

Civil Litigation

Better ways of giving self-reps access to justice | Gary Joseph

By Gary Joseph



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(October 27, 2020, 9:21 AM EDT) -- Once again Nicholas Bala, with the assistance of Rachel Birnbaum, has brought informed and evidence-based information to the profession. Rather than antidotal or unsubstantiated "gossip," Bala, professor at the faculty of law, Queen's University and Birnbaum, professor of social work, King's University College at Western, have provided us with empirical data on the continual and expanding presence of self-represented litigants.

I have written many (too many) times about my concerns with the proliferation of self-represented litigants and am gratified that much of the data gathered supports some of my previously expressed views. Bala and Birnbaum surveyed 57 Ontario judges to obtain their views and experiences with self-reps. Who better informed to offer views and observations than our judges who deal with the movement every day in court?

The Bala/Birnbaum conclusions have been the subject of an article published recently in *The Lawyer's Daily* and I will not repeat them in detail, but I would borrow from their work and summarize some their findings as follows:

1. There is concern among judges about those who are forced by financial circumstances to represent themselves in court, but 67 per cent of the judges agreed that "many litigants decide not to have a lawyer because they believe that they know enough about family law to represent themselves.";
2. Men may be more likely to represent themselves so that they can directly confront their former partner;
3. Almost all the judges (95 per cent) believe that self-represented litigants increase the amount of court time required to resolve a case;
4. About 66 per cent of the judges indicate that settlement is less likely if one or both the parties are self-represented;
5. Most of the judges expressed concern with self-represented litigants' lack of knowledge of process and evidence.

Given all of the above it is startling to me that we, as a profession, seem to encourage the presence of self-reps rather than seek ways to address access to justice issues without turning our courts into "Judge Judy" circuses. An old metaphor of mine will now be repeated. Dental care for all is an equally important societal goal yet we do not see the College of Dentists training the public to do their own filings and pull their own teeth. Yet, we train on the Internet self-reps to cross examine. We publish how-to manuals. Our professional leaders and our government must recognize that saving money on legal aid, failing to provide full-time, well-paid duty counsel (with expanded roles) and reducing the costs of operating a law practice can all better address some of the concerns. I even go so far as to advocate for the role of paralegals working under the direct supervision of lawyers.

Finally and most upsetting to me, is our profession's continual silence on the value we bring to the process. The fact that many litigants decide they can do the job themselves even though they can

afford a lawyer is a damning indictment on us as family lawyers. We must not be modest in promoting our skills, our knowledge base and the very real contribution we, as family lawyers, make to the entire process. To remain quiet in the face of the empirical data that Bala and Birnbaum bring to the issue reminds me of Nero fiddling as Rome burned. As a very failed musician/fiddler (guitar and even worse on the violin), I can attest to the likely outcome if we continue to do nothing.

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