



## Précis Paper

### Dealing with Self-Represented Litigants

This is an interesting presentation by two experienced practitioners discussing the challenges for lawyers of dealing with self-represented litigants.

#### **Discussion Includes**

- Why do people self-represent?
- The Court's obligation to provide a fair trial
- Strategies for dealing with matters with self-represented litigants
- Corresponding with self-represented litigants
- Advising clients about dealing with self-represented litigants
- Vexatious litigants
- Proposals for systemic change

# Précis Paper

## Dealing with Self-Represented Litigants

1. In this edition of BenchTV, Dr Michelle Sharpe (Barrister, 14 Castan Chambers, Melbourne) and Tori Edwards (NSW Manager, Justice Connect, Sydney) discuss the challenges for courts and practitioners of dealing with self-represented litigants. Lawyers need to be aware of the unique challenges that arise when dealing with self-represented litigants and develop appropriate strategies.

### Why Do People Self-Represent?

2. A self-represented litigant is a party to a proceeding who is representing him or herself. There are rising numbers of people self-representing in every jurisdiction in Australia, in part because Legal Aid funding has been falling and it is increasingly difficult to obtain legal aid, particularly for civil and family law matters. The presenters commented that a report of the Productivity Commission noted that only 8 percent of people are eligible for legal aid, whereas just over 13 percent of the Australian population lives below the poverty line.
3. Ultimately, these statistics suggest that many litigants find themselves in the position of having to represent themselves out of necessity. It is incorrect to assume that an individual is representing themselves because they are vexatious, and vexatious litigants make up a small subset of self-represented litigants.

### The Court's Obligation to Provide a Fair Trial

4. Individuals have a right to appear on their own behalf. This right is enshrined in s 78 of the *Judiciary Act 1903* (Cth). In contrast, most rules of court require companies be represented by a lawyer, although a court may make an exception to this and make orders under its inherent jurisdiction.
5. A court may give leave for an individual to be represented by someone other than a lawyer, such as a lay advocate, or be assisted by a McKenzie friend. A McKenzie friend is someone who assists a litigant in person to advocate on their own behalf. Both presenters noted, however, that there are people who frequently act as a McKenzie friend in either paid or unpaid capacities, and may seek to take advantage of vulnerable self-represented litigants. These people may be acting in breach of the rules governing legal professionals in the jurisdiction if they are holding themselves out to be a lawyer or become a professional acting in this role.

6. The court must grant leave before a person may act as a McKenzie friend and will consider factors such as the person's proficiency in English and level of education, and whether the McKenzie friend has the requisite skills or knowledge of the law to provide assistance to the litigant.
7. All litigants have the right to a fair trial. This is engrained in the common law, but also in the *International Covenant on Civil and Political Rights*, 999 UNTS 171, to which Australia is a party, and various pieces of Australian legislation including the *Charter of Human Rights and Responsibilities Act 2006* (Vic), the *Civil Procedure Act 2010* (Vic), and the *Civil Procedure Act 2005* (NSW). Self-represented litigants are at a disadvantage in the court system, because of their lack of knowledge of the law but also their lack of knowledge of civil procedure and court etiquette. In addition, self-represented litigants lack the objectivity that a lawyer brings when acting for a client, and it will be difficult for them to be dispassionate when dealing with their own life problems. These factors were noted by the Victorian Supreme Court in *Tomasevic v Travaglini & Anor* [2007] VSC 337.
8. The courts therefore have an obligation to assist self-represented litigants, in order to ensure that their right to a fair trial is realised. This means that the court may have to do things in dealing with a self-represented litigant that they would not do in the ordinary course. This task can be a challenging one for courts and presents competing considerations. The court will have to make an assessment of the capacity of the particular litigant in person to meaningfully participate in their own fair trial, and the judge has a difficult task of remaining impartial while also ensuring a fair trial to both parties. Of course, our system is an adversarial one, and not inquisitorial in nature, and so if a judge crosses the line and assists a litigant too much, a practitioner should consider bringing an application for the judge to recuse him or herself as soon as possible, or the opportunity may be lost. Although the judge can provide some assistance, it is ultimately up to the parties to adduce the evidence and make the submissions that they rely upon in support of their case.
9. In *Tomasevic v Travaglini & Anor* [2007] VSC 337, the Court set out a number of steps that a court can take in assisting a self-represented litigant, including:
  - Explaining court procedure;
  - Explaining the requirements that a litigant must meet;
  - Explaining what issues are and are not relevant, and encouraging the litigant to make submissions on the relevant matters while discouraging submissions on the irrelevant matters;
  - Asking the litigant whether they are putting forward all of the matters on which they seek to rely and asking for elaboration of matters not fully covered; and
  - Inviting the litigant to present anything further before the hearing concludes.

## Strategies for Dealing with Matters with Self-Represented Litigants

10. Practitioners have a duty to the court, but this must be balanced with the duty to act in the best interests of their client. The presenters reminded viewers that it is not the best interests of a client for a decision to be set aside on appeal, so a practitioner should assist the court in fulfilling its obligation to provide every party with a fair trial.
11. A number of states have guidelines that assist practitioners in dealing with self-represented clients: see, for example, Law Society of NSW, *Guidelines for solicitors dealing with self-represented parties* (April 2006) and Queensland Public Interest Law Clearing House Incorporated, *Self-Represented Litigants: Guidelines for Barristers* (July 2015).
12. The presenters noted a number of considerations when dealing with self-represented litigants. First, practitioners should be mindful that often, a self-represented litigant will not understand the role of the lawyer on the other side, and may seek legal advice from them. Practitioners can take practical steps such as directing the self-represented litigant to sources of advice, including community legal centres or self-representation services. The Court's Registry can also provide services to self-represented litigants.
13. Where appropriate, practitioners can provide explanations to the litigant. In addition, the presenters advised practitioners to be better prepared than they would be ordinarily, and provide copies of written submissions and cases to the litigant in advance. These steps will mean that it is more difficult for an appeal court to make a determination that the obligation to provide a fair trial had not been discharged.
14. Practitioners should avoid bringing applications for summary dismissal or to have pleadings struck out where the litigant is self-represented. Courts prefer that matters run to completion where self-represented parties are involved and self-represented litigants, who generally have a poor grasp of procedure, are disadvantaged in applications of this nature. It is not in clients' best interests to waste money on applications of this nature, and it may be preferable to seek to expedite the final hearing.
15. Finally, practitioners should try to correspond with the self-represented litigant to determine what they see as the issues in dispute. However, when corresponding with self-represented litigants, practitioners should be as plain and straightforward as possible, and clearly communicate their client's position and what the litigant needs to do as a result, bearing in mind their level of education and proficiency in English. Moreover, practitioners should make clear that they act for the other party and cannot provide the litigant with legal advice.

Practitioners also need to be prepared to warn self-represented litigants if they seek to show them material that contains privileged information, without realising the ramifications.

16. Practitioners should remember that same ethical obligations in dealing with another lawyer remain when dealing with a self-represented litigant, including the duty not to mislead an opponent. A practitioner needs to take a more proactive approach in explaining misapprehensions when dealing with a self-represented litigant.

#### Advising Clients about Dealing with Self-Represented Litigants

17. Where the other party is self-represented, clients should be advised that the matter is likely to be more protracted and expensive. This may have consequences for decisions regarding settlement, as costs will be a factor in determining whether to continue proceedings.
18. Practitioners should also advise their client not to react strongly to or inflame a self-represented litigant. Self-represented litigants will often be dealing with matters of great importance to them, and therefore may lack objectivity when reacting to matters raised in court. It may be difficult for clients to be cross-examined by a self-represented litigant, and practitioners may need to raise with the court other ways in which their client can give evidence, for example by video-link. There is also the possibility of the court requiring the self-represented litigant to be represented for the purpose of examining certain types of witnesses.
19. Self-represented litigants should also be reminded to correspond with the lawyer, rather than the other party directly. This can be difficult for them to understand where they have a personal relationship with their opponent.

#### Vexatious Litigants

20. Truly vexatious litigants are a small subset of self-represented litigants. The presenters emphasised that just because the individual who is representing themselves makes a lawyer's job harder, does not mean that they are vexatious.
21. Vexatious litigation involves repeated and baseless pursuit of courses of actions. The courts are empowered to either shut out or control vexatious litigants, both through statutory provisions and their inherent jurisdiction. However, the threshold for the making of declarations about vexatious litigants is high and will not be made lightly.
22. The presenters referred to the work of Dr Grant Lester, a psychologist who has written about vexation litigants. Dr Lester identified the 6 V's of vexatious litigants: Volatile emotions;

feeling Victimised; seeking Vindication; producing Voluminous and Vague communications; and Varying their demands. Vexatious litigants will not be interested in a particular outcome, but in the pursuit of litigation itself.

23. Practitioners are advised to be cautious when dealing with vexatious litigants. They should maintain vigorous boundaries, as vexatious litigants rapidly form attachments to those who they feel are favouring them but then feel betrayed if that favourable treatment is not maintained. Therefore, practitioners should be very clear from the beginning what their role is and attempt to refer the litigant to legal advice as early as possible. Moreover, the formality of the court system ought to be maintained.
24. Correspondence with vexatious litigants should be in writing in order to protect the lawyer, but also should be very simple and repetitive. Barristers should ensure that a solicitor is present in the course of discussions and that the conversations are documented. Practitioners should take any threats of violence seriously and inform the court immediately.

#### Proposals for Change

25. At the systemic level, the presenters noted the importance of providing more people with legal advice in order to ensure that self-represented litigants are not disadvantaged. To this end, more practitioners are starting to "unbundle" legal services, which allows a lawyer to provide advice or assistance in only part of litigation. However, the disadvantage of services of this nature is that it can be challenging for practitioners to give advice on only parts of a proceeding as they may not have a complete understanding of what the issues or facts are. Changes may need to be made to the regulation of legal services and court processes may need to become more flexible in order to facilitate services of this nature.

## **BIOGRAPHY**

### Dr Michelle Sharpe

Barrister, 14 Castan Chambers, Melbourne

Dr Michelle Sharpe is a barrister practicing in general commercial and regulatory law, specialising in consumer protection. Michelle was called to the Victorian Bar in 2002 after working as a solicitor for 3 years and lecturing part-time at the University of Melbourne. She has a Bachelor of Arts (juris) and a Bachelor of Laws with first class honours from the University of Adelaide. She also holds a PhD from the University of Melbourne. The subject of her PhD thesis is unconscionable conduct in commercial and consumer contract which is to be published as a text by LexisNexis in 2018.

### Tori Edwards

NSW Manager, Justice Connect, Sydney

Tori Edwards was admitted to practice as a solicitor in NSW in February 2006. She has practiced in not-for-profit organisations, including advising and representing Aboriginal communities in Federal Court native title claims, and working on a national pro bono legal service for cancer patients. Tori now works for the legal charity and not-for-profit Justice Connect. Tori's work here includes managing a legal service for self-represented people in the Federal Court and Federal Circuit Court in NSW, Victoria, the ACT and Tasmania. Tori holds a Master of Laws (Human Rights & Social Justice) from the University of NSW, a Bachelor of Laws (Hons Class I) and Bachelor of Arts, both from the University of Sydney.

## **BIBLIOGRAPHY**

### Cases

*Tomasevic v Travaglini & Anor* [2007] VSC 337

### Legislation and Treaties

*Judiciary Act 1903* (Cth)

*International Covenant on Civil and Political Rights*, 999 UNTS 171

*Charter of Human Rights and Responsibilities Act 2006* (Vic)

*Civil Procedure Act 2010* (Vic)

*Civil Procedure Act 2005* (NSW).

### Other Material

Law Society of NSW, *Guidelines for solicitors dealing with self-represented parties* (April 2006)

Queensland Public Interest Law Clearing House Incorporated, *Self-Represented Litigants:*

*Guidelines for Barristers* (July 2015)