

## **PRO SE LITIGANTS – A GENERAL OVERVIEW**

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2006 New Judges' School

- I. General considerations in dealing with civil and criminal pro se litigants in Superior Court.
  - a) Decide upon and/or determine your management style/philosophy.
    - 1) neutral arbiter/referee
    - 2) benevolent overseer/guardian
    - 3) apply rules and procedures strictly or with flexibility depending upon case and level of knowledge of litigant
  - b) Be mindful of Canons 1, 2A, 3A(1) through (7) and the requirements of integrity, independence and impartiality which apply to both represented and pro se litigants.
  - c) First and foremost explain your role and thereby your philosophy to the pro se litigant in the presence of the other side. Be aware of the Chief's Memo of September 1, 2004 Re: Guidelines for Providing Legal Information to the Public.
  - d) Be very careful to avoid ex parte contact (which the pro se litigant will attempt at every turn).
    - 1) Do not respond to telephone calls. Have someone, your secretary, administrative assistant, trial court administrator, the clerk advise the pro se to communicate the substance of the telephone call to the Court in writing with a copy to the opposing party/counsel.
    - 2) Respond to written communications directly, succinctly, and carefully with a copy to the opposing party/counsel. Be prepared to read what you have written – frequently out of context – at some future time.
    - 3) Create either a general “pro se litigants” file or individual files and place therein a copy of all correspondence to and from the pro se for future reference. I have several files for each of several pro se litigants indexed by their names.
    - 4) Do not become “pen pals” with a pro se litigant.

- e) In court develop the habit of recording everything, arguments, motions, opening statements, closing arguments, voir dire, etc., when a pro se litigant is a party.
  - 1) Conduct no bench conferences off the record.
  - 2) Conduct no in-chambers conferences unless on the record.
  - 3) Be very careful in how you answer a pro se litigant's questions, how you respond to motions, and what you say and do. You should expect to hear your words again – frequently out of context and subject matter. I suggest short, direct, succinct rulings with little if any explanation. Do not try to oversimplify complex legal concepts merely to reach a pro se litigant's level of understanding.
  - 4) Do not rule from the bench; take the issue, motion, etc. under advisement, then prepare your own order. While time constraints will frequently cause you to want to direct the represented party's attorney to prepare an order/judgment, you should fight the impulse. Such a course of action will increase communication to you from the pro se and may lead the pro se to question your impartiality and fairness.
- f) Do not “punish” the represented party by the manner in which you deal with the pro se litigant. Keep in mind that it is very easy to ask a question of a witness which suggests a claim or defense or that a motion should or needs to be made. Example: “Mr./Ms. Pro Se, at this juncture in a proceeding the Plaintiff/Defendant usually moves for a directed verdict, etc.; do you wish to make such a motion?”
- g) Be prepared to have grievances/complaints filed against you and to be sued in state or federal court no matter how carefully you handle the pro se litigant's situation.

## II. Pro Se Litigants – Criminal matters within the jurisdiction of the Superior Court

- a) My Definition of Pro Se: A person, charged with a crime or crimes or a probation violation by warrant or indictment or by way of misdemeanor appeal, who appears before a Superior Court Judge without an attorney.

b) Procedure:

1) For defendants charged originally by indictment:

- a) Remember these defendants have been arrested on an order of arrest out of Superior Court and all the magistrate does is set a bond and a date to appear in Superior Court. It is most likely that these defendants will not have had a first appearance before a District Court judge, had questions of counsel addressed, or had a probable cause hearing.
- b) Review the file and determine if the indictment has any defects, i.e. not signed by the Grand Jury foreperson, etc., or fails to charge a crime (NCGS 15A-604).
- c) Comply with those requirements of NCGS 15A-601 et seq (First Appearance) which would apply to an indictment situation
  - 1) Advise the Defendant of his right to remain silent and that anything he says may be used against him (15A-602).
  - 2) Inform the Defendant of the charge against him and determine if he has a copy of the paperwork (i.e. indictment) (15A-605(1)(2)). I usually tell the defendant what the charge(s) is/are, whether felonies or misdemeanors, their class(es), and maximum punishment(s).
  - 3) Determine if the Defendant has an attorney, retained or appointed (15A-603(a)).
  - 4) Advise Defendant per 15A-603(b) that:
    - (a) he has important legal rights which may be waived unless asserted in a timely and proper manner and an attorney may assist him by advice and by acting on the Defendant's behalf.
    - (b) he has the right to an attorney and one will be appointed for him if he is unable to afford an attorney.

- (c) if he is found guilty and placed on probation he could be required to repay the State for the fees awarded the appointed attorney. If he is found not guilty he does not have to pay the attorney fees.

2) For all defendants:

- a) Advise of the right to counsel and of the charges or probation violation and determine indigency. For probation violations you might advise, “If I find that you have violated a condition or conditions of probation and the violation(s) is/are willful and without lawful excuse, your probation could be revoked and you could receive a sentence of not less than (x) months nor more than (y) months.”
- b) If the Defendant asserts indigency the Court should comply with the affidavit of indigency procedure (15A-603(c)) and if the Defendant is indigent appoint an attorney or the public defender.
- c) If the Defendant is not indigent and wants an attorney the Court should advise the Defendant to retain an attorney promptly (15A-603(d)).
- d) If the Defendant does not want a court-appointed attorney or wants to waive representation and proceed pro se the Court should require a written waiver of counsel in compliance with N.C.G.S. 7A-457.

3) Waiver Procedure (7A-457(a)):

- a) Waiver must be in writing for all in-court proceedings.
- b) However, waiver only effective if:
  - 1) the Court “finds of record” that at the time of waiver the indigent Defendant acted with full awareness of his rights and of the consequences of the waiver.
  - 2) in making this finding the Court shall consider, among other things, the Defendant’s age, education, familiarity with English language, mental condition, and the complexity of the crime(s).

4) Pro Se Representation at Trial: In addition to the written waiver of counsel (which I frequently obtain at a First Appearance or Motion/Arraignment setting) 15A-1242 provides:

a) “A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only (emphasis added) after the trial judge makes thorough inquiry and is satisfied that the defendant:

- 1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- 2) Understands and appreciates the consequences of this decision; and
- 3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

b) Failure to comply with 15A-1242 is plain error and to allow a Defendant to proceed pro se without making the required inquiry is prejudicial error leading to a new trial.

In State v. Stanback, 137 N.C.App. 583 (2000) the defendant stated he wanted to represent himself and the Court appointed standby counsel but did not make the 15A-1242 inquiry, the Court of Appeals noted at page 586 “The record...does not indicate the trial court made any inquiry to satisfy Defendant comprehended “the nature of the charges and proceedings and the range of permissible punishments.” and “neither the statutory responsibilities of standby counsel...nor the actual participation of standby counsel...is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver.” (emphasis added)

c) The North Carolina Trial Judges Bench Book Volume 1, Chapter 71 at page 7, contains a list of suggested questions which should satisfy the 15A-1242 inquiry and case law mandates re: A defendant’s election to proceed pro se at trial. I have included herewith a copy of questions I prepared for use in these situations. Please note that the questions are specific to a First Degree Murder case, however they are modifiable to any charge.

5) Standby Counsel:

a) N.C.G.S. 15A-1243 provides:

“When a defendant has elected to proceed without the assistance of counsel, the trial judge in his discretion (emphasis added) may determine that standby counsel should be appointed to assist the defendant when called upon and to bring to the judge’s attention matters favorable to the defendant upon which the judge should rule upon his own motion. Appointment and compensation of standby counsel shall be in accordance with rules adopted by the Office of Indigent Defense Services.”

I have not read those rules and do not know nor am I concerned with how they apply primarily because if the defendant had counsel, either appointed or retained, prior to his decision to proceed pro se I usually appoint that attorney as standby counsel.

b) Appointment/denial of standby counsel is discretionary.

See State v. Brooks, 49 N.C.App. 14 (1980) at page 18:

“If defendant was not confident of his ability to represent himself, he was entitled to counsel appointed for his defense; but he had no right to standby counsel. The appointment of standby counsel is in the sound discretion of the trial court.”

And at pages 18 and 19 “...the issue is not whether defendant had the skill and training to represent himself adequately but whether ““he knows what he is doing [when he chooses to represent himself] and his choice is made with his eyes open.””

c) Role of standby counsel:

In State v. Thomas, 134 N.C.App. 560 (1999) the defendant, in a pretrial motion, moved the court to “define the role of standby counsel.” Defendant argued standby counsel could conduct any portion of the trial at defendant’s request without such action disqualifying defendant from further representing himself.

At pages 562 and 563, the opinion sets forth the trial judge's ruling:

"...as far as standby counsel is concerned, that the standby counsel will not make any statement in front of the jury. That is, standby counsel will not make a closing statement; standby counsel will not argue any objections or motions in front of the jury; standby counsel will not conduct jury voir dire."

"...as it pertains to non-jury matters, for example, outside the presence of the jury at the request of Mr. Thomas if he sees fit, standby counsel may be allowed at Mr. Thomas' request to stand and argue questions of law with regard to, for example, positions on motions..."

"So anything outside the presence of the jury, for example, Mr. Thomas, if a legal issue arises and you feel more confident having...Mr. Braswell stand on your behalf if you see fit, you may ask him to do it in your behalf if you so desire. I'm not going to ask him to do it for you. That's going to be my position."

NOTE: A defendant has only two choices, to appear pro se or by counsel. A defendant is not entitled to "hybrid" representation, i.e., to appear both pro se and by counsel. See page 565.

In addressing the question of the role of standby counsel the Court of Appeals cited McKaskle v. Wiggins, 465 U.S. 168 (1984) to the effect that "...a defendant's right to conduct his own defense requires that he 'be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial. And further, "...Participation by counsel with a pro se defendant's express approval is, of course, constitutionally unobjectionable. A defendant's invitation to counsel to participate in the trial obliterates any claim that the participation in question deprived the defendant of control over his own defense. Such participation also diminishes any general claim that counsel unreasonably interfered with the defendant's right to appear in the status of one defending himself."

In this case, where the defendant argued that allowing standby counsel to participate constituted impermissible “hybrid” representation, the Court noted and held that:

“As to the standby counsel’s participation in the trial, the record shows that such involvement occurred either when the jury was absent from the courtroom or at bench conferences outside of the jury’s hearing. Of primary importance however is that in all instances, defendant expressly requested the assistance of the standby counsel.” and “Insofar as the standby counsel participated only “when called upon” by defendant and in a manner that was not at odds with defendant’s right to conduct his own defense...we hold that the trial court did not err in permitting such participation.”

d) Rule of Thumb:

Except for the least serious of misdemeanors always appoint standby counsel. If for no other reason than the possibility that a pro se defendant may become so disruptive that his removal from the courtroom may become necessary.

e) At every opportunity I revisit the waiver of counsel issue and actively attempt to talk the pro se into accepting court-appointed counsel.

f) Be especially careful when a probationer wishes to waive counsel – it could be because there is a deal [i.e. a recommendation/agreement] between the probationer and the probation officer.

III. Pro Se Litigants – Civil Matters within the jurisdiction of the Superior Court

a) My Definition of Pro Se: A person, either a plaintiff or defendant, who appears in a civil action without an attorney or a person who seeks to sue as an indigent (i.e. usually a prison inmate).

b) See N.C.G.S. 1-110 as to the procedure, duties and responsibilities of the Clerk of Superior Court and judge when a pro se seeks to proceed as an indigent.

Section (b) of this statute addresses inmates’ suits and requires a judge to

review the complaint and determine if it is frivolous. If the judge so finds, the complaint may be dismissed.

#### IV. The Pre-Filing Injunction i.e. The Gatekeeper Order

a) Definition – A gatekeeper order is an order entered after a hearing and in response to a Rule 11 Motion for Sanctions in which order the Court imposes as a sanction or one of several sanctions limitations or restrictions upon a litigant’s access to the court or courts.

b) Procedure –

1) Notice and an opportunity to be heard

The record must reflect that notice was given and that a gatekeeper order is being sought. The order should reflect these as findings of fact.

2) Create an adequate record for appellate review

It is suggested that the record should include a listing of all the cases and motions that led the court to conclude the gatekeeper order was needed, that the record show that the pro se litigant’s activities were numerous or abusive, and that the record be sufficiently developed to show that the judicial system is being or has been abused.

c) Form of Order –

1) Findings of fact –

a) specific to the situation before the Court

b) very detailed – cannot be too many

c) incorporate findings/rulings from prior filings of the same lawsuit or from separate lawsuits

d) specific finding of fact that the pro se litigant’s actions were either frivolous or harassing

“At the common law, the term referred to a claim or defense so palpably lacking in legal support as to require no argument or presentation. A better definition in the modern context, judging from the array of such actions, is that

‘frivolous’ is essentially equivalent to ‘ridiculous’.” Ruth v. Congress of the United States, 71 F.R.D. 676 (D.N.J. 1976)

- e) “As our prior cases have indicated, the district court, in determining whether or not to restrict a litigant’s future access to the courts, should consider the following factors: (1) the litigant’s history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant’s motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties. Ultimately, the question the court must answer is whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties.” Safir v. United States Lines Inc., et al., 792 F.2d. 19 (2<sup>nd</sup> Cir. 1986)

2) Conclusions of Law – i.e. basis of authority for the order

a) Violation of Rule 11 –

- 1) order must have sufficient findings of fact and conclusions of law to meet the general requirements for imposition of a Rule 11 sanction
- 2) re: improper purpose. See Mack v. Moore, 107 N.C.App. 87 (1992) at page 93

“For example, an improper purpose may be inferred from “the service or filing of excessive, successive, or repetitive [papers]. . .,” from “filing successive lawsuits despite the res judicata bar of earlier judgments,” . . . from “the filing of meritless papers by counsel who have extensive experience in the pertinent area of law” . . .from “continuing to press an obviously meritless claim after being specifically advised of its meritlessness by a judge or magistrate” . . .

- 3) motion for Rule 11 sanctions must be timely made (i.e. within a reasonable time after impropriety discovered)

b) Inherent power of the Court –

- 1) “Inherent power is that which the court necessarily possesses irrespective of constitutional provisions. Such power may not be abridged by the legislature. Inherent power is essential to the existence of the court and the orderly and efficient exercise of the administration of justice. Through its inherent power the court has authority to do all things that are reasonably necessary for the proper administration of justice.” Beard v. N.C. State Bar, 320 N.C. 126, 129 (1987)

“The court has the inherent authority to do what is reasonably necessary for the proper administration of justice.” Beard at 130.

- 2) Ends of justice and failure to respect the authority of the courts – In Lee v. O’Brien, 151 N.C.App. 748 (2002), an unreported opinion, the parties were neighbors who sued in District Court pro se. After a jury trial, the trial judge granted a permanent injunction against the plaintiff in part as follows:

“6) From filing any civil actions, criminal complaints or magistrate summons against anyone in Wake County, without the prior written approval of a District Court Judge of Wake County[.]”

Held: No error because:

“The trial court found that plaintiff had initiated multiple civil and criminal actions solely for the purpose of harassment and that “Plaintiff will continue to engage in such actions and that the ends of justice will not be served by the unfettered filing of such actions by the Plaintiff.” It further found that, by continually violating orders and injunctions already in place, plaintiff has failed and will continue to fail to respect the authority of the

courts. Based on the facts and circumstances present in this case, we find the trial court's permanent injunction and restraining order does not deny plaintiff access . . . to the courts."

- 3) CAUTION: If you contemplate relying solely upon either basis, (a) or (b), review In Re Alamance County Court Facilities, 329 N.C. 84 (1991)

"Even in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body, nor may it violate the constitutional rights of persons brought before its tribunals. Furthermore, doing what is "reasonably necessary for the proper administration of justice" means doing *no more* than is reasonably necessary." In Re Alamance at page 99

"No procedure or practice of the courts, however, even those exercised pursuant to their inherent powers, may abridge a person's substantive rights."

"The commissioners were served with notice of the hearing and informed of their rights to be represented by an attorney and to present evidence. In response to motions filed by the commissioners, however, the court stated that the movants lacked standing, as they were not parties to the action. "[I]n order that there be a valid adjudication of a party's rights, the latter must be given notice of the action and an opportunity to assert his defense, and he *must be a party to such proceeding*." In Re Alamance at 107 and 108

c) Discretion of the Court –

d) Scope of the order –

- 1) Narrowly tailored to address the perceived abuse

In De Long v. Hennessey, et al., 912 F.2d 1144 (9<sup>th</sup> Cir. 1990) a prefiling order provided:

"Plaintiff Steven M. De Long is hereby enjoined from filing any further action or papers in this court without first obtaining leave of the general duty judge of this court."

Held: Overly broad, discretion abused, and order vacated:

“The order has no boundaries . . . orders restricting a person’s access to the courts must be based on adequate justification supported in the record and narrowly tailored to address the abuse perceived. We find such care is demanded in order to protect access to the courts, which serves as the final safeguard for constitutional rights.

- 2) To the contrary, see Armstrong v. Koury Corp., 16 F. Supp.2d 616 (M.D.N.C. 1998). In this case Judge Osteen issued an injunction which provided in part:

“1. The court enjoins Plaintiff, or anyone acting on his behalf, from filing any action in any court, state or federal, against Koury Corporation, or any agent, employee or assignee of Koury Corporation, without first obtaining leave of this court;

2. The court enjoins Plaintiff, or anyone acting on his behalf, from filing any new action or proceeding in any federal court, without first obtaining leave of that court;

3. The court enjoins Plaintiff from filing any further papers in any case, either pending or terminated, in the Middle District of North Carolina without first obtaining leave of court.”

Held: Affirmed, 168 F.3d 481 (4<sup>th</sup> Cir. 1999)

e) The Gatekeeper –

- 1) Judge –

A limitation or restriction that a pro se litigant must seek and obtain prior leave of court before instituting suit or filing pleadings has been upheld in Virginia, Georgia, New Jersey, and Ohio.

- 2) Clerk of Court –

“. . .to refuse to accept any submissions for filing except petitions for leave of court, unless such filings are accompanied by an order of this court granting leave. In the event that Plaintiff succeeds in filing papers in violation of this order, upon such notice, the clerk of court shall, under authority of this court order, immediately and summarily strike the pleadings or filings.”

Judge Osteen further provided that “Leave of court shall be forthcoming upon Plaintiff’s demonstrating through a properly filed motion, pursuant to Local Rule 7, MDNC, that the proposed filing: (1) can survive a challenge under Rule 12 of the Federal Rules of Civil Procedure; (2) is not barred by principals of issue or claim preclusion; (3) is not repetitive or violative of a court order; and (4) is in compliance with Rule 11 of the Federal Rules of Civil Procedure.

The court **ORDERS** Plaintiff to attach a copy of this order and injunction to any such motion for leave of court.”

3) Attorney –

a) In Kondrat v. Byron, 63 Ohio App.3d 495 (1989), the following restrictions on a pro se litigant’s future filings against the named defendants were affirmed:

No future filings unless “(A) The offered filing carries with it the signature of an officer of the Court of Common Pleas of Lake County, Ohio, which signature is in compliance with Rule 11 Ohio Civil Rules of Procedure, or (B) The offered filing is first submitted to a judge of the Common Pleas Court of Lake County, Ohio, for that judge to make an independent determination that the subject matter of the offered case does [not] arise out of and/or is not a duplication of the same or similar issues previously raised in prior cases filed by Robert J. Kondrat and that such action is properly venued[.]”

b) To the contrary, see In Re Lawsuits of Anthony J. Carter, 235 Ga.App. 551 (1998) In this case the following limitation was imposed:

“ . . . that the clerk of court “shall not file any law suit brought by, or on behalf of Anthony J. Carter unless same is signed by a member in good standing of the State Bar of Georgia who shall certify that the complaint sets out [sic] a prima facie case upon which some relief could be granted.”

Held: Vacated because the order. . .

“ . . . requires Carter to hire an attorney in order to gain access to the court for any claim, legitimate or not, and in effect delegates to that attorney, at least preliminarily, what

should otherwise be the judicial task of determining frivolousness or maliciousness. It creates a conclusive presumption that, regardless of its content, a suit filed by Carter pro se constitutes harassment. So the order prejudices the case and denies process altogether, much less due process, unless Carter as plaintiff relinquishes his constitutional right to self-representation. In other words, it indiscriminately interdicts all suits by Carter when he seeks to invoke his right of self-representation.”

- 4) Pro se litigant enjoined from appearing pro se except as a pauper –
- a) In Kreager v. Glickman, et al., 519 So.2d 666 (1988) the District Court of Appeal of Florida, Fourth District held the following restrictions supported by Florida case law:
- “a. While this court may not speak for other divisions as that is a matter for each such judge or the Chief Judge to determine upon petition, Mr. Kreager shall not further appear in this division pro se. Any further appearance by Mr. Kreager shall be only through an attorney admitted to and in good standing with the [sic] Florida Bar, which attorney shall be responsible for the consequences of his or her filings on behalf of Mr. Kreager.
- c. Mr. Kreager shall not proceed in forma pauperis in this division unless and until he has complied with the statutory requirements regarding affidavits of indigency.”
- b) In Board of County Commissioners, et al. v. Winslow, 862 P.2d 921 (1993) the Supreme Court of Colorado itself entered the following injunction: “. . .(Winslows) are hereby enjoined from appearing pro se in any state court and from further appearing pro se in any state court action now pending in which they seek affirmative relief. With respect to cases now pending, respondents are ordered to arrange for the appearance of legal counsel authorized to practice law in the courts of this state within forty-five days from the issuance of this opinion. In the event that respondents fail to enlist the aid of counsel, respondents’ requests for affirmative relief shall be dismissed with prejudice.” NOTE: This restraint did not prevent the Winslows from appearing pro se as defendants.

