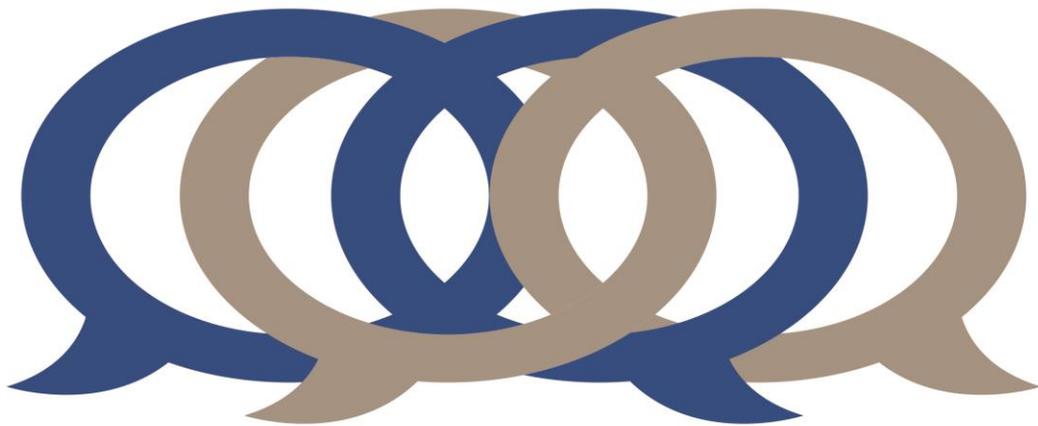


**“MY LEARNED FRIEND”:
BUILDING CONSTRUCTIVE WORKING
RELATIONSHIPS BETWEEN
SELF-REPRESENTED LITIGANTS AND
OPPOSING COUNSEL**



THE NATIONAL
SELF-REPRESENTED LITIGANTS PROJECT
Research, Resources, Dialogue & Collaboration

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Why We Created this Resource

Many self-represented litigants (SRLs) will find that the other side in the dispute is represented by a lawyer, for some or all of the time¹.

When this is the case, a constructive working relationship between the SRL and opposing counsel is critical to the progress and the resolution of the legal matter – sometimes as, and maybe even more, significant than the SRL’s relationship with the other party.

But for a variety of reasons, creating a positive working relationship is very challenging for both sides. At NSRLP, we have collected a lot of information about some of these challenges.

This NSRLP Resource has been developed to assist SRLs in working with opposing counsel, and to assist counsel working with SRLs. We have heard from both SRLs and lawyers about the difficulties each experience in their encounters.

“My Learned Friend” is the first NSRLP Resource we have written that is directly addressed to *both* SRLs and legal counsel. We felt that since the focus is on cooperation and enhanced understanding, this Resource should reflect mutual challenges and interests. Some of these problems relate to the demands or constraints of the particular role: lawyer, or SRL. Others are common to both sides (for example, a general feeling of discomfort and unfamiliarity about how to behave). Many of the difficulties we have heard about from both SRLs and counsel arise from a lack of understanding of the other side’s responsibilities and motivations, and uncertainty about just how to go about developing a constructive working relationship.

“My Learned Friend” offers an overview of the problems articulated by both SRLs and counsel. It offers advice on creating a good working relationship and aims to understanding of both SRLs and counsel about the challenges each faces. The goal is to increase mutual understanding and to provide some practical direction for establishing and maintaining

¹ J. Macfarlane, “National (Canada) Self-Represented Litigants Final Report: Identifying and Meeting Needs of Self-Represented Litigants” (2013) at 31, 91-92.

a constructive and professional relationship that can make a critical difference to case outcomes.

Organization

This Resource has five sections.

The first section describes *why a constructive relationship between someone representing him or herself, and opposing counsel, is in the long-term interests of all parties*. These commonsense arguments may be useful for a SRL to reference when they first introduce themselves to opposing counsel, and obviously very important for counsel to consider in treating a SRL as a serious working partner.

The second section addresses some of the most commonly reported *negative experiences and difficulties experienced by SRLs* when working with opposing counsel.

The third section describes the most *common complaints and concerns expressed by lawyers* about SRLs, and some of the common mischaracterizations.

The fourth section offers some insights into *how lawyers understand their professional role and responsibilities when the other side is self-represented*, and what their codes of conduct require.

The fifth section suggests some *practical strategies* for making the relationship between a SRL and opposing counsel a positive, productive and effective one.

As always, NSRLP welcomes comments to enhance this Resource going forward.

Section One: Why a Good Working Relationship between SRL and Opposing Counsel is Important

It is increasingly common for cases to involve representation on one side but not the other. In 75% of cases in the 2013 study, there was a legal representative on the other side for some, or all, of the time.²

It is in the best interests of *all* parties to work constructively together towards a settlement. It is not in either party's interests to drag out the legal matter and drive up costs. Both legal representation and self-representation are not only financially draining, but very stressful.

The longer the case, the more costs and stress build up. Settlement before trial is the norm in family and civil cases – only a *very small* number of cases will proceed to a full trial. If settlement is the most likely end result, achieving that as early as possible will save costs and reduce stress, especially for those who are managing family transitions and change. However, many cases do not settle until right before trial, often after years of argument and costs.

In interviews conducted for the National SRL Study, some SRLs described positive experiences with opposing counsel where both sides acted reasonably in (for example) exchanging information, exploring negotiated solutions, and trying to resolve the case in mediation.³

In order for a settlement to be reached, and especially for a settlement that comes sooner rather than later in the process, a good working relationship between the SRL and counsel on the other side is crucial. This will allow important information to be exchanged between the two sides, and proposals for resolution to be explored “without prejudice” (that is, without a binding legal commitment at this stage, but as a way to consider possible outcomes).

Practical tips:

² *Ibid* at 31.

³ *Ibid* at. 73-75.

- If opposing counsel is using an adversarial strategy (see Section Two below) - for example, bringing motions seeking to dismiss the case, or by delays in providing requested information - the SRL should clearly and politely demonstrate that they recognize this is an adversarial strategy, and propose alternatives, including exchanging settlement offers or participating in a settlement meeting. “Settlement Smarts for SRLs” (The National Self-Represented Litigants Project <http://representingyourselfcanada.com/settlement-smarts-for-srls>) offers some practical tips and suggestions for SRLs on negotiating or mediating a possible agreement with the other side.
- If a SRL does not seem to be considering settlement possibilities, opposing counsel can share information with them about settlement as the “norm” in family and civil cases, and encourage exploring settlement *without escalating legal tactics*. Many SRLs see escalation (for example bringing additional motions, or a lack of cooperation over documents and hearing dates) as a strategy to push back against - resulting in further stalemate.

Section Two: What SRLs Say about Working with Opposing Counsel

While some SRLs in the National SRL Study (2013) spoke of the helpfulness and civility of the lawyer on the other side, others described a feeling of vulnerability in the face of an obviously uneven contest. “I’m scared because I doubt myself and there is a lawyer sitting on the other side.” From the perspective of the SRL, it is not surprising that they might experience the power imbalance with a lawyer on the other side very negatively. Some SRLs believed that opposing counsel deliberately exploited their advantage in the tactics they used. As one SRL saw it: “As soon as he (opposing counsel) knew I was representing myself, he went in for the kill”.⁴

Specific complaints consistently described by SRLs about opposing counsel include⁵:

⁴ J. Macfarlane, “National (Canada) Self-Represented Litigants Final Report: Identifying and Meeting Needs of Self-Represented Litigants” (2013) at 91.

⁵ *Ibid* at 31, 91-92.

- a. Behavior and tactics that are highly adversarial. These include threatening the SRL with costs, or refusal or delays in providing information, and bringing motions for summary judgment.

NSRLP comment: Some lawyers may believe that such tactics are an inevitable result of the adversarial nature of legal proceedings. However, a SRL may regard such tactics as unnecessary (which they may be) and even take them personally, rather than (as lawyers sometimes say) “just my job”.

- b. Some SRLs feel that there is little accountability for lawyers’ behaviour. They are not clear that they can still make a formal complaint about a lawyer, even if this is not their own lawyer.

NSRLP comment: Provincial law societies do allow for complaints to be brought against lawyers by SRLs. Typically these are complaints against a lawyer who formerly represented the SRL – but a complaint may also be brought against a lawyer representing the other side.

- c. SRLs often complain that opposing counsel is not willing to discuss and seriously explore settlement. Instead they sometimes seem to escalate matters by their unwillingness to speak with the SRL. As one SRL put it: “A lawyer should have the wisdom and skill to modify their approach to resolve matters for all parties, as opposed to putting fuel in the fire.”

NSRLP comment: We know that some lawyers are wary of speaking directly with SRLs because they are unclear how to manage that conversation, or worried about their own client’s reaction, or both. However, in order to move the case forward, it is essential to find a means of communication with the SRL.

- d. Some SRLs believe that judges and lawyers see themselves as above the rules, while the same rules are strictly imposed on a SRL. One SRL gave this example: “My ex’s lawyer treated me

very poorly. When I pointed out to him that he needed to provide me with information and within a specified period, he responded ‘You're not a lawyer, we don't have to follow the rules.’”

NSRLP comment: SRLs widely believe that the rules are applied in favour of lawyers; lawyers widely believe that the rules are applied in favour of SRLs (see Section Three below). The reality probably lies somewhere between the two.

Section Three: What Lawyers Say about Working with SRLs

What do we know from research about what lawyers think about SRLs, and how does this shape their behavior?

In recent years, lawyers have begun to understand the reasons behind higher levels of self-representation, and discussion of this phenomenon is more open and constructive than in the past, with some lawyers making intentional adjustments to their practice in order to work with SRLs (see Section Four below).⁶

Nonetheless some lawyers continue to hold very negative stereotypes of SRLs. Some lawyers continue to believe that SRLs are representing themselves because they think that they can do as good or better job than a lawyer.⁷

The National SRL Study (and similar studies in other jurisdictions⁸) show that the vast majority of SRLs are representing themselves

⁶ "BCCLE-TV: Resolving Disputes With Self-Represented Litigants" June 2016.

⁷ Birnbaum, R. & Bala, N. "Views of Ontario Lawyers on Family Litigants without Representation" 65 *University of New Brunswick Law Journal*, (2012) 99-124. 7% of lawyers reported that the most important reason for family litigants to have no lawyer is that they think they can do as good a job as a lawyer. The same study reported that 19% of lawyers believe that SRLs want to directly confront a former partner in court as a factor.

⁸ *Cases Without Counsel*, Institute for the Advancement of the American Legal System (iaals.org); Dewar et al *Litigants in Person in the Family Court of Australia* (2000); *Access to Justice for Litigants in Person* Lord Chancellor's Civil Justice Review (2011).

because they cannot afford legal services, do not qualify for public assistance, and see no other alternative.⁹

The belief that self-representation is a choice or a tactic, rather than a necessity, limits the way some lawyers relate to SRLs. The most significant stereotypes– that reduce the possibility of a constructive working relationship – include the following:

- a. Regarding all SRLs as mentally unstable, emotional and obsessive about their cases.¹⁰ Related to this, some lawyers see all SRLs as threatening to their client and in need of constant “control”.¹¹

NSRLP comment: The National SRL Study showed that many SRLs suffer from “situational stress”¹² – they feel alone and often desperate for help, and may be facing a personal crisis in their personal or professional life (for example they are going through a divorce, or have lost their job). One SRL describes self-representation as “a recipe for psychopathy”. However this is not the same as a pre-existing mental illness.¹³

- b. Assuming that SRLs are incompetent and unable to function effectively in the justice system. Sometimes this results in extreme views – for example, “Self-represented litigants should be banned”.¹⁴ More often, lawyers believe that SRLs are

⁹ J. Macfarlane, “Identifying and Meeting Needs of Self-Represented Litigants” above note 1 at 41.

¹⁰ Dyck, Karen. ["Shifting The Burden"](#). *Slaw Canada's Online Legal Magazine* 2013. 15 June 2016.

¹¹ Carol Cochrane ["Self-Represented Litigants: A Survival Guide"](#).

¹² J. Macfarlane, “Identifying and Meeting Needs of Self-Represented Litigants” above note 1 at 49.

¹³ Research suggests that individuals with mental illnesses become involved in the legal system more frequently than those without a mental illness. Macfarlane, Julie. ["Querulous Litigants Or Distressed Citizens: Who Are We To Judge?"](#). *The National Self-Represented Litigants Project Blog*. N.p., 2014. Web. 15 June 2016

¹⁴ Boyd, John-Paul E. and Lorne D. Bertrand. ["Comparing The Views Of Judges And Lawyers Practicing In Alberta And In The Rest Of Canada On Selected Issues In Family Law: Parenting, Self-Represented Litigants And Mediation"](#). *Canadian Research Institute for Law and the Family* (2016).

preventing the “efficient and effective operation of the justice system”.¹⁵ Lawyers commonly believe that facing a SRL creates extra work and delays that may be prejudicial for their client.¹⁶

NSRLP comment: The unfamiliarity of SRLs with the legal process sometimes means that cases get delayed, although research is unclear on whether this actually extends the timeline of cases involving SRLs.¹⁷ Lawyers often do not fully appreciate how hard most SRLs work on their cases, and that the mistakes they may make are not the result of lack of application, but due to the complexity and unfamiliarity of the legal system.

- c. Believing that the rules are constantly being “bent” in favor of SRLs. Some lawyers point out that some judges will take more time with SRLs.¹⁸

Section Four: Lawyers’ Professional Responsibilities towards SRLs

SRLs often feel that the behavior of opposing counsel is unprofessional and inappropriate. Some of these criticisms may arise from a lack of understanding about the obligations a lawyer has towards his or her own client. Other behaviours SRLs complain about are clearly, if made out, a breach of the lawyer’s professional code of conduct. It is

¹⁵ Dyck, Karen. ["Lawyers and Self-Represented Litigants"](#). *Slaw Canada's Online Legal Magazine* 2016. Web. 15 June 2016.

¹⁶ “Managing a file with a self-represented (unrepresented) opposing party can be challenging – in some cases, misunderstandings, protracted proceedings, and additional expense to the lawyer or paralegal’s client result” The Law Society of Upper Canada, *Dealing With Self-Represented Litigants*.

¹⁷ See for example Rhode D. [Access to Justice: An Agenda for Legal Education and Research](#) Consortium on Access to Justice; [The Importance of Representation in Eviction Cases and Homelessness Prevention](#) Boston Bar Association Task Force on the Right to Civil Counsel 2012.

¹⁸ Carson, Georgina and Michael Stangarone. ["Self-Represented Litigants In The Family Courts: Is Self-Representation An Unfair Tactic?"](#), *MacDonald & Partners LLP* (2016): n. pag. Web. 15 June 2016.

important to be able to distinguish between these two types of complaints, where possible.

Lawyers tend to take a very cautious and conservative view of their professional responsibilities towards SRLs, in part because this is an unfamiliar situation and little guidance is provided by provincial law societies. The uncertainty that some lawyers experience about how to work with a SRL on the other side is evident in widespread fears about the possibility of a complaint *from their own client* if they appear to be too attentive to the SRL on the other side.

Working with SRLs requires changes in professional practices that may be unwelcome, and even resented. At NSRLP, we strongly believe that the legal profession must serve the public interest and that includes working constructively with SRLs – but the reality is: change is difficult.

Provincial law societies have started to outline guidance and regulation for lawyers who represent a client against a SRL. The following are highlights of current professional rules (both inside and outside Canada), and their likely interpretation when working with SRLs.

a. A duty to treat a SRL with courtesy and respect

In Ontario, the Law Society of Upper Canada’s (LSUC) *Rules of Professional Conduct* states that, “A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings”.¹⁹ This means that lawyers must maintain a level of collegiality and civility when interacting not only with other lawyers, but also with others in the justice system, including SRLs. There is also a reverse obligation not to be rude: lawyers have an obligation *not* to communicate to a client, other legal practitioner or any other person, *including SRLs*, “in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer”.²⁰

¹⁹ The Law Society of Upper Canada, *Rules of Professional Conduct*. 2013. Rule 7.2-1

²⁰ *Ibid* Rule 7.2-4

NSRLP comment: Litigation is often extremely stressful on an interpersonal level, especially if there is much at stake. In “The Rights and Responsibilities of Self-Represented Litigants”, J.P. Boyd makes this important point:

“These codes of conduct require lawyers to treat opposing parties who are not represented by counsel politely and in the same courteous manner as they would treat a fellow lawyer. Of course, litigation can be difficult and emotional at times, and you must remember that the lawyer’s job is to represent his or her client, not you, and to advocate for his or her client’s interests, not your interests”.²¹

Nonetheless there is an overriding duty of civility owed to SRLs as well as to others.

b. A duty not to threaten or bully a SRL

Although the lawyer for the other side cannot provide a SRL with legal or tactical advice about her/his case (this is discussed further at (c) below), the opposing lawyer may present to the SRL a vigorous argument that their interpretation of the law is correct, and the SRL’s interpretation is not.²²

NSRLP comment: If done politely and with restraint, it is perfectly ethical for a lawyer to behave in this way. But this is a matter of degree. Undue pressure and bullying – for example, repeated threats of dire consequences for the SRL, including costs, if they do not withdraw – should be reported to the appropriate law society.²³

²¹ John-Paul Boyd "[The Rights and Responsibilities of Self-Represented Litigants](#)", *Slaw Canada's Online Legal Magazine* 2015. Web. 15 June 2016.

²² Farmer, Devlin. *Representing Yourself In Court*. Print at 58.

²³ Adam Dodek "[Ending Bullying in the Legal Profession](#)". *Slaw Canada's Online Legal Magazine* 2016. Web. 15 June 2016.

c. An obligation not to take advantage of the other side's errors

The LSUC Rules include a rule prohibiting “sharp practice” by a lawyer in dealing with another lawyer. Rule 6 (03)3 continues: “(a lawyer) shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other licensees not going to the merits or involving the sacrifice of a client's rights.”²⁴

NSRLP comment: Increasingly commentators assume that the “sharp practice” rule also applies to lawyer’s dealings with a SRL. For example, “(C)ounsel should advise a self-represented party if she or he has made a procedural error, and advise his or her client that s/he cannot rely on that error. Taking advantage of a SRL’s error is reportable”.²⁵

d. Clarity regarding the lawyer's own responsibilities

The LSUC expects a lawyer, when working with a SRL as the opposing party, to ensure that the SRL is not “under the impression that their interests will be protected by the lawyer” and to ensure the SRL understands the lawyer is acting exclusively in the interest of her/his client.²⁶ The Law Society of British Columbia and Alberta have similar requirements of lawyers practicing in its jurisdiction.²⁷ Essentially, lawyers do not have responsibility to represent the interest of an opposing SRL. A lawyer’s has a duty to represent her/his client’s interests, as well as a general professional duty to the court and to the regulating body.²⁸

NSRLP comment: Balancing their obligations towards their own client with their responsibilities to engage constructively and respectfully

²⁴ The Law Society of Upper Canada, *Rules of Professional Conduct*. 2013. Rule 6

²⁵ *Supra* note 15 at 5.

²⁶ *Supra* note 22 Rule 7.2-9, *Subrule 2.04(14)*.

²⁷ The Law Society of British Columbia, *Code of Professional Conduct for BC*. 2013. Rule 7.2-9.

The Law Society of Alberta, *Code of Professional Conduct* 2013. Chapter 6, Rule 6.02(11).

²⁸The Law Society of Upper Canada, *Ethical Issues Relating To Lawyers And Unrepresented Litigants In The Civil Justice System*. McCarthy Tétrault LLP, 2016. Print.

with a SRL on the other side, is a tough call. While the lawyer does not have any representation duties towards the SRL, arguably their duty to get the best outcome for their client requires that they may need to reach out to and facilitate an exchange with the SRL.

The Advocate's Society describes this balance as follows:

“Counsel should try to communicate with and be fair with self-represented litigants. This is consistent with a lawyer’s duty to the administration of justice. If assisting a self-represented litigant does not prejudice counsel’s client, will move the case forward and will not result in significant costs, counsel should strongly suggest providing assistance.”²⁹

e. A duty to settle a case whenever possible

Provincial law societies require lawyers to consider the possibilities of settlement in all cases.³⁰ This obviously requires communicating with a SRL (see (d) above).

NSRLP comment: One particular practical issue for lawyers is a fear of being called as a witness to details of a now-contested settlement discussion with a SRL (see Section Five below).

f. A duty to share court filings

A SRL is entitled to see all the documents that the opposing lawyer files with the court, in other words, what the judge will see.³¹

g. Returning file materials to a former client

If a client terminates his or her retainer with a lawyer – which usually happens because he or she cannot afford to continue with

²⁹ The Advocates Society: Institute for Civility and Professionalism, *Best Practices*. 2013. Print. at page 6.

³⁰ The Law Society of Upper Canada, *Rules of Professional Conduct*. 2013. Rule 3.2-4.

³¹ The Law Society of England & Wales, *Litigants In Person – Guidelines For Lawyers: Notes For Litigants In Person*. 2015. Print.

that lawyer – s/he may ask the lawyer to hand over the file materials in order to continue with the case self-represented.

If the client bill has not been paid in full, the lawyer has a common law right of lien over the file to secure payment (in other words, the lawyer can hold onto the documents until the bill is paid), which they can ask a court to enforce. While a lawyer may assert a lien on a file, the court has the jurisdiction to order the file to be delivered to the client if it considers this to be “just and proper”.³²

If all accounts have been settled, the lawyer is obliged to return to the SRL all those file materials that have been prepared during the retainer agreement and thus belong to the client. These include, for example, memoranda of law, documents created for use in court, witness statements and notes on attendances for the client’s benefit. Documents that the lawyer has paid for, or has prepared for their own benefit (for example, interoffice memos, the lawyer’s working notes) are not the property of the client.³³

Based on this information, a SRL should try to negotiate the return of all necessary documentation from a former legal representative in order to continue with his or her case as soon as possible.

Section Five: Practical Strategies for Constructive Collaboration between SRLs and Counsel

SRLs and opposing counsel may be on opposite sides of the adversarial system, but they can still find common ground and gain some understanding of one other. The information set out in Sections One - Four tries to fill some of the gaps that presently exist in how well lawyers and SRLs understand one another’s motivations, interests, and responsibilities.

³² For example *Foley v. David* (1996), 93 O.A.C.114, where the court decided that the outstanding fees could be recovered from other parties and the party being charged had not benefited from the litigation.

³³ See Jacqueline Morris, Felicia Folk and John Vamplew, “Whose File Is It Anyway?” (1994) 52:1 *The Advocate* 87.

What happens next will be a test of how well they can put their personal and professional differences to one side, and try to build a good working relationship. The following strategies are recommended for both SRLs and legal counsel who want to develop an effective working relationship.

a. Finding common ground

- (i) Both parties are in “uncharted territory”.* SRLs face an intimidating and complex legal system. Meanwhile, opposing counsel may understand the law and procedure, but know little about how to work professionally with a SRL. Opposing counsel should also recognize the challenges for SRLs as being not unlike their earliest experiences, when they were thrown into a complex world of “legalese” during their days as law students and junior lawyers. Both parties should recognize that neither side is really comfortable with how to deal with one another.
- (ii) Costs.* Neither side wants this matter to be drawn out, and accrue further costs. Keeping costs down for both parties is a shared goal. Ultimately, both a SRL and opposing counsel want the legal issue to be settled as quickly and efficiently as possible.
- (iii) Respect.* Everyone wants to be treated with respect. While this can be hard to remember when actions of others are construed as insulting and hurtful, and when so much is on the line for both sides, both the SRL and opposing counsel should attempt to be as respectful as possible towards each other. Anything less adds fuel to the fire, and only makes the conflict worse.

b. Initial communication

A good first step in establishing a relationship is to send a letter (or email) introducing yourself – as either a SRL or as legal counsel for the other side - and expressing your hope that you can work together. What should this include?

- (i) Setting the tone.* Avoid threats or demands. Instead express your commitment to establishing a constructive working relationship. Say that you hope that your communication can be courteous and civil. A SRL may want to say that they expect to be treated with the same respect as legal counsel, and legal counsel may say that they will treat the SRL with the same respect and courtesy that they would another lawyer.
- (ii) Clarification of counsel's client duties.* It is important for a SRL to understand that opposing counsel is there to represent their own client's interests. If a SRL can communicate that they understand this responsibility, it will ease the lawyer's fear of a malpractice complaint and open up the lines of communication. Counsel may also want to include a statement setting this out clearly, to reduce their anxiety about the SRL potentially misunderstanding their role.
- (iii) Communication protocol and expectations.* Each side should communicate their preferences for how they want to be contacted (email, phone, snail mail, other) over the course of the working relationship. This may also be a good time to set realistic expectations for responses on both sides – for example, limited to the office hours, no weekends, or within X days. This will also reduce pressure on the SRL to feel that they have to respond immediately to every communication.
- (iv) Plain language.* The SRL may want to ask that as far as possible, the lawyer should keep their communications free of specialized language like legalese and to use plain

language as much as possible. This is a reasonable request and will help both sides to work together. It is good practice for counsel to undertake to make this effort at the outset³⁴.

- (v) *Sharing information.* As a matter of good practice, it is important for each side to commit to sharing as much relevant information as possible in order to move the case forward. For example, a SRL may want to refer to the responsibility that the lawyer has to try to make efforts to settle each case (see Section Four (e)) and propose that each side consider what information the other might require (for example, financial information, any expert reports) in order to have a serious discussion about the possibility of settlement. Or, counsel could make this proposal to the SRL.

c. *Continued communication*

As the case continues, both sides should try to stick to the communication protocol (above) and keep communication polite, brief, and wherever possible, in writing.

It is important for both sides to avoid writing or responding to one another in any manner when they are feeling upset or angry.

If you speak face-to-face (perhaps in the courthouse), counsel may feel anxious about discussing settlement in the absence of a third party. This is because they could be called as a witness if there is a future disagreement about the content of the discussion. Similarly, a SRL will want to ensure that their understanding of the content of the conversation is shared by opposing counsel. Either might suggest that a third person – this could be someone accompanying the SRL, or another person from the lawyer’s office – sit with you both while you talk and take some notes of the discussion. These

³⁴ The Law Society of England & Wales, *Litigants In Person – Guidelines For Lawyers: Notes For Litigants In Person*. 2015. Print.

notes should be shared at the end of the discussion, and any emerging understandings clarified.

If you speak by phone, take some contemporaneous (dated) notes of what you say and what the other party says.

Throughout Canada, provincial rules of civil procedure generally require a party bringing a motion to confirm the motion with opposing parties before a hearing. NSRLP is aware that an unfortunate consequence of the caution that affects many dealings between counsel and SRLs is that that lawyers often neglect to confirm a motion if the opposing party is a SRL, whereas this is strictly adhered to if the opposing side is represented by counsel. It is important that lawyers make diligent efforts to confirm upcoming motions/appearances, when required do so, with SRLs just as they would with opposing counsel.

d. Making a settlement proposal

Either side may at any time make a proposal for settlement to the other. This can happen in a meeting with a judge or a mediator, or this may be initiated by an exchange of proposals between the parties.

“Settlement Smarts”

(<https://representingyourselfcanada.files.wordpress.com/2014/07/settlement-smarts-final.pdf>) includes practical suggestions for formulating a settlement proposal.³⁵ In addition, in making a settlement proposal it is important to remember that:

- (i) The other side will need time to consider a proposal and to review it with either the client, and possibly others. Placing short and strict time limits on how long the other side has to consider a proposal is unlikely to be helpful and will be felt as pressure to make a hasty decision;

³⁵ See in particular section 5.2, How to prepare for mediation.

- (ii) Similarly, it is important to note that a counterproposal in response will at least be considered, rather than to insist that an offer is “nonnegotiable”;
- (iii) As the case proceeds, the needs and goals of each side may change. Repeating a proposal that has been rejected earlier may be constructive, if it can be set in the current context and perhaps the reasons for the original rejection recognized.

e. Drafting a settlement agreement

Where an agreement is emerging as a result of a settlement meeting with a judge (case management meeting, settlement conference – the names of these meetings vary among jurisdictions), the judge may ask the represented party’s lawyer to draft the agreement (that will become an order). NSRLP is aware of many instances where drafts were sent directly back to the court without further review by the SRL, who later does not concur the content of the order accurately reflected the agreement.

It is good practice to ensure that the SRL has seen and approved the draft order before it is returned to the court.³⁶

Further Resources

Dodek, Adam "[Ending Bullying in the Legal Profession](#)". *Slaw Canada's Online Legal Magazine* 2016. Web. 15 June 2016.

["BCCLE-TV: Resolving Disputes With Self-Represented Litigants"](#) June 2016.

Boyd, John-Paul E. and Lorne D. Bertrand. "[Comparing The Views Of Judges And Lawyers Practicing In Alberta And In The Rest Of Canada On Selected Issues In Family Law: Parenting, Self-Represented Litigants](#)"

³⁶ See for example The Law Society of England & Wales, *Litigants In Person – Guidelines For Lawyer*. 2015 paras 48-50.

And Mediation". *Canadian Research Institute for Law and the Family* (2016).

Cochrane, Carol ["Self-Represented Litigants: A Survival Guide"](#).

Carson, Georgina and Michael Stangarone. ["Self-Represented Litigants In The Family Courts: Is Self-Representation An Unfair Tactic?"](#), *MacDonald & Partners LLP* (2016): n. pag. Web. 15 June 2016.

[Cases Without Counsel](#), Institute for the Advancement of the American Legal System (iaals.org)

Dyck, Karen. ["Lawyers and Self-Represented Litigants"](#). *Slaw Canada's Online Legal Magazine* 2016. Web. 15 June 2016.

Dyck, Karen. ["Shifting The Burden"](#). *Slaw Canada's Online Legal Magazine* 2013. 15 June 2016.

Macfarlane, Julie ["National \(Canada\) Self-Represented Litigants Final Report: Identifying and Meeting Needs of Self-Represented Litigants"](#) (2013).

Boyd, John-Paul ["The Rights and Responsibilities of Self-Represented Litigants"](#), *Slaw Canada's Online Legal Magazine* 2015. Web. 15 June 2016.

Macfarlane, Julie. ["Querulous Litigants Or Distressed Citizens: Who Are We To Judge?"](#). *The National Self-Represented Litigants Project Blog*. N.p., 2014. Web. 15 June 2016