

## When And How To Communicate With Pro Se Litigants

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Representing oneself can be challenging, not only for the litigant, but also for the courts and other lawyers involved. Given the surprisingly large volume of pro se litigation in the United States, there will inevitably be times when you need to communicate with pro se litigants. Below are some important issues to consider when engaging in such communications.

### Do I Really Need to Have this Conversation?

We have found that communicating with pro se litigants tends to invite further, often more passionate, correspondence from the litigant. Moreover, engaging a pro se litigant is often a fruitless endeavor for a variety of reasons. That said, there are times when conferring with a pro se litigant may be beneficial.

For instance, you may obtain useful information related to the plaintiff's claim. Or you may be able to explain to a pro se litigant why your client is not a proper defendant to sue and persuade them to dismiss you from the case. There are also times when you have no choice but to communicate with a pro se litigant, such as when a court orders mediation.

Obviously, the decision of whether to communicate is one you need to evaluate on a case-by-case basis. But once you have made a decision that you are going to communicate with a pro se litigant, you need to be aware of the ethical rules governing such communications.

### Ethical Rules

Model Rule 4.3 addresses the ethics of communicating with unrepresented parties. See Model Rules of Prof'l Conduct r. 4.3. It lays out three requirements for communicating with an unrepresented party:

- [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.



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- 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.

Rule 4.3 is designed to protect the unrepresented party by making sure he or she understands the nature of the attorney's role and who the attorney represents. This concern is heightened when the unrepresented person is not sophisticated. The comment to Rule 4.3 notes that the attorney needs to identify who he or she represents and may need to explain that the client's interests are opposed to the unrepresented person. See Model Rules of Prof'l Conduct r. 4.3 cmt. at [1].

The second requirement of 4.3, involving correcting potential misunderstandings, adds another level of responsibility to the attorney to make sure that the unrepresented party understands the attorney's role. Again, this is all in the spirit of making sure that attorneys do not take advantage of unrepresented persons.

Finally, Rule 4.3 differentiates between situations in which the unrepresented individual does not have interests adverse to your client and ones where the individual may have adverse interests. Needless to say, a pro se litigant who has sued your client has interests adverse to your client.

And though most pro se litigants have understood that we are not disinterested, that has not stopped them from asking for legal advice from us on occasion. Surprisingly, pro se litigants often ask for information or advice regarding their claim, as well as other, unrelated legal issues they may have. Accordingly, you must be mindful of the obligation not to provide them with legal advice. Usually, the best course is to inform the litigant that the only advice you can provide them is to obtain their own counsel.

### **Method of Communication**

When you are considering whether to engage in communications in the first place, give thought to the method that you will use to communicate with the pro se litigant.

In our experience, it is often best to communicate with pro se plaintiffs over the phone. Letters and other correspondence can be ignored or misunderstood, and at times they can be perceived as intimidating and cause conflicts to escalate.

Further, pro se plaintiffs may not understand, or may otherwise be confused by, your correspondence. Pro se litigants generally respond better to conversations, and you can more effectively and efficiently clarify any potential misconceptions they may have.

### **Document All Communication**

The guidance above is not intended to suggest that you should never correspond with pro se litigants. To the contrary, once you have had a conversation or reached an agreement, you should document the communication in writing.

Informing the pro se litigant that you will be sending a follow-up communication before doing so is a plus. Even if you do not need to document an agreement with the litigant, it is prudent to prepare a short memo to yourself to capture the communication. This will help you better remember the

communication and track the history of the litigation and issues discussed with your adversary.

### **Additional Considerations for Incarcerated Individuals**

A large number of pro se litigants are incarcerated. See Michael L. Walden et al., *Keeping Pro Se Litigants at Bay*, Law360 (Dec. 19, 2016). Communicating with a prisoner is a more complicated process that involves additional considerations.

For example, such communications often need to be coordinated in advance with prison staff. In some jurisdictions, prisoners are not permitted to receive phone calls and, instead, must initiate calls. But to place phone calls, prisoners typically must either have the ability to pay for them or call collect.

In our experience, such litigants often claim not to have sufficient money. Information tailored to specific states or penal institutions can be found online. One final consideration is that phone calls with prisoners generally are recorded by law enforcement.

### **Be Courteous and Respectful**

This should be obvious, and should be a consideration in all your communications, but it is amazing how often attorneys fail to employ basic common courtesy. Often, the adversarial nature of the litigation world causes attorneys to forget the basic rules we learn in kindergarten.

We won't belabor this point further, but it bears inclusion as it is oft forgotten. Be courteous and respectful when you communicate with pro se litigants.

### **Conclusion**

The decision to communicate with a pro se litigant is one that should be carefully evaluated. Following the model rules and the above guidance can help you minimize risks and maximize payoff.

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