Pro Se Case Management for Nonprisoner Civil Litigation

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Preface

> When litigants come to federal court without a lawyer, they are at a disadvantage. Even if their case is strong, they can easily get lost in a maze of procedural rules and arcane terminology. A single error can doom their chances, long before a trial date is set.[1]

At approximately 25,000 per year, nonprisoner pro se filings make up a significant portion of the federal civil caseload[2] and present their own challenges in a system geared toward both parties being represented by attorneys. Many districts have begun taking steps to better handle the steady stream of "self-represented litigants," as pro ses are sometimes called,[3] such as providing specific forms and improved web pages designed for pro se litigants, compiling extensive manuals to educate pro ses about how to proceed with their cases, and working with local bar associations to provide pro bono legal help.

The *Strategic Plan for the Federal Judiciary*, originally released by the Judicial Conference of the United States in 2010 and reaffirmed and updated in 2015, focuses on seven issues, each with several strategies and goals. Issue 5 is "Enhancing Access to the Judicial Process," which begins by asking,

> *How can courts remain comprehensible, accessible, and affordable for people who participate in the judicial process while responding to demographic and socioeconomic changes?*
>
> . . . .

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1. *Pro Se Centers Help Even the Odds for Litigants Without Lawyers*, Judiciary News, Aug. 20, 2015, *available at* http://www.uscourts.gov/news/2015/08/20/ pro-se-centers-help-even-odds-litigants-without-lawyers.

2. In fiscal year 2015, 25,117 nonprisoner pro se civil cases were filed in the district courts, or 9% of the total 279,036 civil filings. Admin. Office of the U.S. Courts, 2015 Annual Report of the Director, at table C-13 (2016).

3. Although "self-represented litigant" is often used in state courts and academic literature, the vast majority of federal cases and materials still use "pro se litigant" or simply "pro se." Note that while there is some debate over whether civil litigants have a *constitutional* right to represent themselves, a statutory right is provided by 28 U.S.C. § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").

> Courts are obligated to be open and accessible to anyone who initiates or is drawn into federal litigation, including litigants, lawyers, jurors, and witnesses. The federal courts must consider carefully whether they are continuing to meet the litigation needs of court users.[4]

The *Strategic Plan* acknowledges that "federal court processes are complex" and "making courts readily accessible is difficult. Providing access is even more difficult when people look to the federal courts to address problems that cannot be solved within the federal courts' limited jurisdiction, when claims are not properly raised, and when judicial processes are not well understood."[5] While the plan focuses on all litigants, not just pro ses, that last part aptly describes many pro se litigants, who all too often attempt to bring claims that do not fall within the jurisdiction of the federal courts, have trouble raising and pursuing their legitimate claims, and have a limited understanding of court practices and procedures. Acknowledging that pro se litigants may need extra help, the plan frequently emphasizes making sure that "all who participate in federal court proceedings . . . understand the process," recognizes that "[c]ontinued efforts are needed . . . to make courts more accessible for jurors, litigants, witnesses, and others," and calls for the development of "best practices for handling claims of pro se litigants in civil and bankruptcy cases."[6]

The Federal Judicial Center has taken several steps in recent years to assist the federal courts in meeting the challenges of handling claims of pro se litigants. The Center conducted two surveys for the Judicial Conference Committee on Court Administration and Case Management. The first study sought information from district court clerks of court about actions they have taken to assist pro se litigants and to assist staff in handling pro se cases. District court chief judges were also surveyed about the impact of pro se litigants on judges and

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4. Judicial Conference of the United States, Strategic Plan for the Federal Judiciary 13 (September 2015) [hereinafter Strategic Plan 2015].

5. *Id.* at 13–14.

6. *Id.* at 14. *See also id.* at 13 ("Strategy 5.1. Ensure that court rules, processes and procedures meet the needs of lawyers and litigants in the judicial process.").

chambers staff and on what measures the judges have taken to meet the demands of these cases. A summary of the surveys' findings was published in 2011.[7] In conjunction with that study, the Center created an online resource in 2013, which is designed "to provide a central forum through which court staff, attorneys, and judges may share methods and resources available for handling pro se cases. The site collects pro se materials that currently appear on each of the district court websites nationwide."[8] Judges and other court personnel are encouraged to explore this site to see the variety of steps other districts have taken to manage pro se cases *before* they reach the judges.[9]

This guide builds upon the Center's surveys and website, as well as other Center programs and materials on nonprisoner civil pro se litigants.[10] Although this publication is not meant to be the "best practices" collection called for in the *Strategic Plan*, offering a wide selection of suggestions and recommendations in one place should

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7. Donna Stienstra, Jared Bataillon & Jason A. Cantone, Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges (Federal Judicial Center 2011) [hereinafter FJC Survey], *available at* http://fjconline.fjc.dcn/sites/default/files/2012/ProSeUSDC.pdf.

8. Federal Judicial Center, "District Court Pro Se Litigation: Resources for Litigants, Court Staff, Attorneys, and Judges" [hereinafter FJC Pro Se Webpage], http://fjconline.fjc.dcn/content/pro-se-litigation-resources-litigants-court-staff-attorneys-and-judges. *See also* Federal Judicial Center, "Bankruptcy Pro Se Debtors and Creditors: Resources for Parties, Court Staff, and Judges," http://fjconline.fjc.dcn/content/254237/bankruptcy-pro-se-debtors-and-creditors-resources-parties-court-staff-and-judges.

9. *See also* Admin. Office of the U.S. Courts Website, "Best Practices—District Methods Analysis Program on Pro Se Case Processing" [hereinafter DMAP Website], *available at* http://jnet.ao.dcn/resources/reports-and-publications/oversight-internal-controls-and-audit/internal-control-and-audit/frequent-findings-and-best-practices/judiciary-methods-analysis-program (follow "District MAP Study" > "Best Practices 2015 – Pro Se Case Processing") (offering information on standardized forms; e-filing and e-service; initial case processing and screening; creating a handbook for pro se litigants; pro bono programs and resources; and IT products for managing pro se cases).

10. *See, e.g.*, DVD: Court Web: Best Practices to Manage the Pro Se Docket (Federal Judicial Center March 25, 2015); National Conference for Pro Se Law Clerks (Santa Fe, N.M. Sept. 9–11, 2015); DVD: Court to Court: Pro Se Collaboration Services and Structure (Federal Judicial Center Sept. 19, 2012) (discussing the Federal Pro Se Clinic in the Central District of California).

enable judges to develop their own set of best practices suitable for their courtroom and the types of pro se litigants they see.

Part I discusses the concept of procedural fairness and the goal of increasing access to justice and addresses some of the potential ethical concerns over providing assistance to a pro se party. There is not a great deal of material on these issues specific to federal courts, so state court and academic resources are often relied upon. Part II examines specific case-management techniques that federal courts have applied or that have been recommended as potentially useful in pro se cases. Part III provides an in-depth look at many of the legal issues that can arise during pro se litigation, focusing on federal rules of civil procedure, rules of evidence, and case law, in order to give judges a better understanding of what they must or cannot do, while providing additional guidance on the many actions judges *may* take in their discretion.

We hope this publication, in conjunction with the Center's other efforts, will provide a better understanding of nonprisoner pro se litigation and the steps that may be taken to improve the experience for both litigants and judges.

I. Procedural Fairness: Access and Ethics

Discussions of how to manage pro se cases often include words like "difficult," "challenging," or even "headache." In fact, a recent FJC program featured a panel discussion entitled "Relief for Pro Se Headaches." To some extent, this view is understandable.

> *Pro se* litigation is difficult for us to handle at least in part because it doesn't fit into the neat box of our traditional system of litigation, the adversarial method of resolving disputes. That system assumes that parties know the law, are adept at procedure and the rules of evidence, and can marshal significant facts, present their side of the case to the factfinder thoroughly and lance the arguments of the opponent. But *pro se* litigants are capable of little if any of that.[11]

Dealing with a large number of pro se litigants "who may not be informed about law and court procedures poses significant implications for the administration of justice—especially, demands on court staff and resources and ethical dilemmas about how to compensate for self-represented litigants' lack of knowledge without jeopardizing judicial requirements of neutrality and objectivity."[12] Pro se cases are, "suffice it to say, a type of litigation that's just riddled with problems on every level."[13]

As challenging as it may be for courts to handle pro se litigation, it is even more so for the average pro se litigant. "It's easy to forget what a confusing, intimidating environment court can be for people not familiar with it. The procedures, terms, and norms that have come to seem simple or obvious to legal professionals are anything but that to most

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11. John C. Sheldon, *Thinking Outside of the Box About Pro Se Litigation*, 23 Maine B. J. 90, 91 (Spring 2008). *See also* Jones v. Niagara Frontier Transp. Auth., 722 F.2d 20, 22 (2d Cir. 1983) ("The lay litigant frequently brings pleadings that are awkwardly drafted, motions that are inarticulately presented, proceedings that are needlessly multiplicative.").

12. Conference of Chief Justices and Conference of State Court Administrators, Final Report of the Joint Task Force on Pro Se Litigation at 3 (Rockport, Me. July 29, 2002) [hereinafter CCJ & COSCA Report].

13. Lois Bloom, Statement at Pro Se Litigation Panel Discussion, at National Workshop for District Judges I (Federal Judicial Center Mar. 22, 1995).

other people."[14] As a result, "pro se filers often are confused, frightened, and lacking the confidence to negotiate what is a complicated system,"[15] so that "even pro se litigants who have meritorious claims may not get a decision on the merits because they cannot navigate the often complex procedural rules that govern federal litigation, leading to resentment and frustration."[16]

Yet, as the *Strategic Plan* noted, courts must be comprehensible and open and accessible to all litigants, not just those who have attorneys. "Access to justice" cannot simply mean that litigants have a right to get into court but are then left to struggle once there. "Practically speaking, our job is to provide access to the opportunity for justice. Our job does not involve creating a special set of rules for these cases," since everyone must follow the Federal Rules of Civil Procedure. "However, if we can make the process more transparent, more understandable by ordinary people, then that promotes the court's function of doing justice."[17]

The question, then, is not so much *whether* to help pro se litigants, but *how* to do so while still heeding the court's ethical obligation to be impartial. This section will examine the expectations of pro se litigants

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14. Kelly Tait, *Effective Communication with Self-Represented Litigants*, Case in Point, at 12 (National Judicial College 2011).

15. *Leveling the Playing Field: Help for Self-Filers*, The Third Branch (Admin. Office of the U.S. Courts, Washington, D.C.), July 2011, at 9 (quoting Judge A. Howard Matz (C.D. Cal.)). *See also* Judge Lois Bloom, *Pro Se Issues*, Phase II Orientation Seminar for U.S. Magistrate Judges (Federal Judicial Center Oct. 21, 2014) [hereinafter Bloom, *Pro Se Issues 2014*] ("Most pro se litigants are scared to death. Most pro se litigants are not the crazy, serial filers that give all the rest of pro se litigants a bad name.").

16. The Public Counsel Federal Pro Se Clinic, Annual Report: February 2009–February 2010 at 1 [hereinafter Public Counsel Annual Report]. *See also* Judge Lois Bloom, *Relief for Pro Se Headaches*, Panel Discussion at the National Workshop for Magistrate Judges (Federal Judicial Center Apr. 24, 2013) [hereinafter Bloom, *Pro Se Headaches*], *available at* http://fjconline.fjc.dcn/content/relief-pro-se-headaches-april-24-2013 ("the pro se litigant doesn't know which end is up").

17. Bloom, *Pro Se Issues 2014*, *supra* note 15. *See also* Supreme Court of Louisiana Task Force on Pro Se Litigation, Guidelines for Best Practices in Pro Se Assistance at 3 (2004) [hereinafter Louisiana Task Force] ("If every citizen has a constitutional right to access courts and a right to self-representation, then courts have a responsibility to make those rights meaningful by providing access and assistance."); CCJ & COSCA Report, *supra* note 12, at 10 ("courts have an obligation to ensure that self-represented litigants have access to the courts").

and some of the ways courts can make the judicial process more accessible while honoring their ethical obligations to both parties.[18]

A. Procedural Fairness

Discussion of pro se litigation usually focuses on what actions judges and other court personnel can take to help pro se litigants navigate the often complex rules and procedures of federal civil litigation. Part II will outline those steps in some detail, but it would be helpful to first examine what it is that civil pro se litigants are seeking or expecting when they bring their cases to court and how that may influence what steps judges should take toward ensuring that they have genuine "access to the judicial process."

In recent years there has been a growing discussion of the needs of pro se litigants that, rather than focusing only on legal or procedural problems they may face, addresses the sociological or psychological aspects of how unrepresented litigants feel about the overall litigation experience. Did they have the chance to fully state their grievance? Did they understand the process? Did they feel they were treated fairly by the judge and by the court system as a whole?[19]

These aspects of the litigation process are sometimes collectively referred to as procedural fairness or procedural justice. The goal of procedural fairness is for all litigants, whether represented or not, to feel that they:

1. have a voice in the process, are given the opportunity to be heard, are listened to, and have genuine input into the decision-making process;

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18. Judges may reasonably disagree on the amount and types of assistance that they or other court staff can or should provide to pro se parties in light of ethical concerns and their duty to be impartial. These materials are not intended to direct judges to any particular way of handling pro se cases, but rather to provide options for judges to consider in light of their individual views and practices.

19. These concerns apply mainly to what some have termed "good faith" pro se litigants—those who have a genuine complaint, whether ultimately successful or not, and who look to the courts to provide a fair venue for airing it. Those who engage in vexatious or harassing litigation, or seek to make a political statement, are likely less interested in the fairness of the process than in winning, making a point, or carrying on a grudge.

2. understand what is happening and what they are supposed to do through each stage of the litigation;
3. are treated with respect and on an equal footing with attorneys and represented parties; and
4. are treated fairly by the judge (and the judicial system in general) in a neutral, unbiased fashion.[20]

Although much of the procedural fairness discussion has occurred in state courts, some of the basic ideas are reflected in the core values of the *Strategic Plan*, such as "fairness and impartiality in the administration of justice; accessibility of court processes; treatment of all with dignity and respect."[21]

The focus on process for cases involving pro se litigants is particularly important because studies have shown that

> while attorneys were most often concerned with fairness in terms of the substantive legal *outcomes* of cases, Citizens' views of the courts[] are heavily influenced by their perceptions of the courts' ability to deliver a fair *process*. . . . [R]esearch has repeatedly established that when litigants perceive that a decision-making process is fair, they are more likely to be satisfied with the outcome.[22]

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20. These elements of procedural fairness are summarized from several sources. *See, e.g.*, Judges Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, A White Paper of the American Judges Association (Sept. 26, 2007); Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants* (American Judicature Society 2005); Handling Cases Involving Self-Represented Litigants: A National Bench Guide for Judges at 2-5 to 2-9 (Self-Represented Litigation Network, National Judicial College, National Center for State Courts & American Judicature Society 2008) [hereinafter National Bench Guide]; Tait, *supra* note 14, at 12–14; Rebecca A. Albrecht, John M. Greacen, Bonnie Rose Hough, and Richard Zorza, *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 The Judges' Journal, no. 1, 16 (Am. Bar Ass'n Winter 2003).

21. Strategic Plan 2015, *supra* note 4, at 2. "As part of its commitment to the core value of equal justice, the federal judiciary seeks to assure that all who participate in federal court proceedings—including jurors, litigants, witnesses, and observers—are treated with dignity and respect and understand the process." *Id.* at 14.

22. National Bench Guide, *supra* note 20, at 2-4 to 2-5. *See also* Burke & Leben, *supra* note 20, at 14 ("While the public emphasizes fair procedures, judges and attorneys focus on fair outcomes, often at the expense of attention to meeting the criteria of procedural fairness that are so important to the public's perception of the court.").

"Most people . . . are in fact more willing to accept a negative outcome in their case if they feel that the decision was arrived at through a fair method."[23]

Conversely, "the perception of unfair or unequal treatment 'is the single most important source of popular dissatisfaction with the American legal system.'"[24] Thus, for example, even if a court follows legal procedural rules to the letter and applies them equally to both sides, litigants will not view the process as a fair one if they believe that their lack of knowledge of those rules and the consequences of not following them prevented the litigants from adequately voicing their concerns. "[A] judge who scrupulously respects the rights of litigants may nonetheless be perceived as unfair if he or she does not meet these expectations for procedural fairness."[25]

Judges have the opportunity to increase the perception of fairness in pro se cases by how they communicate with the litigants. "What judges choose to say and do connects directly to the four major components of procedural fairness: if litigants felt they had a voice, understood what was happening, felt they were treated with respect, and thought the judge was trying to be fair."[26] Achieving procedural fairness, then, relies heavily on good communication, in one form or another, between the judge and litigant.

> Taking the time to listen to the positions of both sides and to communicate clearly the basis of the ultimate decision can result in a feeling of calm reassurance and stability that is almost palpable in the courtroom. In such circumstances it is not uncommon for even

23. Burke & Leben, *supra* note 20, at 5–6. *See also* Chief Justice Dana Fabe (Alaska), State of the Judiciary, Address Before the Joint Session of the Alaska House of Representatives and the Senate (Feb. 13, 2013) at 3, *available at* http://courts.alaska.gov/soj/state13.pdf ("What people should expect . . . from the process is to understand what happened, and why. Even if a judge's decision ultimately goes against them, people can best accept it if they believe they were fully heard and fairly treated.").

24. Burke & Leben, *supra* note 20, at 3.

25. *Id.* at 6.

26. Tait, *supra* note 14, at 14.

> the losing party to leave the courthouse with a sense of satisfaction at being treated with dignity and respect.[27]

Focusing on procedural fairness can help guide courts in choosing specific ways to assist pro se litigants. What follows is a discussion of the key elements of procedural fairness, specific issues courts should be aware of, and actions courts can take to ensure a pro se litigant's right to be heard in a fair and impartial manner.

1. Having Their Say and Being Heard

Perhaps the single most important action a judge can take to foster procedural fairness is allowing litigants to give voice to their concerns.

> It doesn't matter how big or how sophisticated the case is, people need to be heard. . . . If you did a survey of litigants . . . and say, "what did you like and not like about the court system?" Number one—"I did not feel heard. I never got a chance to tell my story. Nobody listened to me.". . . People have this tremendous sense of not being heard.[28]

Note that there are two components to this aspect of procedural fairness: being allowed to tell their story and being listened to.

> For litigants to believe that they have had an opportunity to participate in the decision-making process, [t]here must be an opportunity for input into the decision-making process [and t]his input must have some effect on the decision-maker. If litigants perceive that their contribution is not heard or considered, then [their] "voice" is lost.[29]

It is important to remember that listening can begin in the clerk's office or the court library before litigants even get to court, and can start them off on a positive note.

> Most of the time they're here because they have some business with the court and are agitated and somewhat angry because they feel no

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27. National Bench Guide, *supra* note 20, at 2-8.

28. DVD: Court Attorney Web: The Psychology of Litigation (Federal Judicial Center Oct. 24, 2012) (feat. Judge Jeremy D. Fogel), *available at* http://fjconline.fjc.dcn/content/309805/court-attorney-web-psychology-litigation.

29. National Bench Guide, *supra* note 20, at 2-5.

> one is listening to them and/or disregarding their claim, whether rightly or wrongly, that some injustice is being worked upon them. We've found that most of the time when we provide a friendly and sympathetic ear and listen to their tale of woe, and then if possible point them to some treatise that may or may not help them, they leave in a happier state of mind and with a sense that the federal court is not a cold and uncaring bureaucracy as they might have earlier believed.[30]

Once the case does get to a judge, an early pretrial conference presents a good opportunity to allow the pro se litigant to speak and to let them know you will listen. "Give pro se litigants a little bit of your time and attention. . . . Invite them to speak. It puts the whole tenor of the proceeding in a different place."[31] Start by summarizing the complaint, but then say, "'why don't you tell me in your own words, why is it that you brought this suit and what is it that you're hoping to accomplish?' . . . And just that act of giving that person the floor for several minutes to start an initial conference changes the dynamic in the courtroom."[32]

An added benefit to demonstrating early on that you are listening to them is that it may make litigants more inclined to listen to you. After all, as one judge puts it, before coming into court a litigant "doesn't know me from Adam, so why should they listen to me if I'm not going to listen to them?"[33]

Letting a pro se plaintiff speak at an early conference can also provide an opportunity to make sense of pleadings that may be so poorly drafted it appears certain that the plaintiff has no case. However, "what it was, was that the person couldn't convey in writing

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30. Letter from Gregory Townsend, Branch Librarian, Tenth Circuit, U.S. Courts Library, Albuquerque Branch, to Brenda Baldwin-White, Senior Judicial Education Attorney, Federal Judicial Center (Nov. 2, 2012) (on file with author).

31. Judge Lois Bloom, *Pro Se Issues*, Phase II Orientation Seminar for U.S. Magistrate Judges (Federal Judicial Center Oct. 22, 2013) [hereinafter Bloom, *Pro Se Issues 2013*] (audio available at http://fjconline.fjc.dcn/content/pro-se-issues-october-22-2013). *See also* Civil Litigation Management Manual 141 (Judicial Conference of the United States, 2d ed. 2010) ("A conference with the judge can also send a powerful message to pro se litigants that their cases are receiving the court's attention.").

32. Bloom, *Pro Se Issues 2014*, *supra* note 15.

33. *Id.*

what they could convey when they came before the court. . . . That is our job—not to make the case for the pro se litigant, but to allow the pro se litigant the opportunity to make the case."[34]

At and after the initial conference, assuring pro se litigants that they will have sufficient opportunity to speak throughout the course of the proceedings may help to avoid their attempting to speak at the wrong time or inappropriately. Judges should "[m]ake clear that [they] will hear all sides. Research has shown how quickly most litigants respond to cues that they will be fully heard. They then feel less need to interrupt or to tell everything in one long narrative. It relaxes everyone, which also saves time."[35]

Similarly, give the parties a chance to speak before issuing a ruling or making a decision. "Litigants report that this is very reassuring, particularly if the judge explains early that he or she will do this. The technique reduces litigants trying to cover everything at once and cuts back on their interrupting, thus reducing the time needed for the hearing."[36]

One other facet of communication to keep in mind is nonverbal cues, such as body language.

> Decades of studies demonstrate that 60–93 percent of the meaning of a message comes through nonverbal channels such as vocal inflections, tone of voice, posture, gestures, eye contact, facial expressions, pauses, etc.
>
> Remember that if the nonverbal behaviors don't match the words, people are much more likely to believe the messages they think are being sent nonverbally. So, if the judge says that it's important that the [pro se litigant] understands but then speaks

34. DVD: Court Web: Best Practices to Manage the Pro Se Docket (Federal Judicial Center Mar. 25, 2015) [hereinafter Court Web: Best Practices] (feat. Judge Lois Bloom).

35. Judge Mark A. Juhas, Judge Maureen McKnight, Associate Justice Laurie D. Zelon, & Richard Zorza, *Self-Represented Cases: 15 Techniques for Saving Time in Tough Times*, 49 The Judges' Journal, no. 1, at 18 (Am. Bar Ass'n Winter 2010). *See also* Tait, *supra* note 14, at 14 (Try to "be clear about when the [pro se] will have the opportunity to speak. Letting someone know this ahead of time makes it less likely the person will interrupt and more likely that the person will be ready to interact appropriately.").

36. Juhas et al., *supra* note 35, at 19.

> quickly, barely looks up or pauses, and doesn't check for comprehension, the interpretation is likely to be that expediency is more important than comprehension. The most effective messages are ones where the words and the nonverbal communication are congruent—where they're sending the same message and reinforcing each other.[37]

Even something as simple as "[l]ooking at a person while they are speaking shows attentiveness and makes it easier to see the speaker's body language and to regulate the interaction better."[38] For more information about various methods of communication, tips for more effective communication, and potential communication problems, the earlier-cited *National Bench Guide* provides an in-depth discussion at pages 9-1 to 9-20.

2. Provide Clear Explanations of the Process and the Litigant's Obligations

a. Avoid Legalese: Use Plain English

The first step toward making sure pro se litigants understand the process is to make sure that they understand what you are saying.

> A major potential barrier to effective communication with [pro ses] is the specialized language of the law. While the language used in court needs to be accurate and appropriate, it's just as important that it also be comprehensible if [pro ses] are to have a meaningful opportunity to represent themselves. Adapting the message to the audience is one of the key skills of an effective communicator. This includes choosing simple, concrete words when possible and giving clear explanations of expectations, processes, and legal terminology

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37. Tait, *supra* note 14, at 13. *See also* National Bench Guide, *supra* note 20, at 9-2 ("Nonverbal communication can be even more significant than verbal communication, and listening may be the most used but least taught communication skill.").

38. National Bench Guide, *supra* note 20, at 9-11. *See also* Gray, *supra* note 20, at 53 ("Pay attention and act like you are paying attention. If you take notes or refer to books or information on a computer screen during a proceeding, explain what you are doing so the litigants understand that they have your attention.").

(test explanations in advance). Focus on transparency and accessibility.[39]

Remember that "nothing in the code of judicial conduct (or elsewhere) requires a judge to use the jargon, abbreviations, acronyms, shorthand, and slang that frequently mark communications among legal professionals but inevitably leave a self-represented litigant feeling confused and left out." Avoiding legalese "neither gives an advantage to self-represented litigants nor prejudices represented litigants."[40] Judges and attorneys are "so used to speaking in acronyms and legal jargon that we don't even hear it . . . . Be a whole lot more careful, patient, and explain these terms. It'll take more time, but . . . it will actually make a difference in resolving the cases."[41]

This practice should apply equally to written materials. If anything, it may be even more important, when writing decisions or orders, not to "use legal jargon, abbreviations, acronyms, shorthand, or slang" but to write "in plain English explaining the decision, addressing all material issues raised, resolving contested issues of fact, and announcing conclusions of law."[42] It may also be advisable to explain orders in court so you can ascertain whether the litigants understand the substance of the order. "Clearly explaining the terms of the order is well worth the time. Explaining the reasoning may also be helpful. Even when litigants don't agree with the outcome, they are more like-

39. Tait, *supra* note 14, at 13. *See also* Massachusetts Supreme Judicial Court, Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants with Commentary, at 1 (2006) [hereinafter Massachusetts Guidelines] ("Most self-represented litigants are unfamiliar with complicated legal terms. The use of such terms can delay proceedings and necessitate lengthy explanations of concepts that are more readily understood if stated in plain English.").

40. Gray, *supra* note 20, at 19.

41. Bloom, *Pro Se Headaches*, *supra* note 16.

42. Gray, *supra* note 20, at 54, 56. *See also* Zoe Tillman, *Q&A: Judge Posner on Writing, Law School and Cat Videos*, Nat'l L.J. (May 18, 2016) ("[T]here is no need for terminological complexity in law. I think everything we do, the judges do, can be expressed in ordinary English. And I would think it very desirable for opinions to be written in a way that everybody can read it.") (quoting Judge Posner).

ly to comply if they understand that the decision was not arbitrary."[43] You want to make sure the pro se litigant understands the reasons behind a decision or order so that it is clear how the decision was reached and that his or her concerns were listened to.

If your district has a pro se manual with a glossary of terms, be sure all pro se litigants know about it. If your district does not have one, consider borrowing one from another district to provide to pro ses. The pro se handbook from the Northern District of California, for example, has a full ten-page glossary of legal terms, from "action" to "witness box."[44] The District of Minnesota, on the other hand, has a separate page on the court's website with a similarly lengthy list of legal terms,[45] in addition to its already sizeable (118-page) pro se guide. Both of these guides also define many terms in their text as they walk litigants through the stages of a case.

b. Explain the Process

The process of a federal civil case covers what forms to use, where to sit in the courtroom, how to file an appeal, and everything in between. Every step has its own rules and procedures, and many, if not most, pro se litigants have little knowledge of any of it. While it is primarily the litigant's responsibility to learn how to file, where to sit, and what to do, the *Strategic Plan* acknowledged that courts should make sure that everyone participating in federal court proceedings understands the process.[46]

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43. National Bench Guide, *supra* note 20, at 6-19. *See also* Public Counsel Annual Report, *supra* note 16, at 5 ("A disturbingly large number of litigants come to the Clinic with basic reading and comprehension problems; some cannot even read Court orders and the opposition's filings. Others can decipher the words in the documents but cannot comprehend even the simplest of Court orders.").

44. N.D. Cal., Representing Yourself in Federal Court: A Handbook for Pro Se Litigants 61–70 (2014) [hereinafter N.D. Cal. Handbook], http://www.cand.uscourts.gov/prosehandbook. For other district court pro se guides, see the Center's pro se litigation resource page at http://fjconline.fjc.dcn/content/pro-se-litigation-resources-litigants-court-staff-attorneys-and-judges.

45. *See* D. Minn. Website, http://www.mnd.uscourts.gov/Pro-Se/Glossary.shtml.

46. *See* Strategic Plan 2015, *supra* note 4, at 15.

Judges "need to explain the process" and "should aim for transparent and engaged judging, not detached judging. . . . Remember, engagement and neutrality are two different things. . . . Being engaged does not mean you're putting your finger on the scale" by explaining what the process is.[47] Moreover, "it cannot reasonably be said that impartiality requires a judge (indeed an entire court system) to stand by and watch helplessly while self-represented litigants flounder when simple procedural accommodations would at least enable them to be heard on the merits with evidence presented in a comprehensible fashion."[48]

Pro se litigants "are often confused about the status of their case, what their next step should be, what the court has ordered, or even how to deal with conflicting orders that they didn't even know existed."[49] To help pro se litigants better understand what is expected of them, it has been recommended that courts explain the different aspects of court procedure to all parties in the case—for example, the order in which the parties speak, the time they have, opportunity for rebuttal, not interrupting the other party, the moving party's burden of proof, what evidence may be presented, and what evidence must be excluded.[50]

Evidentiary matters can be particularly problematic for pro se litigants, since many "do not suspect the existence of rules of evidence, and practically all do not understand them. . . . Unless a judge explains why he or she is excluding what pro se parties consider valuable evidence, they are likely to be frustrated by the exclusion, and to grow

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47. Bloom, *Pro Se Issues 2014*, *supra* note 15. *See also* Massachusetts Guidelines, *supra* note 39, at 4 ("Judges should make a reasonable effort to ensure that self-represented litigants understand the trial process.").

48. Gray, *supra* note 20, at 48.

49. National Bench Guide, *supra* note 20, at 1-4. *See also* Gray, *supra* note 20, at 20 (consider "making a self-represented litigant aware of the possible consequences of violating an order entered by the court, . . . that violation of an order to appear for a deposition may result in a dismissal with prejudice, and providing a self-represented litigant with a notice of trial that describes the nature of proceedings in unambiguous terms").

50. Gray, *supra* note 20, at 26–27.

suspicious of the proceeding."[51] Taking a more active role in eliciting or clarifying relevant evidence, providing detailed explanations for rulings regarding admission or exclusion of evidence, and preventing opposing attorneys from taking advantage of the unrepresented, can help ensure a fair proceeding and, just as importantly, assure the pro se litigant that he or she has been treated fairly.[52]

Although the responsibility for explaining these and other aspects of the process ultimately lies with judges, a litigant can be provided with a substantial amount of helpful information well before the initial pretrial conference. As noted in the preface, many districts are now offering forms, instructions, guides, self-help kiosks, and, in a limited number of districts, even legal advice and assistance at pro se legal clinics, some of which are inside the courthouse. Consider providing information on the resources available to pro se litigants—including possible pro bono assistance—as a standard part of any early order in a pro se case, such as the one setting the initial pretrial conference. Almost any information that educates a pro se litigant about the proper steps to take and how to take them will leave less for the judge to do later. As one judge noted, "forms, manuals, kiosks and other resources are extremely helpful and a great relief for me. I don't have enough time to answer every pro se litigant's questions about procedures. Having these resources is a great reference tool and

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51. Peter L. Murray & John C. Sheldon, *Should the Rules of Evidence Be Modified for Civil Non-Jury Trials?*, 17 Maine Bar J. 30, 32–33 (2002). *See also* Richard Zorza, *Toward Best Practices in Complex Self-Represented Cases*, 51 The Judge's Journal, no. 1, 36, 39 (Am. Bar Ass'n Winter 2012) [hereinafter Zorza, *Toward Best Practices*] ("Evidence that requires foundation—documents and hearsay—seems to produce the most time-wasting confusion in trials. A focus on the required foundations in a pretrial conference will improve trial efficiency. *Example: To decide about admitting the financial records you want to present, we must know where they came from and how they have been kept. Maybe we can agree here which will be entered?*").

52. *See* Massachusetts Guidelines*, supra* note 39, at 9 ("Judges may require counsel to explain objections in detail, and judges should explain their evidentiary rulings."); National Bench Guide, *supra* note 20, at 2-4 ("To decide cases fairly, judges need facts, and in self-represented litigant cases, to get facts, judges often have to ask questions, modify procedure, and apply their common sense in the courtroom to create an environment in which all the relevant facts are brought out.").

clearly helps some of the litigants." [53] The Third Circuit has specifically encouraged the use of litigation manuals by pro se litigants, calling them "a valuable resource" that can "help litigants assert and defend their rights when no lawyer is available. And they can reduce the administrative burden on court officials who must grapple with inscrutable pro se filings. . . . Without a doubt, these manuals are informative, and inexperienced litigants would do well to seek them out."[54] For more information on court-provided resources, see *infra* Part II.A.

3. Treat All Litigants with Equal Respect

How pro se litigants are personally treated by judges, courtroom staff, and opposing attorneys can greatly affect whether they feel they were treated fairly and their case was properly heard. "When litigants are treated as valued members of society, they are more likely to feel satisfied that the process is fair. Litigants must be treated with dignity and respect by judges and courtroom staff."[55]

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53. Court Web: Best Practices, *supra* note 34. *See also* Massachusetts Guidelines, *supra* note 39, at 3 ("Judges should encourage the provision of information and services to better enable self-represented litigants to use the courts. Judges also should encourage self-represented litigants to use these resources. . . . While, at first glance, this role seems more appropriately assigned to court staff, it is important that judges support this function.").

54. Mala v. Crown Bay Marina, Inc., 704 F.3d 239, 246 & n.5 (3d Cir. 2013) (also noting that if the district does not have its own manual, a litigant could look for one from "other district courts or from public-interest organizations . . . . through an internet search"). *See also* Self-Represented Litigant Guide Recommendations and Best Practices at 1 (follow "Pro Se Handbook Recommendations" hyperlink to download MS Word document file on DMAP Website, *supra* note 9) (recommending such manuals and noting that they can "further ensure equal access to justice by providing unrepresented litigants with procedural guidance on the filing and litigation of cases in a federal district court, . . . can help self-represented litigants avoid common errors that cause delays [, and] . . . can also ease the burden on court personnel in answering procedural questions and dealing with problematic submissions").

55. National Bench Guide, *supra* note 20, at 2-8. *See also id.* at 2-7 ("if the judge treats people politely, and exhibits a clear concern for their rights, litigants are likely to view the entire process as fair"); Massachusetts Guidelines, *supra* note 39, at 8 ("Judges should ensure that proceedings are conducted in a manner that is respectful to all participants, including self-represented litigants.").

The Code of Conduct for United States Judges does not focus on pro se litigants, but it does call for a judge to "be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process."[56]

Very similar language in the American Bar Association's *Model Code of Judicial Conduct*[57] has been interpreted to place

> an affirmative obligation on a judge both to set an example of courtesy toward self-represented litigants for others to follow and to ensure that court staff receive the training and supervision necessary to help them in the often difficult task of providing patient service to self-represented litigants. In addition, the provision requires judges to exercise their authority in the courtroom to prevent attorneys from bullying or misleading conduct meant to take advantage of a self-represented litigant.[58]

Judges should also let pro se litigants know that the same respect and courtesy toward courtroom personnel and the opposing party is expected from the litigants themselves and "that the rude conduct displayed on television shows like *Judge Judy* is not acceptable in a real

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56. Judicial Conference of the United States, Code of Conduct for United States Judges Canon 3(A)(3) (2014).

57. Model Code of Judicial Conduct Canon 2, Rule 2.8(B) (Am. Bar Ass'n 2011) ("A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control."). *See also* Burke & Leben, *supra* note 20, at 22 ("How litigants are treated by court employees from the moment they enter the courthouse door—or the moment they encounter security personnel at a metal detector—sets the tone.").

58. Gray, *supra* note 20, at 15–16. *See also* National Bench Guide, *supra* note 20, at 6-14 ("The judge can promptly redirect a party who begins testifying on irrelevant information. The judge should also be quick to silence any interruptions by either party, reminding them that each side will have an opportunity to ask questions or present opposing testimony in turn. As judges well know, the temptation to interrupt during hearings is not exclusive to self-represented litigants.").

courtroom."[59] Consider also warning them that, unlike the television shows, their case is not likely to be resolved in half an hour.

4. Neutral, Unbiased Treatment

In cases involving a pro se litigant and a party represented by an attorney, judges must be particularly careful "to avoid creating the appearance of bias in favor of attorneys or represented parties. Respectful demeanor toward all participants in court proceedings is the primary method of ensuring self-represented litigants do not experience or perceive bias, particularly by refraining from harping on a litigant's pro se status" and showing equal respect for both the pro se litigant and the opposing attorney.[60]

Judges should also attempt to ensure that court employees do not seem to show any favoritism, or even just overfamiliarity, toward a represented party's attorney.

> Many attorneys appear often before court staff and judges and may know them well. These attorneys may walk around the courtroom freely and joke with clerks in a way that a self-represented litigant or an outsider would never be allowed to. The self-represented litigant may perceive this as favoritism or may think that the judge will be prejudiced in favor of the attorney.[61]

It is also important that a judge's nonverbal behavior indicates neutrality. "Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased[62] and should aim to "treat all parties in as equivalent a manner as possible with [the

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59. Gray, *supra* note 20, at 52. *See also* Bloom, *Pro Se Headaches*, *supra* note 16 ("You have to set the tone in your courtroom. Whether or not somebody is represented, don't let anybody call each other liars. It's unacceptable. I just tell them it won't be tolerated.").

60. Gray, *supra* note 20, at 17. *See also* Massachusetts Guidelines, *supra* note 39, at 9 (ensure that pro ses are "addressed with titles connoting equal respect to that afforded opposing counsel").

61. National Bench Guide, *supra* note 20, at 6-19.

62. Model Code of Judicial Conduct Canon 2, Rule 2.3, cmt. 2 (Am. Bar Ass'n 2011).

judge's] nonverbal behaviors—turning toward them, amount of eye contact, etc."[63]

If the judge questions witnesses, as often happens when a pro se is involved, he or she should "take care that his or her language, tone, and manner remain neutral during questioning so that the judge displays no attitude towards the merits of the case or the credibility of the witness."[64] This is particularly important in jury cases, so

> judges should instruct the jury that they are not to consider questions asked by the judge as any indication of the judge's opinion as to how the jury should decide the case and that if the jury believes that the judge has expressed or hinted at any opinion about the facts of the case, they should disregard it.[65]

Even without a jury, "judges should explain that the questions are being asked to clarify testimony and that they should not be taken as any indication of the judge's opinion of the case."[66] This could help to avoid having a litigant question whether an adverse ruling was the result of judicial bias.

The aim of avoiding the appearance of bias would also

> suggest that a judge should give an explanation for a ruling to a self-represented litigant, if not to every litigant. . . . By explaining a ruling either in writing or orally on the record, a judge avoids conveying to self-represented litigants "the impression that their efforts to studiously prepare their case were not worthy of comment" or that the judge is biased towards the other side.[67]

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63. Tait, *supra* note 14, at 14.

64. Gray, *supra* note 20, at 34.

65. Massachusetts Guidelines, *supra* note 39, at 11.

66. *Id. See also* Juhas et al., *supra* note 35, at 18 ("Explain at the beginning of the hearing that you may be asking questions and that this will not indicate any view on your part. It will merely mean that you need to get the information to decide the case. This makes it much easier to ask questions. It also reassures litigants that you are thinking about their concern for fairness. Some judges also find it useful to explain key governing evidentiary rules, such as hearsay, that are likely to be applied in practice.").

67. Gray, *supra* note 20, at 20 (citation omitted).

B. The Ethics of Assistance

Many judges are concerned that taking certain actions to assist a pro se litigant could be seen as indicating favoritism toward that litigant or unfairly disadvantaging the other party, thereby running afoul of ethics rules.

> [W]hen dealing with *pro se* litigants, judges must walk a fine line between two competing considerations. On the one hand, if the judge treats the *pro se* party as if he or she were represented by an attorney, the judge runs the risk of effectually impeding the *pro se* party's access to the courts. On the other hand, if the judge is too lenient with the *pro se* party, the judge's impartiality may be called into question.[68]

How is a judge to balance providing assistance to pro se litigants, so that they have meaningful access to the judicial system, with the ethical duty to be impartial? This

> is the ethical dilemma that self-represented litigants pose for judges. Judicial canons of conduct require that judges maintain impartiality toward all parties, which some judges interpret as a prohibition on providing self-represented litigants with assistance during court hearings, especially for cases in which the opposing party is represented. Canons of conduct also require judges to "accord every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." Many judges find it difficult to reconcile the requirement to provide self-represented litigants with an opportunity for a fair hearing with the requirement to remain impartial.[69]

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68. Louisiana Task Force, *supra* note 17, at 13.

69. CCJ & COSCA Report, *supra* note 12, at 4 (internal citations omitted). *See also* Judge Beverly W. Snukals and Glen H. Sturtevant, Jr., *Pro Se Litigation: Best Practices from a Judge's Perspective*, 42 U. Rich. L. Rev. 93, 98 (2007) ("Judges . . . must balance considerations of fairness to represented parties with due process requirements mandating that pro se litigants receive meaningful hearings. This balancing act requires judges to make difficult decisions, such as determining how much guidance to give a pro se litigant on substantive law or how to treat a meritorious case when the pro se litigant has failed to comply with court procedures, while remaining impartial to both the represented and pro se parties.").

The American Bar Association and several states have attempted to reconcile these competing interests by amending ethics rules and providing specific examples of what kind of assistance is authorized, many of which reflect the principles of procedural fairness discussed earlier. The ABA's Model Code of Judicial Conduct, Canon 2, Rule 2.2, states that a judge "shall perform all duties of judicial office fairly and impartially." The explanatory commentary was amended in 2007 to specify that "[i]t is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."[70] Rule 2.6(A) emphasizes the importance of allowing the litigant to be heard: "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law."[71]

Several of the states that have adopted these two rules (or similar versions) elaborated in commentary to the rules on what "reasonable accommodations" judges may take to protect and facilitate a pro se litigant's right to be heard, specifying some combination of the following steps:

- liberally construing pleadings
- providing brief information about the proceedings and about evidentiary and foundational requirements
- modifying the usual order of taking evidence
- attempting to make legal concepts understandable
- using plain English instead of legal jargon
- asking neutral questions to elicit or clarify information
- explaining the bases for rulings
- referring to resources that are available to assist pro se litigants in preparing their case[72]

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70. Model Code of Judicial Conduct Canon 2, Rule 2.2 & cmt. 4 (Am. Bar Ass'n 2011).

71. *Id.* at Rule 2.6(A). *See also* commentary to Rule 2.6(A) ("The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.").

72. *See* Self-Represented Litigation Network, Model Code of Judicial Conduct Provisions on Self-Represented Litigation: Options for Alternative Comment Language Prepared

As one commentator succinctly put it, "under the code of judicial conduct, no reasonable question is raised about a judge's impartiality when the judge, in an exercise of discretion, makes procedural accommodations that will provide a diligent self-represented litigant acting in good faith the opportunity to have his or her case fairly heard."[73] More specifically,

> [i]t does not raise reasonable questions about a judge's impartiality for the judge to explain to all parties how the proceedings will be conducted, for example, to explain the process, the elements, that the party bringing the action has the burden to present evidence in support of the relief sought, the kind of evidence that may be presented, and the kind of evidence that cannot be considered.[74]

Such techniques "simply remove some of the mystery from a system that is supposed to serve its citizens, not baffle them."[75]

The changes in ethics rules were prompted in part by concerns that, to avoid the appearance of favoritism, some judges

> may hesitate to inform a party that for a document to be considered, a proper foundation must be laid, for fear that giving the litigant this information will be seen as taking sides. Or the judge may hold back from pursuing a line of questioning, even if the answers would provide information needed to decide the case fairly, to prevent the appearance of trying to help the litigant provide the "right" answer. In either case, lack of communication from the judge has potentially hampered one side of the case and inhibited the court's ability to base its decision on the law and the facts.
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> . . . There is nothing in the Model Code, in the reports of disciplinary proceedings, or in the case law that prohibits such non-

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in Support of Potential State Activity in Response to 2012 Resolution 2 of the Conference of Chief Justices and the Conference of State Court Administrators 2–4 (Mar. 2013) (contains rules from Colorado, Iowa, Louisiana, Maine, Ohio, and Washington, D.C.).

73. Gray, *supra* note 20, at 5. *See also* Massachusetts Guidelines, *supra* note 39, at *i* ("While the legal and ethical constraints upon the courts and the judiciary, such as those contained in the Code of Judicial Conduct, apply with equal force to cases involving self-represented litigants, judges have broad discretion within these boundaries.").

74. Gray, *supra* note 20, at 2.

75. *Id.* at 5.

> prejudicial judicial communication or engagement. Rather, what is prohibited is nonneutrality or bias. Indeed, we know of no reported cases in which a decision has been reversed or a judge disciplined merely for such nonprejudicial engagement in factfinding. To the extent that decisions are reversed, or judges disciplined, it is for aggressively biased activity in a case.[76]

A group of state court administrators has suggested that the need for such judicial intervention—and the attendant ethical concerns—could be reduced by providing pro se litigants with better information before they appear in court and developing more standardized, court-wide procedures regarding pro se litigation. "Court systems should recognize that the ethical concerns can actually be ameliorated somewhat by the effective implementation of self-represented litigant assistance. Litigants who are better prepared for what will transpire in the courtroom will require less intervention or assistance on the part of the court."[77]

By comparison, the Code of Conduct for United States Judges does not single out pro se litigants, but the principles align with the general concept of procedural fairness. Canon 3 states that judges "should perform the duties of the office fairly, impartially and diligently. . . . (4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law." Although the Code of Conduct does not elaborate on what judges should do to ensure a pro se litigant receives his or her "full right to be heard according to law," federal courts have increasingly utilized or recommended various actions to promote procedural fairness for pro se litigants, as will be shown by the case-management techniques discussed *infra* in Part II.

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76. National Bench Guide, *supra* note 20, at 2-6 to 2-7. *Accord* Karen Adam, *Evidence and Ethics in Self-Represented Litigation*, Case in Point at 22 (National Judicial College 2009) ("On appeal, trial judges are commended for being helpful rather than hurtful to self-represented litigants. In only the most extreme circumstances have judges been reversed or sanctioned for assisting self-represented litigants in presenting their cases.").

77. Conference of State Court Administrators, Position Paper on Self-Represented Litigation 4 (Aug. 3, 2000).

C. Security

One other point warrants mention: There is some thought that increasing the perception of procedural fairness may lessen the risk of abusive or violent behavior from disgruntled litigants. An article from the National Judicial College magazine *Case in Point* addressed the concern that "whenever a litigant feels that counsel or the judge was unsympathetic or handled his or her grievance inappropriately, anything from a disruption in court to a direct threat can occur." The article noted that, along with more traditional security safeguards, the Committee on Judicial Security of the Judicial Conference of the United States, and the Administrative Office of the United States Courts, "are working on ways to assist [pro se] litigants with legal advice so they have a fuller understanding of the complexities and nuances of court proceedings. This type of effort is essential to the education of self-represented litigants and lessens the potential for inappropriate behavior or communications."[78]

The article also advises judges to treat others with respect, not become embroiled in the controversy, and not allow things to become "personal."

> Interviews with a number of suspects who have carried out violent attacks against judicial officers reveal that the suspects felt they were being treated unfairly and were not provided an opportunity to be heard during the court proceedings. Many felt they had no recourse other than to respond with violence. Judges are advised to do their best to explain the process, particularly to self-represented litigants. Sometimes even using terms like "The Court is required to impose a mandatory sentence of . . ." instead of "You richly deserve the punishment that I'm going to impose . . ." helps communicate that you are just doing your job and that it is not personal.[79]

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78. John F. Muffler & James R. Brandlin, *Judicial Security: Implementing Sound Protective Intelligence Methodologies*, Case in Point at 16–17 (National Judicial College 2011).

79. *Id.* at 18.

A Ninth Circuit task force on pro se issues similarly concluded that if pro se litigants felt they were treated fairly and had a better understanding of court processes, it would lower the risk that some would resort to violence.[80]

80. Ninth Circuit Judicial Council Task Force on Self-Represented Litigation, Final Report at 52 (Oct. 2005). "[J]udges and their staff might benefit from instruction in methods of effective communication, both orally and in writing, with pro se litigants, as well as methods to diffuse tense situations and advance effective case management. Although judicial training resources are limited, many of these techniques appropriately fall within the category of improving court security and could be funded as such." *Id.* at 45.

II. Suggested Case-Management Practices for Civil Pro Se Litigation

> Cases involving a pro se litigant present special challenges for several reasons, not the least of which is your obligation to ensure equal justice for litigants who may have little understanding of legal procedure or the law. At each stage in the case, you may need to take actions not required in cases in which all parties are represented by counsel.[81]

As shown in Part I, assistance to pro se litigants is called for on the basis of fairness and adequate access to justice and generally is not precluded by ethical concerns, which may in fact favor assistance. Another reason to assist pro se litigants is that it is often simply the more practical, efficient way to handle these cases. Much of what a court does to assist pro ses is to help them get more quickly to the root of their case and to move it forward. "More than other types of cases, pro se litigants don't make the case move forward, don't know how to move the case forward."[82] In this sense, assistance to pro ses mirrors the recommendation for all civil litigation to have greater judicial involvement through earlier and more intensive case management in order to reduce cost and avoid delay. This section will focus on practical methods of managing pro se cases—methods that serve the dual purpose of providing more procedural fairness for the pro se litigant while helping the court manage its caseload more efficiently.

The following list of suggestions and recommendations is designed to help federal judges deal with the "special challenges" presented by nonprisoner pro se litigants in civil cases. Except as otherwise noted, most of these actions are not required; rather, they are steps a court may take to help the case progress more expeditiously while providing equal justice to those who proceed without the bene-

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81. Civil Litigation Management Manual, *supra* note 31, at 136. *See also* Cranberg v. Consumers Union of U.S., Inc., 756 F.2d 382, 392 (5th Cir. 1985) ("When a *pro se* litigant, even one as skillful as Cranberg, goes to trial against a party represented by a member of the bar, the responsibility of a trial judge may warrant participation which differs markedly from what would be appropriate to a trial between adversaries represented by counsel.").

82. Court Web: Best Practices, *supra* note 34.

fit of an attorney. Note that many of the practices discussed below are also applicable to, even recommended for, litigation between represented parties, with the difference being that they may be utilized to a greater degree and with some modifications when a pro se party is involved.[83]

With relatively few exceptions, the conduct of a case is largely left to the sound discretion of the court, and the circumstances of each individual case and litigant will determine a judge's course of action. Moreover, judges may disagree about the amount and kind of assistance they can—or should—offer a pro se litigant without compromising their duty to be fair to both parties. This material is not intended to promote any particular viewpoint or urge judges to take any particular actions, but rather to provide options and alternatives that may be appropriate and useful in a given situation.

This material is also not meant to be a step-by-step procedural guide for civil pro se cases, which can vary greatly. Cases may be simple or quite complex. The litigants may be as capable as an attorney or poorly educated, may be erudite or not even speak English. Some are sincere and have a legitimate claim, others are abusive filers with a personal or political ax to grind. It is simply not possible to design a one-size-fits-all approach that will be appropriate for every case and every litigant. There should, however, be something here that is potentially helpful in most situations.

A. Manage the Case Before It Is Filed or Docketed

The earliest case-management techniques can be applied well before a case reaches a judge. As noted *supra* in Part I.A.2.b, one of the most helpful measures a court can take for both pro se litigants and the court itself is to provide guidance to the litigant before the pleadings

83. *See, e.g.*, Judge Charles R. Pyle, Getting to Know You—Improving Case Management Efficiency Through Increased Interaction with the Parties at 1 ("Case management techniques and principles for standard civil cases with represented parties will usually, with minor modifications, be useful in a pro se case.") (handout from the Ninth Circuit Pro Se Conference Sept. 18–19, 2014), *available at* http://www.circ9.dcn/prose_conference/reference_materials/case_mgmt/ProSeConferenceHandout.pdf.

are filed. Doing so may improve the information the litigant provides to the court, show the litigant that the case does not belong in federal court to begin with, or allow the litigant to correct mistakes in the initial filing. Some of these steps are highlighted here.

1. Standardized Forms

In the *FJC Survey*, the chief district judges and clerks of court frequently mentioned use of standardized forms and instructions as one of the most effective measures a court can take for handling pro se litigation.[84] Providing standardized forms can be a simple, effective step to help the litigant file a more accurate complaint, which allows the court to process it more efficiently.

> Simple, easy-to-use forms are essential for self-help programs and benefit both litigants and courts. Litigants who use forms prepare legally sufficient pleadings more often, understand the system better, and complete the process faster and more frequently. When forms are available and used, courts run more efficiently and effectively, can decide disputes on the merits more often, and can present better data to decision makers. Forms also encourage jurisdictions to establish what issues are important for a legal problem and the process for resolving that problem. This allows for potential further improvements.[85]

A majority of district courts provide one or more forms geared toward pro se litigants, most commonly a generic civil complaint form.[86] Many courts also provide standardized forms for particular causes of action, most often employment discrimination, civil rights, or social security appeals. For example, in addition to a general civil complaint form, the District of Connecticut has forms for civil rights,

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84. *See* FJC Survey, *supra* note 7, at *vi*, *viii*, 15–17, 34, 35, & 37.

85. Self-Represented Litigation Network, Best Practices in Court-Based Programs for the Self-Represented: Concepts, Attributes, Issues for Exploration, Examples, Contacts, and Resources at 43 (National Center for State Courts 2008) [hereinafter Best Practices in Court-Based Programs].

86. The FJC pro se webpage provides links to most districts' forms at http://fjconline.fjc.dcn/node/78254. The Administrative Office of the U.S. Courts also provides several model pro se forms on the U.S. Courts website. *See* "Pro Se Forms" at http://www.uscourts.gov/forms/pro-se-forms.

employment discrimination, and Social Security claims, which can be filled out online and printed for filing.[87]

An added benefit of specialized forms is that they can remind litigants of necessary preliminary steps they should have taken before filing a complaint in federal court, like seeking a "Notice of Right to Sue" letter from the Equal Employment Opportunity Commission (or applicable state agency), or appealing an unfavorable Social Security decision administratively.[88]

Some districts provide more than just information on how to fill out the forms. The Northern District of Illinois has an instruction booklet with forms for mortgage foreclosure cases. It includes information on a mortgagee's legal rights and options when faced with foreclosure, such as the right to reinstatement or redemption of the loan.[89] On its pro se complaint form for appealing Social Security decisions, the Central District of California provides a "Prayer for Relief" that goes beyond simply asking that the decision be reversed or reconsidered:

> Plaintiff respectfully prays that:
>
> A. Defendant be ordered to submit a certified copy of the transcript of the record, including evidence upon which the findings and decision complained of are based;
> B. Upon such record, this court should modify the decision of the defendant to grant monthly maximum insurance benefits to the Plaintiff, retroactive to the date of initial disability, or in the alternative, remand to the Commissioner for reconsideration of the evidence;

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87. See pro se forms page on the district court's website at http://www.ctd.uscourts.gov/forms/all-forms/prose_forms.

88. For examples of forms for employment discrimination and Social Security appeals, see the following: District of Oregon, http://ord.uscourts.gov/index.php?option=com_content&view=article&id=124&Itemid=329; District of Connecticut, http://www.ctd.uscourts.gov/sites/default/files/forms/Pro Se_6 Compl Empl Discrim.pdf and http://www.ctd.uscourts.gov/sites/default/files/forms/Pro Se_4 Soc Sec Cmp.pdf; Southern District of New York, http://nysd.uscourts.gov/cases/show.php?db=forms&id=63 and http://nysd.uscourts.gov/file/forms/complaint-social-security.

89. *See* N.D. Ill. Website, Filing a Civil Case Without an Attorney: Mortgage Foreclosure Answer Forms & Instructions, http://www.ilnd.uscourts.gov/_assets/_documents/_forms/_ProSe/forms/english/Answer to Foreclosure-English.pdf.

C. For such further relief as may be just and proper under the circumstances of this case.[90]

In addition to standardized forms for social security appeals, the Southern District of New York offers an eighty-five-page manual for pro se litigants, *How to Appeal a Social Security/SSI Disability Case in the United States District Court for the Southern District of New York: A Manual for Claimants*. It includes the nineteen-page section "Common Legal Arguments Raised in Social Security Appeals" for both adult and child disability cases.[91]

A newer variation on fillable forms is E-Pro Se, "a user-friendly, inter-active Web application, developed by the United States District Court for the Eastern District of Missouri," that takes a litigant step-by-step through filling out different kinds of complaints.[92]

> The program gathers necessary information through an on-line exchange with the litigant and then uses the information provided by the user to create these civil case initiation documents that may be filed with the district court. At the end of each program, all forms are printed legibly in a document format organized to provide the court with essential information about the type of claim the filer intends to present for resolution. Self-represented litigants are able to use E-Pro Se to create case initiation documents required for Social Security, employment, consumer, and civil rights complaints.[93]

To date, it appears that only a few other districts have adopted E-Pro Se.[94]

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90. *See* C.D. Cal. Website, Complaint forms for *Pro Se* Litigants at 4, http://court.cacd.uscourts.gov/CACD/Forms.nsf/0b2b50f03ce1d589882567c80058610a/15a7a5773c4bf0cd882578880075ab54/$FILE/Complaint Forms for Pro Se Litigants.pdf.

91. *Available at* http://www.nysd.uscourts.gov/file/forms/how-to-appeal-a-social-security-ssi-disability-case.

92. *See* E.D. Mo. Website, "E-Pro Se/Self Help Document Preparation," http://www.moep.uscourts.gov/e-pro-se.

93. *Id. See also E Pro Se Bolsters Access to Court*, The Third Branch (Admin. Office of the U.S. Courts, Washington, D.C.), Apr. 2010, at 5.

94. D. Minn., http://www.mnd.uscourts.gov/Pro-Se/E-Pro-Se.shtml; D. Vt., http://www.vtd.uscourts.gov/e-pro-se; W.D. Wash., http://www.wawd.uscourts.gov/pro-se/e-pro-se; D. Ariz., http://www.azd.uscourts.gov/electronic-pro-se-e-pro-se-program-now-available.

Whatever types of forms are offered, they may be most effective if plaintiffs are required to use them. In the Eastern District of Missouri, "[a]ll actions brought by pro se plaintiffs or petitioners should be filed on Court-provided forms where applicable. If an action is not filed on a Court-provided form, the Court, in its discretion, may order the pro se plaintiff or petitioner to file the action on a Court-provided form."[95] In addition to promoting uniformity, this would also help courts point out errors or deficiencies in the complaint to make it easier for a plaintiff to properly amend it.

2. Pro Se Guides or Manuals

The instructional guides or manuals that many district courts supply to pro se litigants can also serve as a guide for judges. Any information in these guides has essentially been preapproved as information that a court may ethically pass on to pro se litigants. Some of these guides go fairly in-depth on a wide variety of subjects, including filing the initial complaint, responding to motions, discovery, admissibility of evidence, and trial preparation. So if, for example, a guide explains what disclosures a plaintiff must make to the defendant during discovery,[96] a judge could give the same explanation in court. Judges should consider using the information in their own or other districts' guides when faced with the prospect of whether and how to explain procedural issues to pro se litigants.

In some districts, the available resources are so extensive as to provide a veritable road map on how to litigate a civil case. The District of Minnesota's 118-page pro se guide covers everything from initiating the case to filing an appeal. Among the topic headings are "How Do I Start a Lawsuit?"; "What is a Motion, and How Do I

95. *See* E.D. Mo. L.R. 45-2.06(A).

96. *See, e.g.*, D. Minn., Pro Se Civil Guidebook 59–63 (2015) [hereinafter Minnesota Guidebook], http://www.mnd.uscourts.gov/Pro-Se/Pro-Se-Civil-Guidebook.pdf; S.D.N.Y., A Manual for *Pro Se* Litigants Appearing Before the United States District Court for the Southern District of New York 79–86 (2011) [hereinafter S.D.N.Y. Manual], http://www.nysd.uscourts.gov/file/forms/pro-se-litigants-manual. *See also* N.D. Cal. Handbook, *supra* note 44, at 37 (providing link to an "Initial Disclosures" packet including a fill-in form for pro ses to make initial disclosures: http://cand.uscourts.gov/civillitpackets).

Write or Respond to One?"; "What is Discovery?"; "What Happens at a Court Hearing?"; "What is a Motion for Summary Judgment?"; "What Happens at a Trial?"; and "What Can I Do if I Think the Judge or Jury Made a Mistake?"[97] The district's website also offers several "Information Sheets that provide basic information about specific procedures," a question-and-answer page, and more than thirty forms, most of which reference the pages in the guidebook that cover that particular form.

The Southern District of New York has similar offerings, including an even larger manual (158 pages)[98] and a separate, almost as lengthy manual (120 pages) specifically for trial.[99] Although few other districts provide manuals as large as those in Minnesota and New York, most districts do provide some kind of manual for pro se litigants, as well as forms, instructions, and other helpful materials. The *FJC Survey* reports that

> district courts rely heavily on print and electronic materials to help and guide pro se litigants. The most common sources of information are the district's local rules, principal forms, and courthouse or courtroom locations, followed by handbooks developed specifically for pro se litigants. Eighty-four percent of the districts have such a handbook for non-prisoner pro se litigants.[100]

3. Consider Early Screening of Pro Se Complaints

a. By the Court

For prisoner pro se filings, many districts screen the initial complaint before docketing. It can also be effective in nonprisoner cases to "re-

97. *See* Minnesota Guidebook, *supra* note 96.

98. *See* S.D.N.Y. Manual, *supra* note 96.

99. S.D.N.Y., Representing Yourself at Trial: A Manual for *Pro Se* Litigants Appearing Before the United States District Court for the Southern District of New York (2011) [hereinafter S.D.N.Y. Trial Manual], http://www.nysd.uscourts.gov/file/forms/representing-yourself-at-trial.

100. FJC Survey, *supra* note 7, at *v*. Just under half of the districts offer sample documents for motions or other pleadings or FAQs to assist pro se litigants in navigating court procedures and preparing submissions. *Id.* at 8.

view the pleadings as soon as they are filed; if pleadings fail to meet technical requirements, inform the parties and give them an opportunity to cure defects. . . . [C]heck promptly for threshold issues, such as subject matter jurisdiction, personal jurisdiction, and venue."[101]

If it seems that the plaintiff may have a valid claim for relief but has not filed a proper complaint, it is not inappropriate for the court to point out obvious defects.[102] The Ninth Circuit reasoned that

> provid[ing] the pro se litigant with notice of the deficiencies in his or her complaint helps ensure that the pro se litigant can use the opportunity to amend effectively. Without the benefit of a statement of deficiencies, the pro se litigant will likely repeat previous errors. . . . A statement of deficiencies need not provide great detail or require district courts to act as legal advisors to pro se plaintiffs. . . . [D]istrict courts need draft only a few sentences explaining the deficiencies.[103]

See the discussion *infra* in Part III.A.2.

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101. Civil Litigation Management Manual, *supra* note 31, at 138. *See also* D. Kan., "Ten Techniques for Managing Pro Se Cases" (recommending "an intensive initial review of issues" and using "initial defect orders to address noncompliance with court rules") (on file with author) (document available in materials for the Federal Judicial Center's "Case Management Seminar: Achieving the Promise of Rule 1" June 1–3, 2011); Case Management Manual for United States Bankruptcy Judges at 749 (Federal Judicial Center, 2d ed. 2012) [hereinafter Bankruptcy Case Management Manual] ("Some judges direct the clerk's office to bring filings by pro se parties to their attention so that the documents may be promptly reviewed and the pro se litigant may be given an opportunity to cure defects if technical requirements have not been met. The judges also may check for threshold issues, such as subject-matter jurisdiction and venue.").

102. *See, e.g.*, Bloom, *Pro Se Issues 2014*, *supra* note 15 (For pro se plaintiffs filing inadequate complaints, issue a sua sponte order "directing them to file an amended complaint within 30 days, telling them what the problem with the case is as presently stated.").

103. Noll v. Carson, 809 F.2d 1446, 1448–49 (9th Cir. 1987), *superseded on other grounds by statute as stated in* Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (en banc). Although this was a prisoner case, it also applies to civil cases. *See, e.g.*, Faggett v. Dept. of Motor Vehicles, 164 F.3d 630, 630 (9th Cir. 1998) (table) ("Faggett's first amended complaint was found deficient because it failed to allege what accommodations were necessary and how she was discriminated against due to her disability. The district court granted an opportunity to amend the complaint, and explained how the complaint's deficiencies could be corrected. *See Noll v. Carlson,* 809 F.2d 1446, 1448 (9th Cir. 1987).").

In the Eastern District of New York, pro se staff attorneys review complaints and can "draft orders in cases that are insufficiently pleaded but not appropriate for sua sponte dismissal, generally directing the litigant to amend the complaint." The pro se staff will also "provide procedural advice to individuals seeking to file claims or litigating their claims before the court, through such activities as answering questions about civil procedure and making forms and instructions available for pleadings and motions."[104] This also allows the "early identification of those pro se cases that should be quickly terminated; those that need to be repleaded; and those that need to be transferred to another district." By quickly terminating frivolous cases, the court "can expend greater attention on meritorious cases that may be deserving of court-ordered relief."[105]

In the District of Montana, nonprisoner pro se cases

> are screened for subject-matter jurisdiction, including frivolousness or maliciousness, and representation issues . . . . The whole case or one or more parties or claims may be recommended for dismissal on pre-screening. . . . [I]f the plaintiff is proceeding in forma pauperis, the pleading is also screened for failure to state a claim, including any concession by plaintiff of failure to exhaust available administrative remedies. . . . If amendment may cure any defects spotted on pre-screening, the plaintiff is given a time-limited opportunity to amend. Any amended pleading is again subjected to pre-screening.[106]

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104. Judge Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 Notre Dame J. of L., Ethics, & Pub. Pol'y 475, 496 (2002).

105. *Id.* at 497. The Southern District of New York has a similar system, with all papers filed by pro se litigants being submitted to the Pro Se Intake Unit, which "check[s] for compliance with the Federal Rules of Civil Procedure" and "may assist pro se litigants by explaining Court procedures and filing requirements." Litigants may also speak to a staff member on the phone or in person during normal business hours. *See* S.D.N.Y. Website, Pro Se Intake Unit Webpage, http://www.nysd.uscourts.gov/courtrules_prose.php?prose=office.

106. Ninth Circuit Pro Se Implementation Committee, Interim Report, Appendix D, at 45 (Feb. 2009), http://www.ce9.uscourts.gov/publications/prose/Pro_Se_Committee_Interim_Report_09.pdf.

Once a litigant has amended the complaint, "[i]f the magistrate judge finds that any claim requires an Answer, [he or she] issues an order directing service of the pleading and specifying the claims to answer."[107]

b. By a Legal Assistance Program

One way for courts to conserve judicial resources and still prescreen pro se complaints is to have someone else do it prior to filing. Several districts have partnered with bar groups or law firms to provide legal assistance to pro se litigants who want to file a claim in federal court. Generally, such programs offer an initial consultation with an attorney or paralegal in the courthouse but vary in how much further assistance may be provided. One of the earliest programs was developed in the Northern District of Illinois. Like other assistance programs, it is staffed by volunteer attorneys who will assist a pro se litigant by providing information about federal law and court procedure as it applies to his or her case and offer help preparing certain pleadings, motions, and other court documents; accessing other informational resources about the litigant's legal issues; and referring litigants to other legal service providers or social service agencies.[108] Lawyers for the program will not, however, appear in court, research or write documents, investigate the facts of the case, or negotiate with the other party.

In the Central District of California, the court partnered with a nonprofit law firm to provide a broader range of services for litigants. Volunteer attorneys provide "an initial assessment to determine

107. *Id. See also* DMAP Website, Processing and Screening New Pro Se Cases, *available at* http://jnet.ao.dcn/sites/default/files/pdf/8_Pro_Se_Case_Processing_andScreening_Final_9302015.pdf (recommending two-level review with initial screening and substantive screening of pro se filings).

108. *See* N.D. Ill., District Court Pro Se Assistance Program, *available at* http://www.ilnd.uscourts.gov/_assets/_documents/_forms/_prose/District Court Pro Se Assistance Program.pdf. The Northern District of New York looked to the program of the Northern District of Illinois as a model for its own pro se assistance program (http://www.nynd.uscourts.gov/pro-se-assistance-program). *See* DVD: Court to Court: Pro Se Services N.D.N.Y. (Federal Judicial Center Nov. 2012) [hereinafter Pro Se Services N.D.N.Y.], *available at* http://fjconline.fjc.dcn/content/court-court-pro-se-services-ndny-november-2012-1.

whether the case belongs in federal court," looking in particular at federal jurisdiction and timeliness, as well as assessing whether the case is frivolous. If the claim does not pass the initial assessment, the attorneys "explain to the litigant why [they] do not believe the case belongs in federal court and recommend he or she take the issue to state court or some other appropriate venue," or not proceed with the claim at all if it has no merit.[109] The clinic provides assistance with pleadings, service of process, motions, discovery, and conferences.[110]

Providing legal assistance to litigants before they file as well as after can help the district courts in several ways. As noted above, the litigants may be advised that they should not file in federal court because their case does not meet jurisdictional or venue requirements. They can instead be steered toward the appropriate state court or state or federal administrative agency. Litigants with frivolous claims might be persuaded not to file at all. If they seem to have a legitimate claim, litigants can receive help in formulating their complaints, and sometimes other motions, in accordance with the rules of procedure, lessening the chance that the court will have to deal with an inadequate complaint that may require amending and re-amending while likely inviting repeated motions to dismiss. "The fact that somebody who will be before you, without a lawyer but will have the benefit that guidance and communications and forms and directions provide . . . , is a terrific resource for the judges."[111]

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109. *See* Public Counsel Annual Report, *supra* note 16, at 7 (The clinic advised visitors not to proceed only in cases with "obvious incurable defects, such as lack of federal jurisdiction or factual impossibility (e.g., suits against mythical beings)," and of the 19% the clinic "advised not to proceed, 81% followed [its] advice.").

110. *Id.* at 8–10. The Central District of California also has clinics, operated by a different public interest group, at two other courthouses. *See* C.D. Cal. Website at http://court.cacd.uscourts.gov/cacd/ProSe.nsf/.

111. DVD: Court to Court: Pro Se Collaboration Services and Structure (Federal Judicial Center Sept. 19, 2012) (segment feat. Judge A. Howard Matz (C.D. Cal.), discussing benefits of Federal Pro Se Clinic in the Central District of California), *available at* http://fjconline.fjc.dcn/content/court-court-pro-se-collaboration-services-and-structure-september-2012-1. *See also id.* (segment feat. Terry Nafisi, Clerk of Court (C.D. Cal.)) ("The pro se clinic is the clerk's office's best friend. They have saved us a ton of time, a ton of grief, and have really provided a great public service."); Pro Se Services N.D.N.Y., *supra* note 108 ("Anything that narrows the scope of the litigation, either through the pleadings, through a

The clinics also serve to provide litigants with some of the elements of procedural fairness by giving them a chance to tell their story to someone who will listen to them and attempt to explain court rules and procedures.

> Having a walk-in clinic means that these people who are adrift and angry very often, and fearful always, are able to talk with a human being who can provide support, or at least guidance, and treat them with a sense of dignity and respect, which they often seldom encounter. That makes them more receptive to the principles, the rules, the filing requirements, the technicalities, because they've been given a chance to be heard and to be considered.[112]

While not every district has enough pro se filings to make a legal assistance program worthwhile, or the resources to make it possible, those that do should examine the programs above and the several other districts that have such programs.[113] Similar help for courts might be found using limited-scope or partial representation. See *infra* Part II.D.

B. Be a Proactive Case Manager from the Start

In recent years there has been a growing emphasis on the potential benefits of judges taking a more active role in managing civil cases, especially in the early stages.

> Managed cases will settle earlier and more efficiently, and will provide a greater sense of justice to all participants. Even in the absence

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conversation with the pro ses at the very outset of the litigation, inevitably leads to an extraordinary savings in time and energy." (statement of then-Chief Judge Gary L. Sharpe)).

112. DVD: Court to Court: Pro Se Collaboration Services and Structure, *supra* note 111 (segment feat. Judge A. Howard Matz (C.D. Cal.)). *See also Public Counsel Annual Report, supra* n.17 at 10–11 ("Many litigants, for example, are angry that their cases have been decided without oral argument. A common complaint is, 'I never even got to go in front of a judge.' We explain to these litigants that much of federal litigation is done in writing and does not resemble oral hearings depicted in television programs like 'Judge Judy.' . . . Helping pro se litigants in this way often significantly mitigates the anger that can result from a pro se litigant's misunderstanding of legal proceedings.").

113. *See, e.g.*, FJC Pro Se Webpage, "Pro Se Court Internet Resources by Category—Clinics," http://fjconline.fjc.dcn/node/78249 (listing district court programs and clinics).

> of settlement, the result will be a more focused trial, increased jury comprehension, and a more efficient and efficacious use of our scarcest institutional resource, judge time.[114]

It is thought that "early, active case-management results in greater efficiency, reduced costs, and a shorter time from filing to disposition"[115] and helps the courts meet the goal of Federal Rule of Civil Procedure 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding." Rule 16(a)(2) specifies that one of the purposes of pretrial conferences is to establish "early and continuing control so that the case will not be protracted because of lack of management."

The same benefits from, and need for, active case management are, if anything, greater in pro se litigation. "Nonprisoner pro se cases will also benefit from your early review. You and the parties may be saved considerable time later if you take a few minutes early in the case to start it down an orderly path."[116] Or as one magistrate judge

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114. Judicial Conference of the United States, The Civil Justice Reform Act of 1990: Final Report 10 (1997). *See also* Benchbook for U.S. District Judges 189 (Federal Judicial Center, 6th ed. 2013) [hereinafter Benchbook] ("Active judicial case management is an essential part of the civil pretrial process. . . . Many parties and lawyers want and welcome active judicial case management, viewing it as key to controlling unnecessary cost and delay."); DVD: Amendments to the Federal Rules of Practice and Procedure: Civil Rules 2015—Overview (Federal Judicial Center 2015), *available at* http://fjconline.fjc.dcn/node/309294/ (on rules amendments effective Dec. 1, 2015) ("Litigation results are more satisfactory when a judge actively manages a case from the beginning and stays involved. The amendments do not break new ground; they emphasize the importance of early, hands-on, and continuing case management.").

115. Civil Litigation Management Manual, *supra* note 31, at 3. *See also* Chief Justice John Roberts, 2015 Year-End Report on the Federal Judiciary 10–11 (Dec. 31, 2015) ("Experience has shown . . . that judges who are knowledgeable, actively engaged, and accessible *early* in the process are far more effective in resolving cases fairly and efficiently, because they can identify the critical issues, determine the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing."); William W Schwarzer & Alan Hirsch, The Elements of Case Management: A Pocket Guide for Judges 1 (Federal Judicial Center, 2d ed. 2006) ("A small amount of a judge's time devoted to case management early in a case can save vast amounts of time later on.").

116. Civil Litigation Management Manual, *supra* note 31, at 138.

put it, "All pro se litigation needs intensive case management."[117] The following are some techniques judges may find helpful in managing civil pro se litigation to keep it moving forward.

1. Consider Holding an Early Status Conference and Other Conferences as Needed

In May 2010 the Civil Rules Advisory Committee of the Judicial Conference of the United States hosted the Conference on Civil Litigation at Duke University Law School. The participants at the conference "agreed that cases are resolved faster, fairer, and with less expense when judges manage them early and actively. An important part of this management is an initial case management conference where judges confer with parties about the needs of the case and an appropriate schedule for the litigation."[118]

As with early screening, a conference in the early stages of litigation can be advantageous in several ways. It provides an opportunity to let pro se plaintiffs state their case to help you better understand their pleadings. As one judge noted, "It never ceases to amaze me, the power of holding a conference. . . . I find it is the surefire way to get to the heart of the matter."[119] Even with represented parties, "[t]he

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117. Judge Mary E. Stanley (S.D. W. Va.), Pro Se Litigation Issues: Referral, Screening, Management and Disposition of Cases Filed by Pro Se Plaintiffs 1 (2002) (on file with author).

118. Memorandum from Judge David G. Campbell, Chair, Advisory Committee on Federal Rules of Civil Procedure, to Judicial Conference of the United States (June 14, 2014) Rules Appendix B-12. *See also* Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation 4 [hereinafter Report to the Chief Justice] (consensus of many surveys reported on at the conference "was that district or magistrate judges must be considerably more involved in managing each case from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of that case").

119. Bloom, *Pro Se Headaches*, *supra* note 16. *See also* Sarah Netburn, "*Pro Se* Case Management Practice Tips" 5 (S.D.N.Y. June 3, 2011) (to facilitate discovery, consider "questioning the *pro se* litigant at the [initial status] conference to elicit what she believes the case is about and how she will prove her case") (on file with author) (from materials provided at the Federal Judicial Center's "Case Management Seminar: Achieving the Promise of Rule 1," June 1–3, 2011).

pleadings often fail to clearly identify what claims or defenses—or elements of claims or defense—are genuinely in dispute. The case management conference is an ideal time to probe the parties' contentions to determine what issues actually need to be resolved."[120]

An early Rule 16 conference can "be a useful tool in [nonprisoner] pro se cases[,] . . . particularly for identifying and narrowing issues and for establishing your control over the case. A conference with the judge can also send a powerful message to pro se litigants that their cases are receiving the court's attention."[121] And although a telephone conference may be more expeditious in some circumstances, "a face-to-face conference in the courtroom may be advisable in a case with a nonincarcerated pro se litigant, to address concerns of the pro se litigant, to avoid misunderstandings that can easily arise with such a litigant, and to enable you to emphasize the seriousness of the litigation."[122] Face-to-face discussions also "facilitate the detailed discussions needed to clarify and narrow issues, analyze damage claims, explore settlement possibilities, and address contentious matters; such discussion may be sacrificed or minimized in a telephone conference."[123]

One judge recommends starting conferences with pro se plaintiffs by summarizing what the complaint states, then asking the plaintiff, "[T]ell me in your own words, why did you decide to bring this action and what is it you're hoping to accomplish?"[124] Apart from per-

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120. Benchbook, *supra* note 114, at 193–94.

121. Civil Litigation Management Manual, *supra* note 31, at 141. *See also* National Bench Guide, *supra* note 20, at 6-23 ("The judge can save considerable time by demonstrating his or her familiarity with the basic written contentions of the parties. The judge can take [a summary of the pleadings] from the cover sheet prepared by staff, augmented by the judge's own notes made during the file review. This summary also demonstrates to the parties the judge's concern about the case.").

122. Civil Litigation Management Manual, *supra* note 31, at 19. *See also* DVD: Amendments to the Federal Rules of Practice and Procedure: Civil Rules 2015—Overview, *supra* note 114 (on rules amendments effective Dec. 1, 2015) ("The rules now recognize that live conferences are almost always the most effective way to identify the needs of a case and issue orders tailored to efficient resolution.").

123. Civil Litigation Management Manual, *supra* note 31, at 19.

124. Bloom, *Pro Se Issues 2013*, supra note 31.

haps gaining a better understanding of the facts underlying the complaint, the discussion gives the judge the opportunity to make sure that plaintiffs understand what their particular burden of proof will be.[125]

Federal Rule of Civil Procedure 16(c)(2)(A) specifically allows the judge to take the initiative in "formulating and simplifying the issues, and eliminating frivolous claims or defenses." This section "is intended to clarify and confirm the court's power to identify litigable issues" while "expressly authorizing the elimination of frivolous claims or defenses at a pretrial conference."[126] Along with conferences, a carefully drafted case-management plan can specifically identify the valid claims and defenses and the elements of each claim. The plan can also be an invaluable aid to a pro se litigant in understanding the timetable for the development of a case and the steps the parties are expected to take.

An early conference also provides the first opportunity to explore whether the parties may be receptive to discussing a settlement.[127] See the next section for more information on encouraging settlement.

Take this opportunity to ask pro se litigants if they would prefer to have an attorney. If so, ask what steps they may have taken to find one and whether they are aware of available resources such as a refer-

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125. *Id. See also* Bankruptcy Case Management Manual, *supra* note 101, at 149–50 (Some judges "hold a status conference at the beginning of a case or proceeding to explain procedural requirements in straightforward terms, point out available reference materials (e.g., [rules of procedure and evidence], local rules, treatises, and court-developed instructions and forms), and generally provide a procedural overview of the case or proceeding." Some judges found "a brief discussion on the record regarding the operative law in the circuit facilitates settlement or dismissal of some proceedings" though others "believe that such a discussion is improper. Similarly, some judges will provide citations to the case law controlling the issues under consideration.").

126. Fed. R. Crim. P. 16 advisory committee's note to 1983 amdendments ("There is no reason to require that this await a formal motion for summary judgment. Nor is there any reason for the court to wait for the parties to initiate the process.").

127. *See* Bloom, *Pro Se Issues 2013*, *supra* note 31 ("[C]onferences are the key . . . . I settle a lot of cases that way." Getting the parties talking at the first conference can "plant the seed."); Civil Litigation Management Manual, *supra* note 31, at 21 ("In cases in which strong emotions may be a factor, an opportunity to 'vent' to an impartial listener may help litigants become more open to early settlement.").

ral service or legal clinic. Offer suggestions for possible legal help in your district, if available, including limited-scope representation. See the section on limited-scope representation *infra* in Part II.D. Make sure they understand that there generally is no right to appointed counsel in civil cases.

If the litigant prefers to proceed pro se, or has no choice, ask if he or she has had any experience in litigation or is otherwise familiar with court proceedings. This may help determine how much "special accommodation" to extend to a particular pro se plaintiff. See the discussion *infra* in Part III.G regarding varying solicitude extended to pro ses depending on their knowledge and experience. Ensure that litigants are aware of any printed or electronic resources for pro se filers that are available from the court, and encourage them to utilize any materials your district has to offer, such as standardized forms and manuals.[128] Warn the litigant that it is his or her responsibility to become familiar with the rules of procedure and evidence and any local rules of the court, and that those rules apply equally to parties with or without an attorney.

This is also an opportunity to determine whether you may be dealing with a pro se litigant who could prove to be difficult or has mental health issues.[129] See *infra* Part III.D.1, "Competency Exam Under Rule 17(c)," and Part III.F, "Sanctions."

Consider informing pro se litigants that, even if they are proceeding in forma pauperis, "there are costs associated with a lawsuit. [They] will have to pay these costs even if the Court waives the filing fee and the U.S. Marshals Service serves [their] summons and complaint[s] for [them]. Those costs may include postage, copying costs, and deposition and transcript costs."[130] Also warn that, if they lose,

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128. *See* FJC Survey, *supra* note 7, at 35 ("[H]andbooks, standardized forms, detailed instructions, and other materials provided by the clerk's office or through the court's website" are among "the most effective measures used by the clerk's office that help non-prisoner pro se litigants.").

129. *Id.* at 25–26 (special issue presented by nonprisoner pro se litigants most mentioned by responding chief judges was "litigants who demand things a court cannot provide; litigants who are irrational, unreasonable, or mentally unstable").

130. Minnesota Guidebook, *supra* note 96, at *i*.

costs and attorneys' fees could be awarded against them.[131] While the court can assume attorneys know this, an inexperienced pro se litigant may not. The District of Minnesota's extensive "Bill of Costs Guide" itemizes all costs that may be taxed to the losing party.[132]

The first conference is also a good time to try to set the tone for the case, establish ground rules, or simply go over routine matters that a nonattorney may not know. The court can, for example,

> explain the procedural requirements in straightforward terms; point out resources [that are] available, such as court-developed forms or instructions; discuss a schedule for the case; enter a procedural order to ensure that the case moves to prompt resolution and include dates for cutoff of discovery . . . and, in appropriate cases, for the filing of a motion for summary judgment and the response (because the relevant facts usually are in the defendant's control, early disclosure will facilitate resolution of the action); [and] establish the least disruptive discovery method adequate to the task (a deposition with written questions may be preferable, for example, to a live deposition conducted by an unrepresented party).[133]

Other items to mention or to remind a pro se party about could include the prohibition on trying to contact the judge directly, the requirement that all motions be filed with the clerk's office and served on the other party, and the importance of meeting deadlines when filing or responding to a motion and of keeping contact information current.

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131. *See, e.g.*, D. Kan. Website, "FAQ: Pro Se", http://www.ksd.uscourts.gov/faqs/#prose (warning pro se plaintiffs: "[Y]ou should consider the possibility that you may lose. In that instance *the other side may ask that you be ordered by the court to pay their attorneys' fees and costs*.") (last visited June 17, 2016); D. Md., Instructions for Filing a Civil Action on Your Own Behalf 9 (2014), *available at* http://www.mdd.uscourts.gov/publications/Forms/InstructionsFilingCivilAction.pdf ("[T]he winning party may ask the losing party to pay attorneys' fees or certain costs the winning party incurred during the litigation," including "deposition transcripts, witness fees, and copy expenses. . . . [T]hese costs can easily add up to thousands of dollars.").

132. *Available at* http://www.mnd.uscourts.gov/FORMS/Clerks_Office/Bill-of-Costs-Guide.pdf.

133. Civil Litigation Management Manual, *supra* note 31, at 141.

Unless there is an early dismissal or settlement, it is not likely that one pretrial conference will suffice in a pro se case. It is almost a certainty that questions will arise and motions will be filed that require the judge's attention to resolve. To that end, it may be "helpful to make clear up front that you stand prepared to re-engage" and hold further conferences as needed.

> At the initial case-management conference, consider whether to schedule one or more follow-up conferences. These may include interim pretrial conferences to manage discovery and resolve any disputes, schedule deadlines for potential summary judgment motions, or narrow the issues. These may also include a conference at the end of discovery to identify remaining issues, hear oral argument on motions if that would be helpful, and address any problems that presenting proof at trial may raise.[134]

If it seems like there could be problems with discovery, "some judges schedule a standing discovery conference at set periods (e.g., once a month)." Apart from ensuring there will be time to address any problems, "[e]xperience shows that the lawyers often call shortly before the regularly scheduled conference date to cancel it, as the impending conference date motivates them to resolve the issues on their own."[135]

While this advice from the *Benchbook* is directed at litigation involving represented parties, it is equally helpful in keeping pro se cases on track and moving forward. In addition to the matters mentioned above, later conferences can be helpful to try to ensure that the pro se litigant is focusing on the relevant issues and claims and not on matters or parties that may have been dismissed. Also, "having multiple conferences up front gets the point across to a pro se litigant that cases take work, that they are not one-shot deals."[136]

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134. Benchbook, *supra* note 114, at 197–98.

135. *Id.* at 198. *See also* Court Web: Best Practices, *supra* note 34 (It is "amazing" that you can have letters and submissions back and forth but then set a conference and "the night before the conference . . . they find the box of documents that hasn't been found before. Or, because you hold the conference, the parties start talking about settlement, which really isn't done on paper.").

136. *See* Bloom, *Pro Se Headaches*, *supra* note 16.

For any conference involving a pro se litigant, "record the conference, whether held in person or on the telephone, to avoid misunderstanding and to have a record if disputes arise later; . . . if you decide the conference should be held off the record, stipulations or rulings can be dictated to the reporter at the end of the conference."[137] Settlement conferences may be held off the record, but first get the parties' consent on the record to do so, then after the conference go back on the record to summarize what occurred.[138]

2. Take Steps to Limit the Number of Motions

Although motions

> can narrow issues and thus expedite trial[, or] even make trial unnecessary[, . . .] "make work" motions don't do anybody any good. These include summary judgment motions filed too early or involving disputed facts; surreplies and extensions, followed by motions to strike the other party's motions for surreplies and extensions; and the classic example: a Rule 12(b)(6) motion to dismiss for failure to state a claim, where the asserted defect is readily cured by amendment. . . . Because motions account for such a large part of a judge's time, developing a workable system for dealing with them is critical.[139]

Limiting motions may be even more critical in pro se cases, where every motion is another opportunity for the pro se litigant to fail to understand or properly respond to it.

One step courts can take is to review the initial complaint, point out any defects, and allow amendment, thereby lessening the chance of one or more motions to dismiss. See the discussion *supra* in Part II.A.3. This can also be done at a pretrial conference, as Rule 16(c)(2)(B) authorizes the court to "consider and take action on . . . amending the pleadings if necessary or desirable." Because the plaintiff has the right to amend the complaint once, it makes little

137. Civil Litigation Management Manual, *supra* note 31, at 19–20.

138. *See* Court Web: Best Practices, *supra* note 34.

139. Judges Marsha J. Pechman & Julie A. Robinson, Case Management and the Civil Trial 5–6 (Federal Judicial Center 2010), *available at* http://fjconline.fjc.dcn/sites/default/files/2016/1717-V-10%20Case%20Mgt%20Civ%20Trial.pdf.

sense to deal with a motion to dismiss the initial complaint. Hold off and

> give the person a chance to amend up front. . . . In a conference, [you] can tell somebody, "these are the problems. . . . I'm going to hold off their motion and give you a chance to amend to correct x, y, and z." And then when you get the amended complaint in, they can still move to dismiss but you haven't wasted everyone's time with deciding a motion to dismiss when you're going to have to give them a chance to amend. . . . It happens all the time in pro se cases.[140]

See also the discussion regarding amending pleadings *infra* in Part III.A.2 and III.A.3.

The court may also require the parties to meet and confer to try to resolve the issue. Some districts include in their local rules a duty to confer before filing a motion. In the Western District of Washington, prior to

> filing any nondispositive motion in a civil action, counsel shall discuss the anticipated motion with opposing counsel, either in person or by telephone, in a good-faith effort to determine whether there is any opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement. The duty to confer also applies to non-incarcerated parties appearing pro se.[141]

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140. Bloom, *Pro Se Issues 2014*, *supra* note 15. *See also* Schwarzer & Hirsch, *supra* note 115, at 12 ("Pointless motions . . . waste time and money; whenever possible, the judge should discourage them. . . . At the Rule 16 conference, the judge can ask the parties to specify any grounds they might have for [a Rule 12(b)(6)] motion and can determine in advance whether a defect is curable. Curable defects should generally be brought to the opponent's attention before a motion is filed.").

141. W.D. Wash. Civ. R. 7(m). *See also* D. Minn. LR 7.1(a) ("Before filing a motion other than a motion for a temporary restraining order or a motion under Fed. R. Civ. P. 56, the moving party must, if possible, meet and confer with the opposing party in a good-faith effort to resolve the issues raised by the motion."); D. Colo. Civ. R. 7.1(a) ("Before filing a motion, counsel for the moving party or an unrepresented party shall confer or make reasonable good faith efforts to confer with any opposing counsel or unrepresented party to resolve any disputed matter." The duty to confer does not apply to motions under Federal Rules of Civil Procedure 12 or 56, however.).

Note that not all duty-to-confer rules are applied when a pro se party is involved.[142]

A variation on this idea is to hold a premotion conference to try to resolve or limit the matter at hand.

> Consider establishing a process for the submission of premotion letters or for premotion conferences before a party can file a motion to dismiss or for summary judgment. Some judges have found that a premotion letter or conference requirement avoids or limits motions to dismiss or for summary judgment without the need for full briefing, or clarifies and focuses the issues for those motions that do proceed to full briefing.[143]

With a pro se litigant especially, "having conferences moves the case more efficiently and gives the litigant the chance to be before the court which, . . . for due process and access to the court, is just much more satisfying than them or us constantly dealing with those repeat submissions."[144]

The idea of a premotion conference has been incorporated into a 2015 amendment to Rule 16(b)(3)(B)(v), which states that a court may "direct that before moving for an order relating to discovery, the movant must request a conference with the court."[145] Part of the rationale for the addition is that "[m]any federal judges require such pre-motion conferences, and experience has shown them to be very effective in resolving discovery disputes quickly and inexpensively.

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142. *See, e.g.*, Local Civ. Rule 7.02 (D.S.C.) ("*Duty to Consult before Filing any Motion*. . . . Counsel is under no duty to consult with a *pro se* litigant.").

143. Benchbook, *supra* note 114, at 194 n.1.

144. Court Web: Best Practices, *supra* note 34.

145. Fed. R. Civ. P. 16(b)(3)(B)(v) & advisory committee's notes to 2015 amendments. "Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case." *Id. See also* Roberts, *supra* note 115, at 7 ("Such conferences can often obviate the need for a formal motion—a well-timed scowl from a trial judge can go a long way in moving things along crisply.").

The amendment seeks to encourage this practice by including it in the Rule 16 topics."[146]

Again, these methods are recommended in all cases, not just those involving pro se litigants. They may be especially advisable, however, for pro se cases, given the problems pro ses often have in properly responding to motions. Simpler, less formal procedures can help keep the case on track and avoid needless back and forth motions.[147]

C. Encourage Settlement

As noted earlier, encouraging the parties to consider holding settlement discussions can begin as early as the initial status conference. The question can then be raised at any succeeding conferences.[148] Rule 16 itself encourages judges to promote the idea, stating that one of the purposes of a pretrial conference is to facilitate settlement.[149] "At any pretrial conference, the court may consider and take appropriate action on . . . settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule."[150]

Although "[m]any cases involving a pro se litigant are appropriate for resolution by settlement," some courts have exempted pro ses from their formal alternative dispute resolution (ADR) programs out of a concern that "anyone who assists the parties in such cases with settlement negotiations runs the risk of being pressed by the pro se

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146. Campbell, *supra* note 118. *See also* Report to the Chief Justice, *supra* note 118, at 10 (judges offering "prompt assistance in resolving disputes without exchanges of motions and responses" are better able to "keep a case on track, keep the discovery demands within the proportionality limits, and avoid overly narrow responses to proper discovery demands").

147. *See* Best Practices in Court-Based Programs, *supra* note 85, at 54 ("Try to reduce the number of steps, . . . documents, and . . . procedural requirements" litigants must complete, "while not undercutting the justice and due process requirements. . . . Aim to make each of the remaining steps, documents, and procedures as simple and clear as possible.").

148. Fed. R. Crim. P. 16 advisory committee's notes to 1983 amendments ("A settlement conference is appropriate at any time."). *See also* Bloom, *Pro Se Issues 2014*, *supra* note 15 ("I talk settlement at every single conference. And I try to plant the seed that there's more than one way to resolve a dispute. Most cases do not get tried.").

149. Fed. R. Civ. P. 16(a)(5).

150. Fed. R. Civ. P. 16(c)(2)(I).

party to give legal advice. . . . [Judges] should be cautious about assisting with settlement, since [their] assistance will very likely be misunderstood by the pro se litigant."[151]

On the other hand, there is a recognition that it may be "unfair to the pro se litigant for courts not to provide settlement assistance"[152] that is available to represented parties, and some district courts now offer ADR to pro se litigants. "This type of case has traditionally been exempt from court ADR programs because the needs of pro se litigants can put ADR neutrals at risk of appearing biased in the pro se's favor. [However], a number of districts are experimenting with programs to serve these litigants."[153] The *FJC Survey* reports that 56% of the responding chief judges have referred nonprisoner pro se cases to mediation for settlement discussions.[154]

In the Western District of Texas, for example, the step-by-step guide for nonprisoner pro se plaintiffs states that under Local Rule CV-88(a), "the court recognizes the following Alternative Dispute Resolution methods: early neutral evaluation, mediation, mini-trial, moderated settlement conference, summary jury trial, and arbitration. The court may also approve other alternative dispute resolution methods the parties suggest or the court believes [are] suited to the litigation."[155]

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151. Civil Litigation Management Manual, *supra* note 31, at 143. In order to encourage settlement while preserving the court's impartiality, it has been suggested that judges consider "referring cases with pro se litigants to another district judge or magistrate judge for settlement assistance; and, establishing a regular exchange relationship with another . . . judge to provide settlement assistance in pro se cases." *Id.* at 96–97. This is especially recommended if the parties have agreed to a bench trial, but may not be necessary when a jury will be deciding the case.

152. *Id.* at 143.

153. Donna Stienstra, ADR in the Federal District Courts: An Initial Report 3 (Federal Judicial Center 2011). When the survey was taken, eighteen districts offered some type of ADR program to nonprisoner pro se litigants. *See* table 2, at 3. *See also* Bankruptcy Case Management Manual, *supra* note 101, at 750 ("Courts may wish to refer pro se litigants to mediation. Some judges believe that such a referral not only enhances the possibility of settlement but puts the pro se party on a more equal playing field with represented parties.").

154. FJC Survey, *supra* note 7, at 31 & table 23.

155. *See* W.D. Tex., A Step-By-Step Guide to Filing a Civil Lawsuit in the United States District Court for the Western District of Texas 22 (rev. ed. Apr. 21, 2009), *available*

The Northern District of California has an extensive ADR program that, like the Western District of Texas, offers a variety of methods. For pro se litigants, it specifically recommends a settlement conference conducted by a magistrate judge,

> where [their] questions and concerns can be addressed directly by a judge who has experience working with unrepresented parties. . . . If [they] select mediation, ENE or non-binding arbitration[,] and [the court is] unable to find a suitable neutral, [their] case likely will be redirected to a settlement conference with a magistrate judge.[156]

Mediation may also allow the opportunity to provide the pro se litigant with an attorney for the limited purpose of assisting with settlement. The Western District of Pennsylvania has developed a program with a law firm "to make attorneys available to counsel *pro se* litigants using the ADR process."[157] The Southern District of New York's mediation program for employment discrimination cases, begun in 1999, uses "pro bono attorneys [who] volunteer to represent *pro se* plaintiffs solely for the purposes of mediation."[158] Even just an initial evaluation of the claim by an attorney who ultimately does not take the case could be valuable in giving the litigant an objective idea of how strong or weak the claim is and helping him or her avoid an unfair settlement offer or be more willing to compromise and take less. See also *infra* II.D on limited-scope representation.

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at http://www.txwd.uscourts.gov/FWOA/SitePages/FilingWOAttny.aspx. *See also* N.D. Tex., Civil Justice Expense and Delay Reduction Plan 4–5 (2002), *available at* http://www.txnd. uscourts.gov/sites/default/files/orders/misc/MiscOrder46Civil.pdf (mediation, early neutral evaluation, mini-trials, and summary jury trials are available to civil litigants, including those filing pro se).

156. N.D. Cal., ADR Handbook: Dispute Resolution Procedures in the Northern District of California at 10 (2016), *available at* http://www.cand.uscourts.gov/adrhandbook.

157. *See* W.D. Pa. Website, "FAQs: ADR > Are there lawyers available to assist pro se litigants?" (March 2014), http://www.pawd.uscourts.gov/court-info/faq/ADR. *See also* N.D.N.Y. Website, "Assisted Mediation Program," http://www.nynd.uscourts.gov/assisted-mediation-program (using volunteer lawyers from the Federal Court Bar Association).

158. *See* S.D.N.Y. Website, "Mediation in *Pro Se* Employment Discrimination Cases," http://www.nysd.uscourts.gov/pro_bono_mediation.php.

The settlement assistance program in the Northern District of Illinois was praised by an ABA section for giving pro se litigants

> the substantial benefit of expert assistance of trained volunteer attorneys to help them evaluate their cases, the proposed settlement and the prospects for future litigation . . . . The judge, when determining whether a settlement should be accepted, can be confident that the pro se litigant has had the benefit of counsel in the settlement process.[159]

Benefits flow to opposing counsel as well.

> As many of the cases in the Settlement Assistance Program involve employment litigation where emotions can run high, opposing counsel has the advantage of working with a trained attorney who, while advocating his client's position, has a better view of the evidentiary, practical, and legal issues in the case than most pro se litigants. Clearly, this enhances the possibility of a settlement that will make sense to the opposing counsel's client.[160]

If a settlement is reached and the pro se did not have the benefit of an attorney's advice, the court should consider reviewing the terms with the parties on the record to determine whether the pro se litigant understands the agreement, especially if he or she waives any substantive rights.

> Judges should review the terms of settlement agreements, even those resulting from ADR, with the parties. Judges should determine whether the agreement was entered into voluntarily. If there are specific provisions through which a self-represented litigant waives substantive rights, judges should determine, to the extent

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159. *See* ABA Section of Labor and Employment Law, *Settlement Assistance Program in Northern District of Illinois*, Flash, Mar. 2011, *available at* http://www.americanbar.org/groups/labor_law/publications/flash_archive.html.

160. *Id.* "The statistics regarding the program reveal that it is an undisputed success. The majority of cases . . . are resolved early in the litigation process, and a large number of attorneys have volunteered to be on call for limited appointments." *Id. See also* N.D. Ill. Press Release, Nov. 6, 2006, *available at* http://www.ilnd.uscourts.gov/_assets/_news/PRESS/sap2006.html (for information on the program); FJC Pro Se Webpage, *supra* note 8, at http://fjconline.fjc.dcn/node/78250 (for information on other pro se mediation programs in district courts).

> possible, whether the waiver is knowing and voluntary. . . . Self-represented parties should be informed that once the agreement is approved it becomes an order of the court; therefore, they should raise any questions that they have about the agreement before it is approved.[161]

If the litigant has difficulty understanding English, consider having the agreement translated verbatim into the litigant's primary language by a qualified court interpreter before reviewing it with the litigant.[162]

D. Explore the Possibility of Limited-Scope Representation

Indigent criminal defendants have a Sixth Amendment right to court-appointed counsel, but for civil litigants a court can only "*request* an attorney to represent any person unable to afford counsel."[163] Because most pro se litigants have serious difficulties with one or more aspects of pursuing a claim in federal court,[164] the ideal situation would be to

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161. Massachusetts Guidelines, *supra* note 39, at 12.

162. *Id.* at 13. "The judge may wish to make an affirmative finding that the agreement was reviewed by the court and translated into the self-represented litigant's primary language by a qualified court interpreter. If a qualified court interpreter cannot be obtained, the matter should be continued until one can be present." *Id.*

163. 28 U.S.C. § 1915(e)(1) (emphasis added). In a civil case, the court technically "is not authorized to *appoint* counsel, but may pursuant to 28 U.S.C. § 1915, 'request' an attorney to represent a party who is proceeding in forma pauperis." Ferguson v. Fleck, 489 F. Supp. 219, 221 (W.D. Mo. 1979) (emphasis added). *Cf.* Mallard v. U.S. District Court for the Southern District of Iowa, 490 U.S. 296, 303 (1989) (reversing lower court decision that § 1915(e) "empowers federal courts to make compulsory appointments in civil actions," reasoning that "[t]o the extent that the 'assignment' or 'appointment' of counsel denotes the imposition of a duty to undertake representation that courts may enforce, Congress' decision to allow the federal courts to do no more than 'request' attorneys to serve . . . seems to evince a desire to permit attorneys to decline representation of indigent litigants if in their view their personal, professional, or ethical concerns bid them do so"). It is common practice, however, to use the term "appointment of counsel" or similar language when an attorney is requested under § 1915(e), as discussed elsewhere in this section.

164. *See, e.g.*, Ficken v. Alvarez, 146 F.3d 978, 981 (D.C. Cir. 1998) ("Plaintiffs who file perfectly adequate complaints and respond well to motions to dismiss might be entirely unable to handle discovery or respond to motions for summary judgment. Even *pro se* plaintiffs with sufficient skills to survive summary judgment are unlikely to be able to try a case."). *See also* FJC Survey, *supra* note 7, at 21–23 & table 8 (listing the most common types of problems found in most or all pro se cases).

have enough volunteer attorneys to represent all indigent litigants who need legal assistance. Demand, however, generally exceeds the supply of available attorneys. To reduce this gap, some courts have developed programs that use a panel of law firms and attorneys willing to accept certain pro bono appointments.[165] A small number of courts have instituted pro bono requirements on all practicing trial attorneys in the district.[166]

However, even with such programs, there are not enough attorneys to provide full representation to those who need it. As a result, many districts have stepped up their efforts to provide pro se litigants with at least some help from an attorney, like the legal assistance centers discussed *supra* in Part II.A.3.b. Another method many courts are turning to is the appointment of counsel for a limited purpose. "Even if attorneys are unwilling to take full responsibility for litigating a case, they may be willing to advise the plaintiff, or they may be willing to be appointed for a specific limited role, such as to assist the pro se litigant during trial."[167]

As with other pro se assistance programs, limited-scope representation can provide significant benefits to both the litigant and the court.

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165. *See, e.g.*, N.D. Tex. Website, "Pro Bono Civil Panel Information," http://www.txnd.uscourts.gov/pro-bono-civil-panel-information; E.D.N.Y., Rules Governing Procedures for Appointment of Attorneys in Pro Se Civil Actions, *available at* https://img.nyed.uscourts.gov/files/local_rules/probonoplan.pdf. *See also* FJC Pro Se Webpage, *supra* note 8, at http://fjconline.fjc.dcn/content/pro-se-court-internet-resources-category-pro-bono-programs panel-lists; DMAP Website, *supra* note 9 (follow "Pro Bono Programs" hyperlink under "Pro Se Case Processing Tools: E-Filing and E-Service Frequently Asked Questions" section) (providing information on and links to various pro bono programs of certain district courts).

166. *See, e.g.*, E.D & W.D. Ark. L.R. 83.7; N.D. Ill. L.R. 83.11(g).

167. Civil Litigation Management Manual, *supra* note 31, at 140. For an extensive discussion of the issues around partial representation, including a list of state rules, see the ABA's Standing Committee on the Delivery of Legal Services, *An Analysis of Rules That Enable Lawyers to Serve Pro Se Litigants* (Nov. 2009). The ABA's Standing Committee on Pro Bono & Public Service has a list of court-based pro bono programs, including federal, state, and bankruptcy courts, at http://apps.americanbar.org/legalservices/probono/judicial/court probonoprograms.html. Because the limited nature of the appointment makes more attorneys willing to accept pro bono appointments, courts should respect any agreed-upon limitations to the scope of representation and not attempt to require attorneys to continue further in any given case.

> The core concept of limited scope representation, also known as unbundled services or discrete services, is that attorneys provide assistance within the attorney-client relationship but with that assistance limited only to certain specified tasks or to certain portions of the case. The specific allocation of responsibility, decided jointly by the attorney and the client, focuses legal assistance on those aspects of the matter in which it provides the greatest benefit. It reduces the cost to the client, and facilitates the court's work by reducing continuances and confusion caused by litigants' unfamiliarity with the court process, while providing additional business to the attorney.[168]

The *FJC Pro Se Survey* found that "[a] little over half (56%) [of the district courts] appoint counsel to represent pro se litigants for limited circumstances, such as mediation or trial."[169] In the Northern District of Texas,

> [t]he types of cases assigned include claims of employment discrimination, prisoner and nonprisoner civil rights violations, breach of contract, and other diversity and federal question jurisdiction cases. At times, a judge will appoint counsel for short-term help. For example, an appointment may be made to help a pro se plaintiff evaluate a case before mediation and discovery, to assist during mediation, or to respond to a motion for summary judgment or a motion for default judgment.[170]

In the Northern District of New York,

> an attorney may be appointed for the limited purpose of preparing a confidential report analyzing the merits of the claim(s) raised by the plaintiff. If a case proceeds to trial, an attorney may be appointed as trial counsel to conduct the trial of an action, as support counsel to assist another attorney, or merely as standby trial counsel to assist the *pro se* party in conducting the trial. In some cases, an attorney may be appointed as the *pro se* party's attorney for both pre-trial matters as well as the actual trial of the lawsuit. The capac-

168. Best Practices in Court-Based Programs, *supra* note 85, at 64.

169. FJC Survey, *supra* note 7, at 4.

170. *See* N.D. Tex. Website, "Pro Bono FAQs: What types of cases are assigned?," http://www.txnd.uscourts.gov/faq/pro-bono-faq (last visited June 17, 2016).

> ity in which an attorney is appointed for a party is entirely within the discretion of the Court.[171]

The goal of such programs is to provide "civil *pro se* litigants in federal court the opportunity to have a meaningful consultation with volunteer counsel and to improve access to justice in our Federal Courts." Then, "[e]ven if the *pro se* individual declines representation or refuses to follow a volunteer lawyer's advice, by having access to counsel, the *pro se* litigant is more likely to perceive the justice system to be fairer, thereby reducing the number of appeals."[172]

If a pro se litigant accepts partial representation, make sure that he or she understands that it is for a limited purpose and that, absent a separate agreement, the attorney will not work on other aspects of the case.[173] Courts should consider a formal order of appointment that outlines the scope and duration of the representation so that the litigant is fully informed and the attorney's limited role is clearly defined. Some districts provide a form notice or order that becomes part

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171. *See* N.D.N.Y., *Pro Se* Handbook 5 (2015), *available at* http://www.nynd.uscourts.gov/sites/nynd/files/ProSe_Handbook.pdf. *See also* D. Idaho, Pro Bono Plans, *available at* http://www.circ9.dcn/publications/prose/Pro_Bono_Plan_Combined.pdf ("Any appointment for representation shall be limited solely to those matters at issue before the Court and may be limited to an issue or issues designated by the presiding judge." § I.2(d), p. 22) (attachment to the Ninth Circuit Pro Se Litigation Committee, "Interim Report of the Pro Se Litigation Committee" at Tab 7 (Oct. 17, 2014), *available at* http://www.ce9.uscourts.gov/publications/prose/Pro_Se_Committee_Interim_Report_14.pdf); D. Or. Website, "Applying for Pro Bono Representation," https://www.ord.uscourts.gov/index.php/2015-02-10-16-10-22/applying-for-pro-bono ("Common uses for this type of appointment include: drafting an amended complaint; preparing for and/or appearing at a mediation, settlement conference, or deposition; and responding to a motion to dismiss or a motion for summary judgment.").

172. D. Minn. & Fed. Bar Ass'n, "*Pro Se* Project" 2 (2011), *available at* http://www.fedbar.org/proseproject2011.pdf.

173. *See* Model Rules of Prof'l Conduct r. 1.2(c) (Am. Bar Ass'n 1983) "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."). *See also* Bankruptcy Case Management Manual, *supra* note 101, at 755 ("A critical issue in any limited-scope representation is whether the client has notice and an understanding of what the limited scope of representation is. In addition, court forms and procedures need to ensure that the court and other parties understand whether a party is represented or not in connection with a particular matter.").

of the record.[174] The Western District of Arkansas has used an order that clearly spells out that an attorney will be appointed for certain limited purposes:

> a. to discuss this case with Plaintiff;
> b. to review pleadings and other documents;
> c. to evaluate the case and advise Plaintiff of the merits of Plaintiff's claims and of the advisability of settlement if appropriate; and,
> d. attend such Initial Case Conferences as may be convened by the Court.
>
> Unless otherwise ordered by the Court, this appointment will terminate without the necessity of further order of the Court, upon the adjournment of such Initial Case Conference or at such other time as the Court may order.
>
> It is specifically found and ordered that counsel appointed under this order shall have no obligation or duty to prepare or file pleadings or other documents on behalf of the plaintiff.[175]

Whether an attorney is appointed for full or partial representation, judges are cautioned "to appoint counsel only when a case warrants it. A high percentage of pro se cases do not have the merit to be worthy of a volunteer lawyer, and you should not call on attorneys to represent such cases" and potentially waste their time.[176]

Along similar lines, try to avoid assigning a pro bono attorney to a difficult litigant who "may plague them forever." It could discourage that attorney from future pro bono work and drive away others. Instead, deny the request for an attorney without prejudice and see how far the case advances.[177] At most, consider a limited appointment

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174. *See, e.g.*, S.D.N.Y., Notice of Limited Appearance of *Pro Bono* Counsel form, *available at* http://www.nysd.uscourts.gov/file/forms/limited-notice-of-appearance-of-pro-bono-counsel.

175. *See* W.D. Ark., Order Appointing Limited Purpose Attorney (on file with author). *See also* W.D. Ark., Manual for Pro Se Litigants at 8 (2012) (discussing district's limited-scope pro bono program for pro se litigants).

176. Civil Litigation Management Manual, *supra* note 31, at 140.

177. Judge Lois Bloom, *Pro Se Issues*, Phase II Orientation Seminar for Newly Appointed U.S. Magistrate Judges (Federal Judicial Center Oct. 2008). *See also* National

if an attorney is willing to provide an initial consultation with the litigant to evaluate whether the claim has any legitimacy.

If a claim does appear to have merit, and involves a statute that allows for an award of attorneys' fees to the prevailing party, this may increase the possibility of finding pro bono representation.[178] A successful pro se litigant who receives the assistance of counsel, whether in the form of partial or full representation, can request an award of attorneys' fees.[179]

Judges should be aware that an ostensibly pro se litigant might secure limited-scope representation, generally in the form of advice and help with written materials, without revealing it to the court or the opposing party. This practice of "ghostwriting," while accepted by the American Bar Association[180] and, to varying degrees, by many states, has been disfavored by federal courts. The concern is that the pro se litigant would have professionally written pleadings while unfairly receiving the benefit of more lenient treatment as a pro se. The

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Conference for Pro Se Law Clerks, District Methods Analysis Program Working Group on the Pro Se Litigation (Federal Judicial Center Sept. 10, 2015) [hereinafter National Conference for Pro Se Law Clerks], *available at* http://fjconline.fjc.dcn/content/301975/national-workshop-pro-se-law-clerks (audio only) (If you have a pro bono program, "use it wisely. . . . If you assign an attorney to a case with a very difficult client, they're going to feel used and burned and they are not going to remain as a volunteer in your program.") (comment by Richard L. Robinson, Pro Se Law Clerk (E.D. La.)).

178. National Conference for Pro Se Law Clerks, *supra* note 177 ("In addition to the Karmic rewards in the afterlife, . . . because a lot of federal statutes provide for an award of attorney's fees, . . . [more attorneys] may be willing to take appointments in cases that . . . the court has already pre-screened as being potentially meritorious.").

179. *See* Alan Hirsch, Diane Sheehey & Tom Willging, Awarding Attorneys' Fees and Managing Fee Litigation 16 & n.90 (Federal Judicial Center, 3d ed. 2015) ("Awarding attorneys' fees to pro se litigants who sought advice from outside counsel may be appropriate," citing Blazy v. Tenet, 194 F.3d 90, 92 (D.C. Cir. 1999) (upholding denial of attorneys' fees for lack of adequate documentation, but affirming that "*pro se* status does not by itself preclude the recovery of fees for consultations with outside counsel")). *See also* Bandera v. City of Quincy, 220 F. Supp. 2d 26, 48–52 (D. Mass. 2002) (awarding attorneys' fees to successful pro se plaintiff); Jefferson v. City of Fremont, No. C-12-0926 EMC, slip op. at 8 (N.D. Cal. Apr. 30, 2012) (pro se plaintiff may ask "for attorney's fees if he gets advice from an attorney, even if the attorney does not make a formal appearance," citing *Blazy*).

180. *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007) ("Undisclosed Legal Assistance to Pro Se Litigants").

ABA committee, however, reasoned that "if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal. If the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage."[181]

By contrast, federal courts view ghostwriting as a deceitful practice and an attempt by the attorney to avoid his or her responsibilities under Federal Rule of Civil Procedure 11.

> The *pro se* plaintiff enjoys the benefit of the legal counsel while also being subjected to the less stringent standard reserved for those proceeding without the benefit of counsel. This situation places the opposing party at an unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation to the Court.[182]

The federal courts' responses to ghostwriting have included "(1) ceasing to give pro se litigants any leniency, (2) ordering ghostwriting attorneys to appear before the court, (3) striking ghostwritten documents, and (4) warning litigants and attorneys of sanctions should the ghostwriting continue."[183] A judge who suspects that a pro se pleading has in fact been drafted by an attorney should consider making an inquiry and reexamining whether to extend the usual lenient treatment for pro se pleadings. See also the discussion *supra* in Part II.C

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181. *Id.* at 3.

182. Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997). *See also* Duran v. Caris, 238 F.3d 1268, 1273 (10th Cir. 2001) (in appellate court, "any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved . . . and future violations of this admonition will result in the possible imposition of sanctions"); Ricotta v. State of California, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998) ("[A] licensed attorney does not violate procedural, substantive, and professional rules of a federal court by lending some assistance to friends, family members, and others with whom he or she may want to share specialized knowledge. . . . Attorneys cross the line, however, when they gather and anonymously present legal arguments, with the actual or constructive knowledge that the work will be presented in some similar form in a motion before the Court."). *But cf. In re* Fengling Liu, 664 F.3d 367, 372–73 (2d Cir. 2011) (where attorney acted in good faith to help petitioners rather than gain an unfair advantage or mislead the court or opposing parties and the petitions were "fairly simple and unlikely to have caused any confusion or prejudice . . . , we conclude that Liu's ghostwriting did not constitute misconduct and therefore does not warrant the imposition of discipline").

183. Jessie M. Brown, *Ghostwriting and the Erie Doctrine: Why Federalism Calls for Respecting States' Ethical Treatment of Ghostwriting*, J. of Prof'l Lawyer 217, 225–26 (2013).

about providing a pro se litigant with an attorney for the limited purpose of assisting with settlement.

E. Discovery

Problems with discovery can arise in any litigation, pro se or not. When a pro se party is involved, the keys to success seem to be take the initiative, inform, simplify, and monitor.

At the first status conference, consider issuing an order to get the initial exchange of basic information started. As one judge noted, by using a form order, a judge can "lay it all out for [the litigants], give them the deadlines, and tell them they're going to bear their own costs, that discovery is pay as you go, even if they're proceeding IFP. I put that all in writing right up front."[184] For example, a general discovery order might state:

> Discovery is the process by which the parties request information from each other regarding their claims or defenses. Discovery requests are not made to the Court. Discovery is governed by Rules 26 through 37 of the Federal Rules of Civil Procedure and is conducted between the parties without the Court's involvement. Pursuant to Fed. R. Civ. P. 33 and 34, plaintiff may request, in writing, answers to questions and documents from defendants' attorney. The more specific the request, the more likely the information will be produced. . . .
>
> The parties may conduct depositions upon oral examination pursuant to Fed. R. Civ. P. 30. An oral deposition is a seven (7) hour question-and-answer session in which the person being deposed testifies under oath or affirmation. The deposition in its entirety, both the questions and answers, are transcribed by the court reporter and may be used in the litigation. . . . Each party bears their own costs of conducting discovery.[185]

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184. Bloom, *Pro Se Headaches*, *supra* note 16.

185. Judge Lois Bloom, Practical Tips for Navigating Pro Se Cases 54–55 (E.D.N.Y. Oct. 2012) [hereinafter Bloom, Practical Tips], *available at* http://fjconline.fjc.dcn/sites/default/files/2014/MagJ21303.pdf.

As part of the initial order, "include dates for cutoff of discovery, for submission by the defendant of all relevant records and documents . . . (because the relevant facts usually are in the defendant's control, early disclosure will facilitate resolution of the action)[, and] establish the least disruptive discovery method adequate to the task," such as allowing a deposition with written questions instead of having a live deposition conducted by a pro se.[186]

For specific types of suits that occur frequently in your court, "consider whether you want to use a standing set of discovery demands to which the defendant must respond."[187] For example, in an employment discrimination case, order the defendant to produce, among other things, the plaintiff's complete personnel file, including the claimed reason(s) for "the adverse action(s) taken against plaintiff that is/are the subject of plaintiff's complaint," plus "any supporting documents, reports, memos, evaluations."[188] This will help to reduce the opportunities for the pro se plaintiff to make inadequate or inappropriate discovery requests and for potential discovery disputes between the parties.

In a similar vein, "if there are specific items for discovery that are raised at the conference, you may want to issue an order that sets a deadline for that disclosure. This may help focus the discovery pro-

186. Civil Litigation Management Manual, *supra* note 31, at 141.

187. Netburn, *supra* note 119, at 5.

188. Bloom, Practical Tips, *supra* note 185, at 56–57. Courts may also want to look at the Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action 4–5 (Federal Judicial Center Nov. 2011), *available at* http://fjconline.fjc.dcn/content/pilot-project-regarding-initial-discovery-protocols-employment-cases-alleging-adverse-acti-0. The protocols are designed "to encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery." An initial report on the pilot program indicated that, although cases using the discovery protocols were not resolved more quickly compared to a random sample of other employment discrimination cases, they had fewer discovery motions and motions to dismiss or for summary judgment and appear more likely to settle than the comparison cases. *See* Emery G. Lee III & Jason A. Cantone, Report on Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action 1 (Federal Judicial Center Oct. 2015), *available at* http://fjconline.fjc.dcn/content/309827/report-pilot-project-regarding-initial-discovery-protocols-employment-cases-alleging.

cess."[189] If the original pleadings have been amended to eliminate some claims, and the initial status conference was used to help narrow the relevant issues, that, too, can narrow the focus and avoid unnecessary effort, delay, and expense.

Consider using Rule 16(c)(2)(C) for "obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence." Be sure to warn the pro se litigant that any requests for admission must be answered or they will be taken as admitted under Rule 36(a)(3):

> A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

If your district's materials for pro ses do not include a comprehensive guide to discovery procedures and issues, consider referring them to another district's guide. The District of Minnesota's guide, for example, has an extensive section on discovery in a question-and-answer format.[190] The Northern District of California also has an excellent, concise section on discovery that clearly explains most aspects of discovery and what a litigant can and cannot do.[191]

If discovery disputes do arise between the parties, consider holding conferences, in person or by phone, as often as necessary to keep the case on track. Pro se litigants "may not understand what they're being asked for, so . . . it's much better . . . to have a discovery conference than just dealing with the back and forth on papers. . . . It's more of your time, but usually if there's a real discovery dispute you can get to the bottom of it."[192] It may also be helpful to hold interim conferences after the ini-

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189. Netburn, *supra* note 119, at 5.

190. *See* Minnesota Guidebook, *supra* note 96, at 57–92.

191. *See* N.D. Cal. Handbook, *supra* note 44, at 41–50 (see sections "What is Discovery?" and "What Can I Do if There are Problems With Disclosures or Discovery?").

192. Bloom, *Pro Se Issues 2014*, *supra* note 15 (also noting that if there have been problems regarding depositions, it is helpful if the judge is available by phone during depositions to quickly handle any disputes that arise). This is similar to the recommendations for resolving discovery disputes when both parties are represented. *See* Benchbook, *supra* note 114, at

tial discovery order to evaluate progress and possibly head off any brewing disputes.[193] See also the discussion *infra* in Part II.B.2 about holding a premotion conference under Rule 16(b)(3)(B)(v) before allowing motions regarding discovery disputes to be filed.

If the pro se litigant seems to be having trouble meeting deadlines, be lenient as long as he or she seems to be acting in good faith. Allow reasonable extensions unless you think the litigant is willfully attempting to delay or otherwise obstruct discovery. If the pro se is missing deadlines, not appearing at conferences or for depositions, not responding to discovery requests, not conferring with opposing counsel about disagreements, or otherwise failing to meet his or her discovery obligations, give an explicit warning on the record, explain the potential consequences of not cooperating, and set a new deadline. If the conduct recurs, consider applying sanctions if the litigant does not have valid reasons for the failure to follow orders or rules, including dismissal if lesser sanctions are insufficient. With the usual leeway given to pro se litigants, the court should weigh other factors surrounding the litigant's actions, such as the willfulness or bad faith demonstrated by the violations, the number of violations, the degree of actual prejudice to the opposing party, whether the litigant was adequately warned in advance of possible sanctions, the effect on the court, and whether lesser sanctions, such as excluding evidence or canceling a deposition, would be sufficient. Different circuits may require consideration of different sets of factors. For a discussion of discovery sanctions, see *infra* Part III.F.1.[194]

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196 ("Consider requiring the parties to present discovery disputes informally (e.g., via a telephone conference or a short letter) before allowing the parties to file formal discovery motions and briefs. Many courts have found that they are able to resolve most discovery disputes using these less formal—and considerably less expensive and less time-consuming—methods. These courts do not allow counsel to file motions to compel or for sanctions before getting the judge on the phone (with a court reporter or a tape machine) to discuss the issue. Many courts find that they are able to resolve most discovery disputes over the telephone and that simply being available encourages the parties to resolve many disputes on their own.").

193. *See* Bloom, Practical Tips, *supra* note 185, at 58 (sample order for employment case discovery, setting a status conference for six weeks after the date of the initial discovery order).

194. *See also id.* at 28–30 (discussing cases allowing dismissal for discovery violations).

F. Summary Judgment Warning and Standards

1. Providing Notice of Rule 56 Requirements

Responding to a motion for summary judgment is another potential problem area for pro se litigants, who often understand neither the proper procedure nor the danger of failing to properly respond.[195] Half of the circuits now require a district court to advise pro se litigants on how to respond to a summary judgment motion and warn of the consequences of responding incorrectly or not at all.[196] Significantly, no circuit has *prohibited* a district court from so advising and warning a pro se litigant, prisoner or nonprisoner. Even in the circuits that have refused to *require* a warning, a district court has the discretion to do so on its own initiative. Some legal authorities have suggested that, even when it is not required, "there is no harm in providing special notice to a pro se opponent, and it may help to deter or defeat a subsequent Rule 60(b) motion for relief." [197] In light of the concepts of procedural fairness discussed *supra* in Part I, it would

195. *See* FJC Survey, *supra* note 7, at 22, table 18 (Two-thirds of responding judges said that "[p]roblems with pro se responses to motions to dismiss or for summary judgment" are "[p]resent in most or all pro se cases." Although the survey did not distinguish between motions to dismiss and for summary judgment, it seems unlikely that litigants would be any less confused with summary judgment than with dismissal.). *See also* Bankruptcy Case Management Manual, *supra* note 101, at 751 ("Pro se litigants add a difficult dimension to the court's work in ruling on a motion for summary judgment. Some have little knowledge of the law or of how the courts operate. . . . Pro se litigants on occasion believe that they can rely on their pleadings to oppose a motion for summary judgment or believe that a letter is a sufficient response. They often do not understand the need for an affidavit, declaration . . . , or other sworn or verified documentary evidence.").

196. The other circuits either require advice and warnings only for prisoner pro ses, require it for no litigants, or have not addressed the issue. For a more thorough discussion of case law on this and other summary judgment issues, see *infra* Part III.B.

197. Judge William W Schwarzer, Judge Wallace Tashima & James Wagstaffe, Federal Civil Procedure Before Trial § 14:73.3, at 14-22 (rev. ed. 2014). *See also* Bankruptcy Case Management Manual, *supra* note 101, at 752 ("Without specific notification, the pro se litigant might believe that the motion can be addressed at trial. Thus, the pro se litigant ought to be provided with information concerning the type of response that is required and the consequences of failing to provide such a response.").

seem that the better policy is to provide at least minimal notice of the rule's requirements to pro se litigants.

Simply providing a standardized handout would be beneficial.

> [T]he better view as a matter of policy supports the provision of a warning that details the essentials of Rule 56 to all pro se parties including prisoners. It is true that the text of Rule 56 is silent regarding any special rules toward pro se parties. However, those cases that require a movant to warn a pro se nonmovant of the dangers of failing to comply with Rule 56 stand upon a solid constitutional footing by avoiding a significant and administratively costly problem that raises due process concerns. Providing a handout concerning the Rule 56 mechanism to all pro se litigants ensures fairness and is a small price to pay for a summary judgment process that is free of any arguments of unconstitutionality.[198]

Such a warning could also be included in a district's pro se manual.

2. Court Discretion to Grant, Deny, or Delay the Motion

Courts' efforts to enable pro se litigants to better respond to summary judgment motions seem to be supported by the 2010 amendments to Rule 56 and the accompanying commentary, which specifically acknowledges that "[m]any courts take extra care with pro se litigants."[199] The newer provisions in the rules give district courts additional flexibility to examine the underlying merits of the case instead of having the motion decided on the technical defects in—or outright absence of—the nonmoving party's response. For example, amended Rule 56(e) grants more discretion to the court when "a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c)," a common situation with pro se litigants. The rule now provides that

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198. Edward J. Brunet, John T. Parry & Martin H. Redish, Federal Law and Practice § 9:12 (2014). See also *infra* Part III.B.1.a for sample warnings from the Southern and Eastern Districts of New York and the District of Wisconsin.

199. Fed. R. Civ. P. 56(e) advisory committee's notes to 2010 amendments.

> the court may: (1) give an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or (4) issue any other appropriate order.[200]

The 2010 Advisory Committee Notes for Rule 56(e) emphasize that

> summary judgment cannot be granted by default *even if there is a complete failure to respond to the motion*, much less when an attempted response fails to comply with Rule 56(c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovant's response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step.[201]

The note for subsection (e)(4) seems to directly support the cases that call for pro se litigants to be warned about the complexities and hazards of summary judgment.

> Subsection (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper presentation of the record. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.[202]

To this end, amended Rule 56(c)(3) states: "The court need consider only the cited materials, but it may consider other materials in the record," including "materials not called to its attention by the

200. Fed. R. Civ. P. 56(e).

201. Fed. R. Civ. P. 56(e) advisory committee's notes to 2010 amendments (emphasis added).

202. *Id.*

parties."[203] Thus, if a pro se litigant fails to properly cite to materials in the record in responding to a motion, the district court has the discretion to independently consider all materials in the record that could support the pro se's opposition. Along these same lines, if a party fails to adequately contest a fact, rather than considering the fact as undisputed for purposes of the motion, "the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute."[204]

Another aspect of Rule 56 that may ameliorate a pro se litigant's inadequate response is that the court has discretion to deny a motion for summary judgment even if the rule's standards are met. "It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact."[205] This reference to discretion to deny summary judgment is in keeping with established case law.[206] As explained in *Federal Practice and Procedure*,

> in most situations in which the moving party seems to have discharged his burden of demonstrating that no genuine issue of fact exists, the court has discretion to deny a Rule 56 motion. This is appropriate since even though the summary-judgment standard appears

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203. Fed. R. Civ. P. 56(c)(3) & advisory committee's notes to 2010 amendments.

204. Fed. R. Civ. P. 56(e)(2) advisory committee's notes to 2010 amendments.

205. Fed. R. Civ. P. 56 advisory committee's notes to 2007 amendments. *See also* Fed. R. Civ. P. 56 advisory committee's notes to 2010 amendments (discussion about changing "should" back to "shall" after deciding neither "should" nor "must" were "suitable in light of the case law on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact.").

206. *See, e.g.*, Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986) ("Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial."); Kunin v. Feofanov, 69 F.3d 59, 62 (5th Cir. 1995) ("[E]ven if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that a 'better course would be to proceed to a full trial.'"); United States v. Certain Real and Pers. Prop. Belonging to Hayes, 943 F.2d 1292, 1297 (11th Cir. 1991) ("A trial court is permitted, in its discretion, to deny even a well-supported motion for summary judgment, if it believes the case would benefit from a full hearing.").

> to have been met, the court should have the freedom to allow the case to continue when it has any doubt as to the wisdom of terminating the action prior to a full trial. Of course, too frequent exercise of discretion to deny summary judgment by the courts could vitiate the utility of the procedure. . . . Thus, the court's discretion to deny summary judgment when it otherwise appears that the movant has satisfied the Rule 56 burden should be exercised sparingly.[207]

It would be proper to deny summary judgment, for example, where

> the nonmoving party has failed to offer any counter-affidavits or to provide any explanation under Rule 56(f) as to why opposing affidavits are unavailable . . . if the opposing party is suffering from some handicap that prevents him from satisfying Rule 56(e) or Rule 56(f), such as if the opposing party is a prisoner unrepresented by counsel.[208]

Denial would also be proper "if the noncompliance with the rule merely is technical and the opposing party appears to be proceeding in good faith," such as "when the evidence offered in opposition to the motion is defective in form but is sufficient to apprise the court that there is important and relevant information that could be proffered to defeat the motion."[209] Such flexibility is well suited to cases involving pro se litigants, who often "fail[] to offer any counter-affidavits" and whose "evidence offered in opposition to the motion is defective in form."

In such instances, the court "should exercise discretion and grant the adversary a continuance to remedy the defect." The court may also deny the motion when "it believes that further development of the case is needed in order to be able to reach its decision . . . [and] the better course is to postpone consideration of the motion until further pleadings are served."[210]

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207. Wright, Miller & Kane, Federal Practice & Procedure: Civil § 2728, at 525–27 (3d ed. 1998) (footnotes omitted).

208. *Id.* at 527.

209. *Id.* at 528–29.

210. *Id.* at 529–31.

It should be stressed, however, that how to account for a litigant's pro se status remains within the judge's discretion. In a case where the plaintiff simply failed to present sufficient factual evidence to oppose summary judgment, for example, the Seventh Circuit affirmed the district court's decision to grant the motion. "We realize that this may be the result of Arnett's pro se status and lack of legal skills in conducting discovery, but Arnett's pro se status doesn't alleviate his burden on summary judgment."[211] Whatever the court does, the 2010 amendments imposed a new requirement in Rule 56(a) that it "should state on the record the reasons for granting or denying the motion." The Advisory Committee Notes add that "[i]t is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court's discretion."[212]

3. Declaration in Lieu of Affidavit

Previously, one other aspect of responding to a motion for summary judgment that seemed to frequently trip up pro se litigants was the former requirement in Rule 56(e) that their response must be supported by affidavit. However, after the 2010 amendments "[a] formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit."[213] Under § 1746(2), a party may support or oppose a motion by providing the signed and dated statement, "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct."

Note also that the "requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)(1)(A) that a statement or dispute of fact be

211. Arnett v. Webster, 658 F.3d 742, 760 (7th Cir. 2011).
212. Fed. R. Civ. P. 56(a) & advisory committee's notes to 2010 amendments.
213. Fed. R. Civ. P. 56(c)(4) advisory committee's notes to 2010 amendments.

supported by materials in the record."[214] Rule 56(h) carries forward the penalties for submitting an affidavit—and now a declaration—in bad faith.

G. Final Pretrial Conference and Trial

> [T]he conduct of a jury trial with a *pro se* litigant who is unschooled in the intricacies of evidence and trial practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge. . . . In order that the trial proceed with fairness, . . . the judge finds that he must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out. Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides.[215]

As with all civil litigation, few pro se cases actually make it to trial.[216] When they do, the court can lessen the chance of the trial being a "difficult and arduous task" through thorough pretrial preparation. "The prep is what the key is . . . . The more work you do pretrial, the better the trial will run. That's just the way it is."[217]

An extensive manual or guide may provide pro se litigants with much of the information they need to prepare for and proceed with a trial. The most comprehensive manuals provide an entire section on the basics of trial preparation and the trial itself.[218] The Southern Dis-

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214. *Id.*

215. Ono v. Rogers, 466 N.E. 2d 658, 661 (Ill. App. 1984).

216. For the 12-month period ending Sept. 30, 2015, of the 274,362 civil cases that were terminated in the district courts, only 2,968 cases, approximately 1.1%, made it to trial (2,091 jury, 877 nonjury). Even among the civil consent cases terminated by magistrate judges, only 2.3% (378 out of 16,424) made it to trial. *See* Admin. Office of the U.S. Courts, 2015 Annual Report of the Director, at tables C-4 & M-5.

217. Bloom, *Pro Se Issues 2014*, *supra* note 15. *See also* Pechman & Robinson, *supra* note 139, at 11 ("By the time a trial actually starts, most of the decisions about how it will run should have been made and communicated to the lawyers so that they know what to expect and what the judge expects from them.").

218. *See, e.g.*, Minnesota Guidebook, *supra* note 96, at 106–15; N.D. Cal. Handbook, *supra* note 44, at 53–57.

trict of New York even provides pro ses with a separate, hundred-plus-page *trial* manual, covering everything from trial preparation, jury selection, opening statements, evidence, witnesses, and closing arguments, to the verdict, posttrial motions, and appeals. The manual is designed to be "an informative and practical resource and guide to understanding basic trial rules and procedures and . . . an overview of trial practice in the Court."[219]

Without a manual, "you will need to provide guidance as the pro se party attempts to handle the trial alone."[220] Although the court can take steps before trial to help the litigant prepare, "you will undoubtedly need to personally instruct the pro se litigant [during trial] as well, while carefully maintaining your impartiality."[221]

Before taking on that task, however, consider making an appointment of counsel for the limited purpose of handling the trial or assisting the pro se litigant (assuming he or she consents).[222] A pro se case that has survived motions to dismiss and for summary judgment and has made it through the discovery process should be much more attractive to pro bono attorneys than a case that is just beginning.[223]

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219. *See* S.D.N.Y. Trial Manual, *supra* note 99, at 1. *See also* Self-Represented Litigant Guide Recommendations and Best Practices, *supra* note 54, at 16–21 (suggesting that courts consider including a section on trial procedure when creating a pro se manual to "[t]ell the litigant what a trial entails, how a jury is selected, how to present evidence, how a decision is reached, whether it be a jury trial or bench trial, and how to behave in court").

220. Civil Litigation Management Manual, *supra* note 31, at 143.

221. *Id.*

222. *See also* FJC Survey, *supra* note 7, at 26 ("[T]rial presents by far the greatest need for the assistance of counsel; 73% of the respondents said there is a 'great need' for counsel at trial. No other court event comes close in the respondents' experience."); Civil Litigation Management Manual, *supra* note 31, at 143 ("If the case proceeds to trial, you will want to make a serious effort, if you have not already, to appoint counsel."); Pyle, *supra* note 83, at 6 n.6 ("If a case gets past a motion for summary judgment, appointment of volunteer counsel should be strongly considered.").

223. *See also* Ficken v. Alvarez, 146 F.3d 978, 981 (D.C. Cir. 1998) (internal citation omitted) ("Because district judges are reluctant to 'squander[ ] [their] limited resources of attorneys willing to take pro bono appointments,' they often postpone the appointment decision until after dispositive motions as a means of weeding out frivolous or unmeritorious cases. The timing of the appointment may also reflect the district court's assessment of the adequacy of the record for purposes of its own decisionmaking. A district court that initially denies a motion to appoint counsel because it feels comfortable resolving a motion to dismiss

The District of South Carolina has a program specifically designed to appoint a pro bono attorney solely for the trial stage of a case:

> A volunteer attorney would be appointed only after summary judgment is denied and the case is set for trial. At that point, the volunteer attorney takes over the case to prepare for and conduct the trial. In other words, in most cases, there is no discovery to be taken; all that is required is participation at a pretrial conference, jury selection, and trial. Most judges, upon request, relieve the trial attorney from any obligation to continue in the case if an appeal is taken.[224]

Appointing an attorney at this stage could also improve the prospects for settlement, especially if the opposing party thinks that trial might now be more difficult than anticipated.

1. Narrow the Issues for Trial at the Final Pretrial Conference

Presumably, some matters may have been taken care of before the final pretrial conference. Perhaps some of the original claims were dismissed or resolved by summary judgment. The court may have already ruled that certain evidence will not be admitted, and settlement discussions may have helped to narrow the issues that remain to be tried.

A final pretrial conference provides an opportunity to prepare the pro se litigant for trial. Such a conference is strongly encouraged. It is the judge's

> primary way to ensure that the lawyers and the parties are prepared to try the case and . . . to avoid surprises. The final pretrial conference allows the judge, with the parties and counsel, to identify the legal issues that still need to be resolved. It also provides an oppor-

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on the basis of a record produced by a *pro se* plaintiff may later appoint counsel to ensure the development of a record adequate for summary judgment or trial.").

224. *See* D.S.C. Website, "Volunteer Pro Bono Opportunities," http://www.scd.uscourts.gov/Attorney/ProBono.asp. The district also has "a fund consisting of monies paid by attorneys seeking pro hac vice admission" that may be used "to reimburse out-of-pocket costs of attorneys who participate in this pro bono program."

> tunity to identify and address problems that otherwise might disrupt, delay, or unnecessarily complicate the trial.[225]

Consider it a dress rehearsal for the trial, a chance to see if the pro se litigant understands, for example, trial procedure, his or her burden of proof, and the kinds of evidence that may or may not be presented, with the opportunity to provide additional instruction as needed.[226]

As previously noted, "[c]ase management techniques and principles for standard civil cases with represented parties will usually, with minor modifications, be useful in a pro se case."[227] The *Benchbook*'s section on the final pretrial conference (section 6.01) covers an array of case-management ideas that are readily adaptable to a case involving a pro se party. It provides a useful guide to preparing the parties for the issues and evidence that are to be covered at trial as well as *limiting* what will be covered in the trial. The less a pro se litigant has to contend with at trial, the better. Any matters that can be eliminated or simplified should be.

Before the conference, the court can require the parties to make various submissions that will then be discussed at the conference. Topics that may be particularly helpful in pro se cases include

- identifying the factual issues to be resolved at trial and summarizing the party's position on each
- identifying remaining disputed legal issues
- if not already done, disclosing under Rule 26(a)(3) the identities of expected trial witnesses and any witnesses who will be

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225. Benchbook, *supra* note 114, at 199. *See also* Self-Represented Litigant Guide Recommendations and Best Practices, *supra* note 54, at 15 (noting that a final pretrial conference provides "an opportunity to discuss the following: issues that will be tried, admissibility of exhibits, pending motions, issues concerning jury selection, witnesses, possibility of settlement, length of trial, and any other relevant issues").

226. Civil Litigation Management Manual, *supra* note 31, at 143–44. *See also* Zorza, *Toward Best Practices*, *supra* note 51, at 37 ("Pretrial conferences allow questions of admissibility, organization of evidence, and courtroom procedure to be resolved without the formality, pressure, and time of the courtroom. The conference can resemble a 'dress rehearsal' of the trial, going over the principal elements of testimony beforehand.").

227. Pyle, *supra* note 83, at 1.

presented by their depositions, and a list of all document and trial exhibits

- objections to trial exhibits or to the use of any deposition
- motions in limine[228]

In jury trials, the parties usually submit proposed voir dire questions, jury instructions, and verdict forms, and in a bench trial may be asked for proposed findings of fact and conclusions of law. While "[p]reparing jury instructions and verdict forms is a useful discipline for attorneys, requiring them to analyze their case and, more critically, the sufficiency of the available proof,"[229] these actions may prove challenging for many pro se litigants. On the other hand, "[m]ost circuits have pattern instructions that contain clear statements of the law and comments about when they should be used."[230] Since jury instructions are, of necessity, designed to be understood by non-lawyers, working through case-specific jury instructions may give pro se litigants a clearer understanding of their burden of proof, what the jury will have to decide and, therefore, what they will have to prove.[231] By the time a case reaches the trial stage, the court should have a good idea of whether the pro se would be able to handle such matters.

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228. *See* Benchbook, *supra* note 114, at 200–01. *Cf.* Minnesota Guidebook, *supra* note 96, at 105 (The parties and judge "will discuss which facts in the case are undisputed, the issues to be tried, and anything else the judge believes may expedite the trial. The parties will also be expected to discuss (1) disclosure of all witnesses; (2) the listing and exchange of all exhibits; (3) motions in limine and objections to evidence; (4) all outstanding motions; (5) an itemized statement of damages; (6) their estimates of the length of the trial; and (7) jury selection.").

229. Civil Litigation Management Manual, *supra* note 31, at 102.

230. Pechman & Robinson, *supra* note 139, at 8.

231. *See, e.g.*, Massachusetts Guidelines, *supra* note 39, at 4 ("In the judge's discretion, the elements of claims and defenses, as well as the burden of proof, may be explained in the same manner that they would be explained to a jury.").

2. Evidentiary Issues

Because pro se litigants often have trouble with evidentiary issues,[232] it is even more important than usual to simplify the presentation of evidence and resolve possible disputes. At the final pretrial conference, the court can work with the parties and their preconference submissions "to narrow and refine the issues for trial. Ruling on motions in limine may be an important part of this work. Narrowing and refining the issues and ruling in advance on as many issues as the record permits allow the court and parties to conduct the trial more efficiently."[233]

As in any civil case, the court can use the pretrial conference to "[p]review proposed testimony and eliminate what is repetitious or does not address a genuine dispute[;] . . . [p]review proposed exhibits and have the [parties] pare their lists down to essentials; suggest redaction to eliminate irrelevant portions[; and] . . . [r]eceive exhibits in advance and rule on evidentiary objections to the extent possible."[234] It is also helpful to have the parties "stipulate to uncontested facts and the admission of as much of the documentary evidence as possible."[235]

Consider requiring the parties to "mark all the exhibits [they] intend to introduce at trial before the trial, a process known as *premark-*

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232. *See, e.g.*, Terry Carter, *Judges Say Litigants Are Increasingly Going Pro Se—at Their Own Peril*, ABA J., July 12, 2012, http://www.abajournal.com/news/article/judges_say_litigants_increasingly_going_pro_se--at_their_own_ (survey of almost 1,000 state judges found that the "greatest problem is failure to present necessary evidence, . . . followed by procedural errors, ineffective witness examination and failure to properly object to evidence").

233. Benchbook, *supra* note 114, at 202.

234. Pechman & Robinson, *supra* note 139, at 9. *See also* Civil Litigation Management Manual, *supra* note 31, at 102 ("Exclude evidence bearing on uncontested matters and evidence that is cumulative or unnecessary."); S.D.N.Y. Trial Manual, *supra* note 99, at 17–18 ("at the final pretrial conference the Judge may discuss with the parties the substance and length of each proposed witness's testimony; require a party to limit a witness's testimony; direct that witnesses may not testify about certain matters; or rule that certain witnesses cannot testify at all").

235. Gray, *supra* note 20, at 55. *See also* Civil Litigation Management Manual, *supra* note 31, at 102 ("Arrive at a final and binding statement of the factual and legal issues to be tried, and encourage stipulations.").

ing exhibits. This process generally saves time and avoids confusion during the trial." [236] It would also allow the pro se more time to consider and raise any objections to the other party's exhibits and avoid having to try to do so during the trial. Even if exhibits are marked before trial, make sure the pro se understands the process involved in actually having an exhibit admitted as evidence before the jury may view it or a witness may discuss it during the trial. The litigant must provide a copy of the exhibit to the judge and to the opposing party to review (if not already provided before trial), lay a foundation for the evidence, and request that the exhibit be admitted into evidence.[237]

If the pro se will have a significant number of witnesses and exhibits, establishing a foundation for that evidence in advance, or at least making sure the litigant knows how to do so, could save significant time and frustration during the trial. "Evidence that requires foundation—documents and hearsay—seems to produce the most time-wasting confusion in trials. A focus on the required foundations in a pretrial conference will improve trial efficiency."[238]

If the circumstances warrant, a trial court may even require a pro se litigant to submit questions for witnesses in advance of a jury trial.

> Appellate courts have repeatedly stated that trial courts should use Rule 16 to expedite litigation and prevent surprise during trial. . . .

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236. S.D.N.Y. Trial Manual, *supra* note 99, at 66. *See also* Benchbook, *supra* note 114, at 201–02 ("To ensure that the evidence is ready for trial and to minimize surprises, consider requiring the parties to exchange not only lists of exhibits, but actual copies of exhibits marked for introduction into evidence. . . . The final pretrial conference provides an opportunity to preadmit exhibits if there will be no objections or if the court is able to resolve the objections and rule on admissibility.").

237. *Cf.* National Bench Guide, *supra* note 20, at 6-16 ("[L]itigants should be advised as part of the introductory script that any documents or other evidence received by the court must be shown to the other party first. The judge should also explain the process for marking exhibits and for referring to them.").

238. Zorza, *Toward Best Practices*, *supra* note 51, at 40. *See also* Snukals & Sturtevant, *supra* note 69, at 95 ("If the pro se litigant is knowledgeable enough to proceed with his case to trial, laying a proper foundation for admission of evidence and navigating the hearsay exceptions are sure to make the already difficult job of self-representation nearly impossible.").

> The court in this case attempted to do exactly what Rule 16 envisions, albeit by somewhat novel methods. The court, based upon its observation of plaintiff Miller, concluded that Miller was likely to pose questions at trial that would warrant continuous objection by his adversary. The court feared that constant objections, many of which might be meritorious, would not only lengthen the trial unnecessarily, but would also work to Miller's ultimate detriment. The court therefore exercised the broad discretion available to it under Rule 16 . . . in requiring Miller to submit his questions in advance [so the court could rule on the defendants' objections before trial]. We believe that the court's requirement in this case, like a requirement that parties disclose witnesses and the subject matter of witnesses' testimony, or that exhibits be submitted in advance so that objections can be made at the pretrial stage, is clearly permissible under the Rules. *See* Fed. R. Civ. P. 16(c).[239]

The appellate court recognized that requiring only one side to disclose its questions could result in a serious disadvantage, but concluded that did not happen here.

> There is no basis for holding that the court's order resulted in any unfairness. Although the appellant suggests that he was deprived of spontaneity in his questioning, he has not indicated what he would have done differently or what questions he might have asked had he been completely free to ask spontaneous questions on direct examination. The plaintiff was permitted unfettered redirect examination of his witnesses, full rebuttal, and cross-examination of the defendant's witnesses. Although the district court did not request in advance the precise questions that the defense counsel wished to ask of its witnesses, the nature of the defense and the witnesses to be presented were comprehensively disclosed prior to trial.
>
> The questions that the plaintiff submitted contained a number of inappropriate and irrelevant lines of inquiry, which were properly foreclosed. The result was that the plaintiff was able to present

239. Miller v. Los Angeles Cty. Bd. of Educ., 799 F.2d 486, 488 (9th Cir. 1986). *See also* Fed. R. Civ. P. 16(e) ("The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence.").

> his case to the jury with a minimum of interruption. The district court's procedure clearly worked to his advantage in that regard.[240]

For bench trials, consider requiring that direct testimony by witnesses—including the pro se litigant[241]—be presented by written narrative, with live questioning on cross-examination and redirect as needed.

> Under this procedure the parties submit written narrative testimony of each witness they expect to call for purposes of direct evidence. The witness then testifies orally on cross-examination and on redirect. . . .
>
> The bankruptcy court's procedure . . . is consistent with Fed. R. Evid. 611(a), which allows the court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time.". . .
>
> The use of written testimony "is an accepted and encouraged technique for shortening bench trials.". . . The bankruptcy court's procedure permits oral cross-examination and redirect examination in open court and thereby preserves an opportunity for the judge to evaluate the declarant's demeanor and credibility.[242]

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240. *Miller*, 799 F.2d at 488. *Cf.* Malone v. U.S. Postal Serv., 833 F.2d 128, 129, 133–34 (9th Cir. 1987) (in case where both parties were represented and a mistrial had been declared, district court did not abuse its discretion in issuing pretrial order that required both parties to file "a complete list of witnesses and a 'thorough and complete list of each and every' direct question and anticipated response" prior to a new trial. "[T]he pretrial order at issue served a valuable purpose by trying to organize a very disorganized case.").

241. Pyle, *supra* note 83, at 6 ("[I]t should be discussed how the [pro se] plaintiff will testify. The best way may be in narrative form with the trial judge encouraged to interrupt and redirect plaintiff if he repeatedly gets into objectionable areas.").

242. *In re* Adair, 965 F.2d 777, 779 (9th Cir. 1992) (internal citations omitted). *See also* Ball v. Interoceanica Corp., 71 F.3d 73, 77 (2d Cir. 1995) ("Like the Ninth Circuit, we approve the procedure allowing the parties to produce direct evidence from their witnesses in writing while permitting subsequent oral cross-examination—particularly when the parties agree to that procedure in advance."); Saverson v. Levitt, 162 F.R.D. 407, 410 (D.D.C. 1995) (when full cross-examination would be permitted at trial, "[r]equiring the parties to submit their direct testimony in writing in lieu of the usual question-and-answer form is

Note that there was some discussion about changing Rule 43(a) to specifically allow written testimony in lieu of oral, but the Advisory Committee on Civil Rules concluded that "Rule 611(a) . . . provides sufficient authority for using this procedure when appropriate."[243]

Be sure to tell pro ses that, with only a few exceptions, they "will not be able to present exhibits or call witnesses at trial if they are not listed in the pretrial order. Thus, [they] must be certain that [they] listed all of [their] potential witnesses and exhibits in the pretrial order. [They] are not, however, obligated to call every witness or introduce at trial every piece of evidence listed in the pretrial order."[244] Also make sure that pro se plaintiffs understand that they should raise any issues they want to present to the fact finder during their initial presentation of witnesses and evidence. They generally cannot refer to any matters later, on redirect or in rebuttal, unless they were previously raised by the plaintiff or by the defense.[245] For more discussion of evidentiary issues that may arise during trial, see *infra* Part III.E.

3. Court Practices and Procedures

"Many judges use the final pretrial conference to educate lawyers and parties on the court's trial practices," and the court should make sure

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sanctioned under the inherent powers of the Court, the Federal Rules of Civil Procedure and the Federal Rules of Evidence"); *In re* Stevinson, 194 B.R. 509, 511 (D. Colo. 1996) (finding that "the bankruptcy court's standard procedure of requiring direct testimony by written declaration while permitting oral cross-examination and redirect in open court offends neither due process nor Rule 43(a)—particularly where, as here, the parties fail to object to that procedure as notified in the scheduling order").

243. *See* Attachment to Letter to Hon. Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure, from Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules 3 (May 17, 1993), *available at* http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-1993.

244. S.D.N.Y. Trial Manual, *supra* note 99, at 16.

245. *See, e.g.*, *id.* at 62 ("Questions on redirect examination are generally limited to the subjects covered in cross examination."); D. Kan., Filing Your Lawsuit in Federal Court: A Pro Se Guide 22 (rev. ed. 2016) [hereinafter Kansas Pro Se Guide], *available at* http://www.ksd.uscourts.gov/filing-your-lawsuit-in-federal-court-a-pro-se-guide-2/ ("When the defense is through, you will have a chance to put on any additional witnesses. These are called 'rebuttal witnesses.' If you have any rebuttal witnesses, you may not ask them any new questions on topics that were not already discussed.").

the pro se party is aware of these. The court should also consider informing the parties of its "expectations for the conduct of trial counsel. For example, the judge can educate the parties about proper practice for marking and presenting exhibits, for approaching witnesses, or for the use of courtroom equipment. Such an education can be particularly valuable for trials involving pro se litigants."[246] Other useful topics for discussion include "[w]ho goes first, order of the case, who can be at counsel table, . . . difference between direct and cross-examination (no leading witnesses on direct), no argument until closing, and necessity to formalize objections and wait for ruling."[247]

If it has not been done already, consider informing pro se litigants about courtroom decorum, since they may be completely unfamiliar with seemingly simple matters like where and when to sit, how to dress, how to address the court, and so on. Some districts' pro se manuals cover this, and the court can simply make sure litigants have a copy. The manual from the District Court of Kansas, for example, instructs litigants that

> WHEN YOU ARE IN COURT:
>
> - Do not bring your cell phone, cameras, or recording devices.
> - No weapons, drugs or other illegal items allowed.
> - Dress properly and take off your hat (be neat and clean).
> - No gum chewing; no eating; no drinking; no reading newspapers or magazines; no sleeping; no loud talking.
> - When the judge enters or leaves the courtroom, you must stand up.
> - Call the judge "Your Honor;" speak clearly.

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246. Benchbook, *supra* note 114, at 203. *See also* Gray, *supra* note 20, at 55 ("Explain the process and ground rules (e.g., that you will hear from both sides, who goes first, everything said will be recorded, witnesses will be sworn in, witnesses may be cross examined, how to make an objection).").

247. *See, e.g.*, Judge Robert E. Jones, Judge Gerald E. Rosen, William E. Wegner & Judge Jeffrey S. Jones, *Federal Civil Trials and Evidence* § 4:240 (July 2015) ("Every judge has personal 'ground rules' regarding conduct of trial and courtroom demeanor and many have reduced these rules to writing. The specifics vary among judges and should be made known during the final pretrial conference.").

- Be respectful to the court security officers. They are here for your protection.[248]

The Southern District of New York's *Representing Yourself at Trial* manual has an extensive list of similar do's and don'ts and even provides a sketch of the layout of a typical courtroom, showing the litigant where the parties, judge, and jury are usually located.[249]

4. Other Matters

In a bench trial, consider waiving opening statements if the court is familiar with the facts and the issues to be decided and the pro se plaintiff would essentially say the same thing as he or she would during testimony.[250] If it is a jury trial, make sure the pro se litigant understands that the purpose of making an opening statement to the jury is "for each party to describe the issues in the case and state what they expect to prove during the trial. An opening statement is neither evidence nor a legal argument,"[251] and the parties "must not mention any evidence or issues that the judge has excluded from the trial."[252]

Consider asking the pro se about other common trial preparations that he or she may not have thought of, such as having a trial

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248. Kansas Pro Se Guide, *supra* note 245, at 24. *See also* Self-Represented Litigant Guide Recommendations and Best Practices, *supra* note 54, at 19 (suggesting that courts may want to include a section on proper court etiquette when creating a pro se manual).

249. S.D.N.Y. Trial Manual, *supra* note 99, at 7–8. *See also* Gray, *supra* note 20, at 52 ("Give a basic introduction to courtroom protocol, for example, the importance of timeliness, checking in with the clerk (if that is necessary), who sits where, directing arguments to you, not other parties or attorneys, rising when you enter, and other matters you consider important (attire, gum chewing, reading while court is in session, etc.).").

250. S.D.N.Y. Trial Manual, *supra* note 99, at 31 ("The Judge may ask the parties to waive, or skip, their opening statements. This most often occurs in a bench trial where the Judge is already familiar with the facts, or when the Judge determines that opening statements will be redundant or lengthen the trial needlessly.").

251. N.D. Cal. Handbook, *supra* note 44, at 56.

252. Minnesota Guidebook, *supra* note 96, at 111. *See also* Zorza, *Toward Best Practices*, *supra* note 51, at 40 ("Sometimes the self-represented get carried away and have difficulty limiting themselves to what is to be or has been shown by the evidence. Chambers conferences may be useful to review the key points to be made, minimizing the risk of judicial interventions before the jury, which could be highly prejudicial.").

notebook to organize materials or preparing witnesses and making sure they will be available for the trial. Pro se litigants "often fail to adequately prepare their case by forgetting to subpoena witnesses or provide the court with case law and statutory support for their legal positions, all of which have a number of significant consequences that affect more than just the individual pro se litigant."[253] It may help to allow "a non-attorney advocate to sit at the pro se party's counsel table, and [explain] that this advocate may provide support but will not be permitted to argue on behalf of the party or to question witnesses."[254]

Finally, provide the parties with another chance to discuss settlement.

> The final pretrial conference presents one last opportunity to discuss settlement with counsel and the parties, who may now realize for the first time the actual burdens of going forward. For those cases that do not settle, actual trial time may be shortened as a consequence of frank settlement discussions at this time.[255]

While formulating the plan for trial, keep in mind that "[j]udges have broad inherent discretion to manage the trial of the cases assigned to them"[256] and that "a trial court [has] wide procedural leeway to conduct its civil business in the interest of the sound and efficient administration of justice."[257] This provides judges with great

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253. *See* Snukals & Sturtevant, *supra* note 69, at 96.

254. Civil Litigation Management Manual, *supra* note 31, at 144.

255. *Id.* at 104.

256. *Id.* at 109. *See also* Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 Tex. L. Rev. 1805, 1810 (1995) ("Written rules and statutes are unlikely as a practical matter to provide for all the many things a trial judge may need to do—or may find it useful to do—in dealing effectively with cases during the pretrial phase.").

257. Meador, *supra* note 256, at 1805–06. "Provisions such as those in Federal Rules of Civil Procedure 16, 26, 37, and 42 . . . explicitly authorize trial courts to exercise wide-ranging managerial control over civil cases. Nevertheless, much of what trial courts do, and indeed must do, in the conduct of their business is not provided for in any rule or statute and thus necessarily rests on . . . a broad, inherent authority . . . to exert a high degree of affirmative case management if they choose to do so." *Id.* at 1806–07. *See also In re* San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1012 at n.2 (1st Cir. 1988) ("[D]istrict courts 'have inherent powers, rooted in the chancellor's equity powers, "to process litigation

flexibility to tailor pretrial discussions and trial procedures to both the facts of the case and the characteristics of the individual litigants.

Getting as many issues resolved as possible and educating a pro se litigant about trial procedures and courtroom protocol before trial will allow the litigant to focus on the essentials and not waste time and energy during the trial trying to cover matters that are not relevant or will not be allowed. Perhaps more importantly, it lessens the chance that a litigant will become confused, discouraged, or worse if the trial court has to frequently deny admission of evidence, interrupt to stop improper questioning, or otherwise correct or instruct the litigant during what is likely an already stressful trial experience.

5. During the Trial

a. Opening Remarks

At the beginning of the trial (before the jury is seated, if there is one), ask the parties if they have any additional questions about trial procedure. This assumes that trial procedures were already covered in a final pretrial conference. It may be helpful to review "how the proceeding will be conducted, the legal elements of the matter, and types and forms of acceptable evidence."[258] Remind the parties that they will be given adequate opportunity to state their case and that they must not interrupt the other party. "Except when examining or cross-examining witnesses, litigants should address their remarks and questions to the judge. They should not direct comments to the opposing party or counsel for the opposing party."[259] Assure the pro se litigant that these rules apply equally to both parties.

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to a just and equitable conclusion."' . . . The judiciary is 'free, within reason, to exercise this inherent judicial power in flexible, pragmatic ways.'") (citations omitted); Eash v. Riggins Trucking Inc., 757 F.2d 557, 567 (3d Cir. 1985) (en banc) ("A court's inherent power to manage its caseload, control its docket, and regulate the conduct of attorneys before it, provides authority to fashion tools that aid the court in getting on with the business of deciding cases.").

258. Albrecht et al., *supra* note 20, at 45.

259. Massachusetts Guidelines, *supra* note 39, at 5. *See also* Tait, *supra* note 14, at 13–14 ("Make sure the courtroom ground rules are clear—it's a lot easier for people to follow the rules if they know what they are. For instance, let court participants know that while

If it is a jury trial, explain to the jury, perhaps even during jury selection, that the plaintiff (or defendant) is representing himself or herself, that he or she has the right to do so, and that the jury should not draw any negative inferences from the lack of an attorney or treat the parties differently in any way. Consider giving a jury instruction to this effect, as well as telling the jury that there may be more discussions between the judge and the parties than if both sides had an attorney, that this is not unusual, and that it should not influence their decision in any way.[260] Also let the jury know that if the court interrupts the testimony or asks questions of witnesses, it is only to help keep the case on track and to clarify facts and issues as needed—it should not be taken as an indication that the judge favors one side or the other. Occasional reminders to the jury during trial may be given as needed, and reiterated in the final jury instructions.

b. Testimony

Staying on point while examining a witness, or during their own testimony, may prove difficult for pro se litigants. The case may move more efficiently if the court helps the litigant to "stay focused on matters that are relevant to the . . . ultimate decision. Most litigants appreciate assistance in focusing their testimony, often because of uncertainty about what the judge needs to hear. Explaining the refocusing will make it easier for the litigant to stay on topic."[261]

A related problem is that it may be unclear whether testimony that the litigant is giving or trying to elicit from a witness is relevant to the issue at hand. Giving litigants an opportunity "to explain how it will help you [or the jury] decide the case may be the fairest and simplest approach. In some cases, it may then become necessary to hear the testimony or to explain the lack of legal relevance."[262]

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they're not supposed to interrupt, you might need to interrupt them in order to make best use of the time available. Then if you do interrupt, it doesn't come across as disrespectful.").

260. Zorza, *Toward Best Practices*, *supra* note 51, at 41.

261. Richard Zorza, *A New Day for Judges and the Self-Represented: The Implications of* Turner v. Rogers, 50 The Judges' Journal, no.4, 16, 19 (Fall 2011) [hereinafter Zorza, *A New Day*].

262. *Id.*

A pro se litigant may also become flustered if opposing counsel is making frequent objections. Of course, some objections are inevitable (although there should be relatively few if evidence was previewed at the final pretrial conference), but the court may need to determine whether they are made in good faith.

> Initial objections should be treated respectfully. But if counsel appears to be making objections for tactical purposes, rather than to exclude inappropriate evidence, permit a standing objection and warn counsel to limit the frequency of objections, stating the reason for this instruction. Giving the attorney an opportunity at the end of that phase of the proceeding to identify any particular harm that the modified proceeding has caused should then fully protect the record.[263]

If needed, a short recess can give the pro se time to regroup and allows for any heightened emotions to subside. "Call breaks where necessary if a litigant is becoming confused or tempers on either side are becoming frayed (or your patience is running low)."[264] And if the case involves a jury, the court may have to balance solicitude toward the pro se with keeping inadmissible evidence from the jury.

The court may also have to respond to overly aggressive tactics designed to harass, intimidate, or confuse a witness. "Counsel is entitled to be exploratory in cross-examination and to make helpful factual

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263. Zorza, *Toward Best Practices*, *supra* note 51, at 37. *See also* Massachusetts Guidelines, *supra* note 39, at 10 ("This does not mean that a judge must become a lawyer for a self-represented litigant; however, the judge should recognize when opposing counsel is 'engaging in improper tactics and taking advantage of the [self-represented litigant's] unrepresented status' and 'promptly intervene[], not to be of assistance to the [self-represented litigant], but to assert a judge's traditional role of making sure that all the parties receive a fair trial. . . . A pro se [party] is not entitled to any greater protection than a [party] represented by counsel—but he is not entitled to any less protection either.'") (internal citations omitted).

264. Gray, *supra* note 20, at 56. *See also* National Bench Guide, *supra* note 20, at 6-20 to 6-21 ("It is possible that a litigant may become too anxious to participate reasonably in the hearing. If so, a recess should be taken to allow the person a chance to calm down before further action is taken. Providing the litigant with an opportunity to go out of the courtroom, have a glass of water, or otherwise 'take a break' can provide the time needed for him or her to regain composure.").

points, not to humiliate or deter a witness. Judges should put counsel on notice of the problems with their approach and escalate their interventions. The judge can request the basis of cross-examination or representations that the questions are based on a good-faith belief in the possibility of their leading to relevant testimony."[265]

c. Judicial Questioning

During the course of the trial, judges "may use their discretion, when permissible, to provide self-represented litigants the opportunity to meaningfully present their cases. Judges may ask questions to elicit general information and to obtain clarification."[266] If the litigant is having trouble properly introducing evidence, for example, the court may "[a]sk questions to establish the foundation of evidence. Often litigants don't know the hearsay or foundational rules of evidence. The judge can ask questions, perhaps detailed questions, to determine weight or admissibility, even if there has been no objection to the evidence offered."[267]

If the opposing attorney does make an objection, the court can require a detailed explanation of the grounds for objection to make sure the pro se litigant understands why the evidence may be inadmissible. Similarly, if the court rules evidence is inadmissible, explain the basis for ruling so that the pro se can try to properly admit the evidence. "Concise objections are likely to confuse the self-represented litigant. Judges can request greater specificity and explanation, ask additional questions about the evidence, explain the pro-

265. Zorza, *Toward Best Practices*, *supra* note 51, at 37. "Similar techniques are appropriate with a self-represented party who is engaging in similar behavior." *Id. See also* Gray, *supra* note 20, at 56 ("Require counsel to explain objections in detail. If counsel objects, ask if he or she is arguing that the evidence is unreliable. . . . Do not allow counsel to bully or confuse self-represented litigants or their witnesses.").

266. Massachusetts Guidelines, *supra* note 39, at 9.

267. Zorza, *A New Day*, *supra* note 261, at 18.

cess and the ruling, and possibly indicate another way to make the point."[268]

In general, the court has discretion

> to ask questions and follow-up questions to focus the litigants and get the information you need to decide the case in a timely manner. Self-represented litigants usually appreciate it when judges help them focus on the relevant issues. The time saving is obvious. If you have indicated at the beginning of the hearing that you may ask questions, it is often useful to remind the litigants of that earlier indication at the time that you do ask them.[269]

If a jury is involved, the court should instruct the jury, and repeat as needed, that they should not consider questions from the judge "as any indication of the judge's opinion as to how the jury should decide the case and that if the jury believes that the judge has expressed or hinted at any opinion about the facts of the case, they should disregard it."[270] For further discussion of judicial questioning, see *infra* Part III.E.1, "Court Discretion to Call and Question Witnesses and Develop Facts."

d. Admission of Evidence in General

As noted *supra* in Part I.A.2.b, evidentiary issues can be particularly difficult for pro se litigants, and within reason, concern for procedural fairness favors avoiding the strict application of evidence rules in

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268. Zorza, *Toward Best Practices*, *supra* note 51, at 37. *See also* Massachusetts Guidelines, *supra* note 39, at 10 ("Judges may require counsel to explain objections in detail, and judges should explain their evidentiary rulings.").

269. Juhas et al., *supra* note 35, at 18. *See also* Johnson v. Gen. Bd. of Pension & Health Benefits of United Methodist Church, 733 F.3d 722, 733–34 (7th Cir. 2013) (rejecting pro se plaintiff's claim that trial court showed bias against pro se litigants, explaining that "'Federal judges have wide discretion to determine the role that they will play during the course of a trial. A district judge is free to interject during a direct or cross-examination to clarify an issue, to require an attorney to lay a foundation, or to encourage an examining attorney to get to the point.' The district court's occasional interjections during trial, the denial of some of Johnson's requests for sidebar conferences, and the other sundry events that Johnson identifies fall well within the district court's discretion to manage the trial.") (internal citations omitted).

270. Massachusetts Guidelines, *supra* note 39, at 11.

order to give a pro se litigant a better chance to make his or her case. Whether particular evidence is material and has sufficient indicia of reliability are often matters for the court's judgment and discretion, especially in a bench trial. It may be fairer to a pro se litigant, and in keeping with both the spirit and text of Rule 102, to construe the rules of evidence in a flexible manner, "to the end of ascertaining the truth and securing a just determination."[271] Although greater care should be taken when a jury is involved, judges have great discretion in deciding what evidence to allow in a civil case, and reversals seem to occur more frequently for errors in excluding evidence rather than for admitting too much.

> [A]n analysis of evidentiary issues in federal cases found that the vast majority was overturned because the judges did not admit evidence, not because they admitted it erroneously. Although there are few published case law and ethics opinions regarding self-represented litigants, what is written is instructive. On appeal, trial judges are commended for being helpful rather than hurtful to self-represented litigants. In only the most extreme circumstances have judges been reversed or sanctioned for assisting self-represented litigants in presenting their cases. Stepping off the bench to do independent research for a self-represented litigant, for example, is not allowed. But asking questions of both sides to ascertain information needed to make a decision is absolutely appropriate, and often required.[272]

While some rules of evidence are fairly strict about what may or may not be admitted,

> most of the evidence rules provide a bit of guidance but leave the trial judge free to make an ad hoc decision that balances probative value and potential prejudice. The trial judge has so much discre-

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271. Fed. R. Evid. 102.

272. Adam, *supra* note 76, at 22. *See also* Murray & Sheldon, *supra* note 51, at 34 n.49 ("Out of almost forty thousand federal civil and criminal, jury and nonjury trial court verdicts and judgments entered from July 1, 1988, to June 30, 1990, across the country, only thirty cases were reversed for evidentiary error. . . . Seventeen of those were civil cases, and of them about two-thirds—eleven out of seventeen—were reversed because the court erroneously excluded evidence. . . . In other words, reversals for the wrongful admission of evidence, in all such civil cases, were almost immeasurably few.") (internal citations omitted).

> tion in making many evidence rulings she effectively has the last word. . . . On appeal, the need to show that an error in admitting or excluding evidence had a substantial impact on the outcome also insulates evidence rulings from reversal.[273]

For further analysis of evidentiary issues at trial, see *infra* Part III.E.

e. Issuing the Decision

Most pro se cases are decided by the court rather than by a jury, and the court will have to decide when to issue its decision. There are differing opinions on whether the court should try to issue the decision promptly at the close of evidence or take the matter under advisement and issue a written opinion. The circumstances of each case should determine which course to take.

> Judges should exercise discretion in deciding whether to issue a decision at the close of the hearing while both parties are present, or to inform the parties that the matter will be taken under advisement and that a written decision will be mailed to them. In cases where there is no immediate need to enter an order, the judge may inform the parties that the judge wishes to consider their evidence and arguments before making a decision. If possible, the judge should give a time frame within which the case will be decided.
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> . . . .
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> Depending upon the circumstances, there may be practical reasons not to issue an immediate order, apart from the judge's need to review the file and the law. . . . A decision issued from the bench, particularly if it is not favorable to the self-represented litigant, may result in an outburst directed to the other side, disruption of the court session, or security concerns. Sometimes the self-represented

273. Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. Rich. L. Rev. 1261, 1280 & n.94 (2010). *See also* DVD: Court Web: Hearsay (Federal Judicial Center July 16, 2015) (feat. Prof. David A. Sonenshein) ("The number of reversals on evidentiary rulings is miniscule . . . . In a very close case, I think a judge is, and probably should be, free to do what he thinks or she thinks is the fairest thing to do and not really worry about reversal because . . . you have to really be way off. If it's close, it's very hard to say you are going to be reversed."); Meador, *supra* note 256, at 1816 (appellate courts "tend to accord broad deference to trial courts on matters of procedure and case management").

> party will seek to reargue the case to be sure the judge "understands." These problems can cause serious delays in busy sessions. A written decision, issued by mail, allows the parties to receive it privately, away from the stress of the proceedings, and to reflect on how they wish to proceed.[274]

On the other hand, "judges may have trouble finding time to decide the case once it is submitted, and cases become more difficult to decide as they grow cold with the passage of time." Many judges will "tak[e] a case under submission only if it cannot be decided from the bench and then set[] a deadline on their calendar for its decision. A prompt decision saves resources, increases the parties' and public's satisfaction with the court, and eases the judge's burden."[275]

Whether the decision is given immediately or written later, provide an explanation for it and consider recognizing the positions of both sides. "When litigants understand the reasoning behind the decision, it is often easier for them to respect and comply with [it]. . . . A litigant whose position seems to have been fully considered, even if ultimately rejected, is more likely to respect that decision and find a way to comply with it."[276]

If the pro se litigant lost on some or all of the issues, inform him or her of any right to appeal and that, unless overturned by the appeals court, any issues decided in the case may not be raised again in a federal district court.

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274. Massachusetts Guidelines, *supra* note 39, at 13. *Cf.* Juhas et al., *supra* note 35, at 19 ("While some judges have been reluctant to issue decisions immediately, fearing outbursts or security problems, as a practical matter in most cases such complications do not occur. Rather, the announcement of the decision increases the chance of comprehension and the likelihood that litigants will understand their obligations. It also provides an opportunity to clear up any confusion or ambiguities and to resolve any problems that may be clear to the parties but not necessarily to the judge.").

275. Civil Litigation Management Manual, *supra* note 31, at 113–14. In pro se cases, "[w]hen the trial concludes, decide the matter promptly, if at all possible, and enter your decision." *Id.* at 144.

276. Zorza, *A New Day*, *supra* note 261, at 20. *See also* Massachusetts Guidelines, *supra* note 39, at 56 ("Issue an order in plain English explaining the decision, addressing all material issues raised, resolving the contested issues of fact, and announcing conclusions of law."); Juhas et al., *supra* note 35, at 19 ("Make sure that the litigants understand your decision, what they have been ordered to do, and the consequences of noncompliance.").

H. Interpreters

1. Statutes and Case Law

Pro se litigants who have a limited command of English and limited finances might request that the court provide them with the services of an interpreter at no cost. There is, however, no statutory provision that allows this for pro se plaintiffs, and only limited provision for pro se defendants in civil litigation. Under the Court Interpreters Act at 28 U.S.C. § 1827(d)(1), courts are authorized to provide an interpreter for a party or witness at no cost, but only "in judicial proceedings instituted by the United States." This limitation is strictly enforced, and courts have rejected attempts by pro se plaintiffs, including those who qualify for in forma pauperis status, to obtain the services of an interpreter under this section.[277] Some courts have ruled that § 1827(d) applies to translating written materials, too, such as pleadings or transcripts.[278]

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277. *See, e.g.*, Abdi v. Garbisch, No. 12-306 (JNE/JJG), slip op. at 2 (D. Minn. Sept. 10, 2013) (stating that "in civil matters, the burden of locating and paying for an interpreter is on the party requesting that service"); Sayed v. Proffitt, No. 09-cv-00869-MSK-KMT, slip op. at 1 (D. Colo. Apr. 21, 2010) (holding the court was "without authority to order an interpreter for the court proceedings in this case"); Fessehazion v. Hudson Grp., No. 08 Civ. 10665 (BSJ) (RLE), slip op. at 2 (S.D.N.Y. Aug. 21, 2009) ("Generally, pro se civil litigants have no entitlement to an interpreter or translator."); Loyola v. Potter, No. C 09-0575 PJH, slip op. at 2 (N.D. Cal. Apr. 16, 2009) ("The court is not authorized to appoint interpreters for litigants in civil cases, and, moreover, has no funds to pay for such a program."). *See also* Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 5, ch. 2, § 260 ("Interpreter services needed to assist parties to civil proceedings not instituted by the United States, both in court and out of court, are the responsibility of the parties to the action.").

278. *See, e.g.*, Gomez v. Myers, 627 F. Supp. 183, 186 (E.D. Tex. 1985) (although holding that complaint written in Spanish must be accepted, court could not authorize payment for translation). *See also* Pedraza v. Phoenix, No. 93 Civ. 2631 (MGC), slip op. at 1 (S.D.N.Y. May 9, 1994) (denying plaintiff's request that defendants translate all motions into Spanish: "while Fed. R. Civ. P. 43(f) [now 43(d)] grants the trial judge discretion to appoint an interpreter for trial, there is no federal rule that gives an indigent non-English speaking civil plaintiff the right to a court-ordered translation of pre-trial motions"). *Cf.* Fisch v. Rep. of Pol., No. 07 Civ. 7204 (LAP)(KNF), slip op. at 2 (S.D.N.Y. Oct. 23, 2007) (no right under § 1915(e)(1) for IFP plaintiff to have court pay for translating documents needed for service of process into English).

The Court Interpreters Act covers the "hearing impaired" as well as "persons who speak only or primarily a language other than the English language," and the same limitations apply, with one exception: under § 1827(l), "the presiding judicial officer may appoint a certified or otherwise qualified sign language interpreter to provide services to a party, witness, or other participant in a judicial proceeding, whether or not the proceeding is instituted by the United States," if the court determines "that such individual suffers from a hearing impairment." The appointment is "subject to the availability of appropriated funds" under § 1827(l).[279] The statute does not provide similar discretion to appoint a foreign language interpreter.

If the litigant makes it to the trial stage of the proceedings, Rule 43(d) "provides for the appointment of an interpreter at trial, but fails to extend that authority to pre-trial preparation."[280] Note, however, that although the court may provide compensation for an interpreter during trial, Rule 43(d) also allows the court to "tax the compensation as costs," and a pro se litigant who loses could be held liable for the payment.[281]

In a prisoner civil rights suit, the court discussed whether failing to provide for the translation of documents could implicate a person's right of access to the courts. Because the pro se plaintiff appeared to have a meritorious case, the court was able to appoint counsel who would then be responsible for any necessary translation. Any attorney

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279. *But cf.* Bankruptcy Case Management Manual, *supra* note 101, at 748 ("28 U.S.C. § 1827(*l*) provides that a judge may provide a sign language interpreter in other judicial proceedings, and Judicial Conference policy is that judges must do so. Judges must provide, at judiciary expense, sign language interpreters or other auxiliary aides and services to participants in federal court proceedings who are deaf, hearing-impaired, or have communication disabilities and may provide these services to spectators when deemed appropriate. *See Guide to Judiciary Policy*, vol. 5, ch. 2, § 255.").

280. *Gomez*, 627 F. Supp. at 187.

281. *See* Fed. R. Civ. P. 43(d) ("The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs."). *But cf.* Taniguchi v. Kan Pac. Saian, Ltd., 132 S. Ct. 1997, 2003–05 (2012) (holding that "compensation of interpreters" in 28 U.S.C. § 1920(6) is limited to the cost of oral translation and does not include the cost of document translation).

who has been appointed to represent someone proceeding *in forma pauperis* "is expected to bear the costs of litigation, which presumably includes the costs of interpretation and translation. . . . After completion of the litigation, however, an attorney who represents the prevailing party may be reimbursed for litigation costs and be awarded reasonable attorney's fees under 42 U.S.C. § 1988."[282]

2. Alternatives to Certified Interpreters

Unfortunately, unless the district has instituted some kind of interpreter program, an individual judge is left with few options when a court-appointed, certified interpreter is not available. He or she is left to consider less formal arrangements, with one of the most frequent options being a bilingual friend or family member of the litigant.[283] Courts have the discretion to approve the use of such noncertified translators.[284]

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282. *Gomez*, 627 F. Supp. at 187 n.5. *See also* Fessehazion v. Hudson Grp., No. 08 Civ. 10665 (BSJ) (RLE), slip op. at 1 (S.D.N.Y. Aug 31, 2009) (on reconsideration of Aug. 21 order, appointing counsel to assist pro se civil plaintiff who had requested counsel and an interpreter, finding that plaintiff has a meritorious claim and, "while the language issues raised in her original application do not prevent Fessehazion from articulating her allegations, the Court finds that she is unable to investigate critical facts without assistance of counsel"); Castillo v. Cook Cty. Mail Room Dept., 990 F.2d 304, 307 (7th Cir. 1993) (Although defendant never requested counsel, "it would serve the interests of justice in this case for Castillo to be represented by counsel. Castillo has presented a colorable claim. In addition, Castillo's *pro se* filings indicate that he has some difficulty with the English language. For this reason, he is not particularly capable of presenting his own case. Therefore, it would have been advisable for the district court to have appointed counsel for Castillo.").

283. *Navigating Civil Cases Without an Interpreter*, The Gideon: The Pro Se Litigation Committee Newsletter, Fall 2013, at 3 [hereinafter The Gideon] ("If there is no objection, and the proceeding simply involves argument, or very limited testimony, many judges will allow a friend or family member to interpret after limited inquiry about translation ability.").

284. *See, e.g.*, S.D.N.Y. Manual, *supra* note 96, at 28 ("If you are unable to afford a certified court interpreter, the Judge has discretion to permit you to use a relative or friend to act as an informal interpreter during pretrial proceedings (but not at trial)."); E.D.N.Y., Individual Practices of Magistrate Judge Lois Bloom: 5. Interpreter Services, *available at* https://www.nyed.uscourts.gov/pub/rules/LB-MLR.pdf ("Interpreter services are generally not provided by the Court in civil cases. If a party speaks a language other than English, the party must make his/her own arrangement to conduct his/her case in English. A party may bring an English-speaking friend or family member to court conferences. However, persons

As noted in the previous section, if the situation allows for appointed counsel, then counsel may be responsible for providing adequate interpretation of testimony and documents and have the potential to be reimbursed for those costs if they are the prevailing party. One variation on this could be to first appoint counsel on a limited basis, to give an initial assessment of the case while also assessing the litigant's English proficiency. (See discussion *supra* in Part II.D, "Explore the Possibility of Limited-Scope Representation.") If the litigant has a strong case, the attorney might be willing to take on the whole case and the responsibility for providing an interpreter. If the case is weak, other avenues, including dismissal, could be explored that might reduce the need for an interpreter.

This concept could also be used for translators—a kind of "limited-scope interpretation" to provide an initial assessment for the court and the litigant at modest cost. Along the same lines, if the litigant has some proficiency in English, consider finding an interpreter for only certain aspects of the case, like hearings, document preparation, settlement discussions, or trial.

One suggestion is to ask for help.

> If you know that [your court] has somebody who speaks, let's say Mandarin, you can ask your court interpreter, 'is there ever a time when somebody is being hired for a criminal case to do an arraignment,' which takes five minutes, where you could piggyback because the interpreter will be paid for half a day.[285]

While this idea might not work for trials or lengthy hearings, it could work for shorter proceedings.

The use of "student interpreters from a local university interpreter certification program" has also been suggested.[286] Courts could consider developing relationships with the language programs of nearby colleges and universities to provide interpreting experience for upper-level language students. The bankruptcy court in Los Angeles and

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acting as interpreters must translate exactly what is said; they may not speak for or advocate for the party.").

285. Court Web: Best Practices, *supra* note 34.

286. National Bench Guide, *supra* note 20, at 5-8.

Woodland Hills, California, has had "a local public interest legal organization work with the interpreter's program at a local college to provide volunteer student interpreters to litigants. . . . The student interpreters show up at a designated time and have the opportunity to interpret in a real court setting, gaining valuable experience."[287]

Some district courts participate in the Telephone Interpreting Program (TIP), which "provides remote interpretation for court proceedings where certified or highly qualified court interpreters are not reasonably available locally. From 2001–2013, fifty-six U.S. district courts in 102 locations used TIP for approximately 42,000 events, saving an estimated $14 million for the Judiciary in travel and contract costs."[288] Unfortunately, TIP is limited to criminal cases. But the experience could be valuable if courts want to investigate setting up a similar program for civil cases. In some instances, "courts have arranged for a telephonic interpretation service through Attorney Admissions Funds."[289]

State courts often use remote interpreting in civil cases for litigants with limited proficiency in English. A survey by the National Center for State Courts in 2012 showed that

> [t]he most commonly used technique is the speaker telephone, with 82% of respondents replying they utilize speakerphones for interpreting. Fifty-four percent (54%) of the respondents stated that they use integrated audio/video equipment. Twenty-eight percent (28%) replied that they use specialized telephone equipment that allows simultaneous interpretation and confidential conversations between a party and their attorney.[290]

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287. The Gideon, *supra* note 283, at 3.

288. *See* Admin. Office of the U.S. Courts, *Telephone Interpreting Program: Access to Justice for All*, Judiciary News (Feb. 25, 2014), http://www.uscourts.gov/news/2014/02/25/telephone-interpreting-program-access-justice-all.

289. *See* The Gideon, *supra* note 283, at 3.

290. *See* National Center for State Courts, A National Call to Action: Access to Justice for Limited English Proficient Litigants: Creating Solutions to Language Barriers in State Courts 4 (2013), *available at* http://www.ncsc.org/~/media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Language%20Access/Call-to-Action.ashx.

In sum, it appears there are no imminent easy solutions for the need to provide interpreters for pro se litigants who cannot afford their own. "Judges are increasingly presented with litigants or witnesses in civil cases who speak little or no English. . . . There are no clear rules on what a judge should do in these situations. . . . Most judges find whatever solution best provides due process for all within our limited funding and statutory authority."[291]

I. Challenging Litigants

1. Mental or Emotional Issues

In the Western District of Pennsylvania, a man filed a claim against "Satan and his staff," alleging "that Satan has on numerous occasions caused plaintiff misery and unwarranted threats, against the will of plaintiff, that Satan has placed deliberate obstacles in his path and has caused plaintiff's downfall."[292] Twenty years later in the Eastern District of Pennsylvania, another man filed a claim against God and Jesus in a complaint that "simply states 'Treating Inhuman Sex.'"[293] More recently, a woman in Nebraska filed suit against "Homosexuals" and seemingly sought to have the court declare that homosexuality is sinful.[294]

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291. The Gideon, *supra* note 283, at 3. For an extensive overview and analysis of the problem of providing adequate interpreter and translation services in the federal courts, and recommendations for improvements, see Laura K. Abel, *Language Access in the Federal Courts*, 61 Drake L. Rev. 593, 607–35 (2013).

292. United States *ex rel.* Mayo v. Satan and His Staff, 54 F.R.D. 282, 283 (W.D. Pa. 1971).

293. Jones v. God, Jesus, Others, Civ. A. No. 90-0742 (E.D. Pa. Mar. 25, 1991) (unpublished order).

294. Driskell v. Homosexuals, 533 B.R. 281, 282 (D. Neb. 2015). According to one news story, the plaintiff "filed the handwritten complaint as an 'Ambassador for Plaintiffs God, and His, Son, Jesus Christ,' asking 'To be heard in the matter of homosexuality. Is Homosexuality a sin, or not a sin.'" *See* Christopher Coble, *Nebraska Woman's Lawsuit Against All Homosexuals Dismissed*, Legally Weird: The FindLaw Curiosities Blog (May 7, 2015), http://blogs.findlaw.com/legally_weird/2015/05/nebraska-womans-lawsuit-against-all-homosexuals-dismissed.html.

In the first case, the court allowed the claim to be filed but denied leave to proceed in forma pauperis. There is no record of the plaintiff attempting to refile his claim. The other two cases were dismissed sua sponte.[295] The courts did not simply label the claims as frivolous or "fantastical" but also explained that there was no federal jurisdiction over the claimed wrong and that it would be difficult, at best, to complete service of process on the putative defendants.[296]

While these cases may be at the extreme end of the pro se spectrum, federal judges are all too familiar with frivolous or delusional claims of one variety or another. As outlined elsewhere in this publication, courts can lessen the impact of these suits on judicial resources through the use of such things as prescreened complaints and sua sponte dismissals, sanctions, and filing injunctions. Also, if a litigant has what seems to be a legitimate claim, but not the mental capacity to pursue it, a court can call for a mental evaluation under Rule 17(c) and perhaps appoint a guardian ad litem or attorney. See *infra* Part III.D for a discussion of competency exams under Rule 17(c)(2).

Short of finding that a pro se litigant is mentally incompetent, courts may face litigants who have mental or emotional issues but may also have a potentially valid claim (or defense) that will allow the case to move forward, at least past the sua sponte dismissal stage. Are there actions that judges can take to help manage these cases and move them toward resolution? Yes, but

> judges should understand that there are no formulas for dealing with litigants' mental health problems. What works well with one

295. This is the only way these cases could be dismissed, since, as each court pointed out, there were no named defendants on whom process could actually be served and therefore no defendants to file a motion to dismiss.

296. *See Mayo*, 54 F.R.D. at 283 ("[T]he Court has serious doubts that the complaint reveals a cause of action upon which relief can be granted by the court. We question whether plaintiff may obtain personal jurisdiction over the defendant in this judicial district."); *Driskell*, 533 B.R. at 282 ("The Court may decide what is lawful, not what is sinful. . . . And her attempt to sue a class of unidentified defendants raises a number of problems, the first of which is that no defendant has been identified with sufficient specificity for service of process."); *Jones*, Civ. A. No. 90-0742 (E.D. Pa. Mar. 25, 1991) ("[T]he complaint must be dismissed because quite apart from the question of service on the principal defendants, there is no factual basis for the exercise of this court's subject matter jurisdiction.").

> litigant may be completely ineffective or even harmful to another with the same disorder. While medical professionals have clustered mental health symptoms into patterns of diagnoses, there is no patient profile that predicts anyone's interpersonal reactions in any particular situation. The most important thing is to pay careful attention to each individual. Each case is different and requires the judge's specific attention and assessment.[297]

Some litigants "may be suffering from a delusion or hearing voices, or may be in some other equally frightened state of mind,"[298] and the court may have to attempt to reduce the litigant's anxiety level before he or she can fully participate in the case. One way to do that is by simplifying the process, even more so than with the average pro se.

> The more anxious the litigant, the more important is a case structure that is manageable and understandable for all. Breaking the case into small steps, explaining each one, while repeating where necessary, can be very helpful. The litigant is less likely to lose track of the issue at hand, and the other parties will be better able to understand and address the anxious litigant's position.[299]

Even if the litigant is able to understand court procedures, the substance of their claim might be outside of the court's jurisdiction or authority. "For example, they might ask the court to stop the government from implanting a microchip in their tooth; to restrain their neighbor from coming through the wall at night while they sleep; or to offer relief from the poison the phone company has put into their air vents."[300] Rather than attempting to change their perception of reality, one approach to try is sticking to the facts as presented and being honest with the litigant about what the court can and cannot do in the situation:

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297. National Bench Guide, *supra* note 20, at 11-6. *See also generally infra* Part I.A, "Procedural Fairness."

298. *Id.* at 11-7. *See also* Zorza, *Toward Best Practices*, *supra* note 51, at 38 ("For those for whom all the world is a frightening place, the courtroom is even more so, with its rituals, power, and risk of sudden life-changing outcomes.").

299. Zorza, *Toward Best Practices*, *supra* note 51, at 38.

300. National Bench Guide, *supra* note 20, at 11-7.

> The judge can say that the litigant's story sounds unusual; that he or she has never heard of the government implanting chips before, and so forth. This can be done without directly dismissing the person's own sense of reality. There is no need to verbally label the person as crazy or directly point out his or her mental illness. Point out what evidence would be needed to get the relief requested—is it possible to get an x-ray from a dentist showing the chip in the tooth? a photograph of the neighbor coming through the wall? or an analysis of the poison air from the vent? In asking for this proof, the judge is merely asking what he or she would ask of anyone. Once this is explained to litigants with mental illness, they generally accept this information as an indication that they are not being singled out.[301]

Keep in mind, however, that "the litigant's mental health may make it hard for them to understand the limitations upon judicial power," and some litigants may want more than a simple statement that the court is unable to provide the remedy they seek.[302]

In general, treating these litigants with respect and giving them your full attention (as recommended *supra* in Part I for all pro se litigants) may prompt them to be more cooperative while helping them feel like they have been treated fairly.

> The litigants will be paying close attention to whether the judge is trying to simply 'get rid' of them. They have most likely had many experiences with people being frightened by them and trying to dismiss them as quickly as possible, and so are highly sensitive to this sort of treatment.[303]

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301. *Id.* at 11-8. *See also* Zorza, *Toward Best Practices*, *supra* note 51, at 38 ("Seriously disturbed litigants may bring issues over which the court has no real world jurisdiction, such as the assertion that the landlord is beaming radio waves into their teeth. . . . [B]eing explicit about what the court can and cannot do, and being respectful of the litigant's emotions, may help at least to move forward.").

302. Zorza, *Toward Best Practices*, *supra* note 51, at 38. As with other litigants who may bring claims over which the court does not have jurisdiction, it may be helpful for the court or the clerk's office to offer information about other resources that may provide the relief sought, such as state or local agencies, as well as the availability of mental health services.

303. National Bench Guide, *supra* note 20, at 11-8. *See also* Bloom, *Pro Se Issues 2014*, *supra* note 15 ("It's not just reading them the riot act, it's letting them know you're not

Respectful treatment applies to written orders and opinions as well.

> Sarcasm, a form of ridicule, . . . has no place in opinion writing. Judges should refrain from using sarcasm to attack litigants, whether directly or—by mocking their claims—indirectly. . . .
>
> Judges must be careful to treat distraught litigants, including mentally challenged or even delusional litigants, with respect. Delusional litigants are, regrettably, common enough that law-review articles have been written about them. The issue for the opinion writer—recalling that how a judge writes counts as much ethically as what a judge decides—is how to resolve these claims. . . . A judge should treat the court system and the litigants with dignity. In doing so, the judge will gain the readers' trust and assure them that all litigants will be treated equally.[304]

See also *infra* Part III.D, "Competency."

2. Abusive Litigants

For a litigant who abuses the process—by repeated frivolous or vexatious filings, missing deadlines or court appearances, failing to comply with court orders, deliberately delaying the proceedings, or willfully failing to prosecute—it may come down to having to impose sanctions, which can include fines, dismissal, or a filing injunction. (For a discussion of the application of sanctions on vexatious or otherwise uncooperative litigants, see *infra* Part III.F, "Sanctions.") Short of imposing sanctions, what actions can a court take to manage a case involving a vexatious, abusive, or otherwise uncooperative litigant?

In general, be firm but fair, with clear warnings of what is expected of the litigant and the potential consequences of failure to follow the court's directives. Always make a record of any actions by a litigant that prompt warnings or sanctions. "You do not have to just

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completely against them, because they mostly assume that you are completely against them. And so when you show that you're not, that you're going to give them the process, they become more cooperative.").

304. Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing,* 21 Geo. J. Legal Ethics 237, 280 (2008).

swallow and [accept misbehavior.] But you do have to make a record and you must warn litigants."[305]

If a litigant becomes combative, angry, or disrespectful during a court proceeding, the same "firm but fair" principles can be applied.

> Litigants do not really benefit from being allowed to go on endlessly, arguing with a judge. Certainly, giving litigants their "voice" in a hearing is central to any justice proceeding. However, when a litigant cannot refrain from repeating himself or herself, arguing with or even verbally abusing the judge or opposing party, the judge must put a stop to it. . . .
>
> Judges actually help litigants by setting limits on unacceptable behavior. By keeping such behavior to a minimum, judges are reducing the chances that it might affect their decision-making process. Judges are responsible for maintaining a calm and comfortable process for everyone else in the courtroom. Being able to relax and say "no" to an unhappy or angry litigant without becoming defensive or unkind demonstrates to the rest of the courtroom that the judge is clearly in control of himself or herself, and of the situation.[306]

Making an appeal to a "litigant's sense of fairness may be of help. Similarly, expressing sympathy with the intensity of the emotion may reduce the litigant's alienation. Such statements may help the litigant feel less anger at the judge as a person, thus helping the litigant focus on the process as a whole."[307] Consider warning the litigant that "the case cannot proceed at the expressed level of emotion. Generally, litigants want a decision and want to be able to move on."[308] The court

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305. Bloom, *Pro Se Issues 2014*, *supra* note 15 (For example, if a litigant has missed a deposition, put out an order with an agreed-upon date and say "this is your deposition and you shall appear timely, and if you fail to timely appear, I'm going to dismiss your case.").

306. National Bench Guide, *supra* note 20, at 11-10 to 11-11 ("Litigants should not be allowed to escalate into angry or genuinely disrespectful behavior toward the judge or other courtroom staff.").

307. Zorza, *Toward Best Practices*, *supra* note 51, at 38.

308. *Id.*

can also call for a recess, "a brief 'cooling off' period . . . to let the litigant get a grip and then participate fully in the process."[309]

Some of the most difficult cases courts face

> are those in which the litigant uses the case to make a political point about the legal system and the Constitution. The judge has to maintain accessibility and the dignity of the courtroom and avoid abuse of the legal system. Limiting the focus of the proceedings to those appropriate to the particular court while maintaining a respectful and nonconfrontational attitude to the litigant is the best policy.[310]

If these measures still do not restore order, the court may resort to stronger measures such as

> adjournment, which must, of course, not be allowed to prejudice the nonresponsible party, or a range of sanctions for noncompliance, including the drawing of adverse inferences against the responsible party, particularly for behavior that threatens the integrity of the process, and summary contempt. Some judges use a three-step process of explaining the concept of contempt, the sanctions authorized, and only then imposing the sanction (which can later be waived if the litigant then complies).[311]

In the end, if for whatever reason a litigant is determined to be difficult, it may not be possible for the court to develop a mutually respectful relationship. Until that happens, however, "it's best to give pro se parties a chance, and only deal with them peremptorily after they've demonstrated an unwillingness to deal with the court responsibly."[312]

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309. *Id. See also* National Bench Guide, *supra* note 20, at 11-11 ("Do not hesitate to take a recess to stop or redirect unacceptable behavior. Sometimes a brief break is all it takes.").

310. Zorza, *Toward Best Practices*, *supra* note 51, at 39.

311. *Id.* at 38–39.

312. Outline accompanying *Art of Judging* (Video # 972-V/05, Federal Judicial Center Dec. 2005), page 9 (available at http://fjconline.fjc.dcn/sites/default/files/2012/BankrVideo 03.pdf).

III. Legal Issues Regarding Nonprisoner Pro Se Litigants

Although it has long been established that pro se filings should be held to "less stringent standards than formal pleadings drafted by lawyers,"[313] there is not universal agreement on just how "less stringent" those standards should be. Some cases take a protective, flexible approach: "[A]s a general rule, we are solicitous of the obstacles that pro se litigants face, and while such litigants are not exempt from procedural rules, we hold pro se pleadings to less demanding standards than those drafted by lawyers and endeavor, within reasonable limits, to guard against the loss of pro se claims due to technical defects."[314] This means that when a court "can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements."[315]

Other opinions are less sympathetic:

> A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a *pro se* defendant that would normally be attended to by trained counsel as a matter of course. . . . "The right of self-representation is not a li-

313. Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam).

314. Dutil v. Murphy, 550 F.3d 154, 158 (1st Cir. 2008). *See also* Clark v. Tansy, 13 F.3d 1407, 1412 (10th Cir. 1993) ("The rights of pro se litigants must be carefully protected where highly technical legal requirements are involved, especially when strict enforcement of those requirements would result in a loss of the opportunity to prosecute a claim on the merits."). *Cf.* Bankruptcy Case Management Manual, *supra* note 101, at 747 ("[C]ourts generally may ensure that the claims of pro se parties are given adequate consideration, even if such parties fail to comply with technical procedural requirements and formalities.").

315. Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). *See also* Higgs v. Att'y Gen. of the United States, 655 F.3d 333, 339–40 (3d Cir. 2011) (While "the obligation to liberally construe a *pro se* litigant's pleadings is well-established, . . . [t]here is no question that *pro se* pleadings present particular challenges.").

> cense to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law."[316]

Although there may be a lack of consensus on the precise parameters of the leniency to be extended to pro se litigants, district courts in practice have wide discretion when accounting for a litigant's pro se status. For a start, the rules of civil procedure and evidence often contain built-in flexibility, and their very purpose militates against overly strict adherence.[317] The first rule of civil procedure states that the rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."[318] Similarly, the rules of evidence "should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[319]

The following sections examine the extent of a district court's authority and discretion under case law, several of the key rules of civil

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316. McKaskle v. Wiggins, 465 U.S. 168, 183–84 (1984). *See also* McNeil v. United States, 508 U.S. 106, 113 (1993) ("[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.").

317. *See* Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966) ("The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits.").

318. Fed. R. Civ. P. 1. *See also* Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

319. Fed. R. Evid. 102. *See also* Hormel v. Helvering, 312 U.S. 552, 557 (1941) ("Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.").

procedure and evidence, and the inherent authority of judges to determine practices and procedures in the courtroom.

A. Pleadings or Complaint

1. General Requirements

Under Rule 8(a)(2), a claim for relief must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Until recently, all pleadings were to be construed liberally, following the Supreme Court's dictate in *Conley v. Gibson* that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[320] This part of *Gibson*, however, was overruled in *Bell Atlantic Corp. v. Twombly*, which announced a stricter "plausibility" standard that requires "enough facts to state a claim to relief that is plausible on its face."[321] Although *Twombly*'s holding seemed to be limited to antitrust cases, two years later in *Ashcroft v. Iqbal* the Court clarified that its holding set "the pleading standard for 'all civil actions'" covered by Rule 8(a)(2).[322]

The decisions in *Twombly* and *Iqbal* changed the standard that all pleadings must meet. Both cases involved represented parties, however, and did not address the effect of the decisions on the construction of pro se complaints, which the Court had long held "to less stringent standards than formal pleadings drafted by lawyers."[323] Just two weeks after *Twombly*, the Court reiterated that, even under the new standard, pro se pleadings are to be treated more leniently. "A document filed *pro se* is 'to be liberally construed,'. . . and 'a *pro se* com-

320. 355 U.S. 41, 45–46 (1957).

321. 550 U.S. 544, 570 (2007).

322. 556 U.S. 662, 684 (2009). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

323. Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam).

plaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'"[324]

The appellate courts have also found that, although pro se pleadings must meet the plausibility standard set forth in *Twombly* and *Iqbal*, they should continue to receive more lenient treatment. The Ninth Circuit, for example, held that

> *Iqbal* incorporated the *Twombly* pleading standard and *Twombly* did not alter courts' treatment of *pro se* filings; accordingly, we continue to construe *pro se* filings liberally when evaluating them under *Iqbal*. While the standard is higher, our "obligation" remains, "where the petitioner is *pro se,* particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt."[325]

Even with a more liberal reading, a pro se complaint must still set forth a valid claim. The Second Circuit dismissed a pleading because the statute cited by the plaintiff did not apply to the claim as alleged in the pleadings.

> To survive a motion to dismiss, the complaint must plead sufficient facts to make out a plausible claim to relief. . . . When, as here, the complaint is filed by a *pro se* plaintiff, we construe the complaint liberally, interpreting it "to raise the strongest arguments that [it] *suggest[s]*." . . . Caro's assertion that he would plead a tortious in-

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324. Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam). *See also* Fed. Express Corp. v. Holowecki, 552 U.S. 389, 402 (2008) (acknowledging, in nonprisoner case, that "pro se litigants are held to a lesser pleading standard than other parties").

325. Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010). *See also* Luevano v. Wal-Mart Stores, Inc., 722 F.3d 1014, 1027–28 (7th Cir. 2013) ("the pleading standards for pro se plaintiffs are considerably relaxed, . . . even in the wake of [*Twombly* and *Iqbal*]"; also noting that even after *Iqbal* "the plaintiff need only 'give enough details about the subject-matter of the case to present a story that holds together'") (citations omitted); Bridge v. Ocwen Fed. Bank, FSB, 681 F.3d 355, 358 (6th Cir. 2012) (after citing *Twombly*, stating, "We are ever mindful that *pro se* complaints are liberally construed and are held to less stringent standards than the formal pleadings prepared by attorneys."); Huertas v. Galaxy Asset Mgmt., 641 F.3d 28, 32 (3d Cir. 2011) ("[W]e must construe Huertas's complaint liberally because he is proceeding pro se." (citing *Erickson*)).

> tent is simply a recitation of the missing element in his claim—an exercise insufficient to rescue the complaint from its deficiencies.[326]

The Supreme Court has emphasized that *Twombly* and *Iqbal* "concern the factual allegations a complaint must contain to survive a motion to dismiss" and that neither those cases nor Rule 8(a)(2) "countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted. . . . In particular, no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke [42 U.S.C.] § 1983 expressly in order to state a claim."[327]

2. Opportunity to Amend Pleadings

Following amendments in 2009, Federal Rule of Civil Procedure 15(a)(1) allows one amendment of the pleading as a matter of course within twenty-one days of serving it or after service of a responsive pleading or motion under Rule 12(b), (e), or (f). In all other cases, Rule 15(a)(2) allows a party to amend a pleading only with the opposing party's consent in writing or the court's leave, but the court "should freely give leave when justice so requires." As the Supreme Court firmly stated over fifty years ago,

> this mandate is to be heeded. . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the

326. Caro v. Weintraub, 618 F.3d 94, 97 (2d Cir. 2010) (citations omitted). *See also* Atherton v. D.C. Office of Mayor, 567 F.3d 672, 681–82 (D.C. Cir. 2009) ("A *pro se* complaint, such as Atherton's, 'must be held to less stringent standards than formal pleadings drafted by lawyers.' . . . But even a *pro se* complainant must plead 'factual matter' that permits the court to infer 'more than the mere possibility of misconduct.'" (citing *Erickson* and *Iqbal*)); Taylor v. Books A Million, Inc., 296 F.3d 376, 378 (5th Cir. 2002) ("[R]egardless of whether the plaintiff is proceeding *pro se* or is represented by counsel, 'conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.'") (citations omitted).

327. Johnson v. City of Shelby, 135 S. Ct. 346, 346–47 (2014) (per curiam) (petitioners had "stated simply, concisely, and directly . . . the factual basis for their complaint [and], on remand, should be accorded an opportunity to add to their complaint a citation to § 1983").

> merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."[328]

The relaxed standard for amending pleadings "applies with particular force to *pro se* litigants. '[A] *pro se* complaint is to be read liberally,' and should not be dismissed without granting leave to amend at least once when such a reading 'gives *any* indication that a valid claim *might* be stated.'"[329]

Some courts have said that a pro se plaintiff should be given some notice of why the complaint is deficient:

> *Pro se* plaintiffs are often unfamiliar with the formalities of pleading requirements. . . . [W]e think that the district court should not have dismissed Platsky's complaint without affording him leave to replead. . . . Instead of simply dismissing the complaints for naming federal agencies as the defendants [instead of individual employees as required], it would have been appropriate for the district

328. Foman v. Davis, 371 U.S. 178, 182 (1962). *See also* Becker v. Univ. of Neb. at Omaha, 191 F.3d 904, 908 (8th Cir. 1999) ("[A] motion to amend should be denied on the merits 'only if it asserts clearly frivolous claims or defenses.' . . . Likelihood of success on the new claim or defenses is not a consideration for denying leave to amend unless the claim is clearly frivolous.").

329. Pangburn v. Culbertson, 200 F.3d 65, 70 (2d Cir. 1999) (citation omitted). *See also* Knight v. Mooring Cap. Fund, LLC, 749 F.3d 1180, 1190 (10th Cir. 2014) ("[E]ven though pro se parties generally should be given leave to amend, it is appropriate to dismiss without allowing amendment 'where it is obvious that the plaintiff cannot prevail on the facts [s]he has alleged and it would be futile to give [her] an opportunity to amend.'") (citation omitted); Hale v. King, 642 F.3d 492, 503 (5th Cir. 2011) ("[D]istrict courts should not dismiss *pro se* complaints pursuant to Rule 12(b)(6) without first providing the plaintiff an opportunity to amend, unless it is obvious from the record that the plaintiff has pled his best case."). *Cf.* Juarez v. Select Portfolio Servicing, Inc., 708 F.3d 269, 281 (1st Cir. 2013) (error to deny amendment by pro se plaintiff, distinguishing case from "one where a plaintiff has filed several fatally flawed complaints and nevertheless sought amendment, without explaining which new allegations she would bring or how any new facts could save prior complaints already deemed deficient"; allowing amendment here "is in accord with Fed. R. Civ. P. 8(e)'s mandate that '[p]leadings . . . be construed as to do justice,' and with Fed. R. Civ. P. 15(a), which 'reflects a liberal amendment policy'") (citation omitted).

> judge to explain the correct form to the *pro se* plaintiff so that Platsky could have amended his pleadings accordingly.[330]

In remanding the dismissal of a complaint where the district court did not allow the pro se plaintiff leave to amend or warn him of the "heightened pleading standard applicable to *Bivens* actions," the D.C. Circuit stated that pro se litigants are to be given "more latitude than litigants represented by counsel to correct defects in service of process and pleadings," and although a court does not "need to provide detailed guidance to pro se litigants[, it] . . . should supply minimal notice of the consequences of not complying with procedural rules . . . [and] at least minimal notice of our pleading requirements."[331]

There has been some question whether the right to amend pleadings once under Rule 15(a) applies to in forma pauperis (IFP) cases under 28 U.S.C. § 1915(e)(2), which requires, inter alia, dismissal of any case that is "(i) frivolous or malicious; [or] (ii) fails to state a claim on which relief may be granted." The Second Circuit specifically held that a nonprisoner IFP plaintiff retained the right to amend under Rule 15(a):

> Although the language of § 1915 is mandatory, stating that "the court shall dismiss the case" in the enumerated circumstances, we conclude that a *pro se* plaintiff who is proceeding *in forma pauperis* should be afforded the same opportunity as a *pro se* fee-paid plaintiff to amend his complaint prior to its dismissal for failure to state

330. Platsky v. CIA, 953 F.2d 26, 28 (2d Cir. 1991). *See also* Merritt v. Countrywide Fin. Corp., 583 F. App'x 662, 664 (9th Cir. 2014) ("'Unless it is absolutely clear that no amendment can cure the defect . . . a pro se litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal of the action.' . . . In its notice, the district court need not provide a paragraph-by-paragraph analysis.") (internal citation omitted).

331. Moore v. Agency for Int'l Dev., 994 F.2d 874, 876–78 (D.C. Cir. 1993). *Cf.* Felder v. Del. Cty. Office of Servs. for the Aging, No. 08-4182, slip op. at 3 (E.D. Pa. July 28, 2009) ("It would be unfair to allow a Plaintiff to file a pro se Complaint on the standard form [provided by the district court], which provides minimal room for elaboration on the factual issues, and then dismiss Plaintiff's Complaint under Rule 8 for failure to provide more factual allegations. This is particularly true here, where Plaintiff has provided a number of supporting documents from which this Court, and the Office of Aging, can discern the gist of Plaintiff's employment discrimination claim as well as the individuals involved.").

> a claim, unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim.[332]

The Seventh Circuit agreed, holding that courts "must allow IFP plaintiffs leave to amend at least once in all circumstances in which such leave would be granted to fee-paying plaintiffs under Rule 15(a). . . . Dismissals under section 1915(e) should be treated like dismissals under Rule 12(b)(6)."[333]

3. Repleading

As an alternative to the motion-to-dismiss/leave-to-amend cycle, the opposing party can file a motion under Rule 12(e) "for a more definite statement of a pleading . . . which is so vague or ambiguous that the party cannot reasonably prepare a response." Also, a motion to strike "any redundant, immaterial, impertinent, or scandalous matter" may be filed by the opposing party, or the court may strike such material on its own under Rule 12(f). Either method could be a useful tool in getting a pro se complaint to conform to the pleading requirements of Rule 8.[334] However, if the opposing party is able to respond to an imperfect pleading, the motion should be denied.[335]

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332. Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 796 (2d Cir. 1999).

333. Luevano v. Wal-Mart Stores, Inc., 722 F.3d 1014, 1023–24 (7th Cir. 2013).

334. *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) ("If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding."); McHenry v. Renne, 84 F.3d 1172, 1179 (9th Cir. 1996) (where plaintiffs did not file "the 'short and plain statement' which Rule 8 obligated plaintiffs to submit," court had "discretion, in response to a motion for more definite statement under Federal Rule of Civil Procedure 12(e), [to] require such detail as may be appropriate in the particular case, and may dismiss the complaint if his order is violated").

335. *See* Hubbs v. Cty. of San Bernardino, 538 F. Supp. 2d 1254, 1262 (C.D. Cal. 2008) ("[A] motion for a more definite statement under Rule 12(e) should be granted only where the complaint is so indefinite that the defendants cannot ascertain the nature of the claims being asserted and 'literally cannot frame a responsive pleading'"; here, although it contains inconsistent allegations and is not in the proper form, "plaintiff's pro se complaint does state its claims, and defendants' motion to dismiss 'amply demonstrate[s] that [defendants] do understand the issues presented by the First Amended Complaint.' . . . Accordingly, defendants' motion for a more definite statement under Rule 12(e) should be denied."). *Cf.*

The court also has the discretion to convert a motion to dismiss under Rule 12(b)(6) into a motion for a more definite statement when it may help determine whether the plaintiff has alleged sufficient facts to state a claim. For example, in a case where a pro se plaintiff "may have intended to assert a contract claim of some sort" but the complaint was "utterly devoid of facts," the district court was "unable to discern the nature of Plaintiff's claim and the relief he [was] seeking. Therefore, the Court will . . . , pursuant to Federal Rule of Civil Procedure 12(e) and its inherent authority, convert [defendant's] Motion to Dismiss pursuant to Rule 12(b)(6) into a motion for a more definite statement pursuant to Rule 12(e)."[336]

The motion for a more definite statement may be particularly useful when the plaintiff has filed a plausible claim and alleged some facts but has omitted one or more details that are required for relief. For instance, a plaintiff filed a defamation claim and adequately alleged what the defendant did but failed to allege facts to establish that the defendant acted with actual malice, as required by statute. The defendant moved to dismiss the claim. Under the circumstances, however, the court held that "outright dismissal" of the complaint would be "a drastic outcome, disproportionate to the defect in Dickens's complaint and therefore unjust. Thus, on its own motion and pursuant to Fed. R. Civ. P. 12(e), the Court grants Dickens leave to file a more definite statement . . . to conform his allegation of actual malice to the [statute]."[337]

Omni Innovations, LLC v. Impulse Mktg. Grp., Inc., No. C06-1469MJP, slip op. at 4 (W.D. Wash. July 18, 2007) ("A vague complaint that survives a 12(b)(6) motion can still be subject to discretionary use of Fed. R. Civ. P. 12(e). . . . This is appropriate when a complaint is sufficiently intelligible to satisfy pleading requirements but is so vague or ambiguous that the other party cannot respond to it.").

336. Hall v. Tyco Int'l Ltd., 223 F.R.D. 219, 257 (M.D.N.C. 2004) (citing Fikes v. City of Daphne, 79 F.3d 1079, 1083 n.6 (11th Cir. 1996) (holding that a district court has the power to sua sponte order a more definite statement to narrow the issues).

337. Dickens v. Werner Enter., Inc., No. 1:12CV76, slip op. at 5 (N.D. W. Va. Oct. 10, 2012). *See also* Gadiel v. Kennicott Ridge Assocs., No. 85 C 10389, slip op. at 3 n.4 (N.D. Ill. Nov. 12, 1986) ("Certain lack of detail may not be a sufficient ground for a motion to dismiss; however, such deficiencies may provide an adequate basis for a motion for a more definite statement.").

Although not in cases involving pro se plaintiffs, the Eleventh Circuit has concluded that, while Rule 12(e) states that a "party" may move for a more definite statement, district courts have the inherent power to order a litigant to replead and can provide specific instructions on how to amend the pleading. In a case involving "a perfect example of 'shotgun' pleading, . . . in that it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief," and the defendants did not move for a more definite statement, the district court, "acting *sua sponte,* should have struck the plaintiff's complaint, and the defendants' answer, and instructed plaintiff's counsel to file a more definite statement."[338] A few other courts have begun to apply the principle that courts have inherent authority to order repleading.[339]

The cases just cited involved represented parties, but the principle that courts have authority to order a party to replead sua sponte provides a potentially useful tool in pro se cases. At least one district court has used it for a pro se plaintiff. On the defendants' motion to

338. Anderson v. Dist. Bd. of Tr. of Cent. Fla. Cmty. Col., 77 F.3d 364, 366–68 & n.5 (11th Cir. 1996) ("Experience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice."). *See also* Byrne v. Nezhat, 261 F.3d 1075, 1133 (11th Cir. 2001) ("[I]f, in the face of a shotgun complaint, the defendant does not move the district court to require a more definite statement, the court, in the exercise of its inherent power, must intervene *sua sponte* and order a repleader.").

339. *See, e.g.*, Berlanga v. Terrier Transp., Inc., 269 F. Supp. 2d 821, 833 (N.D. Tex. 2003) (citing Eleventh Circuit case in using court's "inherent authority to demand repleader *sua sponte*" to order plaintiff to file amended complaint rather than dismissing complaint or denying summary judgment); Kung v. Ohio Dept. of Ins., No. 2:05-CV-1048, slip op. at 2 (S.D. Ohio Aug. 10, 2006) (where complaint was so unclear that court would have to "hazard a guess" in deciding defendant's motion to dismiss, court "*sua sponte* orders Plaintiffs to file . . . a more definite statement of its causes of action, clarifying whether federal or state law is involved and the specific statutory or common law causes of action asserted in each of the five counts," citing *Fikes*); Serdlow v. City of Portland, No. Civ. 00-580-HA, slip op. at 3 (D. Or. Aug. 17, 2001) (same, ordering plaintiff to file second amended complaint); *In re* Premium Motor Cars, Inc., 404 B.R. 128, 135 (Bankr. W.D. Pa. 2009) (as part of denying defendant's summary judgment motion where facts were somewhat uncertain, court cited Taylor v. City of Cleveland, No. 1:05cv2983, slip op. at 1 (N.D. Ohio July 13, 2006), in ordering plaintiffs "to re-plead their case allowing them a final opportunity to 'get it right'").

strike the complaint, the court agreed that "significant portions of the Complaint [were] improper and extraneous, [but] enough of the Complaint [satisfied] the federal pleading requirements such that the Complaint [could not] be stricken in its entirety." Although the defendants did not move for a more definite statement under Rule 12(e), "the Court may, *sua sponte,* order Plaintiff to file an amended complaint that clarifies his claims."[340] Some circuits have approved the practice in pro se prisoner cases.[341]

B. Summary Judgment

1. Providing Notice of Rule 56 Requirements

Currently, half of the circuits require that a pro se litigant facing a summary judgment motion receive notice of the procedures for opposing summary judgment and the consequences of failing to respond.[342] Two other circuits have specifically limited the notice re-

340. *Taylor*, slip op. at 1 (citing *Byrne* for authority to order amendment).

341. *See, e.g.*, Phillips v. Girdich, 408 F.3d 124, 128 (2d Cir. 2005) (in prisoner pro se case, "even where a violation of Rule 10(b) is not harmless, dismissal is not typically the appropriate course of action. Once a defendant has been served with a complaint that is defective in this way, it should be met with a motion for a more definite statement under Rule 12(e) or a motion to strike under Rule 12(f), rather than a motion to dismiss under Rule 12(b)"); Alston v. Parker, 363 F.3d 229, 234 n.7 (3d Cir. 2004) (in a prisoner civil case, noting alternatives to dismissing a complaint: "the District Court on its own initiative, may have sought a more definite statement to resolve any ambiguity or vagueness. Fed. R. Civ. P. 12(e). Matters in the complaint that were deemed immaterial or impertinent could have been stricken. Fed. R. Civ. P. 12(f)."). *Cf.* Spears v. McCotter, 766 F.2d 179, 181 (5th Cir. 1985) ("For a number of years the courts have used questionnaires to assist trial judges to bring into focus the factual and legal bases of prisoners' claims. We have referred to such questionnaires as being 'in the nature of a motion for more definite statement' under Fed. R. Civ. P. 12(e). . . . The prisoners' answers to such questionnaires elaborate on the allegations contained in their complaints under Fed. R. Civ. P. 15(a), and do not constitute an independent pleading. . . . This practice of having the prisoner state with more definiteness the form and substance of his claim occurs before service of process is required.") (citations omitted), *overruled on other grounds by* Neitzke v. Williams, 490 U.S. 319, 324 (1989).

342. *See* Ruotolo v. I.R.S., 28 F.3d 6, 8 (2d Cir. 1994) (court "had an obligation to make certain that the Ruotolos were aware of and understood the consequences to them of their failure to comply with the Local Rules" regarding summary judgment); Timms v. Frank, 953 F.2d 281, 285 (7th Cir. 1992) ("[A]ll *pro se* litigants, not just prisoners, are enti-

quirement to prisoner pro ses.[343] Some districts have codified the required notice in their local rules.[344] The Fifth and Eighth Circuits

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tled to notice of the consequences of failing to respond to a summary judgment motion. . . . [T]his notice should include both the text of Rule 56(e) and a short and plain statement in ordinary English that any factual assertion in the movant's affidavits will be taken as true by the district court unless the non-movant contradicts the movant with counter-affidavits or other documentary evidence.") (citation omitted); Jaxon v. Circle K Corp., 773 F.2d 1138, 1140 (10th Cir. 1985) (pro se plaintiffs should receive "notice of the requirements and reasonable opportunity to submit counteraffidavits"); Griffith v. Wainwright, 772 F.2d 822, 825 (11th Cir. 1985) ("an adverse party must be given express, ten-day notice of the summary judgment rules, of his right to file affidavits or other material in opposition to the motion, and of the consequences of default"); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (pro se plaintiff is entitled to the "reasonable safeguard" of notice); Hudson v. Hardy, 412 F.2d 1091, 1094 (D.C. Cir. 1968) ("as a bare minimum" pro se plaintiff should have received "fair notice of the requirements of the summary judgment rule").

343. *See* United States v. Ninety-Three Firearms, 330 F.3d 414, 427–28 (6th Cir. 2003) ("[T]his court clearly has held that no such rule providing 'special assistance' exists with respect to nonprisoner pro se litigants."); Jacobsen v. Filler, 790 F.2d 1362, 1365–66 (9th Cir. 1986) (refusing to extend requirement of notice to to nonprisoner pro ses). *But cf.* Fonseca v. Sysco Food Serv. of Ariz., 374 F.3d 840, 846 (9th Cir. 2004) (reversing summary judgment for defendant in civil case, citing prisoner case for proposition that district court should have provided this pro se plaintiff with notice of complex procedural issues involved in summary judgment).

344. *See, e.g.*, S.D. & E.D.N.Y. LCR 56.2. The notice, which is supposed to be filed with the motion by the moving party, warns:

> THE CLAIMS YOU ASSERT IN YOUR COMPLAINT MAY BE DISMISSED WITHOUT A TRIAL IF YOU DO NOT RESPOND TO THIS MOTION by filing sworn affidavits and other papers as required by Rule 56(e) of the Federal Rules of Civil Procedure and by Local Civil Rule 56.1. An affidavit is a sworn statement of fact based on personal knowledge that would be admissible in evidence at trial. The full text of Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 56.1 is attached.
>
> In short, Rule 56 provides that you may NOT oppose summary judgment simply by relying upon the allegations in your complaint. Rather, you must submit evidence, such as witness statements or documents, countering the facts asserted by the defendant and raising material issues of fact for trial. Any witness statements must be in the form of affidavits. You may submit your own affidavit and/or the affidavits of others. You may submit affidavits that were prepared specifically in response to defendant's motion for summary judgment.
>
> If you do not respond to the motion for summary judgment on time with affidavits or documentary evidence contradicting the material facts asserted by the defendant, the court may accept defendant's factual assertions as true. Judgment may then be entered in defendant's favor without a trial.

See also E.D. Wis. Civ. R. 56 (requiring moving party to include in a motion against a pro se litigant "a short and plain statement that any factual assertion in the movant's affida-

have declined to require notice for any pro se litigants,[345] and the other circuits have not ruled on the issue.

The case law on whether to provide notice about summary judgment procedure to pro se litigants thus focuses on whether such notice is *required*. There do not seem to be any cases holding that a judge *cannot*, as a matter of discretion, provide some form of notice. Each individual judge has the discretion to provide notice when none is required, or perhaps go beyond the minimum notice that may be required in his or her circuit. If the district has a pro se manual, that is an ideal place to provide notice of the requirements for responding to summary judgment motions and a warning about the consequences of a failure to properly respond.[346]

In the circuits that do require it, the notice need not come from the court. "There is no requirement that the district court affirmatively advise the *pro se* litigant of the nature and consequences of a summary judgment motion if the *pro se* litigant has otherwise been adequately notified or is already aware of such consequences."[347] Some circuits have stated that

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vit, declaration, or other admissible documentary evidence will be accepted by the Court as being true unless the party unrepresented by counsel submits the party's own affidavit, declaration, or other admissible documentary evidence contradicting the factual assertion.").

345. Beck v. Skon, 253 F.3d 330, 333 (8th Cir. 2001) (district court is not required to provide "particularized instructions" to pro se litigant responding to summary judgment motion); Martin v. Harrison Cty. Jail, 975 F.2d 192, 193 (5th Cir. 1992) ("particularized additional notice of the potential consequences of a summary judgment motion and the right to submit opposing affidavits need not be afforded a pro se litigant. The notice afforded by the Rules of Civil Procedure and the local rules are, in our view, sufficient."). *See also* Stingley v. Den-Mar Inc., 347 F. App'x 14, 20 (5th Cir. 2009) (applying *Martin* to nonprisoner pro se plaintiff); Bennett v. Dr. Pepper/Seven Up, Inc., 295 F.3d 805, 808 (8th Cir. 2002) (applying *Beck* to nonprisoner pro se plaintiff).

346. *See also* Hailey L. Scoville & Richard A. Bales, *Pro Se Litigants and Summary Judgment*, 214 F.R.D. 231, 233–34 (2003) (recommending that "litigants should receive an extensive warning when they choose to proceed pro se, coupled with a packet explaining the basics of court procedure including summary judgment. . . . Because the packet would be prepared ahead of time and would not be individually tailored to each litigant, providing the packet would maintain judicial neutrality and, after an initial investment of time preparing the packet, spare judges the burden of providing individualized instruction.").

347. M.B. v. Reish, 119 F.3d 230, 232 (2d Cir. 1997).

> the moving party should routinely provide a *pro se* party with notice of the requirements of Rule 56, and of the consequences of noncompliance therewith, contemporaneous with the serving of the motion for summary judgment on the *pro se* litigant. In the absence of such action, the district court should promptly provide the *pro se* with such required notice.[348]

2. Providing Notice Before Converting Motion to Dismiss into Summary Judgment Motion

Some of the same circuits that require giving a nonprisoner pro se litigant notice of summary judgment procedures and the consequences of failing to respond have reached similar holdings when a Rule 12(b)(6) or (c) motion to dismiss is converted into a Rule 56 motion for summary judgment under Rule 12(d).

> The term "reasonable opportunity" in Rule 12(b) [now Rule 12(d)[349]] embraces the requirement that the court give some notice to all parties that it is treating the 12(b)(6) motion as one for summary judgment. . . . Such notice must be reasonably calculated to inform the nonmoving party of the conversion, and of his right to file countering affidavits or to undertake reasonable discovery in an effort to produce a triable issue of fact. . . . In addition, the . . . notice must be sufficiently clear to be understood by a pro se litigant and calculated to apprise him of what is required under Rule 56.[350]

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348. Irby v. N.Y.C. Transit Auth., 262 F.3d 412, 414 (2d Cir. 2001) (summary judgment was appropriate after pro se plaintiff was adequately, though belatedly, warned by opposing party of requirements of summary judgment). *See also* Timms v. Frank, 953 F.2d 281, 285 (7th Cir. 1992) ("Counsel should include this notice with the summary judgment motion, but if they fail to do so this responsibility will fall on the district court.").

349. *See* Fed. R. Civ. P. 12(d) ("All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.").

350. Davis v. Zahradnick, 600 F.2d 458, 460 (4th Cir. 1979) (Although *Davis* was a prisoner case, the opinion did not limit itself to prisoner pro ses and has been cited in nonprisoner cases, e.g., Dolgaleva v. Va. Beach City Pub. Sch., 364 F. App'x 820, 825 (4th Cir. 2010)). *See also* Neal v. Kelly, 963 F.2d 453, 456–57 (D.C. Cir. 1990) (pro se litigant must be informed of consequences of failure to respond and need to file affidavits to counter movant's claims; although a prisoner case, *Neal* has been used for nonprisoner litigation); Farred v. Hicks, 915 F.2d 1530, 1534 (11th Cir. 1990) (if district court converts Rule 12(b)(6)

See *supra* Part II.F, "Summary Judgment Warning and Standards," for further discussion of district court discretion in handling summary judgment motions against pro se litigants.

C. Default Judgments[351]

1. Default Generally Disfavored

A default judgment may be appropriate "when a litigant is confronted by an obstructionist adversary and plays a constructive role in maintaining the orderly and efficient administration of justice.' . . . Nonetheless, it is a 'drastic' sanction . . . that runs contrary to the goals of resolving cases on the merits and avoiding 'harsh or unfair results.'"[352]

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motion into Rule 56(c) motion, it "is required to give 'clear notice of the need to file affidavits or other responsive materials and of the consequences of default'" to pro se litigant) (citation omitted); Beacon Enter., Inc. v. Menzies, 715 F.2d 757, 767 (2d Cir. 1983) (after conversion, district court "did not give the type of unequivocal notice to which a *pro se* litigant is entitled . . . [or] apprise Menzies of the steps she should have taken to submit rebutting evidence"); Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982) ("It goes without saying that the rule [for summary judgment motions] applies with equal force when affidavits are submitted in support of a motion to dismiss under Rule 12(b)(6)."); Youssef v. Dep't of Health and Senior Serv., 423 F. App'x 221, 224 (3d Cir. 2011) (court must give pro se plaintiff "notice of its intent to convert the motion to dismiss into a motion for summary judgment, and an opportunity to submit an affidavit or declaration contesting the facts and legal conclusions set forth in [defendants'] certification"). *Cf.* Mala v. Crown Bay Marina, 704 F.3d 239, 245 (3d Cir. 2013) (dicta: "when a court acts on its own in a way that significantly alters a pro se litigant's rights—for example, by converting one type of motion into a different type of motion—the court should inform the pro se party of the legal consequences").

351. Although there are differences between an "entry of default" and a "default judgment" and the legal requirements for granting or opposing each one, the focus of this section is on the treatment of pro se litigants rather than the specifics of default.

352. Remexcel Managerial Consultants, Inc. v. Arlequin, 583 F.3d 45, 54 (1st Cir. 2009) (citations omitted). *See also* Wright et al., *supra* note 207, § 2681 at 10 ("Under modern procedure, defaults are not favored by the law and any doubts usually will be resolved in favor of the defaulting party. The reason for this attitude is that contemporary procedural philosophy encourages trial on the merits.") (citations omitted). *Cf.* E.F. Hutton & Co., Inc. v. Moffatt, 460 F.2d 284, 285 (5th Cir. 1972) ("The entry of judgment by default is a drastic remedy and should be resorted to only in extreme situations. . . . It is only appropriate where there has been a clear record of delay or contumacious conduct.").

Furthermore, because default judgments "are generally disfavored," and should be "reserved for rare occasions," any doubt "as to whether a default should be granted or vacated . . . should be resolved in favor of the defaulting party. In other words, 'good cause' and the criteria of the Rule 60(b) set aside should be construed generously."[353]

2. Pro Se Litigants

Defaults are even less favored for pro se litigants, whose "fail[ure] to plead or otherwise defend" under Federal Rule of Civil Procedure 55(a) is often due to their lack of knowledge or experience rather than deliberate obstruction. As the Second Circuit noted,

> concerns regarding the protection of a litigant's rights are heightened when the party held in default appears *pro se.* A party appearing without counsel is afforded extra leeway in meeting the procedural rules governing litigation, and trial judges must make some effort to protect a party so appearing from waiving a right to be heard because of his or her lack of legal knowledge. . . . Hence, as a general rule a district court should grant a default judgment sparingly and grant leave to set aside the entry of default freely when the defaulting party is appearing *pro se.*[354]

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353. Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993). *See also* Fed. R. Civ. P. 60(b) ("On motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (6) any other reason that justifies relief.").

354. *Id.* (error for district court to not consider, among other things, defendant's "status as a *pro se* litigant" in determining whether to set aside default). *See also* United States v. Mraz, 274 F. Supp. 2d 750, 756 (D. Md. 2003) (denying government's motion for default judgment where defendant had filed answer three weeks after it was due, in light of defendant's pro se status and strong preference for resolving cases on their merits); United States v. Thornton, 113 F.R.D. 499, 502 (D. Conn. 1986) (setting aside entry of default because "in this case there is no basis for a finding that the default was willful"—defendants unsuccessfully attempted to retain counsel, then "appeared pro se to respond to the application for judgment, and presented a credible defense to the government's claims"); Quaker Valley Sch. Dist. v. Emp'rs Mut. Liab. Ins. Co. of Wis., 96 F.R.D. 423, 424–25 (W.D. Pa. 1983) (in setting aside entry of default against third-party defendants, court stated that the record here "suggests that at most, the [defendants] were neglectful"). *But cf.* United States v. Ware, 172 F.R.D. 458, 459 (D. Kan. 1997) (finding that "a *pro se* defendant's unfamiliarity with the legal system or ignorance of the law does not fall within the definition" of "excusable ne-

However, a litigant's pro se status provides less protection if the litigant's own culpable conduct led to the default. The Ninth Circuit affirmed the denial of a pro se defendant's motion to vacate a default judgment under Rule 60(b) where, "despite receiving three notices concerning the status of this matter, [he] resolutely ignored the court and the [plaintiff] until a judgment [of default] had been filed against him; then, when he did appear, he made protestations of innocence that were found to be wholly untrue by the district court." The defendant also "repeatedly attempted to avoid the [plaintiff]'s attempts to provide him with documents pertaining to the lawsuit" and "refused to appear before the magistrate judge" for the hearing on his claim that he was never properly served.[355]

Similarly, the Tenth Circuit affirmed a default judgment entered against a pro se defendant after she had "failed to comply with numerous court orders," including "the preparation of a court-ordered stipulated scheduling and discovery order." She also "failed to appear at a properly noticed and court-ordered deposition, failed to appear at a court-ordered hearing relating to a discovery motion that she had filed, and failed to timely respond to written discovery." Perhaps not surprisingly, she then "did not appear at the court-ordered hearing for entry of default and determination of damages." The appellate court concluded that the defendant "willfully and intentionally failed to comply with numerous scheduling and pretrial orders of the district court and that she was aware of the possible consequences of her failure to do so."[356]

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glect" under Rule 60(b)(1), granting government's motion for entry of default judgment where tax defendant had failed to file an answer after his motion to dismiss was denied).

355. Am. Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107–09 (9th Cir. 2000). *See also* United States v. Minson, 13 F. App'x 416, 418 (7th Cir. 2001) (pro se defendant debtor had shown "no difficulty navigating the court system" yet "failed to file a timely answer within 90 days, even though the court granted her one extension and warned her that failure to answer would result in a default").

356. Fin. Instruments Grp., Ltd. v. Leung, 30 F. App'x 915, 918–19 (10th Cir. 2002).

3. Intent to Defend

Some courts, noting the disjunctive language in Rule 55(a) of "when a party failed to plead or otherwise defend,"[357] have held that showing an intent to defend weighs against default even if the litigant has otherwise failed to file proper pleadings, a situation that is not uncommon with pro se litigants. The Second Circuit, for example, reversed an entry of default against a pro se defendant who, after failing to obtain counsel, had been late or incomplete with her filings, but had attempted to reply to the plaintiffs' pleadings and made clear her intent to defend or settle the case. Finding that the district court abused its discretion in refusing to set aside the entry of default for "good cause" under Rule 55(c), the court stated that there

> is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training. . . . The court's duty is even broader in the case of a *pro se* defendant who finds herself in court against her will with little time to learn the intricacies of civil procedure.[358]

In contrast, default was warranted where the defendants did not answer the complaint for almost a year and "never even notified the Court of their intention to defend the action or made any kind of appearance before the Court." Although pro se litigants are usually given leeway in matters of procedure, they "are still required to make

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357. The full text reads, "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default."

358. Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983). *See also* United States v. Varmado, 342 F. App'x 437, 441 (11th Cir. 2009) (reversing default judgment against pro se student loan defendant: "she was not given proper notice that default judgment would be issued against her; any delay was slight; there was no evidence of willful misconduct or intentionally dilatory tactics; and she advanced what could be liberally construed as a meritorious defense at this early stage of the proceedings"); Bertolet v. Bray, 277 F. Supp. 2d 835, 837–38 (S.D. Ohio 2003) (denying entry of default judgment against pro se defendant who appeared in court "at least twice" and "raised a number of arguments that . . . could constitute a meritorious defense," thereby demonstrating a sufficient "intent to defend" even though he had failed to file an answer to the complaint).

a good faith effort to comply with Federal Rules in their defense of a civil action. At the very least, defendants are required to notify the Court as to whether they intend to defend the action in any manner." Failure to do so "indicates that their delay was willful."[359]

Although it did not specifically reference pro se litigants, a 2007 amendment to Rule 55(a) specifically recognized the intent-to-defend line of cases.

> Former Rule 55(a) directed the clerk to enter a default when a party failed to plead or otherwise defend "as provided by these rules." The implication from the reference to defending "as provided by these rules" seemed to be that the clerk should enter a default even if a party did something showing an intent to defend, but that act was not specifically described by the rules. Courts in fact have rejected that implication. Acts that show an intent to defend have frequently prevented a default even though not connected to any particular rule. "[A]s provided by these rules" is deleted to reflect Rule 55(a)'s actual meaning.[360]

D. Competency

1. Competency Exam Under Rule 17(c)(2)

Federal Rule of Civil Procedure 17(c)(2) states that "an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." The rule does not, however, specify how a court is to determine whether a litigant is incompetent or when it is required to do so.

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359. S.E.C. v. U.N. Dollars Corp., No. 01 Civ. 9059(AGS), slip op. at 1 (S.D.N.Y. Jan. 28, 2003), *affirmed,* 96 F. App'x 778 (2d Cir. 2004). *See also* United States v. Mulvenna, 367 F. App'x 348, 351 (3d Cir. 2010) (in addition to failing to file an answer or otherwise respond to complaint, pro se defendant "took no action after receiving notice that default had been entered against him, thereby signaling that he was not going to take the requisite steps to defend the litigation").

360. Fed R. Civ. P. 55(a) advisory committee's note to 2007 amendment.

The Second Circuit analyzed Rule 17(c) in a case involving a pro se plaintiff who claimed she was not competent to litigate her Title VII case and had requested appointment of counsel. Her request was denied, she refused to cooperate with discovery despite several warnings, and eventually the district court granted summary judgment for the defendant. The appellate court affirmed, rejecting the plaintiff's claim that the language of Rule 17(c)

> obligates a court to conduct a sua sponte inquiry into a litigant's competency when he or she demonstrates signs of incapacity. We read nothing in the rule itself that obligates a district court to monitor a pro se litigant's behavior for signs of mental incompetence. The obligation imposed by the final sentence of Rule 17(c)—the duty to "appoint" or "make such other order"—arises after a determination of incompetency. If a court were presented with evidence from an appropriate court of record or a relevant public agency indicating that the party had been adjudicated incompetent, or if the court received verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent, it likely would be an abuse of the court's discretion not to consider whether Rule 17(c) applied. . . . Standing alone, however, a litigant's bizarre behavior is insufficient to trigger a mandatory inquiry into his or her competency.[361]

The court added, however, that

> [a]lthough we do not find that Rule 17(c) requires courts to inquire into the necessity of appointing a guardian ad litem absent verifiable evidence of mental incapacity, we also note that nothing in that

361. Ferrelli v. River Manor Health Care Ctr., 323 F.3d 196, 199–202 (2d Cir. 2003). *See also* Powell v. Symons, 680 F.3d 301, 307 (3d Cir. 2012) (agreeing with *Ferrelli* "that a district court need not inquire *sua sponte* into a pro se plaintiff's mental competence based on a litigant's bizarre behavior alone, even if such behavior may suggest mental incapacity. That is an important limiting factor as to the application of Rule 17. The federal courts are flooded with pro se litigants with fanciful notions of their rights and deprivations. We cannot expect district judges to do any more than undertake a duty of inquiry as to whether there may be a viable basis to invoke Rule 17. That duty of inquiry involves a determination of whether there is verifiable evidence of incompetence.") (*Powell* is a prisoner pro se case, but has been applied to nonprisoner cases).

> rule prevents a district court from exercising its discretion to consider sua sponte the appropriateness of appointing a guardian ad litem for a litigant whose behavior raises a significant question regarding his or her mental competency. Indeed, such consideration may be particularly appropriate in the case of a defendant who shows signs of severe incapacity, in part because a judgment entered against a mentally incompetent defendant not represented by a guardian or a guardian ad litem may be subject to collateral attack at a later date.[362]

The Fourth Circuit reached a similar conclusion for a pro se defendant whose court-appointed attorney on appeal argued that "his mental incompetence to defend himself without guardian or counsel, was so manifest that the district court erred in failing to appoint a guardian ad litem for him or, at least, in failing to conduct a specific inquiry into his competence."[363] "Obviously if there has been a legal adjudication of incompetence and that is brought to the court's attention, [Rule 17(c)(2)] is brought in play."[364] In this case, however,

> a common sense appraisal of Sellner on the basis of his out-of-court and in-court conduct would likely have been that here was a person courting destruction out of misplaced zeal or vindictiveness or simple meanness of spirit, who was nevertheless a highly intelligent, shrewd and able person insofar as understanding and managing his immediate practical affairs was concerned. It is impossible to believe, for example, that had Sellner himself resisted an attempt to have him adjudged "incompetent" at the time, he would not easily have succeeded.[365]

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362. *Ferrelli*, 323 F.3d at 203. *See also* McLean v. GMAC Mortg. Corp., 398 F. App'x 467, 470 (11th Cir. 2010) (per curiam) (citing *Ferrelli* in finding district court did not err in failing to sua sponte inquire into plaintiff's mental health). *Cf.* Massie v. Metro. Museum of Art, 651 F. Supp. 2d 88, 98 (S.D.N.Y. 2009) (following *Ferrelli* in considering sua sponte pro se plaintiff's mental health status as factor in determining whether oral settlement agreement was enforceable "in view of plaintiff's . . . questionable mental state, the lack of specificity at the time of the agreement as to what sum he would receive, and plaintiff's prompt pre-performance disavowal of the agreement").

363. Hudnall v. Sellner, 800 F.2d 377, 384 (4th Cir. 1986).

364. *Id.* at 385.

365. *Id.* at 386

The court concluded that there was "no abuse of discretion on the district court's part in failing *sua sponte* to conduct a collateral inquiry into Sellner's mental competence."[366]

On the other hand, where a defendant had been found by the Social Security Administration to be totally physically and mentally disabled, the Ninth Circuit found it was error to allow a trial to proceed without holding a hearing on whether to appoint a guardian. Under Rule 17(c), "the court has broad discretion and need not appoint a guardian ad litem if it determines the person is or can be otherwise adequately protected, [but] it is under a legal obligation to consider whether the person is adequately protected." In this case, the district court

> was clearly on notice that Starr claimed to be incompetent and his claim was made credible by official documentation. Despite this, the court apparently failed to make any inquiry into the issue and took no steps to insure that Starr's interests were adequately protected. This is not an abuse of discretion but a failure to exercise legally required discretion.[367]

Even if a psychiatrist diagnoses a plaintiff with a mental illness after a Rule 17(c) hearing, it is error to appoint a guardian ad litem against the wishes of a plaintiff unless the mental incapacity actually interferes with the ability of the plaintiff to effectively represent himself or herself. The Third Circuit vacated an appointment for an attorney who was acting pro se and who, despite a diagnosis of "a delusional disorder with grandiose and persecutory delusions," was employed as an attorney, "presented as 'intelligent, articulate, and enthusiastic,' . . . and was analytical and organized." The court stated that "[t]he purpose behind appointing a guardian is to protect the interests of the incompetent person, not the defendants. Richards is clearly able to protect her interests in this litigation" by proceeding pro se,

366. *Id.* "Parties to litigation behave in a great variety of ways that might be thought to suggest some degree of mental instability. Certainly the rule contemplates by 'incompetence' something other than mere foolishness or improvidence, garden-variety or even egregious mendacity, or even various forms of the more common personality disorders." *Id.* at 385.

367. United States v. 30.64 Acres of Land, 795 F.2d 796, 804–05 (9th Cir. 1986).

and "the District Court abused its discretion in appointing a guardian ad litem because it did not apply the correct standard or make any factual findings to support such a decision."[368]

Note that if a pro se plaintiff is filing *in forma pauperis* and is subject to 28 U.S.C. § 1915(e), the court need not undertake a Rule 17(c)(2) analysis if the claim is frivolous or malicious or is not one for which relief may be granted.[369]

2. Procedural Issues

A litigant must receive notice and an opportunity to oppose a competency evaluation or the appointment of an attorney or guardian.

> The appointment of a *guardian ad litem* deprives the litigant of the right to control the litigation and subjects him to possible stigmatization, but it does not altogether deprive him of his day in court. Nonetheless, due process mandates some type of hearing. . . . Thus, at a minimum, Thomas should have been given notice and an opportunity to be heard.[370]

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368. Richards v. Duke Univ., 166 F. App'x 595, 598–99 (3d Cir. 2006) (per curiam). *Cf.* Wenger v. Canastota Cent. Sch. Dist., 146 F.3d 123, 125 (2d Cir. 1998) (in determining whether to appoint counsel under Rule 17(c), "the court should consider the fact that, without appointment of counsel, the case will not go forward at all. Of course, this does not mean that appointment of counsel is required when it is clear that no substantial claim might be brought on behalf of such a party. But the fact that the party has no means of asserting his rights other than through counsel is certainly a factor that must be considered.").

369. *See Powell*, 680 F.3d at 307 ("In the context of unrepresented litigants proceeding *in forma pauperis,* [a Rule 17(c)(2)] inquiry would usually occur after the preliminary merits screening under 28 U.S.C. § 1915A or 28 U.S.C. § 1915(e)(2)."); Mahoney v. New Hampshire, No. 14cv431-JD, slip op. at 2 (D.N.H. June 17, 2015) (following *Powell* where complaint failed to survive screening pursuant to § 1915(e)(2)).

370. Thomas v. Humfield, 916 F.2d 1032, 1033–34 (5th Cir. 1990). *See also* Sturdza v. United Arab Emirates, 562 F.3d 1186, 1188–89 (D.C. Cir. 2009) (citing *Thomas*: "When the party for whom the guardian is sought claims to be competent, at least 'some hearing' is required. . . . [B]efore adjudicating Ms. Sturdza incompetent and appointing a guardian, the district court should have ordered her to show cause why a guardian should not be appointed and informed her that in determining whether to appoint one, it would consider any failure on her part to comply or to submit to psychiatric evaluation."). For a more extensive discussion of the procedures to be used in appointing a guardian ad litem, see *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 651–54 (2d Cir. 1999) (affirming district court appointment

In a Ninth Circuit case, the pro se plaintiff was ordered to produce information needed to determine whether he was competent. Although warned that failure to do so could result in dismissal, he did not comply with the order, and the district court dismissed the plaintiff's eight lawsuits with prejudice. The appellate court reversed, holding that where there is a substantial question about the mental competence of a pro se litigant, the "preferred procedure" is for the court to "conduct a hearing to determine whether or not the party is competent, so that a representative [or an attorney] may be appointed if needed. . . . [T]he court may not dismiss with prejudice for failure to comply with an order of the court."[371]

See generally *supra* Part II.I.1, "Mental or Emotional Issues."

E. Evidentiary Issues and Judicial Discretion

Under Rule 611(a) of the Federal Rules of Evidence, "[t]he court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment." The original Advisory Committee Notes to the 1972 Proposed Rules for Rule 611(a) state that "[t]he ultimate responsibility for the effective working of the adversary system rests with the judge."

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of guardian over plaintiff's objection) (then-Judge Sotomayor dissenting in part, finding that the notice given was inadequate).

371. Krain v. Smallwood, 880 F.2d 1119, 1121 (9th Cir. 1989). The "district court has discretion to dismiss the cases without prejudice, appoint a lawyer to represent Krain, or proceed with a competency determination." *Id. See also* Berrios v. N.Y.C. Hous. Auth., 564 F.3d 130, 134 (2d Cir. 2009) ("[I]f the court views it as clear that no substantial claim could be asserted . . . , it may dismiss the complaint, but without prejudice."); *Sturdza*, 562 F.3d at 1188–90 (citing *Krain* in stating that plaintiff, who objected to appointment of guardian, could avoid submitting to psychiatric evaluation by seeking dismissal without prejudice). *But cf.* Sturdza v. United Arab Emirates, 644 F. Supp. 2d 50, 77–78 (D.D.C. 2009) (problem with allowing plaintiff to move for dismissal without prejudice is that "any litigation that she might initiate following the dismissal would likely be precluded by the running of the statutes of limitations on her claims").

Examining Rule 611(a), the Fifth Circuit declared that "[t]he conduct of a fair trial is vested in the sound discretion of the trial judge. . . . His duty extends far beyond ruling on objections and preserving decorum in the courtroom. Though the trial judge must be neutral, he need not be a passive spectator." A judge also has an obligation "to see that the trial is just and not subject to delay. . . . He may question witnesses, elicit facts, clarify evidence and pace the trial." In some cases, "the trial judge may need to assume a greater responsibility for the direction of the trial."[372] The court also noted that "[g]reater latitude should be allowed in the conduct of a bench trial than would be permitted in a trial conducted with a jury. In the former there is no possibility that the judge's actions might improperly influence jurors."[373]

Rule 611, along with Rule 614 (discussed below), provide the flexibility judges often need in pro se cases. See also *supra* Part II.G.2.

1. Court Discretion to Call and Question Witnesses and Develop Facts

Under Federal Rule of Evidence 614(a) and (b),[374] the district court "may call a witness on its own or at a party's request" and "may ex-

372. Cranberg v. Consumers Union of U.S., Inc., 756 F.2d 382, 391–93 (5th Cir. 1985). *See also* Logue v. Dore, 103 F.3d 1040, 1045 (1st Cir. 1997) (The judge "is 'the governor of the trial for the purpose of assuring its proper conduct,' and has a perfect right—albeit a right that should be exercised with care—to participate actively in the trial proper."); Ayash v. United States, 352 F.2d 1009, 1010 (10th Cir. 1965) ("The trial Judge is not a mere moderator or umpire in the trial of a case in federal court, and, within reasonable bounds, he has the right to participate in eliciting the truth.").

373. *Cranberg*, 756 F.2d at 392. *See also* Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence Manual § 2.06, at 2-52.1 (8th ed. Supp. 2010) ("A trial is a search for the truth, and the court is more than a mere umpire of the proceedings."); Fed. R. Evid. 102 ("ascertaining the truth" is one purpose of the rules of evidence).

374. Rule 614 applies to both criminal and civil cases, and although there are some exceptions, the courts do not seem to distinguish between the two. *See, e.g.*, Cunningham v. Housing Auth. of City of Opelousas, 764 F.2d 1097, 1100 (5th Cir. 1985) ("While this power is more often used in the context of a criminal case, *see* Fed. R. Evid. 614(a) advisory committee note, courts have called their own witnesses in civil cases as well."). Also, while almost all of the cases involve represented litigants, the principles hold, or are even stronger, for pro se litigants. *See, e.g.*, Leo H. Whinery, Theodore P. Roberts & Robert B. Smith, The

amine a witness regardless of who calls the witness." The original Advisory Committee Notes state that "the authority of the judge to call witnesses is well established. . . . The authority of the judge to question witnesses is also well established."[375]

The right to examine witnesses seems tailor-made for cases involving pro se litigants, who often lack the skill to conduct a meaningful and efficient line of questioning or cross-examination. The court may question witnesses "to clarify testimony for the jury, to correct misstatements, or to fully develop the relevant facts and assist the jury in giving meaning to such facts by organizing them in a coherent manner. There is 'nothing wrong' with a judge suggesting a line of questioning to an attorney."[376]

Note that there is no *duty* to call witnesses.

> By providing that the trial court 'may' call witnesses, Rule 614(a) recognizes that calling witnesses is a matter of judicial discretion rather than duty, and that a court's failure to call a witness on its own, or at the suggestion of a party, is not a ground for reversal. Ordinarily, the court's exercise of its right will not lead to a reversal either, unless the appellate court concludes that the trial court's action interfered with the fairness of the trial.[377]

Rule 614(b) also uses *may* for the court's power to interrogate witnesses, indicating that it, too, is a matter of discretion rather than a duty, and appellate review is for abuse of discretion.[378]

Judge's Evidence Bench Book § 614:2 (2005 update) (listing "assist a pro se party" as one of the reasons for a judge to call or interrogate witnesses). Although the cases here refer to witnesses in trials, the general principles should apply in other, less formal hearings.

375. Fed. R. Evid. 614 advisory committee's notes to 1972 amendments (noting that one reason for the practice is so that "the judge is not imprisoned within the case as made by the parties").

376. Weinstein & Berger, *supra* note 373, § 2.06, at 2-52.2.

377. *Id.* § 2.06, at 2-51.1–2.

378. *Id.* § 2.06, at 2-52.3; Charles Alan Wright & Victor James Gold, 29 Federal Practice & Procedure § 6235 (1997) ("While some case authority suggests that there are circumstances under which a court has an affirmative duty to interrogate witnesses, the language of Rule 614(b) leaves the decision to interrogate within the discretion of the court."). *See also* Stevenson v. D.C. Metro. Police Dept., 248 F.3d 1187, 1190 (D.D.C. 2001) (affirming trial judge's use of hypothetical question to a defense expert witness, stating that "Rule 614(b) of

The Eighth Circuit affirmed a trial judge's interrogation of a witness even though the defendant claimed that it "constituted an entirely new line of questioning and did not serve the purpose of clarifying previous testimony." The court stated that judicial questioning under Rule 614(b) "is not limited to clarifying previous testimony. The court may take an active role in developing the evidence." Also, the court gave both sides the opportunity to question the witness further and gave a curative instruction to the jury.[379]

In addition to directly eliciting evidence from a witness, a judge has the authority to prompt a litigant to introduce or discuss evidence. During a jury trial in New York, for example, the pro se plaintiff's opening statement at trial and papers she had previously submitted in opposition to a motion for summary judgment indicated that "she could testify to the necessary elements of her claims." However, as she neared the end of her direct testimony, "she had not yet put in any evidence on her quasi-contract claim with respect to her expectation of payment, any demand for payment, or the reasonable value of her services . . . . It became clear that [she] did not know that she needed to testify to those elements at trial." Upon questioning by the judge, she explained that she thought the judge, not the jury, would

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the Federal Rules of Evidence expressly permits judges to question witnesses. . . . 'Judges may do so repeatedly and aggressively to clear up confusion and manage trials or where testimony is inarticulately or reluctantly given.'") (citations omitted).

379. Van Leirsburg v. Sioux Valley Hosp., 831 F.2d 169, 173 (8th Cir. 1987) ("A trial judge will not be reversed for excessive judicial intervention unless the record shows that he was actually biased or that he projected the appearance of advocacy or partiality to the jury."). *See also* Chainey v. Street, 523 F.3d 200, 222 (3d Cir. 2008) ("[T]he abuse of discretion standard is a deferential one and in order to meet the standard the conduct of a trial judge must be 'inimical and partisan, clearly evident and prejudicial.'"). *Cf.* Holland v. C.I.R., 835 F.2d 675, 676 (6th Cir. 1987) (affirming action of trial judge who, "rather than calling his own independent witness, suggested that the government procure an expert witness whose testimony would thereafter be made a part of the government's case in chief. While we recognize that the procedure employed was somewhat unusual, an examination of the record satisfies us that there was substantial compliance with the requirements" of Rule 614); *Cunningham*, 764 F.2d at 1100–01 (affirming district court's order that the parties take the deposition of an uncalled potential witness, even after the case had been submitted to the court for decision, stating, "We find that ordering the taking of this deposition is the equivalent of the court calling its own witness.").

determine any amounts owed for her services, and that her prior written submissions to the court on this issue were sufficient. The same was true for her claim of intentional infliction of emotional distress.[380]

"To avoid the manifest injustice which would flow from such a misunderstanding, the court explained to her the necessity of testifying to those facts in front of the jury":

> [Y]ou should be considering whether on the one hand you wish to leave the record as it is or on the other hand wish an opportunity to add those incidents that you referred to earlier but haven't referred to yet in this trial, because the record is the record at the trial and the verdict will be judged *by the trial record, not by the other matters which were brought to my attention during the course of the preparation of the case.*[381]

The defendant, who had also proceeded pro se, claimed on appeal that this demonstrated bias in favor of the plaintiff. The appellate court rejected that argument:

> The trial judge did assist Scott, who was proceeding *pro se,* by correcting some of her misunderstandings of law and instructing her on what kind of proof she needed to offer. A trial court may ask questions for such purposes as "clarifying ambiguities, correcting misstatements, or obtaining information needed to make rulings." . . . And, it "may actively participate and give its own impressions of the evidence or question witnesses, as an aid to the jury, so long as it does not step across the line and become an advocate for one side." . . . Here, the trial judge assisted both *pro se* parties and did not act as an advocate for either party.[382]

380. Scott v. Rosenthal, No. 97 Civ. 2143 (LLS), slip op. at 5–6 (S.D.N.Y. Aug. 24, 2001).

381. *Id.* at 6.

382. Scott v. Rosenthal, 53 F. App'x 137, 142 (2d Cir. 2002) (upholding awards of $400,000 to plaintiff on her quasi-contract claim and approximately $15,000 to defendant on his counterclaims).

The district court also sua sponte dismissed an oral contract claim, raised by the defendant during the trial, and the appellate court affirmed, holding that the district court did not abuse its discretion.[383]

A court may also have the discretion to raise a legal issue that the parties have ignored or overlooked. In a case involving an alleged breach of warranty, the district court sua sponte questioned whether the contract contained a limitation of remedy provision, an issue neither party had raised. It did, and that provision became the basis for the court's decision to grant the defendant's motion for summary judgment. The Seventh Circuit rejected the plaintiff's appeal, holding the district court's action was within its discretion:

> While district courts must be careful not to create the impression that they are taking an advocacy position on a particular issue, they are not required to ignore contractual provisions or applicable law. Here, the substance of the [warranty] is at the very heart of the parties' dispute in this case. The district court judge did not scour the record searching for a reason to dismiss [plaintiff]'s breach of warranty claim—the remedy limitation is contained in the *same* section as the hotly contested disclaimer of warranties. Given the current state of Illinois law, one could wonder why [defendant]'s attorney chose not to raise the remedy limitation issue. Whatever the reason, the district court was certainly permitted to do so.[384]

The court cited an earlier Seventh Circuit case that had held that "while a judge should never engage in advocacy from the bench, he or she has an obligation to raise legal issues that the parties have overlooked or neglected. After all, the judge is on the bench in the first place (we trust) because of superior legal background, expertise, or credentials, and for that reason '[should] not sit as a passive observer who functions solely when called upon by the parties.'"[385]

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383. *Id.*

384. S. Ill. Riverboat Casino Cruises, Inc. v. Triangle Insulation and Sheet Metal Co., 302 F.3d 667, 677 (7th Cir. 2002).

385. Jones v. Page, 76 F.3d 831, 850 (7th Cir.1996) (citation omitted). "[T]he judge should take an active role, when necessary, to ensure fairness and to conform the proceedings to the law." *Id.*

In a criminal fraud case that involved letters written by a prisoner, who was defending himself (though with standby counsel), the trial court suggested to the prosecutor that the government's handwriting expert compare documents then in evidence with hand-printed voir dire questions written by the defendant in court and handed to the judge. The defendant argued that this constituted plain error because it denied him a fair trial by displaying the trial judge's bias and prejudice toward the defendant. The appellate court affirmed, stating that even in a criminal case, the trial judge may

> tak[e] proper steps to aid and assist the jury in the truth finding quest leading to the proper determination of guilt or innocence. In the promotion of this goal, the trial judge has an obligation, on his own initiative, at proper times and in a dignified, and impartial manner, to inject certain matters into the trial which he deems important in the search for truth.[386]

In another criminal case, outside the presence of the jury, the trial judge expressed "some concerns about the quantum of evidence" to the prosecutor, and suggested she had to provide more evidence for a conviction. They then had a discussion, "with the prosecutor explaining how she had made, or planned to make, her case, and the judge explaining where he found holes in her evidence and what sort of testimony would be necessary to fill in the gaps."[387] The appellate court held that this was not improper, agreeing with "our sister circuits [that] have held that there is nothing wrong with a judge suggesting a line of questioning to an attorney."[388]

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386. United States v. Pinkey, 548 F.2d 305, 308 (10th Cir. 1977). *See also* Massey v. United States, 358 F.2d 782, 787 (10th Cir. 1966) (In a case involving a stolen car, "the trial judge suggested that a Pontiac dealer should be able to shed more light on the subject of identification, and the government, heeding the suggestion, produced a factory representative of the manufacturer as a rebuttal witness. We note that the judge also assisted the appellant by reminding his counsel that he had failed to move for acquittal at the close of the appellant's case. The activity of the trial judge was not that of an advocate, but clearly was designed to get all the available facts fully and fairly before the jury.").

387. United States v. Lopez-Martinez, 543 F.3d 509, 513 (9th Cir. 2008).

388. *Id.* (citing United States v. Ramos, 413 F.2d 743, 746 (1st Cir. 1969) (per curiam) (holding that suggestions "by trial judges to prosecutors concerning elements of proof and appropriate lines of inquiry have often been held proper, even when made in the pres-

2. Court Discretion to Exclude Evidence

Under Federal Rule of Evidence 104(a), district courts "must decide any preliminary question about whether . . . evidence is admissible." This is not an independent basis for excluding evidence but rather "provides the trial court with the authority to decide questions that might make evidence inadmissible under some *other* rule of evidence (or under the Constitution, a federal statute, or other Supreme Court rules)."[389] This authority may be used to limit inadmissible evidence that a pro se litigant attempts to introduce, thus avoiding confusion and potential delay. But a judge may also protect a pro se litigant who may not know to object to inadmissible evidence that the other party may try to introduce by excluding such evidence sua sponte.

> A party's failure to object usually waives the objection and forecloses the party from complaining if the evidence is admitted. But the party's failure does not preclude the trial judge from excluding the evidence on her own motion if the witness is disqualified for want of capacity or the evidence is inadmissible, and the judge believes the interests of justice require the exclusion of the testimony. The Federal and Revised Uniform Rules of Evidence grant the judge sufficiently broad power to intervene *sua sponte* in such circumstances.[390]

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ence of the jury")). *See also* United States v. Never Misses a Shot, 781 F.3d 1017, 1023–24 (8th Cir. 2015) (district court did not abuse its discretion when it called for a sidebar and warned prosecutor that additional testimony was needed from complainant to avoid directed verdict for defendant).

389. United States v. Evans, 728 F.3d 953, 960–61 (9th Cir. 2013) (district court has "gate-keeping" authority under Rule 104(a) to exclude inadmissible evidence). *See also* Andrews v. Bechtel Power Corp., 780 F.2d 124, 140–41 (1st Cir. 1985) (before trial, judge told pro se plaintiff that certain evidence would be excluded from the trial); United States v. Wright, 542 F.2d 975, 979 (7th Cir. 1976) ("A trial judge does not become an advocate in litigation by stopping on his own motion, whether on direct or cross-examination, an improper line of inquiry.").

390. Charles T. McCormick, McCormick on Evidence § 55, at 282–83 (6th ed. 2006) (also citing to "[t]he judge's broad power to control the presentation of evidence to 'make the interrogation and presentation effective for the ascertainment of the truth'" under Rule 611(a), and to Rule 103(e), which allows courts to "take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved").

3. Privileges

The Federal Rules of Evidence only specifically list attorney-client privilege and work product protection in Rule 502. For other privileges "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege" except as otherwise provided by the U.S. Constitution, federal statute, or Supreme Court rule.[391] In a civil case, however, "state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."[392]

Normally, the attorney for either party would raise the issue of privilege to protect a client or witness. A pro se litigant, however—or a witness called to testify by or against a pro se litigant—may be unaware that a particular privilege applies. If no one objects, may the court step in and recognize the privilege? At least one respected authority indicates that judges have the discretion to do so. "[O]ther persons present at the trial, including the adverse party, may call to the court's attention the existence of the privilege, or the judge may choose to intervene of his own accord to protect it . . . on behalf of the owner of the privilege."[393] Note that only the holder of the privilege may actually claim it. The court or other objecting party only brings it to the attention of the person holding the privilege, who then chooses whether to assert or waive it.[394]

a. Spousal Privilege

The "confidential communications" branch of the marital privilege applies to federal civil cases as well as criminal (the testimonial privilege only applies to criminal cases).[395] Although the privilege applies only to confidential communications made *during* a valid marriage,

391. Fed. R. Evid. 501.

392. *Id.*

393. McCormick, *supra* note 390, § 73.1, at 342–43.

394. *Id.*

395. Whinery et al., *supra* note 374, § 505:2, at 5-70 to 5-71. "[T]he privilege is universally accepted in the federal courts and applies in criminal cases and civil cases where federal law supplies the rule of decision. . . . It continues to be based on the rationale that the existence of the privilege encourages spouses to confide in each other." *Id.* § 505:9, at 5-75.

the privilege "survives the termination of the marriage by annulment, divorce, or death."[396]

Note that privileges, including the confidential communications privilege, "protect the holder's outside interests, not the parties' interest in securing justice in the present litigation. Accordingly, when a question calls for privileged matter and the holder is present, if necessary the judge may explain the privilege to the holder, but the judge should not assert it on her own motion if the holder decides against claiming the privilege."[397] Because "both spouses hold the privilege,"[398] a court may be protecting the interests of a nonparty witness—not just the pro se litigant—by recognizing the privilege. The D.C. Circuit has, in a criminal case brought under the laws of the District of Columbia, advised judges to warn a witness-spouse of the privilege. Interpreting a provision of the D.C. Code (enacted by the U.S. Congress in 1961),[399] the court advised that, "outside the presence of the jury, the trial judge should tell one who is called to testify for or against his spouse that his testimony cannot be compelled but may be received if volunteered."[400]

b. Psychotherapist-Patient Privilege

In a case involving a claimed waiver of the psychotherapist-patient privilege by a pro se plaintiff, the Second Circuit focused in part on the fact that the plaintiff was not represented by counsel at the time of the claimed waiver. The plaintiff was a state prisoner pursuing a civil rights claim against two corrections officers for use of excessive force and was proceeding pro se after being denied an appointed attorney. At his

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396. *Id.* § 505:12, at 5-77.

397. McCormick, *supra* note 390, § 55, at 283.

398. *Id.* § 83, at 379.

399. Title 14, § 306 D.C. Code (1961). The statute read: "In both civil and criminal proceedings, husband and wife shall be competent but not compellable to testify for or against each other."

400. Postom v. United States, 322 F.2d 432, 433–44 (D.C. Cir. 1963). *See also* United States v. Lewis, 433 F.2d 1146, 1150 (D.C. Cir. 1970) ("Undeniably, the safer course is to follow the *Postom* suggestion in all instances where the spouse-witness' knowledge of the testimonial alternatives is not crystal clear.").

deposition, the defendants' attorney asked a series of questions that led to the plaintiff describing his stay in the prison's psychiatric unit immediately preceding the alleged assault and some conversations he had with a psychiatric nurse in the unit. The plaintiff was eventually assigned counsel, and shortly thereafter the defendants demanded the production of all of the plaintiff's psychiatric records since his incarceration. Over the plaintiff's objection that those records were protected by the psychotherapist-patient privilege, that he had not intended to place his mental or emotional state at issue, and that he would not seek to make his mental condition an issue at trial, the district court substantially approved the defendants' request. The plaintiff filed a petition for a writ of mandamus seeking reversal of the district judge's order to release his psychiatric records.[401]

The appellate court granted the writ and reversed the order to release the records. Analyzing whether the plaintiff had waived the privilege, the court noted that "a waiver may be implied in circumstances where it is called for in the interests of fairness," that is, when a party attempts to use the privilege as both "a shield and a sword."[402] This fairness analysis is to be decided on a case-by-case basis and is fact-specific. Part of the analysis concerns whether the witness-litigant was appearing without an attorney. "[D]istrict judges should 'make some effort to protect a party so appearing from waiving a right . . . because of his or her lack of legal knowledge' . . . [and] should not allow a *pro se* litigant's rights to 'be impaired by harsh application of technical rules.'"[403]

The court concluded that "nothing in the record here suggests that Sims made a knowing election to waive his psychotherapist–patient privilege. Sims requested and was denied assignment of counsel, and nothing has been called to our attention to indicate that he was even aware that he had such a privilege and was entitled to maintain the confidentiality of his psychiatric communications." The court further found that, "in basing its waiver finding on the proposi-

401. *In re* Sims, 534 F.3d 117, 120–27 (2d Cir. 2008).
402. *Id.* at 132.
403. *Id.* at 133 (internal citations omitted).

tion that at his deposition Sims 'testified freely'. . . about his communications with [the psychiatric nurse], the district court apparently gave no consideration to the fact that at that deposition Sims was not represented by counsel." It is "relevant to the fairness analysis that the record does not indicate that Sims was learned in the law and does indicate that when Sims represented himself at his deposition it was not by his choice."[404]

F. Sanctions

With any sanctions, courts should give all litigants a warning about the conduct at issue, notice of what sanctions are being considered, and an opportunity to respond. The court should also narrowly tailor any order to fit the particular conduct and make sufficient findings for appellate review. The main differences in pro se cases appear to be similar to the general treatment of pro se litigants: be more lenient, explain matters more carefully, give more warnings, and make sure the litigant understands the consequences of any sanction that may be imposed if the conduct continues.

A good example of how pro ses should be treated more leniently is found in Rule 37(c)(1), the "automatic sanction" for failure to make a required disclosure under Rule 26(a). The Committee Note to the 1993 amendments states that

> [l]imiting the automatic sanction to violations "without substantial justification," coupled with the exception for violations that are "harmless,"[405] is needed to avoid unduly harsh penalties in a variety of situations: *e.g.,* . . . the lack of knowledge of a pro se litigant of the requirement to make disclosures. In the latter situation, however, exclusion would be proper if the requirement for disclosure had

404. *Id.* at 136–38.

405. The phrases quoted from Rule 37(c)(1) were amended after 1993 and currently read "unless the failure was substantially justified or is harmless."

> been called to the litigant's attention by either the court or another party.[406]

Because nonprisoner pro se litigants are usually of limited means or are filing in forma pauperis, monetary sanctions tend to be ineffective and are less often imposed than dismissal or a filing injunction. The latter two sanctions are discussed in this section. Default judgments, which can also be imposed as a sanction, were discussed in section C.

1. Dismissal

Courts have the authority to dismiss a case under several of the Federal Rules of Civil Procedure, as well as by virtue of their inherent authority.[407] One of the most frequently used rules in pro se cases is Rule 41(b):

> If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

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406. *Cf.* Griffin v. Aluminum Co. of Am., 564 F.2d 1171, 1172–73 (5th Cir. 1977) (The district court "abused its discretion in imposing the most drastic sanction possible" under Rule 37(d), dismissal with prejudice, for single failure to appear at deposition by pro se plaintiff who apparently "misunderstood the import of Alcoa's efforts to depose him. Ignorance of his obligations under the Federal Rules does not excuse his default, but the district court should have considered Griffin's ineptitude in determining whether a sanction less than dismissal effectively could protect Alcoa's right to discovery.").

407. *See, e.g.*, Vazquez-Rijos v. Anhang, 654 F.3d 122, 127 (1st Cir. 2011) ("In order to operate effectively and administer justice properly, courts must have the leeway 'to establish orderly processes and manage their own affairs.'. . . As such, trial courts have substantial authority to impose sanctions, including dismissal, against a party for noncompliance with various procedural rules and court orders."); Bautista v. L.A. Cty., 216 F.3d 837, 841 (9th Cir. 2000) ("District courts have the inherent power to control their dockets and in the exercise of that power they may impose sanctions including, where appropriate, dismissal of a case."); Chong Su Yi v. Soc. Sec. Admin., 554 F. App'x 247, 248 (4th Cir. 2012) (per curiam) ("[F]rivolous complaints are subject to dismissal pursuant to the inherent authority of the court.").

Note, however, that "[d]ismissal is a harsh penalty, . . . and should therefore be imposed only in extreme circumstances."[408] In the Ninth Circuit, district courts must consider five factors when deciding whether to dismiss a case for failure to comply with a court order: "(1) the public interest; (2) the court's need to manage the docket; (3) the risk of prejudice to the defendant; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic alternatives."[409] An order of dismissal for failure to properly amend the complaint was reversed for failure to satisfy this test, where, among other things, the district court's "bare-bones order" to amend the complaint "did not specify what it required in the pleading, and it gave no warning that it would dismiss the next complaint with prejudice if it did not comply."[410]

In an appeal of a Rule 41(b) dismissal where "the record contains no indication that the district court considered" the five-step test employed in the Second Circuit, the appellate court stated that although it does not

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408. *Bautista*, 216 F.3d at 841. *See also* LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d 206, 209 (2d Cir. 2001) ("[A] Rule 41(b) dismissal remains 'a harsh remedy to be utilized only in extreme situations'"; moreover, because "*pro se* plaintiffs should be granted special leniency regarding procedural matters, . . . 'deference is due to the district court's decision to dismiss a *pro se* litigant's complaint only when the circumstances are sufficiently extreme.'") (citation omitted); Rose v. Soc. Sec. Admin., 202 F.3d 270, 270 (6th Cir. 1999) (table) ("Although dismissal of a case is appropriate when a pro se litigant has engaged in a clear pattern of delay, this court prefers that claims be adjudicated on their merits. . . . Indeed, it is incumbent upon the district court to take appropriate measures to permit the adjudication of pro se claims on the merits, rather than order their dismissal on technical grounds. . . . The court has a duty to ensure that the claims of a pro se litigant are given fair and meaningful consideration.").

409. *Bautista*, 216 F.3d at 841.

410. *Id. See also* Olsen v. Mapes, 333 F.3d 1199, 1204–05 (10th Cir. 2003) (using circuit's five-part test, holding that it was an abuse of discretion to dismiss a case for failure to follow court orders to perfect service where the pro se plaintiffs were entitled to rely on service by the U.S. marshal, there was no evidence that the plaintiffs failed to cooperate with the marshal, and they made sincere efforts to comply with the district court's orders even though they were entitled to rely on service by the marshal). Although there are common threads in each circuit's multifactor test and one circuit may use another's, there is no single multifactor test for whether dismissal is warranted under Rule 41(b) or Rule 37.

> require the court to discuss the factors on the record, a decision to dismiss stands a better chance on appeal if the appellate court has the benefit of the district court's reasoning. Furthermore, notions of simple fairness suggest that a *pro se* litigant should receive an explanation before his or her suit is thrown out of court.[411]

Reversing, the court held that none of the factors warranted dismissal, especially the lack of consideration of lesser sanctions for relatively minor noncompliance.[412]

Similar principles have been applied to dismissals under Rule 37 for discovery abuses, for which some circuits also have multifactor tests and emphasize that pro se litigants should receive adequate warnings:

> *Pro se* litigants, though generally entitled to "special solicitude" before district courts, . . . are not immune to dismissal as a sanction for noncompliance with discovery orders. Dismissal of a *pro se* litigant's action may be appropriate "so long as a warning has been given that non-compliance can result in dismissal."
>
> . . . .
>
> Several factors may be useful in evaluating a district court's exercise of discretion to dismiss an action under Rule 37. These include: "(1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance; and (4) whether the non-compliant party had been warned of the consequences of . . . noncompliance."[413]

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411. *LeSane*, 239 F.3d at 209.

412. *Id.* at 210–11.

413. Agiwal v. Mid Island Mortg. Corp., 555 F.3d 298, 302 (2d Cir. 2009) (internal citations omitted) (affirming dismissal for pro se litigant who, over six months, failed to appear for his depositions or fulfill discovery requests or comply with court orders; plaintiff was repeatedly warned that dismissal was possible and was not deterred by imposition of lesser sanction). *See also* Klein-Becker USA, LLC v. Englert, 711 F.3d 1153, 1159–60 (10th Cir. 2013) (affirming "harsh sanction" of default judgment against pro se defendant after warnings and lesser sanctions did not end repeated failures to comply with court orders and discovery schedules).

Even in an egregious case where dismissal is easily justified, such as one where a pro se plaintiff "deliberately and defiantly refused to comply with several court orders on discovery and [told] the court that he [would] not comply in the future," explaining

> why lesser sanctions will not do is a good practice on the part of a district court using dismissal as a sanction. This information helps us in reviewing the dismissal; and, as our case law shows, the failure to explain why a lesser sanction was not used may result, in the close cases, in a reversal or vacation of an order of dismissal.[414]

Note that although it may prove futile to warn a pro se litigant that pro se status does not excuse noncompliance with court orders, it may be a factor in whether a dismissal is upheld on appeal.[415]

2. Filing Injunctions

As the Fifth Circuit said several years ago, "one acting *pro se* has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets."[416] To deter such conduct, courts may resort to imposing sanctions on vexatious

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414. Phipps v. Blakeney, 8 F.3d 788, 790–91 (11th Cir. 1993) (plaintiff "disobeyed several discovery orders. He was warned repeatedly about dismissal as a sanction for disobedience. He was given numerous chances to cooperate. And, in fact, lesser sanctions were tried . . . . Then plaintiff declared, *after* he had been flatly threatened with dismissal, that he 'had no intention' of appearing at his own deposition or at discovery conferences. No explanation on why lesser sanctions would not have worked was necessary.").

415. *See* Welch v. Comcar Indus., 139 F. App'x 138, 139 (11th Cir. 2005) (affirming dismissal where plaintiff was "unequivocally warned . . . numerous times that his *pro se* status did not excuse noncompliance and that failure to comply with court orders could result in the dismissal of his action").

416. Farguson v. MBank Houston, N.A., 808 F.2d 358, 359 (5th Cir. 1986) (affirming injunction to prevent filing suit against defendants on same claims: "The court's power to enter such orders flows not only from various statutes and rules relating to sanctions, but the inherent power of the court to protect its jurisdiction and judgments and to control its docket."). *See also* Cromer v. Kraft Foods N. Am., Inc., 390 F.3d 812, 817 (4th Cir. 2004) ("[T]he All Writs Act, 28 U.S.C. § 1651(a) (2000), grants federal courts the authority to limit access to the courts by vexatious and repetitive litigants."); Tripati v. Beaman, 878 F.2d 351, 352 (10th Cir. 1989) ("There is strong precedent establishing the inherent power of federal courts to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances.").

or abusive litigants, including injunctions that prohibit or severely limit future filings in both district and appellate courts. In general, before entering a vexatious litigant order, the district court should give the litigant an opportunity to oppose entry of the order, indicate what court filings support issuance of the order, find that the filings were frivolous or harassing, and narrowly tailor the order.

Courts must, however, distinguish between the abusive or vexatious litigant and those who are simply litigious or inept. The Tenth Circuit recognized that "filing restrictions are a harsh sanction, and that litigiousness alone is not a sufficient reason to restrict access to the court. . . . However, where, as here, a party has 'engaged in a pattern of litigation activity which is manifestly abusive,' restrictions are appropriate."[417] Likewise, the First Circuit "emphasize[d] that litigiousness alone will not support an injunction against a plaintiff, . . . and that the use of such measures against a pro se plaintiff should be approached with particular caution . . . . Generally, this kind of order should not be considered absent a request by the harassed defendants."[418]

The court must also

> give notice to the litigant to show cause why the proposed injunctive relief should not issue. . . . This ensures that the litigant is provided with the opportunity to oppose the court's order before it is instituted. Likewise, the scope of the injunctive order must be narrowly tailored to fit the particular circumstances of the case.[419]

A filing injunction was vacated in one case because a "general request [by defendants] for 'other appropriate relief' was insufficient notice to [the plaintiff], who was proceeding pro se, of the possibility that his

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417. *In re* Winslow, 17 F.3d 314, 315 (10th Cir. 1994) (citation omitted). *See also* Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1061 (9th Cir. 2007) ("[T]he simple fact that a plaintiff has filed a large number of complaints, standing alone, is not a basis for designating a litigant as 'vexatious.'").

418. Pavilonis v. King, 626 F.2d 1075, 1079 (1st Cir. 1980) (affirming order enjoining pro se plaintiff "from filing any lawsuit in the federal district court of Massachusetts and prohibiting the clerk of court from accepting for filing any paper submitted by her without authorization by a district judge").

419. Brow v. Farrely, 994 F.2d 1027, 1038 (3d Cir. 1993).

resort to the courts would be precluded without initial scrutiny by the district court."[420]

Any filing injunction should be limited in scope, such as to a particular dispute if the plaintiff files numerous complaints based on the same matter. For example, where a pro se plaintiff's four previously dismissed frivolous complaints and promised future complaints were all related to a dispute over his student loan, a general filing injunction was too broad: "[T]he scope of the District Court's order should be limited to any complaint or other paper *in any way* concerning [plaintiff's] attendance at Kings College, his student loan, the collection of that loan, or any rulings by any administrative or judicial officers concerning the aforesaid matters."[421]

In addition to narrowing the subject matter, a filing injunction should usually be limited to the courts that have been involved in the abusive litigation. An injunction that covered "every state court, every federal district court and every federal court of appeal" and required the plaintiffs to "seek approval from the District of Colorado before commencing any pro se litigation in any court in the United States on any subject matter" was vacated as overbroad for including other federal district and appellate courts and state courts.[422]

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420. Gagliardi v. McWilliams, 834 F.2d 81, 82–83 (3d Cir. 1987) (per curiam). *See also* Moates v. Barkley, 147 F.3d 207, 208 (2d Cir. 1998) ("The unequivocal rule in this circuit is that the district court may not impose a filing injunction on a litigant *sua sponte* without providing the litigant with notice and an opportunity to be heard."). *Moates* is a prisoner case, but the rule is cited and followed in nonprisoner pro se cases, too.

421. Chipps v. U.S.D.C. for the M.D. of Pa., 882 F.2d 72, 73 (3d Cir. 1989). *See also Cromer*, 390 F.3d at 819 ("Although Cromer has certainly proved himself to be a 'frequent filer' with respect to his employment discrimination suit and resulting settlement agreement, nothing in the record justified infringing upon his right to bring suit in *unrelated* cases. . . . Prohibiting Cromer from making any filings in any unrelated suit does not address the problem at issue, and is therefore an overbroad restriction.").

422. Sieverding v. Colo. Bar Ass'n, 469 F.3d 1340, 1344-45 (10th Cir. 2006). *Accord* Baum v. Blue Moon Ventures, LLC, 513 F.3d 181, 191–92 (5th Cir. 2008) (agreeing with *Sieverding* in holding that "the district court abused its discretion in extending the pre-filing injunction to filings in state courts, state agencies," and the appellate court). *See also* Van Deelen v. City of Kansas City, Mo., 262 F. App'x 723, 724 (8th Cir. 2007) (limiting filing injunction "to apply only to actions filed in federal district courts within this circuit," citing *Sieverding*).

However, in a case where the pro se plaintiff had brought meritless actions "in at least five circuits in recent years," the Second Circuit upheld limited filing restrictions on the "bringing of new actions in all federal district courts," not just the district in the instant case:

> The district court is part of the federal judicial system and has an obligation to protect and preserve the sound and orderly administration of justice throughout that system. The order does not prohibit Martin-Trigona from seeking access to other federal district courts; it merely requires that he inform the court in question of pertinent facts concerning the action he seeks to bring, including the existence of the injunction order and of outstanding litigation against the named defendants, and that he obtain leave of that court to file the action. These conditions are hardly unreasonable. We need not wait until a vexatious litigant inundates each federal district court with meritless actions to condition access to that court upon a demonstration of good faith.[423]

The court held, however, that the filing injunction was improperly extended to state courts, although it found that

> a spirit of cooperative federalism calls upon us to alert state courts to Martin-Trigona's past activities so they may take judicial notice of matters relevant to new litigation brought by him. Upon remand, therefore, the district court should continue the provisions of the injunction requiring Martin-Trigona to append pertinent informational materials to pleadings in state courts.[424]

When the district court revised the above injunction, it specified that "[a]ll provisions of this order that personally apply to Anthony R. Martin-Trigona shall apply equally to persons or entities acting at his behest, at his direction or instigation, or in concert with him."[425] At least two circuits have upheld this provision against the plaintiff's

423. Martin-Trigona v. Lavien, 737 F.2d 1254, 1261–62 (2d Cir. 1984).

424. *Id.* at 1263 (also noting that the injunction "may entail periodic revision . . . to keep pace with Martin-Trigona's imaginative pursuit of new methods of harassment").

425. *In re* Martin-Trigona, 592 F. Supp. 1566, 1574 (D. Conn. 1985), *aff'd* 763 F.2d 140 (2d Cir. 1985).

mother when she tried to bring suit on some of the same grounds that he had.[426]

The Tenth Circuit included a similar provision for a pro se litigant with a fifteen-year history of abusive filings that continued despite repeated sanctions. The appellate court issued an order stating that

> appellant and/or his wife or associated trusts are enjoined from filing any further complaints in the United States District Court for the District of Colorado containing the same or similar allegations set forth in this complaint or in any previous case involving appellant, his wife, and/or his associated trusts cited above in this order and judgment.[427]

To help keep track of abusive litigants who are subject to prefiling orders, some districts keep a "bar" list of litigants who are barred from filing new claims without court permission. The Northern District of California, for example, recently compiled a list of "individuals who have been found to be vexatious litigants or have some other substantial pre-filing restriction in place" in the district, dating back to January 1, 2005. The list of vexatious litigants includes a summary of prefiling orders as well as links to the actual orders.[428]

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426. *See* Martin-Trigona v. Shaw, 986 F.2d 1384, 1387 (11th Cir. 1993) ("We certainly owe deference to such an order of a district court which has been upheld by another circuit court of appeals. The injunction entered by the Connecticut district court and upheld by the Second Circuit is a reasonable response to the abusive litigation of Anthony Martin-Trigona and his allies, including his mother, and it will be enforced in this circuit as it has been in others."); Martin-Trigona v. Gellis & Melinger, 830 F.2d 367, 368–69 (D.C. Cir. 1987) (upholding dismissal after mother failed to seek leave of Connecticut district court to file, as required by filing injunction).

427. Stafford v. United States, 208 F.3d 1177, 1178–79 (10th Cir. 2000).

428. *See* N.D. Cal. Website, "Vexatious Litigant List," http://home.cand.circ9.dcn/operations/vexatious-litigant-database/. Some state courts also keep such records. *See, e.g.*, Texas Judicial Branch Website, "List of Vexatious Litigants Subject to a Prefiling Order," http://www.txcourts.gov/judicial-data/vexatious-litigants.aspx (Office of Court Administration "is required to maintain a list of vexatious litigants subject to prefiling orders under Section 11.101 of the Civil Practice and Remedies Code"); Supreme Court of Ohio & Ohio Judicial System Website, "Vexatious Litigators Under R.C. 2323.52," http://www.supremecourt.ohio.gov/Clerk/vexatious/default.asp.

G. Treatment of Individual Pro Se Litigants May Vary Depending on Ability

District courts have the flexibility to examine the knowledge and experience of each individual pro se litigant and adjust the amount of leeway or protection granted to that litigant accordingly. Leniency toward any particular pro se litigant may not be warranted, or may be only partly warranted, and will have to be considered on a case-by-case basis. For example, absent extenuating circumstances, an attorney who is proceeding pro se will likely receive no special accommodation from the court. "While pro se litigants sometimes are accorded a measure of latitude in procedural matters, . . . no such latitude is warranted where, as here, the unrepresented party is himself a lawyer."[429]

The Second Circuit has stated that a court should take a "totality of the circumstances" approach to pro se litigants.

> [W]hile a *pro se* litigant should ordinarily be afforded a substantial degree of solicitude, the exact degree thereof will depend upon a variety of factors, including, but not necessarily limited to, the specific procedural context and relevant characteristics of the particular litigant. In some circumstances, such as when a particular *pro se* litigant is familiar with the procedural setting as a result of prior experience such that "it is appropriate to charge [him] with knowledge of . . . particular requirements,". . . it falls well within a district court's discretion to lessen the solicitude that would normally be afforded.[430]

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429. Barrett v. Lombardi, 239 F.3d 23, 28 (1st Cir. 2001). *Accord* Tracy v. Freshwater, 623 F.3d 90, 102 (2d Cir. 2010); Andrews v. Columbia Gas Transmission Corp., 544 F.3d 618, 633 (6th Cir. 2008); Godlove v. Bamberger, Foreman, Oswald, & Hahn, 903 F.2d 1145, 1148 (7th Cir. 1990); Azar v. Nat'l City Bank, 382 F. App'x 880, 885 (11th Cir. 2010); Richards v. Duke Univ., 480 F. Supp. 2d 222, 234 (D.D.C. 2007).

430. *Tracy*, 623 F.3d at 102–03 (citation omitted). Although *Tracy* is a prisoner case, it does not distinguish between prisoner and nonprisoner civil litigants, and has been cited in nonprisoner litigation. *See, e.g.*, Blasi v. N.Y.C. Bd. of Educ., 544 F. App'x 10, 11 (2d Cir. 2013) ("[T]he degree of solicitude due to *pro se* litigants is 'lessened' in situations where, as here, the litigant has previous legal experience." (citing *Tracy*)).

It was error, however, to withdraw the "special solicitude" for the entire case based upon the pro se plaintiff's experience with and apparent ability in filing motions.

> Tracy's previous participation in ten federal and state actions does not on its own justify a complete withdrawal of solicitude for the entirety of this action, including any trial that may ensue. His voluminous motion practice, even if coupled with some degree of demonstrated competence in prior filings, is insufficient to cure this deficiency.

While it might "have been appropriate to withdraw Tracy's special status in relation to the requirements of opposing a motion for summary judgment, . . . the showing here was not sufficient to justify a full withdrawal of special status with regard to all aspects of this litigation." Such a withdrawal should be limited "to particular matters, as appropriate, based on Tracy's substantial litigation experience."[431]

Similarly, a litigant's skillful handling of matters during a case, despite claims of no special legal acumen, may warrant the withholding or lessening of any special consideration. A plaintiff who "is educated and reasonably articulate and [has] demonstrated to the District Court his ability as a pro se litigant . . . [cannot] argue that he should be excused from adherence to the [civil] rules because he chose to proceed pro se."[432]

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431. *Tracy*, 623 F.3d at 103–04. *See also* Sledge v. Kooi, 564 F.3d 105, 109 (2d Cir. 2009) (per curiam) (in dicta, stating that "when a court considers whether to withdraw a *pro se* litigant's special status, it should consider not only that litigant's lifetime participation in all forms of civil litigation, but also his experience with the particular procedural setting presented. Absent a strong showing that a *pro se* litigant has acquired adequate experience more generally, so as to render special solicitude unnecessary and potentially inappropriate, a court would do well to limit the withdrawal of special status to specific contexts in which the litigant's experience indicates that he may be fairly deemed knowledgeable and experienced."). *Cf.* Turner v. Corr. Med. Serv., Inc., 262 F.R.D. 405, 410 (D. Del. 2009) (fact that defendant was "sophisticated litigant" weighed against lenient treatment).

432. Bennett v. Dr. Pepper/Seven Up, Inc., 295 F.3d 805, 808 (8th Cir. 2002). *See also* Fin. Instruments Grp., Ltd. v. Leung, 30 F. App'x 915, 916 n.1 (10th Cir. 2002) (although plaintiff "claimed a limited ability to use the English language," her "pleadings before this court and the district court demonstrate an obvious legal sophistication, a complete familiarity with the rules of civil procedure, and an excellent command of the English language"; also

"[t]he district court expressed concern that an attorney was ghostwriting Leung's pleadings, allowing her to misrepresent her status as a pro se defendant in order to obtain more leeway as an unrepresented party"); Andela v. The Am. Ass'n for Cancer Research, 389 F. App'x 137, 142 (3d Cir. 2010) ("Although proceeding pro se, Andela, a doctor, exhibited more than enough knowledge of the law to expect that he would follow the Federal Rules of Civil Procedure and file a motion for leave to amend if he wished to add new claims to the suit.").

IV. Conclusion

With rules and procedures largely designed for litigation between represented parties, how do federal courts handle nonprisoner pro se litigants, who may be unaware that such rules and procedures even exist, let alone know how to use them? This manual attempts to answer that question by providing suggestions for steps courts can take to better enable pro ses to navigate the complexities of federal civil litigation. The goal here is not just to help pro se litigants understand the process and make courts more accessible, but also to assist the courts by fostering more efficient movement of pro se cases, which often get bogged down due to the understandable confusion, ineffectiveness, and lack of knowledge on the part of many, if not most, pro se litigants.

Many of the case-management practices and procedures outlined in this manual are already used in cases where both parties are represented by attorneys. For pro se litigation, it can simply be a matter of employing them more frequently or intensively. As Yogi Berra might have said, "Pro se litigation is a lot like litigation with lawyers, only more so." For example, Rule 16 provides a range of steps judges may take at their discretion to manage the pretrial stage of litigation. They can vary the amount of control exercised over pretrial proceedings, providing minimal guidance for experienced attorneys but more active case management when pro se litigants are involved. Judges should utilize the built-in flexibility of the procedural rules, along with a court's inherent authority and broad discretion over procedural matters, to try different methods to find what works best in general and in any given case.

As one magistrate judge succinctly put it, "Be flexible. Experiment."[433]

433. Stanley, *supra* n.117, at 7.

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