

Civil Pro se Litigants

Allen Baddour
Resident Superior Court Judge, District 15B
October 2010

Top 10 Rules for Successfully Managing Pro Se Litigation

- 1. Read the file.** Pro se litigants may miss something critical in the file. Does the file contain proof of service on the Defendant? Did the Defendant file something that should be treated as an Answer, even if not served on Plaintiff?
- 2. Be patient.** These cases will often take longer, whether you are dealing with a pre-trial motion, or with the trial itself. *Judicial Canon 3(A)(3)*.
- 3. Be nice.** There is nothing to gain from being aggressive with a pro se litigant. *Judicial Canon 3(A)(3)*.
- 4. Have no ex parte communications.** Do not accept phone calls, emails, tweets, smoke signals, or any other communication from a pro se litigant. Don't find yourself talking with a winning lawyer who you have asked to draft an order. Better yet, don't ask the winning lawyer to draft the order: prepare your own. A corollary: don't have off the record bench conferences or meetings in chambers, even with both sides present. *Judicial Canon 3(A)(4)*.
- 5. Stay safe.** There can be security issues with pro se litigants. Some pro se litigants tend to be... combative, and even unstable. Alert bailiffs and clerks if you anticipate an issue.
- 6. Be fair.** Your actions and statements can reward or harm one side or the other. *Canon 1*. Telling a pro se litigant what to do, or even when to do something ("this is when lawyers usually ask for a directed verdict") may significantly affect the outcome.

7. Remember the Canons. You may wish to take a moment to re-read the North Carolina Code of Judicial Conduct at the start of every new term. (just like changing the batteries on your smoke alarm when daylight savings time begins and ends).

A couple of thoughts from the Canons:

- A judge should uphold the integrity and independence of the judiciary. *Canon 1.*
- A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. *Canon 2(A).*
- Adjudicative responsibilities.
 - (1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.
 - (2) A judge should maintain order and decorum in proceedings before him.
 - (3) A judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials and others subject to his direction and control.
 - (4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider ex parte or other communications concerning a pending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him.

From Judicial Canon 3(A).

{and so... careful with the private listserv!}

8. Remember the General Rules of Practice.

- Counsel are at all times to conduct themselves with dignity and propriety.
- All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to.
- Abusive language or offensive personal references are prohibited.

From Rule 12, North Carolina General Rules of Practice.

9. **Explain things.** Providing a roadmap to a pro se litigant can take time. So can trying to save a case from error when the pro se litigant does or says something in the presence of the jury. Consider how you want to navigate this before it is too late.

10. **But do not give advice.** Clearly. In case you want a rule to cite...

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(a) give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client; and

(b) 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.

N.C. Prof. Cond. Rule 4.3 (2010)

Pro se Litigants: Recent Civil Case Summaries

Pro Se Litigant: 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.

There are few North Carolina appellate decisions on civil pro se litigants, and most of them are unpublished, but it is clear that the appellate courts equally apply the rules of civil procedure to all parties whether they are represented by counsel. One reason there is so little case law of civil pro se litigants in the appellate cases is that the North Carolina courts have consistently held that the constitutional right to counsel applies only to criminal cases and that the right to counsel does not extend to civil proceedings. Additionally, since the litigants are pro se and typically fail to properly preserve issues for appeal, their case generally gets dismissed on procedural grounds. The reported decisions make it clear that pro se litigants themselves are held to certain minimum requirements.

In a recent North Carolina Supreme Court discussion of civil pro se litigants can be found in Brown v. Kindred Nursing Centers East, L.L.C., 364 N.C. 76, 692 S.E.2d 87 (15 April 2010). The question in this case is whether a pro se complaint alleging medical malpractice may be amended, through counsel, after the expiration of the two-year statute of limitations to include an expert certification as required by N.C.G.S. § 1A-1, Rule 9(j). The plaintiff, as administrator of his father's estate, filed a pro se action alleging negligence, wrongful death, and medical malpractice against defendants, health care providers, five days before the expiration of the applicable two-year statute of limitations, N.C.G.S. § 1-53(4). The NC Supreme Court held that Plaintiff's pro se complaint which did not follow the special pleading requirements of Rule 9(j) was properly dismissed by the trial court, where plaintiff filed a complaint five days before the statute of limitations expired and then moved for an extension to file the 9(j) statement. Furthermore, even though the limitations period can be extended for 120 days under Rule 9(j), this extension is for the limited purpose of filing a complaint; there is no language indicating that the time period can also be used to locate a certifying expert, add new defendants, and amend a defective pleading, as Plaintiff did here. In Justice Brady's opinion for the majority, he noted that although the Court recognized plaintiff initiated this medical malpractice action as a pro se litigant, it is well settled that the rules of civil procedure must be applied equally to all parties to a lawsuit, without regard to whether they are represented by counsel.

The Court of Appeals considered pro se litigants and Gatekeeper Orders in Estate of Dalenko v. Monroe, N.C. Ct. of App., No. COA08-844 (19 May 2009), an unpublished opinion. This appeal is the most recent of a series of lawsuits instituted by Ms. Dalenko, as a pro se litigant, against various defendants, including numerous judges, on behalf of herself, her father, or the Dalenko Estate. Ms. Dalenko, acting pro se, was appealing the dismissals of claims she filed in her capacity as executrix of the Dalenko Estate. These dismissals were in part based on Ms. Dalenko's failure to comply with the Gatekeeper Order entered in 2001, which prohibited her from filing any document with the Wake County clerk's office without a certificate by a lawyer that the lawyer had read the document, that the document complied with Rule 11, and that the lawyer had read the Gatekeeper Order. In the instant case, Ms. Dalenko argued that the Gatekeeper Order should not apply here because it was not intended to apply outside the case in which it was entered and that, if so applied, the order would violate Rule 65(d) of the North Carolina Rules of Civil Procedure, which states that injunctions are binding only on parties, their lawyers and others in active concert or participation with them. The Court of Appeals, however, disagreed and rejected her arguments, stating, among other things, that there was no violation of Rule 65(d) since Ms. Dalenko was a party to the action in which the Gatekeeper Order was entered even if the defendants in her newest lawsuit were not. Therefore, Ms. Dalenko was required to follow the Gatekeeper Order which required her to obtain a Rule 11 certification from an attorney before filing her pro se complaint.

Wade v. Carolina Brush Manufacturing Co., 187 N.C. App. 245, 652 S.E.2d 713 (2007)

The claimant injured her hand while working for the defendant, employer. She later filed a claim for workers' compensation benefits. After a chief deputy commissioner found that she was not entitled to such benefits, her attorney thereafter moved to withdraw from representation, and she filed a pro se notice of appeal with the North Carolina Industrial Commission (Commission). Despite being advised to do so, she filed neither the proper form for appealing nor a brief with the Commission. The employer and insurer requested dismissal because of her failure to file the proper form, a brief, or for an extension of time, but the Commission denied the request. The Commission found that the claimant's failure to comply with the particularity requirement, which requires appellants to state with particularity the grounds for appeal, could be excused in the 'interest of justice' since she lacked representation. It then entered an opinion and award in her favor. The Court of Appeals held that the Commission's invocation of the 'interest of justice' provision in the context of the claimant's total failure to comply with the particularity requirement was an abuse of discretion. Therefore, in light of claimant's 'pro se status,' the penalty for non-compliance with the particularity requirement is waiver of the grounds, and, where

no grounds are stated, the appeal is abandoned. The Court of Appeals did, however, note that pro se litigants who failed to strictly comply with the particularity requirement can be granted 'interest of justice' relief, but not pro se litigants, who like the claimant, completely failed to comply with the particularity requirement.

Harrison v. Harrison, 180 N.C. App. 452 (2006) – while recognizing the difficulties faced by a pro se litigant, the Court held that pro se litigants are required to meet minimal standards of compliance with the Rules of Civil Procedure in fairness to opposing parties. Though not unsympathetic to the difficulties faced by a pro se litigant, the Court recognized that fairness to opposing parties requires holding pro se litigants to minimal standards of compliance with the Rules of Civil Procedure.

In Shwe v. Jaber, 147 N.C. App. 148, 555 S.E.2d 300 (6 November 2001), the buyer of restaurant business brought action against the seller (pro se litigant) for fraud, conversion, unfair practices, and breach of contract arising out of the sale of a restaurant business and sublease of the premises. The buyer attempted to serve the seller with process at several locations before personally serving at the seller's employer's address. The buyer also served his requests for admissions at the same address via mail. After the seller failed to answer the complaint and discovery requests, the buyer filed a motion for summary judgment. The seller appeared pro se for the summary judgment hearing. The trial court granted partial summary judgment for conversion, unfair practices, and breach of contract and awarded damages in the buyer's favor based on seller's failure to answer buyer's discovery requests. After the trial court's order for partial summary judgment, the pro se seller filed motions for relief under Rules 59 and 60 of the North Carolina Rules of Civil Procedure, in which he denied that he had been served with discovery requests or the motion for summary judgment. The seller's motions for relief were denied. On appeal, the seller argued various grounds, including that the trial court should have taken into account that defendant was acting pro se at the time the partial summary judgment was entered and therefore should have been more inclined to allow defendant to withdraw his admissions. The Court of Appeals, however, rejected his arguments, saying, among other things, that our Supreme Court has stated that the rules of civil procedure must be applied equally to all parties to a lawsuit, without regard to whether they are represented by counsel.

A sample "gatekeeper" order

NORTH CAROLINA
CHATHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

GERRY THOMAS PEEK,
Plaintiff,

v.

09 CVS 14

STATE OF NORTH CAROLINA,
G.K. HARRIS, and JEANETTE
EMERICK, Magistrates, JAMES
MICHAEL WATSON, KELLY WATSON,
SERGEANT DANIEL TILLEY,
CHATHAM COUNTY SHERIFF'S
OFFICE, CHATHAM COUNTY
SHERIFF RICHARD WEBSTER, and
PROSECUTOR KAYLEY TABER,
Defendants.

THIS MATTER came before the Court on March 27, 2009 at a mixed session of Superior Court in Chatham County upon defendants' Motions and Amended Motions for Sanctions. The plaintiff appeared *pro se*, and appearing on behalf of defendants State of North Carolina, G.K. Harris and Jeanette Emerick, Magistrates, and Prosecutor Kayley Taber was David J. Adinolfi, II, Special Deputy Attorney General; appearing on behalf of defendants Chatham County Sheriff's Office, Sheriff Richard Webster, and Sgt. Daniel Tilley was James D. Secor, III; and appearing on behalf of defendants James M. Watson and Kelly Watson was Robert Gunn.

The Court has considered the full record in this case, including a review of the pleadings and other documents filed in this case and the arguments and submissions of all parties. Both sides were given an opportunity to be heard on the issues of sanctions, specifically defendants' request for a pre-filing injunction and for attorneys fees. Based on its consideration of the matters noted above, the Court concludes that it has the requisite jurisdiction to address the matters presented in the Motions. Prior

to the entry of this Order, the Court considered and rejected alternative, lesser sanctions. The Court relies on the North Carolina Rules of Civil Procedure and the inherent authority and power of the Court reasonably necessary to assure the proper administration of justice.

Based on consideration of the record proper, the Court makes the following FINDINGS OF FACT:

1. On December 8, 2008, the plaintiff filed a document titled "Specific Affidavit of Negative Averment, Opportunity to Cure and Counterclaim" in an unrelated Chatham County Estates case (07 E 466).
2. On January 7, 2009, the Chatham County Clerk of Superior Court established a Civil Superior Court file for plaintiff's filing, which began the above captioned matter.
3. Also on January 7, 2009, at least some defendants filed a motion to dismiss and answer in response to plaintiff's filing.
4. On January 23, 2009, plaintiff filed a document titled, "Demand for Payment."
5. On February 3, 2009, plaintiff filed a document titled, "Second Demand for Payment."
6. None of the plaintiff's filings complied with the North Carolina Rules of Civil Procedure, in that none of the filings contained a claim upon which relief could be granted, and none were properly served upon the defendants.
7. On February 26, 2009, all named defendants put forth motions to dismiss and motions for sanctions.
8. The undersigned granted the motions to dismiss, but declined to sanction plaintiff for his filings to that point. In open court, with plaintiff present, the undersigned did indicate to plaintiff that any further documents filed that were not legally or factually sufficient, or that were filed for an improper purpose, may subject plaintiff to sanctions, including a pre-filing injunction and attorneys fees.
9. In early March, 2009, plaintiff attempted to serve upon the defendants another document, this one titled "Final Demand for Payment."

10. All four of plaintiff's documents described above were signed by plaintiff.
11. The claims contained in the plaintiff's documents were frivolous, not well-grounded in fact, and were not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.
12. Plaintiff's documents and filings were served or filed for the improper purposes of harassing defendants and unnecessarily increased the cost of litigation.
13. James D. Secor III, has been a licensed practicing attorney in the State of North Carolina for more that eighteen years. His billable hourly rate is \$120.00, which the court finds is reasonable and in accordance with customary practice of other North Carolina attorneys with similar experience. Mr. Secor spent 2.5 hours preparing for and arguing this motion, which the Court finds to be a reasonable amount of time.
14. Robert Gunn has been a licensed practicing attorney in the State of North Carolina for over thirty years. Paul Messick has been a licensed practicing attorney in the State of North Carolina for at least twenty years. They are partners in a law firm, and the billable hourly rate is \$200.00, which the court finds is reasonable and in accordance with customary practice of other North Carolina attorneys with similar experience. Mr. Gunn and Mr. Messick spent 5 hours preparing for and arguing this motion, which the Court finds to be a reasonable amount of time.
15. David J. Adinolfini II, on behalf of his clients, did not seek recovery of attorneys fees as part of their motion for sanctions.

Based on the above findings of fact, the Court makes the following CONCLUSIONS OF LAW:

1. The claims contained in the plaintiff's documents are frivolous, are not well-grounded in fact, and are not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.
2. Plaintiff's documents and filings were served or filed for the improper purposes of harassing defendants and unnecessarily increased the cost of litigation.

3. Plaintiff's filings or service upon defendants of signed documents violate the provisions of Rule 11 of the North Carolina Rules of Civil Procedure.
4. The attorneys' hourly billable rate, and time spent on this case, were reasonable, and in accordance with customary practice of other North Carolina attorneys with similar experience.

NOW, IT IS, THEREFORE ORDERED, ADJUDGED AND DECREED that these Motions for Sanctions be **ALLOWED**. The Court **FURTHER ORDERS THAT**:

1. As it relates to the above named defendants, plaintiff is hereby enjoined from filing, or causing to be filed, any document with any Clerk of Superior Court in the State of North Carolina, without first obtaining leave of a Resident Superior Court Judge in the County where the plaintiff wishes to file the document.
2. As it relates to the above named defendants, plaintiff is hereby enjoined from serving, attempting to serve, or causing to be served on any defendant named above any unfiled document in any county or jurisdiction within the State of North Carolina, without first obtaining leave of a Resident Superior Court Judge in the County where the plaintiff wishes to serve one of the above named defendants.
3. Plaintiff shall seek leave of a Resident Superior Court Judge by mailing or delivering the document, with this ORDER attached, to the Superior Court Judges' Office.
4. Upon receipt of any document sent by or on behalf of plaintiff to the office of a Resident Superior Court Judge, the Judge shall determine if the plaintiff establishes that the proposed filing:
 - a. Is in compliance with Rule 11 of the N.C. Rules of Civil Procedure;
 - b. Can survive a challenge under Rule 12 of the N.C. Rules of Civil Procedure;
 - c. Is not barred by principles of issue or claim preclusion; or
 - d. Is not repetitive or violative of this or any other Court ORDER.
5. If the Court determines the plaintiff has failed to establish that the filing meets the requirements in Paragraph 4, the Court shall discard the filing without further notification to plaintiff or any other party.

6. The CLERK OF SUPERIOR COURT OF CHATHAM COUNTY is hereby ORDERED not to accept any document for filing or any other purpose from plaintiff as it relates to the named defendants unless it complies with this ORDER.
7. As it relates to the above named defendants, the Clerk of Superior Court of every other County in the State of North Carolina is hereby ORDERED not to accept any document for filing or any other purpose from plaintiff, unless it complies with this ORDER.
8. 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 Order, immediately and summarily strike the pleadings or filings.
9. The Court in its discretion further sanctions plaintiff for violations of Rule 11 by awarding attorneys fees in this matter in the amount of \$1300.00, which shall be divided as follows:
 - a. \$300.00 to defendants Chatham County Sheriff's Office, Sheriff Webster, and Sgt. Daniel Tilley
 - b. \$1000.00 to defendants James M. Watson and Kelly Watson
10. Plaintiff shall have 90 days from the date of this Order to comply with the monetary sanction.
11. Plaintiff shall not be in violation of this Order (and need not seek prior approval from the Court) if he mails a check or money order directly to the attorneys for the defendants listed in paragraph 7 above.

Entered in open court on the 27th day of March, 2009,
and signed this the ____ day of April, 2009.

Allen Baddour
Superior Court Judge Presiding