A Different Kind of Challenge

Defending Pro Se Malpractice Claims Against Attorneys

By Kenneth A. McLellan

It is likely that defense attorneys who handle attorney malpractice cases will have to face off against a self-represented, or pro se, claimant sooner or later.

We are privileged to have an adversarial legal system in which attorneys represent their clients' interests in disputes according to court rules, rather than a system in which the litigants battle each other directly. Nothing gives an appreciation for the wisdom of that system more than defending an attorney in a pro se legal malpractice claim. Pro se attorney malpractice claims present unique challenges, and anyone who regularly handles attorney malpractice defense cases will at some point have to deal with a claim or suit brought by a self-represented, or pro se, litigant. In this article, I discuss some of the idiosyncrasies often seen in pro se attorney malpractice claims, case law addressing pro se litigants' claims, and strategies for dealing with these claims. These claims often present little to no indemnity exposure, but they may present significant defense cost exposure.

Self-represented parties present unique challenges for counsel defending against such claims, and these challenges can be magnified where the claim is one of attorney malpractice. The Federal Judicial Center noted in a recent report that "[c]ourts are obligated to be open and accessible to anyone who initiates or is drawn into federal litigation [.]" *See* Jefri Wood, Fed. Jud. Ctr., *Pro Se Case Management for Nonprisoner Civil Litigation*, FJC-MISC-2016-6, 2016 WL 5920807 (2016). While it is understood that self-represented litigants are entitled to court access, those litigants do not have unfettered rights. In some instances, if a litigant abuses the system with repetitive complaints about the same issue, courts may issue a filing injunction. *See generally id.* at 37. Although that is a severe sanction that is not given lightly.

A pro se claimant in a normal practice context, for example, a homeowner dissat-

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isfied with work performed on his or her home, may bring suit because the claimant lacks resources to retain counsel. Perhaps the dollar amount of a dispute does not warrant commencing an action. Perhaps a forum is designed for self-represented parties, such as a small-claims court, which specifically advises claimants that they need not hire an attorney. *See, e.g.*, Your Guide to Small Claims & Commercial Small Claims in N.Y. City, Nassau Cty., Suffolk Cty., No. B 10 (rev. Dec. 20. 2019), **http://www.nycourts.gov**. However, there is a difference with claims against attorneys. Some self-represented litigants have a philosophical problem with the legal profession or the judicial system as a whole. These types of litigants may have a problem with the very idea of a lawyer charging a fee for spending time on a matter, researching law, and preparing pleadings or motions.

In my experience, such self-represented litigants in the context of an allegation of legal malpractice may assert claims of overbilling under the mistaken belief that the process of representing a client involves no more than filling out form documents and pleadings. Self-represented litigants in a normal practice context may bring claims for economic reasons, but often, in connection with claims brought by pro se litigants against attorneys, actions are brought for noneconomic reasons, namely, for the sake of principle, or with the intent to punish an attorney after receiving an adverse result and for taking up the litigant's time and resources.

Challenges

There are certain challenges often encountered in defending pro se attorney malpractice claims. Counsel should expect to see the following issues:

- For some self-represented attorney malpractice claimants, money is not the goal of the litigation; the goal is public vindication or a matter of "principle." As a result, claimants may behave in irrational ways, spending inordinate amounts of time arguing over minor points of procedure or discovery issues.
- Some claimants may display arrogance, lecturing court personnel or judges, and a claimant may be unable to accept a judge's decision that is adverse to some aspect of the claim. Other inappropriate behavior might be encountered, such as anger or ranting by a claimant if he or she loses a motion.
- Some self-represented attorney malpractice claimants may lack objectivity, that is, be unable to perceive the weaknesses of an argument.
- They may exhibit an exaggerated sense of their own importance and narcissistic behavior. Some self-represented attorney malpractice claimants seem to believe that everyone is thinking about them all the time and conspiring against them all the time.
- Self-represented attorney malpractice claimants may be financially well-off, not working, and have all day to focus on their one case, or perhaps several cases.
- Some self-represented claimants may be delusional or afflicted by mental illness, and they may not behave rationally.
- Finally, some pro se legal malpractice plaintiffs verily believe that no one can handle their case better, but the difference from other professions is that they are actually permitted to represent themselves.

As for the last point, immediately above, a non-engineer cannot stamp his or her own plans while applying for a building permit, for example. A person cannot perform surgery on him- or herself.

Today's technology can enable pro se legal malpractice plaintiffs to create chaos. Much information is easily available online. Case law and sample pleadings, for instance, can be located through a simple Google search; e-filings can be effectuated with ease at any time of the day or night; communication with opposing counsel can be accomplished via emails at any time of the day or night, and these invariably end up in court filings, sometimes out of context or without filing counsel's responses, requiring much effort to correct the record.

Case Law

There is a body of case law addressing self-represented litigants. Although it is beyond the scope of this article to review the case law in-depth, a brief examination is provided here. Generally speaking, the courts will excuse unartfully pleaded complaints when adjudicating claims of self-represented parties. *See*, *e.g.*, *Haines v. Kerner*, 404 U.S. 519 (U.S. 1972). Even so, courts will dismiss actions if the plaintiff's complaint does not state a claim, regardless of the plaintiff's pro se status. *Genet v. Buzin*, 159 A.D.3d 540, 72 N.Y.S.3d 81 (N.Y. App. Div. 2018) (dismissing the plaintiff's claim as not stating a cause of action and noting that it was based on dissatisfaction with defendants' strategic choices and tactics). Courts will be "mindful" of the fact that a plaintiff may be a pro se litigant and will "make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training." However, pro se status does not "exempt a party from compliance with relevant rules of procedural and substantive law." *Roy v. Law Offices of B. Alan Seidler, P.C.*, 284 F. Supp. 3d 454 (S.D.N.Y. 2018) (dismissing a pro se claim against criminal defense counsel because the underlying conviction was undisturbed). A California Court has held that "[a] party who chooses to act as his or her own attorney 'is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys.'" *Stover v. Bruntz*, 12 Cal. App. 5th 19, 218 Cal. Rptr. 3d 551 (Cal. Ct. App. 2017) (articulating a standard applicable to pro se claimants, in a family law case).

Pro se legal claimants will often operate outside the scope applicable rules or conventional norms. Often, pro se claimants will not agree to courtesy adjournments or mediations readily, as is usually the case when all parties are represented by counsel. Any settlement with a pro se claimant should be placed on the record in open court, and only after the court has inquired whether the pro se litigant understands the settlement, has entered into it freely, and had the opportunity to secure counsel. It can be frustrating to deal with a self-represented claimant. Counsel must remember that pro se claimants will not hesitate to include emails in court filings, often not providing the whole context of the discussion. Even in the face of abusive correspondence from a pro se claimant, professionalism and disciplined, measured responses will benefit defense counsel in the long run. If the pro se claimant brings multiple suits over the same

occurrence, the remedy of a filing injunction may be available. *See Safir v. U.S. Lines, Inc.*, 792 F.2d 19 (2d Cir. 1986) (articulating a standard for a five-part test for a filing injunction).

Concluding Observations: Tactics

Conventional tactics may not always work in the defense of attorney malpractice claims brought by pro se claimants. Counsel must be aware that personal attacks and irrational behavior may be the norm. Patience and persistence are required in these situations, as well as an effort to remain professional and civil. All communications may wind up in front of the court. If repetitive suits or claims are brought, it may be advisable to seek a filing injunction (mentioned above). Litigation with self-represented parties is a balancing act for a court. The court must grant access to all parties while requiring adherence to court rules and standards of ethics and civility, regardless of whether represented by counsel. Often, the key is to allow the pro se claimants to air their claims that they have somehow been wronged by a member of the legal profession. Once that happens, either the parties can explore resolution, or often, the case will be ripe for dismissal. Litigation with pro se claimants in an attorney malpractice context can be challenging, but the challenges can be overcome. FD