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STRATEGIES FOR DEALING WITH SELF-REPRESENTED LITIGANTS

JONA GOLDSCHMIDT*

The numbers of self-represented litigants (SRLs) has been rising steadily since the late 1990s, both in the U.S.¹ and in the Commonwealth countries.² At one time, SRLs were found primarily in traffic, criminal, landlord-tenant, and small claims courts. While precise data on the distribution of SRLs across courts and case types is sparse, the existing data show a growing number are now finding their way into family courts for divorces or post-judgment relief.³ Courts as an institution have met this challenge and adopted a variety of strategies, such as instructional clinics, simplified court forms, video-taped introductions to the court system, and self-help centers,⁴ to aid SRLs in participating in the litigation process.

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1. See Ayn H. Crawley, *Helping Pro Se Litigants to Help Themselves*, <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/HelpThemselves.pdf>, (collecting U.S. trend data, and stating that “[i]t is the common experience of most court system [sic] in the United States that there has been a rising tide of pro se litigants flooding a justice system designed, in large part, for the traditional full representation model.”); Madelyn Herman, *Self-Representation: Pro Se Statistics*, (March 25, 2006) <http://www.ncsconline.org/WC/Publications/Memos/ProSeStatsMemo.htm> (hereafter *Pro Se Statistics*) (collecting data on SRLs in state, state appellate, federal courts, and remarking that “[c]ourts are continuing to see an increase in the numbers of litigants who represent themselves. Self-represented litigants are most likely to appear without counsel in domestic-relations matters, such as divorce, custody and child support, small claims, landlord/tenant, probate, protective orders, and other civil matters”).

2. See Richard Foster, *Australian Experience with self-represented Litigants (SRLs) – A Family Court Perspective*, 21st Meeting of the Austl. Inst. of Jud. Admin., Freemantle, Western Australia, Sept. 19 - 21, 2003, <http://www.aija.org.au/ac03/papers/RichardFoster.rtf> (“Self-represented litigants are indeed a growing phenomenon in Australian courts and are no doubt here to stay. While we still do not have an accurate picture of the numbers, we know they are increasing in all jurisdictions.”); CBCNews.Com, *Self-Representation Causing Chaos in Courts: Chief Justice*, Aug. 12, 2006, <http://www.cbc.ca/canada/story/2006/08/12/court-representation.html>, (“Nearly half of Canadians are choosing to represent themselves at trial because of steep legal fees, creating a lack of acceptable representation, the country’s top judge said Saturday.”).

3. See Herman, *Pro Se Statistics*, *supra* note 1 (reporting data showing SRLs in some counties make up 81 percent of divorce litigants in Utah, 58 percent in Iowa, 70 percent in New Hampshire, 73 percent in Florida, 72 percent in Wisconsin, and 75 percent in Boston).

4. See www.selfhelpsupport.org, a clearinghouse for information about pro se assistance programs and the National Center for State Courts, *Access and Fairness: Self-Representation Resource Guide*, <http://www.ncsconline.org/wc/CourTopics/ResourceGuide.asp?topic=ProSe> (collecting a wide range of materials, including program information from many jurisdictions).

The flood of SRLs in our courts is expected to increase even further as a by-product of enhanced means of access to justice. While this causal relationship has not been empirically tested, the National Center for State Courts⁵ reports that it is now receiving more information requests about self-representation and the legal process from individuals and the media than from its traditional clients, the courts and court administrators.⁶

Although courts have implemented policies, programs, and organizational changes to handle the growing number of SRLs, little guidance has been given to attorneys to prepare them for their inevitable interactions with this new kind of adversary. In this brief discussion, I present some practical strategies for attorneys who may oppose an SRL on behalf of their clients. But before presenting these strategies, it is useful to keep in mind that there is no one type of SRL. Thus, any suggested strategy must be adapted to the nature of the SRL against whom one may be litigating.

The existing literature on the subject appears to have been written based upon the authors' frustrating experiences litigating against SRLs in federal courts,⁷ which is not where most SRLs are found.⁸ It is possible that SRLs in federal courts—with the exception of bank-

See also Jona Goldschmidt, Barry Mahoney, Harvey Solomon, & Joan Green, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 72-104 (1998) [hereafter, MEETING THE CHALLENGE] (describing fourteen *pro se* assistance programs).

5. The mission statement of this non-profit organization in Williamsburg, Virginia, states, *inter alia*, that "[t]hrough original research, consulting services, publications, and national educational programs, [the] NCSC offers solutions that enhance court operations with the latest technology; collects and interprets the latest data on court operations nationwide; and provides information on proven 'best practices' for improving court operations." http://www.ncsconline.org/D_About/index.htm (last visited January 31, 2008).

6. William Downs, *Where We've Been: Pro Se Information Trends*, <http://www.ncsconline.org/WC/Publications/Trends/2004/ProSeWhereTrends2004.pdf>.

As AOCs [administrative offices of courts] develop more comprehensive and effective programs for pro se litigants, more people will decide to go to court pro se. Naturally, this will increase the public interest in pro se litigation and the amount of media devoted to pro se litigants. These changes will shift the issues the courts will have to address in the future to include dealing with larger numbers of pro se litigants and fine tuning their programs so that no pro se litigant is denied access to justice. The National Center should expect more information requests from private citizens asking for legal assistance, legal information, or information on unbundling as going to court pro se becomes easier and more acceptable. The AOCs and court staff members will make more information requests about ensuring access to the larger and more diverse group of people who are pro se litigants.

7. The best articles (and the only ones I have found) on the subject are Cornelius D. Helfrich, *Facing a Pro Se Litigant*, THE COMPLETE LAWYER 41- 43 (Summer 1997); Scott L. Garland, *Avoiding Goliath's Fate: Defeating a Pro Se Litigant*, 24 LITIG. 45-67 (Winter 1998); and Paul B. Zuydhoeck, *Litigation Against a Pro Se Plaintiff*, 15 LITIG. 13, 15 (Summer 1989).

8. In 2006, of all pro se cases filed in the federal courts, only 19,468, or 28 percent, were filed by non-prisoners. Admin. Office of the U.S. Cts., 2006 ANNUAL REPORT OF THE DIRECTOR, Table S-24, *Civil Pro Se & Non-Pro Se Filings, by District*, <http://www.uscourts.gov/judbus2006/tables/s24.pdf> (Data showing the distribution of SRLs across case types is not reported).

rupts—are mavericks, a “special breed” of SRL who are willing to navigate the labyrinth of federal court rules and procedures for some personal cause or political agenda. These SRLs are often lumped together by judges and court staff into the category of “pests” or “kooks.”⁹ As one commentator who litigated against one of these SRLs put it, “Most lawyers would volunteer to be flogged with a cat-o’-nine-tails before offering to try a case against an unrepresented litigant.”¹⁰ Another commentator noted that prevailing against an SRL “will admit you to a special club of paranoid trial lawyers: those who appreciate the difficulties of pro se litigation.”¹¹ Federal court litigators who have encountered litigious SRLs may be able to relate to the following characterization:

Pro se plaintiffs usually are zealots, adopting tactics for which lawyers would be sanctioned. They forum-shop with glee, file multiple frivolous motions and appeals, refuse to respond to discovery requests, and try to extort settlements. But—and this is the source of much frustration—judges justifiably tolerate such conduct and stretch whenever possible to assist such plaintiffs. In this environment, traditional defense strategies likely will fail. Blunders and miscues that would be fatal for a represented plaintiff will not necessarily doom a pro se litigant. Defense attorneys must revise their usual tactics.¹²

The reality, however, is that the average SRL in state court is not a “pest” or “kook.” The available data on the characteristics of SRLs show that these litigants are generally from a lower income bracket, tend to be young, and have some college-level education.¹³ They are

9. MEETING THE CHALLENGE, *supra* note 4, at 60.

10. Helfrich, *supra* note 7, at 41.

11. Zuydhoek, *supra* note 7, at 61.

12. *Id.* at 14. The litigant against whom attorney Zuydhoek defended against was a “Reverend Jackson, a non-lawyer who claimed to have a law degree from a correspondence school.” *Id.* at 13. As SRLs go, it is safe to say that the most litigious are likely to be those with some legal experience. The description of this litigation with Rev. Jackson would place him in the “kook” category, which is not the typical pro se litigant. Zuydhoek further describes such litigants, without distinguishing the “kooks” from all other SRLs, as having certain “predictable characteristics”:

Their allegations have no merit; either they obviously fail to state a claim or the claim has no factual foundation—or one firmly grounded in fantasy. Such plaintiffs are persistent. They never tire. In fact, their persistence is their central characteristic: For the people I am talking about, protracted litigation is an important aspect of life. It may range from a hobby to an obsession.

Id. at 14.

13. Bruce D. Sales, Connie J. Beck & Richard K. Haan, *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553, 561-62 (1993) (based on a sample of 273 pro se divorce litigants in Maricopa County, Arizona). While aggregate data collection on the volume of pro se litigation is increasing as more courts study the phenomenon, little empirical research beyond the Sales, et al., study has been conducted on the personal characteristics of SRLs. See MEETING THE CHALLENGE, *supra* note 4, at 11-13 (reporting the results of three additional surveys: (1) a 1996 study by the New York State Bar Association that concluded they are “better educated and on the more highly compensated end of the

generally seeking divorces or other forms of garden-variety judicial relief, and are not litigating because they enjoy doing so.¹⁴

Despite the generally negative attitude evidenced by commentators, there are many principles that can be drawn from the available literature, applicable rules of legal and judicial ethics, and common sense. These principles and strategies will greatly benefit practitioners who must interact with SRLs, the SRLs themselves, and the justice system.

I. ETHICAL ISSUES

A. Legal Ethics

1. Communication with the Self-Represented Litigant

Many attorneys are under the misconception that legal ethics rules require that their personal interactions with SRLs must be minimal and detached. In fact, attorneys are permitted to engage with SRLs as they would with any opposing counsel. Interactions between attorneys and SRLs are primarily governed by Rule 4.3 of the ABA Model Rules of Professional Conduct (2007), entitled *Dealing with an Unrepresented Person*.¹⁵ That rule states:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a

middle-income spectrum"; (2) a 1997 evaluation of the Maricopa County Self-Service Center which found that the typical use of the center was a first-time SRL who filed for divorce or divorce-related relief, had an annual income under \$40,000, and completed high school and some college, with 18 percent of such users having a college degree or some graduate study; and (3) a 1995 California study that found that "it appears that a significant portion of the family *pro pers* [the term California uses to refer to SRLs] in California are not poor and not poorly educated."). See also, John M. Greacen, *Self-Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know* 3 (2002), http://www.courtinfo.ca.gov/programs/cfcc/pdf/files/SRL_whatwewknow.pdf ("We have poor data on who is self-represented.").

14. *Id.*

15. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2007). The 1983 version of Rule 4.3 (which was resolved in the 2003 amendments) generated numerous court and ethics opinions regarding such issues as what constitutes "misleading" the unrepresented person, what protocol is necessary when an attorney interviews unrepresented employees of corporations or other organizations, whether a lawyer may submit documents to the unrepresented party for signature, and the distinction between giving an unrepresented person information versus legal advice. See ABA Ctr. for Prof'l Responsibility, ANNOTATED MODEL RULES OF PROF'L CONDUCT, 409-12 (3d ed. 1996).

reasonable possibility of being in conflict with the interests of the client.¹⁶

It is fair to say that a plaintiff SRL will know the role of counsel when he or she enters an appearance for the defendant client, or *vice versa*, when counsel's name appears on pleadings in a case brought against a self-represented defendant. Nevertheless, prudent counsel will take the "reasonable effort" of preceding all communications with a SRL by way of a cautionary admonition – preferably in writing – providing the information required by Rule 4.3.

According to Rule 4.3, Comment 1:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).¹⁷

What exactly does the Rule 4.3 prohibition against providing "legal advice" to SRLs mean?¹⁸ Comment 2 of Rule 4.3 provides as follows:

16. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2007). Practically speaking, the advice to obtain counsel will fall on deaf ears, inasmuch as the SRL in most cases has already been unable or is unwilling to secure counsel due to the high cost of legal services, the non-meritoriousness of the case which made it impossible to secure counsel, or because the SRL is of the view that he or she can handle the case himself.

17. MODEL RULES OF PROF'L CONDUCT R. 4.3, cmt. 1; MODEL RULES OF PROF'L CONDUCT R. 1.13(f) provides, "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." *Id.* at R. 1.13(f).

18. *Cf.*, John M. Greacen, *Legal Information vs. Legal Advice: Developments During the Last Five Years*, 84 JUDICATURE 198-204 (2001), and John M. Greacen, *No Legal Advice from Court Personnel: What Does That Mean?* 34 THE JUDGES' JOURNAL 10-15 (1995), both of which address the same question in the context of nonlawyer court clerks' communications with SRLs. In the 1995 paper, Greacen states:

Neither of these distinctions—advice versus information—is satisfactory for the poor deputy clerk who needs to decide whether to answer a question. Cases are often won or lost on procedural issues. It is hard to know what is information, when an inquiring citizen is clearly going to rely and act on what you say.

The author suggests adoption of the following principle:

Court staff have an obligation to inform litigants, and potential litigants, how to bring their problems before the court for resolution. It is entirely appropriate for court staff to apply their specialized expertise to go beyond providing generalized information (how do I file a lawsuit?) to giving detailed procedural guidance (how do I request a hearing?). What does the court like to see in an application for fees, a motion for default, a child support enforcement order, a motion to suppress evidence, or an application for letters testamentary?

Any advice that a court staff member gives, which is limited to this purpose and function, is appropriate—including the provision of references to applicable rules, statutes or court precedents, the supplying of forms or examples of pleadings commonly used by other counsel, or the articulation of the reasons for the court's preferring a particular process. Such

The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.¹⁹

Thus, Rule 4.3 prohibits attorneys from giving "legal advice" to SRLs without defining it, while Comment 2 inaccurately refers to that provision by stating that it "prohibits the giving of *any* advice" apart from the advice to obtain counsel.²⁰ Thus, not only is "legal advice" undefined, the distinction between "legal advice" and "advice" is unexplained, and no reference is made to "legal information." The language in Comment 2 indicating that "impermissible" advice shall be determined in part based upon the "experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur" does little to clarify the attorney's duties in this regard.²¹

Fortunately, however, Comment 2 expressly permits attorneys dealing with SRLs to negotiate with them the terms of a transaction, settle a dispute, prepare documents for their signature, explain the meaning of the documents to them, and offer a "lawyer's view of the underlying legal obligations."²² This language essentially places the SRL in the same position as an opposing counsel. The last phrase in Comment 2, permitting an explanation of the lawyer's view of the "under-

advice is helpful to the party receiving it. The party might have committed a fatal procedural mistake if it had not gotten such advice. But the fact that it is helpful does not make it improper. The court system has an interest in seeing that disputes are decided on their merits. Court staff should help litigants use procedures to reach that end, not erect them as hurdles over which court users will stumble.

Id. at 14.

19. MODEL RULES OF PROF'L CONDUCT R. 4.3 cmt. 2.

20. *Id.* and MODEL RULES OF PROF'L CONDUCT R. 4.3.

21. MODEL RULES OF PROF'L CONDUCT R. 4.3 cmt. 2.

22. *Id.*

lying legal obligations,” appears to permit a lawyer to give his legal opinion respecting the legal obligations of the parties.²³ Thus, lawyers dealing with an SRL have great latitude insofar as communications with an SRL, but they may not go so far as to say, “I would advise you to . . .” Attorneys can explain legal procedures and requirements—which would constitute legal information, not advice—and otherwise paint the “legal picture” for the SRL about a pending matter by stating their view of the respective “legal obligations” of the parties. If understood properly, this transfer of legal information will not only educate the SRL, but make it more likely that she will see the “writing on the wall” resulting in a greater likelihood of settlement or, if necessary, a more amicable litigation process.²⁴ The “critical need” for SRLs in family court, one commentator notes, is not for legal advice, but for legal information regarding the litigation process, rules of procedure, and post-trial remedies.²⁵

23. *Id.*

24. Several other provisions of the Model Rules of Professional Conduct provide additional guidance for the attorney dealing with an SRL. These include the provisions in the Preamble stating that every lawyer is, *inter alia*, “an officer of the legal system” (MODEL RULES OF PROF’L CONDUCT preamble, at ¶ 1) who, as a negotiator, “seeks a result advantageous to the client but consistent with requirements of honest dealings with others” (*Id.* at ¶ 2). The lawyer “should use the law’s procedures only for legitimate purposes and not to harass or intimidate others” (*Id.* at ¶ 5). Lawyers “should seek . . . access to the legal system . . .,” and “should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance” (*Id.* at ¶ 6). Lawyers are required to maintain “a professional, courteous and civil attitude toward all persons involved in the legal system” (*Id.* at ¶ 9). Rule 3.4, entitled “Fairness to Opposing Party and Counsel,” provides additional duties, including prohibitions upon unlawfully obstructing a party’s access to evidence, or altering, destroying, or concealing evidence; falsifying evidence, or counseling or assisting a witness to testify falsely; disobeying obligations under the rules of a tribunal; making frivolous discovery requests, or failing to diligently respond to discovery requests; alluding to matters at trial not reasonably relevant or admissible, asserting personal knowledge of facts unless testifying, or stating personal opinions regarding the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or requesting a person other than a client to refrain from giving testimony, unless the person is a relative, employee or other agent of the client, or where the lawyer reasonably believes the person’s interests will not be adversely affected by refraining from giving such information. Model Rules of Prof’l Conduct R. 3.4. *See also* Rule 4.1, entitled “Truthfulness in Statements to Others,” which prohibits knowingly making a false statement of material fact or law to a third person, or failing to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless such fact is confidential. *Id.* at R. 4.1.

25. Paula L. Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 39 CT. REV. 8, 13 (2003):

From an examination of the specific tasks involved in pursuing litigation, it becomes clear that access to legal information is the most critical need of self-represented litigants in the vast majority of cases. Legal judgment—the reasonable inferences that an experienced legal professional makes based on available information—can be critical to litigants in more complicated cases in which the sheer volume and complexity of legal information requires more time than the average layperson can commit to preparing his or her own case. But in less complex cases, self-represented litigants are typically able to make reasonable inferences from legal information, and thus the need for access to legal advice can be very helpful, but is not absolutely necessary. The question then becomes who is best situated to provide accu-

2. Self-Representation and Ghostwriting

Another emerging legal ethics issue affecting litigators with SRL adversaries arises from the growing practice of ghostwriting, i.e., the drafting by behind the scene attorneys of pleadings or other court papers for SRLs. These ghostwriting attorneys offer “unbundled” legal services, a form of permissible limited representation.²⁶ The ghostwriters are often undisclosed for a variety of reasons.

The major reason for non-disclosure is the fact that attorneys providing this service are not paid enough to provide full representation. They know that to place one’s name on a pleading will be considered by the court as an entry of appearance and obtaining leave to withdraw from a pending matter for financial reasons is often difficult. In the absence of rules specifically permitting limited representation in certain types of litigation,²⁷ litigators know that courts rarely allow counsel to withdraw from a pending matter for financial reasons. Additionally, the SRL or the ghostwriter may simply want to keep the fact of their relationship, or the identity of counsel, confidential as they have a right to do.

Unfortunately, federal courts – despite any specific prohibition upon the practice – uniformly disfavor undisclosed ghostwriting, despite its benefit to SRLs of modest means.²⁸ The practice is said to constitute a violation of the attorney’s duty of candor to the tribunal, the prohibition against making a misrepresentation to the court, a violation of the prohibition against assisting a client in making a misrepresentation to the court, a violation of Fed. R. Civ. P. 12, and generally gives the SRL – supposedly the beneficiary of liberal treatment to which he or she would not be entitled if they received ghost-

rate legal information to self-represented litigants, and to encourage litigants to seek legal advice in appropriate circumstances.

Id.

26. MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (“A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”). The term “unbundled” refers to providing discrete-task legal services rather than full representation, first proposed by Beverly Hills, California, attorney Forrest Mosten as a means of enhancing access to justice for persons of moderate means. See Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 Fam. L.Q. 421 (1994) (proposing that a cafeteria-style form of limited legal representation, allowing clients of limited means to select which service(s) they want, thus empowering them by the act of making this decision, and also benefitting attorneys who are willing to service this niche population); Forrest S. Mosten, *UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERY OF LEGAL SERVICES A LA CARTE* (2000).

27. Limited representation rules to regulate the growing availability of unbundled legal services have been adopted by statute and/or court rule in thirteen states to date: Alaska, Arizona, California, Colorado, Connecticut, Iowa, Massachusetts, Maine, Missouri, North Carolina, Utah, Vermont, and Washington.

28. I have found no state court decisions addressing the ethics or legality of ghostwriting.

writing assistance – an “undue advantage” over the represented party.²⁹

I have elsewhere pointed out the deficiencies of these arguments, arguing that limited representation is expressly permitted by legal ethics codes, and suggesting that the real factors motivating these early federal court views include (1) the novelty of the practice at the time, (2) confusion of the court and the adverse party as to whether the ghostwriter was or was not representing the SRL (and to whom notices should be sent), and (3) the desire by the represented party’s attorney (who was the one complaining about the practice) to prevent the SRL from gaining any assistance that would level the playing field between the parties.³⁰ Both the ABA and the Arizona ethics committees recently agreed, finding that – absent any court rule or statute prohibiting undisclosed ghostwriting – the practice does not violate any of the rules of professional responsibility.³¹

Nevertheless, litigators in states that do not yet regulate limited representation may have occasion to deal with SRLs who receive ghostwriting (or “coaching”) assistance. They are free, of course, to complain about it to the court, citing the aforementioned federal court decisions and spending their time and their client’s money arguing (incredulously, in my view) that they are being unfairly disadvantaged by their SRL adversary.

A more prudent and economical approach would be to simply communicate with the SRL to determine the fact and scope of the limited representation. Counsel can thereby confirm whether ghostwriting is occurring, determine whether they may or should communicate directly with the ghostwriter or “coaching” attorney, and, if so, over what particular matters and at what times. Absent instructions to the contrary from their undisclosed attorney, notices and communications should continue to be transmitted directly to the SRL. There is no

29. See, e.g., *Johnson v. Bd. of County Comm’rs*, 868 F. Supp. 1226 (D. Colo. 1994), *aff’d on other grounds*, *Conn. Light & Power Co. v. Sec’y of U.S. Dep’t of Labor*, 85 F.3d 89 (2d Cir. 1996); *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075 (E.D.Va. 1997); *Duran v. Carris*, 238 F.3d 1268 (10th Cir. 2001). Cf. CODE OF CONDUCT FOR UNITED STATES JUDGES, CANON 5(F) (prohibiting judges from practicing law, but permitting judges to “give legal advice to and draft or review documents for a member of the judge’s family.”); Richard Posner, *OVERCOMING LAW* 57 (Harvard University Press, 1995) (“[A] majority of the Supreme Court’s opinions [are] being written by law clerks; today, a judge written opinion, at any level of the American judiciary, is rare.”); Lisa G. Lerman, *Misattribution in Legal Scholarship: Plagiarism, Ghostwriting, and Authorship*, 42 S. TEX. L. REV. 467, 468 (2001) (“A law school graduate who becomes a judicial clerk probably will spend a year or two ghostwriting for a judge.”).

30. Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145 (2002).

31. See ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-446 (May 5, 2007) (available at http://www.abanet.org/media/youraba/200707/07-446_2007.pdf) (last visited Feb. 2, 2008); Arizona State Bar Comm. on the Rules of Prof’l Conduct, Op. 05-06 (July 2005) (<http://www.myazbar.org/Ethics/opinionview.cfm?id=525>) (last visited Feb. 2, 2008).

need to make a “federal case” out of the fact of undisclosed pro se assistance; it is more likely to benefit the parties and the court by way of better-crafted pleadings, it will keep the SRL within the bounds of ordinary litigation, and raises the likelihood that the SRL is at least getting some legal advice which will keep him or her from becoming the proverbial “pest” or “kook.”

B. *Judicial Ethics*

In litigating against SRLs, lawyers must recognize that judges have a constitutional duty to provide parties, as a matter of due process, with a “meaningful opportunity to be heard.”³² In addition, they have several ethical duties which arise during the litigation process.

Judges must “uphold and promote the . . . impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”³³ For many years judges felt themselves in a quandary when presiding over “mixed cases,” that is, cases involving a represented and an unrepresented party. They realized that they had to maintain their impartiality, but they also knew that there were instances in which – in order to avoid possibly harsh results – they had to provide SRLs with information and certain guidance in order to meet their constitutional obligation.³⁴

In February 2007, the ABA addressed this issue by revising the *Model Code* to include the following comment to Rule 2.2: “It 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.”³⁵ This provision constitutes a sea change in judicial ethics, which many commentators and pragmatic judges believed was necessary in order to avoid claims of bias on the part of represented parties and their attorneys whenever judges provided minimal assistance to SRLs.³⁶

32. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

33. See MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007) (MCJC), http://www.abanet.org/judiciaethics/ABA_MCJC_approved.pdf (last visited Jan. 31, 2008). See also MODEL CODE OF JUDICIAL CONDUCT Canon 2 (requiring that judges perform the duties of their office “impartially, competently, and diligently”); and MODEL CODE OF JUD. CONDUCT R. 2.2 (requiring judges to “perform all duties of judicial office fairly and impartially”).

34. See MEETING THE CHALLENGE, *supra* note 4, at 52-61 (reporting the results of a national survey of state judges indicating that this is the central problem in pro se litigation with which they were concerned).

35. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 4 (2007), http://www.abanet.org/judiciaethics/ABA_MCJC_approved.pdf.

36. Judges are loath to provide any assistance often cite *McKaskle v. Wiggins*, 465 U.S. 168, 183-84 (1984), in which the Supreme Court stated that, in the context of a criminal trial, “[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

The implications of this new development in judicial ethics remain to be seen. The question is what is a “reasonable accommodation”? Until appellate decisions address this question, litigators can expect in the future to see somewhat more assistance given to SRLs by judges, who will still be required to balance their constitutional duty to provide meaningful hearings while maintaining their impartiality and avoiding the appearance of bias. It may now become more difficult to take advantage of the SRLs’ lack of substantive and procedural knowledge for the benefit of one’s own client,³⁷ which – while once common and easy to do – also causes more pro se post-judgment filings seeking to overturn dismissals, summary judgment, or other harsh results.

As noted below,³⁸ in order to avoid being cast in a “David versus Goliath” role and incurring the wrath of the court or jury, prudent attorneys will withhold their objection to whatever modest assistance may be provided by the court (which may be granted grudgingly, at best) to ensure the SRL a meaningful opportunity to be heard.

II. PRETRIAL STRATEGIES

While there may be no sure-fire, overall strategy to deal with SRLs, attorneys must recognize that SRLs are, in most cases, sincerely trying to present a claim or defense, but simply do not know how to do so. Much can be achieved, however, by the litigator who engages in amicable pretrial communication with the SRL.

Conducting preliminary discussions with the SRL achieves several purposes. It can, if handled properly, reduce the SRL’s anxiety over the legal matter, which may help to prevent, reduce, or dispel the hostility that can lead him or her to act rashly or irrationally. It can also result in a settlement of the dispute, which will serve everyone’s interests. Moreover, if settlement discussions are unsuccessful, valuable information can be gained from these discussions which may be useful if a trial is later necessary. In the alternative, the information learned may be sufficient to persuade one’s own client to dismiss the claim or modify a previous position. The key is not to bully the SRL, or to act

reasoning of most judges is that, if the Court took this position in criminal cases, it surely applies in civil cases.

37. See, e.g., Marshall H. Tanick, *Self-Representation: The Perils of Pro Se*, FINDLAW, <http://library.findlaw.com/1999/Nov/1/131043.html> (last visited February 2, 2008) (describing the experience of a partner in the author’s law firm who had a case in Federal court in St. Paul involving complex labor law issues in which the claimant represented himself. The partner was representing “the employer who was being sued, along with the National Labor Relations Board, [and] felt that the pro se individual did a ‘reasonably good job’ in the case, but that he made some legal and tactical blunders that [the partner] properly took advantage of to help his client get the case promptly dismissed.”).

38. See *infra* notes 47-52 and accompanying text.

aggressively toward him, for that will surely increase the SRL's hostility to the lawyer, or his client.³⁹

At the outset, counsel should contact the SRL in writing to request a meeting to discuss the case. This letter should include the admonition required by Rule 4.3 to the effect that counsel is not the individual's own attorney, but represents the adverse party in the matter. This may result in an opportunity to learn the facts underlying the SRL's position, and may possibly lead to the discovery of relevant documents, names of witnesses, or other evidence. If a settlement is reached as a result of these discussions, a letter should be sent to the SRL reciting the settlement terms, suggesting that the SRL retain counsel to look over the agreement, and requesting that, upon his or her approval, a copy of the letter be signed and returned to counsel. Counsel may find that the SRL is upset about a matter that can be remedied by something as simple as an apology.

A settlement letter will not only memorialize the agreement, but also the ethical manner of communication between counsel and the SRL. Counsel should then schedule one or more settlement or pre-trial conferences in which the court should be asked to inquire of the litigant, on the record, as to his or her understanding of the terms of the agreement, its fairness to the parties, and the fairness with which counsel treated the litigant during the negotiations.

If trial seems inevitable, an initial effort should be made to engage in informal discovery rather than a formal notice to appear at a deposition. An informal notice, for example, would be a phone call to the SRL from counsel's secretary asking what days and times might be most convenient for the litigant to come to counsel's office (or for counsel to come to the litigant's home, or a neutral location, if the SRL prefers) to discuss the case. This is probably not a meeting to which counsel should bring his or her client.

A meeting with both parties may prove useful later—especially if litigation is inevitable—if counsel can persuade the SRL to meet and discuss those facts about the dispute which can be agreed upon. A written stipulation of certain facts would ideally be one product of this meeting. When counsel presents the court with such stipulations, or a settlement agreement itself, it shows that counsel is assisting the court to process its caseload smoothly, and evidences counsel's good faith treatment of one whom the court may consider the underdog.

39. "Don't do anything to cause the pro se opponent to turn the thing about which she is angry into an all-consuming cause. If you do that, you may never get rid of her. Don't talk down to her. Even if she does not have a clue, treat her as your equal. Treat her with respect; kill her with kindness. Surprisingly, your good behavior is frequently reciprocated." See Helfrich, *supra* note 7, at 43.

Any such meeting would be an educational one for the SRL. First, it would be the time to explain to the SRL the “underlying legal obligations” of the parties, as permitted by Commentary 2 of Rule 4.3.⁴⁰ After the SRL explains his perception of the liability of the parties, counsel can explain his view of the merits of the SRL’s claim (or defense), and of his client’s position. Counsel could point to the deficiencies or weaknesses, if any, of the SRL’s claim, and what counsel believes will happen if the matter proceeds to trial. If the SRL is a plaintiff, he will probably have no idea of the necessary elements of the cause of action he seeks to bring, nor of the available defenses of his adversary. It may expedite resolution of the dispute if counsel provides such information about the deficiency in a SRL’s claim or perhaps the existence of a statute of limitations that appears to bar the claim.

If communication is not utilized, the SRL will flounder and make numerous procedural mistakes, which will be costly to one’s client because of the necessary time expended addressing them. There may be ill-conceived pleadings leading to several amendments being filed with the court, to which counsel will need to respond. There will be motions filed that are not authorized by the rules of court, and not noticed up or filed with improper notice of filing. Or the SRL may fail to appear at depositions, or otherwise comply with discovery or procedural rules. These kinds of problems can be avoided by using conciliatory, friendly communication with the SRL. In contrast, a “scorched earth” approach in which counsel out-maneuvers the SRL to the latter’s detriment may cause him or her to become more litigious in turn. This would create the “Frankenstein’s monster” of an overzealous pro se litigant that lawyers hope to avoid.

III. MOTION PRACTICE

Litigation may be inevitable if informal efforts at resolution of the matter are unsuccessful. In the face of a pro se complaint, therefore, motions to dismiss may be necessary in order to dispose of the matter. However, counsel should not act like an SRL when preparing motions. Counsel must be sure to cite to relevant authorities in the motion, should avoid making conclusory statements, should not neglect to file affidavits or other evidence in support of the motion, and should not fail to evaluate the arguments and authorities cited by the opponent. If the court—which expects to get minimal guidance from

40. See *supra* notes 14-16 and accompanying text.

an unrepresented litigant as to the law—has to do the lawyer's work, it will resent the attorney more than the unrepresented litigant.⁴¹

Counsel should consider postponing the filing of a motion to dismiss until a motion for a more definite statement is filed.⁴² A premature motion to dismiss that attacks the sufficiency of the pleadings will probably result in leave to amend, and the SRL will get one or more further opportunities to state a cause of action. Thus, it could be a waste of client funds and may anger the court,⁴³ especially if several amendments are allowed. Filing one or more motions for a more definite statement will enable counsel to pin down the SRL as to his or her theories of relief and the facts relied upon.

If discovery is not forthcoming after reasonable efforts to persuade the SRL to comply, sanctions by way of dismissal may be sought. If answers are provided, discovery by way of interrogatories and a deposition will further elicit the basic facts, after which an earlier motion for summary judgment can be filed. The following reflects the type of suggestion made by litigators who view SRLs as “pests” or “kooks,” and who want to outwit and take advantage of them:

This is important because pro se litigants rarely recognize the finality of any of their or the court's actions. They file responses to answers, surresponses to reply briefs, endless motions for reconsideration, and repeated motions on the same issues. And the courts sometimes grant them leave to do so. With so many shots at argument, sooner or later the pro se litigant will pick a winner. It is much better to rule out arguments up front by stating the pro se party's claims and allegations clearly. Then you can argue not only for waiver, but also that waiver occurred knowingly.⁴⁴

41. “After all, the attorney should know better. Just as bad, the court will procrastinate, which means that the lawyer will have to put off the impatient client who was promised an easy victory.” Garland, *supra* note 7, at 46.

42. Zuydhoek, *Litigation Against a Pro Se Plaintiff*, *supra* note 7, at 15. An exception to this rule is where the plaintiff fails to make proper service. *See, e.g.,* Michelson v. Merrill, Lynch, Pierce, Fenner & Smith, 619 F.2d 83, 85 (2d Cir. 1980) (no error where trial court dismissed pro se plaintiff's action after he failed twice to properly serve defendants). *But see* Valentin v. Dinkins, 121 F.3d 72 (2d Cir. 1997) (the court has obligation to assist pro se plaintiff in the identification of defendants and in the service of process); Gordon v. Leeke, 574 F.2d 1147, 1152-53 (4th Cir. 1978) (Upon stating a meritorious claim, the court has duty to “advise him how to proceed and direct or permit amendment of the pleadings to bring that person or persons before the court.”); Meckley v. United States, 1992 U.S. App. LEXIS 9033, *4 (4th Cir. 1992) (“[T]he district court has some responsibility to assist pro se litigants who are unable to identify the proper defendant.”). These principles have not stopped some courts from dismissing complaints where the SRL failed to properly serve a defendant per state procedural rules. *See, e.g.,* Brown v. Thaler, 880 A. 2d 1113, 1116 (Me. 2005) (Dismissal of SRL complaint was proper where summons was first served improperly by certified mail, and no effort was subsequently made to obtain and file the required an “acknowledgement of receipt” executed by defendants, or to have defendants personally served.).

43. Zuydhoek, *supra* note 7, at 15.

44. Garland, *supra* note 7, at 47.

One commentator emphasizes the importance of one's reply brief (after the SRL has responded to the motion to dismiss). It is considered a mistake to file a reply brief that is short and conclusory. This reply brief, which technically cannot be replied to (a rule which of course may not be followed by the SRL), should be one in which all the parties' arguments for and against the motion are discussed. One author suggests the following:

Use the reply brief to write the court's opinion in favor of your motion. Frame the law succinctly but completely, identify your opponent's arguments and waiver of arguments, and explain simply why you should win. Don't skimp on the reply brief and give the court a reason to fill the vacuum left by the pro se litigant's poorly drafted response brief.⁴⁵

Of all the stages in litigation, summary judgment is one of the most critical. The non-movant SRL is often disadvantaged by lack of knowledge of summary judgment principles and procedures. It is easy for the moving party to dispose of an SRL's claim or defense by submitting a motion in proper form with accompanying affidavits and supporting materials, against which either hearsay-filled affidavits may be filed in response, or no counter-affidavits may be filed at all. A dismissal or other adverse ruling in a summary fashion will increase the likelihood of an appeal by the unrepresented party.

One of the few accommodations federal appellate courts have recognized is the requirement that SRLs be given "fair notice" of summary judgment procedures.⁴⁶ In light of this emerging trend, a prudent attorney will attempt to avoid the harsh results of dismissal or summary judgment that are later challenged. Counsel should take the initiative and request that the court instruct the litigant, or offer to provide instruction about the rules governing summary judgment. This may take some extra time, but it will probably be well worth the investment if it can save one's client the burdens of post-judgment motions or an appeal.⁴⁷

IV. DISCOVERY

According to one commentator, "the frustration of pro se litigation grows as the case moves into discovery. Most pro se litigants have no

45. *Id.*

46. *See, e.g.,* Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982); Graham v. Lewinski, 848 F.2d 342 (2d Cir. 1988); Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975); Klingele v. Eikenberry, 849 F.2d 409 (9th Cir. 1988); Jaxon v. Circle K Corp., 773 F.2d 1138 (10th Cir. 1985); United States v. One Colt Python .357 Caliber Revolver, 845 F.2d 287 (11th Cir. 1988).

47. One court requires by local rule that the movant's counsel provide such notice. *See, e.g.,* N.D. Ill. R. 56.2 (requiring a special notice, included in the rule, containing summary judgment proceeding instructions in plain English be served upon non-movant SRLs).

concept of the purpose or scope of discovery. They often ignore requests to produce and interrogatories; responses are usually conclusory and argumentative.”⁴⁸ He recommends counsel take the following steps during discovery: (1) give advance notice and warning of court rules requiring that all filings be served on counsel, and that periodic checks of the court docket be made to monitor filings the SRL may have made without proper notice; (2) depose a plaintiff SRL before any defendants are deposed, “to make a record of defense efforts to educate the plaintiff about proper discovery techniques,” to be used later “to restrict the plaintiff’s improper actions during the depositions of defense witnesses”; (3) obtain testimony regarding the fact of plaintiff’s efforts to secure counsel, an inquiry that may be important later “if the plaintiff later tries to get special treatment because of supposed naiveté”; (4) explain the procedures for making corrections to the transcript of the deposition, so that, if counsel later impeaches plaintiff with inconsistencies, “the jury will react more favorably knowing that the plaintiff understood the earlier proceedings”; (5) inform the plaintiff that the testimony is given under oath, may be used at trial or before trial in connection with pretrial motions, so that “the judge will be more likely to make decisions based on such testimony if that warning has been given”; and (6) explain to the SRL that it is not a time for arguing facts or law, and that he cannot ramble on at the deposition, because “by teaching the plaintiff the ground rules and making a record of that lesson, you will be better able to protect your client during *his* subsequent deposition.”⁴⁹

Defense counsel may also want to consider using requests for admissions. Failure to respond to the statements posed within the requisite time period will result in their being deemed admitted. The request should be served by certified or registered mail, and should contain a conspicuous warning regarding the requirements of the rule which “will provide comfort to the judge when she allows the [represented] defendant to introduce admissions obtained by default.”⁵⁰

Litigators should also take advantage of rules that permit the court to conduct pretrial conferences, not only to resolve discovery disputes, but to formulate a plan for trial and to make pretrial evidentiary rulings. One issue that can be addressed is the admissibility of narrative testimony, which is what SRLs typically offer at trial.⁵¹ One commentator recommends that counsel argue that Rules 611(a) and 103(c) of

48. Zuydhoek, *supra* note 7, at 16.

49. *Id.* at 16, 59.

50. *Id.* at 59.

51. “Most judges provide self-represented litigants with a detailed explanation of trial procedures, as time permits, and then allow narrative testimony.” MEETING THE CHALLENGE, *supra* note 4, at 57.

the Federal Rules of Evidence authorize the court to prohibit narrative testimony.

Rule 611(a) permits the court to “control the mode of interrogating witnesses and presenting evidence.” The court is required by that rule to “avoid needless consumption of time.” Argue that making the plaintiff respond to specific questions will limit improper arguments and confine the proof to relevant areas. Counsel should refer to specific examples of plaintiff’s pursuit of irrelevant issues at the depositions. In addition, Rule 103(c) requires the court to “prevent inadmissible evidence from being suggested to the jury.” Counsel should argue that the court cannot exercise the necessary control and prevent jury taint unless the plaintiff is restricted to a question-and-answer format. Defense counsel can suggest, as an alternative to the narrative, that the pro se plaintiff submit in writing, before trial, questions he will be seeking to answer. The court can then designate some neutral person, perhaps the law clerk, to ask the questions. To limit objections during the testimony, the court should allow defense counsel, before trial, to challenge the propriety of particular questions.⁵²

V. TRIAL STRATEGIES

At trial, counsel must realize that there are many opportunities for coming on too strong and playing—in the eyes of the judge or jury—the role of Goliath.

The most important piece of advice I have for a lawyer litigating against a pro se litigant is to protect your credibility by avoiding hubris. Hubris is tempting when you, a hardy, experienced litigator, have to deal with a pro se litigant who does not know the law, does not play by the rules, and cannot communicate without engaging in a harangue. The temptation grows to omit legal citations from your briefs, engage in *ad hominem* attacks, and speak to the judge or the clerk about “this mess we should all clear up,” as if you and the court stand united against the pro se party.

Don’t. There are two reasons why not.

First, such behavior turns the court against you. If there is anything more unappetizing than a smug lawyer, it is a smug lawyer opposing an obviously outclassed pro se party. Nothing is more likely to remind the court of its special obligation to protect the unrepresented party. Additionally, on the occasions when you are wrong, you will look plain stupid and childish. To avoid provoking this negative emotional reaction, treat the pro se litigant with respect: do not complain or snigger about the pro se party’s lack of skill, intelligence, or coherency;

52. Zuydhoek, *supra* note 7, at 60. Other commentators suggest relaxing, or even eliminating, the Rules of Evidence for non-jury cases involving SRLs. John Sheldon & Peter Murray, *Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials*, 86 JUDICATURE 227 (2003).

and avoid ex parte contacts with the court regarding the pro se litigant's position. While superciliousness might find favor with some courts, most likely that number is small.⁵³

This suggestion is especially apt in the context of evidentiary objections. While it may be an annoyance to hear testimony that is laden with objectionable statements, the better practice is to be judicious with one's objections. Despite reformers' efforts to modify traditional evidentiary, procedural, and judicial ethics rules as they pertain to SRLs,⁵⁴ judges differ in the extent to which they require SRLs to follow the rules of evidence.⁵⁵ Therefore, objections should be limited to testimony that has the potential to actually damage a client's case: "Letting the pro se litigant babble on about irrelevant things makes the problem the judge's, not yours. It also makes you seem rather reasonable, both to the court and the unrepresented litigant."⁵⁶ Minimal objections will also serve to show how reasonable you are to the jury.⁵⁷

When making objections, or responding to any comments from the SRL, it is prudent to avoid straying from the general practice of addressing the court directly. Likewise, one's client should be admonished beforehand to maintain a poker face regardless of irrelevant,

53. Garland, *supra* note 7, at 46. (emphasis added). Some courts recognize a judicial duty to protect SRLs because they are unskilled in legal matters and prone to making errors. See, e.g., Karim-Panahi v. L.A. Police Dept., 839 F.2d 621, 623 (9th Cir. 1988). As noted in one survey, "Judges observe that some attorneys take advantage of the fact their opponent is self-represented. They say that they 'must bend over backwards to keep [the] pro se litigant from being taken advantage of.'" MEETING THE CHALLENGE, *supra* note 4, at 53. Some courts recognize that judges have a duty to protect vulnerable SRLs. See, e.g., Bolshakov v. McCarthy, 702 N.Y.S.2d 748 (N.Y. Civ. Ct. 1999) (denying malpractice defendants' motion to preclude or dismiss action for failure to respond to overbroad bill of particulars where "the within complaint indicates a vulnerable plaintiff," and "the demands that are the subject of this motion display an effort to take advantage of that vulnerability. The court . . . may, on its own initiative [pursuant to court's authority to regulate discovery], issue a protective order so as to prevent disadvantage or other prejudice to a litigant.").

54. See, e.g., Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice*, 40 FAM. CT. REV. 36, 51 (2002) (arguing that rules of procedure and evidence should be relaxed in cases involving SRLs); Sheldon & Murray, *supra* note 52, at 228 ("When [a pro se] litigant faces a party represented by counsel in a jury-waived proceeding, rules of admissibility become more than superfluous: They become weapons that the lawyer can use to gain an advantage that has nothing to do with the merits of the case.").

55. MEETING THE CHALLENGE, *supra* note 4, at 57.

56. Helfrich, *supra* note 7, at 42.

57. Until such time as courts relax the rules of evidence in *pro se* cases, attorneys opposing SRLs may want to consider making a request outside the presence of the jury that the court follow the rules of evidence. And, while a judge may ask questions of the plaintiff or witnesses, if the judge tries to relax the rules of evidence, "Try to persuade the court that the evidentiary rules should not be relaxed for the pro se litigant." Zuydhoek, *supra* note 7, at 60, (citing Andrews v. Bechtel Corp., 780 F.2d 124, 142 (1st Cir. 1985), cert. denied, 476 U.S. 1172 (1986)) (district court did not err in finding pro se plaintiff had failed to introduce evidence to satisfy his Title VII claim, despite fact that evidence had been adduced earlier in connection with class certification hearing, where to do so "would violate the basic tenets of the adversary system").

incomprehensible, or foolish statements made by the litigant, which will also serve to make the client appear to have the more rational position.

Cross-examination of the SRL should be brief. "The plaintiff [SRL] likely will provide nonresponsive arguments; repeated motions to strike nonresponsive and improper answers will not help your case. Strive only to highlight the major flaws in the plaintiff's credibility and then sit down."⁵⁸ In the exceptional case where a SRL is disruptive, contumacious, or defiant, counsel may of course seek sanctions, including a bar on the introduction of evidence.

VI. RULE NONCOMPLIANCE

Under American state and federal case law, liberality is granted to SRLs with respect to pleadings,⁵⁹ and, on occasion, in cases of inadvertent non-compliance or imperfect compliance with procedural rules.⁶⁰ Generally, however, courts require that SRLs follow the same rules and obey the same requirements as represented parties.⁶¹

There are many ways to bring non-compliance to the court's attention so as to diminish the court's (possibly unfair) sympathy for the SRL, or avoid the problem of such litigant's non-compliance in the first place. For example, educating the litigant by letter or other communication as to his or her obligation under the rules, as suggested above with reference to summary judgment procedure, is one way to instruct the litigant.⁶² This would not constitute giving legal advice, where counsel merely refers the litigant to a particular rule and recites its contents.⁶³ In the event of a SRL's subsequent non-compliance,

58. Zuydhoek, *supra* note 7, at 60.

59. Haines v. Kerner, 404 U.S. 519, 521 (1972) (civil rights complaint filed by pro se prisoner plaintiff to be held "to less stringent standards than formal pleadings drafted by lawyers.").

60. See, e.g., Genaro v. Mun. of Anchorage, 76 P.3d 844, 846-47 (AK 2003) (The court should assist a pro se plaintiff if he makes "some attempt to comply with the court's procedures," and informing him of the technical defects of his complaint would not compromise the court's impartiality.); Collins v. Arctic Builders, 957 P.2d 980 (AK 1998) (reversing dismissal of workers' compensation claim for determination of whether *pro se* claimant's attempt to timely file his claim was thwarted by court clerk); Traguth v. Zuck, 710 F.2d 90, 93-94 (2d Cir. 1983) (reversing default judgment against SRL for failure to file answer through counsel, where answer was timely filed pro se).

61. See, e.g., Faretta v. California, 422 U.S. 806, 834, n.46 (1975) ("The right of self-representation is not a license . . . not to comply with relevant rules of procedural and substantive law."); Newsome v. Farer, 103 N.M. 415, 708 P.2d 327, 331 (1985) ("the pro se litigant must comply with the rules and orders of the court, enjoying no greater rights than those who employ counsel . . . Although pro se pleadings are viewed with tolerance, . . . a pro se litigant, having chosen to represent himself, is held to the same standard of conduct and compliance with court rules, procedures, and orders as are members of the bar.") (citing Birdo v. Rodriguez, 84 N.M. 207, 209, 501 P.2d 195, 197 (1972)).

62. See *supra* notes 36-41 and accompanying text.

63. See *supra* notes 14-19 and accompanying text.

the court will be more willing to entertain sanctions or dismissal in light of the fact that the litigant was warned of his obligations. Such warnings should accompany not only motions for summary judgment, but also motions to dismiss. In addition, it has been recommended that upon receipt of a complaint and summons, a notice be served upon the plaintiff regarding Rule 11. The notice should draw attention to the requirements that pleadings have a foundation in fact and law, and are not served for an improper purpose such as to harass or cause unnecessary delay or needless expense.⁶⁴

In addition to, or in lieu of, the foregoing, counsel should provide a form order to the court that states a due date for the unrepresented party's required response to a motion. Thereby, failure to timely respond can be construed as failure to obey the orders of the court, again making it more likely to have the court on counsel's side if and when sanctions are sought.⁶⁵

Repetitive, meritless filings are sometimes a tactic of an uninformed SRL and may properly be sanctioned.⁶⁶ This is especially true if he or she has a history of litigiousness in one or more courts (i.e., the proverbial "pest," although the line between "pest" and "kook" is not a bright one). It is not uncommon for courts to enjoin further filings unless they are first screened by the court or other requirements are met.⁶⁷ If the SRL is truly a "pest," having filed numerous complaints in other courts, presenting such a list of previous litigation to the court will surely dispel the SRL's "aura of innocence." In addition, this action may prove useful if and when the litigant conducts further litigation against one's client after the first matter has ended.⁶⁸

Despite liberality rules for pleadings, the general sympathy some individual judges (and some appellate courts) have in cases of imper-

64. Zuydhoek, *supra* note 7, at 15.

65. Garland, *supra* note 7, at 50.

66. See generally, Michael J. Mueller, Note: *Abusive Pro Se Plaintiffs in the Federal Courts: Proposals for Judicial Control*, 18 U. MICH. J.L. REF. 93 (1984); Deborah L. Neveils, *Florida's Vexatious Litigant Law: An End to the Pro Se Litigant's Courtroom Capers*, 25 NOVA L. REV. 343 (2000).

67. See, e.g., *Antonelli v. Caridine*, 528 U.S. 3 (1999) (Petitioner who filed 55 previous petitions was denied leave to proceed *in forma pauperis*, and order entered barring future filings for certiorari or extraordinary writs in noncriminal matters.); *Whitaker v. Superior Court of California*, 514 U.S. 208 (1995) (enjoining filings until petitioner pays docketing fee and complies with rules concerning format of petitions); *In re Winslow*, 17 F.3d 314 (10th Cir. 1994) (filings enjoined unless first reviewed by Chief Judge). See also Mueller, *supra* note 60, at 102, 103, n.30 (reviewing the various definitions of "frivolousness" and recommending strategies for federal courts to deal with what he refers to as "career plaintiffs," some of whom have filed upwards of 600 to 700 federal lawsuits).

68. "Once the court has ruled against them, some pro se litigants are loath to say goodbye; they continue to file evidence, substantive motions, motions for reconsideration, and, even worse, additional lawsuits. I don't know if this stems from zealotness or unfamiliarity with the concept of finality." Garland, *supra* note 7, at 51.

fect compliance with court rules does not permit the court to become an advocate for the litigant. This is a point of which counsel can remind the court, and place on record in the event of an appeal.

VII. CONCLUSION

Today's family law litigators and others practicing in courts of general jurisdiction are facing a growing number of SRLs, a trend described by a prominent trial court administrator as "both apparent and irreversible."⁶⁹ Litigators, like courts as institutions, must adapt to this movement. To do otherwise is to risk the possibility of lengthy, acrimonious, and costly litigation from the minority of such litigants who may feel mistreated and who come to believe there is a vast conspiracy against them by the bar and the judiciary. The suggestions presented above for handling cases involving the majority of sincere SRL adversaries—coupled with a patient attitude toward them, their legal situation, and their real objectives—will help the litigator avoid such potential contentiousness, so that an expeditious and just result can be achieved, and one's sanity can be maintained.

69. See Gordon M. Griller, *Litigants without Lawyers: "Going It Alone" in the Nation's Courts*, in *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 413, 413-415 (Gordon M. Griller & E. Keith Stott, Jr., eds., 7th ed. 2002).