

Self-represented Litigants: Practitioner Tips and Duties

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College of Law Seminar, 26 May 2014



Your Opponent: Why Self-Represented?

- Cost of representation (73%)
- Inability to obtain legal aid (38%)
- Clients consider that they can handle their case themselves (31%)
 - Proportionate response
 - Desire for control/chance to be heard
 - Belief lawyer not needed
 - Tactical advantage
 - Social changes/simpler court/tribunal processes

Productivity Commission Access to Justice
(Draft Report, 2014) [14.3]

Your Opponent

- Not bound by same ethical rules as practitioners
- Status confers no licence to place to one side or to disregard the procedural requirements imposed by rules: *SZNFR v Minister for Immigration and Citizenship* [2009] FCA 8511 (Flick J)
- But a degree of latitude must be afforded: *Underdown v Secretary, Dept of Education, Employment and Workplace Relations* [2009] FCA 965 (McKerracher J)

Your client

- Needs you to explain role and duties of bench
- Needs you to explain likelihood and costs impact of increased court appearances
- Consider or update costs disclosures and estimates
- Prepare them for likely experience of being cross-examined by SRL, and your ability to object where unduly annoying, harassing, intimidating, offensive, oppressive or repetitive

Your Bench

- Should not intervene so as to be unable to maintain a position of neutrality and avoid substantive injustice to other party
- Should diminish disadvantage of being unrepresented, but not so as to provide a positive advantage and without disobedience to the applicable rules
- May be receiving unsolicited communications from SRL
- Likely to be more cautious

Your Duties

- Officer of the Court: s 33 *Legal Profession Act 2004* (NSW)
- Overall duty of honesty and professionalism
- Not mislead on matters of law and fact
- Encourage reasonable compromise and not exacerbate a dispute
- Not inflame situations
- Observe basic civilities

Law Society of NSW

- *Guidelines for solicitors dealing with self-represented parties*
- <https://www.lawsociety.com.au/cs/groups/public/documents/internetcostguidebook/008731.pdf>
- Solicitor bound to perform duties to opponent, a solicitor should deal with a self-represented party to same standard as would with a represented party, solicitors should set parameters for dealing with self-represented party, and a solicitor can and should advance points and take all objections and make all submissions reasonably open to solicitor in advancing their client's case (1.2)
- Solicitor should recommend use of legal practitioner (1.4)

NSW Bar Association

Guide to Barristers on Dealing with Self-Represented Litigants (2001, updated 2012)

- While a barrister's primary duty is to their client, a barrister should give advice independently and in accordance with their paramount duty to the administration of justice, notwithstanding any contrary wishes of their client. A client's long term interest are best served by the facilitation of a fair hearing ([2])

- Some barristers' rules may be problematic, eg, prohibition on conferring or dealing directly with party opposed to barrister's client and obligation to take reasonable steps to avoid possibility of becoming a witness in case
- Barrister should assess intelligence and other personal attributes of self-represented litigant affecting litigant's capacity to understand conduct their own case
- Barrister should be conscious of impact self-represented litigant might have on other participants in court processes

- **Rule 12:** must not engage in conduct which is: (a) dishonest or otherwise discreditable to a barrister; (b) prejudicial to the administration of justice; or (c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.
- **Rule 25:** overriding duty to the Court to act with independence in the interests of the administration of justice.
- **Rule 26:** must not deceive or knowingly or recklessly mislead the Court
- **Rule 28:** correct express concessions in re material fact, case law or legislation if believes concession in error and knowledge or reasonable belief of that error

Reminder to check jurisdiction for particular considerations

- ***E. Allen and Ors v Flour Construction Services Pty Ltd* [2014] FWCFB 174**

[48] A lawyer's duty to the Commission is paramount and supersedes a lawyer's duties to their client. A grant of permission to appear pursuant to s 596(1) of the Act is based upon a presumption that the representative to whom leave is granted will conduct themselves with probity, candour and honesty. The duty of advocates in that regard has been long recognised by the Commission.

Interlocutory applications

- Consider benefits of asking for hearing to be expedited rather than asking for unmeritorious claims to be struck out
- Courts reluctant to strike out claims by SRL, and application may simply delay proceedings and provide SRL with ammunition or a further sense of grievance
- Beware HCA warning against satellite litigation:
 - Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46

Civil Procedure Act 2005 (NSW)

- **s56(2)** - Mandates Court to give effect to overriding purpose when it exercises any power or interprets any provision of the Act or court rules
- **s56(3)** - Imposes duty on parties to assist Court to further overriding purpose
- **s 56(4)** - Requires lawyers or other persons with an interest in proceedings to not cause a party to breach that duty

Adjournment applications

- Discretionary matter
- Courts may be more readily grant to SRL, subject to case management obligations
- Be ready to argue:
 - Notice SRL has had of proceedings
 - Any non-compliance by SRL with requirements
 - Prejudice to client likely to arise from grant

Facilitating progress

- Record on transcript effect of orders or directions
- Ensure copies of all orders made are served with notification of:
 - Consequences of non-compliance in terms of effect on court's timetable and costs
 - what action will be sought on next occasion
- Non-appearance:
 - Seek self-executing procedures
 - Provide for Registrar to execute required documents

Outside hearing: good practice

- Do not give legal advice or risk becoming a witness – counsel should not speak except in presence of instructing solicitor or clerk
- Minimise comments or chatter (avoid being repeated/reported)
- Reduce all substantive conversations (including offers of compromise) to writing
- If using ADR avoid actual or perceived inequality of power - seek SRL brings family member/ friend for support, or use mediator who can ensure that SRL puts case forward to best of ability

Hearing conduct: balancing principles and duties

- Court's duty: to ensure a fair hearing
- Court's duty to SRL: see *Johnson v Johnson* (1997) FLC 92-764 and *Re F: Litigants in Person Guidelines* (2001) 27 Fam LR 517
- Practitioner's duty to client: general rule, fact that litigant unrepresented does not mean you should not take all points, and advance all submissions, that would otherwise normally be open
- SRL duty: to observe distinction between evidence and submissions, comply with procedural rules

- Court should not give legal advice
- Court may intervene to explain procedural choices and right to object to inadmissible evidence
- Court may attribute an objection to evidence to SRL defendant
- Practitioner has no duty to help SRL run their case, or take any action on their behalf

- Practitioner's paramount duty to the court means should draw to Court's attention attempts to:
 - Raise irrelevant issues
 - Adduce evidence outside pleaded case
 - Make submissions beyond pleadings and evidence
- Better view is not law in NSW that required to draw attention to failure to call evidence essential to case prior to conclusion of case

Avoiding Appellable Error

- Be mindful of duties: run case assuming an appeal
- Assist or remind bench to discharge bench's own obligations to SRL
- Raise excessive intervention and assistance
- Be attentive to early objection to preserve appeal rights, or make disqualification application
- Avoid risk of (apprehended) bias: no familiarity/jargon
- Ask Court remind SRL that submissions unless supported by evidence not taken into account

- Use transcript as *your* record
- Have evidence of service of pre-trial steps
- Ensure provision of all relevant documents
- Minimise objections on relevance
- Use *voir dire*
- Point out gaps in evidence
- Anticipate *Browne v Dunn* deficiencies and need for prior warning

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