

Dealing with *Pro Se* Litigants: Ethics Advice for Lawyers and Judges

Michael Downey

October 2020

Right to Proceed *Pro Se*

- Lay-person may represent himself or herself in legal proceedings
- Does not extend to representing corporate entities (unless specifically allowed)

Missouri Informal Opinion 20060062

- **QUESTION:** An administrative tribunal's hearing officers, who are licensed attorneys, preside over cases heard by the tribunal. The tribunal received complaints for review by a single-member LLC and a single-member S Corporation. The tribunal's concern is that if the single member of the LLC or S Corporation appears before the tribunal without an attorney, he or she may be in violation of § 484.010. If such an appearance is practicing law without a license, that subjects the tribunal's attorney hearing officers who preside over the hearings to ethical problems. Is it necessary for single-member LLC or S Corporations to be represented by an attorney in cases before the tribunal?
- **ANSWER:** Neither an LLC nor an S Corporation can appear in a tribunal through an officer or other nonlawyer, if that tribunal requires representation by an attorney for any party not appearing pro se. *Joseph Sansone Company, v. Bay View Golf Course*, 97 S.W.3d 531 (2003). **In other words, if the conduct will constitute the practice of law, an LLC, S Corporation, or other corporate entity is not permitted to appear pro se, absent specific authorizing statutes, rules, etc, unless there is law that makes a distinction for a single-member entity.** However, not every act in an administrative tribunal constitutes the practice of law. *See, State ex rel., Missouri Department of Social Services v. Administrative Hearing Commission*, 814 S.W.2d 700 (Mo. App. W.D. 1991). If a nonlawyer's conduct, on behalf of an LLC or S Corporation, will constitute the practice of law and there is no statute, rule, or other legal authority permitting the particular conduct by a nonlawyer, the attorneys who participate in the proceeding will be assisting the unauthorized practice of law. The attorneys should take steps to stop or prevent this conduct.

Program Outline

- Judicial ethics
- Lawyer ethics
 - Opposing *pro se* litigants
 - Providing legal services to the unrepresented

Judicial Ethics

Floyd v. Cosi, Inc. (EDNY 2015)

- *Pro se* plaintiff sued for employment discrimination
- (Represented) defendant moved to dismiss/for summary judgment – claims were time-barred
- Dilemma for judge
 - Alleged events occurred 300 days before complaint was filed with EEOC
 - “Continuing Violation” doctrine might save claims, but was not raised by plaintiff

Dilemma

- Seek correct disposition of case – and ask about continuing violations?
- Maintain appearance of impartiality – and possibly allow viable claim to be dismissed
- Judge Weinstein asked questions, denied motion, then recused

Missouri Canon 2-2.2: Impartiality and Fairness

- (A) A judge shall uphold and apply the law, and **shall perform all duties of judicial office** promptly, efficiently, **fairly and impartially**.
- (B) A judge **may make reasonable efforts**, consistent with the law and court rules, **to facilitate all litigants, including self-represented litigants, being fairly heard**.

Comments to Canon 2-2.2

[1] In disposing of matters promptly and efficiently, a judge **must demonstrate due regard for the rights of the parties to be heard** and to have issues resolved without unnecessary costs or delay. To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule 2-2.2.

[4] A judge **may make reasonable accommodations to afford litigants the opportunity to have their matters fairly heard.**

Judge Kenneth Wright (Cook County, IL)

- “[*Pro se* litigants’] fear as well as lack of knowledge and expertise will make them hesitant and belligerent. We [judges] will attempt to placate them by urging them to seek legal assistance. If they cannot obtain assistance, we will fall back on the black letter law....They will present motions they do not understand and make arguments fed to them by third parties.”

Missouri – Divorce and Child Custody

- To protect public interest in dissolution and child custody cases, judge may take a more active role in litigation. *Brown v. Yettaw* (Mo. App. S.D. 2003)
 - “[A] trial judge may elicit testimony from witnesses, may cause other witnesses to be subpoenaed, and in all proper ways may develop pertinent evidence not adduced by the parties themselves.”
- Judge must remain impartial and not assume position of advocate. *Harms v. Simkins* (Mo. App. E.D. 1959)

Missouri Rule 88.09

Every party not represented by counsel who participates in a proceeding for dissolution of marriage, legal separation, parentage or the modification of a judgment in any such proceeding shall:

- (a) Complete a litigant awareness program that includes an explanation of the risks and responsibilities of self-representation, unless waived by the circuit court. The awareness program shall be prepared by a committee designated by this Court, but each circuit may determine the manner and means by which the training shall be provided and the proof of compliance; and
- (b) Unless such use is waived by the trial court, use the pleadings, forms, and proposed judgment prepared by a committee designated by this Court that have been approved by this Court. These forms shall be accepted by the courts of this state, until disapproved or superseded by this Court.
- (c) Nothing in this Rule 88.09 prevents a court from determining the legal sufficiency of any pleading nor prevents a court from entering judgment in a form different from the judgment form approved pursuant to Rule 88.09(b).

* The materials can be accessed at <http://www.selfrepresent.mo.gov/page.jsp?id=5240> "Representing Yourself in Missouri Courts: Access to Family Courts."

Pro Se Pleadings

- Litigants have a right to represent themselves, but they are bound by the same rules of procedure and are entitled to no indulgences. *Shelton v. Julian*, 610 S.W.2d 129, 130 (Mo. Ct. App. 1980).
- [A] Petition filed *pro se* should be reviewed giving the Petition its broadest intendment, construing all allegations in favor of the *pro se* litigant. *Love v. St. Louis City Board of Education*, 963 S.W.2d 364, 365 (Mo. Ct. App. 1998).
- [E]ven a “crude, nonprofessional *pro se* pleading can qualify as an answer.” *Svejda v. Svejda*, 156 S.W.3d 837, 839 (Mo. Ct. App. 2005).

Common Response

- Note law requires *pro se* litigants to be held to “same standards as attorneys”
- Allow some variance on strictly procedural requirements
- Require *pro se* litigants to
 - Cooperate in the litigation process
 - Prove their case

Rule 2-2.6. Ensuring Right to Be Heard

- (A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.
- (B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

Rule 2-2.9(A). *Ex Parte* Communications

A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

- (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
 - (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
 - (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.
- (2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties
- (3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.
- (4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.
- (5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

Comment [4]

A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

Response to *Ex Parte* Communications

Rule 2-2.9(B)

If a judge inadvertently receives an unauthorized ex parte communication that the judge considers bears upon the substance of a matter, the judge shall take appropriate action.

General Suggestions – “Reaching Out or Overreaching” AJS/SJI (2005)

- Exercise discretion in making procedural accommodations to self-represented litigants
 - “Impartiality” is not inflexibility
 - Rules of procedure should not require sacrifice of fundamental justice – cases should be decided on merits
- Set example of courteousness, not intimidation
- Beware conduct that may create impression of undue familiarity with counsel
- Clearly explain process, proceedings and elements of matters, and evidence that may and may not be considered
- Avoid legal jargon and confusing terminology
- Avoid making technical errors case-dispositive
 - Substance not label of pleadings
 - Litigant must still make adequate factual showing, provide adequate notice to adversaries, and satisfy burden of proof

Permissible Conduct

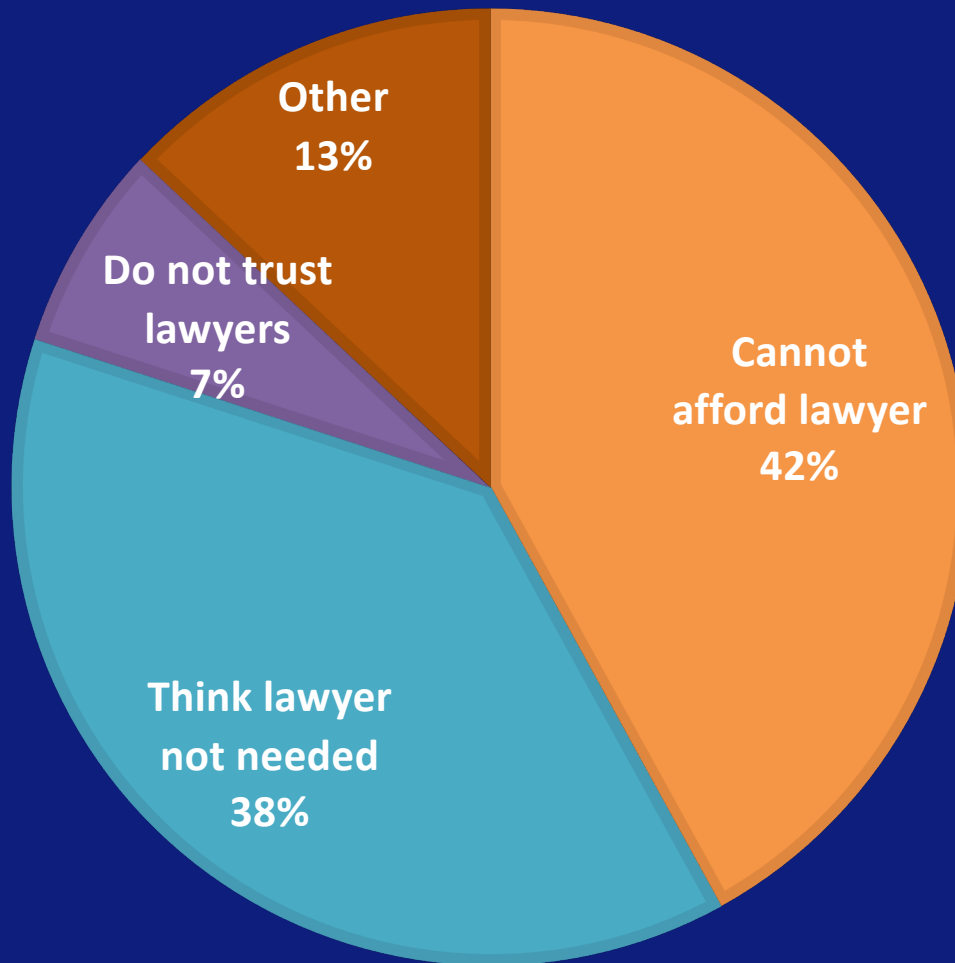
- Provide pro se litigant with appropriate forms (Florida Advisory Opinion 93-8)
- Have clerks assist in filling out forms (Arizona Opinion 88-5)
- Make inquiries to satisfy minor or technical inquiries in non-adversarial settings (Indiana Advisory Opinion 1-97) (name change not sought for fraudulent purposes)

- *Barker v. Norman* (5th Cir. 1981) – trial court abused discretion by failing to afford pro se plaintiff opportunity to properly respond to motion for summary judgment
- *Gordon v. Watson* (5th Cir. 1980) – trial court should have given pro se litigant opportunity to file sworn statement

Missouri Pro Se Commission

9 recommendations including mandatory litigant education, standardized forms, and formulation of “Best Practices” (available at www.MissouriEthicsCLE.com)

Who Is *Pro Se* in Missouri (2006)



60% household
income < \$30K

6% household
income > \$70K

5. Give a basic introduction to courtroom protocol, for example, the importance of timeliness, checking in with the clerk (if that is necessary), who sits where, directing argument to you and not other parties or attorneys, rising when you enter, and other matters you consider important (attire, gum chewing, reading while court is in session, etc.).
6. Explain the prohibition on ex parte communications (you cannot talk to one side without the other side being present and litigants cannot file any papers with the court that are not served on the other side).
7. Actively manage and schedule cases involving self-represented litigants.
8. Insofar as possible, monitor counsel to ensure a self-represented litigant is not being misled.

Pleadings

9. Construe pleadings liberally:
 - Look behind the label of a document filed by a self-represented litigant and give effect to the substance rather than the form or terminology.
 - Do not ignore an obvious possible cause of action or defense suggested by the facts alleged in the pleadings even if the litigant does not expressly refer to that theory.
 - Consider information in other documents filed by a self-represented litigant.
 - Allow amendment freely.

Pre-Hearing

22. Explain the process and ground rules (e.g., that you will hear from both sides, who goes first, everything said will be recorded, witnesses will be sworn in, witnesses may be cross-examined, how to make an objection).
23. Explain the elements and the burden of proof.
24. Explain the kinds of evidence that can be presented and the kinds of evidence that cannot be considered.
 - Explain that you will make your decision based only on the evidence presented.
 - Encourage the parties to stipulate to uncontested facts and the admission of as much of the documentary evidence as possible.
25. Try to get all parties and counsel to agree to relax technical rules of procedure and evidence so the hearing can proceed informally with an emphasis on both sides getting a chance to tell their story.

Hearing

26. Ensure the notice of hearing unambiguously describes, in a way a self-represented litigant can understand, that a hearing on the merits is being scheduled and the litigant should be prepared with evidence and witnesses to present the case or defense.
27. Allow non-attorneys to sit at counsel table with either party to provide support but do not permit them to argue on behalf of a party or to question a witness.
28. Before starting, ask both parties whether they understand the process and the procedures.
29. Call breaks where necessary if a litigant is becoming confused or tempers on either side are becoming frayed (or your patience is running low).
30. Question any witness for clarification when the facts are confused, undeveloped, or misleading.

“Reaching Out or Overreaching”

- 44 “Proposed Best Practices for Cases Involving Self-Represented Litigants”
- 17-question self-test with discussion guide

CA Formal Advisory Opinion 76 (2018)

- A judge may give a self-represented litigant a neutral explanation of how to respond to a motion for summary judgment.
- A judge may provide a self-represented litigant information about the requirements for entry of a default judgment.
- A judge may ask a self-represented litigant if she wants a continuance to bring a witness to court.
- During a trial, a judge may ask witnesses neutral questions to clarify testimony and develop facts.
- A judge may sign a settlement agreement prepared by the attorney for 1 party and signed by an unrepresented party, but, as a best practice, should ask the parties if they understand the document and ask the unrepresented party if she understands her responsibilities under the agreement.
- When a self-represented litigant refers to information after being instructed not to, a judge is not required to grant a motion for a mistrial but may instruct the jury to disregard the testimony.
- If an unrepresented plaintiff makes no specific claim for damages at the close of her case, the judge may ask the plaintiff, “Are you asking for damages in this case? If so, what is the amount you are asking for? And why are you asking for this amount?”
- In a criminal case, if a prosecutor tries to take advantage of a defendant’s unrepresented status to introduce the defendant’s prior drug-related arrest and the factual basis for a search, the judge should immediately intervene even if the defendant does not object.

In domestic violence cases, the committee stated, a judge:

- May give the self-represented plaintiff a short continuance to learn about the relevant rules of evidence and the procedural requirements for the admission of hospital records,
- Should permit a support person to accompany a self-represented moving party to counsel table, and
- Should inform a self-represented respondent that he could present oral testimony.

Lawyer Ethics

Rule 4-4.3. Dealing with Unrepresented Person

- In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.
- When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

General Guidelines

- Be truthful (*cf.* Rules 4-3.3, 4-4.1 and 4-8.4)
- Be respectful
- Avoid taking undue advantage
- (Over-) Communicate
- Put things in writing

Rule 4-4.1: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 4-1.6.

Recent Expert Testimony

- Paternity case
- Case was appealed and then remanded
- Mother was now pro se
- Father's lawyer represented to Court that court could determine support and maintenance without taking further evidence
- Father's compensation had materially increased since evidentiary hearing, prior to appeal

“Ghostwriting”

- Preparing pleadings for *pro se* litigants to file onS their own
- Will benefits for *pro se* litigants afford (secretly) lawyer-assisted litigant unfair advantage?
 - Some jurisdictions: Yes, must name lawyer (NV, WV)
 - Some jurisdictions: Yes, must disclose assistance of lawyer but need not name lawyer (FL)
 - Some jurisdictions: No (AL, AZ, NC)
 - *Federal courts are also not consistent*

“Unbundled” Legal Services – Rule 4-1.2(c)

A lawyer may limit the scope of representation if the client gives informed consent in a writing signed by the client to the essential terms of the representation and the lawyer's limited role. Use of a written notice and consent form substantially similar to that contained in the comment to this Rule 4-1.2 creates the presumptions:

- (1) the representation is limited to the lawyer and the services described in the form, and
- (2) the lawyer does not represent the client generally or in any matters other than those identified in the form.

“Unbundled” Legal Services – Rule 4-1.2(c)

(d) The requirement of a writing signed by the client does not apply to:

- (1) an initial consultation with any lawyer, or
- (2) pro bono services provided through a nonprofit organization, a court-annexed program, a bar association, or an accredited law school,
- (3) services provided by a not-for-profit organization funded in whole or in part by the Legal Services Corporation established by 42 USC Sec. 2996b.

Anti-Contact Rule and Limited Scope Clients – Rule 4-1.2(e)

- An otherwise unrepresented party to whom limited representation is being provided or has been provided
- is considered to be unrepresented for purposes of communication under Rule 4-4.2 and Rule 4-4.3
- except to the extent the lawyer acting within the scope of limited representation provides other counsel with a written notice of a time period within which other counsel shall communicate only with the lawyer of the party who is otherwise self-represented.

Rule 4-4.2. Communication With Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

“Teaching” Pro Se Litigants – Opinion 20080033

QUESTION: May Attorney establish a course providing *pro se* litigation education in the area of family law as an independent business without creating an attorney/client relationship?

ANSWER: Rule 88.09 requires parties who want to represent themselves to complete a litigation awareness course. Therefore, it is permissible for Attorney to establish a course. Attendance at the course would not prevent an individual from hiring Attorney for limited or full representation. If it will be a limited representation, Attorney must comply with Rule 4-1.2 as it became effective July 1, 2008.

Lawyer Acting Pro Se – Opinion 2011-03

Question: May Attorney communicate with Attorney's parents about the parents' litigation, where the parents' counsel does not consent to the communication, Attorney is seeking to intervene in the matter pro se, and further litigation concerning the matter is likely in the future?

Answer: No. In representing a party, Rule 4-4.2 prevents a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer, unless the other lawyer consents or unless authorized to do so by law or court order. The rule's prohibition applies to a lawyer who is involved in a matter as a party or a person with interests.

Thank you



Michael Downey
Downey Law Group LLC
(314) 961-6644
(844) 961-6644 toll free
mdowney@DowneyLawGroup.com