

Family**Extra-legal advice: What self-represented litigants are learning about family lawyers | Meg Holden**By **Meg Holden**

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(September 26, 2022, 12:10 PM EDT) -- Lawyers know that there are two sides to any story. What some seem to miss is that, from a self-represented litigant's perspective, there is lawyers' way of seeing the story, and that of everyone else.

Self-represented litigants make up an increasing proportion of applications brought to court in Canada, perhaps as high as 74 per cent in family law cases. (See Department of Justice, 2016 (June) [Self-Represented Litigants in Family Law](#). JustFacts Research and Statistics Division.) The legal profession has begun the work of calling for fundamental changes to the professional duties of lawyers in terms of "the traditional commitment to an adversarial ethic and zealous advocacy." (See Leitch, J. 2020 (31 July) "Lawyers and Self-Represented Litigants: Taking Pinteas More Seriously." Canadian Forum on Civil Justice. SLAW.) Self-represented litigants need a voice in this, too. Emboldened by participation in the inaugural School for

Family Litigants offered by the National Self-Represented Litigants' Project in 2021, and by an invitation to participate in a May 2022 CBABC lunchtime professional development session, I offer here my humble advice to the legal profession, based on my perspective and experience.

A quick overview of what I carry. Since separating from my common law partner and the father of my children in 2014, I have had the opportunity to retain and/or receive paid advice from six lawyers, and have made 15 separate appearances in the Supreme Court of British Columbia as a self-represented litigant/respondent, following two appearances in which I was represented by private counsel. I also have experience attempting to resolve aspects of my dispute with: a child specialist, parenting co-ordinator, children's lawyer, four mediators, both private and court-employed social workers, three police officers, the B.C. Attorney General, staff at the Ministry of Children and Family Services, the Canada Revenue Agency, my ex's three lawyers, and the lawyer that one of those lawyers hired to bring a claim against me.

I am a self-represented litigant because a good lawyer told me I was capable of doing it, and because this became my only responsible option as a parent. I am not a conflict addict. I do not now, nor have I ever, expected an unreasonably favourable outcome of my family dispute. My ex, for his part, has no criminal intent, he isn't ill, he is just extremely motivated to exercise the full extent of his rights in ways that happen to limit my own rights and those of our children, and unbearably so. After four years of pursuing the straight and narrow path of the law to resolve my family dispute, my kids were suffering more, not less, and my ex was becoming more unreasonable, not less. I had a frank conversation with my lawyer about the dire state of my finances and alternatives and received the honest advice that the only likely result of extending her retainer would be to further deepen both my own and my ex's household debt. She convinced me that I was better off representing myself.

When I took legal action on my own behalf, all of the professional courtesy I had observed between my lawyer and my ex's lawyer was withdrawn from my reach. The new process between me, no longer as client but now as self-rep, and my ex's lawyer, shifted in orientation utterly and unexpectedly.

When I was represented by a lawyer, I had been coached to treat opposing counsel not as my enemy

nor as an unchecked advocate for my ex but as a kind of learned ally of our mutual interest in a durable settlement. When left to my own devices as a self-rep, I became a fool for failing to treat opposing counsel as a sworn enemy to the extent that I stood in the way of his client's best life. When I heeded opposing counsel's demand that I not submit a piece of evidence in an application record, and lost the application as a result of failing to produce this evidence, shame on me. When I complained to the court that it was opposing counsel's advice that led to my failure to produce this evidence, well, shame on me again.

The family law process that I had been led to understand as a discovery of truth borne by uncontradicted evidence and fair sharing of the value and pleasures generated within a family, as well as the debt and responsibility, was transformed into a battle against a lawyer with a remarkable degree of motivation to seek the very maximum of the former, and minimum of the latter, for his side.

(As an insult-to-injury kind of aside, when the nature of what I was up against became clear, I did attempt to retain a therapist, but the two I managed to consult with declined to have me as a client, stating that what I seemed to need was not a therapist, but a lawyer!)

Court, I had been told, was a last resort and represented an undesirable surrender of control to a judge to make very personal decisions for me, and surrender opportunity to seek more personally relevant resolution of family matters in ways not contemplated within family law. Communication and creative negotiation were always preferable. When I began to represent myself, the opportunity space for creative resolution dwindled, then vanished. Where I had previously been coached always to provide offers to settle, each step of the way, my offers were now roundly ignored. My ex's lawyer ceased to be available in any venue other than court and ceased to communicate with me in any way other than e-mail. When I informed him that based on past experience, I did not trust the contents of his e-mails, court was what I was left with. Informal resolution ceased to be an option. Under the gaze of the judge is the only place where I am nominally a person with the standing to merit a lawyer's considered attention.

When I had a lawyer, I was told that 98 per cent of family law questions had already been answered. Now that I am a self-rep, somehow almost every point I make can be called into question by opposing counsel.

In court, I have to be a different person: more deferential and distant, less personal and exceptionally perfect. Paragraphs imperfectly numbered or tabs mistakenly lettered can adjourn applications indefinitely. Where I was once told to have empathy for the judge, and to express my experience personally, my emotion is now a sign of my lack of professionalism and self-control. Where I was once told to keep my family law matters as informal as possible, even in court, it is now considered jarring and inappropriate for me to refer to my co-parent by his first name.

I was once told to keep my statements short, because hearing both sides is the essence of juridical responsibility. I now face adverse judgment if I appear to say less than I should, given what opposing counsel has to say about me. I now have seen a judge enter the court and, based on the material provided by opposing counsel and the first visual read of the courtroom, exercise their discretion to discard the written argument I have prepared. Opposing counsel, for his part, claims that he needs to say and submit more than he used to do, as his official duty has now doubled due to my lack of counsel.

I am grateful to have the option of court to attempt to resolve my dispute, of course. I am grateful to belong in a country where court is open to everyone who has a reasonable claim of unjust treatment. I may be a full citizen of Canada; but in the courtroom, I am more like a refugee. When opposing counsel does something overbearing, off-script, or untoward, they can fall back on their unique responsibility to the court to resolve matters, whereas all I can fall back on is my fresh eyes on the rules. At the bar, a self-rep is a refugee. I take the steps that are spelled out for me in law and legal practice, and am informed by the other side that I am wasting the court's time.

Being a self-rep means I have crossed the line into a land in which I have a map but no legend. All I have is the trace of the line of the law, as I am able to read and apply it as a layperson. Knowing and applying legal rules is, in itself, a monumental challenge, but what per cent of the actual work of legal resolution is done that way? My research skills are half decent, but because I am not a member

of the bar, I have pathetically little access to knowledge of thresholds, the changing landscape of good law versus outdated law, and unreported cases.

I think I know how to communicate effectively, but in this setting, opposing counsel has all the benefit of the doubt, all the presumption of accountability. On my side of the aisle, using two different shades of highlighter can mean the end of my credibility on a given day in court.

I would summarize the legal strategy used against me, in lay terms, as: if you can't beat her, go for a conduct order. If this depiction only elicits a sense of schadenfreude, please continue reading part two of this article. In part two, I put the trouble with this situation in terms that should hit lawyers where it counts: why self-reps like me may have an advantage over lawyers like you.

This is part one of a two-part series.

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