

OPPOSING A SELF- REPRESENTED APPELLANT:

BEST PRACTICES AND ETHICAL CONSIDERATIONS

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- Although I am employed by the Idaho Office of the Attorney General, my views may not necessarily reflect the views of the Office, and this presentation is not endorsed by it.
- Hypothetical scenarios are my own creation. You need to use your best judgment and follow the applicable rules in responding to any situation.

PRO SE INVOLVEMENT IN APPEALS

- Ninth Circuit
 - **2022** (FY) – 8,559 new appeals
 - 39.1% (3,349 new appeals) had at least one self-represented litigant
 - Prisoner appeals: 1,373; agency appeals: 489
 - 3,593 appeals terminated in FY 2022;
 - 2,220 appeals terminated on the merits after argument, submission on the briefs, or consolidation
 - **2021** (FY) – 9,487 new appeals
 - 42% (3,988 new appeals) had at least one self-represented litigant
 - Prisoner appeals: 1,634; agency appeals: 714
 - 4,044 terminated; 2,443 terminated on the merits

PRO SE INVOLVEMENT IN APPEALS (CONTINUED)

- 2020 (FY) – 10,400 new appeals
 - 44.1% (4,590 new appeals) had at least one self-represented litigant
 - Prisoner appeals: 1,920; agency appeals: 891
 - 4,355 terminated; 2,734 terminated on the merits
- 2019 (FY) – 10,106 new appeals
 - 44.4% (4,490 new appeals) had at least one self-represented litigant
 - Prisoner appeals: 1,860; agency appeals: 857
 - 4,339 terminated; 2,811 terminated on the merits

SCENARIO 1

- You represent an agency director and recently won a motion to dismiss in the federal district court against a pro se plaintiff. The self-represented litigant has sent you the following email:

Mr. Church,

I just filed a notice of appeal from Judge Smith's decision. I am hoping I did it right. Did I? Oh, and I wanted to save the postage, so I am just emailing you a scanned copy of it. I'll also send an email with it to Director Jones.



SCENARIO 1: THE ISSUES

- 1) Appellant wants you to comment on whether he or she correctly filed a notice of appeal.
- 2) Appellant has not mailed you a copy of the notice of appeal.
- 3) Appellant wants to communicate directly with the client.

ISSUE 1: YOU'RE NOT THE LITIGANT'S ATTORNEY

- *See generally* IRPC 1.1—1.18 (duties to client)
- IRPC 4.3 is the primary rule

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing 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. 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. 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.

Commentary

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

ISSUE 1: CLEARING UP THE CONFUSION

- Practice tip:
 - Provide a written response
 - Use the response as a vehicle to help the appeal move forward (and potentially save costs for your client)
- Follow IRPC 4.3:
 - Clear up the misunderstanding
 - Tell the other person to secure legal advice if he or she has legal questions
 - Note that you represent an opposing party

ISSUE 2 – ELECTRONIC SERVICE

- Most pro se litigants will not have electronic filing or service privileges
- For Ninth Circuit filings: personal delivery, mail, third-party carrier (UPS, FedEx)

(2) Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.

- But note this caveat in FRAP 25(c)(4):

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on filing or sending, unless the party making service is notified that the paper was not received by the party served.

ISSUE 2: SUGGEST EMAILING DOCUMENTS

- Practice tip: agree to provide documents electronically
- Try to reach an agreement to have each party share documents electronically
 - FRAP 25 requires consent in writing
- Include a second contact on your side
- Benefits:
 - Receive the documents faster
 - Service after 5 p.m.
 - Cost savings for your client

ISSUE 3 – COMMUNICATION WITH CLIENT

- Practice tip: reinforce that on this appeal, the litigant needs to be contacting you
- IRPC 4.3 does not ban all statements to pro se litigant
 - Giving legal advice other than advise to secure counsel is proscribed

Mr. Doe,

Thanks for reaching out. I can understand wanting to save the postage. I am okay with you emailing me any document you file, instead of sending me a copy in the mail. Please just make sure to copy my paralegal at (<email>) when you email the document to me.

I'd also like to make sure documents get to you faster. Would you agree that I can serve my copy of any document I file in the future by emailing it to you at (<email>)? Please let me know, otherwise I will just mail them to (<address>).

I thought I would also mention that I still represent the Director. All communications about this lawsuit should go to me, instead of contacting Director Jones directly. Because I represent an opposing party in this appeal, I did want to say that I cannot give you any legal advice. I would recommend you seek the services of a lawyer in case you need any legal advice.

A RESPONSE TO SCENARIO 1



HOW WOULD THIS DIFFER IN IDAHO'S COURTS?

- Idaho Rules for Electronic Filing and Service
 - Note per IREFS 1, these governing filing and service
- IREFS 17 – Service
 - 17(a) speaks of consent for e-filing system
 - 17(c) provides for service by conventional means
 - 17(j) refers to other applicable court rules
 - IAR 20 – permits mailing of documents

SCENARIO 2

- You're in the Ninth Circuit. The self-represented appellant has just filed a 50-page opening brief, which is handwritten.
- The appellant cites numerous documents, but does not attach them or otherwise provide an excerpt of record.
- You now have to provide a response brief.

ISSUES FOR SCENARIO 2

- Handwritten 50-page brief?
 - Permitted by 9th Cir. R. 32-1
 - Proposed circuit rule amendment

YOU'VE GOT MORE WORK TO DO

- What about the Excerpts of Record?

30-1.3. No Excerpts Required for Pro Se Party

A party proceeding without counsel need not file excerpts. If such a party does not file excerpts, counsel for appellee or respondent must file Supplemental Excerpts of Record that contain all of the documents that are cited in the pro se opening brief or otherwise required by Rule 30-1.4, as well as the documents that are cited in the answering brief.

- 9th Cir. R. 30-1.4
 - Decisions appealed, reviewed, or collaterally challenged
 - Notice of appeal and lower court docket sheet included at end of last volume

NUANCES OF 9TH CIR. R. 30-1.3

- What happens if the self-represented litigant provides an incomplete excerpt?

- Answer is unclear

- Appellate practice guide

appeal. If the appellant or petitioner declined, pursuant to Rule 30-1.3, to file Excerpts of Record, you *must* file Supplemental Excerpts of Record containing all of the documents that are cited in the appellant or petitioner's opening brief or are otherwise required to be filed by Ninth Circuit Rule 30-1.4, as well as any other documents that are cited in your answering brief. The same

- Proposed rule change:

30-1.3. No Excerpts Required for Pro Se Party

A party proceeding without counsel need not file excerpts. If such a party does not file excerpts, counsel for appellee or respondent must file Supplemental Excerpts of Record that contain all of the documents that are cited in the pro se opening brief or otherwise required by Rule 30-1.4, as well as the documents that are cited in the answering brief. If a pro se party elects to file excerpts of record or other appendices to their brief, the excerpts must include a caption page pursuant to Circuit Rule 30-1.5(d) and a table of contents pursuant to Circuit Rule 30-1.5(a).

SCENARIO 2 – BUT IN IDAHO’S COURTS

- IAR 36(b)
 - Printed briefs – either typewritten or word processor
 - Prisoners incarcerated or detained in a state prison or county jail permitted to use handwritten briefs



IDAHO'S RECORD REQUIREMENTS

- *Colafranceschi v. Moody*, 164 Idaho 771, 435 P.3d 1091 (2019) (per curiam)
 - Pro se appellant
 - Challenge to ICAR 59 vexatious litigant determination and entry of pre-filing order
 - Pro se litigants are held to the same standards

"This Court adheres to the rule that persons acting *pro se* are held to the same standards and rules as those represented by attorneys." [Huff v. Singleton](#), 143 Idaho 498, 500, 148 P.3d 1244, 1246 (2006) (citing [Suits v. Nix](#), 141 Idaho 706, 709, 117 P.3d 120, 123 (2005)).

FAILURE TO PROVIDE A SUFFICIENT RECORD

- The Idaho Supreme Court is bound by the record on appeal and cannot consider matters or materials that are not part of the record or not contained in the record.

"The party appealing a decision of the district court bears the burden of ensuring that this Court is provided a sufficient record for review of the district court's decision." [Gibson v. Ada Cnty., 138 Idaho 787, 790, 69 P.3d 1048, 1051 \(2003\)](#) (citations omitted). Consequently, "[w]hen a party appealing an issue presents an incomplete record, this Court will presume that the absent portion supports the findings of the district court." [Hansen v. White, 163 Idaho 851, 853, 420 P.3d 996, 998 \(2018\)](#) (citing [Gibson, 138 Idaho at 790, 69 P.3d at 1051](#)). In addition, this Court "will not presume error from a `silent record or from the lack of a record.'" [Gibson, 138 Idaho at 790, 69 P.3d at 1051](#) (citations omitted).

Here, as Colafranceschi has the burden to prove the court below erred and to ensure a sufficient record, the missing documents noted above are presumed to support the administrative judge's findings.

RECENT APPLICATION OF RECORD DEVELOPMENT RULE

- *Medical Recovery Servs. v. Moser*, Docket No. 49755 (March 25, 2024)
 - Certain transcripts should have been included in the clerk's record and lodged with the Supreme Court. They were not.
 - "While there clearly was an error in the preparation of the record and lodging of transcripts, the parties are responsible for ensuring that all documents necessary for the appeal are provided to the Court."
 - MRS did not file a Rule 29 objection or Rule 30 motion.
 - "Because this Court will not presume error by the district court, the district court's determination is presumptively correct...."



SCENARIO 3

- Dealing with a settlement offer.

Mr. Church,

I just want what's mine. I will dismiss this appeal if the State gives me an allotment of developable land of at least 16,000 acres from any Idaho State Parks near Boise or other Idaho State Parks of warmest climates. I also want to be called chief of that land.

ETHICAL CONSTRAINTS

- Relevant rules:
 - IRPC 1.2 (client makes decision whether to settle)
 - IRPC 1.4 (communication requirements) and cmt. 2
 - IRPC 4.3 and cmt. 2

resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations. Similarly, a prosecuting attorney may negotiate

RESPONDING TO THE SETTLEMENT OFFER

- Practice tip: offer a clear, short denial if that is your intention

Mr. Doe,

Thanks for reaching out with the settlement offer. My client has considered it and respectfully declines your settlement offer.

- If offering a counter-offer, follow IRPC 4.3 and cmt. 2
 - Comment 2 recognizes
 - Lawyer is permitted to prepare documents
 - Lawyer can explain his or her view of the meaning of the document
 - Lawyer can explain his or her view of the underlying legal obligations.

NINTH CIRCUIT APPOINTMENT OF COUNSEL

- A litigant can file a motion for appointment of counsel
- Ninth Circuit can *sua sponte* recruit pro bono counsel
 - Oral argument will likely be granted

FINAL CONSIDERATIONS

- Balancing duties to our client and the court, and appropriately communicating with pro se appellants
- Vexatious litigant
 - ICAR 59, including ICAR 59(g)
 - *Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057 (9th Cir. 2014)

RESOURCES

- Idaho Pro Se Appellate Handbook (dated 2013?)
 - https://isc.idaho.gov/files/IdahoAppellateInformationHandbook_2013.pdf
- Ninth Circuit pro se litigant website:
 - <https://www.ca9.uscourts.gov/forms/pro-se-litigants/>
- Ninth Circuit pro se handbooks (revised January 2024)
 - <https://www.ca9.uscourts.gov/guides/open-case-pro-se/>

SOURCES

- Case excerpts obtained from Google Scholar: scholar.google.com
- Ninth Circuit Appellate Advocacy Guide, rules, and proposed rules available at the Ninth Circuit website: ca9.uscourts.gov
- Idaho Rules of Professional Conduct excerpts obtained from the Idaho State Bar website: isb.idaho.gov
- Idaho Appellate Rules and Idaho Rules of Electronic Filing and Services available from the Idaho Supreme Court website: isc.idaho.gov