Ethical Issues Relating to Lawyers and Unrepresented Litigants in the Civil Justice System

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There appears to be little question that the number and proportion of unrepresented litigants in the justice system is increasing.

No one is quite sure why this is so. There are any number of suggestions:

1. The increasing costs of the participation in the justice system that are very familiar to those involved in corporate forum. More complex transactions; more documents; more complex rules of procedure;

2. The costs of lawyers themselves is, some say, escalating;

3. The diminishing reputation of lawyers, and indeed all professionals, may lead litigants to believe that lawyers are not suitable representatives;

4. Members of the public may believe that they can "go it alone" in the justice system for any number of reasons, including greater education, greater publicity about unrepresented litigants;

5. There may be a proportion of the population who, for numerous reasons of personality, want to litigant, and want to do so personally.

Whatever the reasons, judges and lawyers have an increasing concern about this trend, and how they should treat the unrepresented litigants. This has led to a number of studies on the issue, including:

1. In 2006, the Statement of Principals on Self-represented Litigants and Accused Persons, by the Canadian Judicial Council;

2. In 2005, the Rules of Court Project – Self-represented Litigants, by the Alberta Law Reform.

Presently, I have been a Chair of a Committee of the American College of Trial Lawyers which has drafted a Code of Conduct for trial lawyers in trials involving unrepresented litigants.

My role as Chair of the Committee which has drafted these rules had led me to conclude that there are a number of issues facing lawyers in trial involving unrepresented litigants. They include the following:

1. Does a lawyer representing a client in a proceeding (or transaction) owe a duty to the opposing unrepresented litigant? If so, what is the nature of that duty?

2. Can or should a lawyer tell a litigant to retain a lawyer?

3. What is the duty of the court to the lawyer, if the unrepresented litigant is given an indulgence by the court?

4. What is the duty of the lawyer to the court or the unrepresented litigant if a lawyer asks for an indulgence from the court?

5. Do the rules of professional conduct:

   (a) apply to the unrepresented litigant?; (and, particularly if they do not)

   (b) do the rules of professional conduct apply to lawyer when dealing with unrepresented litigants?

6. Should the rules of evidence (or other laws) strictly apply to unrepresented litigants during the course of a hearing?

7. Is the lawyer under a duty to provide concessions to an unrepresented litigant, or to waive an advantage held by the lawyer's client when dealing with an unrepresented litigant?

8. Is a lawyer entitled to take any advantage of the fact that a litigant is unrepresented, or impose any hardship or disadvantage on an unrepresented litigant?

9. Does a lawyer have a duty toward his or her client to discuss the implications of a trial against an unrepresented litigant?

10. How should a lawyer communicate with an unrepresented lawyer? Must the lawyer advise the court of all material communications with the unrepresented litigant? Is there a different standard of conduct applicable to a lawyer when settling with an unrepresented litigant than settling with a represented litigant?

I intend only to address three of these questions. The first question is perhaps the most important and fundamental because it shapes the debate on other questions: Does a lawyer have a duty to the unrepresented litigant? Our Committee came to the basic answer: no. Or, more properly put, it is our view that the lawyer's duty can be better understood as a duty to the court, and a duty to his or her professional organization, not a duty to the opposing party.

Obviously, in a court setting or transaction setting, a lawyer cannot act in a way which amounts to a civil wrong, whether or not the opposing party is represented or not. The lawyer cannot defame the unrepresented party. The lawyer cannot deceive the unrepresented party. But once those limits are recognized, any further obligation of the lawyer to the unrepresented party would have to be based upon a duty to that party.

It is difficult to see the basis of such a duty in an adversarial setting. Apart from the duty to the court and his professional regulating body, the lawyer's only duty is to the client. The lawyer is prohibited from creating any conflict of interest between that duty and a duty to others. The lawyer must "fearlessly" advocate for the client and must "obtain for the client the benefit of any and every remedy in defence which is authorized by law", subject of course to the principles of legality and the duty to the court and the profession. These obligations are clearly set forth in Rules 3, 5, 6 and 9 of the Code of Professional Conduct of the Canadian Bar Association.

Accordingly, there appears to be no basis to establish any duty of the lawyer to the unrepresented litigant.

That is the fundamental issue or question, and it might well be the subject matter of debate here today.

A more satisfactory approach, in our view, to the lawyer's duty, can be found in approaching the issue from the lawyer's duty to the court, and to his or her professional body. But stating the

duty to the court leads us to the next issue, and that is whether the lawyer's duty to the court is different than the unrepresented litigant's duty to the court.

In framing the Code of Conduct, we placed the duty to the court of the lawyer and the litigant, represented or unrepresented, on the same basis:

> "1(a) Litigants, whether represented or not, and trial lawyers, have a duty to the court to act with honesty, civility and with reasonable dispatch and to not prosecute or defend frivolous claims. This duty is the foundation of the relationship between the trial lawyer and the unrepresented litigants."

In our commentary to this fundamental first principle, we stated that this principle is the one which enables "the trial and appellant system to function. The court system cannot exist without those duties being respected."

We did recognize, however, that the duty of the lawyer to the court may have different implications for the lawyer when the opposing party is unrepresented. Thus, the commentary to Rule 1(a) states that "it is the duty to the court, and the lawyer's professional duty, that may require the trial lawyer to have regard to the <u>different position</u> of the represented, as opposed to the unrepresented, litigant".

Nevertheless, we state that the unrepresented litigant has the same duty to the court, the only difference being that it "may be more difficult for the unrepresented litigant to recognize than the lawyer due to lack of training or experience".

In discharging this duty to the court, lawyers must realize that Canadian judges have now adapted their own Statement of Principles, published by the Canadian Judicial Council, to guide them when dealing with unrepresented litigants.

Lawyers will have an obligation to the court to assist the court when applying those Principles. Since those Principles have only been recently been published, there may be controversy about their application. Some of those Principles may be challenged by lawyers. But lawyers will still have an obligation to assist the court in applying some principles of justice and fairness in these circumstances.

A third issue which we can discuss today is whether the laws of evidence, or other laws, should be bent or waved in favour of an unrepresented litigant. Some judges say that the rules of evidence – say, the hearsay rule – are too technical to be apply against an unrepresented litigant.

Our view is that these laws do apply to unrepresented litigants. Courts cannot have rules for represented litigants and other rules for unrepresented litigants. Courts have an obligation to apply the law equally to all. What the court can do – and may have to do – is to take the time to explain those rules to unrepresented litigants.

Here is one place where the lack of legal knowledge or expertise of the unrepresented litigant may throw a burden on the lawyer. The lawyer may have a duty to explain to the court the legal implications of certain evidence, or submissions or proceeding. In our draft Code, we stated this proposition as follows:

> "4(b) As an officer of the court, a trial lawyer remains under a duty of candour, fairness, courtesy and respect to the court when the opposing party is an unrepresented party. That duty requires that the trial lawyer's participation enables the court to provide a fair and impartial hearing for all parties represented and unrepresented.
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> 4(c) In light of duties owed to the client, a trial lawyer is entitled to raise every argument he or she believes may help the client's case, and is not required to assist or extend indulgences to an unrepresented litigant if it would compromise the rights and interests of the trial lawyer's client."

Accordingly, the lawyer may have to navigate conflicting duties, to the court and to his client. As the commentary to this rule states, the lawyer may be under a "high standard of conduct as an officer of the court in the presence of an unrepresented litigant". In this setting, there may be a higher duty to present unfavourable authority, or drawing attention to legislative provisions, or ensure that evidence is not misstated, which would normally be undertaken by opposing counsel. Nevertheless, it is our view that the lawyer should "refuse any request by the bench or anyone else that would put the trial lawyer in a conflict of interest with his or her client by favouring or assisting the unrepresented party".

The fourth area of ethical consideration is whether a lawyer can ever take advantage of an unrepresented litigant. Our view is that a lawyer can not take undue advantage of an

unrepresented litigant, that is, an advantage due solely to the fact that the litigant is unrepresented. But it will be difficult to find the boundary line between taking "undue" advantage of an unrepresented litigant, and merely enforcing client's rights.

We stated the proposition as follows:

> "7(a) 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 unrepresented, and should avoid imposing unnecessary disadvantage, hardship, or confusion on the unrepresented litigant.
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> 7(b) A trial lawyer is entitled to raise proper and legitimate technical and procedural objections but should not take advantage of technical deficiencies in the pleadings, procedural 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 interests of the client."

As you can see, we placed the emphasis on the lawyer not taking advantage of technicalities that do not go to the real merits or legitimate expectations of a client. Again, the boundary line between "insisting upon a legitimate technical or procedural deficiencies, on the one hand, and not taking advantage of technical deficiencies which "do not go to the real merits or legitimate expectations of the client" is a difficult one to establish. There is a "fairness spectrum" in which the particular conduct will have to be judged. Clearly, when faced by an unrepresented client, the client's duty is closer to the latter end of the spectrum, that is, to not insisting on technical deficiencies.