

Self-represented Litigants: Guidelines for solicitors

Practice Support

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Acknowledgements

Queensland Law Society (the 'Society') has prepared this information kit to assist legal practitioners in understanding the laws regulating corporations engaging in legal practice in Queensland. The purpose of this document is to provide general guidance – it is not intended to be comprehensive or constitute legal, structuring, financial, tax or duty advice. The Society accepts no responsibility for the accuracy of any of the information or opinions contained in this information kit, or for any loss flowing from its use. You should obtain your own legal and financial advice about the contents of this document, including whether you should incorporate your practice.

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Self-represented Litigants

Introduction

As solicitors your legal and ethical duties to your clients, to the court and even to other solicitors are well documented. Your obligations when acting in a matter where the other party is self-represented are less clear. It is common for people to be self-represented and it is therefore worth considering the difference this may pose in the conduct of your matters.

Better communication between solicitors and people who are self-represented is likely to benefit solicitors, their clients and the courts. It could assist to reduce stress associated with legal disputes, facilitate an amicable, speedy and cost effective solution, reduce matters that have unnecessarily progressed to trial, and improve the quality of hearings when disputes do come before the courts. It could also increase public confidence in the legal profession and improve the way solicitors are perceived through their dealings with people who are self-represented.

Understandably people who are self-represented generally do not know the process, the form and manner of communication, and the various customs and procedures of the courts and legal profession. What is common among them is that they have a personal interest in the outcome of the matter and (often but not always) limited legal knowledge. This causes some to struggle to represent themselves in a way that conforms to the way that solicitors are accustomed to dealing with their own professional colleagues.

A common although mistaken view is that people who are self-represented 'choose' to be self-represented. The majority of people who are self-represented do so because of financial disadvantage, and had they the financial means to engage legal representation they would likely choose to do so. In any event, the reasons for a person to be self-represented should not affect how you approach them nor are personal judgments as to the reasons for self-representation helpful.

Scope

These guidelines aim to provide guidance to solicitors practising in Queensland in circumstances where they must deal directly with a person who is self-represented. The focus is on civil matters undertaken in Queensland. While not designed specifically for family or criminal lawyers they may still provide some practical guidance.

Family lawyers are encouraged to also review **Best practice guidelines for lawyers doing family law work** published by the Commonwealth at pp 29-33 and **Re F: Litigants in Person Guidelines** [2001] Fam CA 348 (4 June 2001).

For prosecutors page 44 of the **Director's Guidelines** published by the Queensland Office of the Director of Public Prosecutions sets out guidance for dealing with an unrepresented accused.

Solicitors' Rules in Queensland

In Queensland the **Australian Solicitors Conduct Rules 2012** ('ASCR') contain the main professional conduct rules applying to a solicitor.

The ASCR contain sections dealing respectively with fundamental duties, relations with clients, advocacy and litigation, relations with other solicitors, relations with other persons, and law practice management.

The same high standards which apply to your conduct towards other practitioners and your duties to the court, should apply equally when dealing with people who are self-represented. In other words, your conduct as a solicitor should in no way be affected by the fact that the other party to a matter is self-represented. However, the way in which you discharge your duty to your client and the court may require you to be more creative and thoughtful in your approach and communication style when dealing with a self-represented person.

You should pay particular attention to Rule 34 of the ASCR 'Dealing with other persons' and the comments of the Chief Justice in **Legal Services Commissioner v Sing** [2007] LPT 004.

For litigation matters, keep in mind:

- Your obligations under the Advocacy and Litigation section of the **ASCR**, in particular the obligations to inform the court of any authority against your own client's case (see Rule 19).
- The provisions of Rule 5 of the *Uniform Civil Procedure Rules 1999* ('UCPR') which provide:
 1. The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
 2. Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.
 3. In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.
 4. The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.

Costs

Bear in mind your costs disclosure obligations to your client, including the obligation to give initially the best estimate you can of their total final costs, or if this is not reasonably practical, a range of estimates and an explanation of the major variables that will affect the calculation of those costs (see s.308 of the **Legal Profession Act 2007** (Qld) ('the LPA')). Dealing with a self-represented party may increase your client's costs and may be just such a "variable". You also have an obligation to warn the client of any changes to your estimate(s) (see s.315 of the LPA), so you may need to consider this obligation when you learn that the opponent is self-represented or if they cease to be represented.

You might also consider explaining to your client the reasons for the expected higher costs in dealing with a self-represented party. Clients unfortunately often take the view that they should not have to pay for you to communicate with the other party (other than letters of demand) but of course you may not be able to progress their matter for them otherwise.

The judiciary

In Queensland, the judiciary is guided by the **Equal Treatment Benchbook (2005)** when dealing with people who are self-represented. Chapter 12 of the Benchbook is dedicated to self-represented parties. The key messages in that chapter are:

- All litigants have a right to appear in person;
- In many instances, exercising that right will inevitably reduce a person's chances of securing justice; and
- A judge's role requires them to maintain their impartiality but at the same time ensure that self-represented people are advised of procedural and evidentiary rules during a proceeding.

Initial communication and setting parameters

Having to communicate directly with the other party as opposed to the other party's solicitor may be challenging. In the same way as you do when you first engage a client it is important to set the parameters of your communication with a person who is self-represented. Importantly:

- Confirm that they are not represented;
- Make it clear that you act for your client and will act in their best interests;
- Make it clear that any communications with you are not confidential and may be communicated to your client and to the court (the exception being settlement negotiations); and
- Suggest that they seek independent legal advice, as soon as possible.

Many members of the community may never have had occasion to speak with a lawyer and are often at a loss as to where to start. When advising them to seek legal advice suggest they contact:

- Queensland Law Society (for details of private solicitors who have relevant expertise and may be willing to act for them, usually on a fee-paying basis); or
- If they cannot afford private legal assistance, Legal Aid, their local community legal centre; or LawRight, if they need assistance with civil litigation in the Supreme Court, District Court, Court of Appeal, Federal Court or QCAT (the contact details of LawRight's Self-Representation Service can be found at the end of this guide).

The following example provides an illustration of the difficulties that could arise without clear and firm communication at the start of a matter.

A bank commences action against a couple who have defaulted on their home loan. On receiving the claim, the couple are very distressed and telephone the bank's solicitor to explain that they are making extra repayments and that they had spoken to the bank and understood everything would be 'okay'. The solicitor tells the couple not to worry as this is all part of the procedure and they should just keep to the arrangement made with the bank. The couple, thinking that the matter is sorted, take no further action, fail to seek independent legal advice, pay the amount owed but not before the bank obtains a default judgment giving it the power to repossess the couple's home.

In this example, by failing to communicate their role, the bank's solicitor breached a number of professional conduct rules and the consequences for themselves, their client and the couple, who were self-represented were significant.

The solicitor should have made it clear that they acted for the bank and that they could not provide the couple with any assistance. Under no circumstances should they have implied that 'everything would be okay' (which was misleading) and the solicitor should have advised the couple to seek urgent legal advice.

Language, tone of communication and providing procedural assistance

The language and tone of communications between solicitors may not be appropriate when communicating with a person who is self-represented. Ordinary communications that a solicitor may send to an opposing solicitor may often, to a lay person, seem intimidating, aggressive or even misleading but be 'par for the course' between practitioners in the course of litigation.

For example, if a self-represented person fails to comply with their disclosure obligations, sending a letter demanding "full disclosure, failing which we will apply to the court and rely on this letter in respect to costs" may not be an appropriate response. Instead, including in your letter reference to the rules in the UCPR, where the rules can be found, an explanation of the consequences of failing to comply and a suggestion that they seek advice with respect to their disclosure obligations may be more beneficial.

The benefits of such an approach include:

- Striking a positive relationship with the self-represented person which may assist your client to settle the matter; and
- Giving your own client a better chance of receiving proper disclosure without having to make an interlocutory application which could result in potentially unrecoverable costs and further delay for your client.

Importantly, providing general information or some procedural guidance should not be confused with providing legal advice which would result in a breach of duty to your client.

Practical tips: *When preparing written correspondence addressed to a self-represented person sit back and read the correspondence and ask yourself "How will this correspondence be received?" "Will it inflame the situation and reduce any chance of a settlement for my client?" "Will it delay proceedings and add to the costs for my client?" "If I were not a lawyer would I understand what was being said in the correspondence?" "Have you complied with Rule 34 of the ASCR (see above)?"*

When dealing with people who are self-represented, aim not just to use plain language but clear, simple and easily understood language.

Consider the following scenario:

A self-represented plaintiff, P, is bringing a professional negligence action against her former solicitor. The solicitor had acted for P in two personal injuries matters. The statement of claim prepared by P only refers to one of these matters; however it is obvious to you, as the solicitor's solicitor, from P's correspondence and statements, that P wishes to make a claim with respect to both personal injuries matters.

In this case, you could ignore the fact that P clearly wishes to include both matters. The risk for your client is that the second matter will be brought up at a later date or that there will be confusion in affidavit material presented by P which delays, prolongs or confuses the matter. Alternatively you could advise P of the following:

"If you wish to pursue our client in relation to this second matter, you will need to amend your Statement of Claim to include that matter. You can only amend your Statement of Claim with the leave of the Court, and we will oppose your application because it is now out of time."

It also assists if you can refer to the relevant rule in the UCPR and insert a link to the rules so that the self-represented litigant can view the rules themselves.

Neither action would breach any rules but the first option could delay the matter and increase your client's costs.

Self-represented parties often have some assistance

Self-represented parties often get occasional advice or assistance from community legal services or other solicitors. This may cause you difficulties in terms of the 'no contact rule' – **Rule 33** of the ASCR provides that a solicitor must not deal with the client or clients of another solicitor unless ... (see the ASCR for exceptions).

The position is clear when the other lawyer is on the court record or has stated that they are instructed or acting, but otherwise you need to take care. Just because the party has had some advice from a lawyer does not mean they are legally represented in terms of these rules.

Generally it is safe to continue to deal directly with the other party until advised that a solicitor is on the record, or is acting, or the other party has given you authority to speak with their lawyer, but in case of doubt, seek confirmation of the position from the other party, or the other lawyer if you know who they are. In some circumstances you might, as a matter of courtesy and prudence, copy the other lawyer in on any direct correspondence – you should seek their views on this, as some lawyers may prefer you do not.

Note that Rule 34 of the ASCR provides for the other lawyer to consent to direct communication with the party, but does not provide for the other party to consent, so beware where a lawyer is acting and the other party contacts you directly. You should not speak to them or reply to their email or written communication, other than to explain that all communication has to be through their lawyer. If they tell you that their lawyer is no longer acting, you should confirm this with the other lawyer before any further communication takes place.

Also see the **Communication with another solicitor's client** on the QLS Ethics Centre website.

People who are self-represented may also have the assistance of a friend, relative or advocacy service. In the same way as communication parameters should be set with a person who is self-represented, so should such parameters be set with the friend, relative or advocate. It is important that you obtain written authority from the self-represented person before dealing with the friend, relative or advocate. Further, remember that the friend, relative or advocate does not have the same obligations to their 'friend' as a solicitor. For example, they do not have obligations of confidentiality or an obligation to not act where they have a conflict of interest. Occasionally, a friend, relative or advocate may themselves have a personal interest in the matter which could be to the detriment of the person who is self-represented.

Practical tips: *If a friend, relative or advocate is assisting a self-represented person, obtain a written authority from the person before communicating directly with the friend, relative or advocate. Avoid where possible communicating with the friend, relative or advocate if the self-represented person is not present or not able to listen to a conversation if it is via the telephone. If you do have to communicate with the friend, relative or advocate without the self-represented party being present, then confirm the conversation in a letter to the self-represented person.*

In the event that the self-represented person seeks the court's leave to have a friend or relative assist them in Court, then they are known as a 'McKenzie Friend' (see *McKenzie v McKenzie* [1970] 3 All ER 1034 at 1036 and **Cooke v Stehbens** (1998) 24 Fam LR 5).

Consider your client's perceptions

Where the other party to a matter is self-represented, this may create additional issues in the solicitor/client relationship of which you should be aware. Your client may form an impression that you are assisting the other party, and they may resent the costs they are being charged by you when the other party is not paying anything. Further difficulties can arise if your client has to be cross-examined by the other party.

Practical tips: *When you become aware that the other party is or has become self-represented, write to your client and explain your role to your client to ensure they understand that any perceived assistance you are giving to the other side is designed to reduce their overall costs and to ensure that the matter proceeds as smoothly as possible.*

It may also help to explain the role of the Judge and what to expect from them during any hearing (refer to **Equal Treatment Benchbook** (2005)).

If your client is cross examined by the other party then in preparing your client, consideration should be given to the emotional undercurrents and 'buttons which can be pushed' by a person who may have intimate knowledge of your client. For further guidance see '**Guidelines for barristers on dealing with self-represented litigants**' published by the NSW Bar Association.

Acting for a government or corporation against a self-represented person

In the same way that acting for an individual against a self-represented person who might be a person with whom your client has had a close relationship raises particular difficulties, so does acting for a government or large corporate client against a 'faceless' self-represented person. A perception of injustice is all the greater where one party has access to significant legal and financial resources and the other has no legal representation and most often very limited financial resources. Care must be taken not to take steps which could result in a significant injustice.

If acting for the Commonwealth Government then the **Legal Services Directions 2017** made under the *Judiciary Act 1903* (Cth) sets out in Appendix B the Commonwealth's obligation to act as a model litigant. The Queensland Government has also adopted similar **Model Litigant Principles**. These obligations may also provide some guidance to lawyers acting for corporate clients particularly if they have corporate responsibility policies and requirements. The obligations include for example:

- Not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;
- Not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by failure to comply with a particular requirement; and
- Apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

Undertakings

The use of undertakings between solicitors is common practice. **Rule 6** of the ASCR sets out the obligations associated with the giving of undertakings by solicitors to other lawyers. The ability to rely on a solicitor's undertaking can ease or alleviate many steps in a matter. Undertakings enable solicitors to exchange documents and carry out any number of tasks that if it were not for the undertaking may require additional procedures. The common undertaking given by solicitors in conveyancing matters in relation to transfer documents is just one example. In litigation, circumstances may arise which are assisted by the giving of an undertaking.

Where the other party is self-represented then you may need to take additional steps or procedures to protect the position of your client. Care is needed as sometimes to the lay person these additional steps or procedures may give the impression that you are deliberately 'making things difficult' or 'trying to hide something'. Communicate the reasons for the steps you are taking to alleviate some of the potential distrust.

Lawyers can also be reluctant to accept 'undertakings' from a self-represented party because they cannot necessarily rely on them in the same way that they can rely on the undertaking of a professional colleague who is subject to strict professional rules.

Capacity issues

Where you suspect that the capacity of a self-represented person may be impaired, difficult issues arise. Not only because communicating with a person who is self-represented presents additional challenges but also because the law around, and the practical consequences of, communication with a person with impaired capacity may be detrimental to your client.

If a party to litigation may have impaired capacity and if the issue of capacity is raised and found to exist by the Court or QCAT, the UCPR requires that the matter can only proceed if a litigation guardian is appointed. If you are acting for a plaintiff in a matter and there is a finding that the defendant has impaired capacity, then unless a litigation guardian is appointed your client will not be able to continue the proceedings. If your client is defending a matter where the plaintiff has impaired capacity, then the matter may sit unresolved, indefinitely, until a litigation guardian can be appointed. Where you suspect that the self-represented person may have impaired capacity the question arises as to whether you or your client has an obligation to make the court aware of your suspicions. Further, there is a risk that the validity of any settlement agreement could subsequently be challenged on the grounds of impaired capacity.

Reference: If capacity may be an issue, read the **Queensland Handbook for Practitioners on Legal Capacity**, prepared by Allens > < Linklaters and *Queensland Advocacy Incorporated*, Queensland Law Society and **Incapable of Justice: Capacity and Self-Represented Civil Litigants**, prepared by LawRight.

Settlement negotiations

The fact that the opponent is self-represented should not, in itself, be sufficient reason to assume that there is no possibility of settlement. You have a duty to your client at least to consider the available forms of alternative dispute resolution. **Rule 7.2** of the ASCR provides that a solicitor must where appropriate inform clients of alternatives available to a fully contested adjudication of the case.

A person who is self-represented may not understand the alternatives or processes associated with alternative dispute resolution mechanisms. The LawRight Self Representation Service's experience is that self-represented people are generally not given any offer for conciliation or mediation before court proceedings commence, but would participate if they are given the opportunity.

Settlement negotiations can be hindered when one party is self-represented due to assumptions that a person who is self-represented may not consider settling a matter or due to misunderstanding by the person who is self-represented of the settlement process. You should explain what you are doing when making offers to settle, as lay people often misunderstand the litigious process as conducted by lawyers. For example, there have been instances where a self-represented person has interpreted an offer of settlement as an admission of liability, reinforcing their sense of likely success and resulting in a refusal to settle.

Practical tips: *Just because a party is self-represented does not mean that offers to settle or alternative methods of settling a dispute should not be explored. Clearly explain the offer being made by your client and the reasons why your client may want to settle (eg reduced legal costs). Be careful of making offers which may be considered offensive as, again, a lay person may not understand the process is usually to start low and work up. If the offer is too low it may inflame the situation and reduce chances of a settlement. On correspondence marked 'without prejudice' it may be worth providing information as to what that means. Give self-represented people time to consider offers and an opportunity to obtain advice about the offer.*

LawRight's Self Representation Service may be able to offer a free mediation service when a self-represented party is unable to contribute to the cost of mediation.

Dealing with difficult behaviours

People who are self-represented have a very personal interest in the outcome of the matter and may therefore frequently get anxious or act in an emotional manner. Lack of familiarity with legal process will only act to increase their confusion or frustration. Solicitors should recognise that while anxiety or heightened emotions might lead to tension or a challenging situation, either a reactive emotional or a less than respectful response on the part of the solicitor are only likely to heighten tensions and slow the path to constructive progress.

In dealing with any difficult situations, solicitors might benefit from the following tips:

- Prevention is better than cure: try to avoid or mitigate the risk of difficult situations by offering appropriate respect, support and information throughout. This will help to limit confusion and anxiety and thus reduce the risk of challenging behaviour or difficult situations.
- Seek first to understand: it will be much easier to resolve tensions if you understand them. Are there any causes of anxiety, confusion or misunderstanding that you are able to resolve?
- Demonstrate understanding through active listening: show – through active listening, body language, voice, paraphrasing, confirmations and relevant questioning – that you understand what self-represented litigants might be saying. This will help to limit any frustrations they have with you personally or the nature of any communications.
- Maintain strong boundaries: be clear that you are not giving advice, even where they push you to do extra things or provide them with answers. You should however, try to be positive where possible – don't just tell them where you can't help them, tell them where you can or where they might be able to receive assistance.

If solicitors find they face such challenging or difficult situations on a regular or semi-regular basis, they should consider specific training in dealing with conflict, active listening or emotional intelligence.

Resources

a. Statutory resources

Legal Profession Act 2007 (Qld)
Australian Solicitors Conduct Rules 2012
Uniform Civil Procedure Rules 1999 (Qld)
Legal Services Directive 2017 made under the *Judiciary Act 1903* (Cth)

b. Case resources

McKenzie v McKenzie [1970] 3 All ER 1034 at 1036 *Cooke v Stehbens* (1998) 24 Fam LR 5 *Re F: Litigants in Person Guidelines* [2001] FamCA 348 (4 June 2001)

c. Other resources

Best practice guidelines for lawyers doing family law work Family Law Council, October 2011
Guidelines for barristers on dealing with self-represented litigants The New South Wales Bar Association, October 2001
Guidelines for solicitors dealing with self-represented parties The Law Society of New South Wales, April 2006
Queensland Handbook for Practitioners on Legal Capacity Allens, Queensland Advocacy Incorporated
Incapable of Justice: Capacity and Self-Represented Civil Litigants LawRight, November 2009
Supreme Court of Queensland Equal Treatment Benchbook (2005), chapter 12
Queensland ODPP Director's Guidelines, page 44
Queensland Government Model Litigant Principles

If you have a client you can no longer assist because they cannot afford legal services or if you feel an unrepresented party would benefit from ongoing discrete task assistance, LawRight operates the Self Representation Service in the District and Supreme Courts (including Court of Appeal), Federal Courts and QCAT at Brisbane, which may be able to assist them. Discrete assistance for self-represented parties outside Brisbane can also be given by email or telephone.

Contact

You may obtain further guidance on the Solicitors' Rules and solicitors' ethics from QLS Ethics Centre, via 07 3842 5843 or ethics@qls.com.au.

Self Representation Service – Federal Courts office

E: fedadmin@lawright.org.au
Ph: (07) 3248 1278

Self Representation Service - Queensland Supreme and District Courts office

E: courtsadmin@lawright.org.au
Ph: (07) 3247 9222

Self Representation Service - QCAT office

E: qcatadmin@lawright.org.au
Ph: (07) 3006 2324.



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