

## Civil Litigation

# Duties of opposing counsel to self-represented litigants

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(September 25, 2020, 11:12 AM EDT) -- One of the most frustrating experiences faced by a lawyer is that a self-represented litigant (SRL) is not bound by the same or equivalent ethical obligations governing a lawyer within professionally binding codes of conduct. The professional codes impose a series of duties, however, that are owed by a lawyer to an SRL, which must be respected by a lawyer on penalty of sanction for professional misconduct.

From 2004 to 2010, the Law Society of Alberta participated with the Federation of Law Societies of Canada in development of a model *Code of Conduct*, and thus the Alberta proscriptions are similar to the national ethical standards governing lawyers across Canada.

The overarching duty of a lawyer in the practice of law is to act honourably and with integrity (*Alberta Code of Conduct* 2.1-1). Another overarching duty is one of civility, which a lawyer is obliged to extend to *all parties* with whom the lawyer has dealings. This overarching duty is set out in the professional codes in most if not all of the jurisdictions in Canada.

In Alberta, the *Code of Conduct* (Code) requires that a lawyer be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings in the course of his or her practice (5.1-6, 7.2-1); thus, this duty would extend to opposing counsel's interactions with SRLs. Rude, provocative or disruptive conduct by a lawyer may constitute professional misconduct (5.1-6 commentary).

Further, a lawyer must not send correspondence or otherwise communicate with any persons in a manner that is abusive, offensive or otherwise inconsistent with the proper tone of a professional communication from a lawyer (7.2-6).

As part of this duty of civility, the Code explicitly states that a lawyer should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client (7.2-1 commentary), and this duty would extend to interactions with SRLs. As well, a lawyer has a duty to correct any misinformation inadvertently given to an opposing party and this would include an SRL (7.2-5).

Supporting our view that a lawyer's overarching obligations to the profession will apply to SRLs is the explicit commentary in the Code, 7.2-12, which states that "When dealing in a professional capacity with a non-lawyer representing another person, or with a person not represented by counsel, a lawyer has the same general duties of honesty, courtesy and good faith that are owed to professional colleagues."

In addition to the overarching duties of a lawyer, the *Code of Conduct* specifically addresses interactions with SRLs, and again this requirement seems to be consistent throughout Canada.

A lawyer must advise the unrepresented person to obtain independent legal representation, take care

to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer, and make it clear to the SRL that the lawyer is acting exclusively in the interests of his or her client (7.2-12).

With the partisan role of the lawyer clearly flagged, the lawyer must avoid being placed in a conflict of interest by assisting the SRL. The American College of Trial Lawyers in "Canadian Code of Conduct for Trial Lawyers Involved in Civil Actions Involving Unrepresented Litigants" (May 2009) suggests that a lawyer refrain from giving information or explanations to an SRL unless directed to do so by the trial judge, and instead refer the SRL to court staff or appropriate legal resources, or suggest the SRL make an inquiry of the judge.

The Code also requires a lawyer to strictly and scrupulously fulfil any undertakings given and honour any trust conditions accepted in the course of litigation (5.1-7), and this duty extends to undertakings or trust conditions given to SRLs.

As noted by the American College of Trial Lawyers, an SRL is not bound by the professional conduct and ethics applicable to lawyers and therefore cannot give a lawyer's undertaking — it may therefore be difficult to hold an SRL to any undertaking. Thus, it may be difficult to protect against the outside use of disclosure materials, for example.

A lawyer is required by the Code to inform the tribunal of any relevant adverse authority that the lawyer considers to be directly on point that has not been mentioned by another party (5.1-2(n)), and this duty to the court is particularly acute when the opposing party is an SRL.

Some authors have suggested that this duty may also oblige the lawyer to advise the court of relevant governing legislation and regulations that the SRL has overlooked, and this would seem to be apt given the obligation of a lawyer to "make sure the court has before it all relevant legal authority, whether helpful or not" (5.1-2 commentary).

In the "Canadian Code of Conduct for Trial Lawyers Involved in Civil Actions Involving Unrepresented Litigants" it is also suggested that the lawyer may have to assist the court regarding evidentiary issues that might otherwise have been brought to the court's attention by opposing counsel, although this would not require the lawyer to volunteer facts, information or evidence favourable to the SRL.

In addition to possible sanction for professional misconduct arising from a lawyer's treatment of an SRL, some cases suggest the possibility of a costs sanction against the recalcitrant lawyer.

For example, in *Kent v. Waldock* 2000 BCCA 357, the lawyer expressed intense dislike of the self-represented plaintiff and behaved discourteously and inconsiderately to him, insulting him as being "histrionic," "narcissistic" and suffering from a brain injury. The lawyer also failed to disclose important documents to the SRL and applied to the court to strike a jury notice without notice to the SRL, representing to the court that the matter was "noncontentious."

The appellate court noted that the purpose of a cost award against a lawyer was to compensate the litigant, not to punish the lawyer, for conduct by the lawyer that was reprehensible or amounted to an abuse of the process of the court. The appellate court did not assess costs for the personal insults as there was no evidence that costs were incurred or wasted as a result of the lawyer's remarks.

The matter of the insults was the responsibility of the disciplinary body governing lawyers. Costs were assessed against the lawyer personally for failing to disclose documents and applying to strike the jury notice, however, and the registrar was directed to recommend the amount of such costs.

The appellate court concluded: "Mr. Murphy was certainly entitled to be a strong advocate on behalf of his client and to take advantage of the rules of court in the conduct of his case but he was not entitled to abuse Mr. Kent [the SRL] any more than he was entitled to abuse the process of the Court."

This is the third part in a three-part series. Part one: What are the court's obligations in dealing with self-represented litigants?; part two: Court's obligations in dealing with self-represented litigants: Limits to assistance.

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