Move afoot to change approach to self-represented litigants

BY JUDY VAN RHIJN
For Law Times

To date, the burden of guiding litigants through the legal system has fallen on judges, opposing counsel, and *pro bono* services, but a move is now afoot to address the problem in a more significant way.

The Canadian Bar Association recently presented a report on the issue that it describes as "an invitation to envision and act." While the report notes there's no comprehensive Canadian data on the number of unrepresented litigants, estimates vary widely at 10 to 80 per cent, depending on the court and the subject matter, with family law cases falling at the higher end.

Patricia Hebert, chairwoman of the CBA's national legal aid liaison committee and a member of the access to justice committee, is one of the authors of the report. "The courts have made a lot of changes in recent years, but it doesn't matter how many changes you make to help the SRLs who are already in the door. We need to ask: How do they become self-represented litigants? How do we prevent them coming to the courthouse if they don't need to?"

Fellow committee member Sheila Cameron of New Brunswick says one of two things has to happen. "Either we give meaningful legal assistance to the people who need it and stay with the current system or we change the system so it is more accessible."

Until recently, there had been a complete dearth of studies into the issue. Kumail Karimjee of Karimjee Greene LLP set out to write a paper on the topic some years ago and was shocked to find that, despite all of the talk about self-represented parties, the Ontario Superior Court of Justice didn't keep any statistics on them. "Judges and lawyers are required to make decisions based on evidence, and we expect the same of politicians. However, on the access to justice issue, there is often a tendency to focus on traditional answers such as the need for more lawyers taking on *pro bono* files. Improving access to justice is a complicated challenge, and the starting point must be gathering the empirical evidence needed to guide reform."

Karimjee believes the information for court use documents submitted when a civil action starts would make it very easy to track the number of cases affected, the areas of law involved, and whether the self-represented litigant is a plaintiff or a defendant. Further, motion requisition forms and mediator and pretrial reports could assist the court to create data based on the stage of proceedings.

The CBA report articulates the concern about the lack of an evidentiary base for action but it does reference two recent reports that informed its recommendations. A 2013 study by Rachel Birnbaum, Nick Bala, and Lorne Bertrand found that surveys of 54 judges, 400 lawyers, and 275 family litigants clearly revealed a significant increase in the amount of self-representation in family matters over the past five years. It raises concerns about two-tier justice with those who are wealthier tending to resolve disputes with lawyers outside the court system and those with more limited means using an increasingly stressed family court system without representation.

Hebert notes that according to the experiences related, people don't always represent themselves for a good reason. "It's not because they made the choice that it would be best for them or there are enough resources to help them cope." At the same time, the outcomes are generally worse. "If they are not successful, then they are unsuccessful in an even bigger way," says Hebert. "They can't save the parts that could have been saved."

Another report by Julie Macfarlane this year is a qualitative study designed to develop data on the experience of self-represented litigants in Alberta, British Columbia, and Ontario. Macfarlane found that even when self-represented litigants had started off confidently, by the end of their proceedings their view of the legal system was overwhelmingly negative.

Cameron says the McFarlane research shows that no matter what people do to help self-represented litigants, it doesn't work. "If they go into court by themselves, we're not helping. They think they are equipped but they're really not. Lawyers are trying and courts and governments are trying, but we are not seeing a difference in results. They might have better-looking documents, but the results are not better. If all the focus stays on free workshops, brochures, and self-help guides, then our money and efforts are in the wrong place."

The summary CBA report provides a concrete action plan for addressing the issue. "We're not just sending it out in the world," says Hebert.

"We're identifying the key players who would be required to make the changes. We hope that institutions and individuals will pick up the torch." **LT**

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