

## On-demand court counsel for the self-represented? A revolutionary change for family law

**STACY M. MACCORMAC**  
For Law Times

**W**hen do self-representing litigants need a lawyer most?

If you've watched needlessly messy and lengthy courtroom proceedings, like I have, the answer is when the litigant is standing in front of a judge.

Currently, the Ministry of the Attorney General says more than 57 per cent of family law litigants are self-representing. In my experience, in some jurisdictions, it is closer to 70 per cent.

Who are these self-representing litigants? I believe many of them are middle class and have household incomes of about \$40,000 to \$90,000 per year. In Ontario, those with no incomes or low incomes have the assis-

tance of duty counsel available to them and wealthy litigants can afford private counsel.

That means the ones going solo are middle-class litigants.

This is extremely troubling. The middle class is society's social and financial backbone. When breakdown of these family units occurs, an effective resolution is critical.

To compound matters, self-representing parties cost the justice system unknown millions of tax dollars. This is due to delays caused by the volume of cases and the lack of legal knowledge parties have in navigating the proceedings. There is an emergency situation when it comes to inhibited access to justice and skyrocketing government costs.

The recently announced joint family law justice review by the Ministry of the Attorney Gener-

al and the Law Society of Upper Canada is mandated to determine if non-lawyer involvement is the solution to this emergency situation. With respect, in my opinion, it is not.

Family litigation is intensely emotional and deceptively complex. The issues involve child custody, incomes, real estate, businesses, pensions, estates, mental illness, domestic violence, child abuse, drug and alcohol addiction, and impending bankruptcy. There are often long-term negative consequences to hastily made, uninformed short-term agreements or orders. Lawyers are very cognizant of all of this. As a result, they can provide quick and invaluable assistance to a self-represented litigant and the court.

Trying to solve the problem of in-court legal representation for litigants by suggesting that non-lawyers potentially represent them is akin to suggesting that a non-doctor perform surgery. Lawyers know each step in a family litigation case must be carefully considered to avoid prejudice at the next step or at trial. The courtroom is the litigation lawyer's operating theatre. There are no substitutions that can truly protect the public.

The family law review proposes that a middle-income-earning litigant may be represented at a court hearing by a law student, law clerk, or paralegal. In this same situation, a low- or no-income litigant will be represented by a family lawyer, through duty counsel. This is neither fair nor balanced. Plus, research indicates that most family litigants would prefer to be represented by a lawyer in court if they could afford it. This was reflected in a recent study conducted by Dr. Julie MacIaciane called "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants."

MacIaciane found that even though self-representing litigants reported extreme stress over

completing, serving, and filing court documents, the most intimidating aspect they reported always came down to their actual court appearance.

So what is a possible solution? I believe the time has come to allow experienced family lawyers to be on-site at courthouses and available on demand.

A middle-class litigant may not have \$10,000 or \$20,000 (or more) for a traditional legal retainer arrangement, but he or she may be able to pay an hourly rate for a private lawyer to provide them with representation at a court appearance.

The model proposed is not based on lawyers providing free services. They do not need to be, nor should they be, free. Family litigation lawyers are experts in this field. Limited scope retainers and unbundled services are the answer the public needs. With a limited scope retainer, a litigant can pay for a lawyer's advocacy services on a short-term basis.

The concept of on-demand day-of-court counsel may raise fears that potential paying clients would opt to use day-of-court services each time they go to court, rather than hiring a lawyer on a traditional retainer basis. However, there is no need to fear. If the day-of-court private retainer lawyers are not permitted to be retained past that day, there is no fear lawyers will be searching for new files through the program.

Further, there will not necessarily be one lawyer per litigant available under the day-of-court program. So, litigants would not be able to rely on the system as their sole source of legal representation. Finally, day-of-court lawyers will likely advise litigants to get more legal advice and some litigants may then go and hire counsel.

This model will have the result of more lawyers doing more work, not less.

As with any new concept, the devil is in the details.

Carefully drafted limited-scope retainer agreements reflecting the type of court attendance can be prepared by lawyers in advance to address the narrow scope of the representation, thereby setting appropriate client expectations and protecting against malpractice claims and complaints. Printers and laptops are portable so documents including an invoice can be produced immediately or e-mailed. Identification can be verified.

Credit and debit card transactions can now be processed on a mobile device, so payment can be completed in real time.

Some legal accounting software is now mobile. Trust accounts will not be needed. Local experienced lawyers can join a day-of-court panel managed by a potential software application. A minimum required time of four years at the bar practicing specifically family law litigation will provide a minimum level of court experience to the litigant. At the same time, this will minimize the movement of duty counsel panel lawyers to the day-of-court private retainer panel, ensuring a continuance of legal representation for the low- to no-income litigants.

Conflict checking for lawyers providing short-term and duty counsel services is not as stringent. However, day-of-court lawyers could do so through mobile access to their firm client database. These are issues that can and will be worked out. On-demand day-of-court counsel is a revolutionary idea that provides true access to justice for the self-representing litigant at court while simultaneously creating large cost savings for government. This is a win-win situation. **LT**

► *Stacy M. MacCormac is the past president of the Northumberland County Law Association and has been a family law practitioner in Cobourg since 2004.*

### Check out [lawtimesnews.com](http://lawtimesnews.com)

for insight from our regular online columnists

**Darcy Merkur** brings a plaintiff-side perspective on insurance matters in *Personal Injury Law*

From trade deals to foreign investment, **Patrick Gervais** keeps you up to date on business issues in *Trade Matters*

**Monica Goyal** discusses the latest gadgets and trends in legal technology in *Bits & Bytes*



## THE MOST COMPLETE DIRECTORY OF ONTARIO LAWYERS, LAW FIRMS, JUDGES

With more than 1,400 pages of essential legal references, *Ontario Lawyer's Phone Book* is your best connection to legal services in Ontario. Subscribers can depend on the credibility, accuracy and currency of this directory year after year.

More detail and a wider scope of legal contact information for Ontario than any other source:

- Over 27,000 lawyers listed
- Over 9,000 law firms and corporate offices listed
- Fax and telephone numbers, e-mail addresses, office locations and postal codes

Includes lists of:

- Federal and provincial judges
- Federal courts, including a section for federal government departments, boards and commissions



NEW EDITION  
Perfectbound  
Published December each year  
One subscription \$29