

Self-Represented Litigants

From One Judge's Perspective*

&

From One Lawyer's Perspective



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*Judge Demong's views are his own and not necessarily the same as those of his colleagues on the Provincial Court or the Court of Queen's Bench

The Self-Represented Litigant

- The term “SRL” is accepted as the general descriptor for an unrepresented party
- There are many reasons an individual is not represented
- These reasons may impact upon the way that both counsel and the Court interact with the SRL

Statistics on SRLs

- The National Self-Represented Litigants Project (May 2013) addressed the issue in the context of Alberta, B.C. and Ontario SRLs
- 60% of the SRLs were family litigants, 31% were litigants in civil court, (13% Small Claims, 18% general civil), 4% were before tribunals.
- Financial issues were most commonly cited as the reason for self-representation

Statistics on SRLs

- Almost half of SRLs in the McFarlane Report had been previously represented
- 10% of SRLs chose to be self-represented from the outset. Finances were not a factor
- No matter the reason for becoming an SRL, within a short time almost all expressed disillusionment, frustration and a feeling that their matter was overwhelming as a result of complexity and time commitments

A Judge's Perspective – The Demeanour of Most SRLs

- Generally agreeable, friendly & focussed
- Rarely familiar with statutes, regulations, common law or procedure
- Commonly first time court attendees

A Judge's Perspective – SRL Preparation for Trial

- Generally the SRL:
 - Has not read materials that may explain how to run a trial
 - Even if they have, few understand the nature and intent of pleadings, document production, preparation and presentation of evidence, cross-examination or final argument

A Lawyer's Perspective – Impact of the SRL

- Unintelligible pleadings/originating documentation
- Resultant uncertainty as to SRL's position and the case you are to meet
- There is often an implicit, sometimes an explicit, expectation by the SRL that both you and the Court will accommodate the SRL in a number of ways
- This can lead to frustration on your part– remember, the trier of fact is trying to balance your experience against the SRL's often very limited skills in order to create a more level playing field

A Lawyer's Perspective – The Demeanour of SRLs

- The vast majority of SRLs in my experience are anxious and unsure of themselves. This manifests variously as:
 - Nervousness
 - An approach to their case that borrows heavily from television
 - Disorganization
 - Use of inappropriate and/or unsuitable materials
 - Negativity toward you from some
 - A strange collegiality from others

A Judge's Perspective – The SRL Modus Operandi

- Many SRLs seem to operate on the premise that when they get to court, they need only “tell their story” and then the court will “sort it out” and “do justice” for them
- Some perspective: of sixty civil trials in the last nine months, only two SRLs filed exhibit books, and only one filed a brief, (that dealt with criminal law as considered by the Ontario County Court)

A Lawyer's Perspective – Implications for Hearing

- Most of my practice against SRLs is before a tribunal
- The involvement of an SRL yields the following practical considerations:
 - They often want to file new documents the morning of the hearing
 - They have no idea how to present their case, (see: they want to tell their story to the court)
 - They interrupt, they change their story, they seek assistance from the trier of fact when your questions prove to be uncomfortable

A Judge's Perspective – Assistance the Court Will Offer the SRL at Case Management & at Trial

- Clarification of pleadings
- Scheduling of court dates
- Production and filing of documents
- Dealing with evidence
- Clarification of appropriate conduct in Court

A Judge's Perspective – Implications of the SRL for Counsel

- There is a huge power and knowledge imbalance in favour of the lawyer
- Accordingly, for the action to proceed in orderly fashion, counsel will find it necessary to:
 - Explain
 - Educate
 - Accommodate

A Judge's Perspective – What You Can Expect From the Bench

- An implicit appreciation of the power and knowledge imbalance between you and the SRL
- Admonishment of the SRL as necessary, (i.e. abusive, recalcitrant, avoiding legal obligations)

A Judge's Perspective – What You Can Expect From the Bench

- An expectation that you will:
 - Conduct yourself as an officer of the court
 - Treat the SRL as you would a respected colleague
 - If you seek orders or directions from the court, the court will assume that you will have previously explained to the SRL what you need, why you need it, the consequences which might flow if you don't get what you want, and the process you intend to follow to obtain it.

A Lawyer's Perspective – Practice Tips

- I tend to:
 - Bring copies of pertinent legislation and cases for the SRL
 - Explain what the SRL may expect during the hearing
 - Explain that I am not a witness and, therefore, you cannot be asked questions, (this is a very common issue in my practice)
 - In most instances, ensure that the SRL knows that I understand that the process can be overwhelming

A Lawyer's Perspective – Practice Tips

- I always:
 - Make the trier of fact aware of cases that are contrary to my interest, unknown to the SRL, yet very relevant to the hearing, (Note: the duty to make full and frank disclosure before the court arises when the party opposite is not represented and not present in court)
 - Exercise patience and restraint when I want to point out the irrelevance of the SRL's (non-damaging) statements – if the statements do not affect your case, and your objection will only increase tension, why make it?

A Lawyer's Perspective – Practice Tips

- I never:
 - Take advantage of obvious mistakes made by an SRL where there is no prejudice to my client to do otherwise
 - Argue with the trier of fact as to whether he/she/they should be interventionist and have not yet had an occasion where I felt that it would benefit me to do so
 - Try to unduly complicate an action so as to make it even more troublesome for the SRL to make his/her case
 - Lose sight of the fact that the pleasant SRL today could rethink my actions or words and make me the subject of a complaint tomorrow

A Lawyer's Perspective – Practice Tips

- I never:
 - Use legal jargon
 - Take any action/use words that might lead the SRL to feel that I am unduly friendly or acquainted with the trier of fact or the court/tribunal personnel
 - Present as unduly tied to rules and timelines unless the SRL has clearly been abusive of either or both, (this has not been my experience)

A Judge's Perspective – What The Court Expects of You

- The court will expect from you:
 - Candour
 - Courtesy
 - Respect
 - Patience
 - Simplification of complex issues
 - Agreement on issues, where possible
 - Timely sharing of information, documents, and legal briefs

A Judge's Perspective -- Avoid These Behaviours

- The surprise motion
- The late breaking introduction of documents
- Condescension
- Obfuscation of the issues
- Any attempt to confuse the SRL or unnecessarily complicate matters

A Judge's Perspective – What the SRL May Expect from the Court

- A more interventionist judge with a more inquisitive, interrogatory style
- A judge who spends a longer time explaining:
 - The practice of the Court
 - The rules of evidence
 - The interpretation of substantive law
 - The implications of the evidence upon the arguments that you tender to the Court

A Judge's Perspective – How This Impacts You

- You may expect a more relaxed approach to:
 - The strict rules of evidence
 - The order of witnesses
 - The right to offer rebuttal evidence
- You may also expect:
 - The same benefit of this approach, but if you do not find this to be reasonable, draw your concerns to the attention of the Court – otherwise, your silence will be seen as acquiescence by the Court.

A Lawyer's Perspective – Negotiation

- Negotiation with an SRL can prove to be a minefield:
 - I ensure that I negotiate in writing, if I negotiate at all;
 - I encourage use of ILA for settlements
 - If the negotiation occurs during a break in the hearing or immediately before the hearing, I ensure that the fact a settlement occurred is placed on the record
 - At times, I ensure that a colleague is present during settlement negotiations
 - I make detailed notes of the negotiations – if they fail, often SRLs will try to raise them at the hearing

A Judge's Perspective – The Result of Your Efforts

- As you prepare for trial, expect that in exchange for your patient explanations, your reasonable tutorials and sensible accommodations, the Court will not hesitate to make those orders necessary to facilitate the orderly flow of information and scheduling

A Judge's Perspective – The Impact of Your Actions on the Trial

- If you are inclined to accommodate, the following four things will likely occur:
 - The trial will be much less onerous for the judge
 - Your reputation before the Court will grow appreciably
 - The frustration you will undoubtedly feel will be greatly diminished
 - You may well amend your style when litigating against SRLs – they are here to stay.



?? Questions ??