Dealing with a self-represented litigant who really needs legal advice

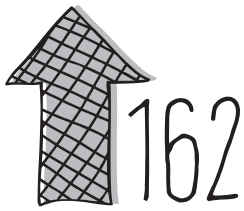
Self-represented litigants are a challenging reality in today's legal landscape. In addition to the extra time and effort that can make dealing with a self-rep more expensive for your client and more frustrating for you, it seems there is a greater potential for a malpractice claim. This is highlighted by the number of claims LawPRO is seeing where the opposing party was a self-rep. In 2014, there were 162 such claims, almost double the 86 we saw a decade earlier, in 2004.

As you work to resolve a matter, you may find yourself negotiating directly with a self-represented litigant. In the discussions that will occur, facts will be disclosed, legal issues will arise, and decisions will have to be made by both parties. As the lawyer in the middle of these discussions, you may be faced with the question of what duties you owe and to whom. Consider the following hypothetical situation:

MALPRACTICE CLAIMS

WHERE OPPOSING PARTY WAS A SELF-REP

IN 2004



MALPRACTICE CLAIMS

WHERE OPPOSING PARTY WAS A SELF-REP

IN 2014

You represent the wife in a matrimonial proceeding. The husband is unrepresented. The marriage was of short duration and there were no children. The only asset is the husband's pension. At a mediation, the parties agree to settle on the basis that the husband's pension will be divided equally. The husband, who is in a new relationship and is anxious to settle, signs the minutes. Before you have your client sign the settlement documents, you require a clarification from the pension provider.

Following the mediation, you review additional disclosure provided by the husband and discover that the husband made an assignment in bankruptcy following the separation. You also realize you overlooked documents in your file which mentioned the assignment. You conduct a bankruptcy search and, to your surprise, learn that the husband had been discharged following your retainer and prior to the mediation.

An order of discharge from bankruptcy releases the bankrupt from all claims provable in bankruptcy. In this case, because of the husband's assignment in bankruptcy, the wife should have obtained a court order under Section 69.4 of the *Bankruptcy and Insolvency Act* for leave to pursue her claim. Pensions are not assets that vest with the trustee in bankruptcy and are exempt from bankruptcy proceedings. As such, the husband's creditors would not have been prejudiced and a leave order most likely would have been granted. Assuming leave had been granted, the wife would have been free to pursue the claim for part of her husband's pension. However, as the husband was discharged from bankruptcy, it is too late to seek leave. In this case, the wife could very well lose her claim to the husband's pension. As mentioned earlier, the husband is in a new relationship and is still eager to sign the minutes of settlement. He emails and calls you repeatedly asking whether his wife has now signed the settlement documents.

As it turns out, the minutes of settlement need minor amendments due to information given by the pension provider, which requires the husband to re-sign them. You are concerned about the ethics of asking the husband to re-sign a settlement now that you know the husband has no legal obligation to divide his pension.

What do you do? Fortunately the *Rules of Professional Conduct* provide guidance for this situation. First, as a lawyer you owe a duty to your client. Having said that, Rule 7.2-9 provides that when a lawyer deals on a client's behalf with an unrepresented person, the lawyer shall:

- Take care to see that the unrepresented person is not proceeding under the impression that their interests will be protected by the lawyer; and
- Take care to see that the unrepresented person understands that the lawyer is acting exclusively in the interests of the client and accordingly their comments may be partisan.

After having reported this matter to LawPRO, you also consult with Practice Advisory at the Law Society of Upper Canada. As a result of direction provided to you, you draft a letter to the husband which encloses the Minutes of Settlement and includes the following paragraph:

> "Please be informed that I do not represent you in any way and am not protecting your interests. You should therefore seek legal advice prior to signing these documents. I act exclusively for Ms. Smith and any comments that I have made may be partisan. Again, we strongly suggest and recommend that you review these documents with a lawyer of your own choosing and obtain independent legal advice before signing them. We trust that this is perfectly clear, and remain…"

Although it is not required by the *Rules of Professional Conduct*, it is prudent to urge the self-represented litigant to obtain independent legal advice as indicated in the above letter. Whether the husband seeks independent legal advice and signs the minutes remains to be seen. Either way, Rule 7.2-9 provides excellent loss prevention advice. Following it will rebut any allegation by the non-client husband that he relied upon the lawyer to protect his interests. Failing to follow the rule invites the risk that such an allegation will succeed. Indeed, there are numerous reported decisions which criticize lawyers for failing to recommend ILA.

Consider the above scenario next time you have a self-rep on the other side. Always remember who your client is, and where your duties lie. ■

Yvonne Diedrick is Claims Counsel at LawPRO.