The Judge as Counsel

D.A. Rollie Thompson, Dalhousie Law School, Halifax, Nova Scotia

Unrepresented litigants need "legal advice", in some form and from some source. If they don't get it outside of court, they'll look for it at the courthouse. If they don't get it somewhere in the courthouse, then they'll try to get it in court, from the judge. The buck stops at the judge.

Some judges will refuse to give legal advice. Other judges will venture into the realm of legal advice, just to move a trial or hearing along, albeit with a sense of unease. Some judges will actually change their procedures, especially when both parties are without lawyers. Hence my title, even if it is a bit melodramatic.

A quick comment about language. Most use the term "self-represented litigants" to describe lawyer-less parties, a dangerous term. The vast majority of lawyer-less parties are "unrepresented", as they have no choice. The unrepresented would like to have a lawyer, but can't afford or find one. The "self-represented" might be able to afford a lawyer, but don't want one or can't keep one. There is some small overlap between these two categories. Estimates suggest that 15 to 25 per cent of those without lawyers fall into the "self-represented" category.[1] For the most part, I will therefore use the term "unrepresented", as a more accurate description, especially in civil matters.

All of these unrepresented, litigants or not, lack legal advice. The best they can hope for is some "legal information". Most unrepresented litigants will eventually wind up before a judge, still looking for "legal advice".

This short article addresses these linked problems. First, how do the unrepresented get "legal advice" outside the courtroom? Is "legal information" enough? What's the difference between the two? Second, if the unrepresented can't get "legal advice" outside the courtroom, what can or should judges do inside the courtroom? If both parties are unrepresented? If only one party is unrepresented? Is this a matter for individual judges to sort out, case by case, or does this problem demand a systemic response, by way of practice directions, policies or rules?

The Need for Representation in Our Adversarial System

The "unrepresented" work within an adversarial system of litigation, which we inherited from England, as did other British colonies. Here we're back to basics for a moment. In an adversarial system, the parties – and their lawyers – are responsible for the investigation, preparation, prosecution and presentation of their own cases. The judge sits as a neutral umpire, deciding the case as presented by the parties. This is especially true in civil matters, where the institutional purpose is primarily dispute resolution.

Lawyers are a necessary element of a party-driven system, but the services of lawyers are distributed on a market basis. Those who can afford lawyers get them. Wealthy individuals and institutions can afford very good lawyers. The poor can't afford lawyers and, with rare exceptions, there is no civil legal aid in Canada.[2] For those in between, for the middle class and small businesses, litigation is a "catastrophic" experience – expensive, painful, requiring extraordinary financial arrangements with lenders or lawyers, and to be avoided whenever possible.

The result has been a dramatic increase in unrepresented litigants appearing in non-family civil cases in our superior courts, which is the focus of this piece. The corollary, noticed less often, is the absence of certain classes of claimants and claims from the same superior courts, because potential claimants can't get a lawyer or legal advice. The literature abounds with concerns about the unrepresented who appear before our superior courts. We should be equally concerned about those who don't appear.

Legal Information, But Not Legal Advice

Most courts adhere to the standard instruction, "not to give legal advice". Court staff are not to give legal advice. At most, court staff may be permitted to give limited "legal information", typically only in courts where the unrepresented appear most frequently such as small claims courts or family courts. Outside of these areas, superior courts generally maintain a passive "registry" approach, consistent with their umpireal role in litigation. Counter staff accept documents for filing, provided their "form" looks about right (and sometimes even if the form isn't right).

Courts are not alone, however, in trying to draw the line between "legal information" and "legal advice". That same line is drawn outside the courts, by public legal education and information bodies, by websites, by dial-a-law lines, by "do-it-yourself" kits, by student *pro bono* projects, even by lawyer volunteer programs. The only people who will give you "advice" are your friends and relatives, and it isn't "legal" advice.

Typically the line is drawn something like this. "Legal information" involves answers about the law in general, about the options available, about basic court processes, and – more dangerously – about how the law "might" apply or "usually" applies. By contrast, "legal advice" involves individualised answers about how the law would apply to a person's particular case or what option the person should pursue or what outcome is likely in the person's case.

"Legal advice" is a term difficult to define, as John Greacen has pointed out,[3] in his context of directives to court staff.

Instead, Greacen has offered a set of five general principles to govern what court staff should keep in mind in answering questions, followed by eleven further guidelines for staff to use (five about what staff can do, six what they can't). Greacen's articles have been widely used in the United States and even in Canada, to underpin directions to court staff. For example, among the guidelines, court staff can answer "questions about court rules, procedures and ordinary practices", questions that often contain the words "Can I?" or "How do I?" Or, court staff can "explain the meaning of terms and documents used in the court process". But court staff cannot "advise litigants whether to take a particular course of action", usually in questions that contain the words "Should I?" In the end, Greacen's helpful suggestions just elaborate more carefully and more practically the line between "legal information" and "legal advice".

What do Unrepresented litigants really need?

There is another problem with this line being drawn. The distinction between "legal information" and "legal advice" is really more often a statement about the nature of the underlying law, than about how questions are answered or who answers them. This in turn has serious implications for dealing with the unrepresented.

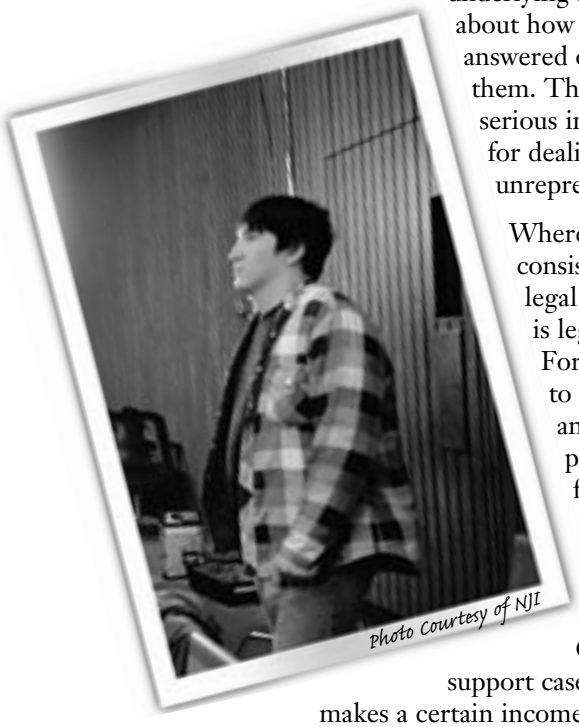
Photo Courtesy of NJI

Where the law consists of a "rule", legal information is legal advice.[4] For example, to commence an action, a plaintiff must file some form of originating notice and a statement of claim. Or, in a child support case, a parent who makes a certain income must pay the "table amount" – the amount stated in the readily available provincial tables, depending upon the number of children involved.[5] What a party should do is what a party must do, under a "rule".

Admittedly, there can be issues around whether a set of facts does or doesn't fall within a rule. And sometimes there can be a limited number of exceptions to a rule, an exception which might apply. Still, providing "information" about rules is likely to be helpful to the unrepresented.

Contrast the answers on a topic where the law is "discretionary". Where there is more than one valid option for action, or where a court has more than one available option in the outcome, then "legal information" is decidedly unhelpful. Too much information, about too many options, with too little guidance. For example, think of explaining the law of summary judgment, or *forum conveniens*, or any one of a host of procedural issues. Or, even worse, explain the principled approach to hearsay and how a court can admit hearsay evidence that does not fit an existing exception. What the unrepresented want here is "advice", some guidance through the welter of possibilities.

Unfortunately, the modern trend is away from "rules" and towards "principles" and "discretion", especially in our law of procedure and evidence. Our rules of civil procedure are mislabelled, as they are not "rules" at all. For the most part, our civil procedure rules contain broad statements of principle, consistent with their origins in equity procedures. Great pools of discretion are left to judges, to manage and direct litigation in a fair and efficient manner. Even more so, "principled flexibility" has taken over our evidence law, on topics like hearsay, privilege, character evidence, expert evidence, etc. Not only does all this require a lawyer, increasingly it requires a very good lawyer, one who can argue from policy and rationale, rather than rule and exception.

This modern trend in the law – more complex, more policy-oriented, more multi-factor balancing tests, more discretion – makes the law largely inaccessible to those without lawyers, or even those without very good lawyers. Good old "rules", printed in legislation or stated in a leading case, are an endangered species, perhaps on their way to legal extinction. It may be time to recognise the merits of rules of substantive law, at least in those areas of law where the unrepresented appear more frequently. Legislators and judges should keep in mind the cost and confusion of litigating vague, open-ended, contextual law.

In some of these areas of law, we already see more rules of substantive law, for example, child support or property division in family law, or employment standards or residential tenancies in administrative law. Even in these fields, however, the law of procedure and evidence remains flexible and discretionary. And, in my experience, it is the procedural stuff that baffles the unrepresented, that is, how to get from claim to hearing.

It is little surprise then that unrepresented litigants receive very little helpful "legal information" about matters of civil procedure and evidence, from sources outside the courthouse or from court staff. And the unrepresented can't get "legal advice" on such matters either. So they come to court, looking for that advice.

Looking for Legal Advice from the Judge

If unrepresented litigants can't find legal advice outside the courtroom, they will look for advice from the judge. The same questions that weren't answered at the clerk's counter will be repeated inside the courtroom, only now with an edge to the voice. Or, if not asked, the need for an answer is implicit in the gaps seen in the preparation of an unrepresented litigant, whether those are procedural

or substantive in nature. But the giving of "legal advice" is inconsistent with the role of "judge-as-neutral-umpire", a role developed in the context of the adversary trial.[6] Judges in our superior courts don't investigate, or gather evidence, or examine witnesses, or root out documents, or prepare arguments. That's left to the parties, represented or unrepresented.

What's a judge to do? First, provide "legal information" to the unrepresented, with all the complications mentioned above. Second, push and prod the matter along with the most innocuous bits and pieces of "legal advice" possible. Third, make procedural rulings to move the matter forward, rulings that "tell" the unrepresented what to do and what the law is. These rulings are often no more than what a lawyer would have told the litigant, effectively amounting to "legal advice", for example, you should complete this form, or disclose these documents, or provide that information. As I said in a previous article:

> Lawyers explain the realities of the court process, again and again and again – informing clients of their obligations as litigants and the penalties for non-compliance. Lawyers screen or gate-keep every step clients take in the court process – suppressing ill-considered or frivolous motions or restraining senseless opposition. Lawyers serve as enforcers and compliance officers for the courts – explaining obligations under court orders, dissuading clients from contemptuous conduct and nagging clients until they've done what they must.[7]

Fourth, relax the procedural rules to accommodate the unrepresented in order to get to the substantive issues.[8]

One American author has gone further, arguing that judges, mediators and clerks have a duty to provide legal advice and assistance to the unrepresented within the adversary system, to ensure fairness and justice.[9] In this stimulating article, Russell Engler suggests a broader view of impartiality, that courts need to provide more help to the unrepresented, especially where the other side is represented. Courts must look closely at "voluntary" settlements where one party is unrepresented. Judges in superior courts should adopt the more active trial roles performed by small claims courts and administrative agencies. The pre-trial roles of clerks and court-connected mediators should also be expanded, to provide more assistance and "advice" to unrepresented litigants. As Engler points out, the less advice received at these earlier stages, the more that will be demanded of the judge.

Engler's proposals are seen as controversial, even though he is trying to improve the existing adversary system.[10] In Canada, we have addressed the "problem of self-represented litigants" by a number of measures, all of which leave the superior court procedures more-or-less intact and "lawyerly".[11] We have hived the unrepresented and self-represented off to administrative tribunals or sent them to administrators. We have sent them to alternative dispute resolution. We have adopted simplified rules in particular areas of law, like family law or small claims or smaller civil claims.[12] We simplify some forms. We even experiment with providing education about the process and help with completing forms.

More lawyers for civil cases in our superior courts will not be forthcoming. There is no chance that our market system for allocating lawyers, based upon the wealth of parties, will be changed. Legal aid gives a low priority to civil matters outside of family law. Even if there were more money for legal aid lawyers in civil matters, the real priority should be poverty law – like income assistance, residential tenancies, public housing, mental health, etc. – which takes place outside the superior courts. Given these legal aid priorities, duty counsel will likely never be allocated to civil matters in superior courts.

A Modest Proposal for Changing the Rules for the Unrepresented

So we're back to superior courts and judges facing more unrepresented litigants. One solution would be to retain the long tradition of elitist English superior courts, with limited access for those without money and little concern about the issue. In our populist democratic times, this option is less and less viable. Second would be what these courts are doing now, adjusting for unrepresented litigants on an ad hoc basis, as I've described above, within the conventional role of neutral umpire in an adversary system. Third would be Engler's suggestion, to redefine the roles of judges, mediators and clerks to ensure true impartiality within a reformed adversary system.

In my view, none of these measures go far enough. It's time to admit that the traditional adversary system cannot accommodate more unrepresented litigants. And it's time to address this in a systemic way, by way of practice directions and rule changes. Herewith I offer a modest proposal, one that draws from our experience with family courts, small claims and administrative tribunals.

First, we need to make changes to our superior court rules to adjust for the increased presence of unrepresented litigants. Ad hoc adjustments by judges are not sufficient.

Second, Russell Engler reminds us that there are really three categories of cases: those where both or all parties are represented; those where both or all parties are unrepresented; and those where one or some parties are represented and others unrepresented, the most difficult category. The existing rules are built on the assumption that all parties are represented, so we need new rules for the other two categories. But what should those rules be?

Third, where all parties are unrepresented, we need to change the "front end" of the court process, to provide more

assistance and advice to all parties. These rules and forms should be simplified and more "rule-like" in their drafting, so as to provide concrete guidance to the unrepresented parties. The assistance need not come from judges, but it would require better-trained court staff and lawyers acting as "judicial" or "court" officers.[13] These court officers would supervise the pre-trial process, assisting the parties with filing of forms, disclosure, identification of the issues, preparation of the case for trial, and case management before trial. In effect, this process involves a shift to a more inquisitorial system in the pre-trial phase.[14] Trials and hearings would eventually take place before judges, for those cases that did not settle.

At the initial stage, it may be wise to limit access for this new procedure to only certain kinds of claims, or some maximum monetary amount, not unlike the limits on "simplified proceedings". In fashioning these limits, superior courts might wish to review their existing dockets, to identify those fields of law where the unrepresented are more common. But it should not be forgotten that there is another group of claims to be considered, those "ghost claims" not seen now, because unrepresented claimants don't bring them to superior courts.

Fourth, within this unrepresented procedure, there should be different rules for the conduct of the trial or hearing. We should recognize the need to shift to a more inquisitorial procedure in such cases, with the judge examining witnesses, proving documents, retaining experts, suggesting possible arguments to the parties, etc.

Fifth, where one party is represented and the other is unrepresented, it may be wise to give the unrepresented claimant the choice of procedure: the conventional adversary rules or the unrepresented, more inquisitorial route. We might even let a represented defendant choose this route, but only with leave of the court. And we might give the court discretion to order the parties into, or out of, this unrepresented procedure, in appropriate cases. As Engler says, the represented vs. unrepresented proceeding is the greatest challenge of all for the court process and the judges.

There need to be specific rule changes to address the represented vs. unrepresented proceeding, in both conventional and inquisitorial procedures. In particular, there should be a clear acknowledgement of the court's duty and the judge's duty to provide more help to the unrepresented party to maintain a meaningful impartiality. Effectively, this means an element of "judge-as-counsel" or, perhaps more accurately, a more active, inquisitorial approach in such cases.

There is nothing all that unusual about these proposals. Over the last fifty years, we have recognised increasingly the need for specialised rules for different types of proceedings. The days of generalist judges and trans-substantive rules of civil procedure are gone. Case management and caseflow management have accustomed us to the differential treatment of civil cases, not to mention increased judicial control over the progress of cases. Rationing procedure to match the monetary amount involved is reflected in small claims courts and simplified rules. This modest proposal to accommodate unrepresented litigants is just another incremental step in the necessary reform of our civil procedure.

Endnotes

1 D.A.R. Thompson and L. Reierson, "A Practising Lawyer's Field Guide to the Self-Represented" (2002), 19 Can. F.L.Q. 529 at 530. This whole issue of the Canadian Family Law Quarterly is devoted to self-represented litigants in family law matters, Issue 19.3.

2 Technically, I mean "non-family civil" here, as there is coverage in family law matters in most jurisdictions, although varying wildly from one jurisdiction to another. We have yet to see how the Federal Justice Minister's announcement of more funding for civil legal aid translates in terms of actual services.

3 John Greacen, "No Legal Advice from Court Personnel! What Does That Mean?" (1995), 34 Judges' Journal 10 and a follow-up article John Greacen, "Legal Information vs. Legal Advice – Developments During the Last Five Years" (2001), 84 Judicature 198.

4 For an excellent discussion of the nature of "rules", see Cass R. Sunstein, "Problems with Rules" (1995), 83 Cal. L.Rev. 953. I discussed the merits of rules in the family law context in "Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative" (2000), 18 Can.F.L.Q. 25 at 27-31.

5 I pick child support as an example here, because the legislators chose to adopt "child support guidelines" (which really should be called "child support rules"), in a conscious decision to opt for rules that mandated a particular result in most cases.

6 For a marvellous historical account, one that reads more like a mystery novel, see John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003). A mere 400 years ago, the judge as counsel for the unrepresented accused was a fundamental element of the "trial before the lawyers".

7 D.A.R. Thompson, "No Lawyer: Institutional Coping with the Self-Represented" (2002), 19 Can. F.L.Q. 455 at 478-9.

8 While enforcing the rules strictly for the self-represented, *ibid*. at 474-8.

9 Russell Engler, "And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks" (1999), 67 Fordham L. Rev. 1987.

10 See, for example, Russell G. Pearce, "Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help" (2004), 73 Fordham L. Rev. 969.

11 Above, note 7 at 488-92.

12 Like Ontario's Rule 76, Saskatchewan's Rules 477-489 or Manitoba's Rule 20A.

13 In part, this model draws upon and extends the process employed in Rule 70, the family proceedings rule in the Nova Scotia Civil Procedure Rules.

14 See John H. Langbein, "The German "Advantage in Civil Procedure" (1985), 52 U. Chi. L. Rev. 823.