

A Delicate Balance: Strategies for Dealing with Self-Represented Litigants

Prepared for: Legal Education Society of Alberta

Foreclosures Fundamentals

Presented by:

Kyle Kawanami
Emery Jamieson LLP
Edmonton, Alberta

For presentation in:

Edmonton, Alberta – May 18, 2017
Calgary, Alberta – May 23, 2017

A DELICATE BALANCE: STRATEGIES FOR DEALING WITH SELF-REPRESENTED LITIGANTS

INTRODUCTION

Representing a client when the opposing party is self-represented brings with it unique challenges. Numerous papers explore issues faced by lawyers and judges when dealing with a self-educated population. This paper seeks to address: how to effectively engage with self-represented litigants as the file progresses, privacy issues, considerations when advising self-represented litigants in the foreclosure process, some common concerns and responses of self-represented litigants, and some cases that can be of assistance when it appears that a self-represented litigant may be taking advantage of their self-represented status.

CONSIDERATIONS IN DEALING WITH SELF-REPRESENTED LITIGANTS

Litigants are Self-Represented for a Variety of Reasons

People represent themselves in Court for a variety of reasons. While some do not believe that they need the assistance of a lawyer, many are not able to afford legal representation. Many self-represented litigants involved in foreclosure actions fall into this category. This is not surprising, as if these litigants are not able to pay your client, they often do not have the means to retain legal counsel.

Many self-represented litigants may not be familiar with the Court process. Some features of the Court process which lawyers take for granted, such as the necessity of having evidence in affidavit form or the timelines involved in proper service, a self-represented litigant may not be aware of. The Courts often look to plaintiff's counsel to educate such litigants.

Get it in Writing, Get it on the Record

Written communication takes on added importance when dealing with self-represented litigants. It can help avoid confusion or differing memories of what may have transpired. It can also be helpful in cases where the self-represented litigant is obtaining assistance from others.

The written communication can also make clear after the fact, in the event of a dispute, as to what was and was not said to the self-represented litigant.

It follows that it is important to maintain a courteous and professional tone in the written communications that you have with a self-represented litigant. Professional courtesies and mutual understandings may be absent, and the e-mail that you fired off in a fit of pique may well wind up

appended to an affidavit or passed up to the presiding Master or Justice the next time you are in Court (or for that matter submitted directly to the Master or Justice without notice to you).

Start from the Beginning

At the start of a foreclosure file, unless you are dealing with a corporate defendant, every defendant starts out as self-represented. Your initial contact, whether it be a demand letter or service letter, should set out the ground rules. Specifically:

1. While they are entitled, and encouraged, to seek legal advice, it will not be from you. Make it clear that you are not their lawyer, and that you cannot and will not offer them legal advice;
2. Who they should contact in your office to discuss their matter – whether your assistant, your paralegal or yourself, let them know who they should be in touch with to discuss their matter;
3. Provide them with your file number, and emphasize that it should be referenced in communications with your office – if you are acting for a lender client and have a number of files with a number of defendants with similar names, this can be important in ensuring that your office is able to quickly access the information needed to respond;
4. Confirm that it is your office that they are to contact to deal with this matter, and not your client directly;
5. If an arrears or payout quote is provided, be sure to emphasize when it expires and the conditions of the quote (for instance, that no further legal work is required beyond providing a registrable discharge);
6. If their mortgage has matured, confirm that to them;
7. Confirm for them how payments are to be made – bank draft, certified cheque, other method – and that payments are to go to your office, and not to the financial institution, as often your client will have placed a solicitor's lock on their account;
8. Solicit how they would prefer to receive correspondence or notice of future Court Applications - such as by e-mail, regular mail or other method that would result in a savings for both them and your client – and confirm what is necessary to ensure service using that method – any authorization forms required by your client, or a written confirmation that could be appended to an Affidavit in support of a Substitutional Service Order.

While some files may resolve themselves at the demand letter stage, laying the ground work early can help avoid confusion later on in the file for those that do not.