

The Ethics of Litigating Against Pro Se Parties and Other Unlicensed Persons

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Definition of Term “Pro Se”




Merriam-Webster Definitions for Pro Se

“On one’s own behalf”

–

“Without an Attorney”



Expectations of Pro Se Parties in the Litigation System

Practical Obstacles for Pro Se Parties


- Underlying complexity of the law
- Elaborate procedural rules
- Financial barriers to retention of counsel
- Unfamiliarity with “day to day” aspects of the court system



Special Protections for Pro Se Parties in Criminal Proceedings

Unique Criminal Procedures for Pro Se Parties

- Constitutional right to counsel
- Practical ability to change counsel with limited financial cost
- Specialized procedures to waive right to counsel



General Case Law
Standards for Pro Se Litigation
(both civil and criminal)

General Case Law

Standards for Pro Se Litigation

- Liberal construction of pleadings / motions
- Obligation to comply with court procedures
- Requirements to provide supporting authority
- Temporary extensions for parties seeking to obtain new or alternate counsel

Liberal Construction of Pleadings and Other Filings

“Although [the] pro se petition before the district court is entitled to a liberal construction, we may not rewrite a petition to include claims that were never presented.”

Childers v. Crow, 1 F.4th 792, 798 (10th Cir. 2021)

Obligations to Comply with Court Procedures

“Although pro se pleadings are viewed with tolerance, a pro se litigant is held to the same standard of conduct and compliance with court rules, procedures, and orders as are members of the bar.”

Camino Real Envtl. Ctr., Inc. v. N.M. Dep't of the Env't,
2010-NMCA-057, ¶ 21, 148 N.M. 776, 242 P.3d 343

Need to Provide Supporting Authority and Citations to Record

“Where a party cites no authority to support an argument, we may assume no such authority exists.”

Burns v. Burns, No. A-1-CA-37653, 2020 N.M. App. LEXIS 12, at *10 (N.M. Ct. App. Mar. 23, 2020) (unpublished) (applying this rule to a pro se party)



Notable Rules of Professional Conduct

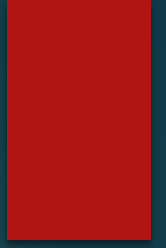
Rule 16-403 NMRA – Communications with Unrepresented Persons

“In communicating 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.”

Rule 16-403 NMRA – Clarification Responsibilities

“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.”

Rule 16-403 NMRA – Legal Advice Limitations



“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 16-401 NMRA –

Truthfulness in Statements to Others

“In the course of representing a client a lawyer shall not knowingly . . . Make a false statement of material fact or law to a third person.”

Also consider Rule 16-404 NMRA general obligations on avoiding actions “that have no substantial purposes other than to embarrass, delay or burden a third person”



Challenges for Attorneys Litigating Against Pro Se Parties

Challenges for Attorneys

Litigating Against Pro Se Parties

- Lack of ethical restrictions for pro se litigants
- Reputational considerations for lawyer versus unrepresented party
- Judicial inclination to afford leniency to unrepresented parties
- Dispute extending beyond the courtroom



Disciplinary Complaint Risks Affiliated with Pro Se Parties

Practical Suggestions on Responding to Pro Se Disciplinary Complaint

- Respond in a timely manner
- Address facts comprehensively
- Effectively frame ethical standards and other applicable rules
- Emphasize any prior determinations of matters at issue in complaint



Other Potential Risks Presented by Pro Se Litigants

Unconventional Arguments



Frivolous Filings and Serial Litigation



Harassing or Threatening Conduct

Physical Violence

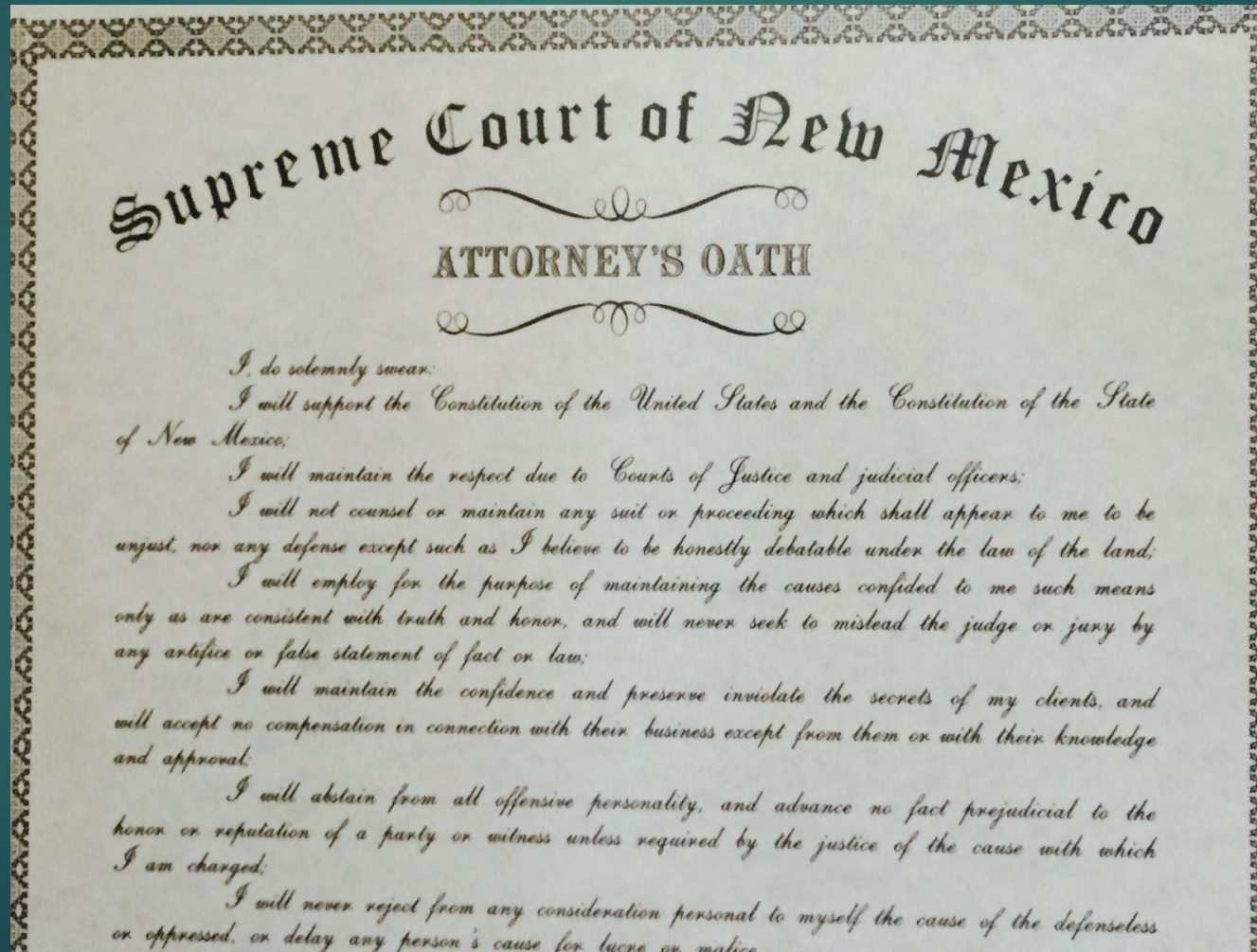
Potential Reputational Attacks

- Negative online reviews
- Efforts to contact coworkers, superiors, professional acquaintances
- Accusations of professional misconduct



Professionalism Considerations with Pro Se Parties

Specific Challenges with Unlicensed Persons



Notable Categories of Unlicensed Persons

- Former attorneys
- Suspended or disbarred attorneys
- Pro se litigant with some legal training
- Other non-attorneys offering services that may function as legal services

Challenges with Unlicensed Persons

- Minimal ethical obligations
- Limited enforcement of unauthorized practice of law restrictions
- Difficulty to obtain effective recourse for unauthorized practice of law

General Parameters of Statutory Claim for Unauthorized Practice of Law

"No person shall practice law in a court of this state, except a magistrate court, nor shall a person commence, conduct or defend an action or proceeding unless he has been granted a certificate of admission to the bar under the provisions of Chapter 36 NMSA 1978."

NMSA 1978, § 36-2-27

Private Right of Action for Unauthorized Practice of Law

“A person who suffers a loss of money or other property as a result of an unauthorized practice of law in violation of Section 36-2-27 NMSA 1978 may bring an action for the greater of actual damages or one thousand dollars (\$1,000) and for the restitution of any money or property received by the alleged violator”

NMSA 1978, § 36-2-28.1 (B)

Dynamics of Statutory Unauthorized Practice of Law Claim

Not limited to clients

Potentially limited damages

Recoverability of attorney's fees
(Section 36-2-28.1(C))

Other Resources

- *Advisory Opinions – NM and Other States*
- *State Bar Ethics Hotline – 800-326-8155*
- *Consultation with Colleagues*

Questions?