

**Family**

## Extra-legal advice: Why lawyers should worry about the self-rep advantage | Meg Holden

By **Meg Holden**

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(September 28, 2022, 11:18 AM EDT) -- In part one of this article (see below for link), I discussed what the worst things about self-representing against opposing counsel are. In this follow up, I put to the legal profession that lawyers have reason to worry about the suffering of self-reps. If you consider me as the kind of self-represented litigant you could be approached by tomorrow, or oppose in court next month, might you see fit to rethink your strategy?

There is a kind of advantage I have in court, as an amateur who reads and applies the rules with fresh eyes. Especially with the changing protocols related to the pandemic, I have consistently had the sense that court staff knew who I was, what I was trying to achieve and how to accurately advise me not to get lost in the incredibly complex court process.

From instructions about transcripts, swearing affidavits, filing and retrieving records, what was and what was not a pleading, changing deadlines, wardrobe recommendations, advice about highlighters, submitting and retrieving orders, elevator buttons that didn't work, when to wear and not to wear a mask, where to sit. "If it were me, I would want to be the one doing the talking too," more than one staff member at the courthouse has whispered to me.

I have seen the court take an interest in the way I interpret the rules because it is often unusual, and it brings items, both mundane and substantive, to their attention in a way that gives them pause. The court knows that I don't know enough about the unstated rules and thresholds to manipulate these. There is the sense that this offers a reality check and I have seen that work in my favour, whereas opposing counsel is more bound by expectations from current practice of their craft.

Representing myself against a lawyer in court is, of course, terrifying. I stay up all night on pure adrenaline every time I receive a communication from opposing counsel. But I'm not the only one negatively affected. It also has horrified lawyers who have offered me advice on limited retainer, when they read these communications. It is a particular kind of terror to be told, by way of legal advice, that reading my submissions and those of opposing counsel made one lawyer feel sick to her stomach.

Then there is the other party in this situation, my ex, who was dependent on his lawyer before, and becomes more deeply dragged into this sense as more elaborate defensive moves are proposed to him, and he becomes more resentful of me, and ever more worried about the long-term financial implications for him.

I have come to see that the standard of fidelity to which I previously held lawyers is not merited. Previously — and I now know, naively — I expected lawyers to faithfully translate legal rules and language into common language and practical implications for us laypeople. I have learned that lawyers treat one another worse than I could have imagined. I say this as an academic at a public university, who knows what passive-aggressive behaviour is surrounding knowledge and behaviour and knows how collegiality can be used as a weapon. What I have learned from my self-represented legal practice is how to treat another professional person as a pure opponent, without a modicum of civil trust.

I ask lawyers to consider what happens to their practice when would-be clients have no hope of resolution remaining, but only dogged curiosity about why the law cannot resolve what ought to be resolvable. Consider that the curiosity of self-represented litigants like me includes all the aspects of their practice that do not appear in any record. Consider that at least some lay litigants are learning, painfully, to take on the attitude of the least generous litigators.

My humble extra-legal advice is that if family litigants and the legal profession could think through the differences that these dynamics make, then we might find some new space for movement. If my failure to attain a modicum of fairness and resolution is a problem for me and my family, it is also a problem for the legal profession and the practice of family law, in more ways, I think, than are currently receiving consideration. Mutually assured exhaustion is a poor excuse for family law resolution.

This is part two of a two-part series. Part one: Extra-legal advice: What self-represented litigants are learning about family lawyers.

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