



**Faculty of Federal Advocates Presents:**

**Best Practices in Pro Se Party Litigation  
(Materials Attached)**

February 13, 2020 / 12:00 – 1:15pm

*Pro se litigation can be challenging for everyone involved. Pro se litigants are to be held to the same standards as lawyers but may struggle with the complexities of federal court litigation. Judges and opposing attorneys may struggle to find an appropriate balance between holding pro se parties accountable to applicable rules and procedure and affording them a measure of leeway since they are unrepresented. This panel will offer perspectives from all sides and insight into best practices for giving these cases their best opportunity to move forward as smoothly as possible.*

Panel:

**Leslie Kelly, Esq.**  
Project Attorney  
Colorado Bar Association  
Federal Pro Se Clinic

**Caitlin McHugh, Esq.**  
Partner  
Lewis Roca Rothgerber  
Christie LLP

**Hon. S. Kato Crews**  
U.S. Magistrate Judge  
District Court, Colorado

Moderator:

**Daniel Graham, Esq.**  
Counsel  
Perkins Coie LLP



## FEDERAL PRO SE CLINIC

### I. The Federal Pro Se Clinic: What We Are and What We Do

- The Clinic was established in 2018 by the Colorado Bar Association in coordination with the U.S. District Court for the District of Colorado.
- We are open 9am-5pm, Monday through Friday. The Clinic is located at the Alfred A. Arraj Courthouse (901 19<sup>th</sup> Street) and is next to the Clerk’s office on the main floor.
- Staff and volunteer lawyers provide limited scope legal assistance by appointment to civil, non-prisoner, pro se parties. See D.C.COLO.LAttyR 2(c) (“An attorney may provide short-term limited legal services through the Federal Pro Se Clinic (“FPSC”) subject to the standards of conduct adopted by the FPSC.”). We do not assist with bankruptcy or criminal matters, or with appeals.
- The Clinic helps litigants at all phases of their cases. For example, we advise on claim formulation, responding to motions, amending complaints, filling in proposed scheduling orders, and discovery issues. We do not enter appearances or represent pro se litigants in court, mediation, or status conferences; and we do not draft pleadings or briefs.
- Before using our services, a pro se litigant enters into a written agreement consenting to limited scope representation.

### II. Who Is Proceeding Pro Se in Civil Cases at the U.S. District Court for the District of Colorado?

U.S. District Court for the District of Colorado Statistics for 12-month period ending September 30, 2019	
Total Civil Cases Filed	3,637
Total Pro Se Civil Cases Filed	1,208
Total Prisoner v. Non-Prisoner Pro Se Civil Cases Filed	821 v. 387
Total Civil Cases with Pro Se Plaintiffs v. Cases with Pro Se Defendants	1,164 v. 40  (in 4 cases, both parties are pro se)

- Case types: ~35% Employment Discrimination, ~35% Civil Rights, and 5% Consumer Credit. The remaining cases involve a variety of diversity jurisdiction claims (e.g., breach of contract and tort) and Social Security appeals.
- The majority of litigants proceed *in forma pauperis*; most cannot afford counsel.
- Pro se litigants represent every walk of life. Every litigant is unique.

### **III. Other Things to Keep in Mind**

- Getting to know the pro se litigant in your case will be a plus.
- Our adversary system and the notion of zealous advocacy are premised on the idea that both sides are well represented. See, e.g., Colo. RPC Preamble, para. 8 ("A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."). Not only are pro se parties unrepresented, almost all lack meaningful access to representation.
- In addition to fulfilling all one's ethical duties (e.g., candor toward the tribunal and truthfulness), reasonableness is a good guiding principle when deciding what positions to take before the court.

### **IV. Last Thing...**

- The Clinic loves (and needs) volunteers! If you are interested in a pro bono volunteer opportunity that works for a busy schedule, please contact Jessica Harner at 303-380-8786.

## **TEN CONSIDERATIONS IN PRO SE LITIGATION**

**by U.S. Magistrate Judge S. Kato Crews**

**February 2020**

1. A *pro se* litigant's pleadings should be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). But it is improper for the court to assume the role of advocate for the *pro se* litigant.

2. Despite the liberal construction afforded *pro se* pleadings, courts will not construct arguments or theories for a *pro se* party by supplying additional facts or constructing legal theories that assume facts never pleaded. *Dunn v. White*, 880 F.2d 1188, 1197 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990).

3. *Pro se* litigants should be afforded deference in the form of “[o]ccasional allowances by the court for honest mistakes [which] provide leeway for plaintiffs who are not trained in the law and do not have representation. This deference, though, should be balanced with potential abuse ... and constant delays in the judicial system.” *Brewer v. DKD Elec. Co.*, Civ. No. 02-0407 LH/RLP, 2004 WL 6218811, at \*2–3 (D.N.M. June 14, 2004); *see also Wallin v. Sygma Network*, No. 18-cv-01097-DDD-SKC, 2019 WL 6702066 (D. Colo. Nov. 18, 2019), report and recommendation adopted, No. 18-cv-01097-DDD-SKC, 2019 WL 6700434 (D. Colo. Dec. 9, 2019).

4. Most *pro se* litigants are intimidated by lawyers. Be kind. Be patient. As officers of the court and of the legal system, lawyers have an affirmative obligation to treat *pro se* litigants (and all litigants) with respect and professionalism. *See, e.g.*, attached summary of applicable Colorado Rules of Professional Conduct.

5. Your role as counsel of record and as an officer of the court is to manage litigation in a manner “to secure the just, speedy, and inexpensive” determination of litigation. Fed. R. Civ. P. 1. “Traditional” litigation and discovery tactics may be unnecessary and less effective with a *pro se* litigant and may only serve to exacerbate issues in the case.

6. Avoid overuse of legalese. Using words a layperson can understand may aid the *pro se* litigant’s understanding of your arguments and the pertinent issues, and could lead to a more focused and coherent response from the *pro se* litigant. This benefits everyone.

7. File a response to a *pro se* litigant’s paper even if you’re not sure how to respond. Your response might simply be to tell the court that you’re uncertain of how to construe the filing, or that you don’t believe the filing requires a response, but nevertheless you oppose the relief sought. No response may confuse the *pro se* litigant into believing she prevailed because no response was filed. Also, without a response the motion may fall through the cracks if the court is waiting on a response before taking up the matter.

8. Request a status conference with the court whenever things seem to be going south. These conferences afford the court an opportunity to explain things to the *pro se* litigant and reset and reiterate expectations, obligations, and requirements.

9. Don't shy away from trying to settle these cases with the assistance of a third-party. *Pro se* litigants may start with highly unrealistic expectations of what a victory or settlement should look like. A third-party can reset those expectations with a dose of reality that aids in settling the case.

10. Don't construe the several chances a court might afford a *pro se* litigant as the court favoring that party or advocating for them. With the significant challenges *pro se* litigants face, some judges may make decisions to ensure that these litigants get a fair opportunity to present their case so that justice might be done. But all judges have their limits in affording such leeway. See, *supra* ¶3.

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**COLORADO RULES OF PROFESSIONAL CONDUCT<sup>1</sup>  
IMPLICATED IN *PRO SE* LITIGATION**

**Rules of Prof.Cond., Rule 4.1  
RULE 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 to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

**Rules of Prof.Cond., Rule 4.3  
RULE 4.3. DEALING WITH UNREPRESENTED PERSON  
Effective: December 1, 2019**

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.

**Rules of Prof.Cond., Rule 4.4  
RULE 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS  
Effective: December 1, 2019**

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

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**Rules of Prof.Cond., Preamble  
PREAMBLE: A LAWYER'S RESPONSIBILITIES**

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

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<sup>1</sup> With limited exceptions, the Colorado Rules of Professional Conduct have been adopted as standards of professional responsibility for the U.S. District Court and the U.S. Bankruptcy Court for the District of Colorado. See D.C.COLO.LAttyR 2.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

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[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.<sup>2</sup> . . .

[9] . . . Zealousness does not, under any circumstances, justify conduct that is unprofessional, discourteous or uncivil toward any person involved in the legal system.

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<sup>2</sup> This is a curious statement because it suggests that caution is warranted to ensure justice is being done when an opposing party is **not** represented by counsel.