

# Marching to Their Own Beat

It's Personal for the Pro Se Plaintiff, So Beware of These Common Snags and Snares

By Michelle K. Pieroni

**A**fter having just returned from a rather protracted motion hearing that involved a pro se plaintiff—someone who represents himself in court without an attorney—I feel qualified to say that dealing with unrepresented litigants can be a harrowing experience. It really is a no-win situation because, as a defense lawyer, you are expected to win. If you lose, you cannot help

but feel professionally disgraced.

In my case, the pro se plaintiff disputed the manner in which the insurance company handled his workers' compensation claim and filed a state court action alleging breach of settlement agreement. During the course of discovery, the plaintiff (whom I'll call Mr. Johnson) filed voluminous pleadings and demands and made some rather unsavory remarks directed toward both me and the claims professional involved in the case.

We moved for summary judgment on the basis that Mr. Johnson had released any claims against the





insurance company by virtue of the settlement agreement that he had signed in exchange for the carrier's payment of compensation benefits. At the summary judgment hearing, Mr. Johnson advised the judge that I had "fraudulently induced" him into signing the settlement agreement and sought to have the agreement set aside. The judge seemed fairly receptive to my argument that Mr. Johnson is an intelligent man who was not duped into signing a settlement agreement. However, the judge has not yet entered an order, and I do not want to jinx myself by hazarding a guess as to which way he will rule. With this experience behind me but still fresh on my mind, I decided to put in writing some of the lessons I learned from crossing swords with Mr. Johnson.

### **Take It Seriously**

Whether you are the claims professional or the defense lawyer, your first inclination upon receiving a complaint filed by a pro se plaintiff may be to brush it aside. Don't do this. As the title of this article suggests, the case is personal to the pro se plaintiff. This is more than likely his one chance to prove his case before a court of law (unless, as is the case with Mr. Johnson, he makes a hobby out of suing insurance companies for perceived injustices).

The claims professional and defense lawyer should take a proactive and collaborative approach toward dealing with the case. Be especially mindful of deadlines, as the pro se plaintiff likely has marked his calendar with red stars to let himself know whether a deadline to respond to a pleading or motion has passed without a response that he deems sufficient. Know from the outset that the cost of defending what may appear to be a frivolous case may very well exceed the cost of defending a case brought by a seasoned attorney.

In my case, Mr. Johnson was so proud of himself for figuring out our state's electronic filing system that he could not resist the urge to barrage the inbox with over 10 pleadings and briefs between Thanksgiving and New Year's



Day. While I pitied his wife for having to spend her holidays listening to Mr. Johnson talk about his plan of attack, I, too, was put in the unenviable position of having to report back to my client that Mr. Johnson had graced us with the gift of more paper. Fortunately, the claims professional and I were able to work together to make strategic decisions as to which of those motions demanded a response. My only hope is that the judge was as annoyed as I was by the motion filings and that Mr. Johnson's strategy backfired on him.

### **Expect the Unexpected**

Whether it be through the Internet or legal shows on television, the pro se plaintiff likely will know just enough about the law in order to be dangerous. Many of his motions will be made up and not brought pursuant to any rule of civil procedure. While you may laugh about the naivety of any given motion, do not get lulled into a sense of complacency. Right or wrong, many judges bend over backwards to assist pro se plaintiffs in prosecuting their cases (not all of them, though, as there are judges who admonish pro se plaintiffs for undertaking their own representation). In any event, you must develop a plan for responding to

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the motions that you think might have an impact on your case. In addition to showing the court that you are treating the pro se plaintiff with respect, you will want to protect the record for appeal in the event of an adverse ruling. Just roll with the flow and realize that you are seeing things that you did not learn in law school and that you will never again see in your practice.

### **Set Aside Extra Time**

Mr. Johnson is retired and can devote as much time as he wants piddling with his case. After all, this is a matter



of principle to him, and he wants to prove that he is right and the insurance company is wrong. While you have other cases to which to attend, Mr. Johnson is staying up at night devising a scheme to get the insurance company to pay him some money or to obtain a ruling in his favor. Make time to deal with the pro se case even if it seems that you have more important matters on your plate.

### **Be Patient and Professional**

As mentioned, Mr. Johnson accused both me and the claims professional of engaging in uncivil, if not outright unethical, conduct. For example, he described the claims professional's telephone conversations with him as "ranting" and "belligerent." In addition to accusing me of fraudulently inducing him to sign the settlement agreement, he asked the court to censure me for what he called "dishonesty and subterfuge" in responding to discovery directed toward my client.

While my immediate reaction was to fire back pleadings challenging Mr. Johnson's unfounded allegations, I decided to let the record speak for itself and to let the judge decide who was the real victim during the discovery process. At the hearing, I resisted the urge to rebuff every insult Mr. Johnson cast upon me and my client. Let the pro se plaintiff be his own worst enemy.

While it may seem unfair, the parties are playing by a different set of rules when there is a pro se plaintiff involved. Lawyers are bound by rules of professional responsibility; laypersons are not. Do not jeopardize your bar license (or let your attorney do so) by engaging in or encouraging unethical behavior just because the party on the other side may not know the rules.

### **Be Honest and Candid**

While this should go without saying, it may be especially important when dealing with a pro se plaintiff. In many states, settlements of workers' compensation cases require court approval. I would much rather have a lawyer on the other side to convince the court that the

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settlement is in his client's best interests than to present the court with my own evaluation of the case. This will not be the last time I have to go before the court seeking approval of a settlement that my client has reached with a workers' compensation claimant (pro se or not). Do not put your reputation or that of your client on the line by trying to convince the court that a settlement is in the best interests of a plaintiff when truly it is not.

Along the same lines as being honest, the defense lawyer should be particularly mindful of showing candor toward the tribunal when there is an unrepresented party on the other side. Not to say that a lawyer should ever misrepresent the facts or law, but you certainly do not want it to appear to the court that either the insurance company or its lawyer have strong-armed a vulnerable, pro se workers' compensation claimant into a settlement that is not in his best interests. In the case of closure of medical benefits, it is especially important to maintain transparency to avoid any penalties that may be imposed by Medicare or Medicaid down the road.

### **Be Prepared**

In my 18 years of practicing law, I have not had as much anxiety preparing for any hearing or trial than when I was getting ready for the hearing with Mr. Johnson. We actually had three motions pending at the time of the hearing (our summary judgment motion, a motion to compel, and a motion for partial summary judgment filed by Mr. Johnson), and it was unclear in which order the judge would address these motions. While this may seem unimportant, the resolution of one motion could likely render another

moot. I needed to provide the judge with enough factual background to let him know why the settlement agreement should be enforced without getting bogged down in minutiae. I outlined the facts, researched the law, and rehearsed my presentation ad nauseam (much to the dismay of my family and friends). In the end, I do not know if my preparation efforts will affect the outcome of the case, but at least it gave me peace of mind going into the hearing.

### **Keep Perspective**

If you win, try not to boast too much—your next pro se case may turn out much differently. If you lose, try not to let it hurt your ego too much. Chalk it up to the pro se plaintiff having more incentive to win than you.

The case may be personal to the pro se plaintiff, but it does not have to be to you. This is not your first and, hopefully, will not be your last claim or case. While it is easier said than done, you should try not to dwell on the case. Let the facts and law be your guide.

For better or for worse, litigating with a pro se plaintiff is unlike any other experience a claims professional or defense attorney is likely to have. Unlike many of the plaintiffs whose cases I have defended against over the years, I will never forget Mr. Johnson. The next time you find yourself coming up against a pro se plaintiff, good luck and remember these tips. ■

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