Professional Liability Defense QUARTERLY

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What the Ethics Pros Say About *Pro Se* Litigants

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"He who represents himself has a fool for a client." –

Abraham Lincoln

Imagine the average accountant challenging Serena Williams to a tennis match. Seems ill advised, right? The accountant would be out of her element, out trained, and out skilled. She might not even know the rules of the game, or have a functioning racket. How would Serena – among the most talented professional athletes in the world – approach such an event? Would she seek to display her superior training and skill? Would the umpire allow the accountant certain leeway in an attempt to even the playing field? Wouldn't it be easier for everyone if the players were more evenly matched? Surely, if the accountant could get someone like Roger Federer to play in her place she would jump at the chance!

Now let's imagine that a non-lawyer wants to bring a lawsuit. It seems appropriate to retain a lawyer who has the skills and knows the rules,; and yet many people opt not to. This not only disadvantages the *pro se* litigant, it also makes litigation more difficult for opposing counsel, the court, and the judicial system as a whole. As lawyers, we are the Serena in the tennis match scenario, except in addition to following the procedural rules of court we also need to keep within ethical boundaries when dealing with unrepresented people like *pro se* litigants.

Who Are *Pro Se* Litigants?

State and federal courts are experiencing an increasing proportion of *pro se* litigants, for various reasons. *Pro se* litigants may lack the funds to retain counsel, or they may simply wish to avoid the expense. Some believe their cases are so straightforward counsel is not needed. Others are convinced they know better than anyone else and counsel would only hold them back. Perhaps most dangerous of all are those litigants who have such unreasonable expectations that no lawyer will agree to represent them. Oftentimes, such litigants have had counsel at various times, but for whatever reason the attorney client relationship has broken down.

The decision to represent oneself comes with inherent risks. *Pro se* litigants are usually not equipped with the legal knowledge necessary to make and support appropriate arguments. Failure to comply with court rules, whether inadvertent or intentional, can delay and frustrate the process. *Pro se* litigants who take their case to trial could face a mistrial for failure to abide by the judge's rulings. In such situations, *pro se* litigants are not entitled to an award of attorney fees, but a court may order a *pro se* litigant to pay the attorneys' fees for the opposing party.

Litigating against someone acting *pro se* comes with risks for the attorney as well, especially for lawyers who must skate the line between zealous advocacy for their client and ethical responsibilities to unrepresented parties.

Ethics and *Pro Se* Litigants

Lawyers facing off against *pro se* litigants are in a difficult position. When dealing with opposing counsel, one can generally assume the other lawyer will know and follow rules of discovery and understand which arguments are supported by the law and which are specious. This is usually not the case with *pro se* litigants.

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There are many misconceptions about lawyers and the judicial system. Some *pro se* litigants view anyone connected to the court system, and especially their opponent's lawyer, as untrustworthy, biased, and corrupt. They may think that opposing counsel is trying to trick them, or has a special relationship with the judge which prevents them from obtaining a fair trial. Conversely, many laypeople mistakenly assume that a lawyer retained by any of the parties is obligated to "seek justice" instead of zealously advocate for their client's interests. They may become confused and angry that an opposing lawyer is not ensuring they know which caselaw applies, explaining the court rules, or making their arguments for them.

To lessen the impact of such misunderstandings, the Model Rules of Professional Conduct outline a lawyer's responsibilities when dealing with unrepresented people such as *pro se* litigants. Simply stated, Rule 4.3 obligates a lawyer to inquire whether a person is represented, to ensure that unrepresented people know that the lawyer is not disinterested, and to not provide legal advice to unrepresented people other than the "advice" to secure counsel.

A lawyer must avoid advising a *pro se* litigant because such advice could give rise to an attorney-client relationship. If a relationship forms, the lawyer will have clients with directly adverse interests, and with a conflict that is not waivable. The only remedy at that point would be to withdraw from all representation.

***Pro Se* Problems**

Popular sentiment against lawyers and the judicial system can inflame *pro se* litigants. A 2017 ABA Legal Needs Study showed that 45% of *pro se* litigants believe that lawyers are more concerned with their own self-promotion than their client's best interest. Many websites proclaim that lawyers will lie, steal and cheat to win, and that judges are biased.

Pro se litigants generally lack the perspective that trained legal counsel can provide. Many laypeople believe the law is objective, that "justice" is black and white, and that if they do not win it is because of some inherent bias or flaw in "the system."

Lawyers on opposing sides of a dispute can discuss the facts and the law in a relatively objective way. The lawyers will zealously advocate for their clients, but the dispute itself is not personal to them. Each case is but one of many in a continuous stream of cases.

In contrast, a lawsuit might be the most stressful and significant aspect of a litigant's life. *Pro se* litigants are often emotionally invested and unable to objectively assess the strengths and weaknesses of their positions. This lack of perspective, in combination with a general distrust of the judicial system, can complicate the proceedings for other litigants, their attorneys, and the court system as a whole.

It's frustrating when opposing counsel makes specious arguments or fails to display common professional courtesy, but at least in such situations the lawyer is constrained by ethical rules. Not so for *pro se* litigants. Even when *pro se* litigants flagrantly violate court rules or make arguments that are facially preposterous, courts tend to give them wide latitude. If a lawyer seeks a sanction, like a barring order, against a *pro se* litigant that has violated a discovery rule, a rule which if violated by a lawyer would ineluctably lead to a such an order, the lawyer risks the ire of the court in attempting to take advantage of the *pro se* litigant's inexperience and trying to win on technicality. Many jurisdictions express a preference for resolution of cases on the merits, even if this requires overlooking incompetence or rule violations from a *pro se* litigant that would otherwise result in a dismissal. This puts the lawyer in a difficult position between balancing the court's notion of fairness and the risk of turning the court against the lawyer and their client against the responsibility to zealously advocate for the client. As many decisions of this kind are in the discretion of the trial court, balancing these issues can be a very thin tightrope.

Pro se litigants may be more likely to seek sanctions against their opponent or opposing counsel for perceived wrongs. Some *pro se* litigants will seek reconsideration or appeal of any adverse ruling, whether allowed by the rules or not. It is not uncommon for a *pro se* litigant to bring ethical claims or lawsuits against opposing counsel, the judge who ruled against them, or even the bench and bar as a whole when they believe they have been wronged by "the system." The sheer volume of paper generated by a *pro se* litigant can make what might have otherwise been a straightforward case extremely expensive.

The best advice for lawyers, even when unrepresented parties are rude or threatening, is to remain calm and composed. Being "kind" to *pro se* litigants cannot prevent bar complaints or other retaliation, but it is always better to be able to show that you as a lawyer behaved ethically and professionally.

It is best to avoid conversations outside the presence of the court or off the record at a deposition with *pro se* litigants because unrepresented parties may either unintentionally or deliberately misconstrue what was discussed. Lawyers should be especially careful in communicating with *pro se* litigants suspected of being mentally unstable. Even when sanctions are likely warranted for inappropriate behavior by a pro se litigant, think carefully before asking the court to award them. Unstable litigants can threaten the safety and security of opposing counsel and judges, and it is best to avoid actions that are likely to entice retaliation.

Like a *pro se* litigant, your client may also be emotionally invested in his or her case. Your job as a lawyer is to provide knowledge, skill, and perspective to get them to resolution within the bounds of the law. Clients might not understand why you, as their attorney, would choose a more passive response to inappropriate behavior from a pro se litigant. It is important to explain your overall approach and why it is in your client's best interest to avoid engaging in unethical or unprofessional tactics or taking positions that may annoy the trial court. This is especially so when you represent a business or other wealthy or powerful interest. Staying the course, and winning cases against pro litigants on the merits, is usually the smarter course of action.

Ethically Helping *Pro Se* Litigants

Rule 1.2 of the Model Rules of Professional Conduct outlines the ethical parameters of an attorney-client relationship. Rule 1.2(c) allows the lawyer to limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent. The comments to the rule state that, for example, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation to address a common and uncomplicated legal problem.

There are ways for lawyers to assist a *pro se* litigant, with whom the lawyer is not adverse, without entering into a continuing attorney-client relationship, but navigating such a situation can be tricky. Unlike in a *pro bono* situation, where the attorney-client relationship exists despite no money changing hands, in a "ghostwriting" relationship the *pro se* litigant might pay a lawyer to draft pleadings or motions to be filed by the *pro se* litigant. Lawyers also might help a *pro se* litigant fill out certain forms. In such situations, the lawyer must be careful to remain in compliance with the "ghostwriting" rules of the jurisdiction.

The 2007 ABA Committee on Ethics and Professional Responsibility issued a formal opinion addressing whether and how lawyers can ethically ghostwrite motions, pleadings, and other documents for *pro se* litigants. Some jurisdictions have adopted the reasoning of that opinion, and others have rejected it. While the majority of states allow ghostwriting, some states require the litigant and lawyer to disclose the lawyer's involvement. Some states do not allow ghostwriting at all. Be sure you know the rules of your jurisdiction before engaging in such a relationship.

Conclusion

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Under the Model Rules of Professional Conduct, a lawyer is "an officer of the legal system and a public citizen having special responsibility for the quality of justice." This informs the professionalism with which a lawyer should conduct themselves in all situations, but particularly with a *pro se* litigant. While the Model Rules call for lawyers to assist in providing access to the legal system, that responsibility, except to advise them to get a lawyer, does not extend to the handling a matter against a *pro se* litigant. As *pro se* litigants become more common, more lawyers will have to deal with the ethical challenges of litigating matters against those acting *pro se*.

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Membership in the PLDF includes delivery of the *Professional Liability Defense Quarterly*, which is devoted to current legal defense and claims handling issues. Articles of topical interest spanning a wide range of malpractice defense subjects are presented to add value to effective defense preparations for the claims handler and defense counsel. We encourage member submission of articles proposed for publication to: Editor-in-Chief, *Professional Liability Defense Quarterly*, PO Box 588, Rochester IL 62563-0588, admin@PLDF.org

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