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Equal Injustice for All: High Quality Self-Representation Does Not Ensure a Matter Is "Fairly Heard"

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"To the struggling litigant obliged to rely on his own unaided strength we can all extend sympathy, but upon him who masquerades as a trained professional man ridicule is sure to fall."[1]

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1. FREDERICK PAYLER, LAW COURTS, LAWYERS AND LITIGANTS 167 (1926).

INTRODUCTION

Most literature about self-representation focuses on self-represented litigants' (SRLs) limited access to justice and diminished likelihood of success on the merits of their cases when opposing a represented party.[2] These constraints are likely a consequence of SRLs' unfamiliarity with the law, court rules, and courtroom etiquette and decorum norms.[3]

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2. *See* Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, SEATTLE J. SOC. JUST. 51, 69 (2010) ("Lawyer-represented people are more likely to prevail than people who appear unrepresented, on average," but how much better "varies considerably across studies"); Mitchell Levy, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1843–44 (2018) (reporting that for cases with defendant SRLs, represented plaintiffs win between 43% and 93% of the time, depending on case type; "in essentially all categories, pro se litigants fare far worse than represented litigants"). For success rates of pro se criminal defendants, *see* Jona Goldschmidt & Don Stemen, *Patterns and Trends in Federal Pro Se Defense, 1996-2011: An Exploratory Study*, 8 FED. CTS. L. REV. 81, 103 (2015) (reporting results of a study of federal criminal court data for a fifteen-year period, finding that at trial "pro se defendants (15%) were more likely to be found guilty than defendants with retained (5%) or appointed counsel (3%). In examining the rates of acquittal at trial, the rate is highest for retained (1.1%); the proportion of acquittals in appointed counsel (0.6%) cases were slightly lower than that for pro se defendants (0.8%)").

3. As one judge put it: "When two pro se litigants appear before me, I am constrained to remember my judicial obligations. Ordinarily, neither party is even the slightest bit knowledgeable about 'judicial decorum' or evidentiary rules; both are anxious to tell their stories and make their points, irrespective of ordinary decorum and courtesy." Hon. Howard I. Lipsey, *The Role of the Judge in Pro Se Litigation*, 10 Divorce Litig., no. 6, 1998, at 115. In a discussion of mandatory pro bono proposals and the opposing argument that most lawyers are incompetent to provide specialized poverty law services, Professor Millemann writes:

> The ultimate flaw in the "we are incompetent" argument is best revealed by acknowledging, arguendo, some truth in it. Assume that after four years of college, three years of law school and varying periods of law practice, some lawyers are "incompetent" to help the poor, either in court or outside a courtroom setting. All this despairing assumption tells us is that the poor are far less competent to represent themselves and do not have the readily available access to attaining competency that lawyers have. Competency is a comparative concept. Lawyers, even the least proficient lawyers, are *more* competent than *pro se* litigants.

However, there are some rare instances where SRLs—in civil or criminal cases—perform quite well, to the court's surprise. These high-functioning, unrepresented litigants are usually literate, educated, and computer savvy, which enables them to conduct effective legal research.[4] These litigants also may have access to lawyers to consult with;[5] be lawyers themselves; or be exposed to legal issues through their occupation, such as running a business. All of these facets help these high-functioning, unrepresented litigants navigate the justice system.[6] I will call this segment of the SRL population the "expert SRLs."

Expert SRLs act differently than disfavored SRLs in cases above the small claims category; but unlike expert SRLs, disfavored SRLs typically have no knowledge of the law or court rules, how to apply the law to their

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Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question: For*, 49 MD. L. REV. 18, 62 (1990). Poverty and illiteracy are also barriers to an SRL's ability to effectively navigate the justice system. *See* Donald F. Fontaine, *Fee Shifting: A Proposal to Solve Maine's Intractable Access to Justice Problem*, 72 ME. L. REV. 47, 83 (2020) (proposing a fee-shifting rule permitting prevailing SRLs to collect attorneys' fees from institutional defendants in civil disputes).

> [C]ombined with the other barriers that make it difficult for nonlawyers to adapt effectively to the procedures of the court, the poor suffer the additional barrier of insufficient literacy skills. Because unbundled services depend upon literacy skills, they appear to be of limited benefit to the poor. The picture of a single mother holding a child in one hand and a forcible entry and detainer brief in the other, ready to face a lawyer who is regularly in court is not a picture of equal access to justice. *Pro se* is not for poor people. They wisely avoid it and let their defaults be entered.

Id. at 77.

4. *See, e.g.*, *In re* Saltzman, 1997 WL 539669, at *5 n.11(Aug. 22, 1997) ("An examination of the trial record indicates that Saltzman made a more organized and sophisticated presentation than the usual pro se litigant."), *aff'd sub nom.* Richeson v. Saltzman, 142 F.3d 440 (7th Cir. 1998); *In re* Keeley, No. 14-22843, 2017 WL 213799, at *4 (Bankr. D. Kan. Jan. 17, 2017) (the SRL "did an excellent job as a pro se litigant in the presentation of her case . . . ."); *In re* Alexander, 270 B.R. 281, 290 (B.A.P. 8th Cir. 2001), *aff'd* 44 F. App'x 32 (8th Cir. 2002) ("[D]espite the fact that he is not an attorney, Alexander demonstrates remarkable understanding of complicated legal arguments and his pleadings and briefs are well done."); Gorrell v. Comm'r of Soc. Sec., No. 3:07-2247, 2008 WL 11348408, at *2 (M.D. Pa. June 13, 2008) ("The court finds that given the leeway afforded pro se litigants and the quality of the submissions of the plaintiff thus far, there is no need for the appointment of counsel in this case.").

5. In one study of discrimination litigation the authors found four primary barriers to SRLs' inability to secure legal counsel. In addition to cost, distrust of lawyers, and plaintiff lawyers' assessments of the merits of their cases, their "lack of information about the legal process coupled with no connections to lawyers or others who know more about these processes is the most significant barrier we find." Ellen Berry, Robert L. Nelson & Laura Beth Nielsen, RIGHTS ON TRIALS: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 114 (2017).

6. Expert SRLs have some or many of the aforementioned characteristics. In my experience with the three SRLs subjects of the case studies discussed and others with whom I have had contact over the years, expert SRLs litigate in a manner very similar to a lawyer in terms of their quality of self-advocacy. They read, understand, comply with, and apply the substantive law and the court's rules, citing supporting authorities in their papers. Their pleadings are clear and generally well written. And based on a reading of transcripts of hearings in the cases described, I find all three are generally effective oral advocates in the court room.

case, or the "pests" or "kooks" with political agendas which courts may occasionally encounter and abhor.[7] I have found no empirical studies focusing on the subject of expert SRLs, and this may be because there are so few SRLs who fall into that category. Regardless of literacy and other skills, even expert SRLs face barriers to fair treatment in the justice system.

In this Article, I challenge an assumption upon which many access-to-justice programs are based: that because effective self-representation can be taught, being an expert SRL will ensure that their case will be fairly heard.[8] The case studies described below show that expert SRLs are vulnerable—like the less competent SRLs—to experiencing a miscarriage of justice that injures their case; whereas a represented party or their lawyer would not suffer the same injury. In considering the case studies described below, one may surmise that there is truth to the quotation cited at the beginning of this Article; that is, judges may be prone to seeing expert SRLs as "masquerading" as lawyers, "ridiculing" them by holding them more strictly to procedural and evidentiary rules than lawyers—and in some cases, unfairly sanctioning expert SRLs for litigating their cases like lawyers.

In light of lacking empirical data on expert SRLs, I offer three cases in which I was personally involved as illustrations of this Article's thesis. I conclude with the recommendation that courts should adopt a policy, which at a minimum *encourages* judges to provide reasonable accommodations so that SRLs' cases are fairly heard. This would be a change to the

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7. In a national survey, some state court judges consider SRLs who come to court with a "political agenda" as "pests" or "kooks." JONA GOLDSCHMIDT, BARRY MAHONEY, HARVEY SOLOMON & JONA GREEN, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 60 (1998).

8. This philosophy also appears in the ABA's standards for legal services providers: "Strategies that employ various forms of limited assistance, such as advice lines, community legal education and assistance to pro se litigants should also be examined to determine the degree to which those who are assisted learn how to help themselves and accomplish meaningful results with the assistance offered." STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA, STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID 44 (2006), https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/standards-and-policy/standards-for-the-provision-of-civil-legal-aid/ [https://perma.cc/D4PD-RXWC]. Written self-help materials are commonly used by courts to guide SRLs through the justice system, but these have been shown to be largely ineffective for many SRLs. Numerous barriers keep SRLs from being able to use self-help materials beyond the materials themselves and these include: (a) "overtaxed bandwidth" (referring to "prospective memory" for things that need to be remembered to defend one's case in court); (b) anxiety and feelings of threat ("paralyzing emotions") regarding the court experience; (c) legal mundanity (i.e., where to go, where to sit, who speaks when, and what will occur next); (d) excessive focus in existing materials on trying to teach legal concepts and legal jargon, rather than procedures; (e) a lack of learning tools such as analogies and images; and (f) misuse of all-caps typography and use of long sentences. D. James Greiner, Dalie Jimenez & Lois R. Lupica, *Self-Help Reimagined*, 92 IND. L.J. 1119, 1126–36 (2017).

current policy in some states that merely permit judges to provide reasonable accommodations to SRLs as a matter of judicial discretion. However, it is my view that the ideal means to prevent the types of injustices described below is to establish a judicial *duty* to provide reasonable accommodations, so that cases are fairly heard and reviewed on the merits.

I. THE PROMISE OF "REASONABLE ACCOMMODATIONS"

A. General Rules for SRL Management

The United States Supreme Court announced general rules governing the treatment of SRLs in two seminal decisions: *Faretta v. California*[9] and *McKaskle v. Wiggins*.[10] While those cases involved self-represented criminal defendants, the courts have applied those same general rules to civil cases with only slight modification.[11]

Faretta is best known for recognizing a constitutional right to self-representation.[12] Defendant Faretta was "literate, competent, and understanding, and . . . was voluntarily exercising his informed free will" in

9. Faretta v. California, 422 U.S. 806, 836 (1975); *see also* Haines v. Kerner, 404 U.S. 519, 520 (1972) (stating that a pro se prisoner's § 1983 civil rights complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers"); Erickson v. Pardus, 551 U.S. 89 (2007) (holding that even under the new "plausibility test," SRLs are still entitled to their day in court despite "inartful pleadings" if the pleadings raise plausible allegations). The Court has not extended the liberality rule beyond SRLs' papers.

10. McKaskle v. Wiggins, 465 U.S. 168 (1984).

11. *See, e.g.*, Fraisar v. Gillis, 892 A.2d 74, 76 (Pa. Commw. Ct. 2006) ("[D]istrict judges have no obligation to act as counsel or paralegal to pro se litigants[;] . . . being too proactive on the pro se litigant's behalf can undermine a judge's role as an impartial decision maker. . . The same certainly applies in the civil context." (citing Pliler v. Ford, 542 U.S. 225, 231, (2004); Browne v. Gore, No. SX-10-CV-155, 2011 WL 13055217, at *5 (V.I. Super. Ct. Feb. 18, 2011). As an author of a treatise on federal practice writes: In addition to the habeas context, "[a]ppropriate or not, exasperation with prisoner litigation in general could lead some judges to be less charitable to pro se prisoner civil rights claims as well, despite the Supreme Court's admonitions to the contrary." EDWARD BRUNET, JOHN PARRY & MARTIN REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 9:10 n.5, Westlaw (database updated November 2020).

12. The case involved a trial judge who refused to permit the defendant to self-represent, despite his apparent competence to do so, and his knowing an intelligent waiver of counsel. *Faretta*, 422 U.S. at 810. The U.S. Supreme Court held that the refusal was a Sixth Amendment violation based on an analysis of English common law; language in Colonial charters; the federal statutory right to self-representation established by the Judiciary Act of 1789; the language of the Sixth Amendment itself, which speaks of a right to "assistance of counsel"; and the right of every individual to personal autonomy. *Id.* at 807–34. In vacating Faretta's conviction, Justice Stewart concluded the majority opinion with an admonition that before being allowed to represent themselves, pro se defendants must establish they knowingly and intelligently waive their right to assistance of counsel. *Id*. at 835. In addition, "[pro se defendants] should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that '[the defendant] knows what he is doing and his choice is made with eyes open.'" *Id.* at 835 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)). Faretta "clearly and unequivocally" informed the court of his choice to represent himself and did not want counsel. *Id.*

waiving his right to counsel, and—most importantly for this discussion—"his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself."[13]

The *Faretta* decision recited several principles for courts' management of SRLs in footnote 46.[14] Most relevant here is the comment that the right to self-representation is not "a license not to comply with relevant rules of procedural and substantive law."[15] So an SRL is not required to have technical legal knowledge to waive his or her right to self-representation,[16] but paradoxically must "comply with relevant rules of procedural and substantive law."[17] Justice Stewart does not note any exceptions to the latter requirement.[18] Most courts have taken Justice Stewart's statements to mean that an SRL is encumbered to learn the law and to strictly follow it.[19]

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13. *Faretta*, 422 U.S. at 835–36.

14. These principles include the following: (1) "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct"; (2) "a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary"; (3) an SRL may not "abuse the dignity of the courtroom"; and (5) an SRL "cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel." *Id*. at 834, n.46.

15. *Id*.

16. Faretta's "technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." *Id*. at 836.

17. *Id*. at 834, n.46.

18. *Id*.

19. Courts take either a conservative or liberal approach to rule compliance by SRLs (also referred to as the majority and minority views, respectively):

> [The] two positions differ quite a bit from each other. The first takes the view that it is best when a judge accords the self-represented litigant no "special treatment." Exceptions exist, but they are limited. The emotional message that seems embedded in the majority view is that self-representation is a voluntary choice, it is moreover a foolish choice, and litigants who put themselves in this position "deserve" the consequences of that choice. The minority view is the opposite: a judge has a duty to accommodate the special circumstances of the unrepresented litigant up to the point that such accommodation infringes on the rights of the other side. The emotional message in minority view opinions is that a person's lack of counsel likely is not voluntary and is instead the result of a lack of means—but that even if voluntary, self-representation is a choice vouchsafed by the Constitution. The court has an obligation to provide as fair a process for the uninformed and unsophisticated citizen as for the one who can afford the most accomplished and aggressive attorney
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> . . .
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> These contrasting standards give very different messages to the trial judge attempting to cope with an unrepresented litigant in the courtroom. The first posits a basically passive role for the judge, with the litigant bearing the burden of becoming sufficiently familiar with the law, rules of procedure, and rules of evidence to function as a lawyer. The second instructs the judge to aid the unrepresented litigant, who cannot be expected to perform as a trained lawyer would, in every way short of prejudicing the opponent.

Rebecca A. Albrecht, John M. Greacen, Bonnie Rose Hough & Richard Zorza, *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGES' J., no. 1, Winter 2003, at 16, 43-44. *But see* JOHN M. GREACEN & MICHAEL HOULBERG, INST. FOR THE ADVancement OF THE AM. LEGAL

In *McKaskle*, the trial court appointed standby counsel to assist a self-represented defendant in a state robbery trial.[20] Wiggins complained that standby counsel engaged in unsolicited and overzealous actions that interfered with the presentation of his defense.[21] The Court rejected Wiggins' claim because counsel's actions did not destroy the jury's perception that the defendant was representing himself, and because counsel's actions did not interfere with the control of his defense.[22] Wiggins' case arose out of a criminal prosecution, and Justice O'Connor devoted the majority opinion exclusively to assessing the nature and scope of the role of standby counsel appointed to a pro se defendant in criminal cases.[23] But in the course of describing possible forms of assistance by standby counsel that would not violate a defendant's right to self-representation,[24] Justice O'Connor added the following unrelated comments in dicta:

> 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. *Faretta* recognized as much. "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law."[25]

SYS., ENSURING THE RIGHT TO BE HEARD: GUIDANCE FOR TRIAL JUDGES IN CASES INVOLVING SELF-REPRESENTED LITIGANTS (Nov. 2019), https://iaals.du.edu/publications/ensuring-right-be-heard [https://perma.cc/9GKR-Y57L]; McNeil v. United States, 508 U.S. 106 (1993) (affirming dismissal of a pro se federal tort claims action for failure to exhaust administrative remedies prior to filing and addressing the issue of pro se procedural errors as follows: "[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel. As we have noted before, 'in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'" (quoting Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980). *See also* PHH Mortg. V. Nickerson, 374.P.3d 551, 160 Idaho 388 (Idaho 2016) (motion to reconsider not timely filed; "Pro se civil litigants are not accorded special latitude merely because they chose to proceed through litigation without the assistance of an attorney. Further, pro se litigants are held the same standards and rules as those represented by an attorney."); Zavodnik v. Harper, 17 N.E.3d 259, 266 (Ind. 2014) (holding SRLs are afforded no inherent leniency simply by virtue of being self-represented); State v. Sellers, 858 N.W.2d 577, 584 (Neb. 2015) (holding SRLs to the same standards as one who is represented by counsel); In re Application of Black Fork Wind Energy, L.L.C., 433 N.E.3d 173, 178-79 (Ohio 2013) (holding SRLs are presumed to have knowledge of the law and legal procedures, and they are held to the same standard as litigants who are represented by counsel); Reasor v. Jordan, 110 So.3d 307, 312 (Miss. 2013) (same).

20. McKaskle v. Wiggins, 465 U.S. 168, 170 (1984).

21. *Id.* at 176.

22. *Id*. at 178.

23. *Id*. at 176–82.

24. *Id*. at 183.

25. *Id*. at 183–84. This language has been cited by courts in civil matters. *See, e.g*., Mala v. Crown Bay Marina, Inc., 704 F.3d 239, 243 (3d Cir. 2013) ("[T]here is no case law requiring courts

Many subsequent decisions by lower courts cite the Court's language regarding rule compliance.[26] The *McKaskle* Court sought to preempt the question: If there is no standby counsel, who will assist the unrepresented defendant? The Court may have sought to foreclose the possibility of future suggestions that judges themselves provide some assistance to SRLs.

B. ABA Model Code of Judicial Conduct 2.2, Comment [4]

Since the late 1990s, despite the Supreme Court's "hands off" policy with respect to judges assisting SRLs with rule compliance, state and federal court administrators—having noticed the increasing presence of SRLs in courts nationwide—developed a plethora of services and programs for them.[27] These "access-to-justice" programs include not only self-service centers for distribution of appropriate forms but also educational programs such as clinics conducted by pro bono lawyers, videos, and other means of instruction designed to teach SRLs the law and court rules applicable to their case.[28] The information provided by these programs is very general in order to avoid unauthorized practice of law violations by court staff and potential malpractice implications of unintended attorney-client relationships.[29]

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to provide general legal advice to pro se parties. . . In a long line of cases, the Supreme Court has repeatedly concluded that courts are under no such obligation."); Bias v. Moynihan, 508 F.3d 1212, 1219 (9th Cir. 2007) ("The trial court is under no obligation to become an 'advocate' for or to assist and guide the pro se layman through the trial thicket."); Fraisar v. Gillis, 892 A.2d 74, 76 (Pa. Commw. Ct. 2006) ("This Court is not aware of, nor has Fraisar cited, any authority for his contention that court functionaries are required to accomplish service for a pro se litigant or explain to a litigant requesting such assistance that it does not perform the same.").

26. *Id.*; *see also* McNeil v. United States, 508 U.S. 106, 113 (1993) (affirming dismissal of a pro se federal tort claims action for failure to exhaust administrative remedies prior to filing); Pliler v. Ford, 542 U.S. 225, 231–32 (2004) (district courts are not required to give the particular advisements required by the Ninth Circuit before dismissing a pro se petitioner's mixed habeas petition).

27. *See* JONA GOLDSCHMIDT & IRA PILCHEN, USER-FRIENDLY JUSTICE: MAKING YOUR COURT MORE ACCESSIBLE, EASIER TO UNDERSTAND, AND SIMPLER TO USE (1996); Goldschmidt, *supra* note 2, at 68–102; JOHN GREACEN, SERVING SELF-REPRESENTED LITIGANTS REMOTELY: A RESOURCE GUIDE (2016), https://www.srln.org/system/files/attachments/Remote%20Guide%20Final%208-16-16_0.pdf [https://perma.cc/R9UB-JYPS]; *Best Practices in Court-Based Programs for the Self-Represented: Concepts, Attributes, Issues for Exploration, Examples, Contacts, and Resources*, STATE JUST. INST. (2008), https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/328 [https://perma.cc/3QYK-SJFC]; Jefri Wood, *Pro Se Case Management for Nonprisoner Civil Litigation*, FED. JUDICIAL CTR. (2016), https://www.fjc.gov/sites/default/files/2017/Pro_Se_Case_Management_for_Nonprisoner_Civil_Litigation.pdf. [https://perma.cc/C25R-BU7M].

28. *Id.*

29. *See generally* Matthew Longobardi, *Unauthorized Practice of Law and Meaningful Access to the Courts: Is Law Too Important to Be Left to Lawyers?*, 35 CARDOZO L. REV. 2043, 2046 (2014) (arguing that a state's interest in having UPL rules is outweighed by low-income litigants' interests in seeking affordable legal services); Michele N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litiga-*

The available data show that SRLs' satisfaction with these programs is high.[30] But, as noted earlier, the data also show that SRLs, on average, continue to be less likely to prevail than represented parties.[31] With few exceptions,[32] these programs as a whole do not provide individualized instructions that SRLs need about the application of the law to their case nor do they instruct SRLs on methods used to respond to motions, develop trial strategy, the best means to present evidence, or other litigation mechanics. This leaves SRLs to their own devices in learning the law, applying the law to their case, and drafting proper submissions to a court.

To address the challenge facing courts presiding over SRL cases that have merit but are not properly litigated to the detriment of that party, some scholars, including myself, called upon the ABA to establish a judicial *duty* of reasonable assistance for SRLs based on the common law[33] and continuing practice in Commonwealth countries in order to address

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tion, 2 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 166, 170 (2012) ("[A]ttorneys providing limited representation operate in uncharted waters with little confidence in being protected against malpractice and ethical complaints.") (citing case law and articles on the subject).

30. *See, e.g.*, Lonni Summers, Bradley Powers & Jamie Walter, *Perceptions of Remote and Walk-In Service Delivery in Family Law Cases*, 57 FAM. CT. REV. 501, 508–09 (2019) (94% of clients across several program types agreed or strongly agreed with the satisfaction survey question; and responses to the open-ended responses were "overwhelmingly favorable").

31. *See supra* note 2.

32. Noteworthy is the U.S. District Court for the Northern District of Illinois' William J. Hibler Memorial Pro Se Assistance Program, described as follows:

> Volunteer attorneys complete scheduled shifts, providing limited legal assistance to pro se litigants at the Dirksen Federal Courthouse on all phases of federal litigation. Malpractice insurance is provided through the program's legal aid partner, LAF (formerly the Legal Assistance Foundation of Chicago) [;] Time Commitment: Each shift is 3 hours, and volunteers are asked to staff at least one shift per month. A sign-up sheet is sent out each month allowing volunteers to choose a shift that fits their schedules[;] Training Requirements: The half-day, on-site training consists of shadowing an experienced volunteer for one shift, followed by an opportunity for a legal aid staff attorney to observe and provide feedback to the volunteer as he or she works with clients independently. An experienced staff attorney is always available to answer questions and provide ongoing support to volunteers. Volunteers may work in teams[;] Other Requirements: Volunteers must be members of the Northern District Trial Bar and have at least three years of federal court experience and a valid Illinois law license (active, inactive, or retired status). Experience in employment discrimination or civil rights law is helpful, but not required.

Northern District Pro Bono Programs–Trial Bar Pro Bono Program, U.S. DIST. CT. FOR THE N. DIST. OF ILL., https://www.ilnd.uscourts.gov/Pages.aspx?BQuMZcPiD1N2onwVG/J4/Q. [https://perma.cc/2N66-ATR8].

33. *See* WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAW OF ENGLAND 349 ("[T]he judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular."). However, this did not include tactical advice in formulating a defense, or acting as the pro se defendant's attorney. JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY TRIAL 30 (2003).

these fundamental gaps in pro se education.[34] The ABA answered our call when it added a new Comment to Rule 2.2 of the Model Code of Judicial Conduct (MCJC).[35]

MCJC Rule 2.2 states that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."[36] ABA Comment [4] states: "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." [37] Note that the language is discretionary, and there is no definition—nor are any examples given—of "reasonable accommodations."

In 2012, the Conference of Chief Justices (COCJ) and the Conference of State Court Administrators (COSCA) passed joint Resolution 2, entitled *In Support of Expanding Rule 2.2 of the ABA Model Code of Judicial Conduct to Reference Cases Involving Self-Represented Litigants*.[38] The state ethics rule drafters debated whether Comment [4] should state that it applies to all litigants, rather than specifically mentioning pro se litigants as it does.[39] The resolution states that "the Conferences agree that Rule 2.2 should specifically address cases involving self-represented litigants."[40] Also, the resolution "suggest states modify the comments to Rule 2.2 to reflect local rules and practices regarding specific actions judges can take to exercise their discretion in cases involving self-represented litigants."[41]

Seven states have since adopted Comment [4] verbatim;[42] twenty-three states have adopted some variation of it.[43] The variations in some

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34. *See* Jona Goldschmidt, *Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience*, 17 MICH. STATE J. INT'L L. 601, 630–31 (2008-) (describing the Canadian judicial duty of reasonable assistance, based on the duty to ensure trial fairness, and arguing for its adoption by U.S. courts).

35. MODEL CODE OF JUDICIAL CONDUCT r. 2.2 (AM. BAR ASS'N 2007).

36. MODEL CODE OF JUDICIAL CONDUCT r. 2.2 (AM. BAR ASS'N 2010).

37. *Id*.

38. CONF. OF CHIEF JUSTS. & CONF. OF STATE CT. ADM'RS, *Resolution 2 In Support of Expanding Rule 2.2 of the ABA Model Code of Judicial Conduct to Reference Cases Involving Self-Represented Litigants*, (July 25, 2012), https://www.ncsc.org/__data/assets/pdf_file/0023/23747/07252012-support-expanding-rule-aba-model-code-judicial-conduct-self-representing-litigants.pdf [https://perma.cc/96U2-SEM9] [hereinafter *Resolution 2*].

39. *Id*.

40. *Id.*

41. *Id.*

42. States adopting a comment identical to the ABA's Comment [4] in their judicial ethics codes, include: Hawaii, Rule 2.2, Comment [4]; Indiana, Rule 2.2, Comment [4]; Minnesota, Rule 2.2, Comment [4]; Nevada, Rule 2.2, Comment [4]; Oklahoma, Rule 2.2, Comment [4]; Utah, Rule 2.2, Comment [3]; and Washington, Rule 2.2, Comment [4].

43. The states (and D.C.) adopting some variation of the ABA's Comment [4] in their judicial ethics codes, include: Arizona, Rule 2.2, Comment [4]; Arkansas, Rule 2.2(B), Comment [4]; Califor-

cases include examples of what "reasonable accommodations" means,[44] which is lacking in the ABA's Comment [4] but encouraged by Resolution 2.[45] These examples are very general and include such "accommodations" that really should be requirements, e.g., Arkansas's list includes (1) making referrals to any resources available to assist the litigant in the preparation of the case; (2) liberally construing pleadings to facilitate consideration of the issues raised; (3) providing general information about proceeding and foundational requirements; (4) attempting to make legal concepts understandable by using plain language whenever possible; (5) asking neutral questions to elicit or clarify information; (5) modifying the traditional order of taking evidence; and (6) explaining the basis for a ruling.[46]

Unfortunately, only about one-half of the states have adopted a "reasonable accommodations" rule in their judicial conduct codes. Without exception, states which provide judges with the authority to make reasonable accommodations make it (consistent with the ABA's Comment [4]) discretionary under all variations of the rule rather than mandatory. Aside from the few states that articulate examples of reasonable accommodations,[47] state judges are given no guidance as to when the reasonable accommodations rule should apply. There is scant case law involving Comment [4], and none of it holds that reasonable accommodations are mandatory or a right[48] nor is there a federal equivalent Rule 2.2, Comment [4].[49]

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nia, Canon 3B(8), Advisory Comm. Comment; Connecticut, Rule 2.2, Comment [4]; District of Columbia, Rule 2.2, Comment [4]; Idaho, Rule 2.2, Comment [4]; Illinois, Canon 3(A)(4); Iowa, Rule 51: 2.2, Comment [4]; Kansas, Rule 2.2, Comment [4]; Kentucky, Rule 2.2, Comment [4]; Maryland, Rule 18-102.2(b); Massachusetts, Rule 2.2, Comment [4]; Maine, Rule 2.6(C); Missouri, Rule 2-2.2, Comment [4]; Montana, Rule 2.2, Comment [5]; Nebraska, § 5-302.2 (Canon 2), Comment [4]; New Hampshire, Rule 2.2(B), Comment [4]; New Jersey, Rule 3.7, Comment; New Mexico, Rule 21-202, Comment [4]; North Dakota, Rule 2.2, Comment [4]; Ohio, Rule 2.2, Comment [4]; Pennsylvania, Rule 2.2, Comment [4]; Rhode Island, Rule 2.2(B); and Tennessee, Rule 2.2, Comment [4].

44. *See supra* note 37.

45. Resolution 2, *supra* note 39.

46. JUDICIAL CODE OF CONDUCT r. 2.2(B), cmt. [4]; *see also* Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423 (2004) (arguing judicial neutrality is not mutually exclusive with judicial engagement).

47. *See id*.

48. *See* Spring v. Wick, No. 2013–G–3163, 2014 WL 2958305, at *24–25 (Ohio Ct. App. 2014); Levi v. Gordon, 356 P.3d 1045 (Haw. Ct. App. 2015); Reyes v. City of Phoenix, No. 17-04741-PHX-JAT, 2018 WL 4377161, at *4 (D. Ariz. 2018).

49. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES CANON 3 (2019) ("A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently,"), https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges [https://perma.cc/45ND-XH83]. Comment [4] to Canon 3 states: "A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law." *Id.*

When considering the following three case studies, the reader should keep in mind this review of the Supreme Court's pronouncements with respect to courts' strict treatment of SRLs and ask themselves, in light of the growing state adoption of Comment [4]: (1) whether the judges in these cases (at trial and on appeal) had the opportunity to affirmatively exercise their discretion to offer reasonable accommodations that would have assisted the SRLs having their cases fairly heard on the merits; (2) whether the benefit of procedural justice and fair treatment of the SRLs would have outweighed the cost of time and effort the court would have expended to provide those accommodations; and (3) whether a court providing reasonable accommodations in these matters would have contributed to the SRLs' and the public's trust and confidence in the courts.

II. CASE #1: THE CLAIM FOR RETURN OF SPECIAL ASSESSMENT PAYMENT

A. Facts and Procedural Posture

Philip Goldberg is a retired banker with an MBA and, based on my contacts with him, I see him as sort of frustrated lawyer.[50] He is an experienced SRL, having previously litigated several successful cases against his homeowners' association (HOA)—in whole or in part—with the most recent being eight years prior to this filing. Goldberg knows the rules of civil procedure and filed clearly written, detailed, pleadings citing to relevant authorities. This case is described in greater depth than the other two case studies which follow because it went to trial on multiple counts and legal issues. However, this was a small claims case because the damages sought were within the statutory limit for such cases in Illinois.[51] It was not "small" in the terms of legal complexity[52] as multiple statutes were relevant to the four counts. Discovery became an issue[53] and motion hearings were held in which the rules of evidence were strictly applied (only to Goldberg) contrary to the court rules that permitted the courts to relax

50. He sought me out to discuss this case when the matter was pending, but I advised him that my professional university obligations prevented me from representing him in the matter. Goldberg responded that he was not seeking representation; rather, having learned about my interest in self-representation, he just wanted me to "see how the Illinois courts treat pro se litigants."

51. A small claim under Illinois law is defined as "a civil action based on either tort or contract for money not in excess of $10,000, exclusive of interest and costs." Ill. Sup. Ct. R. 281.

52. Defendants conceded in an early motion to continue the first trial date that the "issues presented . . . are complex." Goldberg Case, Defendants' Motion for Leave to Continue Trial Date, at ¶ 5 (on file with author).

53. Under the rules, "(a) No depositions shall be taken or interrogatories or other discovery proceeding or requests to admit be used prior to trial in small claims except by leave of court. (b) Motions. Except as provided in sections 2-619 and 2-1001 of the Code of Civil Procedure [motions to dismiss], no motion shall be filed in small claims cases, without prior leave of court." Ill. Sup. Ct. R. 287.

the rules of evidence in small claims cases.[54] This case most assuredly became a battle the HOA's counsel had not expected when they entered their appearance against the expert plaintiff SRL.[55]

Goldberg's complaint challenged the HOA's imposition of a $7,500 special assessment for road repairs and other claims not discussed here.[56] It was separated into six counts (unusual for the typical small claims case) four of which survived a motion to dismiss.[57] Count I is most relevant here: The board member ineligibility claim. Goldberg claimed that the board's special assessment vote was void *ab initio* because one of the three board members was ineligible to serve as a board member of the HOA.[58] The putative board member (1) was not a property owner and thus not a "member" of the HOA, and (2) because state law specifically requires nominees for board positions be selected "from among the membership" of the HOA.[59]

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54. Illinois Supreme Court Rule 286 states:

> In any small claims case, the court may, on its own motion or on motion of any party, adjudicate the dispute at an informal hearing. At the informal hearing all relevant evidence shall be admissible and *the court may relax the rules of procedure and the rules of evidence*. The court may call any person present at the hearing to testify and may conduct or participate in direct and cross-examination of any witness or party. At the conclusion of the hearing the court shall render judgment and explain the reasons therefor to all parties.

Ill. Sup. Ct. R. 286 (emphasis added).

55. *See* Brian L. Champion, *Defending Against a Pro Se Plaintiff: When the Plaintiff Is David and You're Goliath*, 20 ME. BAR J. 236, 239 (2005) ("[D]o not be lulled into thinking that any *pro se* matter brought against your client will be an easy case. It may very well turn out to be the most difficult, trying, and potentially embarrassing case of your career.").

56. Complaint for Monetary Relief, Goldberg v. Glenstone Homeowners Ass'n, No. 14 SC 1870 (Ill. Cir. Ct. Sept. 19, 2014).

57. The claims can be summarized as follows: Count I – The defendant HOA's Board of Directors is illegally constituted because one putative board member is not an owner of property within the HOA, thus not a member of the association, and is therefore ineligible to sit on its 3-member board of directors; Count II – The special assessment the HOA imposed on Goldberg for road repairs violates the association's Declaration because it was not adopted in strict compliance with the association's Declaration and bylaws; Count III – The HOA's imposition of the special assessment was fraudulent and violated the Deceptive Practices Act [*dismissed*]; Count IV – The HOA failed to issue a proper notice of a special meeting of homeowners to challenge the assessment which Goldberg requested [*dismissed*]; Count V – Goldberg, not exclusively the HOA, had legal authority over his private road, according to his deed and the subdivision plat, thus limiting its authority to impose a special assessment for unnecessary repairs of his road, and Count VI – The HOA had no authority to repair and maintain a lot not contained within the subdivision common elements, and charge him and other homeowners for it via the subject special assessment for road repairs purportedly for HOA property repair.

58. Because the HOA is a not-for-profit corporation, the Illinois Not-for-Profit Act requires that its board consist of not less than three members. 805 ILL. COMP. STAT. 105/108.10(a) (1986) ("The board of directors of a corporation shall consist of three or more directors.").

59. Illinois Common Interest Community Association Act, 765 ILL. COMP. STAT. 160/1-25(A) (2015) ("Elections shall be held in accordance with the community instruments, provided that an election shall be held no less frequently than once every 24 months, for the board of managers or board of directors *from among the membership* of a common interest community association." (emphasis added)) [hereinafter *CICAA*]. Despite language in the HOA's Declaration that provided that board

The matter was tried on the four surviving counts; and on defense motion at the close of Goldberg's case, the trial court entered directed findings in the defense's favor on all counts without any evidence being offered.[60] Both sides sought sanctions from the trial court for their litigation conduct, but only those sought by counsel against Goldberg were awarded.[61] Goldberg appealed the decision to the Illinois Appellate Court. The court affirmed the trial court's every ruling in a 36-page unpublished opinion, holding that Goldberg's claims were frivolous and granting counsel's second petition for additional sanctions on appeal (in the amount of $15,952.90). The Illinois Supreme Court denied leave to appeal;[62] thus, for his trouble in seeking reimbursement of the $7,500 paid assessment, Goldberg was forced to pay over $32,625.65 in fees, costs, and interest to the HOA. [63]

B. Reasonable Accommodations Not Provided

1. Preventing, Sanctioning, and Not Engaging in Unprofessional Conduct

a. False Statement of Law/Failure to Disclose Adverse Authority

The court in Goldberg's case failed to provide reasonable accommodations in several respects. First, it failed to prevent sharp practices taken against him by defense counsel which violates ethical norms. The court also exhibited bias against Goldberg and engaged in questionable ethical conduct by seemingly coaching opposing counsel as reflected in three instances. Opposing counsels' memorandum of law in support of their mo-

members were to be elected "by the members" of the HOA to give effect to the Declaration language, he argued, would not only contravene explicit state law but could also result in a non-property owner and non-association member being elected to the HOA board. *Goldberg*, No. 14 SC 1870.

60. *Goldberg*, No. 14 SC 1870.

61. Order of the Court, *Goldberg*, No. 14 SC 1870 (granting attorney's fees and costs against Goldberg in the amount of $16,672.75).

62. Goldberg v. Glenstone Homeowners Ass'n, No. 2-14-1025, 2015 WL 7568483 (Ill. App. Ct. 2016), *pet. for leave to appeal denied*, 50 N.E.3d 1139 (Ill. 2016).

63. The Illinois Judicial Code has an equivalent to the ABA MCJC's Rule 2.2, Comment [4]. The provision states: "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of self-represented litigants to be fairly heard." Ill. Sup. Ct. R. 63(A)(4). Also in effect was the Illinois Access to Justice Act. 705 Ill. Comp. Stat. Ann. 95/1 (2013).

tion to dismiss Count I misrepresented the language of the Illinois Common Interest Community Association Act (CICAA)[64] by omitting the adverse provision that would have defeated their claim.[65] That is, the memorandum stated that HOA boards are "a group of people elected *by the members*,"[66] thus implying that anyone, property owner or not, could sit on the board.[67] They also alleged that "[n]either statute [referring to the CICAA or the Illinois General Not-for-Profit Corporation Act (GNFPCA)] require[s] that a member of the board be a record title owner."[68] And so, counsel asserted that Goldberg's claim that directors must be elected "from among" its members must be dismissed because

64. *See supra* note 61.

65. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3(a) ("[A] lawyer shall not knowingly … (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; [or] (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."); David L. Hudson Jr., *Lawyers Have a Duty to Disclose Adverse Legal Authority Even If It Hurts Their Case*, A.B.A. J. (June 1, 2019) (noting that ABA Formal Opinion 280 stated that "'The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case?'"), https://www.abajournal.com/magazine/article/duty-to-disclose-adverse-legal-authority [https://perma.cc/3K87-H9DZ]; Alan D. Strasser, *Candor Toward the Tribunal: The Duty to Cite Adverse Authority)*, A.B.A. J. (Jan. 27, 2021), https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/practice/2021/candor-toward-the-tribunal-the-duty-to-cite-adverse-authority/ [https://perma.cc/W93Z-2X69]; *see also* Ill. Sup. Ct. R. 3.3(a)(1), (3) (the Illinois equivalent to the ABA candor rule in effect at the time of the trial).

66. Defendants' Memorandum in Support of Motion to Dismiss, *Goldberg*, No. 14 SC 1870 (emphasis added).

67. The CICAA defines an HOA "Member" as "the person or entity designated as an owner and entitled to one vote as defined by the community instruments." 765 ILL. COMP. STAT. 160/1-5 (2010). The HOA's Declaration is silent regarding a requirement that directors be property owners and likely a scrivener's error. However, the CICAA, provides a "common interest community association shall be in full compliance with the provisions of this Act no later than January 1, 2012," thus making this statutory eligibility requirement a part of the HOA Declaration and binding on it. 765 ILL. COMP. STAT. 160/1-80. The Act also provides for a method of amending HOA Declarations to make them consistent with the Act:. *See* 765 ILL. COMP. STAT. 160/1-60(a). The trial judge never consulted the statute to parse out its provisions and their applicability to the case; but the Declaration does provide that "Every Owner of any Lot which is subject to assessment, in whole or in part, shall automatically be a member of the association and shall remain one so long as he remains an Owner of Lot subject thereto." HOA Declaration, art. 3, § 1 (1985) (on file with author). Because he was not a lot owner, the putative board member was ineligible to become a board member. The next section discusses the HOA's alternative argument, to wit, the putative board member did not need to be a member of the HOA since he was a beneficiary of a land trust. *See infra* Section II(B)(2).

68. The HOA cited to the *definitional* section of the CICAA, 765 ILL COMP. STAT. 160/1-5, failing to cite or address the more specific section governing election eligibility under 765 ILL. COMP. STAT. 160/1-25(a) upon which Goldberg relied on. Counsel presumably wished to avoid the consequences of the bedrock rule of statutory construction that was adverse to their clients' position. *See* People ex rel. Madigan v. Burge, 18 N.E.3d 14, 22–23 (Ill. 2014) (stating that when two conflicting statutes cover the same subject, "the law is settled that [h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment"). Here, the elections method provision was far more specific than the definitional section of the statute.

"this definition is not in the statute" and "there is no legal or factual support whatsoever for Plaintiff's frivolous cause of action."[69] The lawyers not only falsely denied the existence of adverse law in their pleadings[70] but also made assertions without basis in law[71] in open court: "First of all, Your Honor, Mr. Goldberg, what he pulled from that statute is not what it says. What it says in his complaint is not what the statute says and what he's saying now is not what the statute says."[72] Had the lawyers quoted the aforementioned adverse authority accurately, the HOA's argument that non-property owners could sit on an HOA board would have been defeated. Instead, the trial court relied on counsel's representations, did not independently ascertain the correct statement of law, and ruled in favor of the HOA.[73]

b. Withholding Material Evidence and Judicial Bias

Lawyers have an ethical duty not to "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."[74] Nor may a lawyer "in trial . . . assert personal knowledge of facts in issue."[75] Both of these duties were violated by opposing counsel in Goldberg's case. The HOA's putative board member claimed to be eligible to sit as a board member by virtue of being a beneficiary of his wife's "land trust."[76] A land trust permits property owners to conceal their identity by placing title in a trust managed by a bank as trustee with the owner(s) named as confidential

69. Memorandum in Support of Motion to Dismiss, *Goldberg*, No. 14 SC 1870.

70. *See* 765 ILL. COMP. STAT. 160/1-25(a). The statute provides "[a] common interest community association shall be in full compliance with the provisions of this Act no later than January 1, 2012." 765 ILL. COMP. STAT. 160/1-80.

71. MODEL RULES OF PROF'L CONDUCT r. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

72. Trial Transcript at 9, *Goldberg*, No. 14 SC 1870 (transcript from proceedings on Sept. 19, 2014).

73. *Id*. at 18–19. The colloquy went as follows:

> THE COURT: Again, they don't have to prove it. They don't have to prove it. You're the plaintiff. So far what I've got here says that he doesn't have to be a member. He has to be elected by the members. Okay? That's what I've got.
>
> MR. GOLDBERG: It has to be not by, from among. It does not say by election shall be held from among membership, not by the membership, it's from among the membership.
>
> THE COURT: I've already ruled. Okay?

74. MODEL RULES OF PROF'L CONDUCT r. 3.4(a).

75. *Id*. at ¶ (e).

76. Trial Transcript, *supra* note 74, at 11.

beneficiaries.[77] Beneficiaries have the power to direct the trustee to partition, sell, or otherwise convey title to trust property,[78] which cannot be done by beneficiaries of a *revocable* living trust.[79] Thus, the trust document was material evidence.

The record does not show that counsel ever showed Goldberg the trust document at trial, even though counsel shared it with the court.[80] Goldberg submitted a certified copy of a document reflecting the filing of the putative board member's property conveyance, describing the document as a "revocable living trust."[81] However, counsel represented to the court in lieu of testimonial evidence that the trust was a land trust.[82] Before

77. Land trust means "any express agreement or arrangement whereof a use, confidence or trust is declared of any land, or of any charge upon land, for the use or benefit of any beneficiary, under which the title to real property, both legal and equitable, is held by a trustee, subject only to the execution of the trust, which may be enforced by the beneficiaries who have the exclusive right to manage and control the real estate, to have the possession thereof, to receive the net proceeds from the rental, sale, hypothecation or other disposition thereof, and under which the interest of the beneficiary is personal property only." 765 ILL. COMP. STAT. 405/1. A land trust primarily serves as a vehicle in real estate transactions to maintain secrecy of ownership and allow ease of transfer. FirstMerit Bank, N.A. v. Soltys, 29 N.E.3d 568, 575 (Ill. App. Ct. 2015).

78. *See* Toushin v. Ruggiero, 38 N.E.3d 130, 140 (Ill. App. Ct. 2015); Azar v. Old Willow Falls Condo. Ass'n, 593 N.E.2d 583, 586 (Ill. 1992) ("Thus, it is readily apparent that true ownership in a land trust lies with the beneficiaries, although title lies with the trustee."); *see also* First Chicago Tr. Co. of Illinois v. Old Willow Falls Condo. Ass'n, 593 N.E.2d 581, 583 (Ill. 1992) ("In an Illinois land trust, the interests of the trustee and the beneficiary together aggregate fee simple ownership . . . There are no express provisions in the Condominium Property Act or defendant's by-laws or declaration indicating that a developer cannot be a unit owner.").

79. *See* Robert S. Hunter, *The Use Of The Living Trust, Generally*, 19 ILL. PRAC., ESTATE PLANNING & ADMIN. § 221:1 (4th ed. 2020). Beneficiary means "a person that: (A) has a present or future beneficial interest in a trust, vested or contingent, assuming nonexercise of powers of appointment," while revocable means "revocable by the settlor without the consent of the trustee or a person holding an adverse interest. A revocable trust is deemed revocable during the settlor's lifetime." ILL. COMP. STAT. 3/103(3), (31).

80. Trial Transcript, *supra* note 74; Plaintiff's Exhibit 1, at 15, *Goldberg*, No. 14 SC 1870 (describing the filing of a "revocable living trust").

81. Trial Transcript, *supra* note 74; Plaintiff's Exhibit 1, at 15, *Goldberg*, No. 14 SC 1870.

82. The following colloquy occurred:

> LAWYER: There's also another section of the Declaration, Your Honor, which is Article 1, Section 1 that says for purposes of this section, holders of beneficial interest under land trust holding title to any lot which is part of the property shall be considered owners. Mr. Goldberg never even asked if Mr. Anastacio fits into that definition, which he does, and he will testify to that effect.
>
> THE COURT: So he's the beneficiary of the trust?
>
> LAWYER: Correct, his wife.
>
> THE COURT: That is the owner of the property?
>
> LAWYER: Correct.· He's the owner by definition, plus according to the Declaration, he doesn't need to be.

Trial Transcript at 11–12, *supra* note 74. Counsel seemingly violated the ethical prohibition upon lawyers not to "assert personal knowledge if facts in issue except when testifying as a witness" MODEL RULES OF PROF'L CONDUCT r. 3.4(e) ("A lawyer shall not . . . *assert personal knowledge of facts in issue except when testifying as a witness*, or state a personal opinion as to the justness of a cause, the

the court ruled on Count I, the following colloquy took place between defense counsel and the trial judge:

> LAWYER: Your Honor, may I clarify something for the record, please? The exhibits
>
> that I've shown to you, have we admitted those or should we wait?
>
> THE COURT: Wait.
>
> LAWYER: Thank you.
>
> THE COURT: Or you can ask that they be admitted. You just won't be entitled to a directed finding at the close of this case.
>
> LAWYER: I'm going to wait, then.[83]

The court ruled against Goldberg on this count because he did not introduce the very document withheld from him by opposing counsel and denied viewing and disclosure by the court.[84]

c. Seeking and Imposing Unjustified Sanctions

Goldberg filed a pretrial motion for sanctions against the lawyers, informing the court he filed the motion "because [he] wanted to ask the Court if [sanctions] would put an end to the false disparagement of [him] and also put an end to the defendants' attorney bad faith and flawed interpretation of law."[85] He complained that counsel improperly cited a libel case that referred to an inapplicable privilege that would effectively immunize them and anyone else from sanctions for litigation misconduct and that the case was not analogous to Goldberg's.[86] The court subsequently denied the motion for sanctions.[87]

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credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." (emphasis added)); *see also* ILLINOIS RULES OF PROF'L CONDUCT r. 3.4(A)(e).

83. Trial Transcript at 19, *supra* note 74. Judges are required to maintain impartial and "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." MODEL CODE OF JUDICIAL CONDUCT r. 1.2; *see also* ILLINOIS CODE OF JUDICIAL CONDUCT CANON 2 and 3(A)(9): "A judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"; "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, . . .").

84. Trial Transcript at 18–19, *supra* note 74.

85. Transcript of Proceedings at 16, *Goldberg*, No. 14 SC 1870 (transcript from proceedings on Aug. 26, 2014).

86. *Id*. at 29. Counsel argued "Statements made in open court are not—do not fall under [sanctions] Rule 137, you know, and also these are, like I said, based on personal opinions and they're interpretations of the law, that's for the Court to decide." *Id*. This proposition would of course negate all ethical duties of candor to the tribunal.

87. *Id.* at 43.

Counsel's conduct in this case is outweighed by their *chutzpa* in seeking (and successfully obtaining) their own sanctions against Goldberg.[88] In this segment of the case, the trial court seemingly showed bias in favor of defense counsel by awarding fees for the entirety of the HOA's representation rather than for work done on sanctionable matters (of which in my view, or that of any reasonable person, there were none).[89] Goldberg lost the case, but defense counsels' petition for fees mischaracterized Goldberg's complaint by using the terms "baseless" and "frivolous" to describe the suit.[90] They argued the following entitled them to fees:

- Goldberg filed a motion for leave to subpoena defendants after they moved to quash his subpoena because it was issued without leave of court.
- Goldberg purportedly agreed not to exchange discovery prior to trial (which he denied) and they "were forced to respond to two frivolous pleadings filed by Goldberg with respect to unauthorized discovery."
- Goldberg's motion for leave to file the subpoena he mistakenly filed without leave of court was scheduled [by the court clerk] for a separate date and time from when counsel had separately scheduled the hearing on their motion to quash the subpoena, "causing defendants to incur even more fees and costs."
- Goldberg's motion for sanctions and leave to file an amended complaint were "both denied because they were baseless pleadings," (although no such language was stated in these Orders or in the record other than counsel's statements).
- Goldberg "failed to present any facts or evidence in support of his remaining claims" (which was contradicted by his extensive testimony and admitted exhibits, in contrast to the absence of any defense evidence).[91]

88. Defendants' Petition for Attorneys' Fees, *Goldberg*, No. 14 SC 1870 (filed October 9, 2014).

89. *Id*. (Order granting defendants' petition for attorneys' fees in the amount of $16,672.75 on December 2, 2014).

90. Defendants' Petition for Attorneys' Fees at 1, *Goldberg*, No. 14 SC 1870.

91. *Id*. at 2–3. At oral argument regarding the fees petition, counsel made the following additional representations: (1) "It was clear at the time of trial that plaintiff's claims were baseless and he brought them based on his own personal opinions. They were not grounded in law or in fact"; (2) "Neither motion had any merit and the attempted discovery only proved he had no factual support whatsoever for his claims. In the small claims matter, defendants were forced to engage in and respond to at least five baseless motions and his subpoena, all of which were denied"; and (3) his "subjective opinion of the merits of his position is irrelevant as attorney/client must inquire into facts to support a legal claim. . . Mr. Goldberg insisted on a trial based lawsuit, and it's our contention [that] the imposition of sanctions against him is proper." *Id.* at 4–5.

Had a lawyer been accused of such "(mis)conduct," it is likely no reasonable judge would have entered sanctions against him or her.

Goldberg subpoenaed a number of documents pretrial but was met with a motion to quash on grounds that the court rules required leave of court to conduct discovery.[92] Upon receipt of the motion to quash, Goldberg attempted to correct his error by filing a motion for leave to take discovery, which the court clerk happened to set for hearing on a date other than the defendants' date for their motion to quash.[93] In response, the HOA argued that Goldberg agreed not to conduct discovery—which Goldberg promptly denied and was not reflected in the record[94]—and that his request was merely a "fishing expedition."[95] The following occurred when Goldberg tried to argue that he had a right to the documents listed in his motion.[96] The trial judge cut him off and denied the request *in toto*:

> THE COURT:· Anyway, it's denied.
>
> MR. GOLDBERG:· I —
>
> THE COURT:· It's denied.
>
> MR. GOLDBERG:· The whole thing is —
>
> THE COURT: Everything is denied.· Yes, I read it —
>
> LAWYER:·Thank you, Your Honor.[97]

Goldberg went to trial on the surviving four counts. Citation of authority is not needed for the proposition that actions which survive a motion to dismiss are by definition not frivolous.[98] And losing a case at trial does not constitute a basis for sanctions, or else no one would want to practice law. The dismissal Order in this case made no finding that the

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92. Transcript of Proceedings at 40, *supra* note 87. The Illinois small claims court rules provide: "No depositions shall be taken or interrogatories or other discovery proceeding or requests to admit be used prior to trial in small claims except by leave of court." Ill. Sup. Ct. r. 287(a). While Goldberg was held to strict compliance with the rule that permitted discovery only by leave of court, no such rule enforcement was carried out as to opposing counsel. If counsel believed subpoenas *duces tecum* constituted unauthorized discovery, their obligation was to first consult with Goldberg to informally resolve the dispute before seeking judicial relief. Ill. Sup. Ct. r. 201(k). No such effort was made by counsel, causing unnecessary filing of their motion to quash and a hearing about which they complained in their fees petition that they were "forced" to do.

93. Motion for Leave to Subpoena Relevant Defendant Glenstone Corporate Documents in Instant Matter, *Goldberg*, No. 14 SC 1870 (filed on July 29, 2014).

94. Transcript of Proceedings at 37, *supra* note 87.

95. *Id*. at 38.

96. *Id*. at 35–36.

97. *Id*. at 39.

98. *See* Neitzke v. Williams, 490 U.S. 319, 331 (1989) ("We therefore hold that a complaint filed *in forma pauperis* is not automatically frivolous within the meaning of § 1915(d) because it fails to state a claim.").

claims were "baseless" or "frivolous."[99] However, there is more to this story.

In response to the claim that Goldberg's suit was merely based on "personal opinion" and not based on a reasonable inquiry,[100] Goldberg cited five attorney-authored writings that he had consulted before filing his complaint regarding HOA board member eligibility to show he had a reasonable basis at law for the action.[101] But the court refused to consider these on hearsay grounds, even though they weren't being offered for the truth of the matters therein.[102] Goldberg pleaded: "I'm not an experienced litigator, and that's something that the Court should take into account is the level of experience," to which the judge responded:

> You chose to bring this pro se, that's your choice and no, you come in here and you filed a lawsuit and you filed things. No. That's the whole thing. You chose to do it and you chose to do it pro se. That's not something the Court is going to consider. You come in here and it's like gee, I got a bad appendix, I think I'll try and take it out myself. Not a good idea. Go ahead.[103]

These remarks tend to demonstrate the trial judge dressed Goldberg down ("ridiculed" him) for "masquerading" as a lawyer. The court further demonstrated a desire to punish Goldberg by inexplicably entering a fees award of $16,672.75 for the defense of all four counts tried and dismissed based on insufficient proof. The court never characterized any part of his case as being frivolous, which begs the following questions: would an attorney have been sanctioned in this manner; would any attorney so wrongfully accused of misconduct not file a counter-motion for sanctions in response to opposing counsel filing a frivolous sanctions motion; wouldn't

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99. Order of the Court, *Goldberg*, No. 14 SC 1870 (granting defendants' motions for directed findings on Counts 1, 2, 5, and 6 on September 19, 2014) (on file with author).

100. *Id*. at 27.

101. *Id*. at 9; *see also* Plaintiff's Response to Defendants' Petition for Attorneys' Fees, *Goldberg*, No. 14 SC 1870 (filed on November 18, 2014) (Group Exhibit A).

102. There was no evidence that Goldberg failed to conduct a reasonable inquiry. Counsel having earlier requested a delay of trial due to the "complex" issues it presented, knew from his pleadings that Goldberg had conducted extensive research and that the pleadings were highly detailed factually and legally. Goldberg's effort to support his position with lawyer-written articles about eligibility requirements under the CICAA to sit on HOA boards which contained legal authorities and argument were rejected by the court at both the trial based on counsel's hearsay objection—as well as the fees hearing. In contrast, defense counsel cited law review articles in their pleadings, and these would not have been similarly rejected on hearsay grounds. This is another example of the court's bias against an expert SRL, that is, applying evidentiary rules strictly against them, but not against opposing counsel.

103. Transcript of Proceedings at 17, Goldberg, No. 14 SC 1870 (transcript from proceedings on Nov. 18, 2014).

a reasonable judge see the unprofessional (*Goliath-like*) nature of counsel's conduct in seeking unfounded sanctions against the SRL in such a case?

In addition to affirming the trial court's decisions and its fees award,[104] the appellate court granted the defendants' petition for an additional $15,827 in attorneys' fees and costs for the entirety of their work on appeal.[105] The appellate court reiterated the reasons given by the trial court in imposing sanctions, including his alleged failure to produce the trust document defense counsel withheld and to which the trial court had denied access.[106] The court believed Goldberg reiterated many of the same, sanctionable arguments and that the arguments had "become no less sanctionable when repeated."[107] The defendants prevailed on the merits and on their fees petitions by demonstrably taking undue advantage of both the lack of legal sophistication of their pro se adversary, as well as the trial judge's erroneous presumption that representations by licensed Illinois attorneys as to the facts and the law were unquestionably truthful when they were not.

Unfortunately, the appellate court also committed the same error when it relied upon the same misrepresentations in its unpublished opinion, failed to carefully consult the critical statute (§ 1-25(a) of the CICAA),

104. Under Illinois Rule 137, sanction for attorneys' fees at trial is a "drastic" remedy and only imposed where other enforcement efforts have failed and shown to be a "deliberate and continuing disregard for the court's authority." Santiago v. E.W. Bliss Co., 973 N.E.2d 858, 862 (Ill. 2012) (citing Sander v. Dow Chemical Co., 651 N.E.2d 1071 (Ill. 1995)). Goldberg was not even alleged to have engaged in any "deliberate and continuing disregard for the court's authority." *Santiago*, 973 N.E.2d at 862. He merely exercised his right to self-representation, filed pleadings based on his understanding of the rules, the law, and the facts, and lost his case due to lawyer misconduct and judicial bias. The fees awarded clearly added insult to injury and did indeed show me "how Illinois courts treat pro se litigants."

105. Rule 375(b) is penal in nature; its purpose is to "condemn and punish the abusive conduct of litigation and their attorneys who appear before us." Fraser v. Jackson, 12 N.E.3d 62, 74 (2014).; *See also* Bank of Chi. V. Park Nat'l Bank, 277 Ill. App. 3d 167, 174, 660 N.E.2d 19, 24 (1995) ("If, under an objective standard of conduct, a reasonably prudent attorney in good faith could have brought the appeal, a request for sanctions will be denied.").

106. Goldberg v. Glenstone Homeowners Ass'n, No. 2–14–1025, 2015 WL 7568483, at *17–19 (Ill. App. Ct. 2015).

107. *Id.* at *19. The implication of this comment is that anyone sanctioned by a trial court may not on appeal repeat arguments made below or risk being sanctioned again. In other words, there is no appeal from sanctions unless new arguments not previously made at trial occur (which would constitute a waiver of review because they were not made at trial). It is probably good this was an unpublished opinion with no precedential value because beyond being a ludicrous proposition, it would also appear to apply as a statement of a general legal rule. It is as an exhibition of disgust with an expert SRL who relies upon the same rules of procedure and law and makes arguments as best he can similar to that of a practicing lawyer.

and added in my view entered unwarranted sanctions[108] to punish ("ridicule") this expert SRL for appealing[109] an adverse decision as any reasonable attorney would have done under the circumstance.[110] The implications of the court's opinion are likely that an SRL who appeals an adverse decision for failure of proof should be sanctioned.[111] The case here involved valid legal issues in six counts involving multiple statutes and documents brought by a literate and considerate SRL but who met unexpected unprofessional conduct by counsel and the court. Any reasonable lawyer would have raised the issues Goldberg did as part of zealous advocacy. Sure, some of the claims may have been, as in any trial or appeal, stronger than others, but that does not make them sanctionable.

Moreover, any reasonable attorney would appeal claims that stated a cause of action but were later lost at trial or dismissed, especially where a prima facie case is made and, like here, no contrary evidence is introduced by the opposing party. But for defense counsels' false allegations in the pleadings, false statement of law at trial, withholding of material evidence, and the court's inappropriate strategic guidance to counsel not to offer critical documents into evidence, the defendants would not have prevailed. [112]

2. Ensuring Unbiased and Competent Appellate Review

In an unpublished opinion modified on rehearing, the appellate court affirmed all of the trial judge's rulings and entered an additional fees award on defense counsels' motion, covering the entirety of counsel's fees

108. Sanctions on appeal are authorized under Illinois Supreme Court Rule 375(b) for, *inter alia*, filing a "frivolous" appeal ("An appeal or other action will be deemed frivolous where it is not reasonably well grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law.").

109. No lawyer would be sanctioned for these trivial acts in litigation.

110. In granting a Rule 375(b) sanctions petition, the court asks whether the act taken by the individual being sanctioned was not a good faith effort that would have been taken by a reasonable and prudent attorney. Gilkey v. Scholl, 595 N.E.2d 183, 186 (Ill. App. Ct. 1992). An "objective standard of conduct" is used under Rule 375(b). Bank of Chicago v. Park Nat'l Bank, 660 N.E.2d 19, 24 (Ill. App. Ct. 1995) ("If, under an objective standard of conduct, a reasonably prudent attorney in good faith could have brought the appeal, a request for sanctions will be denied.").

111. Some judges may be easily persuaded that claims are frivolous, even if they survive a motion to dismiss, by hearing opposing counsel repeatedly calling them *frivolous*.

112. For me, this entire saga was a plain miscarriage of justice warranting my intervention as an officer of the court. My efforts to support Goldberg by filing an amicus brief in support of his petition for leave to appeal to the Illinois Supreme Court, to bring the matter to the attention of the Illinois Attorney Registration and Disciplinary Commission (which refused to investigate my 29-page complaint against the lawyers), and my motion to the latter court to enter a supervisory order directing the IARDC to investigate the matter were all unsuccessful. Complaint from Jona Goldschmidt to the Illinois Attorney Registration & Disciplinary Comm'n (on file with author).

for the appeal.[113] Addressing Goldberg's Count I claim the appellate court reasoned that:

> Fatal to Goldberg's claim is a lack of evidence that Anastacio needed to be an Association member in order to be a validly-elected director . . . Nor does the Community Act aid Goldberg. Section 1–5 defines "member" as a person or entity designated as an owner and entitled to vote under the relevant community instrument. 765 ILCS 160/1–5 (West 2012). And *Section 1–25 states that directors shall be elected by the members in accordance with the relevant community instrument.* 765 ILCS 160/1–25(a) (West 2012). *Both sections defer to the relevant community instrument—here, the Declaration. The Community Act does not otherwise restrict who may be a director.* We have already determined that the Declaration does not require that Anastacio have been a member to be a director, and therefore, the Community Act does not advance his argument . . . [I]t is up to the articles of incorporation and bylaws to prescribe qualifications for directors. Again, the Declaration controls, and it did not require that Anastacio be a member to serve on the board of directors.[114]

Shockingly, the italicized language is false and mischaracterizes the language of §1-25(a) of the CICAA (entitled "Board of managers, board of directors, duties, elections, and voting") which Goldberg cited and relied upon, and which establishes a statutory procedure for electing homeowner association board members to be elected "from among the membership."[115] The appellate court cited but misstated § 1-25(a), erroneously stating that "Both sections [§§ 1-5 and 1-25(a)] defer to the relevant community instrument—here, the Declaration. The Community Act does not otherwise restrict who may be a director."[116] It appears that neither the trial court nor the appellate court really studied the statute. One has to wonder as Goldberg did: *how is this possible?* Does this mean four different judges (one at trial and three on appeal) failed to examine the record and find the law as written where the issue was thoroughly briefed and debated?

Rather than deal with the § 1-25(a) issue, the appellate court focused solely on the defense's argument that Goldberg did not prove a negative,

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113. Goldberg v. Glenstone Homeowners' Ass'n, No. 2-14-1025, 2015 WL 7568483 (Ill. App. Ct. Nov. 24, 2015) (modified opinion on reharing), *pet. for leave to appeal denied*, 50 N.E.3d 1139 (Ill. 2016).

114. *Id.* at *11 (emphasis added).

115. 765 ILL. COMP. STAT. 160/1-25(a) ("Elections shall be held in accordance with the community instruments, provided that an election shall be held no less frequently than once every 24 months, for the board of managers or board of directors from among the membership of a common interest community association.").

116. *Id*.

i.e., that the putative board member was *not*, as defense represented without evidence, a beneficiary of a land trust.[117] The admission of the certified copy of the county clerk's filing record showed that the putative board member conveyed his property to his wife's "revocable living trust."[118] In the normal course of litigation, the court would require an evidentiary response as a matter of burden shifting[119] once Goldberg introduced that exhibit. Instead, the court relied again simply on counsel's oral representation regarding the nature of the trust and instructed her not to enter it into evidence; thus, the appellate court inexplicably held Goldberg did not introduce the critical trust document which only defense possessed and never introduced into evidence—much less provided access to the document through discovery which the trial court also denied.[120]

How many lawyers lose trials and appeals because there was a lack of evidence to prove an element in their respective cause of action; or because case law was not exactly on point; or because the court interpreted the language of a document differently than a party? Most lawyers experience losing a trial or appeal on these or similar grounds, but do they expect to be sanctioned for appealing a case they lost? Obviously, this is a rhetorical question, but the answer is different when it comes to an expert SRL who does their best to plead a case, loses at trial, is sanctioned for bringing the case, and then sanctioned again for appealing the adverse decision. All this seems to suggest the appellate court here joined the trial court in "ridiculing" the SRL for "masquerading" as a lawyer.

III. CASE #2: THE WILL CONTEST

A. Facts and Procedural Posture

This case, *Oakland v. Bell State Bank & Trust*,[121] also involves an educated SRL (a social worker) who from reading the record also filed well-written pleadings citing relevant authorities, followed procedural

117. *Goldberg*, 2015 WL 7568483, at *11.

118. Trial Transcript at 15, *supra* note 74. The appellate opinion makes no reference to this evidence.

119. *See* People v. Helt, 892 N.E.2d 594, 596–97 (Ill. App. Ct. 2008) ("'A hearing on a petition to rescind a summary suspension of driving privileges is a civil proceeding.'. . . The defendant bears the burden of proof and, if he or she establishes a *prima facie* case for rescission by presenting at least some evidence on every element essential to the cause of action, the burden shifts to the State to come forward with evidence justifying the suspension."); People v. Orth, 530 N.E.2d 210, 216 (Ill. 1988) ("Since the motorist was not put on notice that he was required to present a *prima facie* case for rescission, on remand he must be given an opportunity to do so. If, and only if, he presents such a case, the burden will shift to the State to come forward with evidence in rebuttal justifying suspension.").

120. *Goldberg*, 2015 WL 7568483, at *11.

121. *In re* Estate of Gassman, 867 N.W.2d 325 (N.D. 2015), *cert. denied*, *sub. nom.*, Oakland v. Bell State Bank & Trust, 136 S. Ct. 1493 (Mem) (2016).

rules, and made articulate arguments in court.[122] In 2015, Margaret Oakland contacted me seeking assistance in filing an amicus brief with the U.S. Supreme Court, supporting her pending petition for certiorari; in the petition, she sought discretionary review of a state supreme court decision in a probate matter.[123] She raised, *inter alia*, a due process issue regarding the failure of the trial judge to afford her a reasonable accommodation.[124] Given my interest in the subject matter and the merits of her case, I filed an amicus brief supporting her position.[125] Not surprisingly, the cert petition was denied.

Oakland was the only child of her father, a successful lawyer and farmer, who beginning in the 1980s, suffered from a belief that people were poisoning him to secure his farmland, including his divorced spouse.[126] He instructed Oakland never to have contact with her mother (the ex-spouse), or he would consider Oakland to be a co-conspirator.[127] Oakland's father would eventually tell others he believed Oakland was poisoning him.[128] She possessed additional evidence of other delusions,[129] and her father had in fact once been diagnosed with a delusional disorder but refused psychiatric treatment.[130] He left all his farmland to the descendants of a woman he had met after his divorce, leaving out his daughter.[131]

Oakland was prepared to prove at trial that her father suffered from multiple delusions twenty years prior, during, and after the time of signing his 2011 will.[132] The day before trial, the court heard eleven motions *in limine* filed by the bank which defended the validity of the will.[133] The motions sought exclusion of most of Oakland's intended witnesses unless the testimony related to the poisoning delusion that existed at the time of or immediately before the will's execution.[134] The court reasoned that no

122. At one hearing, defense counsel even remarked "we've got hundreds of pleadings" in the case. Transcript of Proceedings at 8, Oakland v. Bell State Bank & Trust Co., 02-2012-PR-00014 (transcript from Jan. 27, 2014).

123. *Oakland*, 136 S. Ct. at 1494.

124. *Oakland*, 136 S. Ct. 1493.

125. Motion For Leave to File and Brief of Amici Professor Jona Goldschmidt and Attorney Mark Andrews in Support of Petitioner, *Oakland*, 136 S. Ct. 1493.

126. *Id*. at *9-10.

127. *Id*. at *10.

128. *Id*. at *11.

129. Oakland's father did not believe she was his daughter or that he was the son of his biological father. Transcript of Proceedings at 17, *supra* note 124. He believed in aliens and that the U.S. Army Corps of Engineers had infected him with cancer because of his prior successful litigation against it. *See* Report of Proceedings at 273, *Oakland*, *supra* note 124 (transcript of Jan. 28, 2014).

130. Report of Proceeding at 41 (transcript of Jan. 29, 2014), *supra* note 124.

131. *Id*. at *12.

132. *Id*. at *10, *12.

133. Transcript of Proceedings (transcript of Jan. 28, 2014), *supra* note 124.

134. As Oakland wrote in her Petition: "By proposing inappropriately narrow parameters for proof of a mental illness that spanned decades and manifested through a broad range of delusional

witness testimonies other than those pertaining to the poisoning delusion would be relevant because—agreeing with defense counsel's position—the expert only testified to that delusion.[135] This rationale led the court to rule that most of Oakland's fact witnesses would be excluded.[136] At the hearing on the motions *in limine*, Oakland and opposing counsel vigorously argued the evidentiary issues raised, but at no time was there mention of her duty to make an offer of proof *at trial* on the motions.[137] At trial, the jury ruled in favor of the bank, and Oakland filed a motion for a new trial.[138] Neither before or during trial did the court explain the requirement and process for making an offer of proof,[139] nor did the court explain the fatal result of failing to make an offer of proof at trial.[140]

At the post-trial hearing, defense counsel argued that Oakland "didn't put forward the testimony" she sought to offer at trial:

> [S]o the offer of proof of proof that she claims she said something like, oh, I intended or the anticipated testimony. That's not how this works. You do an offer of proof so we could hear the testimony, the trial court can hear it and then we have a record for the appeal so the Supreme Court can look at it if need be. Intention is not evidence.

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statements and behaviors, the Bank targeted most of Oakland's evidence on a critical issue of fact." Petition, *Oakland*, 136 S. Ct. 1493.

135. Transcript of Proceedings at 17–18 (transcript of Jan. 28, 2014), *supra* note 124.

136. *Id.*

137. "Oakland, however, *made no other offers of proof* about other evidence indicating Gassmann's state of mind near the time when he executed his will. Before trial, the parties addressed Dalhoff's deposition testimony and the court ruled on objections made during the taking of that deposition. However, the record reflects that court did not review the entire contents of Dalhoff's deposition and *Oakland made no offer of proof* about the deposition at trial. Moreover, although Oakland claims Bonello attended the trial, she *made no offer of proof* about his proposed testimony at trial. . . [S]he *failed to make appropriate offers of proo*f for the evidence she now claims was improperly excluded. On this record, we cannot say the district court's rulings on Bell State's motions in limine were arbitrary, capricious, or unreasonable, and we conclude Oakland *did not make an appropriate offer of proof* at trial to properly preserve issues about the evidence she now claims was improperly excluded, including Dalhoff's deposition testimony and Bonello's proposed testimony." *In re* Estate of Gassman, 867 N.W.2d 325, 330–32, 335 (N.D. 2015).

138. Report of Proceeding at 3 (transcript of Jan. 29, 2014), *supra* note 124.

139. "The proponent of evidence bears the burden of making an offer of proof when there is an objection to the introduction of evidence so that there is a record of the specific evidence sought to be excluded." 88 C.J.S. Trial § 175 (citations omitted). A proffer of excluded evidence "should make known the substance of the expected evidence in question so as to make clear to the court what is being offered in proof, and why the offer should be admitted over the opponent's objections, so that the court may make an informed ruling." 88 C.J.S. Trial § 177 (citation omitted).

140. Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 411 (N.D. 1994) (exclusion of evidence by a motion *in limine* does not dispense with the requirement of an offer of proof so the trial court can consider the proffered evidence in the context of other evidence presented during trial). Jurisdictions differ on when the offer should be made. "While in some jurisdictions the offer of proof should not be made until the court has sustained an objection to a question asked, in other jurisdictions, the court must be informed before making its ruling as to what answers are expected to be elicited from the witness." 88 C.J.S. Trial § 180.

> Nobody prevented her from putting these people on the stand. . . [I]f she were represented by legal counsel, legal counsel would have put those people on the stand. And so we deal with that in an offer of proof. She chose not to do that, I don't know why but she didn't do it.[141]

Oakland argued that she *had* made appropriate offers of proof by making every effort to assist the court in making an informed decision on the motions before it.[142] She also directed the court's attention to N.D. Rule of Evidence 103. That rule states, in relevant part:

> (a) A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
>
> (1) if the ruling admits evidence, a party, on the record:
>
> (A) timely objects or moves to strike; and
>
> (B) states the specific ground, unless it was apparent from the context; or
>
> (2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.[143]

In other words, Oakland interpreted an "offer of proof" literally. She believed that by offering descriptions of her named witnesses and explaining the relevance of their expected testimony during the motion *in limine* hearing, she was complying with the rule's requirement. She tactfully emphasized to the court that, "I think, you know, the fundamental issue [quoting Rule 103] is substantial justice and that is, you know, one of the court's primary functions more so than to, you know, judge who is – who is, you know, bringing the most sophisticated offers of proof at the best time.[144] To no avail, the trial judge denied her motion or new trial because there was "no basis for a new trial."[145]

The North Dakota Supreme Court affirmed the trial court on the same grounds: Oakland "made no offer of proof about other remote statements excluded by the court, and in the absence of an appropriate offer of proof, we are unable to review her claim the court erred in excluding remote evidence of his alleged insane delusion."[146] The court repeated this deficiency on her part in several other places in its opinion.[147]

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141. Report of Proceeding at 26–27 (transcript of May 19, 2014), *supra* note 124.
142. *Id*. at 8–9.
143. North Dakota R. Evid. 103(a) (emphasis added).
144. Report of Proceeding at 11–12, *supra* note 143.
145. *Id*. at 43.
146. *In re Estate of Gassmann*, 867 N.W.2d at 332.
147. *Id*. (emphasis added).

B. Reasonable Accommodations Not Provided

1. Providing Procedural Information to Preserve Appellate Rights

The issue here is that Oakland was not informed about the need to make an offer of proof to preserve evidentiary ruling errors for a new trial motion or appeal. This would have been less of an accommodation and more of a matter of communicating basic procedural information Oakland was entitled to, so that her case could be fairly heard. In other words, Oakland—while an intelligent litigant facing a bank's flurry of motions—was never informed of the requirement from *case law* that established her duty to make an offer of proof *at trial* to preserve her right to appeal evidentiary exclusion rulings—something lawyers learn in law school.

Rule 103 contains no definition of "offer of proof," fails to mention the word "trial," and cites to no case law establishing the appellate issue waiver rule. Even an expert SRL like Oakland had no understanding of the offer-of-proof requirement which prejudiced her case post-trial and on appeal.[148] She wrote to me recently that "I make a terrible trial lawyer: too slow, too mousy, and I lack the confidence. But I might have done ok, if the court had tried to level the playing field rather than pushing me further down."[149] Both counsel and the court were "hiding the ball" from Oakland, requiring her to follow the same procedural rules as lawyers, but not informing her of a critical, unstated rule. Despite mine and co-counsel's argument as amici that the trial judge had ethical and due process obligations to inform Oakland of the meaning and requirement of making an offer of proof, the U.S. Supreme Court denied certiorari.[150]

2. Distinguishing between Rule Non-Compliance and Imperfect Compliance

This point goes to the previous discussion in so far as Oakland made great efforts to establish the validity of her intended witness testimony as the court ruled one by one on the eleven motions *in limine*.[151] In reality,

148. She recently commented on the court's motion *in limine* hearing: "January 27: I remember this day well. This is when it first hit me that the judge was agreeing to 'exclude' whatever evidence the other side asked for, but I did not understand that he was just excluding the evidence 'in limine' and that what needed to be done was to make an offer of proof. I felt so terrible. My cousin had traveled there to read the transcript of the deposition by my aunt, and they just DECIMATED it. Trouble is, I didn't understand that there was a way to save it and to get the 'excluded' evidence back in." Email from Margaret Oakland to Author (Apr. 16, 2021, 10:06 CST) (on file with author).

149. Email from Margaret Oakland to Author (Apr. 17, 2021, 12:46 CST) (on file with author).

150. Oakland v. Bell State Bank & Trust, 136 S.Ct. 1493 (2016) (Mem).

151. Transcript of Proceedings, *supra* note 127.

she did not engage in rule non-compliance, as such, in failing to make offers of proof at trial; her inaction was a form of *imperfect* compliance.[152] As such, given Oakland's SRL status and her good faith effort in responding to the motions *in limine*, the trial court as well as the North Dakota Supreme Court should have treated her responses to the motions as equivalent to making an offer of proof at trial, permitting appellate review of the rulings. This is especially so because North Dakota follows ABA Rule 2.2, and Comment [4], authorizing reasonable accommodations to SRLs so their cases are "fairly heard."[153]

IV. THE VETERAN'S MORTGAGE APPLICATION CLAIM

A. Facts and Procedural Posture

Andrew Prescott is a U.S. Army veteran with a B.S. in Mathematics, has worked numerous retail jobs in his life, and is self-taught in the fields of science, philosophy, psychology, theology, religious texts, spiritual texts, classic literature, and other writings.[154] My review of the record in his case indicates that he—like the other two SRLs—submitted detailed submissions to the court that were clearly written and cited to legal authorities.[155]

Prescott was looking for a VA mortgage to make improvements on a property in Florida where he resides.[156] Through a mortgage broker, Prescott was referred to an Illinois bank as a potential VA authorized lender.[157]

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152. *See* Coppedge v. United States, 369 U.S. 438, 444 n.5 (1962) (holding that judges should take a "liberal view of papers" filed by pro se prisoners, which it found to be "equivalents of notices of appeal" despite technical deficiencies); Becker v. Montgomery, 582 U.S. 757, 767 (2001) (holding that "imperfection in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court" where appellant filed a notice of appeal with a typed instead of a required original signature); Smith v. Barry, 502 U.S. 244, 247 (1992) (holding that premature notice and appellate brief filing within time for filing notice of appeal was sufficient). State courts have also followed a similar approach, construing certain documents as the functional equivalent of those required by court rules. *See, e.g.*, Hughes v. Habitat Apartments, 860 S.W.2d 872 (Tex. 1993) (construing an *in forma pauperis* affidavit as an answer). Moreover, the non-compliance—if one calls it that—would be considered a "soft bar" which should be excused and not a "hard bar" (like a statute of limitations). Albrecht, *supra* note 20.

153. North Dakota R. 2.2, [4] ("It is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.").

154. Email from Andrew Prescott with Brief Biography to Author (Mar. 18, 2021, 7:53 CST) (on file with Author).

155. Sometimes he mistakenly cited to the federal rules instead of Illinois court rules in support of his motions. Report of Proceedings, Prescott v. Flanagan State Bank, No. 4-18-0246, 2018 WL 6621327 (Ill. App. Ct. Mar. 26, 2018); Plaintiff's Motion for Leave to File Amended Complaint, *Prescott*, 2018 WL 6621327 (Ill. App. Ct. Oct. 18, 2017).

156. Complaint at Law, *Prescott*, 2018 WL 6621327.

157. *Id*.

At the time of the mortgage application, the property was not subject to liens but verification of an existing lien on the property was a requirement for the type of VA loan Prescott applied for. [158] He was unaware of this and expected the bank to know such requirements. [159] However, the bank failed to alert Prescott of the requirements and dragged its heels for six weeks. [160] Ultimately, Prescott was forced to withdraw the mortgage application and use credit cards and savings to make payments on the home, ruining his credit and making it impossible to get a mortgage elsewhere. [161]

Like Goldberg, Prescott's case has a somewhat complicated history involving multiple amended pleadings, multiple legal issues in multiple counts, back-and-forth dispositive motions, as well as two appeals. The first appeal dealt with a grant of the defendant bank's motion for summary judgment on three of Prescott's four counts, and the court affirmed the trial court's judgment.[162] While the first appeal was pending, the trial court entered summary judgment in favor of the defendant on the last surviving count.[163]

On May 16, 2019, the trial court entered judgment in the defendant's favor on the remaining count.[164] Prescott filed a timely motion for reconsideration on June 5, 2019, which was scheduled for hearing on August 29, 2019.[165] On June 27, 2019, Prescott moved to withdraw the motion for reconsideration and filed a motion for new trial. [166] At the hearing, the court granted Prescott's motion to withdraw the motion for reconsideration, and then denied the motion for new trial on grounds it was "a late filing," that is, because more than 30 days had expired since the May 16, 2019 judgment.[167] The appellate court followed suit and used Prescott's alleged "untimely" filing of the motion for new trial as grounds to dismiss the appeal [168] and stating "[w]hile we *understand and appreciate the trial courts desire to, for the benefit of the parties, address the merits*, we find the court was without jurisdiction to do so.[169]

158. Report of Proceedings at 5, *supra* note 157.

159. *Id*. at 5–6.

160. *Id*.

161. Third Amended Complaint at Law, *Prescott*, 2018 WL 6621327 (Ill. App. Ct. Jan. 30, 2018).

162. *Prescott*, 2018 WL 6621327, at *2.

163. Order of the Court, *Prescott*, 2018 WL 6621327 (Ill. Ct. App. May 16, 2019) (granting summary judgment and dismissing count II).

164. *Id*.

165. Report of Proceedings at 13, *Prescott*, 2018 WL 6621327 (Ill. Ct. App. Aug. 29, 2019).

166. *Id*. at 16.

167. *Id*.

168. Prescott v. Flanagan State Bank (Prescott II), No. 4-19-0648, 2020 WL 397159, at *1 (Ill. App. Ct. 2020).

169. *Id.* at *4.

B. Reasonable Accommodation Not Provided: Preventing "Traps for the Unwary"

In this case, we have a trial judge who imposes strict compliance on SRLs in so far as the 30-day requirement for filing post-trial motions.[170] I suspect that under the facts described, most lawyers would request that the court consider Prescott's motion for new trial to supplement, amend, or relate back to the earlier motion for reconsideration. However, the judge in this case decided to apply the 30-day requirement strictly. Prescott fell into a trap such that he could not preserve his issues on appeal because he mistakenly obtained the order to withdraw his timely-filed motion for reconsideration first before filing the proposed motion for a new trial, thus preventing his case from being fairly heard on appeal. Again, a reasonable accommodation by way of the court informing an SRL that what is being asked would destroy his appellate rights —i.e., to file a motion to replace the one that he wanted to withdraw—is not asking the court to overreach. Instead, the judge here would have only needed to spare a minute or two to explain the potential forfeiture of rights resulting from Prescott's requests. The Illinois Appellate Court then shirked its obligation to fairly hear this SRL's case on appeal by employing a similarly strict interpretation of the 30-day rule, and thus failed to review the claim.[171]

Where is the latitude that the United States Supreme Court requires in interpretation of SRLs' pleadings? Why did the trial judge not allow the proposed motion for new trial to amend or supplement or relate back to the timely-filed motion for reconsideration? In my view, this was like many rulings in Goldberg's and Oakland's cases, a failure to provide a reasonable accommodation (an explanation of his unintended waiver of appellate rights) and a failure to hear the cases based on technical rule violations that demonstrably failed to consider the party's pro se status.

CONCLUSION

These cases show how both expert and less sophisticated SRL's are equally subject to injustice brought upon by lawyers and judges at trial and on appeal. The case studies also demonstrate how the judiciary provides no accommodations to SRLs—much less reasonable ones—and a failure of judicial economy by requiring the filing and consideration of appeals that would probably be unnecessary had accommodations been afforded in the first instance. Affirmative, reasonable accommodations to the SRLs in these cases would have ensured the cases were fairly heard.

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170. Report of Proceedings, *supra* note 157, at 16.

171. *Prescott II*, 2020 WL 397159, at *4.

Goldberg faced not only unprofessional conduct by opposing counsel but also possible judicial misconduct. If the court were mandated to provide reasonable accommodations of the required and permissible forms,[172] these would have included: (a) ordering discovery of crucial documents; (b) verifying the SRL's claim regarding the language of a particular statute where opposing counsel asserts that the law does not exist; (c) holding counsel to the same degree of strict rule compliance as the SRL; and (d) giving greater consideration to his pro se status, good faith efforts in all matters before the court, and lack of any contumacious conduct when considering counsel's motion for sanctions against him. I argue these accommodations are more properly considered required forms of assistance.

With Oakland, all the court had to do by way of a reasonable accommodation was to explain what an "offer of proof" was in a timely manner, that is, at the time the court sustained eleven motions *in limine* that the bank filed against her. No more than a minute of the court's time in explanation would have afforded Oakland the opportunity to establish the proposed witness testimony to explain the length and multitude of her father's delusions, or at least preserve the exclusion issues on appeal. The court's lack of accommodation cost Oakland the right to appeal the issues and an injustice that could have been easily avoided. This procedural explanation should be a required form of assistance. And despite substantive knowledge of the law pertaining to veterans' benefits, mortgages and the various elements of the causes of action brought, Prescott too was unjustly ensnared in a procedural trap. His error in filing a timely post-trial motion—and before it is heard, filing a second motion after 30-days asking that the first be replaced, making the second motion untimely—is the exact kind of "trap for the unwary" that the Supreme Court holds must be avoided.[173]

These SRLs were not seeking legal advice. They wanted both ethical adversaries and impartial judges, and basic information so they could properly present their cases and have them heard on their merits at trial and on appeal. If injustice can be meted out so heartlessly to expert SRLs

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172. *See* Jona Goldschmidt, *Required, Permissible, and Impermissible Forms of Fedeeral Judicial Assistance to Self-Represented Litigants: Toward Establishment of a Judicial Duty of Reasonable Assistance*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 217, 224 (2019) (collecting examples of required, permissible, and impermissible forms of federal judicial assistance).

173. For example, "trap for the unwary" is used in the context of entrapment. United States v. Russell, 411 U.S. 423, 429 (1973) ("[T]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." (citing Sherman v. United States, 356 U.S. 369, 372 (1973))); Slack v. McDaniel, 529 U.S. 473, 487 (2000) (referring to the "complete exhaustion" rule of habeas proceedings as not being a trap for the unwary); Tucker v. Alexander, 275 U.S. 228, 231 (1927) ("The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial.").

as was done here—perhaps because they were viewed by the court as "masquerading" as lawyers—what happens to the less educated and literate SRLs who do not have such litigation competence? We know from a recent empirical study that judicial policies of strict rule compliance and lack of judicial assistance are in fact pervasive in our state courts to the detriment of less sophisticated SRLs.[174]

The cases described support current research findings and show that some courts are generally focused exclusively on strict rule compliance as mandated by the Supreme Court such that cases are not fairly heard on the merits, appeals are rejected, and gross miscarriages of justice are ignored at trial and on appeal. To avoid the carousel of systemic injustice, courts should be encouraged, or preferably, *required* to provide reasonable assistance to SRLs by modifying Comment [4] and the state variants. Reasonable assistance to SRL should be mandatory in order to preserve judicial economy at trial and on appeal, to ensure that cases are "fairly heard" on their merits, and to promote public trust and confidence in the justice system.

174. Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg, & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. ___, at 54 (forthcoming 2022) (reporting the results of 200 hours of court observations of SRL cases in three jurisdictions, and concluding that "judges maintain court complexity, including using jargon and refusing to explain court processes and legal terms, strictly control and limit party testimony, and do not adjust their behavior to account for the consistent and robust pre-hearing case development assistance provided to only one side of the cases we studied.").