Delaware Bankruptcy Inns of Court May 14, 2013
Best Practices for Dealing with *Pro Se* Litigants

Thoughts from the Judges

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The following excerpts are edited/paraphrased from interviews conducted with each of the judges in April 2013, in connection with a forthcoming *Delaware Lawyer* article on the Delaware bankruptcy court. At the conclusion of each interview, the judges were gracious enough to answer questions relating to this month's DBIC presentation.

Judge Walrath

PAJ: Is there anything we can be doing better to help resolve *pro se* matters?

MFW: I think the bar is doing as much as it can. I think it is imperative that you contact them and try to work it out, and try to explain to them what's going on. Many times it's just a misunderstanding of what is going on. But if you get to the point where it's clear from talking with them that this is not going to resolve, let them have their day in court.

In judges' training, they tell you – especially with *pro se*s – if anybody comes into court, it is important to let them feel that they've been heard. So let them say their point. Try and explain to them your ruling, if you're ruling against them. Try to explain to them why. And I've had many claimants, et cetera, make their argument, and then I said, "Okay, I understand, but here's what Congress says as far as priority of your claim, and I have to follow that." And then they say, "Okay, well thank you for listening to me." That's all they want – they want to feel that in reality somebody is listening to them and explains to them why they can't get what they think they're entitled to. I haven't seen too many of our lawyers try and shut down *pro se*s at all.

It got to a point in one of my cases where the debtor filed a motion to bar a party from filing vexatious pleadings. It's just a matter of balance once you get to the point where you say, "You are barred from filing." And courts have upheld that – barring a vexatious, litigious person who has no interest in the case really, from filing any further pleadings, that has been upheld. But you can't do that the first time or the second time he files it.

PAJ: *Pro se* papers can be very difficult to follow, and as counsel responding to them you do twice as much work, because you have to build the argument that you think they're trying to make, and then respond to it. Do you find a very terse brief on the part of the represented party more helpful than one that tries to explain it all?

MFW: Yeah. I can't even figure out what they're all arguing. A terse response that focuses on, "This is what the issue is, and nothing he has said in his pleading addresses this issue. It's a simple legal issue." That's much more effective.

PAJ: I think some of the perception on our side is that, with a long brief, we are trying to help by charitably construing what the *pro se* litigant's arguments may be, so that if the Court is inclined to rule our way, you can kind of tick through the issues in your ruling, and we will have done the work for you. Is that accurate?

MFW: That's fine if it's three pages versus 30. I mean it's a balancing act, it really is. But otherwise, you know, let them have their day in court and that might settle it.

PAJ: Who are the most active *pro se* litigants in your experience? Creditors? Activist shareholders?

MFW: It just depends on the case. Sometimes there are people who file things who have no connection with the case. I had one shareholder in a case that would send periodic letters, and Cathy [Farrell] would chuckle about them every time she got them. I never read them – she handles them and sends them back (unless you file a motion, the judge isn't going to read it). But they'd be, "How's it going?" and, "We're waiting for our money," and, "This was our nest egg," and the like. So finally, she got a postcard from them. They were obviously in some tropical island someplace just wondering where their "nest egg" was. Okay, *really*? Their *nest egg*? We had to laugh about that.

Judge Carey

PAJ: Are there best practices or observations for dealing with *pro se* litigants you would like us to convey to the bar?

KJC: It's difficult, I know, for a lawyer to deal with a *pro se* litigant on the other side. All I would say is, try to be as communicative with the *pro se* litigant as you can be. I know sometimes they are either unsophisticated or are just so wedged in their position that they don't want to hear anything you have to tell them. Understand that the Court is going to give them a forum and that the litigation may not be as neat as it would be, were the other side represented by counsel, but everybody's entitled to their day in court. Sometimes it takes what we might consider a disproportionate amount of time and effort to deal with that, but that's just the nature of it, making sure that due process is extended to these folks.

PAJ: When a *pro se* matter comes to the Court on briefing and oral argument, do you find it helpful when the represented party submits a comprehensive brief, or is it sufficient (or even better) for the represented party to just tag the bases, in essence, and let the argument play out at the hearing?

KJC: The complete discussion is very helpful because sometimes the Court has the same difficulty that opposing counsel has in trying to figure out what relief exactly is being requested. If something comes in a form in which I come to the view that they're asking the Court to do something, then it's treated as a motion and has to be responded to. But sometimes the requests are not all that clear, so yes, it is helpful to the Court.

PAJ: At the hearing, a common struggle on the practice side is balancing the desire to get the hearing over against protection of your record on an eventual (often, inevitable) appeal. Do you find counsel preserving their record and interposing objections and the like to be distracting? Or understandable?

KJC: I think that the represented party has to use discretion in determining when to do that, but you're right, appeals often follow. And from the Court's standpoint, it's important to let the District Court know the *pro se* litigant was afforded every opportunity to present his or her case, and that the Court was thoughtful in considering what the *pro se* litigant was asking it to do.

Judge Sontchi

PAJ: Are there some things that you would consider best practices, or practices to avoid, when dealing with the *pro se* litigant?

CSS: I'll give you a recent example of how things went wrong. There was a *pro se* that started in early December to try to get the attention of debtors' counsel, and a person at the lead counsel firm was in charge of it and was the point person. There was a three-week period where counsel never picked up the telephone, and he got a series of more and more aggressive emails that he tried to respond to, but he did so maybe incompletely, and the situation started to deteriorate. So we got to early January and it was a mess, and I believe that counsel made a fundamental mistake of not picking up the telephone early in that process and starting a dialogue by telling them, as opposed to emailing them. Now, it may not have made any difference with this litigant, but I think and believe that the way the record developed, the debtor may have been able to do a lot to make that problem go away.

Ultimately, they had to come in to me in on an emergency TRO request, *ex parte*, to keep the *pro se* litigant from divulging confidential information. So I had to do an *ex parte* TRO, then I had to enter a sanctions order for violation of the TRO, they then settled, they then *un*settled but I approved the settlement anyway, and now the *pro se* litigant has filed a judicial misconduct complaint against me at the Third Circuit. Maybe nothing could have been done to prevent the situation from playing out the way it is, but I believe that, had initial contact in early December been followed up at least at some point by a telephone call, a lot more could have been averted, because you can see the emails in that case get more and more aggressive, and more and more frustrating, because counsel was giving no response. So I know that there are problems with doing that, because you're going to tell the *pro se* litigant "A" and he's going to come back and say you said "negative A," and there was a situation in this case where the *pro se* litigant accused, I think at two different times, one lead counsel and one local counsel of saying something on the telephone that either was not true, or was a misreading of what was said, and if you have an email you have a written record, but on a telephone call you don't.

What ultimately helped a lot in this case is I basically told the debtor to turn it over to Delaware counsel, and he was able to settle it very quickly. Now, then again, the settlement fell apart, but it didn't ultimately matter, because I approved it anyway, and I know that counsel did a combination of telephone calls and emails. So the message from that, I think, is that with many *pro se* litigants, the mistake would be to give them either no attention or just email attention. I mean, sometimes a phone call can do wonders. Sometimes it's not going to get you anywhere, and at that point you need to just make your record and deal with it.

PAJ: As a junior associate I was tasked with resolving letter responses to the solicitation packages and confirmation hearing notice that had trickled in to the docket, and my initial reaction was that they were not really objections that needed resolving. Nevertheless, the partner made me call (not email) every single party on the list, and made a point of it. I

was struck, because left to my own devices, I definitely would have gone the email route because it's more comfortable.

CSS: He's absolutely correct, and in today's environment, probably a combination with a phone call first, followed by the email.

PAJ: Is it helpful, or over-lawyering, when you get a *pro se* matter in front of you at the hearing and you've got the *pro se* briefs, such as they are, but then you have a really comprehensive brief by the represented party, as opposed to a shorter brief that just tags the bases?

CSS: I'll give you an example. I recently issued an opinion on a *pro se* case, in an adversary proceeding, and the liquidating trust won on all points, and that was a situation where the liquidating trust really had to write the other guy's brief for him in order to respond to it, and it was very helpful. And I know it's time consuming and expensive, but in that situation it was very helpful, and they got their 16-page opinion when all was said and done.

PAJ: I think the concern that prompted my question is that we don't want to seem to our clients or to the Court like we're overworking the file, but we need to preserve our record and protect ourselves, and it's tough to strike a balance.

CSS: With a *pro se*, things like failure to timely pay the filing fee, failure to technically serve the defendant, failure to respond to the answer and brief in time, those are not going to get you anywhere. Against the *pro se*, they're just not going to get there. This opinion was a motion to dismiss on three points, one of which was failure to timely serve the liquidating trust, one was that the claim was time-barred because of the bar date (but there was a technical reason that wasn't going to work anyway), and one was 12(b)(6) failure to state a claim, and I mean it was like shooting fish in a barrel. So what happened is I denied the motion to dismiss in connection with failure to plead a claim. It's a good example of how *pro se* litigation generally falls down, which is technicalities that are important, like failure to state a claim. And the Third Circuit will back you up. I mean, they would back me up on a 12(b)(5) failure to serve objection against a *pro se* because they say it's okay to hold them to that. But as a trial court, generally, it's not necessarily very helpful. So, you know, they won on the substance of the 12(b)(6), but they lost on the two technical objections against the *pro se*.

PAJ: Lost at the trial court, but having won at the trial level, the appellee can of course argue that those objections also support affirmance of the decision.

CSS: And I denied them without prejudice, because as to the service I said there was a factual issue and there actually was a hole in the bar date argument as to whether he was a known or unknown creditor at the time, because he did not receive actual service and they were relying on the publication, so that's a factual issue about whether he was a known or unknown creditor, there was nothing I could do anyway.

PAJ: Would it be fair to say that, as long as you don't put an undue amount of emphasis on the procedural points, it's fair to raise them?

CSS: Sure, of course.

PAJ: And I think how we think of it, it kind of gives the Court a menu of options as far as how to dispose of the matter.

CSS: Yes, and part of the reason it was easier to deny the motion on the two technical points is that the 12(b)(6) was so overwhelmingly in favor of the debtor, and I felt very comfortable with the real substance.

Judge Walsh

PAJ: Are there some things that you would consider best practices, or practices to avoid, when dealing with the *pro se* litigant?

PJW: I don't take chapter 7 cases, nor 13s, so I can't remember the last time I had a *pro se* case.

PAJ: I think it's mostly creditors in chapter 11 cases, or activist shareholders, or an employee who lost all of their savings because their company stock became worthless. But in your experience, you just don't see a lot of it come to a head?

PJW: No, I don't. In the Polaroid case, and this goes back to maybe ten years ago, there was a retired scientist who got a group of retirees together and he showed up at nearly every hearing, and that was a hotly contested case. And this guy must have been in his early seventies, maybe later than that, and he was very effective. *Very* effective. In fact, at the end of the case, I told him he should consider going to law school. The guy was really good.

But then, in the DBSI case, I'm sure I had at least 500 letters from people who got burned.

PAJ: I'll pose my question to you as a hypothetical then: In a *pro se* litigation matter, do you think it would be more helpful if the represented party did a comprehensive brief that tried to be charitable to the *pro se* litigant's arguments in order to respond to them, or if the represented party put in a shorter brief that simply tagged the bases on what the legal issues are.

PJW: I think a lengthy response is easier for me.

Judge Shannon, with Chief Judge Gross

PAJ: What have you seen in *pro se* matters in front of you that are best practices for represented parties, or practices that they should avoid?

BLS: With chapter 11, I think that the best approach that particularly debtor counsel can take is to be as accommodating as humanly possible. There are situations where you have *pro se* litigants in a case that are active, aggressive, abusive, or over the top. And it is worth communicating that to the Court.

But my approach is, for example, starting with the most routine example of claim objections. I am gratified to hear when counsel gets up and says, "We have received 11 letters in response. We have called each one of these parties. We have spoken to each one of these parties. Three of them said, 'Fine,' the other eight said, 'A pox on your house.' They are not here today, but we *did* speak to them." I think that that's valuable. I think that's incumbent upon counsel. I think that is a responsibility that debtor's counsel has, as a courtesy, to explain to them, "This is what is going to happen. This is why, and if you want to, you can come to Court."

And a technical opposition to a pleading – to come to the podium and say, "I've gotten this letter of objection, I don't know what it means, I've asked for a sale and I don't know what this objection is." Well, *you* need to construe it broadly because *I* will.

What I look for is abiding cooperation and courtesy. And if you have, then, a litigant that is abusing the process, it is usually going to be apparent to the Court. I joke sometimes about sanctions, that we don't encourage sanctions practice here. My reasoning is that, usually, if you are entitled to Rule 11 sanctions, you don't need to file a motion. Because I ought to know.

KG: Yes, yes.

BLS: But with a routine *pro se* litigant, I expect maximum cooperation, especially given the fact that in many of our cases the claimants and employees are not nearby.

KG: That's right.

BLS: And one of the points that I believe that the bar and Court have made repeatedly is that we accommodate those folks and permit them to appear by phone, and we will waive the phone charges, and we rely on counsel to make it so that they are not harmed by distance and are afforded an opportunity to meaningfully participate in the bankruptcy case. I think that is terribly important.

KG: Yes.

BLS: I think that is part of our mandate. Especially in the bankruptcy court.

PAJ: Clients find it frustrating for us to spend any time researching and briefing in a *pro se* matter that is headed for a contested hearing, but often our response is that the Court expects us to do that. Do you find it helpful for the represented party to expend the time and effort to do a comprehensive response saying, for example, "Here is what I think he is arguing, and if that is what he is arguing, here's what the response is."

BLS: Yes. I want a response.

KG: Yes. You betcha!

BLS: I want a response. And I realize that it is a burden, but you know something, sometimes it is not all upside to be in bankruptcy.

KG: Because you've probably talked to that *pro se* person, or may have talked to them. I don't want to sit up there and say I don't understand what they are talking about. You can help me with that.

BLS: And I think the other point is, by way an example, take a *pro se* employee objection to the sale of a company. And their objection is, "I haven't gotten my vacation package." It's kind of buried in the middle of a one page, single-spaced letter. I find it helpful if the debtors reply, and if you have a section for letter objections that says, "We have received John Smith's letter. The sale of the company has no impact one way or the other on the allowance or disallowance of a vacation period. That's our answer." And similarly, if you just get one of those one-line letters: "This is a big fraud." The debtors' response is, "We've got a court-appointed committee that is supportive. They are fiduciaries. There is no evidence of fraud. This is our response." It's a summary answer, but those are objections and they're entitled to be responded to.

Recap with Chief Judge Gross

PAJ: Thank you so much for taking the time to discuss the challenges of *pro se* litigants. It seems that in the chapter 11 cases, they are primarily creditors, though I know Judge Walrath has had at least a couple of individual chapter 11 debtors.

KG: There are occasionally people who are extremely poor and really can't afford a lawyer, and there's really not enough there for a lawyer to take a case. But most are people who think that they can do it.

PAJ: In my experience, anyway, it's people that just don't understand what's going on. They think, "Oh, there's a court, courts are where justice happens, I have a cause, this must be where I should be." And they don't understand that, procedurally, if they're a creditor and they "win," what's in it for them is an allowed claim, which is not likely to be paid dollar-for-dollar.

KG: That's right.

PAJ: And so in practice, I think so much of what ends up bubbling to the surface and going forward in a litigation posture is where you either *can't* communicate with the person, or you *haven't* communicated effectively. And so far what we've heard from the other judges is that, first and foremost, communication is key. Just as Judge Shannon said – call people on the phone, reach out to them, it's your obligation to do that. Everybody is speaking with one voice there.

KG: I agree.

PAJ: If you reach out and you can't get through to the person – maybe there are some mental health issues, maybe it's just that they have a real cause and they won't let up until a court tells them "No" – have you ever seen a lawyer handle it particularly well in front of you? Or particularly poorly, which would be just as helpful?

KG: Prior to *Nortel*, other than a few claim objections, I have not had a *pro se* party. So I can't give you a best practice. Hard to give best practices other than you really, really have to deal with that *pro se* litigant very gently. The Court should be gentle. Opposing counsel should be gentle. Because you don't want to put the judge in a position of coming to the defense of the *pro se*. But I like to hear, and it is very important that I hear, that there have been conversations with the *pro se* litigant. To the extent possible – I may observe why it couldn't have happened, because the person is not well enough. In the end, maintain your civility and professionalism, and let the Court decide.

PAJ: How about in practice before taking the bench? Did you have any experience with going up against a *pro se*? Any thoughts on that, or how it might have come out otherwise?

KG: One case. And in this particular case, the *pro se* really tried to out-*lawyer* me. And it became very, very awkward. It got to the point where I normally would have been very, very helpful to the *pro se* litigant, but I was probably a little *less* helpful than I otherwise would have been to another lawyer, because he annoyed me so much. He was so aggressive about everything. He watched too much TV.

PAJ: So if you end up having to go toe to toe, be gentle.

KG: Yes. Let the Court know that you are being as cooperative as you can be, within your responsibilities to your client.

PAJ: And as we talked about before, take the argument seriously enough to give the judge a view of what arguments they may be attempting to make, what the standard is, why they should be overruled, and why you should win.

KG: Yes, that's right.

PAJ: I guess the tough pill for all of our clients to swallow is that that's just what happens. There is no quick way to resolve a dispute with a *pro se* litigant other than talking him out of it, which is tough.

KG: Yeah, to get them to walk away from it.

PAJ: Would you say there is a different set of rules that apply to the *pro se*s? Are we expected to stretch more to settle their claims than we would with a commercial party? Or is it enough to be courteous and accommodating to them?

KG: That's really all.

PAJ: So we just stick to the general playbook regarding settlements?

KG: I would say this. We are sympathetic to the *pro se*s. But I am also very sympathetic to lawyers who are representing the other parties, knowing that it can be very, very difficult to deal

with the unrepresented person. So, again, you don't have to be best friends with them. Just show that you tried, and that you are not taking anything personally. The *pro se* litigant is taking it very personally. By getting up to the podium and speaking, in contrast, calmly and respectfully, you are going to win the points back.

PAJ: Returning to the theme of communication. There is a little bit of tension on our side, in that we have ethical limitations on dealing with unrepresented persons. And on the one hand, there's a real need to have a human connection and talk to them personally. But when you do that, you end up running into the, "Well, the lawyer told me this." Then you get into the he said, she said.

KG: You are right. First and foremost, treat the *pro se* person with respect. Confirm your discussion in writing. Don't bully or threaten.

PAJ: What has emerged from talking to the other judges is to call, but follow up with a confirmatory email memorializing the conversation and reiterating the disclosures you need to make – "I am not your attorney, you should seek legal advice" – in other words, make your record in the event that it heads for a contested hearing.

KG: That would be helpful. We have the same thing with *pro se*s. A *pro se* calls my secretary. I'm always worried that they will claim that they were given some piece of advice. Then what I do? Turn it into a mini-hearing?

"What advice were you given?"

"I was told I didn't have to file that claim."

"Well, who told you not to file a proof of claim?"

"Your secretary."

At that point, I've got to have a hearing. I'm hoping that the *pro se* help we are getting will cut down on some of these problems.

PAJ: That shades into something we were going to touch on in the presentation. What is the Court doing to address the challenges of *pro se* litigation?

KG: We got some funding to hire a liaison to organize, hopefully, obtaining representation for these *pro se* litigants.

PAJ: At the District Court there is a prisoner litigation law clerk who acts as a gatekeeper for prisoner litigation – would the *pro se* liaison serve a gating function? Or just match up the *pro se* litigants with counsel?

KG: That's it.

PAJ: So no gatekeeping function. Then again, maybe we don't have as much of an issue with *pro se* litigants as the District Court does with prisoners, in that people are appearing in our Court just as creditors.

KG: Probably not. Even in chapter 13, creditors are generally represented. A handful aren't, and they are the main challenge.