

The Ethics of Working with Pro Se Litigants & Judicial Review Practice Pointers

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I. Working with Pro Se Litigants (30 minutes)

- a. Should pro se litigants be held to a different standard?
 - i. When is it appropriate to object to a pro se litigant's question?
 - ii. When is it appropriate to object to a pro se litigant's exhibit(s)?

Case Law—"Pro se litigants receive no preferential treatment." *Scheckel v. State*, No. 12-2295, 2013 WL 4504919 (Iowa Ct. App. August 21, 2013); see *Hays v. Hays*, 612 N.W.2d 817, 819 (Iowa Ct.App.2000). "The law does not judge by two standards, one for lawyers and the other for lay persons. Rather, all are expected to act with equal competence. If lay persons choose to proceed pro se, they do so at their own risk." *Metro. Jacobson Dev. Venture v. Bd. of Review*, 476 N.W. 2d 726, 729 (Iowa Ct.App.1991); see *State v. Piper*, 663 N.W.2d 894, 913–14 (Iowa 2003), *overruled on other grounds by State v. Hanes*, 790 N.W.2d 545, 551 (Iowa 2010).

- b. How do you assure the pro se litigant that the process is fair?
 - i. Perception versus actual bias?

Iowa R. of Prof'l Resp. 32:4.3: 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.

- c. Should you have a prehearing conference?
 - ii. What is it designed to accomplish?
 - iii. Is it an ethical obligation?
- d. Are there limits when negotiating settlement with a pro se litigant?

Iowa R. of Prof'l Resp. 32:4.3: Cmt. 2. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the

person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Best practice—Affirmatively tell the pro se litigant that you represent an opposing party and that your interest maybe adverse to him or her. Repeatedly if necessary.

Case law—*Hopkins v. Troutner*, 4 P.3d 557 (Idaho 2000) (court found that the attorney overreached with pro se litigant when the attorney gave an “opinion” on the value of the case).

- e. Should you seek default judgment against a pro se litigant?
- f. How should you work with an interpreter?
 - i. Do you have an obligation to object if you reasonably believe the interpreter is incorrectly or incompletely interpreting the proceedings?
- g. A judge's responsibility

ABA Standards of Judicial Administration

2.23 Conduct of Cases Where Litigants Appear Without Counsel. When litigants undertake to represent themselves, the court should take whatever measures may be reasonable and necessary to insure a fair trial.

Commentary

The duty of the courts to make their procedures fair is not limited to appointing counsel for eligible persons who request representation. In many instances, persons who cannot afford counsel are ineligible for appointed counsel; in other cases, persons who can afford counsel, or who are eligible to be provided with counsel, refuse to be represented. The refusal may be grounded on the litigants' belief that if they have counsel they will be denied any opportunity to speak for themselves, that only through personal presentation of the case can they really make known the merits of the case, that no lawyer will faithfully represent them at a fair fee, or that the judicial system is so inherently unjust that the only chance for a fair trial is to represent themselves. In other instances, litigants may believe, reasonably or unreasonably, that the matter in controversy is one in which it is not worth retaining counsel, even though the case is genuinely meritorious and even though the opposing party may have retained counsel. In criminal cases, an accused has, at least under some circumstances, a federally guaranteed right to self-representation. *Faretta v. California*, 442 U.S. 806 (1975).

All such situations present great difficulties for the court because the court's essential role as an impartial arbiter cannot be performed with the usual confidence that the merits of the case will be fully disclosed through the litigant's presentations. These difficulties are compounded when, as can often be the case, the litigant's capacity even as a lay participant appears limited by gross

ignorance, inarticulateness, naivete, or mental disorder. They are especially great when one party is represented by counsel and the other is not, for intervention by the court introduces not only ambiguity and potential conflict in the court's role but also consequent ambiguity in the role of counsel for the party who is represented.

Yet it is ultimately the judge's responsibility to see that the merits of a controversy are resolved fairly and justly. Fulfilling that responsibility may require that the court, while remaining neutral in consideration of the merits, assume more than a merely passive role in assuring that the merits are adequately presented. The proper scope of the court's responsibility is necessarily an expression of careful exercise of judicial discretion and cannot be fully described by specific formula. Legal corollaries of the right to counsel and the experience of conscientious judges establish certain guidelines.

Where litigants are entitled to be provided with assistance of counsel, but indicate a desire to represent themselves, the court should fully advise them of the right to representation and the importance of availing themselves of it. The court should strongly discourage waiver of counsel by litigants entitled to the appointment of counsel viii and should require litigants to consult with a lawyer before accepting a waiver of the right. American Bar Association Standards for Criminal Justice (2d ed. 1986 Supp.), Special Functions of the Trial Judge, Section 6-3.6; Providing Defense Services Section 5-7.2. Where litigants appear primarily interested in an opportunity to state the case personally to the court or jury, they should be assured that they will have reasonable opportunity to speak and may thereby be persuaded to accept the assistance of counsel. In some circumstances it may be appropriate to appoint standby counsel. American Bar Association Standards for Criminal Justice (2d ed. 1986 Supp.), Special Functions of the Trial Judge Section 6-3.7. Where litigants have no right to be provided with counsel, the court in appropriate cases should urge them to retain counsel and facilitate appropriate referrals to the bar for that purpose. **Where litigants represent themselves, the court in the interest of fair determination of the merits should ask such questions and suggest the production of such evidence as may be necessary to supplement or clarify the litigants' presentation of the case.**

Case law—*Berkley v. D.C. Transit, Inc.*, 950 A.2d 749 (D.C. 2008) A pro se claimant for unemployment benefits showed up for her hearing, and her former employer, the DC transit agency, did not. The ALJ explained to the claimant that it was “initially” the employer's obligation to show that she left her job voluntarily, that she was not obligated to testify, but that if she did, “you can meet your burden of explaining if you did, in fact, voluntarily quit work.” The claimant, who also suffered from a disability, did testify, although she was confused, unable to recall dates or times, or offer documentation. The ALJ ruled that she had left her job voluntarily and was therefore not entitled to benefits. The DC Court of Appeals ruled that generally a pro se litigant is not entitled to any special treatment or assistance from the judge. However, the judge does have a duty to avoid misleading the pro se litigant in a way that prejudices her. The Court ruled that the ALJ's colloquy was both misleading and erroneous. It was easy to see how the claimant thought she had to provide some explanation for leaving her job, when in fact, she had no burden. The case was remanded.

Rutherford v. Labor & Indus. Rev. Comm'n, 752 N.W.2d 897 (Wis. Ct. App. 2008) Employee filed disability discrimination complaint against employer under Wisconsin Fair Employment Act. The Workforce Development Division dismissed it, based on their finding that she did not have a disability. Employee timely appealed and was entitled to a hearing, where she could show evidence of her disability. The ALJ excluded her medical records because they were not certified and had notes on them, and because the employee had not provided these to the employer before the hearing. The Wisconsin Court of Appeals remanded for another hearing; the evidence should have come in under the evidentiary standard in administrative proceedings, and also, the pro se litigant should not have been held to the same standard as attorneys in following procedure and introducing evidence.

II. Judicial Review (30 minutes)

a. Always keep an eye on the record

Iowa Code section 17A.19(7)— In proceedings for judicial review of agency action a court may hear and consider such evidence as it deems appropriate. In proceedings for judicial review of agency action in a contested case, however, a court shall not itself hear any further evidence with respect to those issues of fact whose determination was entrusted by Constitution or statute to the agency in that contested case proceeding. Before the date set for hearing a petition for judicial review of agency action in a contested case, application may be made to the court for leave to present evidence in addition to that found in the record of the case. If it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the contested case proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision in the case by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court and mail copies of the new findings or decisions to all parties.

Case law—*Smith v. Iowa Bd. of Med. Exam'rs*, 729 N.W.2d 822 (Iowa 2007) (holding that it is the appellant's responsibility to provide the court with a sufficient record to decide the appeal).

b. Petition checklist

i. Does the petition meet the pleading requirements of Iowa Code § 17.19(4)?

Case law—*Second Injury Fund v. Klebs*, 539 N.W.2d 178 (Iowa 1995) (holding Iowa's lenient pleading standards do not apply to petitions for judicial review, notice pleading is insufficient, and the statutory requirements must be met).

ii. What grounds for relief are specified?

Best practice—always compare the grounds raised in the petition with the grounds argued in brief. Litigants are limited to the grounds set forth in the petition.

Case law—*Medco Behavioral Care Corp. v. Dep’t of Human Servs.*, 553 N.W.2d 556 (Iowa 1996) (“We therefore hold a district court may grant a party on judicial review (other than in a contested case) leave to amend the pleading. . . .”).

- iii. Was the petition filed in the proper venue under Iowa Code § 17A.19(2)?

Iowa Code § 17.19(2)—“Proceedings for judicial review shall be instituted by filing a petition either in Polk county district court or in the district court for the county in which the petitioner resides or has its principal place of business.”

Case law— *Anderson v. W. Hodgeman & Sons, Inc.*, 524 N.W.2d 418, 420 (Iowa 1994) (finding that compliance with statutory provisions is necessary for the court to acquire jurisdiction; transfer not permitted if case is filed in the wrong; transfer is only permitted between counties if BOTH counties have jurisdiction).

- iv. Was the petition served within ten days of filing?

Case law— *Birchansky v. Iowa Dep’t of Pub. Health*, No. 12-1827, 2013 WL 3830116 (Iowa Ct. App. July 24, 2013) (finding that service is jurisdictional).

- c. Judicial review from an ALJ’s perspective