

Introduction

“Go on, get out. Last words are for fools who haven't said enough.”

Karl Marx

“I am mindful of the fact that the plaintiff was unrepresented and was unfamiliar with the rules of evidence and the rules of procedure of this court. A trial judge should bear in mind when a trial is conducted by an unrepresented litigant to every reasonable degree grant the litigant understanding and assistance. This is, of course, subject to the overriding proviso that the trial judge must be absolutely impartial, must not play the role of advocate, and must apply the rules of evidence and procedure equally to all litigants. The fact that a litigant is unrepresented does not entitle a trial judge to fail to apply the rules of procedure or ignore the law.”

Justice Ferrier

(Angel v. Angel, [1997] O.J. No. 3976 (Gen. Div.) at paragraph 8)

“... when a judge of this court makes a timetabling order, either on the consent of the parties or after hearing submissions, the parties must comply with the order. Certainly in some cases unforeseen problems may arise necessitating a motion to vary the timetable. However, such motions should be rare because counsel and self-represented litigants should take the time and trouble to examine the procedural needs of their cases before committing to a timetable.”

Justice D. Brown

(Pershadsingh v. Thompson, 2010 ONSC 4943 at paragraph 42)

Overview

It is now generally accepted that unrepresented or self-represented litigants are becoming more and more common in the court system. It is widely agreed that unrepresented or self-represented litigants present unique challenges and difficulties - ones that can often be frustrating, time consuming and expensive.

I have opted to take a somewhat unorthodox approach in this paper as to what to expect and how to deal with a self-represented litigant. I first present a manifesto of the self-represented litigant in his/her own words. It is meant to grab your attention as self-represented litigants often do. Moreover, there is no easy way to describe a self-represented litigant, but a manifesto captures the spirit of a self-represented litigant and his/her thinking. I then present a lawyer's toolkit. By definition, a toolkit offers a practical approach to the challenges and difficulties counsel faces when confronted by a self-represented litigant. It is designed to provide the reader with sound advice, collective wisdom, and specific tools to equip the reader in what will be the long struggle ahead.

Finally, it should be noted that there is a difference between the unrepresented litigant, who wants to retain a lawyer, but cannot afford to, and the self-represented litigant, who chooses to be self-represented, usually has an agenda, and often cannot find a lawyer who will work with him/her. I approach the topic through the matrix of a self-represented litigant - it is spicier. However, the experiences and lessons are equally applicable to the unrepresented litigant. Enjoy!

MANIFESTO OF THE SELF-REPRESENTED LITIGANT!!!

- **I EXPECT TO BE HEARD**
 - I WILL BE HEARD
 - I DEMAND TO BE HEARD

- **I WILL SHOUT**
 - I WILL BELLOW
 - I MAY ULTIMATELY BEG

- **I WILL NOT GIVE UP, BUT SIMPLY REPEAT THE SAME ARGUMENT OVER AND OVER**

- **I WILL TRY TO MAKE YOU ANGRY, TO SAY SOMETHING YOU REGRET, TO DO SOMETHING YOU SHOULDN'T**

- **I DON'T KNOW THE *RULES OF CIVIL PROCEDURE* OR THE RULES OF EVIDENCE AND FRANKLY DON'T CARE**

- **I EXPECT THE COURT TO PROVIDE ME WITH ADVICE AND ASSISTANCE**

- **I EXPECT COUNSEL TO PROVIDE ME WITH ADVICE AND ASSISTANCE**

- **THE SYSTEM IS BIASED**

- **WHEN IT SUITS ME, I WILL PRETEND NOT TO UNDERSTAND**

- **I WILL PROMISE MUCH, BUT DELIVER LITTLE**

- **I WILL BE NICE; I WILL BE NASTY; I WILL BE UNPREDICTABLE**
 - WHEN CORNERED, I AM DANGEROUS

- **I DON'T PLAY FAIR OR BY THE MARQUEES OF QUEENSBERRY RULES**
 - DON'T EXPECT ANY FAVOURS FROM ME
 - FAIRNESS IS HOW I DEFINE IT

- **I WILL TENDER ANY EVIDENCE I WANT REGARDLESS OF THE RULES OF EVIDENCE**
 - I EXPECT A JUDGE TO CONSIDER ANY DOCUMENT I SUBMIT, CONVERSATION I REFER TO, OR TESTIMONY I GIVE

- **IF NECESSARY, I WILL PLAY ON THE COURT'S SYMPATHIES**

- **I WILL THROW MYSELF ON THE MERCY OF THE COURT**

- **I AM ALWAYS UNPREDICTABLE**
 - I CAN BE REASONABLE AND REASONED
 - I CAN BE EMOTIONAL AND INTRANSIGENT

- **I WILL DISRESPECT YOU AND YOUR PROFESSION**

- **I WILL MAINTAIN MY INNOCENCE AND MY RIGHTS**

- **I WILL FEIGN HURT AND INJUSTICE**

- **I CAN BE DISINGENUOUS**

- **I CAN BE CAPRICIOUS**

- **I WILL BURY YOU IN PAPER, FAXES, LETTERS, EMAILS, COURT FILINGS**

- **I WILL TRY AND RUN UP LEGAL FEES TO PUNISH YOUR CLIENT OR FORCE A SETTLEMENT**

- **I WILL ROUTINELY IGNORE YOUR CORRESPONDENCE**
 - I WILL RESPOND TO WHAT I WANT, WHEN I WANT

- **I WILL ROUTINELY IGNORE COSTS ORDERS**
 - COST ORDERS SHOULD NOT APPLY TO ME AND I WILL NOT PAY

- **I WILL NOT ACCEPT SERVICE OF DOCUMENTS**

- **IT'S NEVER MY FAULT**
 - REPEAT AFTER ME – IT IS NEVER MY FAULT

- **I DON'T NEGOTIATE**
 - THE ART OF COMPROMISING ELUDES ME

A LAWYER'S TOOLKIT TO DEAL WITH THE SELF-REPRESENTED LITIGANT

- **KNOW THE DIFFERENCE BETWEEN AN UNREPRESENTED LITIGANT AND A SELF-REPRESENTED LITIGANT.**
 - THE SELF REPRESENTED LITIGANT CHOOSES TO BE SELF-REPRESENTED AND OFTEN HAS AN AGENDA
 - THE UNREPRESENTED LITIGANT WOULD LIKE A LAWYER, BUT CANNOT AFFORD IT

- **DO NOT PROVIDE LEGAL ADVICE**
 - IF THE SELF-REPRESENTED LITIGANT MAKES A PROCEDURAL MISSTEP, LET HIM/HER KNOW, BUT DO NOT PROVIDE LEGAL ADVICE

- **READ RULE 2.04(14) OF THE LSUC RULES OF PROFESSIONAL CONDUCT**
 - URGE THE SELF-REPRESENTED LITIGANT TO RETAIN COUNSEL
 - ENSURE THAT THE SELF-REPRESENTED LITIGANT IS NOT UNDER THE IMPRESSION YOU WILL PROTECT HIS OR HER INTERESTS
 - MAKE CLEAR THAT YOU ARE ACTING IN THE EXCLUSIVE INTERESTS OF YOUR CLIENT AND YOUR COMMENTS MAY BE PARTISAN

- **COMMUNICATE IN WRITING**
 - YOU ARE NOT REQUIRED TO SPEAK TO THE SELF-REPRESENTED LITIGANT
 - AVOID TELEPHONE CALLS
 - SET OUT THE GROUNDS RULES FOR ONGOING COMMUNICATION
 - FOR EXAMPLE, BY EMAIL
 - USE CLEAR, CONCISE LANGUAGE. AVOID RHETORIC, LEGALESE, OR LAWYER SPEAK

- **PROTECT YOURSELF**

- PAPER YOUR FILE
- TRANSCRIBE VOICE MAIL MESSAGES
- DO NOT MEET WITH THE SELF-REPRESENTED LITIGANT ALONE
- CONFIRM ALL AGREEMENTS, DISAGREEMENTS, AND DATES IN WRITING
 - IF NECESSARY, EMPLOY REVERSE ONUS LANGUAGE - "IF I DO NOT HEAR FROM YOU BY APRIL 30TH, I WILL ASSUME YOU AGREE"
- CONFIDENTIALITY, CONFIDENTIAL OR WITHOUT PREJUDICE DISCUSSIONS AND CORRESPONDENCE WILL NOT BE RESPECTED
- DO NOT PROVIDE FRIENDLY ADVICE OR HELPFUL SUGGESTIONS HOWEVER WELL INTENDED
- THE SELF-REPRESENTED LITIGANT IS SHAMELESS, BE ON GUARD
- WHEN APPROPRIATE, ASK FOR COURTROOM SECURITY

- **RESPOND TO ALL CORRESPONDENCE IN A TIMELY BUT NOT FEVERED MANNER**

- MAKE SURE THE RECORD IS ACCURATE AND SET THE RECORD STRAIGHT AS REQUIRED
- IN THE FACE OF A LETTER WRITING CAMPAIGN, ADVISE THE SELF-REPRESENTED LITIGANT WHEN AND HOW YOU WILL RESPOND. CONSIDER COMPOSING AN OMNIBUS LETTER RESPONDING TO SEVERAL LETTERS, ISSUES OR COMPLAINTS

- **REMEMBER YOUR CLIENT AND WHO PAYS YOUR BILL**

- REGULARLY COMMUNICATE WITH YOUR CLIENT REGARDING ISSUES, LATEST DEVELOPMENTS, AND TACTICS EMPLOYED BY THE SELF-REPRESENTED LITIGANT
- REMIND YOUR CLIENT THAT LITIGATION COSTS WILL LIKELY INCREASE
- REMIND YOUR CLIENT THAT THE MATTER MAY BECOME FRUSTRATING OR BE DELAYED
- REMIND YOUR CLIENT THAT THE SELF-REPRESENTED LITIGANT MAY IGNORE PROCEDURAL REQUIREMENTS AND FAIL TO COMPLY WITH COURT ORDERS
- REMIND YOUR CLIENT OF YOUR PROFESSIONAL OBLIGATIONS TO BE FAIR, RESPONSIVE AND CIVIL TOWARDS THE SELF-REPRESENTED LITIGANT

- REMIND YOUR CLIENT THAT YOU ARE ON HIS/HER SIDE

- **DO NOT BECOME ANGRY OR FRUSTRATED/MAINTAIN YOUR COOL/KEEP YOUR EYE ON THE PRIZE**
 - RULE 6.01 OF THE LSUC *RULES OF PROFESSIONAL CONDUCT* REQUIRES YOU TO CONDUCT YOURSELF IN SUCH A WAY AS TO MAINTAIN THE INTEGRITY OF THE PROFESSION
 - YOU ARE REQUIRED TO BE COURTEOUS, CIVIL AND ACT IN GOOD FAITH WITH ALL PERSONS YOU DEAL WITH
 - YOU MUST AGREE TO REASONABLE REQUESTS CONCERNING TRIAL DATES, ADJOURNMENTS, THE WAIVER OF PROCEDURAL FORMALITIES, AND SIMILAR MATTERS THAT DO NOT PREJUDICE THE RIGHTS OF YOUR CLIENT
 - YOU MUST AVOID SHARP PRACTICE AND MUST NOT TAKE ADVANTAGE OF OR ACT WITHOUT FAIR WARNING UPON SLIPS, IRREGULARITIES, OR MISTAKES
 - WHEN SERVING COURT DOCUMENTS, EXPLAIN WHAT THE DOCUMENT IS, ITS PURPOSE AND ITS INTENT
 - BE FAIR TO THE SELF-REPRESENTED LITIGANT AND THE COURT WILL BE FAIR TO YOU

- **CONTROL THE PROCESS AND THE SELF-REPRESENTED LITIGANT**
 - MOVE THE MATTER ALONG
 - CONSIDER COURT IMPOSED TIMETABLES
 - RULE 3.04(4) – CONSEQUENCES OF NON-COMPLIANCE
 - INSIST UPON DISCLOSURE OBLIGATIONS
 - ASK FOR COST AWARDS
 - STRATEGICALLY AND EFFECTIVELY USE SETTLEMENT OFFERS (including for motions)
 - NON-COMPLIANCE WITH COURT ORDERS
 - PURSUE ENFORCEMENT
 - RULE 60.11 – CONTEMPT ORDERS

- RULE 60.12 - FAILURE TO COMPLY WITH INTERLOCUTORY ORDERS
 - ATTACKING AN IRREGULARITY
 - WITH LEAVE, IF THE SELF-REPRESENTED LITIGANT KNOWS OF THE IRREGULARITY AND DOES NOTHING
 - RULE 2.01 – EFFECT OF NON-COMPLIANCE WITH THE *RULES OF CIVIL PROCEDURE*
- **USE THE *RULES OF CIVIL PROCEDURE* TO YOUR ADVANTAGE**
 - PROPORTIONALITY
 - RULE 1.04(1.1)
 - SUMMARY JUDGMENT MOTIONS
 - RULE 20
 - RULE 21 MOTIONS
 - QUESTIONS OF LAW
 - NO REASONABLE CAUSE OF ACTION (defendant)
 - THE COURT LACKS JURISDICTION (defendant)
 - ANOTHER PROCEEDING PENDING (defendant)
 - ACTION IS FRIVOLOUS, VEXATIOUS OR AN ABUSE OF PROCESS (defendant)
 - RULE 37.16
 - PROHIBIT MOTIONS WITHOUT LEAVE
 - SECTION 106 OF *THE COURTS OF JUSTICE ACT*
 - STAY OF PROCEEDINGS
 - RULE 25.11 MOTION
 - STRIKING OUT A PLEADING OR DOCUMENT AS AN ABUSE OF PROCESS OR SCANDALOUS/VEXATIOUS
 - RULE 24 MOTION
 - DISMISSAL OF ACTION FOR DELAY

- RULE 56
 - SECURITY FOR COSTS (defendant)

- **TAKE CHARGE OF THE LITIGATION**
 - NEVER RELY ON THE SELF-REPRESENTED LITIGANT
 - CONTROL ANY FACT FINDING
 - CONTROL DISCLOSURE FROM THIRD PARTIES
 - LOCATE AND SPEAK TO WITNESSES
 - PRESERVE EVIDENCE
 - GET TO KNOW FRONT LINE COURT PERSONNEL

- **DO NOT SIGN, SWEAR OR OTHERWISE EXECUTE DOCUMENTS FOR THE SELF-REPRESENTED LITIGANT**
 - IT'S NOT YOUR JOB

- **ACCEPT THAT THE COURT MAY ASSIST THE SELF-REPRESENTED LITIGANT TO UNDERSTAND THE PROCESS/PROCEDURES AND RELEVANT LEGAL ISSUES**
 - THE COURT WILL BE LOATHE TO CUT OFF OR SHUT DOWN A SELF-REPRESENTED LITIGANT
 - THE COURT WILL ALLOW A SELF-REPRESENTED LITIGANT TO "DRONE ON" SO THAT HE/SHE CANNOT LATER COMPLAIN THAT HE/SHE WERE NOT GIVEN A FAIR HEARING OR AN OPPORTUNITY TO BE HEARD

- **FAIRNESS MAY REQUIRE THE COURT TO RELAX THE *RULES OF CIVIL PROCEDURE* OR GOVERNING LEGISLATION**
 - FAIRNESS DOES NOT REQUIRE THE SELF-REPRESENTED LITIGANT TO HAVE A LAWYER'S FAMILIARITY WITH LEGAL PROCESS/PROCEDURE

- FAIRNESS DOES NOT DEMAND THE SELF-REPRESENTED LITIGANT TO PRESENT HIS/HER CASE AS EFFECTIVELY AS A COMPETENT LAWYER
 - FAIRNESS DEMANDS THE SELF-REPRESENTED LITIGANT HAVE A FAIR OPPORTUNITY TO PRESENT HIS/HER CASE TO THE BEST OF HIS/HER ABILITY
- FAIRNESS REQUIRES THE COURT TO TREAT THE SELF-REPRESENTED LITIGANT EQUITABLY AND ATTEMPT TO ACCOMMODATE A SELF-REPRESENTED LITIGANT'S UNFAMILIARITY WITH THE PROCESS/PROCEDURE SO AS TO PERMIT HIM/HER TO PRESENT HIS/HER CASE
- FAIRNESS ALSO REQUIRES THE COURT TO RESPECT THE RIGHTS OF YOUR CLIENT
- THE LAWYER SHOULD HELP ENSURE AN APPROPRIATE STANDARD OF FAIRNESS
 - WHILE A LAWYER NEED NOT PREJUDICE HIS/HER CLIENT'S RIGHTS, AS AN OFFICER OF THE COURT, HE/SHE IS BOUND TO PROTECT THE PROCESS.
 - A FAIR HEARING WILL HELP BULLETPROOF ANY APPEAL
 - AN APPEAL COURT IS LIKELY TO INTERVENE WHERE THE SELF-REPRESENTED LITIGANT DID NOT GET A FAIR HEARING OR THERE WAS A REASONABLE APPREHENSION OF BIAS
- **INSIST UPON A COURT REPORTER TO TRANSCRIBE ALL COURT PROCEEDINGS**
 - ROUTINELY ARRANGED BY THE COURT
- **ACCEPT THAT A SELF-REPRESENTED LITIGANT WILL LIKELY BE GIVEN WIDE LATITUDE/ACCOMMODATION TO PRESENT EVIDENCE AS COMPLETELY AS POSSIBLE**
 - BORDERLINE EVIDENCE MAY BE ADMITTED, AS A SELF-REPRESENTED LITIGANT MAY NOT UNDERSTAND THE CONCEPTS OF RELEVANCE AND ADMISIMIBILITY.
 - LET IT IN. ASK YOURSELF – “IS THIS A HILL YOU WANT TO DIE ON?”
 - THE COURT MAY DIRECT A SELF-REPRESENTED LITIGANT TO RELEVANT CASE LAW OR LEGISLATION AND ASK FOR COMMENTS, ALERT THE SELF REPRESENTED LITIGANT TO SPECIFIC AREAS OF CONCERN, OR QUESTION THE SELF-REPRESENTED LITIGANT
 - REMIND YOUR CLIENT THAT JUST BECAUSE THE COURT IS MORE LENIENT WITH A SELF-REPRESENTED LITIGANT, DOES NOT MEAN THE COURT IS BIASED

- **ENSURE THAT YOUR CLIENT RECEIVES A “FAIR HEARING”**
 - THE COURT CAN INTERVENE FOR THE PURPOSES OF FOCUSING THE PROCEEDINGS OR AIDING THE SELF-REPRESENTED LITIGANT
 - IF A COURT IS TOO LENIENT – SAY SO AND REMIND THE COURT THAT THAT THE *RULES OF CIVIL PROCEDURE* AND THE RULES OF EVIDENCE APPLY TO BOTH PARTIES EQUALLY.

- **BOOK MORE TIME FOR COURT HEARINGS AND EXAMINATIONS**
 - HEARINGS AND EXAMINATIONS WILL INVARIABLY TAKE LONGER

- **CONSIDER CASE MANAGEMENT OR ASK THE JUDGE TO BE SEIZED OF A MATTER**

- **MAKE IT EASY FOR THE JUDGE**
 - PREPARE PLEADINGS BRIEFS, ORDER BOOKS, FACTA
 - BRING EXTRA COPY OF COURT MATERIALS – JUST IN CASE
 - IF THE SELF-REPRESENTED LITIGANT’S ENGLISH IS POOR, CONSIDER HAVING IMPORTANT DOCUMENTS TRANSLATED
 - ETHICALLY, AND AS AN OFFICER OF THE COURT, YOU ARE DUTY BOUND TO BRING TO THE COURT’S ATTENTION ALL RELEVANT LEGISLATION AND CASE LAW, INCLUDING CASES THAT GOES AGAINST YOUR CLIENT

- **DO NOT THREATEN OR PRESSURE THE SELF-REPRESENTED LITIGANT**
 - DO NOT BULLY THE SELF-REPRESENTED LITIGANT BY THREATENING COST SANCTIONS
 - IF A SETTLEMENT IS REACHED, RECOMMEND THAT THE SELF-REPRESENTED LITIGANT SEEK ILA (if appropriate, the estate could pay for ILA)
 - SUGGEST A 24-HOUR COOLING OFF PERIOD AFTER A MEDIATED SETTLEMENT IS REACHED (double edged sword – proceed with caution)

- **PREPARE YOURSELF FOR SURPRISES**
 - LAST MINUTE SERVICE AND FILINGS
 - HEARSAY EVIDENCE
 - SELF-SERVING AND INCOMPREHENSIVE AFFIDAVITS
 - A LITANY OF EXCUSES AND COMPLAINTS
 - A LAUNDRY LIST OF ACCUSATIONS

- **ACCEPT THAT YOU WILL NEVER CONVINCe THE SELF-REPRESENTED LITIGANT TO SEE REASON, BE REASONABLE, OR THAT HE/SHE IS WRONG**

- **SPEAK QUIETLY AND CARRY A BIG STICK**

- **RELAX**
 - LET THE PROCESS UNFOLD (within reason)
 - LET THE SELF-REPRESENTED LITIGANT VENT
 - THINK STRATEGICALLY AND PREPARE THE HAMMER BLOW

COST CLAIMS BY THE SELF-REPRESENTED LITIGANT

- **SELF-REPRESENTED LITIGANTS DO NOT HAVE AN AUTOMATIC RIGHT TO RECOVER COSTS**
 - REMAINS WITHIN DISCRETION OF THE COURT

- **COSTS ONLY AWARDED TO SELF-REPRESENTED LITIGANTS**
 - WHO CAN SHOW THEY DEVOTED TIME AND EFFORT TO THE WORK ORDINARILY DONE BY A LAWYER; AND
 - AS A RESULT, THEY LOST THE OPPORTUNITY TO ENGAGE IN REMUNERATIVE ACTIVITY.

- **IF AN OPPORTUNITY COST IS PROVED, A SELF REPRESENTED LITIGANT MAY BE ENTITLED TO RECEIVE A MODERATE OR REASONABLE COST AMOUNT**

APPLICABLE CASE LAW

- **FAIRNESS TO THE SELF-REPRESENTED LITIGANT**
 - *DAVIDS V. DAVIDS*, (1999) 125 O.A.C. 375, [1999] O.J. NO. 3930 (C.A.)
 - *BAECHLER V. BAECHLER*, [1992] O.J. NO. 1209 (C.A.)
 - *LIEB V. SMITH* (1994), 120 NFLD. & P.E.I.R. 201 (NFLD T.D.)
 - *BUTLER V. KRONBY*, [1996] O.J. NO. 4434 (GEN. DIV.)
 - *ANGEL V. ANGEL*, [1997] O.J. NO. 3976 (GEN. DIV.)
 - *S.S. V. Y.G* (2002), 29 R.F.L. (5TH) 412 (ONT. C.J.)
 - *REID ESTATE V. REID ESTATE* (2010), 59 E.T.R. (3D) 312 (S.C.J.)
- **REQUIREMENT TO COMPLY WITH THE RULES OF CIVIL PROCEDURE**
 - *PERSHADSINGH V. THOMPSON*, 2010 ONSC 4943
 - *ARNOLD V. ARNOLD*, 2009 CANLII 706 (ON SCDC)
- **COSTS CLAIMED BY THE SELF-REPRESENTED LITIGANT**
 - *MUSTANG INVESTIGATIONS INC. V. IRONSIDE* (2010), 2010 CARSWELLONT 5398, 103 O.R. (3D) 633 (DIV. CT.)
 - *SWORIK (GUARDIAN OF V. WARE* (2005), 18 E.T.R. (3D) 132 (ONT.S.C.J.)
- **LSUC RULES OR PROFESSIONAL CONDUCT**
 - RULE 2.04(14)
 - RULE 6.01(1)
 - RULE 6.03(1)
 - RULE 6.03(2)
 - RULE 6.03(3)
 - RULE 6.03(5)
- **MISCELLANEOUS**
 - *RANKING (LITIGATION GUARDIAN OF) V. RANKING ESTATE*, 2008 CARSWELLONT 2987

- *VANO (RE)*, 2012 ONSC 262 (CANLII)