

The Pitfalls of Self Representation

by Carol Roberts, Arbitrator

INTRODUCTION

There are a number of reasons parties appear at a legal proceeding without the assistance of a lawyer or an advocate. One reason may be that the party cannot afford counsel. Also, some people believe that they are able to represent themselves better than anyone else. The proliferation of television programs that make the conduct of legal proceedings appear simple and straightforward may also be another reason people chose to represent themselves. Sometimes a party has had a lawyer in the past and found that experience to be less than satisfactory.

The fact is that many self represented parties underestimate the challenges involved in presenting their case, often making simple cases difficult and difficult cases even more complex. As an arbitrator on a wide variety of matters, I have witnessed non-lawyers who have ably represented themselves in various legal contexts. However, that has been the exception rather than the rule.

In this article I will outline the pitfalls of self representation at an SDRCC hearing and offer some suggestions in the event that now or in the future the reader decides to go it alone.

THE PITFALLS OF SELF REPRESENTATION

1. Failure to understand legal terminology

The language of the law is often an “opaque mystery” to those untrained in it. Although there has, for some time now, been a movement aimed at the use of plain language in the law, this does not, in and of itself, do anything to assist a party with procedural rules or the effective presentation of a case.

For example, although words such as evidence, argument, prejudice, disclosure, natural justice, credibility, reliability, bias, relevance and weight are all simple terms in everyday contexts, they can carry potentially significant consequences if the specialized meanings in legal settings are not fully appreciated. For instance, many parties do not understand that evidence includes photographs and documents as well as oral testimony, and that affidavit evidence is often given less weight than oral evidence because the maker of the affidavit is unavailable to be cross-examined on it.

2. Failure to understand procedure

As a party to a hearing, you have a right to “natural justice”. This means that you must be informed of the case against you and have the opportunity to respond to it. It also includes the right to have a case heard by an unbiased decision maker.

Self represented parties often fail to understand how to most effectively respond to a case and this can ultimately be to their disadvantage. For example, many non-lawyers are unaware that they must disclose to the other side all their evidence in advance of the hearing and if they do not, the arbitrator may either deny them the right to use it or grant the other side an adjournment to answer it. Either result could have serious consequences. Also, many self represented parties are unaware of the circumstances under which an arbitrator will allow hearsay evidence and what weight it should be given in coming to a decision.

3. Failure to understand an arbitrator’s jurisdiction

Arbitrators are bound to apply the law and the SDRCC Code. While they are able, within limits, to assist with certain procedural matters and often grant self represented parties a certain degree of latitude in presenting their case, they are unable to instruct the parties on subtleties and nuances of the law or the Code. While an arbitrator is able to guide you in on some minor procedural matters, they are unable to suggest theories or weaknesses of a case that should be pursued. They cannot assist you in advancing a case even though they might think yours is a particularly good one. More importantly, they cannot guess what a party is looking for in terms of making key points or seeking outcomes and they will not respond to or take into account vague statements. The most an arbitrator can do is diminish, as far as possible, certain disadvantages that the self represented party may encounter and to ensure as much fairness as possible.

Self represented parties also often fail to appreciate that the arbitrator cannot give them what they seek. You are well advised, prior to any hearing, to ask yourself what remedy you are seeking and carefully consider whether or not the arbitrator has the jurisdiction to give that to you.

4. Failure to appreciate the legal essence of the dispute

I have been an arbitrator in a number of hearings where a self represented party had an excellent case but failed to do prevail because he/she misunderstood the important and “winning” issue and focused on an “unwinnable” one. In other instances, I have observed individuals make an excellent presentation on an entirely irrelevant issue.

In advance of the hearing and even before retaining a lawyer or advocate (if you choose to do so) ask yourself what the issue is the arbitrator must decide. What sort of evidence best supports your view of that issue? How will you gather and

present that evidence? The other party's theory of the issue or case will differ from yours. That does not mean they are lying, but you must decide how to best explain why their theory is wrong. At the very least, carefully working on these questions on your own will help keep your legal bills within tolerable limits.

5. Inexperience with a dynamic process

Many self represented parties are unable to "read" a decision maker and adapt their presentation accordingly. They are also often unprepared for unanticipated questions or surprise evidence and unable to respond effectively to these sorts of occurrences. Hearings can be "fluid" and unpredictable.

It is often said that a lawyer who represents herself has a fool for a client. Because many adjudicative proceedings have serious consequences for the parties, there is often a level of emotion involved which is best diffused by a lawyer or lay person with advocacy skills who can act as a "buffer".

While facts of a case are best known to the athlete, the law and relevant arguments are best appreciated by an experienced advocate. If you do elect to hire a lawyer or advocate, try to retain one with a background in presenting cases before SDRCC arbitrators. If you cannot find one with experience in that area, at the very least find one who has experience with administrative law in general. Be aware that no lawyer cares as much about the outcome as much as you do. Therefore, carefully review the materials they have prepared to ensure the facts are correct and make suggestions when you feel something is being overlooked.

GOING IT ALONE

If you do find it necessary to represent yourself the following points should be kept in mind:

- a. Familiarize yourself with the SDRCC Code, including the rules of procedure.
- b. Obtain a handbook on advocacy. There are a number of publications available either through legal aid societies or law student clinics. Law libraries and the internet are also useful resources although the latter is still somewhat suspect if you do not consult accredited web-sites.
- c. If possible, sit through another party's case to familiarize yourself with the "flow" of a hearing and anticipate how your case might unfold.
- d. Run your case by a lawyer, law student or seasoned advocate and have them identify any weaknesses or pitfalls in your case. You may be able to avoid or eliminate the "soft points" or at least present them in a manner that causes them to seem less relevant than what otherwise might be the case.
- e. Research decisions published on SDRCC website that might be similar to yours. Although adjudicators are not obliged to follow decisions of other

adjudicators, you can make a persuasive case that you should not be treated any less favorably than another athlete in similar circumstances.

Your sporting career is far too important for you not to prepare fully and properly for any SDRCC hearing you might find yourself involved in. This is your best assurance that your case will be advanced in the best way possible.

When I was a young lawyer I asked a seasoned litigator what his advice would be for a young advocate who was preparing her first case. His reply was: "Three things come to mind: preparation, preparation and preparation". There is simply no substitute for hard work whether in administrative law or athletics. It can trump many other shortcomings.