

Family litigants without lawyers

Study documents growing challenges for the justice system

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There is growing concern about litigants without lawyers — especially for family cases, which are often complex and have profound effects on litigants and their children and where judgment is particularly prone to being influenced by emotions.

One's perspective on litigants without representation reflects one's role in the justice system: judges and lawyers dealing with cases have a different view from government administrators with systemic responsibilities, and litigants with a focus on their case have a different view as well.

We are undertaking a series of studies on access to family justice and report here on

preliminary findings from a recent survey of the perceptions of Ontario family lawyers — the first study of its kind in Canada. This study reports fewer litigants have lawyers than in the past, which is posing serious challenges for lawyers and their clients, as well as for those without lawyers and the family justice system.



[Illustration by Peter Bono for The Lawyers Weekly]

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We conducted an Internet-based survey of attendees at the Law Society of Upper Canada's

Family Law Summit, held in Toronto in mid-June. There was a healthy response rate, with 325 (over 40 per cent) of the participants responding, suggesting a high level of concern about these issues. On average, lawyers reported that for 27 per cent of their family cases the other side had no lawyer at all, and another 21 per cent of the cases had no lawyer on the other side for part of the case. Only four per cent of the lawyers reported no experience in the past year with family cases without a lawyer for the other party.

This significantly understates the problem of lack of representation for the justice system, since these figures do not reflect cases where both parties are unrepresented. When asked whether the number of family litigants without lawyers had increased in the previous five years, 37 per cent indicated that there were many more such cases, 44 per cent reported more cases and just 19 per cent thought it was about the same. None reported fewer litigants without lawyers.

The question of why litigants are without lawyers is complex. There are many reasons for a person to be without a lawyer, and some individuals may not themselves be fully aware of their own rationale for not having a lawyer. The respondents to this survey clearly believe that the inability to afford a lawyer, exacerbated by recent cuts to Legal Aid, is the primary issue: 65 per cent reported this as the most important reason and another 31 per cent indicate it is an important reason. Thus, most of those with no lawyer are “unrepresented” by financial circumstance: they want a lawyer but can’t afford one.

There is, however, a minority who could afford a lawyer but choose to represent themselves: they are often referred to as “self-represented” litigants. In this survey, seven per cent of lawyers reported that the most important reason for family litigants to have no lawyer is that they think that they can do as good a job as a lawyer and 19 per cent think that a desire to directly confront one’s former partner in court is a factor (though only one respondent ranked this as the most important factor).

Over 90 per cent of respondents expressed a concern that when the other party has no lawyer, this increases costs for the represented party. For example, 75 per cent of lawyers reported that they must always document communications more carefully with a party who has no lawyer as there is more potential for misunderstandings or even deliberate misrepresentation of communication. Further, 84 per cent of the respondents indicated that those without lawyers usually or always have unrealistic expectations at the start of a case, making settlement more difficult.

At the same time, almost half of the lawyers (48 per cent) reported that the party without a lawyer looks to them for advice or information usually or always and only nine per cent reported this to be a rare occurrence; no lawyer said it never happens. The comments of respondents make it clear that many lawyers find themselves in a very difficult position when the other side has no lawyer.

There are cases where a lawyer is justified in suggesting to the party without a lawyer that a reasonable offer to settle is being made. While the lawyer will invariably urge the other party to seek independent legal advice before accepting the offer, this rarely occurs. Although it

may be preferable for lawyers to only make settlement offers to those without lawyers before a judge at a conference, this adds to the expense for the represented party and the justice system and leaves it to the judge to, in effect, try to advise the party without a lawyer that the offer is reasonable.

Respondents reported many frustrations in dealing with those litigants without lawyers, but also offered some good advice to their colleagues. For example, one suggested: “Never... allow e-mail communication [or telephone calls] with an unrepresented [party] as it is too easy [for them]. I had a recent case where I received at least 5 e-mails daily from the unrepresented party. He was abusive. I switched communication to written letters by mail or fax only.”

In this survey, 57 per cent of the lawyers reported that judges treat those without lawyers “very well” and another 31 per cent believe judges provide “good treatment” to those without lawyers. Almost 90 per cent of the lawyers reported that their clients sometimes or always express concern that the judge seems to favour the party without a lawyer. Nevertheless, most lawyers reported that those without lawyers generally receive less advantageous outcomes than they would if they had lawyers, and almost half of the lawyers expressed concern about the lack of protection for victims of family violence who do not have a lawyer.

Although the quantitative part of the survey did not ask the reasons for the poorer outcomes, the comments reveal that a major problem for the unrepresented is that they do not have a good idea of what evidence is persuasive or fail to introduce it in court. While judges are often tolerant, perhaps too tolerant, about the failure of those without lawyers to follow procedural rules, their lack of awareness of options and remedies affects their outcomes. Further, some self-represented litigants are “their own worst enemies” — revealing from demeanour and conduct in court why they should not get the relief they seek.

Bar associations and governments are certainly aware of the problems created by the lack of legal representation for family litigants and ultimately their children, but present fiscal realities make these difficult issues to address. The Ontario government is taking steps to improve access to information about the family court process, including introducing mandatory information programs for all family litigants, though a majority of the lawyers responding to this survey thought that these programs have little value, even for those without lawyers, let alone for their own clients.

Another way to address some of the problems is to have “unbundling” of legal services, with lawyers offering some assistance or representation at some hearings, without providing full legal representation. Eighty-five per cent of the respondents to this survey indicated that they provide some family services on the basis of “limited scope retainers.”

There is no single or simple solution to these problems, but it is clear that the challenges posed by family litigants without lawyers needs to be better understood and addressed. Our own research plan is to further analyze the results of this survey, and with the assistance Pro Bono Students Canada undertake a study of the experiences and perceptions of family litigants with access to justice and problems with lack of legal representation.

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