judge's reasons commented about how counsel should not have behaved discourteously nor should he have allowed his feelings to influence his conduct. The closing remarks of the appeal judgment (2000 BCCA 357, para. 46), were that counsel "was entitled to be a strong advocate on behalf of his client

and to take advantage of the rules in the conduct of the case, but he was not entitled to abuse Mr. Kent any more than he was entitled to abuse the process of the court”.

In *Kaston v. Amex Bank of Canada*, 2004 BCSC 809, paras. 13-15 Mr. Justice Macaulay commented on how the in-person litigant endeavoured to scrupulously comply with the Rules of Court and common courtesy but that the same could not be said of defence counsel, who was clearly stonewalling, waiting unconscionably long to respond to requests for discovery. The Court condemned her cavalier treatment of the plaintiff.

Instead you want to be the subject of remarks from the Court about counsel such as:

- “...conducted themselves patiently, reasonably, and with the utmost effort to cooperate in allowing Mr. Vesuna to bring his claim to trial, despite the many challenges posed by the plaintiff’s disorganization and lack of understanding of the rules of procedure or evidence.” (*Vesuna v. British Columbia (Minister of Transportation of British Columbia)*, 2011 BCSC 1618, para. 10); or
- “...provided the court with background material, the legislation and a thorough analysis of the applicable legislative provisions. Her approach to this matter was professional and met our expectations of a member of the Bar, particularly when dealing with an unrepresented litigant. We are indebted to her for her assistance.” (*Sullivan v. Strata Plan BCS-251*, 2005 BCCA 342, para. 26)

As referenced above, we have a duty to avoid sharp practice or to take paltry advantage on small technical mistakes. This ethical duty is truly tested when dealing with lay litigants who make lots of mistakes in their pleadings, on procedural matters and in the conduct of a trial. As counsel you must recognize how difficult it is for them to be operating in our environment which has so many technical rules. We should always be reasonable when appropriate. Generally speaking you should not rely on technicalities unless your client is being prejudiced. Generally speaking the Courts are sympathetic to a lay litigant and taking unreasonable positions because you can when there is no prospect of prejudice to your client, is not going to endear you to the judiciary. What a Judge wants to hear about are the merits of your application or your case; the Judge does not want to see you put up unnecessary hurdles in front of a lay litigant just to make the litigation process more difficult for them than it needs to be. Instead, you have an ethical obligation to not take paltry advantage of mistakes or slip ups by lay litigants.

In a paper entitled "Ethical Issues Relating to Lawyers and Unrepresented Litigants in the Civil Justice System", Thomas G. Heintzman proposed the following amendment to the CBA Code:

A trial lawyer must not attempt to derive benefit for his or her client at trial with an unrepresented litigant due to the fact that the litigant is represented, and should avoid imposing unnecessary disadvantage, hardship, or confusion to the unrepresented litigant.

A trial lawyer is entitled to raise proper and legitimate technical and procedural objections but should not take advantage of the technical deficiencies in the pleadings, procedure steps, or presentation of the case against an unrepresented party which do not go to the merits of the case or the legitimate rights and interest of the client.

These are words to keep in mind.

III. NEVER GIVE LEGAL ADVICE

It is inevitable that an in person litigant will ask you for advice. When asked, no matter how minor or inconsequential the information sought may seem, you must never offer legal advice.

In fact, it is best not to give advice of any sort. It can be a slippery slope with a self-represented litigant. What can start out as seemingly harmless information may lead to further and further questions and the risk that the lay litigant will misunderstand or misinterpret your words and then misinforming the Judge. Some lay litigants have a knack in getting lawyers to talk to them and then twisting the information to their advantage in front of the Judge.

Chapter 4.1 of the *Professional Conduct Handbook* spells out that:

A lawyer acting for a client in a matter in which there is an unrepresented person must advise that client and unrepresented person that the latter's interests are not protected by the lawyer.

It is important to establish your role at the outset of your dealings with an unrepresented litigant and ideally to do so in writing. Spell out that your role is to represent your client; you cannot and you will not give any legal advice and encourage the lay litigant to seek out appropriate legal advice. You can offer him or her information about the potential sources of legal advice if they are unwilling to retain counsel even after being encouraged to do so.

For example, you can refer the in person litigant to:

- The Supreme Court website, http://www.courts.gov.bc.ca/supreme_court has a drop down menu for "self-represented litigants" that identifies resources and other websites with information about general areas of law, how to do legal research, Court procedures and documents.
- The Lawyer Referral Service through the CBA, provides 30 minutes of legal advice for \$25 (call 604.687.3221 or 1.800.663.1191).
- The Access Pro Bono BC pilot project provides pro bono legal assistance and representation at the Vancouver Courthouse every Wednesday for low-and-modest income litigants appearing in Civil Chambers in Vancouver (604.603.5797 or see their website, <http://accessprobono.ca>).

- The Supreme Court Self-Help and Information Center has a website at <http://www.supremecourtselfhelp.bc.ca> with helpful videos about Court documents and "Taking your Case to the Supreme Court of BC."

I suggest that no matter how informal you are with opposing counsel, it is a good practice to address an unrepresented litigant by their surname. It helps the lay litigant understand that your relationship with them is professional and it is a good reminder to yourself. You should always be polite but do not engage in any sort of casual conversation. It starts to blur the line for the lay litigant and raises opportunity for him or her to seek legal advice from you or for him or her to engage in conversation has the potential of later being misinterpreted or misquoted.

Not only should you advise the lay litigant to retain counsel at the initial stage of the litigation, continue to do so at every opportunity; for example, every time you serve a motion or expert report have a standard line recommending that they seek legal advice in respect of this application/report and in respect of the action as a whole.

IV. KNOW YOUR OPPONENT

It is important for you, as best as you can as an armchair psychologist, to assess the personality of the individual that you are litigating against. This will help you figure out how to deal with them. The type of person that they are may also have an effect on how the Judge deals with them. It will also allow you to prepare your client for the costs when those warning lights go off that you are going to have to cope with a particularly difficult personality.

There are two main categories of lay litigants: those who would like a lawyer but cannot afford to hire one and those who can afford a lawyer but chose not to retain one. Madam Justice Trussler, in her article "A Judicial View on Self-Represented Litigants", (2002) 19 C.F.L.Q. 547, suggested that the latter break down into three categories: recreational litigants who have spare time to spend on litigation; people who are intelligent, or sometimes just self-absorbed, who feel they can do better than a lawyer; and, those who are deluded or dangerous.

Thankfully most plaintiffs presenting personal injury claims in Supreme Court are able to secure counsel by way of contingency fee agreements. Thus it seems that a litigant pursuing a personal injury claim finds themselves without a lawyer because either they have managed to alienate a number of lawyers previously acting for them and often because they are mentally ill or they have a difficult/hopeless claim that no lawyer was prepared to take on. Inevitably, it adds up to trouble for opposing counsel and expense for their client.

Having some understanding of the personality that you are going to deal with will help in your approach. The more difficult the litigant, the more you need to limit your contact with them to writing and the more you should let them speak in a Courtroom. Often these are the personalities that hang themselves in front of a Judge because the more they talk the more unreasonable they appear and the more their claim starts to look like it lacks merit.

V. PUT EVERYTHING IN WRITING

There is not much that needs to be said on this topic other than put everything in writing.

In fact, it is often easier for you to limit your communications with any lay litigant and particularly with the more difficult litigants to writing. This is the only way to ensure that there are no misunderstandings and, in the long run, will limit the expense to your client.

VI. UNDERSTAND THE COURT'S ROLE

It is important, as counsel, to appreciate the difficult position that a Judge is placed in when one litigant is unrepresented. Counsel should be aware of and recognize that the Court has a duty to ensure that the unrepresented litigant has the opportunity for a fair hearing. We should also be mindful of how difficult it must be for someone not trained in the law or procedure to represent themselves in a trial. To ensure a fair trial, the Judge is forced to step beyond their usual role and must assist the non-lawyer in understanding the legal process and relevant legal issues so that the case can be presented to the best of the self-represented litigant's ability. By doing so, a Judge may appear to grant leniency to the self-represented litigant which is not otherwise extended to counsel leaving your client or any other represented litigant with the impression that the Judge is biased against them. For example, sometimes it is necessary for the Judge to ask questions of the unrepresented litigant or any of his or her witnesses to obtain relevant information. This may appear to some to be the Judge assuming an advocacy role on behalf of the unrepresented litigant. It is not.

Madam Justice Rowles recently addressed the Court's balancing act between assisting and advocating on behalf of in-person litigants in *Burnaby (City) v. Oh*, 2011 BCCA 222 as follows:

[35] What has been said in the case authorities on trial fairness and the obligations placed on trial judges when there is an unrepresented litigant is of assistance in considering the appellant's arguments. In *Davids v. Davids*, [1999] O.J. No. 3930, 125 O.A.C. 375 at para. 36, the Ontario Court of Appeal said the following under the heading "Was the trial so unfair as to result in a miscarriage of justice?":

[36]... The fairness of this trial was not measured by comparing the appellant's conduct of his own case with the conduct of that case by a competent lawyer. If that were the measure of fairness, trial judges could only require persons to proceed to trial without counsel in those rare cases where an unrepresented person could present his or her case as effectively as counsel. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. Nor does fairness dictate that the unrepresented litigant have a lawyer's familiarity with procedures and forensic tactics. It does require that the trial judge treat the litigant fairly and attempt to accommodate unrepresented litigants' unfamiliarity with the process so as to permit them to present their case. In doing so, the trial judge must, of course, respect the rights of the other party.

[36] In *Ridout v. Ridout*, 2006 MBCA 59, leave to appeal ref'd [2007] 1 S.C.R. xiv, the Manitoba Court of Appeal noted, at para. 12, that self-represented litigants do not have "some kind of special status". At para. 13, the Court said:

The trial judge cannot become the advocate for the unrepresented litigant, nor can the judge provide legal advice. However, the judge's challenge is to take pains to ensure that a party's lack of legal training does not unduly prejudice his or her ability to participate meaningfully in the proceeding.

Madam Justice Kirkpatrick described the difference this way in *Topgro Greenhouses Ltd. v. Houweling*, 2006 BCCA 183:

[51] Mr. Houweling's factum can only be described as incoherent. His oral submissions did little to assist us. We are not obliged to create arguments for an in-person litigant such as Mr. Houweling. As this court stated in *Newson v. Kexco Publishing Co.*, (1995), 17 B.C.L.R. (3d) 176, 111 W.A.C. 297(B.C.C.A.) 297:

Our obligation, as with all litigants in person, is to put our deepest understanding to the arguments being made without becoming advocates for the personal litigant or creating new arguments which he has not advanced...

Your role as counsel is to recognize the Judge's predicament and to be supportive wherever possible. This includes explaining the circumstances to your client so that they are not misinterpreting the Judge's assistance as unfairly favouring the in person litigant. At the same time, you have to ensure that any relaxation of the procedural or evidentiary rules being afforded to the lay litigant does not deprive your client of procedural fairness. So the Judge is forced into a balancing act between assisting the unrepresented litigant to ensure a fair trial and not taking on the role of advocate. You have to temper your role somewhat recognizing that an unrepresented litigant is at a disadvantage but also ensuring that your client does not suffer prejudice in the process. You should always ensure that you advance objection to any leniency prejudicing your client. In those rare circumstances where there is unwarranted relaxation of the rules or standards of evidence, it is important make objections, both to bring balance back to the proceedings but also to strengthen any appeal that may be necessary.

VII. SECURITY RISKS

Some lay litigants are unreasonable or volatile no matter how reasonable and calm you remain. As a rule, try to diffuse and not escalate conflict with such a personality; no matter how hard it is to remain calm. Some lay litigants suffer from mental illness and so it is hard to predict their behaviour. It is best to limit your direct contact with the difficult lay litigant as much as possible. Sometimes a lay litigant's behaviour can cause you to become concerned for your safety. If you are threatened by someone, anyone, you should not hesitate to involve the police. You can also seek advice from the Law Society about how to deal with these individuals.

If you have any concerns about your safety in a Courtroom, you should contact the local sheriff's office and apprise them of your concerns so that there can be increased security put into place. You may be asked to put your concerns in writing so that the sheriff can determine the seriousness of the risks. You should allow the sheriff time to acquire more information about the particular person so that they can properly evaluate risk. After reviewing the request, the sheriff may have a deputy attend Court and stay for the hearing or attend periodically. You should also advise trial scheduling when booking Court dates if there is a potential need for increased security. They, in turn, will advise the sheriff office.

During any Court appearance the need for a sheriff to attend can simply be satisfied by requesting the clerk to call the sheriffs or ask the presiding Judge to have the sheriffs attend. This may not be something that younger counsel are comfortable in doing and so it is important to address these needs prior to Court starting whenever you are able.

Each Courtroom is equipped with a "panic button" device available to the Judge and the clerk. If pressed, there will be an immediate response from the sheriffs.

If you have been in Court with a person who seems to have become unhinged, be careful that you are not followed when you leave the Courthouse.

VIII. CHAMBERS PRACTICE

Chambers applications can be particularly frustrating when dealing with a lay litigant. Often they do not understand the procedure and appear without an Affidavit inevitably preferring to tell their story to the Judge. Other times, the lay litigant prepares an Affidavit rife with inadmissible evidence, hearsay, irrelevant information or which is missing the critical evidence. Again, the lay litigant anticipates being able to fill in the missing evidence by telling the Judge all about it when they stand up in Court. Some seem to like the dramatic element of surprise and don't want to disclose information to you until they have the ear of the Judge. Some lie to the Judge to get what they want. Some Judges will listen to the lay litigant and relax some of the rules or procedure in Chambers which could result in prejudice to your client. Other Judges will adjourn an application to allow the lay litigant to prepare the necessary materials which is expensive for your client. As counsel you want to be able to enforce the rules against a lay litigant where there is the potential for prejudice to your client and you always want to limit any opportunity for them to obtain an adjournment.

When serving documents write a cover letter explaining in simple terms what is being served, the order you are seeking, what they must do in response including the necessity to prepare an Affidavit with any evidence that they intend to rely upon and identify any applicable deadlines. Provide the relevant cases, statutes and rules at the same time. If they serve defective material, write back and explain the deficiencies and tell them that you will be objecting to the admissibility of the evidence unless they cure the defects. It is important to be specific about your objections. By ensuring that the lay litigant understands what is expected of them, you are setting the stage to make successful objection if they show up with nothing but a script. Hopefully, you are also limiting any opportunity that they might get an adjournment. A lay litigant's best defence to a procedural or

evidentiary objection is that they did not understand. If you point the errors out in advance allowing them an opportunity to fix them, this removes the "ignorance of the law" argument that can often be persuasive. Doing so in writing allows you to show the letter to the Judge and the lay litigant can't argue that they didn't understand what you were telling them.

You should also be prepared for the fact of life that lay litigants often get adjournments. Sometimes, rather than opposing an adjournment, you should think about seeking terms. If there is a history of multiple adjournments, having a written chronology of the litigation's history can be helpful in drawing a Judge's attention to the prejudice to your client. It may also help the Judge to hear about the legal expense incurred by your client as a result of the constant delays.

You may want to consider asking the Judge or Master if they will consider themselves seized of the proceedings or whether they will hear other applications in the proceedings if the litigant is bringing a number of unnecessary applications.

Often a lay litigant's submission will include an accusation that you did or said something that is false. It is most important that you not react emotionally. You should also take some comfort from the fact that although the Judge may not say so, it is likely that he or she recognizes the falsehood. Judges have a lot of experience with lay litigants and understand that a lay litigant may be inclined to say anything to win; after all they are not bound by the same ethical duties as we are. Undoubtedly, being in Chambers is intimidating and nerve wracking for the non-lawyer and the experience is not likely to bring out their best behaviour.

Once you have manoeuvred around the procedural challenges of dealing with a non-lawyer in chambers, as referenced above, you must also remember your ethical duty as an officer of the Court to ensure that you draw the Judge's attention to all relevant authorities even if they don't help your case.

The following are some cases which contain judicial comment about an unrepresented litigant's obligations which are helpful to have in hand when you appear in chambers.

Mr. Justice Wilson addressed a very badly behaved lay litigant in *Nelson v. Nelson*, 2000 BCSC 1276 whose conduct included:

[26] His addresses were unrestrained. He persisted in interrupting Ms. Harold despite admonishments not to do so. He was profane. He insulted Ms. Harold and made serious accusations of professional irresponsibility, against Ms. Harold and members of her firm. Despite Ms. Harold's objections and directions from me that he stop, Mr. Nelson persisted in his rude and insulting behaviour.

[27] On several occasions, Mr. Nelson needlessly stated that he was not represented by a lawyer. There is no reason why counsel must be subjected to conduct of this nature by a self-represented litigant.

[28] In my opinion Mr. Nelson's conduct was reprehensible, bordering on scandal and outrage, deserving of rebuke. Mr. Nelson's conduct was conduct with which this court must disassociate itself. One method of disassociating itself with such conduct is for the court to make an award of special costs. Such an award is fully justified in this case.

The Court recognized that there are some obligations on a lay litigant commenting:

[38] Mr. Nelson has a right to an audience in this court as a self-represented litigant. However, he has a responsibility to have some knowledge of the rules of procedure in this court, and to follow those rules. His present applications are hopelessly ill conceived".

In *Kemp v. Wittenberg*, 2001 BCSC 273, Madam Justice Kloegman (née Satanove) was faced with Affidavits prepared by an unrepresented litigant which contained irrelevant and redundant evidence and lacked germane evidence. At paragraph 9, Her Ladyship said:

Dr. Kemp constantly reminded me that she was not a lawyer and did not always appreciate our rules of evidence. While I have sympathy for her, I am reminded of what Justice Platana said in *Bazuik v. Dunwoody* (1997), 13 C.P.C. (4th) 156 (Ont. Ct. Gen. Div.):

The problem of unrepresented parties, who may not be familiar with law and procedure, is one which is facing courts today with an ever increasing frequency. Courts are mindful of a degree of understanding and appreciation which should appropriately be extended to such parties. However, notwithstanding the difficulty with such parties attempting to properly represent themselves, courts must also balance the issues of fairness and be mindful of both, or all parties. Issues of fairness of course must always be determined in accordance with accepted legal principles and the law which has developed. A sense of fairness and understanding granted to unrepresented parties ought never to extend to the degree where courts do not give effect to the existing law, or where the issues of fairness to an unrepresented litigant is permitted to override the rights of the defendant party.

Taylor Ventures Inc. v. van der Zwan, 2000 BCCA 647, involved an appeal from an order made by a Judge in reliance on statements made by a bankrupt attending in Chambers without having filed an Affidavit. The Court of Appeal found that the Chambers Judge had erred in doing so and remitted the matter back to Chambers. Southin J.A. wrote:

"Mr. van der Zwan appeared in person. He filed no Affidavit. He did not go in the witness box. He made certain statements to the learned Chambers judge which are set out in the learned Chambers judge's reasons as if they

had been proper evidence. Upon those statements, the learned Chambers judge made some findings and, of course, from the point of view of the trustee in bankruptcy the difficulty is that he had no opportunity to cross-examine this witness, using the word witness loosely, and fairly enough complains in this Court of what happened."

The Court recognized that there has to be some leeway given to unrepresented litigants but the learned Chambers Judge ought to have made it clear to the bankrupt that he would not pay any attention to any facts unless they were properly attested to in accordance with practice.

In the introductory paragraph of the recent decision, *Shebib v. Victoria (City)*, 2012 BCCA 42 Mr. Justice Chaisson said:

This case illustrates the tension that often develops among the aspirations of self-represented parties, the interests of parties who are represented and the responsibilities of the court in overseeing the orderly administration of litigation.

And at paragraph 11 and 33:

[11] Court rules, procedures and provisions governing appeals are designed to achieve an effective appellate process. Their objective is to facilitate, not obstruct, the achievement of a correct legal result. Appellate procedural rules protect and promote the interest of parties, including Mr. Shebib. When rules and procedures are not followed, it is difficult for this Court to administer appeals effectively. Parties who do not follow the appropriate rules and procedures often obscure their legitimate positions, making it hard for this Court to address their concerns. Failure to comply with the appropriate rules and procedures also may unfairly compound the difficulties of the opposing party's task of presenting its position and resisting the position of the defaulting party.

[33] These rights must be determined in accordance with the law. It is as important to Mr. Shebib as it is to the respondent that this be so. Equally important is the ability of each protagonist to pursue his or its position in accordance with the rules and procedures of this and other courts. Causing chaos in the processes of the court and leaving the court unclear as to positions being advanced does not serve the best interests of any litigant.

Madam Justice Ross' decision in *Bay v. Family Insurance Corporation*, 2008 BCSC 1164 is a recent example of the Court enforcing the Rules against unrepresented litigants. The claim was dismissed for want of prosecution because the self-represented plaintiff had failed to comply with requests for information and other failures to comply with the Rules. It is a good example of how important it is for defence counsel to put requests in writing and identifying the consequences for failing to comply with the Rules.

Pursuing a summary trial application against an unrepresented litigant raises difficulties as identified in: *Insurance Corporation of British Columbia v. Murdoch*, 2005 BCSC 200;

Chavez v. Burnaby (City of), 2004 BCCA 116. However, see *Volk v. Bremner*, 2008 BCSC 1584, in which a summary dismissal of a in-person litigant's claim was granted over protests and after the plaintiff had asked for an adjournment because he wanted more time to prepare.

Generally speaking a Halliday order is inappropriate where the plaintiff is unrepresented: *Thurston v. Blondeau*, 2004 BCCA 505, paras. 11-12; *Tennis v. Stracuzzi et al*, 2006 BCSC 70, paras. 23-25.

Wherever possible attend Chambers with a draft order so that it can be signed by the Judge or Master at the hearing. You will need to have the form of order vetted by the Registry before offering it to the Judge so do so before attending in Chambers.

If you cannot have the Judge or Master sign the order at the hearing, always remember to ask the Court under Rule 13-1(1) and (2) to dispense with the necessity of having the self-represented litigant's endorsement on the form of order. This will save any dispute about the form of the order or having to chase after the self-represented litigant to sign it.

IX. CONSIDER SETTLEMENT CONFERENCES

Negotiating with a lay litigant can be very difficult. Many don't understand the concept of without prejudice negotiations and will feel free to blurt out an offer you have made when it is inappropriate to do so, such as in Chambers. To prevent the opportunity for miscommunication, negotiations should always be done in writing. Any time there are negotiations either face to face (i.e., after a Chambers application) or over the phone (which should be discouraged) you should always immediately follow up with written confirmation of what took place, the offer and the fact that it was without prejudice. So negotiating with a lay litigant can be cumbersome and ineffective.

I have never done a mediation with an unrepresented party, but suspect that there are difficulties that arise for the mediator. I imagine that it is inevitable for the unrepresented party to attempt to seek legal advice from the mediator placing them in a difficult position. If the negotiations are not going the way the unrepresented litigant wants it to go, they can easily be alienated by the mediator; no amount of convincing will satisfy them that the mediator is not on your side.

Instead, think about a judicial settlement conference under Rule 9-2. There are a number of advantages the most significant being that there will be a presiding Judge. The Judge has an authority that most lay litigants will respect. They might be able to stomp out of a mediation because they are frustrated or think that the mediator has turned against them. It would take a very brave litigant to walk out of a judicial settlement conference. The Judge can guide the litigant about legal points in a way that will have the lay litigant's ear. Whereas, he or she might be inclined to dismiss that same advice from you as being you only arguing your case on behalf of your client. If successful, at the conclusion there will be a record of the settlement that would be hard for the lay litigant to deny.

The late Provincial Court Chief Judge Stansfield in the case of *Belanger v. AT & T*, [1994] B.C.J. No. 2792 wrote about how effective settlement conferences are in that Court which he attributed, in part, to the fact that Judges are able to interact with litigants

in a relatively informal way that allows them to fairly and quickly get to the matters really in issue.

X. USE CASE PLANNING CONFERENCES TO YOUR ADVANTAGE

Obtaining the types of records that are routinely exchanged in personal injury litigation can become a difficult task when you are dealing with a self-represented party. Some do not want to cooperate. Some will not understand the relevance of some records, such as pre-accident clinical records, tax returns or their MSP printout. Some will think you are inappropriately invading their privacy. Of course, you have the avenue of setting down a Chambers application to compel production of relevant documents, but consider engaging the case planning conference procedure under Rule 5 ("CPC") instead. Whereas the self-represented litigant will be reluctant to cooperate with you, they are more likely to cooperate when they hear the Judge confirm that what you want is appropriate. The CPC allows an opportunity for you to address a number of other anticipated issues such as setting up discovery, ensuring that the lay litigant delivers a proper list of documents etc. Instead of picking off each of these issues individually with successive Chambers applications, with some forethought you can address a number of them in one early CPC. Using this strategy may save your client the costs of having to trot off to chambers each time the plaintiff fails to comply with the rules.

If you are using a CPC to enlist the plaintiff's cooperation, ensure that you are fully prepared. For example, come to the conference with the authorizations that you want the plaintiff to sign so that it can be done right then and there. Obtain orders from the Judge directing the self-represented litigant to carry out the tasks that you want. Under Rule 5-3(5) if a case planning order is approved in writing by the case planning conference Judge or Master, that order need not be approved in writing by a lawyer or by a party. As with any order, send a copy to the lay litigant with a letter explaining what it is and their obligations to comply with the terms of the order.

CPCs are also an opportunity to ensure that the lay litigant understands the procedural rules and expects that they are going to be enforced. Once the conference is set down, you should write to the litigant to explain that they must prepare a case plan proposal and identify what must be contained in the proposal. This exercise will ensure that they are aware of the rules for discovery of documents, examinations for discovery, requirement for exchange of expert evidence and the need to identify their witnesses. All of this will be reinforced by the Judge or Master hearing the CPC.

XI. CONDUCTING THE TRIAL REQUIRES SOME CAREFUL THOUGHT AND PREPARATION

Conducting a trial with a self-represented party can be a very trying experience and it requires careful thought in advance of the trial as to how you are going to conduct the trial. As counsel, we often expect there to be a level of cooperation on a number of trial procedures such as introduction of medical records. With a lay litigant, you cannot count on that same level of cooperation; instead, they are likely suspicious of any sort of cooperative approach. You will have to be prepared to prove admissibility and ensure that only relevant evidence is placed before the Court. Identify these issues early so that you can, for example, issue a necessary subpoenas because the lay litigant has refused to make an admission to a notice to admit seeking the usual admission of business records.

You should also engage the CPC and trial management conference ("TMC") procedures. These are opportunities to have a Judge assist in canvassing procedural and evidentiary issues which may arise. The lay litigant may be more receptive to cooperate after a Judge has endorsed a certain course. The Judge can act as form of independent referee which can help the lay litigant, who might be sceptical of your suggestions, see the benefit to a particular option. A TMC is the perfect place to hash out anticipated evidentiary issues and hopefully have the Judge assist in mediating reasonable and appropriate agreements about documents etc. It is also the place for the Judge to explain to the litigant what is going to happen in the trial.

You might think that having a lay person as your opposition means that you will have an easy time regarding some of the evidentiary hurdle that arise in a trial; after all they are not likely to have any understanding of the rules of evidence. This is not a wise tactic. As outlined by some of the cases below, there are consequences to taking any short cuts in the Courtroom with an unrepresented litigant. It is certainly not to your client's benefit to attempt to take advantage or any short cuts when dealing with an unrepresented litigant.

Trozzo Holdings Ltd. v. Niagara Holdings Ltd., 2002 BCCA 655 involved a trial between a represented plaintiff and an unrepresented defendant. The Court of Appeal ordered a new trial because documents relied upon by the plaintiff were not properly proven and findings of fact were unsupported by admissible evidence. Mr. Justice Finch identified the issue on appeal as:

[5] This case exemplifies some of the difficulties that arise when a trial in the adversarial system is conducted without the benefit of counsel on both sides.

[6] Counsel for the plaintiff tendered two books of documents at the outset of the trial which included correspondence, experts' reports, photographs, invoices and cancelled cheques. Almost none of these documents were properly proven as to either authenticity or authorship. In a case where the defendant was represented by counsel, one would expect him or her to take a position on the admissibility of these documents. If objection were taken to some, or all, counsel for the plaintiff would no doubt act accordingly to adduce whatever formal proof was required.

...

[14] It is easy to see how counsel for the plaintiff, unopposed by counsel for the defence, could be lulled into such a casual approach to the way the evidence was presented. One is naturally inclined to act on the assumption that if objection is not taken, the evidence can be received, for all purposes, in the form presented. It is very difficult for the Judge in such circumstances to intervene without appearing unfairly to assist the unrepresented by taking objections on his behalf; or appearing unfairly to assist the unrepresented party by pointing out what proof is lacking or how it should be remedied.

Owimar v. Greater Vancouver Transportation Authority, 2007 BCCA 630 is another example of how important it is for counsel, when dealing with an un-represented litigant,

to take time to ensure that the trial is being conducted fairly, particularly where seeking to admit documents by admission. During the trial, in front of a jury, Mr. Owimar who was unrepresented agreed to admit the defendant's book of documents which contained the plaintiff's psychiatric records. Mr. Owimar appealed from the jury's verdict (at which he was represented by counsel) arguing the psychiatric records were irrelevant and inadmissible. The Court of Appeal held that despite Mr. Owimar's consent it was incumbent on the trial Judge to vigilantly review the evidence and undertake a timely analysis of the relevance, materiality and probative value versus prejudicial effect. Undoubtedly, the outcome would have been different had the plaintiff been represented by counsel at trial. Thus the danger is that even if you succeed in getting evidence before a Judge or jury that might not have otherwise gone in had the adverse party been represented by counsel, there is the risk that it will be overturned on appeal. It is always better to do it right the first time.

XII. CONCLUSION

Experience has taught us that the best approach with a lay litigant is to always treat them with respect and to maintain your professionalism no matter how trying the situation. If you do so and engage some common sense in anticipating and addressing issues before they arise, you will limit the self-represented litigant's ability to plead ignorance of rules of procedure and evidence and, hopefully also expense to your client.

I suggest it is also important to remember that the litigation is usually important to the lay litigant and that they are having to operate in a venue that is foreign to them. I cannot imagine how difficult it must be for them and although some are plainly just crazy, others have legitimate claims that would be trying for even skilled counsel to contend with. They deserve our respect and we must walk what can be a fine line at times between being fair and reasonable and not prejudicing our own client.