LITIGANTS IN PERSON

Presented by Tony Allen, Barrister
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There are a number of learned papers on the subject. See, for example Lindsay Ellison SC '*Litigants in Person – the Good the Bad and the Ugly*' paper for Bar CPD May 2014.

Barristers are bound by the Bar Rules and guidance is given by the Association's 'Guidelines for Barristers on Dealing with self-represented Litigants.'

My experience is in Family Law and Child Care Protection. Over the past few years I've had very many litigants in person in my area both at hearing and on appeal or application before the Court of Appeal.

Your duties to the Court and to your client are stated in either the Solicitors Rules or the Bar Rules. A Barrister's primary duty is to the client but subject to forensic judgement and the paramount duty to the administration of justice. A barrister is not a mere mouthpiece for the client.

1. Character of the Litigant in Person.

- No one will spend more time on a case than some LIP. May LIPs know their documents upside down and inside out. They are obsessed with their documents and their cause. Whether they understand those documents or their relevance or legal effect is another issue. Some simply cannot understand the legal issues and any attempt to explain those issues will be fruitless for both you and the bench.

  • Obsessiveness.

  • Documents.

- Some will simply refer without particularity to 'documents showing' or 'something being admitted.' I'm firm with this. I insist on the litigant taking the Court to the document or part of the transcript. May litigants, despite having a daily transcript and other assistance, simply refuse or are incapable of finding the evidence or, when found, it says simply something quite to the contrary or is unhelpful.

  • Narrative of documents.
  • Alteration of documents.
  • Subpoenae.

- You may have come into the case because someone else more familiar was jammed. Some are aware you're fresh and will mislead with skill. One solicitor should retain the file and one counsel should, ideally, be briefed or if you cannot brief that counsel, the solicitor holding the file must appear with Counsel.

  • Continuity of carriage.

- Some LIP are not eligible for legal aid or do not pass the merits test, others believe they know their case base, are untrustworthy of lawyers, have an axe to grind against the Courts of lawyers, are obsessive or irrational.

• Vexatious

- Some LIP will become vexatious litigants. Sadly, some, once exhausted and declared vexatious, will be found on the steps outside a Court exchanging pleasantries with lawyers who have replaced their friends and their meaning. I won't talk about vexatious litigants. There was an interesting talk on the Law Report some weeks ago I listened to while driving to chambers about the profile of vexatious litigants.

• Character of LIP

You must assess the character and capacity of the LIP and his or her capacity to conduct the case. Part of that assessment is the nature of the case and the stage of proceedings. Factors include:

- The intelligence of the person.
- Any legal training of the person;
- The 'google search' or internet search litigant. Usually the quotes have nothing to do with the ratio of the case or persuasive obiter dicta. You will be forced to read cases you have not read for years to answer submissions or matters raised in affidavits.
- Those that do not qualify for legal aid because of means but still cannot afford legal costs. The LIP in this position may have a good case or cause of action. Within the irrelevancies or objectional material may be a good defence or case. Some judicial officers will isolate that case and the relevant material and give such help as they can at law. You may apply for recusal but the damage is done even if the recusal is granted.
- In parenting or child care matters, the ICL or ILR or Direct representative will argue the case the LIP cannot argue or put appropriate material before the Court. So read the documents carefully. Not dismissively because you are annoyed or they superficially attract no serious consideration. You may be wrong and your duty is to your client.

• Independent ICL etc.

- The 'barking mad.'

2. Lurkers.

Be aware of the physical proximity of the LIP. If you are in a public space, do not discuss the case. You may look up to find them within hearing distance or discover him or her just around the corner. Be careful about your reports by mobile phone once you have left the building. You do not want your advices to be known, do not want to become a witness in the case, your duty is to your client to remain in the case and you do not want a complaint to the OLSC form the LIP or your client, or both. Your duty of confidentiality is clear in the Bar Rules and Solicitors' Rules.

- Lurkers
- Confidentiality

3. Character of your client and impact of LIP.

- The relationship of the LIP and your client. This is especially important in Family Law. Inflammatory material may have been filed. The LIP may know how to annoy your client or intimidate them. Advice to not be annoyed or look away from the LIP may not succeed. The conduct may be so offensive or intimidatory that the LIP must be removed to another room for the case to continue.

- Family Law and effect of LIP.

- The LIP is not immune from objections to their cross-examination. Some objections should be made once and then left alone. A judge is quite able to recognize irrelevant material, hearsay etc. Keep your objections to what really matters and they rely upon weight in those forums where the rules of evidence do not apply. Ellison notes there is little utility in objecting to relevance since cases are not won or lost on irrelevant evidence.

- Cross-exam.
- Rules of evidence

- You must tell your client that the Bench must ensure a fair trial and according to precedents such as *Re F*, can legitimately offer help to the LIP. Do not allow your client to have the impression of partiality.

- Preparing the client.

- Some intelligent LIP will be able to cross examine effectively. Usually the cross-examination will become a conversation with the witness, a roll up of questions that need to be separated, questions about documents that have not been identified or a ramble of their grievances, arguments or submissions or simply short and ineffectual. I have often found a judge will reformulate the question while others will simply reject the question without my having to object. I usually keep my objections pointed.

- Cross-exam. By LIP.

- You must prepare your client for cross-examination by a LIP.

- Some judges will reverse the order of cross-examination in an attempt to show the LIP how it is done and to get to the relevant issues sooner rather than later. You are entitled to object, but I usually do not.

- You must assess the risk of violence from some. There are procedures in the Courts for security that may need to be followed. I have had two. My worst was when I appeared for FACS instructed by the Crown. The Father's eldest children attend upon the office of the client during proceedings causing a lockdown and $60,000 in damage. I demanded the production of a mobile during one of many appearances, gave the produced phone to my solicitor who had it forcibly removed from her by the LIPs eldest two sons in the Court waiting area. The Father's attitude to the mother was poisonous and his glares at her devastating during the case. He ripped his hair out and demanded a hair analysis for drugs. He jumped on the Bar table, would frequently leave the box and interrupt proceedings with histrionics and several boxes of tissues. Sexual abuse was an issue and he fondled and kissed his eldest adult daughter during proceedings. He was well known to police. I'd have called him up for contempt and slotted him, but the judge was wiser. We persevered, he was removed to a separate court, security was provided and the matter proceeded.

• Risks of violence.

- LIPs often repeatedly say they are self-represented even if they have legal training as if they are entitled to privilege such as not complying with the rules or the laws or having the judge run the case for them. In Ellison's paper at page 5 he cites an article *du Boulay v Worrell & Ors* [2009] QCA at paragraph 69 to the effect that it may be a self-represented litigant should be afforded a degree of indulgence and given appropriate assistance but is bound by the rules of the court as any other litigant, the rules are to facilitate procedural fairness and act impartially for all parties and the represented parties are entitled to protection from oppressive and vexatious conduct regardless of whether that conduct arises from ignorance, mistake or malice.

• LIP are bound by the law and rules.

• Procedural fairness.

4. Impact on the Bench and progress of the case.

- Be aware of the forum. In Care matters, the proceedings are to be conducted without undue formality or technicality and the judicial officer may ask questions. In Care, the rule of evidence do not apply unless directed to apply. In parenting matters, many of the rules of evidence do not apply unless directed to apply. This results in prolix and repetitive affidavits full of material or little or no weight which will only elongate proceedings and the costs of your client. In some jurisdictions each party bears their own costs in other than exceptional circumstances.

• Forum and rules of evidence.

- Some LIP will make repeated interlocutory applications. In care matters, the supervisory jurisdiction and the parens patriae jurisdiction of the Supreme Court may be sought during a proceeding.

• Repeated frivolous applications.

- Non-compliance with orders preparing a case for hearing is common. Guidelines at 28 to 30. The problem of an impecunious LIP and the futility of a costs order.

- Prepare your case meticulously for your client and do not become complacent because you have a LIP. If you are going to rely upon written submissions and precedent, given them a copy of the case and to the LIP beforehand with sufficient time for them to be read and an adjournment avoided. You don't have to but, more likely than not, the Court will indulge a LIP.

• Case preparation and openness.

- LIP often do not understand or claim not to remember certain interlocutory orders. They often do not note them. Ensure you tell them what orders have been made and send a copy of any timetable. Ensure notification of what you are seeking in plain English.

• Copies of orders.

- Strike out applications are rarely helpful with LIPs. The Guidelines address this at paragraph 40 and following. The Court will attempt to explain that there is no evidence to support a claim or it is misconceived and attempt to allow it to be fixed.

• Strike out applications.

5. Hubris and self-control.

- You and your colleagues may regard the LIP as a 'barking mad' or inept or foolish and the subject of some humour. Once again, be aware of lurking or the risk of being overheard. Do not allow this to underestimate the LIP. If you appear for the Crown in a Care Matters or for a child in a parenting or care matter, avoid levity or familiarity with your colleagues since it gives the impression of collusion or unfairness.

- More importantly, do not allow a dismissive attitude to be reflected in your submissions, objections or dealing with the Bench. If the LIP is truly irrational or unable properly to understand their case or thinks documents say what they do not or think what you say means something it does not or impugns your character, you must not allow this to affect your professionalism and must maintain your control. Make your submissions on the evidence and law. Your personal offence is neither here nor there.

• Don't be dismissive.

- Your patience and interpersonal skills will be tested by some LIP. You must understand their stress, frustration, desperation and heightened emotions. Politeness and professionalism is the key.

• Empathy.

- Do not use Latin or jargon a LIP is unlikely to understand. It appears 'clubby' and is impolite. For example, in a matter where there is not right or appeal but there is no right of appeal but there remains relief in the nature of certiorari I told the President that the application appeared to be under section 69 of the Supreme Court Act in the nature of certiorari and for the 'benefit of the LIP that means . . . '

• Use plain English.

I have had two narcissists as LIPs (and I mean that in DSM terms). Most recently the LIP was in the Care jurisdiction. She was a former solicitor, though you'd never know. She was always late for court over the 20 days. I became involved for the final nine days and objected to her giving any narrative of any document and sought a direction. She would (1) deny receiving documents even when served multiple times; (2) used the Associate and the Crown Solicitor as a photocopying service, and used the Crown Solicitor to serve documents saying something had gone wrong with her computer or some other lame excuse; (3) minor daughter could hear the proceedings; (4) despite multiple opportunities over a 12 month period and because I'd objected to a narrative of documents, she would daily say she did not yet have an opportunity to inspect documents. Repeated arrangements were made for the Associate to attend early and she failed to attend. Arrangements were made for her to inspect documents over lunch, she would insist on taking part of the period for lunch requiring a solicitor to mind the documents for that period only to not attend to inspect and the arrive 15 or more minutes late after the lunch break depriving the solicitor of any lunch. You must have to exercise extraordinary self-control and so does the Bench.

• Narcissists.

6. The flood.

You may get voluminous or incomprehensible correspondence. It is often observed that there is underlining, italics, capitals and bold.

• Correspondence.

- You must at least skim repetitious correspondence. I recommend a procedure adopted by one of my solicitors who worked for the Ombudsman. Simply tell the LIP you have read the letter or document, it raises no new issue or no issue to which you propose to respond and in future correspondence you will not reply to repetitive or irrelevant material but will place it on your file. However, you cannot be released from the burden of skimming it. Your duty is to your client and you cannot imperil that by your annoyance.

7. Family Law Guidelines.

Lexis Nexis appropriately summarises this case and the law. In *Re F: Litigants in Person guidelines* (2001) Fam LR 517; FLC 93-072, the Full Court of the Family Court of Australia set out nine guidelines relating to cases involving litigants in person, modifying the guidelines previously set out in the *In the Marriage of Johnson* (1977) 22 Fam LR 141: FLC 92-764. The *Re F* guidelines are as follows:

1. A judge should ensure as far as possible that procedural fairness is afforded to all parties whether represented or appearing in order to ensure a fair trial.

• Procedural fairness.

2. A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling of witnesses and the right which he or she has to cross-examine the witnesses.

• Manner of procedure.

3. A judge should explain to the litigant in person any procedures relevant to the litigation.

4. A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation.

• Basic information.

5. If a change in the normal procedure is requested by the other parties, such as the calling of witnesses out of turn, the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the imposition of witnesses and his or her right to object to that course.

6. A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise.

• General advice.

7. If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights.

• Privilege.

8. A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated: *Neil v Nott* (1994) 121 ALR at 150.

• Clarify submissions.

9. Where the interests of justice and the circumstances of the case require it, a judge may:

a. Draw attention to the law applied by the court in determining issues before it;

b. Question witnesses;

c. Identify applications or submissions which ought to be put to the court;

d. Suggest procedural steps that may be taken by a party;

e. Clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

The above list was not regarded as exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias.

A breach of these guidelines may result in procedural unfairness, which may in turn require a re-trial: See *S v R and the Children's Representative* (1999) 24 Fam LR 213; FLC92-834. See also *In the Marriage of Sadjak* (1992) 16 Fam LR 280; (1993) FLC 92-348 per Nicholson CJ, Nygh and Purdy JJ where the particular needs of litigants whose first language is not English are discussed. See also *In the Marriage of Su and Chang* (1999) 25 Fam LR 558; FLC 92-859 (FC).

• Avoid re-trial and Appeal.

Notwithstanding the guidelines, the Full Court of the Family Court has since held that is it not incumbent on the judge to inform the litigant of the consequences of failure to cross-examine or to make tactical decisions on behalf of the litigant in person as to which witnesses it might be useful to cross-examine or as to the manner in which they should be cross-examined. Nor should the judge offer legal advice to an unrepresented party because it may be unfair or have an appearance of unfairness to the other represented parties. It is considered, however:

The judge had a duty to ensure the proceedings do not become protracted especially where a party is unrepresented. Some useful guidance is provided by the Full Court in *C and C* (1998) 23 Fam LR 491; FLC 92-824. The following points are especially important:

(a) A party's right to challenge evidence by cross-examination has to operate within the broad parameters of s97(3), as determined by the court;

(b) In general, the imposition of time limits on a party in the presentation of their case would amount to a breach of natural justice, but the requirements of natural justice may be waived where a party agrees to time limits being imposed, or fails to objects to their imposition;

• Time limits.

(c) A trial judge should be cautious of rejecting apparently outrageous propositions out of hand, because if an appeal court finds some merit in the proposition but no findings in relation to it, then a re-trial may be necessary.

• Outrageous propositions.

8. Following the Guidelines.

You must observe those guidelines and they may override your duty to your client. You must be aware of the tightrope they stretch for the Judge to walk and be vigilant to prevent the Judge erring in his or her assistance to the LIP becoming that of an advocate or advisor. Recusal applications are the most difficult for a barrister (I prefer 'disqualification' but it now appears I must refer to 'recusal') but you must first try to prevent them and then make the application if necessary.

Whether the Judge is giving too much help or is being dismissive of the LIP your client will not thank you for a trip to the Court of Appeal and the delay.

9. Try to settle and discuss issues.

Always have your solicitor present. If you are a solicitor acting alone, always have a paralegal or a note taker present. Reduce any oral offer to writing immediately, date and time it. Do not comment on what you think the Bench will do or the likely outcome as it will result in embarrassment or a complaint.

• Dealing with LIP: corroboration.

10. Help to the LIP.

When I'm for a child or the Crown in a Care Matter my duty is to be a 'Model Litigant.' I will help a LIP find a lost document or part of a transcript. My experience is that I'll be asked to find it anyway and it shows I know my case. I'd not do that as an adversary.

In an Appeal or application for prerogative relief I have had the awful experience of the documents files being prolix and the Registrar of the Court of Appeal arranging the preparation of the appeal books only to make a mess of them: the pages did not match and the Appeal Books served were not identical. The Court of Appeal wanted to make it my problem because I was appearing for the Crown, despite repeated offers to prepare the Appeal Books. Therefore, I would recommend that you try to settle the Appeal Books with the LIP, don't argue about what they want included, just do it and file them otherwise you'll have a mess even if you're not for the Crown. Similarly, I would provide copies of documents even if I know they've had them before since I don't want the argument at hearing and consequent delays.

Further, I would always take a couple of clean spares of all documents to hearing since:

(a) With a LIP I prefer to take them to an unmarked copy of the document or their evidence or other evidence to put something to them in the box; and

(b) The LIP will often deny ever being served with or having read the document. I would do this even if I was an adversarial counsel.

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