Arkansas Association of Defense Counsel

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DEFENDING AGAINST A *PRO SE* PLAINTIFF

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The number of cases filed by *pro se* plaintiffs are surprisingly high, especially in Arkansas. According to the Federal Courts Statistics Division, for the 12-month period ending September 30, 2015, United States District Courts reported a total of 73,745 *pro se* cases filed out of the total 279,036 civil cases filed. *See* Administrative Office of the United States Courts, Table C-13: Civil *Pro Se* and Non-*Pro Se* Filings, By District, During the 12-month Period Ending September 30, 2015, available at http://www.uscourts.gov/statistics/table/c-13/judicial-business/2015/09/30. That means, approximately twenty-seven percent (27%) of cases filed in Federal District Court are by *pro se* plaintiffs. In the State of Arkansas, a total of 3,070 civil cases were filed in either the Eastern or Western District Courts, with 1,411 of those cases being *pro se*. That's approximately forty-six percent (46%) of civil cases that are filed *pro se*.

With such a high number of cases being filed *pro se*, defense attorneys are bound to be tasked with defending their client against a *pro se* sometime in their careers. While not all encompassing, this article seeks to provide you with a few legal and practical tips on how to defend a lawsuit against a *pro se* plaintiff.

NEVER UNDERESTIMATE A *PRO SE*

Most *pro se* plaintiffs lack a formal legal education or even a general understanding of the legal system and its rules and procedures. However, that does not mean you should underestimate a *pro se*. Not only do *pro se* litigants have significant time to devote to the litigation, either due to the fact that they are incarcerated or that this may be their only case, but some *pro se* litigants may have assistance from an experienced attorney, non-profit organization, or the so called "jailhouse lawyer." With that being said, the first thing I do when I receive a Complaint filed by a *pro se* litigant is do some research on them.

Researching the pro se

1) Check Arkansas's Administrative Office of the Courts CourtConnect website. Has the *pro se* been involved in previous litigation in state court? This may tell you how much experience the *pro se* has in litigating, whether the pro se has refiled a previously dismissed claim (*res judicata*), and criminal charges brought against the *pro se*.

2) Check the federal electronic case filing (ECF) dockets. Again, this may be useful to tell you whether the plaintiff has filed similar or identical cases in other jurisdictions, how much experience they have in litigating, and whether the *pro se* should be permitted to proceed *in forma pauperis* (IFP). You may discover, as I did, that a *pro se* plaintiff received a substantial judgment or settlement in another case, yet has requested IFP status in your case. If this happens, I recommend letting the Court know that you believe that the *pro se* may be misleading the Court about their financial situation and let the Court investigate further.

3) Sometimes I even go as far as to check to see if they have any social media pages, like Facebook. I have had a *pro se* post Facebook statuses regarding the litigation, pictures of themselves in a motor vehicle when they are alleging that they are terrified to drive, or even posting pictures of themselves at work when they claim that they are unemployed and unable to find a job.

Researching the *pro se* can be particularly important when they are incarcerated, given the

Prison Litigation Reform Act of 1995 (PLRA), which states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C § 1915(g). Thus, if the prisoner has 3 or more prior dismissals based on Fed. R. Civ. P. 12(b)(6) or the frivolous nature of the claims, they will be prohibited from bringing the action against your client. Therefore, just a little bit of research could result in an easy dismissal for your client.

YOU'VE RECEIVED THE COMPLAINT, NOW WHAT?

Obviously, the first thing you should do upon being notified that your client has been served with a complaint, is to make sure that the complaint was filed properly. *Pro se* litigants often times serve complaints without filing them. Additionally, make sure the complaint was served properly. While a court is likely to overlook defects in service if your client received actual notice, it's prudent to still raise the defense of insufficient service of process.

Next, you should review the complaint for any pleading defects. *Pro se* complaints are difficult to read. Not only do they contain misspellings and poor grammar, but often times they are incomprehensible and do not spell out what it is they are claiming that your client allegedly did or what laws they allege your client violated. Most courts will interpret a *pro se* litigant's pleading liberally and, in some cases, will even advise them of the defects in their pleadings and give them the opportunity to amend their complaint. Specifically, in civil actions in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity, courts do a preservice screening under the provisions of the PLRA and reviews the complaint to determine whether the causes of action stated 1) are frivolous or malicious, 2) fail to state claims upon which relief may be granted, or 3) seek monetary relief against a defendant who is immune from such relief. *See* U.S.C. §§ 1915(e)(2)(B) & 1915(A).

If you believe that plaintiff's complaint contains pleading defects, do not immediately file a motion to dismiss. While a judge might grant your motion to dismiss, it will most likely be without prejudice, allowing the plaintiff to amend and refile the complaint. An alternative is to file a motion for more definite statement. By taking this route, the court is likely to order and provide direction to the pro se plaintiff in an attempt to get a more intelligible claim. And if plaintiff does not comply, a court is more likely to grant a motion to dismiss.

If a *pro se* plaintiff has filed the complaint in state court, but you are able to remove to federal court based on federal question or diversity jurisdiction, it may be wise to do so. While not always true, I've found that federal courts are better equipped to handle *pro se* litigants, as they often have *pro se* law clerks to provide guidance to the *pro se* and facilitate the process.

Finally, it's also important to communicate to your clients the difficulties involved with *pro se* litigants. Most clients being sued by *pro se* litigants wonder why we can't just make this go away quickly, especially if there is no validity to the claims. Be sure to inform them that the court is likely to be lenient with a *pro se* plaintiff and that we must be patient.

DEFENSE STRATEGIES

As previously mentioned, federal courts tend to be better equipped to handle *pro se* litigants. While each judge and court have their own procedures for the litigation process with a pro se litigant, typically the Eastern and Western District Courts adhere to the following:

Eastern District[1]

If the *pro se* litigant is incarcerated, the court will most likely only issue an initial scheduling order containing a discovery deadline and a dispositive motions deadline. Once a defendant has filed their motion for summary judgment, the court will typically mail a questionnaire to the *pro se* plaintiff guiding them through the defendant's motion, and asking them to respond to the claims or defenses.

If the *pro se* litigant is **not** incarcerated, the court will most likely issue a full scheduling order with a trial date.

Western District[2]

If the *pro se* litigant is incarcerated, the court will most likely only issue an initial scheduling order containing a deadline for initial disclosures, a discovery deadline, and a deadline for dispositive motions. Additionally, the initial scheduling order will typically have a motion for summary judgment hearing date. The Western District does not require a *pro se* litigant to respond to a motion for summary judgment by filing a response when the *pro se* is incarcerated. Rather, the court will hold a hearing where the court guides the plaintiff through the defendant's motion, and allows the plaintiff to orally respond to each claim or defense. Your clients do not need to be present for this hearing, and I would not recommend your clients be present (as that may open the door to them being called to testify by the plaintiff). Prior to the hearing, the court requires the plaintiff to provide the court with any documents they wish to use as exhibits at the hearing. In the months following the hearing, the court, if before a magistrate, will issue a report and recommendation to which the parties may object. The judge then decides whether the court will adopt the report and recommendation. If the case is not dismissed in the report and recommendation, then a scheduling order will be issued and you proceed to prepare for trial.

If the *pro se* litigant is **not** incarcerated, the court will typically issue a full scheduling order with a trial date.

While *pro se* litigants are required to know and comply with the procedures and rules of the court, judges are often times very lenient towards *pro se* plaintiffs. *Burgs v. Sissel*, 745 F.2d 526, 528 (8th Cir. 1984). The Western District of Arkansas even provides a "Prisoner Litigation Guide" and "Instructions for Filing Complaint by Prisoners" to plaintiffs filing a §1983 claim. *See* United States District Court, Western District of Arkansas, Prisoner Forms, available at http://www.arwd.uscourts.gov/prisoner-forms. More often than not, *pro se* litigants will cite to their lack of experience and understanding of the law or court rules and judges are likely to give *pro se* plaintiffs a few chances to get things right. Probably the best method in dealing with a *pro se* who is not abiding by the rules, not responding to discovery, or not meeting deadlines is to be understanding. Judges tend to appreciate attorneys who display understanding towards *pro se* litigants.

Often times the discovery process can be daunting to a *pro se* litigant and can result in their being unresponsive to written discovery requests. When the plaintiff does not respond to discovery requests, be sure to follow up with a good faith letter. Fed. R. Civ. P. 37(a)(1). If the plaintiff still does not respond, file a motion to compel. Fed. R. Civ. P. 37. If the plaintiff does not comply with a court order, you are then on solid ground to move to dismiss the case. Fed. R. Civ. P. 37(b(2)(A); Fed. R. Civ. P. 41(b). Another easy way to get a case dismissed in federal court is by filing a Motion to Dismiss for plaintiff's failure to provide their current address. In the Western District, Local Rule 5.5(c)(2) states that it is the duty of any party not represented by counsel to promptly notify the Clerk and the other parties of any change in address, and any if any communication from the Court to a *pro se* is not responded to within thirty (30) days, the case may be dismissed without prejudice. *See also* Fed. R. Civ. P. 41(b); *Brown v. Frey*, 806 F.2d 801, 803–04

[1] Each judge may have procedures that vary slightly from those mentioned herein.

[2] Each judge may have procedures that vary slightly from those mentioned herein.

(8th Cir. 1986) (a district court has the power to dismiss an action based on "the plaintiff's failure to comply with any court order").

Depositions are probably the most important tool to understand a *pro se* litigant's claims against your client. Many times, they just want someone to listen to their story. In that case, let them run with it and talk. I have even gotten lucky enough to have several plaintiffs state that their claims are not really against my client, but other co-defendants, which ultimately resulted in dismissal of my clients from the lawsuit. It's important to remember, however, that depositions of inmates cannot take place without the Court's leave. Rule 30(a)(2)(B).

In the rare case that the *pro se* plaintiff is not incarcerated and wants to take your client's deposition, be sure to remind your client to respond politely to plaintiff's questions and not to get frustrated with lengthy and often incomprehensible questions. It's important that your client does not lose their temper or appear condescending. The same goes for when they are testifying at trial and plaintiff is directing.

Finally, my advice is to get everything in writing. My experience with *pro se* litigants is that there tends to be misunderstandings, and sometimes, the *pro se* will even try to misrepresent a conversation you had with them to the court. To avoid this situation, memorialize verbal conversations by following up with a letter or e-mail. Also, assume that every letter or e-mail may one day appear on the judge's desk, so be courteous and thorough. The same goes for negotiating settlements. Reduce the settlement to writing as quickly as possible.

Litigating against a *pro se* plaintiff can be challenging, time consuming, frustrating, and burdensome. Courts tend to be lenient towards pro se litigants and often times provide extra help to facilitate the litigation process. It is your job to be patient and understanding and ultimately marshalling the evidence to present to the court in a way that illustrates the lawfulness of your client's conduct.

The AADC wishes to thank Jenna Adams of the Arkansas Municipal League for writing this article.

We welcome your articles and thoughts for future editions.

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