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Pro Se Litigants and Summary Judgment

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I. INTRODUCTION

Pro se litigation [1] occurs when a litigating party proceeds in an action without the aid of counsel. [2] Therefore, pro se litigators face the confusion of the legal system alone. Since they often do not possess critical legal knowledge, the court system has frequently provided them some leeway in their proceedings; for instance, courts often liberally construe the pleadings ***233** of pro se litigants. [3] Courts do so out of recognition that many litigants proceed pro se not by choice, but because they have been unable to secure legal representation, even for claims that may prove meritorious.

The pro se litigant especially experiences this confusion when faced with a motion for summary judgment. [4] Few pro se litigants know what summary judgment entails; they often fail to respond to the motion and find their case dismissed. [5]

This article addresses the issue of whether federal district courts should be required to provide particularized instructions to a civil pro se litigant at the summary judgment stage. This issue arises when a pro se litigant's case is dismissed and that litigant claims the case should not have been dismissed because that litigant was unaware of the procedures to follow when facing a summary judgment motion. This issue has created a split among the federal courts. The Eighth Circuit opposes providing instructions to pro se litigants, arguing it would compromise the adversary system. [6] The Seventh [7], Eleventh [8], and District of Columbia [9] Circuits have held that special instructions should be provided to pro se litigants to promote equal access and fairness.

This article agrees with the rationale of both sides of the circuit split. Requiring a judge to tell a litigant how to litigate her case forces the judge to see the case through the litigant's eyes-a role inconsistent with that of the judge as neutral adjudicator. It also imposes a considerable burden on the judge. On the other hand, depriving pro se litigants of instructions makes it extraordinarily difficult for such litigants-even those with meritorious claims-to navigate the legal system and to survive summary judgment. This leaves pro se litigants with no meaningful access to justice.

This paper argues 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. This approach advances the rationales of both of the circuit approaches. 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. At the same time, providing the packet ***234** would help guarantee that pro se litigants with meritorious claims have their meaningful day in court.

Although this article focuses on the particular problems faced by pro se litigants in the summary judgment phase of federal litigation, many of the principles discussed are broadly applicable throughout the course of pro se litigation. Similarly, although this article focuses on the difficulties pro se litigants face in the federal courts, many of the principles discussed are equally applicable to pro se proceedings in state courts.

Part II of this article describes pro se litigants. Part III explains the background of the federal summary judgment rule. Part IV explores the split of authority among the federal circuits on the issue of whether pro se litigants should receive instructions on summary judgment from the federal district courts.

Part V analyzes the circuit split and proposes that pro se litigants be equipped with a pre-formulated packet explaining both the risks of proceeding pro se and an explanatory roadmap of federal litigation including summary judgment. Part VI concludes that pro se litigants should be granted special instructions at the beginning of the litigation process because it will foster the important value of access to the courts. The proposed pro se reference manual would provide no individualized instructions, thereby avoiding the problems of judicial instruction and any complications to the adversary system that would follow. A model excerpt of a proposed pro se reference manual is set forth in an Appendix.

II. PRO SE LITIGANTS

A. *The Right to Appear Pro Se*

The pro se litigant has been a character in the judicial process since ancient times. [10] Today, an individual's right to represent himself or herself in a United States court of law is found in the United States Code. [11] Section 1654 states, “In all courts of the United States the parties may plead and conduct their own cases personally ... ” [12] Some commentators have found this right to be “at the core of the American judicial system ... ” as part of equal access to law. [13]

B. *Who Pro Se Litigants Are*

Most pro se litigants are prisoners asserting civil rights or constitutional claims. [14] The number of prisoner pro se claims in the federal courts increased from 1% in 1958 to 11% in 1989. [15] The claims frequently filed by prisoner pro se litigants include habeas corpus petitions and section 1983 ***235** actions. [16] A recent study conducted by the Hastings College of Law explored non-prisoner pro se litigation using a sample of 227 civil pro se litigant cases selected from filings in the United States District Court in San Francisco. [17] The study found that 52.4% of pro se litigants were plaintiffs, 14% were defendants, and the remaining 33.6% were classified as “others.” The “others” category was comprised mostly of lawyers facing disbarment proceedings and individuals appealing bankruptcy. [18] The study also found that over half of the 227 cases were dismissed on preliminary motions, only 15% reached settlement, and only 1 case reached a trial on the merits. [19]

C. *Judicial Hostility Toward Pro Se Litigants*

Despite the long-founded right to appear pro se, the Supreme Court has commented that “one who is his own lawyer has a fool for a client.” [20] This statement reflects the common judicial hostility toward pro se litigants and the belief that since pro se litigants lack the necessary legal knowledge, they are unable to adequately defend themselves in a court of law. [21]

Judicial hostility toward pro se litigants stems at least in part from annoyance created by the increased burden on judges and the high prevalence of “petty” and often meritless claims by prisoners. The judicial calender is consistently full, [22] if not over-full, and judges understandably become agitated when a party requires more attention than the judge has available. Pro se litigants require more attention by judges due to the litigants' lack of legal knowledge. The majority of pro se litigants are prisoners asserting claims of mistreatment by prison officials. [23] These claims add to the judicial burden and are usually unfounded. [24]

One vehicle for disposing of pro se claims is summary judgment under Rule 56 of the Federal Rules of Civil Procedure, which is discussed in the next section.

III. SUMMARY JUDGMENT

A. *Summary Judgment Procedures*

Summary judgment is a tool used to dismiss a case when there is no genuine issue as to any material fact and the party seeking the judgment is entitled to it as a matter of law.[25] This form of dismissal was introduced in ***236** 1938 in the Federal Rules of Civil Procedure as Rule 56.[26] Summary judgment rescues a party from sham claims filed by his or her adversary and the economic burdens of litigation.[27] The rule entitles the court to find, before the trial proceedings begin, that no issue of fact exists requiring a trial.[28]

There are three important filings in summary judgment. These include the motion, a memorandum or brief to support the motion, and the non-moving party's response.[29] The first is the summary judgment motion, which is a request to the court to dismiss the case. The motion cannot be filed until twenty days after the suit has been filed, but once that time has elapsed it may be filed at any time prior to trial.[30] This allows summary judgment to occur early in litigation to permit the speedy disposal of meritless cases.[31] The early summary judgment motion also can present a problem. Judgments might be granted before discovery, which could have revealed a meritorious case, is complete.[32] This timing dilemma must be addressed on a case-by-case basis by the court.[33] The court has the discretion to continue the summary judgment motion so that parties may complete their discovery and then answer the motion accordingly.[34]

The motion for summary judgment must contain a statement of the particular grounds that the motion should be granted on and specify the relief that is requested.[35] The types of relief are full summary judgment, where the entire case is dismissed, and partial summary judgment, where the dismissal is limited to certain issues in a case.[36]

The second filing, a memorandum or brief supporting the motion, must be supplied to the court and non-moving party and usually accompanies or is part of the motion.[37] This memorandum or brief should "begin with a section that contains a concise statement of material fact as to which [the] movant contends no genuine issue exists. Each fact should be supported by a reference to the particular portions of the records upon which the movant relies."[38] The memorandum should also contain evidence supporting the ***237** summary judgment.[39]

The third filing is the response to the motion for summary judgment by the non-moving party.[40] When the party opposing the motion responds, the party must include evidence to establish a material fact; otherwise, the court likely will decide that the non-moving party has admitted that there is not a genuine issue and grant the motion.[41] The non-moving party cannot merely deny the allegations; the party must present evidence that is "significantly probative" or evidence that "furnishes, establishes, or contributes toward proof."[42]

In the response, the nonmovant should respond to each of the movant's facts and provide a summary of the conflicting evidence that the nonmovant is relying on to establish a material fact.[43] The format of this memorandum or brief is similar to the memorandum or brief the moving party submitted in support of the summary judgment motion.[44] Should the non-moving party fail to respond to the motion, the court can treat the facts set forth by the moving party as admitted and enter a summary judgment against the non-moving party.[45]

Once the filings have been completed, the court will render its decision. The judge in the California Court of Appeals described in *ITT Telecom Products Corp. v. Dooley*[46] the appellate court's review of a summary judgment. In the court's review, the court

will identify the issues and identify if any of the facts are truly undisputed. If the nonmovant has developed a defense then the court will not dismiss the case, but if the court still cannot find a factual basis for the claim, then the court will dismiss the case. [47]

B. *Summary Judgment Legal Standards*

1. The "Slightest Doubt" Standard

Summary judgment first appeared in American courts in the late 1800's, but was rarely used and was limited to plaintiffs and transactions susceptible to documentary proof. [48] The procedure was officially established in 1938 in the Federal Rules of Civil Procedure as Rule 56, which was amended in 1963. As summary judgment evolved it became available to ***238** both parties, but was still rarely used for fear that summary judgment would deny a person's right to a jury trial. [49]

For nearly the first fifty years of Rule 56's existence, the federal circuits limited its use to those cases where there was not the "slightest doubt" about the relevant facts. [50] This limit resulted in great caution and little use of summary judgment by federal judges. [51] An example is *Avrick v. Rockmont Envelope Co.* [52] Avrick produced air mail stationary and owned the trademark 'Sky-Rite' for use on the stationary. Rockmont, also a producer of air mail stationary, used the term 'Sky Mail' on its stationary. Avrick brought suit in the United States District Court for the District of Colorado to enjoin Rockmont from using the term 'Sky Mail'. [53] Avrick alleged that Rockmont's 'Sky Mail' labeling resembled Avrick's 'Sky-Rite' labeling so closely that consumers would become confused. The trial court, after conducting a side-by-side analysis of the company's stationary, granted summary judgment in favor of Rockmont. Avrick appealed the grant of summary judgment to the United States Court of Appeals for the Tenth Circuit. [54] The Court of Appeals reversed the grant of summary judgment because it found that the trial court had based its judgment on a side-by-side analysis of the stationary. The Court of Appeals agreed that it was unlikely that a purchaser would become confused between the two products, but held that it was more unlikely that a purchaser would carry a sample of the products for comparison.

Several states have retained this stringent view of summary judgment, on the rationale that a narrow summary judgment standard is the most effective way to guarantee each litigant his or her right to trial. [55] For example, in *Steelvest, Inc. v. Scansteel Service Center, Inc.*, [56] the Kentucky Supreme Court distinguished Kentucky's summary judgment procedure from that of federal procedure. The Court stated that "summary judgment is proper only where the movant shows that the adverse party cannot prevail under any circumstances." [57] As discussed below, this standard differs significantly from the modern federal standard.

2. The Post-Trilogy Federal Standard

In 1986, three United States Supreme Court cases breathed new life into summary judgment. These decisions are often termed the *Trilogy* and are composed of *Matsushita Electric Industrial Co. v. Zenith,* [58] *Anderson v.* ***239** *Liberty Lobby, Inc.,* [59] and *Celotex Corp. v. Catrett.* [60] The *Trilogy* established eight general principles that allowed lower federal courts to make wider use of summary judgment to weed out frivolous lawsuits that bog down the judicial calendar. [61] These eight principles include: placing the initial burden on the movant to show an absence of a genuine issue, meeting the burden by pointing out that the non-movant lacks the evidence to support his or her claim, allowing the complete failure of proof by the non-movant of a genuine issue to render all other facts inmaterial, allowing summary judgment even when smaller issues of fact or conflict remain, making the federal directed verdict standard and summary judgment standard the same, requiring the non-movant to produce more than a "scintilla" of evidence to overcome the motion, requiring the non-movant to present affirmative evidence to defeat the motion, and deeming summary judgment appropriate when, after sufficient discovery time, the non-movant cannot demonstrate sufficient evidence to defeat the motion. [62]

The new standard following the *Trilogy* has resulted in a broader definition of summary judgment and much more common use. Some commentators, however, believe that the federal pendulum has swung too far in the direction of liberal summary judgment

standards. These commentators argue that summary judgment should be used cautiously and sparingly to avoid mistakenly dismissing a case where a genuine issue of material fact exists. [63] Other commentators, supporting the more liberal standards, argue that summary judgment should be at first base in the game of litigation which means that when litigating a case one of the initial moves a party should make is to file for summary judgment. [64] In any event, the increased use of summary judgment has affected all areas of civil litigation and has added a new obstacle to the game, particularly for pro se litigants. [65]

IV. INSTRUCTIONS ON SUMMARY JUDGMENT TO PRO SE LITIGANTS

Since most civil pro se litigants are by definition without any counsel, some courts have required less of the litigants and have been more forgiving of minor mistakes. [66] For example, in *Haines v. Kerner,* [67] the United States Supreme Court held that pro se litigants had the right to have courts liberally construe their pleadings, and specifically stated that it would hold ***240** the allegations of the pro se complaint "to less stringent standards than formal pleadings drafted by lawyers." [68]

Some jurisdictions have not awarded the pro se litigant any special treatment aside from due process rights and liberally construed pleadings. [69] Reluctance to aid pro se litigants derives from a fear of compromising a court's impartial view of the case. This fear has been criticized for limiting litigants access to the legal system. [70] Recommendations to increase access include "limiting frivolous litigation through legislation, providing legal forms in public libraries, translating forms into foreign languages, and incorporating computer technology to enhance the delivery of forms and information to the public." [71]

A. *Disfavoring Instruction*

The Eighth Circuit has held that pro se litigants are not entitled to any special privileges or instructions, because the litigants have chosen to proceed without counsel and therefore should be held to the same standard as attorneys. [72] The rationale is that it would compromise the adversary system to allow district court judges to guide the litigant through the process.

In *Beck v. Skon,* [73] the Eighth Circuit held that the district court did not owe a pro se plaintiff any instructions on the mechanics of summary judgment. [74] David Beck was a prisoner who had been shot many years earlier; the bullet was permanently lodged near his spine. While incarcerated, Beck began to experience pain, cramping, and numbness in his back and lower extremities. [75] His physicians warned him that walking and climbing stairs were exacerbating his condition, so he requested to be moved to another cell block closer to the cafeteria and infirmary. That cell block was limited only to prisoners with certain job assignments who complied with strict behavioral standards. [76] Since Beck could not hold the certain job assignments of the cell block, prison officials denied his request. The prison offered him a wheelchair or to have his meals delivered to his cell, but Beck refused without reason. Beck also suffered from a right hernia which the prison physicians offered to surgically repair once he signed the necessary medical permit forms. [77] Beck wanted to have the ***241** surgery, but refused to sign the forms and further refused to be fitted or wear a truss to stabilize the hernia. [78]

Beck then filed a § 1983 [79] action against the prison officials alleging that they violated his constitutional rights by failing to relocate him, failing to provide a prescribed medical device, and conditioning his surgery on his execution of a release of liability. [80] Prison officials filed a summary judgment motion arguing that nothing in the complaint indicated a genuine issue of fact. The district court granted summary judgment when Beck failed to respond to the motion.

Beck appealed to the United States Court of Appeals for the Eighth Circuit. Beck, though conceding that he did not ask for advice, argued that he nevertheless was entitled to advice on how to respond to the summary judgment motion. [81] The Eighth Circuit refused to impose a duty on the district court to provide a pro se litigant with instructions on summary judgment. [82] The Court of Appeals, affirming the district court's ruling, stated that Beck should be considered like any other litigant and therefore should be required to respond to the motion for summary judgment with specific factual support to avoid the judgment. [83] The

Court of Appeals also stated that given the facts, there was no evidence that Beck was denied any of life's necessities, and that Beck's disagreements with the medical staff did not establish a genuine issue of fact that would warrant a denial of the summary judgment motion. [84]

In another Eighth Circuit case, *Carman v. Treat,* [85] Robert Carman was a pro se litigant whose case was dismissed for failure to provide evidence to substantiate his claims. Carman filed a § 1983 [86] action alleging that his civil rights had been violated when prison officers assaulted him while attempting to control him in a struggle. Carman then claimed that the alleged assault was really the prison official's retaliation against him for filing the civil rights action. [87] The prison officials, believing that Carman had no basis for his claim, requested that the court punish Carman for making the allegations. Carman failed to provide evidence demonstrating that the prison officials had been responsible for the retaliation, and the district court punished Carman by dismissing his case. [88] Carman appealed ***242** the lower court's dismissal, contending that the district court had abused its discretion by imposing the sanctions based on his violations of the Rules of Civil Procedure because he was not well versed in those rules. The Eighth Circuit Court of Appeals responded that, "Carman's pro se status did not entitle him to disregard the Federal Rules of Civil Procedure." [89] Though summary judgment was not directly at issue in this case, the essential elements are similar. A pro se litigant's case was dismissed for his failure to comply with the Federal Rules of Civil Procedure, and the dismissal was upheld by the Court of Appeals despite the pro se litigant's attempts to argue his status as a mitigating factor.

Bennett v. Dr. Pepper/Seven Up, Inc., [90] a third Eighth Circuit case, is another case in which a district court refused to give special instruction to a pro se party. Claude Bennett filed an employment discrimination complaint against Dr. Pepper/Seven Up, Inc., (Dr. Pepper). [91] Prior to drafting his complaint, Bennett sought the advice of counsel, but proceeded with his claim as a pro se litigant. When discovery had closed, Dr. Pepper filed a motion for summary judgment. [92] Bennett failed to respond to the motion for summary judgment and did not contact the district court until 20 days after his response was due. Bennett telephoned the judge's chambers requesting an extension to file a response after he was advised by counsel to do so, but never filed a written request for an extension. [93] The following day, the district court granted Dr. Pepper's motion for summary judgment. Bennett then retained counsel and filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure seeking relief from the summary judgment. The district court denied Bennett's motion for relief. [94]

On appeal, Bennet argued that relief from the summary judgment was justified for excusable neglect. [95] He contended that the excusable neglect arose from his status as a pro se litigant and the district court's failure to notify him of the date his response to the summary judgment motion was due. The Eighth Circuit Court of Appeals affirmed the district court's denial of relief from summary judgment, ruling that the district court was not responsible for advising Bennett of the date. [96] The court found that Bennett was an educated man, who had sought the advice of counsel several times during the litigation, and had followed the Federal Rules of Civil Procedure until the time Dr. Pepper had filed its motion for summary judgment. The court held that Bennett could "not now argue that he ***243** should be excused from adherence to these rules because he chose to proceed pro se." [97]

B. *Favoring Instruction*

The Seventh, Eleventh, and District of Columbia Circuits have ruled that summary judgment instruction should be permitted, if not required. [98] These courts have stated that such instruction allows equal access to the court system, due process, and fairness. Courts that support instruction have argued that the instruction to pro se litigants will not "tip the scale" of the adversary system, but rather will ensure that the litigant will be heard on the merits. [99]

In *Moore v. Florida,* [100] the Eleventh Circuit granted a pro se litigant special instruction because the court concluded that such litigants should be clearly advised of their rights and duties on summary judgment motions and alerted to the possible results of their failure to respond. [101] Samuel Moore was a prisoner who developed a skin condition that was aggravated by shaving. His physicians gave him a pass excusing him from the prison shaving regimen, but Moore claimed that prison officials

ignored the pass and continued to force him to be cleanshaven. [102] Moore filed suit against prison officials as a pro se litigant, alleging violation of his First and Eighth Amendment rights. [103] The defendants filed a motion for summary judgment, which was granted by the district court when Moore failed to respond to defendants' motion. [104] The United States Court of Appeals for the Eleventh Circuit reversed the summary judgment, stating that Moore's status as a pro se prison inmate entitled him to special instruction. [105]

Similarly the Seventh Circuit has held that pro se litigants should be awarded special instruction. In *Lewis v. Faulkner,* [106] Arthur Lewis, a prisoner, alleged the denial of due process during a disciplinary proceeding against him. The defendants filed a summary judgment motion which was granted by the district court when Lewis failed to respond to the motion. [107] The Court of Appeals stated that it would be irrational to believe that a pro se litigant would have the experience or knowledge to know that when a motion for summary judgment is filed against him he must then file ***244** affidavits to contradict the defendant's motion. [108] The court also stated that it is proper to provide the pro se plaintiff with notice of the consequences of failing to respond to the summary judgment motion, since few pro se plaintiffs have a legal background. [109] This notice or instruction, the court concluded, should be provided by the trial judge presiding over the case. [110]

Many courts that have granted instructions have based their holding on *Hudson v. Hardy,* [111] a case from the United States Court of Appeals for the District of Columbia Circuit. Wayne Hudson was an inmate who filed a writ for declaratory judgment alleging that certain unjust and cruel action was taken against him without probable cause. [112] Kenneth Hardy, a named defendant and Director of the Department of Corrections, filed a motion for summary judgment. Hardy contended that no claim was stated in Hudson's complaint since the allegations related to internal prison management, and further that the affidavit submitted with the defendant's motion for summary judgment showed that prison officials had substantial justifications for their disciplinary actions. [113] The district court granted Hardy's motion for summary judgment after Hudson failed to respond to the motion.

On appeal, the D.C. Circuit ruled that requirements of the summary judgment rule may not be extended to prisoner pro se litigants with strict adherence. [114] "We hold that before entering summary judgment against appellant, the District Court, at a bare minimum, should have provided him with fair notice of the requirements of the summary judgment rule. We stress the need for a form of notice sufficiently understandable to one in appellant's circumstances fairly to apprise him of what is required." [115]

The above cases from the Seventh, Eleventh, and District of Columbia Circuits all favor providing instruction to pro se litigants on summary judgment. Collectively, these Circuits support proper notice, instruction, and warning provided to pro se litigants.

V. ANALYSIS

A. *Arguments for Special Instruction*

There are two arguments in favor of providing special instruction to the pro se litigant on summary judgment at the district court level. First, by providing instruction, the pro se litigant will have equal access to the judicial system. By refusing to provide instruction, the court is holding the pro se litigant to the same standard as an attorney. This standard is ***245** arguably unfair because the litigant does not have the same extensive legal background as an attorney. Special instructions will allow litigants to arm themseves with the necessary tools to voice their grievances and be heard on the merits.

Second, pro se litigants should not be penalized for their misfortunate circumstances requiring their pro se status. Often such litigants must proceed pro se because they either lack the necessary funds for an attorney or their case is not attractive enough to attract an attorney willing to take the case on a contingency fee. The financial burdens and the lack of a legal education are incredible burdens that pro se litigants face; courts should not exacerbate those burdens by refusing the courtesy of instruction.

B. *Arguments against Special Instruction*

There are three arguments against providing special instruction to the pro se litigant on summary judgment at the district court level.

1. Compromised Judicial Impartiality

During litigation, the judge's objective, third party perspective is vital. This impartiality allows the judge to render a decision in the case, free from personal influences and emotions. Providing instruction to the litigant could compromise the impartiality of the judge and thereby compromise the adversary system.

Currently, if a judge believes the pro se litigant requires special instruction, those instructions must come from the judge. This forces the judge to see the case through the eyes of the pro se litigant, arguably blurring the distinction between judge and advocate. The judge renders decisions and his or her decisions may become swayed if he or she must show special privileges to one of the litigating parties. However, if instructions are given via a standardized and pre-written manual, the court clerk can simply issue the manual at the beginning of the litigation, thereby providing special instruction. The judge does not have to provide individualized special instruction since the instructions are contained in the manual.

2. Burdensome

Requiring the district court judge to instruct pro se litigants on the facets of the litigation process, including summary judgment, might be too burdensome. The judge and/or the judge's clerks must spend time educating the pro se litigant about each phase of litigation. This consumes scarce judicial resources that could more productively be used elsewhere.

Currently, all of the individualized instruction requires much time and effort from the judge and the judge's staff. The judge has to sift through poorly prepared motions, provide the pro se litigant with guidance on his or her motions, and afford the pro se litigant several opportunities to correct the motions. However, if a manual is used, there is some initial preparation time, but following the manual's completion the need for the individualized instruction will be eliminated or at least reduced. Moreover, pro se litigants should be expected to “get it right” the first time because they will already have instructions. The judge will not have to handle so many insufficient motions or afford so many second chances. Thus, once the manual is introduced and distributed, there should be a significant net reduction in the judicial burden.

***246** 3. Opening the Floodgates

Pro se litigation currently is extraordinarily difficult and rarely successful. This fact tends to discourage potential litigants from proceeding pro se. If, however, the process appears easier, more potential pro se litigants will be encouraged to proceed this way, and the courts may become overburdened. [116]

This argument, however, ignores the important social value of access to justice. Fewer pro se litigants may lighten the judge's load, but the value of access to the court system is indispensable. The failure to provide pro se instruction screens out many potential pro se litigants who may have meritorious claims, but who are so intimidated by the difficulties of proceeding pro se that they are left without access to any state-sponsored forum for dispute resolution, meaning that they either go without justice or they take it into their own hands using self-help remedies. The remainder of pro se litigants are prisoners who have ample time on their hands and prison law libraries at the tips of their fingers. A pro se manual would help bridge the gap and provide access to litigants who currently are shut out of the federal judicial forum.

C. *Proposal*

This article proposes that each circuit design a handbook or reference manual focused on common problems and questions that face pro se litigants. These handbooks can provide definitions to commonly used legal terms, for instance what an objection is and when it is used or what a motion is and how motions are filed. The handbook should contain a roadmap of the judicial process explaining how a case moves from filing to the decision and the many possible side tracks it could take and why. These side tracks include summary judgment, judgment not withstanding the verdict, etc. Finally the handbooks should provide a list

of references that the litigant can use to further his or her search, for example *The Nutshell Series*, various Treatises, and internet sites. These handbooks should be written in language understandable to lay persons.

The argument against these resources would be the time needed to develop the books, the cost to produce the books, and that it is not the court's duty to provide the pro se litigant with a law school education. While the initial time required to compose the handbook may be substantial, it does not necessarily have to be the court's time. Judicial clerks or legal service programs or second and third year law school students could draft the handbook. The manual could then be submitted to the court for approval. The cost of printing these handbooks would be minimal, and could be attached to the pro se litigants filing fees. Finally, there is no comparison to the limited, or "need-to-know" material that would be contained in these handbooks to the material law students receive through their years of schooling. These handbooks would not provide a law school education, but rather provide the litigant with the bare essential tools needed.

***247** By providing these minimal resources, all interests are best served. The pro se litigant gets his or her day in court. To many litigants, this ability to be heard is all that they primarily are seeking. The court's time is not bogged down by having to stop to provide numerous explanations. While the court does have to expend some time when the handbook is written, it is merely a one-time rather than a recurring expense. The opposing counsel can better prepare his or her case with the confidence that the litigant will also now be prepared.

VI. CONCLUSION

Many pro se litigants find their cases on the courtroom floor for failure to respond to a summary judgment motion. Many of these litigants might successfully counter these motions if the litigants were armed with the proper tools. This article proposes that courts provide pro se litigants with a handbook that provides essential explanations of terms, procedures, and references to other useful sources. Such a handbook could be written voluntarily by law clerks, legal service programs, or law students, and then approved by the court for distribution. The cost to produce these handbooks could be added to the litigant's filing fees and would be minimal.

Though some pro se litigants may choose to proceed that way, most do not. Unlike criminal pro se litigants, civil litigants are rarely appointed counsel by the courts. Most civil litigants either do not have the resources to obtain counsel or their cases are not attractive enough to secure counsel through a contingency fee.

Access to the judicial system is an integral part of our country's foundation. This access can be burdensome to the court system, but remains very important. The pro se reference manual provides a compromise by decreasing the court's burden and upholding the ability to access the judicial system.

APPENDIX:

A Model of the Pro Se Reference Manual

The following is an excerpt from the proposed Pro Se Reference Manual.

Pro Se Reference Manual

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The following is a highlight from Chapter 6 of the proposed Pro Se Reference Manual.

Chapter 6. How Your Case Can Be Thrown Out

After you file your complaint, or suit, there are several different tactics that the opposing party may use, or try to use, to have your case dismissed, or thrown out. This may occur before your case reaches trial, before it reaches a verdict, or after the verdict. The four avenues that a party may use to have a case dismissed are Rule 12(b)(6), Summary Judgment, Directed Verdict, or Post-verdict Judgment as a Matter of Law. This chapter explores each of these tools and how you can try to keep your case alive.

A. Rule 12(b)(6)

Rule 12(b)(6) derives its name from the Federal Rules of Civil Procedure which you will remember from chapter 1 is the rule handbook that the court uses as a guide much like a game rule book. Rule number 12, section b, allows the dismissal of a case based on incorrect or insufficient pleadings. This means that the opposing party believes that the pleadings, which are the papers you filed when you filed your suit, did not follow the specific rules contained in the Federal Rules of Civil Procedure. Some common mistakes that can result in the dismissal of a claim include lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, insufficient process, and insufficient service. These elements of the pleadings are explained in Chapter 5 of this manual. The opposing party can file a motion stating his or her complaints with your pleadings anytime after you file your complaint. The judge will make his or her decision by looking only at your pleadings to see if they follow the rules and not at whether the facts you allege are true or not.

If you find that you have made a mistake in your pleading, you often may amend your pleading to correct the mistake. The federal rule pertaining to amended pleading is Rule 15. A litigant may amend his or her pleading one time before the opposing party files its response and the case is placed on the court's calendar, or amend anytime within 20 days after the litigant files his or her pleading. Once these windows of opportunity to amend have closed, a party must seek the court's permission or the written consent of the opposing party to amend. This is accomplished by filing a motion for leave to amend explaining the proposed amendment and the reasons for it. It is advisable to attach to this motion a copy of the amendment you are proposing.

To protect yourself from dismissal under Rule 12(b), make sure you understand and follow the Federal Rules of Civil Procedure. You will also ***249** want to check the specific rules of the court where your case is being heard (these are called “local rules”). Once you have written your complaint, you may want to have it checked by someone from your local legal services.

B. Summary Judgment

Summary Judgment can also be found in the Federal Rules of Civil Procedure as Rule 56. This rule allows courts to identify and throw out those cases that are without merit. This method is different from Rule 12(b)(6) because that method allows a dismissal on poorly prepared pleadings; in this method the pleadings may be well-prepared but the claim is poor. At any time after twenty days have passed after you file your complaint, the opposing party may file a summary judgment motion. The opposing party is usually referred to as the movant, because the movant is the party seeking the judgment, and you are usually referred to as the non-movant, because you oppose the judgment. When the movant files its motion for summary judgment, the movant is alleging that your pleadings do not contain a genuine issue as to any material fact and therefore the movant is entitled to summary judgment to dismiss your case as a matter of law. A material fact is one that would affect the outcome of the case; for example in a discrimination case the actions that lead a party to believe she has been discriminated against are material facts. A genuine issue is an issue based on the material facts that would allow a jury to return a verdict in favor of the complaining party.

Once you receive notice that the movant has filed a summary judgment motion, you must respond with memo or brief that contains evidence establishing a material fact regarding each element of your case that the movant argues is deficient. You should use an affidavit, a deposition, or other sworn statement to establish a material fact. An affidavit is a voluntary declaration that is sworn as the truth by the affiant, who is the person making the declaration. The affidavit must be based on personal knowledge, must state specific facts admissible in evidence, and must be offered by a competent affiant. If you fail to respond to the movant's motion, then the judge will assume that you have admitted that there is no genuine issue in dispute and will dismiss the case. If you ask the judge to do so, the judge may wait to make a decision until the discovery period has ended to enable you time to find the evidence you need to establish the genuine issue of fact. Remember, however, that if you do not respond to a summary judgment motion, your case will be dismissed.

C. Directed Verdict

A directed verdict, or Judgment as a Matter of Law, is sought by a party after the opposing party's case has been presented at trial. This judgment is Rule 50(a) in the Federal Rules of Civil Procedure. The party seeking the judgment alleges that the other party's evidence presented at trial cannot sustain a verdict in their favor. These judgments are granted to save the court's time when it is clear that there is no hope of a favorable verdict for the opposing party.

D. Post-verdict Judgment as a Matter of Law

This judgment is Rule 50(b) in the Federal Rules of Civil Procedure. The rule operates to dismiss a case after the jury has returned a verdict that is ***250** not supported by the evidence. The judge then enters this judgment, changing the verdict, because of insufficient evidence presented at trial.

Footnotes

a1 Northern Kentucky University, Salmon P. Chase College of Law, J.D. anticipated May 2004. Special thanks to Chief Justice Joseph E. Lambert of the Kentucky Supreme Court. Chief Judge Karl S. Forester of the United States District Court for the Eastern District of Kentucky, Judge William O. Bertelsman of the United States District Court for the Eastern District of Kentucky, and Judge R.W. Dyche, III of the Kentucky Court of Appeals. Though several of these judges disagreed with our conclusions, all of them offered valuable insights to the topic. Special thanks to Hon. Warren N. Scoville and Mrs. Holly Hopkins Scoville. Dedicated to Jason C. Bonham for his never-ending support.

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1 *See generally* Julie Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. Chi. L. Rev. 659 (1988); *see also* Jessica Case, Note, *Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?*, 90 Ky. L. J. 701 (2002); Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice*, 10 Family C. Rev. 36 (2002); Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 Notre Dame J. L. Ethics & Pub. Pol'y 475 (2002); Edward Holt, *How to Treat "Fools": Exploring the Duties Owed to Pro Se Litigants in Civil Cases*, 25 J. Legal Prof. 167 (2001); Helen Kim, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard*, 96 Yale L. R. (1987); Joseph McLaughlin, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 Fordham L. Rev. 1109 (1987); Spencer Park, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 Hastings L. J. 821 (1997).

2 *See* Park, *supra* note 1.

3 *See* Bradlow, *supra* note 1.

4 *See generally* Robert M. Bratton, *Summary Judgment Practice in the 1990's: A New Day Has Begun-Hopefully*, 14 AM. J. Trial Advoc. 441 (1991); *see also* Edward Brunet, *The Timing of Summary Judgment*, 198 F.R.D. 679 (2001); Judge David Hittner & Lynn Liberato, *Summary Judgment in Texas*, 54 Baylor L. Rev. 1 (2002); Robert W. Parnacott, *A Practitioner's Guide to Summary Judgment*, 67-Dec. J. Kan. B. A. 36 (1998); Patricia M. Wald, *Federal Practice and Procedure Symposium: Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897 (1998); Heather C. Wright, *Kentucky's Strict Summary Judgment Standard in Light of the Supreme Court's Ruling in Steelvest, Inc. v. Scansteel Service Center*, 82 Ky. L. J. 969 (1993).

5 *See* McLaughlin, *supra* note 1.

6 *See* Beck v. Skon, 253 F.3d 330 (8th Cir. 2001).

7 *See* Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982).

8 *See* Moore v. Florida, 703 F.2d 516 (11th Cir. 1983).

9 *See* Hudson v. Hardy, 412 F.2d 1091 (D.C. Cir. 1968).

10 *See* Goldschmidt, *supra* note 1, at 36.

11 *See* 28 U.S.C. § 1654.

12 *See id*.

13 *See* Case, *supra* note 1, at 701.

14 *See* Hershkoff, *supra* note 1, at 476.

15 *See id*.

16 *See id*.

17 *See id*. at 2.

18 *See id*.

19 *See id*.

20 *See* Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

21 *See* Kim, *supra* note 1, at 1641-1642.

22 *See* Vicki Zick, *Reshaping the Constitution to meet the Practical Needs of the Day: The Judicial Preference for Binding Arbitration*, 82 Marq. L. Rev. 247 (1998).

23 *See* Hershkoff, *supra* note 1, at 476.

24 *See id*.

25 *See* Fed. R. Civ. P. 56.

26 *See id*.

27 *See* Bratton, *supra* note 4, at 442.

28 *See id*.

29 *See* Fed. R. Civ. P. 56.

30 *See id*.

31 *See* Parnacott, *supra* note 4, at 37.

32 *See id*. at 37-38.

33 *See id*.

34 *See* Fed. R. Civ. P. 56; *see also* Brunet, *supra* note 4, at 682.

35 *See* Fed. R. Civ. P. 56.

36 *See id*; *see also* Parnacott, *supra* note 4, at 37.

37 *See* Fed. R. Civ. P. 56; *see also* Parnacott, *supra* note 4, at 39.

38 *See* Parnacott, *supra* note 4, at 39-40.

39 *See* Fed. R. Civ. P. 56.

40 *See id*; *see also* Parnacott, *supra* note 4, at 41-43.

41 *See* Fed. R. Civ. P. 56; *see also* Parnacott, *supra* note 4, at 42.

42 *See* Parnacott, *supra* note 4, at 42.

43 *See* Fed. R. Civ. P. 56; *see also* Parnacott, *supra* note 4, at 43.

44 *See id*; *see also* Parnacott, *supra* note 4.

45 *See* Fed. R. Civ. P. 56; *see also* Parnacott, *supra* note 4, at 42.

46 *See* 262 Cal. Rptr. 773, 775 (Cal. App. 1989).

47 *See id*.

48 *See* Wright, *supra* note 4, at 971.

49 *See id*.

50 *See* Wald, *supra* note 4.

51 *See id*. at 1900.

52 *See* 155 F.2d 568 (C.A.10 1946).

53 *See id*.

54 *See id*.

55 *See id*.

56 *See* 807 S.W.2d 476 (Ky. 1991).

57 *See id*.

58 *See* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

59 *See* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

60 *See* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

61 *See* Wald, *supra* note 4, at 1904.

62 *See* Wright, *supra* note 4, at 974-976.

63 *See id*.

64 *See* Wald, *supra* note 4, at 1904.

65 *See id*.

66 *See* Bradlow, *supra* note 1, at 664.

67 *See* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

68 *See id*.

69 *See id*.

70 *See id*. at 664-667.

71 *See* Holt, *supra* note 1, at 170.

72 *See* Beck v. Skon, 253 F.3d 330 (8th Cir. 2001).

73 *See id*.

74 *See id*.

75 *See id*.

76 *See id*. at 330.

77 *See id*.

78 *See id*. at 330-331.

79 *See* 42 U.S.C. § 1983.

80 *See id*.

81 *See id*.

82 *See id*. at 333.

83 *See id*. at 332.

84 *See id*. at 333.

85 *See* 7 F.3d 1379 (8th Cir. 1993).

86 *See* 42 U.S.C. § 1983.

87 *See id*.

88 *See id*.

89 *See* 7 F.3d at 1381.

90 *See* 295 F.3d 805 (8th Cir. 2002).

91 *See id*. at 806.

92 *See id*.

93 *See id*. at 806-807.

94 *See id*. at 807.

95 *See id*.

96 *See id*.

97 *See id*. at 807.

98 *See* Moore v. Florida, 703 F.2d 516 (11th Cir. 1983); *see also* Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982); Hudson v. Hardy, 134 U.S. App. D.C. 44, 412 F.2d 1091 (D.C. Cir. 1968); Ham v. Smith, 653 F.2d 628 (D.C. Cir. 1981).

99 *See* McLaughlin, *supra* note 1, at 1113.

100 *See Moore*, 703 F.2d 516.

101 *See id*.

102 *See id*.

103 *See id*.

104 *See id*. at 518.

105 *See id*. at 521.

106 *See* Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982).

107 *See id*.

108 *See id*.

109 *See id*. at 102.

110 *See id*. at 102.

111 412 F.2d 1091 (D.C. Cir. 1968).

112 *See id*. at 1093.

113 *See id*.

114 *See id*. at 1094.

115 *See id*. at 1095.

116 "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Anatole France, Le Lys Rouge ch. VII (1894).

214 F.R.D. 231