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Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?

BY JESSICA CASE

It is illogical and unfair to tell a man "everyone is charged with knowing the law," and "ignorance of the law is no excuse," when we send him to prison for violating a law he did not know about . . . and then when in prison he sues someone, to say he is not charged with knowing the law governing procedure in his own lawsuit until we send him a personal explanation.¹

INTRODUCTION

Over the past decade increasing numbers of pro se litigants have crowded federal dockets,² forcing courts and scholars to take a closer look at the rights of indigent and unrepresented litigants.³ At the core of the American judicial system is the right to "equal justice under
law." On a procedural level, the phrase has generally been taken to mean "equal access to justice," and thus equal access to law. As federal courts struggle to adhere to this fundamental concept in accommodating pro se litigants, the question becomes what is equal access to law? Does ensuring equal access to pro se litigants entail additional assistance from courts that is not given to represented litigants? Or should equal access embody true equality, with all litigants being held to the same procedural standards?

A pro se litigant is defined as "[o]ne who represents oneself in a court proceeding without the assistance of a lawyer." The right to represent oneself in civil matters is ensured in federal court and has been enforced strictly. While the right to counsel is mandated in criminal cases, there is no inherent right to counsel in the civil context. Thereby, pro se claims have grown to comprise a substantial percentage of the federal court caseload, becoming a heavy burden to the federal courts.

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4 The concept of "equal justice under law" provides the underpinnings for both the Equal Protection and the Due Process Clauses. See, e.g., Lehr v. Robertson, 463 U.S. 248, 265 (1983) (citation omitted) ("The concept of equal justice under law requires the State to govern impartially. The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective."); United States v. Smith, 171 F.3d 617, 624 n.6 (8th Cir. 1999) ("The Fifth Amendment due process clause incorporates the principles of equal justice under the law applicable to the federal government.").


6 BLACK'S LAW DICTIONARY 1237 (7th ed. 1999).

7 28 U.S.C. § 1654 (1994) ("In all courts of the United States the parties may plead and conduct their own cases personally. . . ").

8 See Schilling v. Walworth County Park & Planning Comm'n, 805 F.2d 272, 276 (7th Cir. 1986) (failure to obtain counsel may not be held against the pro se litigant); Traguth v. Zuck, 710 F.2d 90, 93-94 (2d Cir. 1983) (requirement that a pro se litigant must answer a complaint through counsel violates the litigant's statutory right); O'Reilly v. N.Y. Times Co., 692 F.2d 863, 867 (2d Cir. 1982) (the right to appear pro se is a valuable right not to be dishonored by courts).


10 See Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27-31 (1981) (holding that counsel be appointed in civil cases only when failure to do so would be fundamentally unfair).

11 See supra note 2 and accompanying text.

12 See Green v. McKaskle, 788 F.2d 1116, 1119-20 (5th Cir. 1986) (stating frivolous pro se litigation wastes judicial resources and impairs the chance of success of meritorious claims); Urban v. United Nations 768 F.2d 1497, 1499-1500
Many scholars have endorsed the idea of courts taking a paternalistic view toward unrepresented litigants, and in *Haines v. Kerner*, the Supreme Court held that the pleadings of pro se litigants are to be viewed with some leniency. But just how far should the courts go, in fact how far can they go, before the balance is tipped in favor of the pro se litigant, thus defeating truly equal access?

The question of how far a court's helping hand should extend to pro se litigants is perhaps most pertinent at the summary judgment stage. During summary judgment, one party, under the strictures and guidance of the Federal Rules of Civil Procedure, Rule 56, submits a motion requesting that the court rule in its favor as a matter of law. The moving party has the burden of establishing the absence of an issue of material fact. A court will only grant this motion when the pleadings and affidavits submitted to the court convince the judge that no genuine issue of material fact exists.

The summary judgment juncture is critical for any litigant because a ruling in favor of the party requesting summary judgment represents an adjudication on the merits and precludes the possibility of a trial on the issues absent a successful appeal. Summary judgment can be particularly difficult for a pro se litigant because the requirements of the rule are
somewhat complex and the pro se litigant may not be aware of her obligation to submit reply affidavits. Therefore, federal courts are struggling with the question of whether or not particularized summary judgment instructions should be given to pro se litigants.

See generally Jacobsen v. Filler, 790 F.2d 1362, 1364-66 (9th Cir. 1986) (reflects the difficulty pro se litigants have with knowing to respond to opposing parties' motions); Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982) (refused to impute knowledge of the requirement to respond to a summary judgment motion to a prison inmate acting as a pro se litigant); Madyun v. Thompson, 657 F.2d 868, 876-77 (7th Cir. 1981) (requiring notice to pro se litigants that summary judgment motions require counter-affidavits).

While the reply requirement is explicitly listed in the text of Rule 56, some argue that a pro se litigant nevertheless remains unaware of their obligation under the rule. See Jacobsen, 790 F.2d at 1368 (Reinhardt, J., dissenting) (arguing that laymen are unable to appreciate procedural obligations); Ross v. Franzen, 777 F.2d 1216, 1219 (7th Cir. 1985) (stating "it is not realistic to impute to a [pro se litigant] without legal background the awareness of failing to respond ... to a motion for summary judgment.").

This struggle is evidenced by a split among the federal circuit courts over whether these instructions should be given. The Fifth, Sixth, and Eighth Circuit Courts of Appeals have refused to require a federal district court trial judge to inform a pro se litigant of the requirements of the summary judgment rule. See, e.g., Beck v. Skon, 253 F.3d 330, 333 (8th Cir. 2001) (stating that while several other circuits have required summary judgment instructions to be given to pro se litigants, the Eighth Circuit will require a pro se litigant to respond to a motion for summary judgment in the same way as a non pro se litigant); Martin v. Harrison County Jail, 975 F.2d 192, 193 (5th Cir. 1992) (per curiam) ("[P]articularized additional notice of the potential consequences of a summary judgment motion ... need not be afforded a pro se litigant. The notice afforded by the Rules of Civil Procedure and the local rules are, in our view, sufficient."); Brock v. Hendershott, 840 F.2d 339, 342-43 (6th Cir. 1988) (relying on a sense of fairness for other parties who chose counsel and must bear the risk of their attorney's mistakes, the court adopts a rule that no special treatment will be afforded ordinary civil litigants who proceed pro se).

The Second, Fourth, Seventh, Tenth, Eleventh and D.C. Circuit Courts of Appeals mandate that notice of summary judgment requirements be given to pro se litigants. See, e.g., Trammell v. Coombe, No. 97-2622, 1999 U.S. App. LEXIS 34073 at *5 (2d Cir. Dec. 23, 1999) ("The failure of a district court to apprise pro se litigants of the consequences of failing to respond to a motion for summary judgment is ordinarily grounds for reversal."); Merila v. Johnson, No. 94-4202, 1995 U.S. App. LEXIS 7989 at *3 (10th Cir. Apr. 11, 1995) ("District courts must take care to insure that pro se litigants are provided with proper notice regarding the complex procedural issues involved in summary judgment proceedings."); Timms v. Frank, 953 F.2d 281, 283-84 (7th Cir. 1992) (inferring from the
The great weight of scholarly and a majority of judicial commentary on the subject suggests that particularized summary judgment instructions are appropriate for pro se litigants.\textsuperscript{25} Based on the structure, policy, and rules of procedure that the non-movant, when faced with a motion for summary judgment must be given a reasonable opportunity to present counter-affidavits and that such reasonable opportunity for a pro se litigant presupposes notice; Herron v. Beck, 693 F.2d 125, 127 (11th Cir. 1982) (stating a court should assume proper notice to a pro se litigant); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam) (reversed and remanded because the pro se litigant was not notified of his responsibilities with respect to the summary judgment filed by the opposing party); Hudson v. Hardy, 412 F.2d 1091, 1094 (D.C. Cir. 1968) ("[B]efore entering summary judgment against appellant, the District Court, as a bare minimum, should have provided him with fair notice of the requirements of the summary judgment rule.").

The Ninth Circuit requires notice of summary judgment requirements for pro se prisoner litigants only. The foremost reason for not extending the notice requirements to an ordinary civil case was to not treat pro se litigants more favorably than parties with attorneys. See Jacobsen, 790 F.2d at 1364.

The First Circuit has not formed a view as to whether particularized summary judgment instructions should be given. See Hunsberger v. FBI, No. 96-1841, 1997 U.S. App. LEXIS 6516 at *5 (1st Cir. Mar. 14, 1997) ("The failure to advise plaintiff of the Rule 56 procedures, even if erroneous (a matter as to which we intimate no view), would thus have been harmless."). The Third Circuit, per the author's research, has not addressed the issue of whether pro se litigants are entitled to summary judgment instructions. However, the Third Circuit has intimated that it affords pro se litigants significant procedural leniency. See Tabron v. Grace, 6 F.3d 147, 153-54 n.2 (3d Cir. 1993) (pro se litigant failed to raise an issue of contention in a timely manner. The court noted that they "have traditionally given pro se litigants greater leeway where they have not followed the technical rules of pleading and procedure.").

\textsuperscript{25} See, e.g., supra notes 13-15, 24 and accompanying text; see also infra notes 62-67 and accompanying text.

For more discussion on pro se litigant issues, see, for example, Russell Engler, Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons, 85 CAL. L. REV. 79 (1997) (concluding that lawyers frequently violate existing ethical rules against giving advice to unrepresented parties and suggests stricter enforcement of the ethical rules as well as the passage of additional ethical rules concerning negotiations with unrepresented parties); Kevin H. Smith, Justice for All?: The Supreme Court's Denial of Pro Se Petitions for Certiorari, 63 ALB. L. REV. 381 (1999) (concluding that the Supreme Court's denial of paid pro se civil petitions constitutes rational judicial action in light of both the Court's functions and the characteristics displayed by cases in which pro se petitions are filed); Rosalie R. Young, The Search for Counsel: Perceptions of Applicants for Subsidized Legal Assistance, 36 BRANDEIS J. FAM.
authority of the judicial system, and on the principles of common sense and practicality, this Note disagrees.

All litigants deserve minimum due process rights, one of the most meaningful of which is the opportunity to be heard, "granted at a meaningful time and in a meaningful manner." This fundamental constitutional right granted to pro se litigants is protected by the Federal Rules of Civil Procedure promulgated by the judiciary, and by the adversary system of the American courts. The opportunity of a pro se litigant to be heard need not be further advanced by eroding the purpose and meaning of the rules, nor by changing the nature of the adversary system or the role of judges in the nation's courts. A uniform rule providing for judicial notification of the requirements of the summary judgment rule to pro se litigants threatens to do both. Notification of such requirements should be left to federal district court trial judges in their discretionary capacity and not mandated by the courts of appeals.

Part I of this Note discusses the Supreme Court and federal circuit courts of appeals' reactions to the plight of pro se litigants in general. Part

L. 551 (1997) (discussing author's findings after conducting fifty-one in-depth interviews with applicants for subsidized legal assistance in Centre City, a mid-sized northeastern city); Edward M. Holt, Student Commentary, How to Treat "Fools": Exploring the Duties Owed to Pro Se Litigants in Civil Cases, 25 J. LEGAL PROF. 167 (2001) (addressing the duties owed pro se litigants pretrial, trial and post trial and suggesting that the federal court system follow Minnesota in developing a model for uniform treatment of pro se litigants); John Matosky, Note, Illiterate Inmates and the Right of Meaningful Access to the Courts, 7 B.U. PUB. INT. L.J. 295 (1998) (exploring the obstacles to providing illiterate inmates with "meaningful access" to courts in wake of the Supreme Court's decision in Bounds v. Smith).


See Bounds v. Smith, 430 U.S. 817, 821 (1977); Jonhson v. Avery, 393 U.S. 483, 485 (1969). The right to access to the courts is derived from the First Amendment, see, e.g., NAACP v. Button, 371 U.S. 415, 428-29 (1963); Harrison v. Springdale Water & Sewer Comm'n, 780 F.2d 1422, 1427-28 (8th Cir. 1986), and the due process clause of the Fourteenth Amendment, see, e.g., Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Ryland v. Shapiro, 708 F.2d 967, 971-72 (5th Cir. 1983). This right protects a litigant's interest in using judicial processes to attain redress of grievances. See Bounds, 430 U.S. at 825; Wolff, 418 U.S. at 579; Johnson, 393 U.S. at 485.

See infra notes 115-45 and accompanying text.

See infra notes 185-206 and accompanying text.

See infra notes 202-06 and accompanying text.

See discussion infra Part I.
II addresses the split among the circuits and analyzes several federal appellate court holdings regarding summary judgment instructions and pro se litigants. Part III explores Federal Rule of Procedure 56 and explains why its requirements are clear and unambiguous, thereby dissolving the need for particularized instructions for pro se litigants. Part IV argues that a rule created by the federal circuit courts of appeals mandating judicial notification of summary judgment requirements oversteps the authority of circuit courts to make rules for lower courts and does harm to the adversary system by skewing the traditional and essential role of trial judges.

I. JUDICIAL REACTIONS TO PRO SE LITIGANTS

Judicial reactions to pro se issues have been varied. The Supreme Court has stated, in dicta, that pro se litigants are to be held to the same procedural requirements as represented litigants when they waive their right to counsel. The Court, throughout its line of decisions addressing various pro se concerns, has carved out only one exception to this mandate—that pro se litigants are entitled to have their pleadings read liberally. The federal circuit courts of appeals, however, oscillate in their treatment of pro se litigants. Some of the courts take a generally paternalistic view toward pro se litigants, while others indicate that they are held to the same standards as represented litigants.

A. The Supreme Court and Pro Se Litigants: How Much Procedural Leniency Should Be Granted?

The Supreme Court has supported a view of procedural consistency for pro se and represented litigants alike. Starting from this general rule, the

32 See discussion infra Part II.
33 See discussion infra Part III.
34 See discussion infra Part IV.
35 Faretta v. California, 422 U.S. 806, 835-36 (1975) (pro se litigant “required to follow all the ‘ground rules’ of trial procedure”).
37 See, e.g., Maggette v. Dalsheim, 709 F.2d 800, 802 (2d Cir. 1983); Muhammad v. Rowe, 638 F.2d 693 (7th Cir. 1981) (per curiam); Phillips v. United States Bd. of Parole, 352 F.2d 711 (D.C. Cir. 1965) (per curiam); see also infra notes 80-83 and accompanying text.
38 See, e.g., Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981) (per curiam); United States v. Pinkey, 548 F.2d 305, 311 (10th Cir. 1977); see also Rhode, supra note 3, at 1805-06; infra notes 69-79 and accompanying text.
39 See, e.g., Bradlow, supra note 3, at 668.
Court has granted one exception in requiring pro se pleadings to be read in a flexible manner. The general reluctance of the Court to afford any further leniency to the pro se litigant, as well as the Court’s general insistence on strict compliance with procedural rules, supports the argument that the procedural requirements of Rule 56 should not be appended with a mandate of judicial provision of summary judgment instructions to the pro se litigant.

In *Faretta v. California* the Supreme Court noted in dicta, after inferring from the right to counsel clause in the Sixth Amendment a right to self-representation in criminal cases, that pro se litigants are to be held to the same procedural standards as represented litigants when they waive the benefit of counsel. This view has been given substantial deference, not only by the Supreme Court, but also by lower federal courts. The Court, in *McKaskle v. Wiggins*, evinced its dedication to the *Faretta* standard. In *McKaskle*, the Court held that unsolicited assistance from standby counsel did not impair the prisoner-defendant’s *Faretta* rights, reasoning that such

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40 Id. at 671.
41 See infra notes 54-67 and accompanying text.
42 See infra notes 54-67 and accompanying text.
43 *Faretta v. California*, 422 U.S. 806 (1975). In *Faretta*, the Court held that a state could not constitutionally force a lawyer on a defendant who was literate, competent, and understanding, and who had voluntarily exercised his informed free will. Id. at 820-21. While the Court noted that the right to counsel in criminal proceedings was constitutionally protected and essential to due process, the Court also held that counsel thrust upon a defendant “is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.” Id. at 820 (footnote omitted).
44 Id. at 835 n.46 (“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.”).
46 See, e.g., *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 140 (1st Cir. 1985) (pro se plaintiff cannot be exempted from Fed. R. Evid. 103(a)(2), forbidding a claim of error predicated on evidence not actually offered at trial); *Burgs v. Sissel*, 745 F.2d 526, 528 (8th Cir. 1984) (pro se plaintiff’s case dismissed with prejudice for failure to comply with order of the court and lack of diligence in pursuing claim); *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981) (per curiam) (pro se plaintiff in habeas action cannot be excused from failure to take a timely appeal under federal rules).
48 Id. at 183. The *McKaskle* Court distinguished the case from *Faretta* in that McKaskle had been given the opportunity to represent himself which was not meaningfully impaired by the unsolicited assistance of outside counsel. The Court
counsel might provide the pro se litigant with needed assistance in complying with procedural requirements since pro se status did not excuse the litigant from normal procedural rules. The Court explained:

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. *Farretta* recognized as much.

The Court further illuminated its stance on procedural adherence in *McNeil v. United States*. There the Court affirmed dismissal of a Federal Tort Claims Act suit based on the pro se plaintiff’s failure to exhaust administrative remedies. The Court stated:

While we have insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed, and have held that some procedural rules must give way because of the unique circumstance of incarceration, we 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.”

The Court, when faced with the question of whether or not a federal district court judge should be required to inform pro se litigants of summary judgment requirements, will likely apply the same philosophies evidenced in *McKaskle* and *McNeil*, viewing the duty to do so as a “chore” that a judge should not be required to “take over” for a pro se litigant. Such a

concluded that because McKaskle had been able to make motions, argue points of law, and question witnesses, outside counsel’s assistance outside of the presence of the jury as well as before the jury did not interfere with the defendant’s right to present his own defense. *Id.* at 183-84.

49 *Id.*

50 *Id.*


52 *Id.* at 113.

53 *Id.* at 113 (citations omitted) (quoting Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980)).

result would further follow from the Court's view of the essential function of summary judgment.\textsuperscript{55} The Court, in explaining that summary judgment was a desirable way of disposing of pro se prisoner's claims not frivolous on their face, but lacking a genuine issue of material fact,\textsuperscript{56} noted, "summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial."\textsuperscript{57}

The only generalized special treatment the Supreme Court has guaranteed pro se litigants, apart from the due process rights accorded all litigants in civil cases, is the right to have courts liberally construe their pleadings.\textsuperscript{58} In \textit{Haines v. Kerner},\textsuperscript{59} a prisoner pro se litigant's complaint against state and prison officials alleged that he was denied due process in proceedings which led to his solitary confinement, during which he claimed to have sustained physical injuries.\textsuperscript{60} The Court reversed a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, noting that, as a general matter, pro se pleadings are held to less stringent standards than those of represented litigants.\textsuperscript{61} Further, the Court held that a pro se plaintiff's pleadings should not be dismissed for failure to state a claim unless "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"\textsuperscript{62} This liberalized view toward the pro se plaintiff's pleadings has been followed closely both by the Supreme Court\textsuperscript{63} and lower federal courts\textsuperscript{64} in the years since the \textit{Haines} decision.

\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Bradlow, supra note 3, at 671; see also Hughes v. Rowe, 449 U.S. 5, 9-10 (1980) (per curiam); Haines v. Kerner, 404 U.S. 519, 521 (1972) (per curiam).
\textsuperscript{59} Haines, 404 U.S. at 519.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 520.
\textsuperscript{62} Id. at 520-21. In full, the Court stated:

[A]llegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the \textit{pro se} complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

\textit{Id.} (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).
\textsuperscript{63} See Hughes, 449 U.S. at 9-10.
\textsuperscript{64} See, e.g., Brandon v. Dist. of Columbia Bd. of Parole, 734 F.2d 56, 62 (D.C. Cir. 1984) (if the complaint misapprehends the claim appropriate to its grievance,
While the Court’s rule in *Haines*\(^6\) is limited to construction of pleadings and does not on its face extend to further procedural leniency,\(^6\) some federal circuit courts have stretched the Court’s reasoning to support holdings granting various procedural exceptions to pro se litigants.\(^6\) On the other hand, many circuits have justified refusal to do so on the basis of the Court’s general refusal to grant procedural exceptions to pro se litigants.\(^6\)

### B. Federal Circuit Courts of Appeals and Pro Se Litigants: Varying Levels of Paternalism

A majority of circuit courts hold pro se litigants to the same standards as represented litigants when procedural hurdles other than that of summary judgment arise.\(^6\) In fact, some of the same federal courts of appeals that require notice of summary judgment procedures be given pro se litigants have denied leniency in cases involving amended complaints,\(^7\) compliance the trial court must recharacterize the claim); Madison v. Tahash, 359 F.2d 60, 61 (8th Cir. 1966) (construing application for appointment of counsel as one for a certificate of probable cause); DeWitt v. Pail, 366 F.2d 682, 685 (9th Cir. 1966) (pro se complaints cannot be construed inflexibly so as to require dismissal if the complaint fails to request appropriate relief); Downing v. New Mexico State Supreme Court, 339 F.2d 435, 436 (10th Cir. 1964) (per curiam) (pleadings prepared by layman should be construed liberally).

\(^{65}\) *Haines*, 404 U.S. at 520-21.

\(^{66}\) Bradlow, *supra* note 3, at 672.

\(^{67}\) *See infra* notes 80-82 and accompanying text.

\(^{68}\) *See infra* notes 69-79 and accompanying text.

\(^{69}\) *See, e.g.*, Dozier v. Ford Motor Co., 702 F.2d 1189, 1194 (D.C. Cir. 1983) ("At least where a litigant is seeking a monetary award, we do not believe pro se status necessarily justifies special consideration . . . [H]e cannot generally be permitted to shift the burden of litigating his case to the courts . . . .") (citation omitted); Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981) (per curiam) ("Merely proceeding pro se does not confer an extension of the ordinary jurisdictional requirement of timely filing."); United States v. Fowler, 605 F.2d 181, 183 (5th Cir. 1979) (trial court’s denial of a pro se litigant’s request for a continuance to obtain counsel not in error); United States v. Pinkey, 548 F.2d 305, 311 (10th Cir. 1977) (one “who proceeds pro se with full knowledge and understanding of the risks” involved is not entitled to any greater rights than a represented litigant); Larkin v. United Ass’n of Journeymen, 338 F.2d 335, 336 (1st Cir.1964) (per curiam) (pro se litigant charged with knowing appellate rule requiring the filing of an appellate brief as prerequisite to oral argument); Springer v. Best, 264 F.2d 24, 26 (9th Cir. 1959) ("It is not the function of this Court to supervise laymen in the practice of law.").

\(^{70}\) *See* Ping Tou Bian v. Taylor, No. 01-7144, 2001 WL 1631254, at *2 (2d Cir. Dec. 17, 2001) (holding that the court would not accept the amended complaint of a pro se plaintiff who had amended his complaint without leave of court in
with requirements for appellate briefs,\textsuperscript{71} and the amount in controversy requirement.\textsuperscript{72} Other specific examples of courts refusing procedural exceptions are found in the contexts of appearance for depositions,\textsuperscript{73} appeals periods,\textsuperscript{74} and pretrial statements.\textsuperscript{75}

In refusing to grant pro se litigants procedural exceptions, several courts have narrowly construed the Supreme Court's holding in \textit{Haines} granting pro se litigants the right to have their pleadings read liberally.\textsuperscript{76} For example, the Sixth Circuit, in \textit{Wells v. Brown},\textsuperscript{77} upheld dismissal for failure to state a claim in a suit brought by a pro se prisoner against prison and state officials.\textsuperscript{78} The court discussed one reason for a narrow application of the rule:

\begin{quote}
In recent years an increasingly large number of frivolous cases have been filed in federal court—both by lawyers and \textit{pro se}. Many of these
\end{quote}

\textsuperscript{71} \textit{See Stephenson v. Township of Thornton, No. 00-3154, 2001 WL 1071765, at *1} (7th Cir. Sept. 7, 2001) (holding that an appellate brief submitted by a pro se litigant is not sufficient to sustain an appeal unless it meets the basic requirements outlined in Fed. R. App. P. 28(a). "[W]e cannot cure the substantial deficiencies in Stephenson's brief by creating legal arguments for him... [W]e may not review this appeal because Stephenson has failed to comply with basic requirements designed to promote our interest in the uniform administration of justice."). (citation omitted).

\textsuperscript{72} \textit{See Dozier, 702 F.2d at 1194} (refusing to allow a pro se plaintiff to refile his complaint to comply with the amount in controversy requirement to avoid res judicata).

\textsuperscript{73} \textit{See, e.g., Hepperle v. Johnston, 590 F.2d 609} (5th Cir. 1979) (pro se plaintiff's repeated failure to appear for deposition justified dismissal under Fed. R. Civ. Pro. 41(b) after warning of possible dismissal).

\textsuperscript{74} \textit{See Martinez-McBean v. Virgin Islands, 562 F.2d 908} (3d Cir. 1977) (pro se plaintiff who understood appeal procedures not entitled to relief from earlier order of dismissal).

\textsuperscript{75} \textit{See Burgs v. Sissel, 745 F.2d 526} (8th Cir. 1984) (pro se plaintiff's § 1983 complaint properly dismissed under Fed. R. Civ. P. 41(b) for failure to amend a flawed pretrial statement after three chances to comply with the district court's pretrial order).

\textsuperscript{76} \textit{See, e.g., McDonald v. Hall, 610 F.2d 16}, 19 (1st Cir. 1979) ("Our duty to be 'less stringent' with pro se complaints does not require us to conjure up unpled allegations."); Holsey v. Collins, 90 F.R.D. 122, 128 (D. Md. 1981) (even pro se litigants must meet some minimum standards); Jarrell v. Tisch, 656 F. Supp. 237, 239 (D.D.C. 1978) (pro se plaintiffs should plead with "requisite specificity, so as to give defendants notice" of constitutional allegations).

\textsuperscript{77} \textit{Wells v. Brown, 891 F.2d 591} (6th Cir. 1989).

\textsuperscript{78} \textit{Id. at 594}.
suits waste the time of public officials, lawyers and the courts. Minimum pleading requirements are needed, even for pro se plaintiffs, whose lawsuits now comprise more than 1000 or almost 25% of the appeals filed in this Court. . . . Before the recent onslaught of pro se prisoner suits, the Supreme Court suggested that pro se complaints are to be held to a less stringent standard than formal pleadings drafted by lawyers. Neither that Court nor other courts, however, have been willing to abrogate basic pleading essentials in pro se suits.\textsuperscript{79}

These decisions are contrary to those of other courts, which, reading \textit{Haines} broadly, have extended procedural leniency to pro se litigants when addressing personal service requirements,\textsuperscript{80} appearance at status calls,\textsuperscript{81} and response to motions for dismissal.\textsuperscript{82}

The federal courts of appeals decisions in the realm of pro se litigants have been influenced, and in some instances dictated, by the Supreme Court’s decisions addressing the special issues that surround pro se litigants in the federal courts. While the Supreme Court has never specifically addressed the propriety of summary judgment instructions for pro se litigants,\textsuperscript{83} the Court’s decisions in this general area have established the foundation and framework for the debate among the circuits as to whether federal district court judges should be required to inform pro se litigants of Rule 56 requirements for summary judgment.

\section*{II. THE CIRCUIT SPLIT: SHOULD SUMMARY JUDGMENT INSTRUCTIONS BE GIVEN TO PRO SE LITIGANTS?}

Fundamental differences as to what constitutes equal access to justice drive the debate over whether federal district court judges should be required to inform pro se litigants of their obligations when faced with a

\textsuperscript{79} \textit{Id.} (citations omitted).
\textsuperscript{80} \textit{See} Borzeka v. Heckler, 739 F.2d 444, 446-47 (9th Cir. 1984) (Fed. R. Civ. 4(d)(5), requiring personal service on an officer or agent of the United States when the United States is a party, should be given “flexible construction,” particularly in the case of a pro se litigant).
\textsuperscript{81} \textit{See} Camps v. C & P Tel. Co., 692 F.2d 120, 124-25 (D.C. Cir. 1981) (pro se plaintiff who arrived late for status call should not have his case dismissed).
\textsuperscript{82} \textit{See} Mitchell v. Inman, 682 F.2d 886, 887-88 (11th Cir. 1982) (per curiam) (pro se plaintiff who was not given notice of the need to respond to a motion to dismiss should not have his case dismissed for failure to do so).
\textsuperscript{83} Bradlow, \textit{supra} note 3, at 668.
motion for summary judgment. While each court of appeals advances its individualized bases in rulings on the question, as a general matter the courts answering this question affirmatively focus on the pro se litigant’s disadvantaged status in the adversary system. On the other hand, courts answering in the negative tend to focus on the advantage such a rule would give pro se litigants over represented litigants.

A. Pro Se Notification of Summary Judgment Requirements: A Circuit Court of Appeals Mandate

One of the first federal circuit court of appeals cases to hold pro se litigants to less exacting summary judgment procedural requirements was Phillips v. United States Board of Parole. The case involved a prisoner pro se litigant whose complaint had been dismissed at the summary judgment stage by a federal district court when the plaintiff failed to respond to the motion with supporting affidavits. The D.C. Circuit Court of Appeals held that the requirements of Rule 56 should not be applied strictly to prisoner pro se litigants because of the difficulties of gathering evidence while incarcerated. In later decisions, both in the D.C. Circuit Court of Appeals and other circuits that followed its lead, this procedural leniency toward pro se prisoners developed into a mandate that all pro se litigants be informed of the requirements of the summary judgment rule in a manner that could be understood by the litigants. The line of decisions following Phillips is based on the reasoning that a pro se litigant who has not been warned of his obligation to submit reply affidavits in response to a motion for summary judgment has not been given an opportunity to comply with Rule 56(e).

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84 See infra notes 86-96 and accompanying text.
85 See infra notes 105-14 and accompanying text.
86 Phillips v. United States Bd. of Parole, 352 F.2d 711 (D.C. Cir. 1965) (per curiam).
87 Id. at 712.
88 See id. at 713-14.
89 See Hudson v. Hardy, 412 F.2d 1091, 1094 (D.C. Cir. 1968); accord Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982); Davis v. Zahradnick, 600 F.2d 458, 460 (4th Cir. 1979); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam).
90 See Maggette v. Dalsheim, 709 F.2d 800, 802 (2d Cir. 1983); Moore v. Florida, 703 F.2d 516, 520 (11th Cir. 1983); Madyun v. Thompson, 657 F.2d 868, 877 (7th Cir. 1981); Ham v. Smith, 653 F.2d 628, 630 (D.C. Cir. 1981) (per curiam); Roseboro, 528 F.2d at 310.
Other circuit courts of appeals affording pro se litigants procedural leniency at the summary judgment stage by requiring district court trial judges to inform the litigant of the requirements of summary judgment derive the basis of their reasoning from a number of different sources. Some courts draw from the Federal Rules of Civil Procedure, reasoning that service of a motion for summary judgment does not adequately advise a pro se litigant of the duty to submit affidavits or other evidentiary materials in opposition to the motion because the requirement is not explicitly stated in Rule 56(e). Other circuits extend the Supreme Court’s reasoning in *Haines v. Kerner*, holding that it would be illogical to liberally construe a pro se litigant’s pleadings only to thereafter strictly enforce procedural compliance.

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91 See *Ross v. Franzen*, 777 F.2d 1216, 1219 (7th Cir. 1985) (“a gloss on the federal rules”); *Lewis*, 689 F.2d at 101 (“fair inference from the rules”). This reasoning, however, has been rejected by other courts. See *Jacobsen v. Filler*, 790 F.2d 1362, 1365-67 (9th Cir. 1986) (the Federal Rules of Civil Procedure themselves provide adequate notice); *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983) (pro se status does not entitle litigants to special treatment); *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981) (per curiam) (“The right of self-representation does not exempt a party from compliance with relevant rules of procedural and substantive law.”); *United States v. Pinkey*, 548 F.2d 305, 311 (10th Cir. 1977) (trial court has an obligation to be “advocate” for pro se litigant).

92 See *Moore*, 703 F.2d at 521 (“the instant local rule was not constructive notice”); *Lewis*, 689 F.2d at 101-02 (obligation to submit reply affidavits not obvious to layman); *Ham*, 653 F.2d at 630 (“fair notice” of Rule 56 requirements is “bare minimum”).

In *Lewis*, the pro se plaintiff was served a motion for summary judgment, yet nowhere in the papers was there notice that failure to counter the defendant’s affidavits with his own would result in the defendant’s affidavits being taken as true. *Lewis*, 689 F.2d at 101. While admitting that notice of such a consequence is outlined in the rules of procedure, the Seventh Circuit held that specific notice should be given to pro se litigants. *Id*. In this case, the court noted that while the plaintiff had a reasonable opportunity to respond to the motion: “reasonable opportunity presupposes notice. Mere time is not enough, if knowledge of the consequences of not making use of it is wanting.” *Id* at 102.


94 While the Supreme Court’s decision in *Haines* is limited to construction of pleadings, some circuit courts have extended that decision to require district court judges to provide pro se litigants with notice of summary judgment procedures. The Tenth Circuit, in *Merila v. Johnson*, 52 F.3d 338 (10th Cir. 1995) (unpublished table decision), No. 94-4202, 1995 WL 225240, at *1, extended the Supreme Court’s ruling in *Haines* using three great leaps of logic:

“A pro se litigant’s pleadings are to be construed liberally and held to a less
guarantee of notice through a view that summary judgment is "contrary to lay intuition. ..." When dealing with prisoner pro se plaintiffs, several circuits justify requiring notification of summary judgment requirements by looking to the unique circumstances of incarceration.

Stringent standard than formal pleadings drafted by lawyers.” "District courts must take care to insure that pro se litigants are provided with proper notice regarding the complex procedural issues involved in summary judgment proceedings.” Thus, “pro se litigants are to be given reasonable opportunity to remedy the defects in their pleadings,” including the opportunity to resubmit affidavits to conform with Fed. R. Civ. P. 56(e).

Id. (citations omitted). See also Muhammad v. Rowe, 638 F.2d 693 (7th Cir. 1981) (per curiam), where the court stated:

[P]latiff is “entitled to an opportunity to offer proof” unless “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Here, plaintiff was not only denied counsel, but also was not informed that he could answer documents filed in support of the defendants’ motion for summary judgment with his own documents. . . .

Id. at 695-96 (citations omitted); cf. Shah v. Hutto, 704 F.2d 717 (allowing appeal of plaintiff pro se prisoners even though it was untimely filed and they did not file a motion for extension of time to file), rev’d on other grounds, 722 F.2d 1167 (4th Cir. 1983); Craig v. Garrison, 549 F.2d 306 (4th Cir. 1977) (holding that a pro se prisoner should have been advised of his right to obtain an extension of time in which to file his notice of appeal if he could have shown excusable neglect, and that the trial court must make such inquiry), superseded by statute as stated in Shah v. Hutto, 722 F.2d 1167 (4th Cir. 1983); McLaughlin, supra note 3, at 1120 (arguing that diminished filing requirements for pro se litigants are not enough to ensure said litigants appropriate access to the courts).

96 See also Jacobsen v. Filler, 790 F.2d 1362, 1368 (9th Cir. 1986) (Reinhardt, J., dissenting). See generally Zeigler & Hermann, supra note 2.
Of the six circuits that require the district court trial judge to inform a pro se litigant of the requirements of Rule 56, four circuits appear to require automatic reversal if the pro se litigant in a civil suit is not given notice.\(^7\) The Seventh Circuit allows for reversal only if the plaintiff can prove prejudice resulting from the lack of notice.\(^8\) The Ninth Circuit has stated that lack of notice is reversible error but that, in certain cases, a harmless error analysis may come into play.\(^9\)

The reasoning and analysis of the courts that require judicial notification of the requirements of the summary judgment rule is often directly contradicted by that of those circuits refusing to mandate such notice.

**B. Circuit Courts of Appeals' Refusal to Require Summary Judgment Instructions for Pro Se Litigants**

The circuit courts of appeals that have denied pro se litigants the right to be notified as to the requirements of the summary judgment rule\(^10\) have, Federal Rule of Appellate Procedure 4(a) and an Argument for Its Resurrection, 4 REV. LITIG. 71, 74 (1983) (confinement makes compliance with procedural deadlines and obligations difficult because of the prisoner’s limited ability to contact the proper authorities concerning the progress of his lawsuit). \textit{But see} Jacobsen, 790 F.2d at 1367 (Reinhardt, J., dissenting) (distinguishing between the poor and the imprisoned “creates two classes of indigent litigants, those who are poor and law abiding, and those who are poor and not. It then affords lesser rights and protections to the former.”).

The scenario involving pro se prisoners is common, as ninety-five percent of pro se litigation involves prisoners seeking a writ of habeas corpus or alleging civil rights violations. Zeigler & Hermann, \textit{supra} note 2, at 159-60.

\(^7\) \textit{See} Champion v. Artuz, 76 F.3d 483, 486 (2d Cir. 1996) (per curiam); Neal v. Kelly, 963 F.2d 453, 457 (D.C. Cir. 1992); Griffith v. Wainwright, 772 F.2d 822, 826 (11th Cir. 1985); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam).

\(^8\) \textit{See}, e.g., Sellers v. Henman, 41 F.3d 1100, 1102 (7th Cir. 1994) (“[W]e do not reverse . . . unless there is reason to believe that the plaintiff was prejudiced by the failures. . . .”).

\(^9\) \textit{See} Rand v. Rowland, 154 F.3d 952, 961 (9th Cir. 1998). The court stated: [T]here may be the unusual case where the harmlessness of the failure to give the required notice may be established on the record. . . . For example, judicial notice by the district court of its own records, either at the behest of the defendant or \textit{sua sponte}, may disclose that the plaintiff had recently been served with Klingele notice [pro se prisoner entitled to notice of Rule 56 requirements] in prior litigation. Similarly, an objective examination of the record may disclose that the pro se prisoner litigant has a complete understanding of Rule 56’s requirements gained from some other source.

\textit{Id.}

\(^10\) \textit{See supra} note 24.
in a general manner, based their decisions on both a strict adherence to views espoused by the Supreme Court in *Faretta*\(^\text{101}\) dicta and a narrow reading of the *Haines*\(^\text{102}\) decision.\(^\text{103}\)

The Sixth Circuit Court of Appeals, in *Brock v. Hendershott*,\(^\text{104}\) refused to require such instructions out of a sense of fairness for other parties who chose counsel and must bear the risk of their attorney’s mistakes.\(^\text{105}\)

\(\text{101\ Faretta v. California, 422 U.S. 806 (1975). See generally Bradlow, supra note 3, at 659-71.}\)
\(\text{102\ Haines v. Kerner, 404 U.S. 519 (1972) (per curiam).}\)
\(\text{103\ Cf. Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997). While the First Circuit has not written an opinion evidencing their view on whether pro se litigants are to be given summary judgment instructions, they did, in *Ahmed*, evidence a willingness to strictly construe the Supreme Court’s rulings in *Haines* and *Faretta*. See id. The court elaborated on the distinction between construing pleadings liberally and granting leniency at the summary judgment stage. In this case the pro se plaintiff did not contend that he should have been provided with summary judgment instructions at the federal district court level, and the court ruled that summary judgment had been appropriate:}\)

We are required to construe liberally a pro se complaint and may affirm its dismissal only if a plaintiff cannot prove any set of facts entitling him or her to relief. However, pro se status does not insulate a party from complying with procedural and substantive law. The policy behind affording pro se plaintiffs liberal interpretation is that if they present sufficient facts, the court may intuit the correct cause of action, even if it was imperfectly pled. This is distinct from the case at hand, in which the formal elements of the claim were stated without the requisite supporting facts.

*Id.* (citations omitted).

\(\text{104\ Brock v. Hendershott, 840 F.2d 339 (6th Cir. 1988). In *Brock*, the Sixth Circuit adopted an exception similar to that adopted by the Ninth Circuit in *Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986), in that only prisoner pro se litigants were to be given help in complying with the rules of procedure. *Brock*, 840 F.2d at 343. In later cases, however, the Sixth Circuit extended the rule requiring procedural compliance to include situations involving prisoner pro se litigants. See Gaddis v. Myers, 178 F.3d 1294 (6th Cir. 1999) (unpublished table decision), No. 97-6410, 1999 WL 196538, at *1 (holding prisoner pro se litigant to standard pleadings requirements); Darroch v. Ohio Dep’t of Rehab. & Corrs., No. 95-3560, 1996 U.S. App. LEXIS 2792, at *5 (6th Cir. Feb. 2, 1996) (requiring prisoner pro se litigant to provide a transcript of the lower case on appeal in order to argue that he had met his burden of proof).}\)

\(\text{105\ Brock, 840 F.2d at 342-43; see also Beck v. Skon, 253 F.3d 330, 333 (8th Cir. 2001) (collecting a series of Eighth Circuit cases requiring pro se compliance with procedural requirements. “Like any other civil litigant, Beck was required to respond to defendants’ motions with specific factual support for his claims to avoid summary judgment.”).}\)
courts have expressed concern that a mandate to provide notice would encourage even greater numbers of frivolous pro se suits and impair the impartiality of the trial judge. Based partly on these rationales, the Ninth Circuit, in *Jacobsen v. Filler*, while still holding that summary judgment instructions must be provided for prisoner pro se litigants, declined to extend this rule to non-prisoner pro se litigants:

Besides favoring unrepresented litigants over badly represented ones, Jacobsen's suggestion would require the trial court to help one side to a lawsuit rather than another solely because of the status of their legal representation. Doing so necessarily implicates the court's impartiality and discriminates against opposing parties who do have counsel.

106 See Wells v. Brown, 891 F.2d 591, 594 (6th Cir. 1989) (large numbers of frivolous pro se litigation places a heavy burden on the court system); Klein v. Spear, Leeds & Kellogg, 309 F. Supp. 341, 342 (S.D.N.Y. 1970) (discussing one pro se litigant who had filed more than thirty frivolous law suits).


The precise number of people who represent themselves is somewhat hard to determine, because very few jurisdictions keep statistics regarding pro se litigants. One jurisdiction that did keep track of its pro se litigants, however, is Spokane County, Washington. In 1998, approximately 2500 people represented themselves in Spokane County, up from 2200 pro se litigants in 1997. Those figures, however, include parties in both civil and criminal trials, and the bulk of the pro se litigants are in the civil arena.

Id. at 815 (footnotes omitted).

108 See Bradlow, supra note 3, at 668 (Faretta and Wiggins were decided with a view toward preserving the impartiality of the judge, which “was one of the original justifications for the sixth amendment right to counsel.”).

109 Jacobsen v. Filler, 790 F.2d 1362 (9th Cir. 1986).

110 Id. at 1365 n.7. While the court based this decision on the ground that judicial assistance to pro se litigants in general undermines the adversary system, the court reasoned that the damage done to the system was justifiable in the prisoner context, explaining that prisoners often cannot get lawyers even if they have the financial means to do so. Id. at 1364 n.4.
In Jacobsen, the Ninth Circuit Court of Appeals also partially relied on their assessment that the requirements of Rule 56 were sufficiently clear.\textsuperscript{111} The Fifth Circuit followed the Ninth Circuit's lead in Martin v. Harrison County Jail,\textsuperscript{112} noting that Rule 56 provides a succinct statement of litigants' obligations at the summary judgment stage.\textsuperscript{113} The court stated, "[t]o adopt any other rule would make it impossible to determine precisely what notice was adequate in a given case."\textsuperscript{114}

The holdings of both the Ninth and Fifth Circuits provide support for the argument that Rule 56's requirements are sufficiently clear to provide all litigants with notice of what is required at the summary judgment stage, thereby sufficiently protecting the pro se litigant's right to equal access to justice.

III. THE SUMMARY JUDGMENT RULE'S GUIDELINES AND REQUIREMENTS

The summary judgment rule provides a fair and concise method with which to ensure that already crowded court dockets are not filled with unmeritorious, spurious suits.\textsuperscript{115} The summary judgment rule, set forth in Federal Rule of Civil Procedure 56, is clear in its terms and provides procedural safeguards for all litigants, thereby negating the need for a distortion of the rules by requiring judges to provide pro se litigants with specific summary judgment instructions.\textsuperscript{116}

\textsuperscript{111} Id. at 1366.
\textsuperscript{112} Martin v. Harrison County Jail, 975 F.2d 192 (5th Cir. 1992) (per curiam).
\textsuperscript{113} Id. at 193.
\textsuperscript{114} Id.
\textsuperscript{116} See infra notes 117, 145 and accompanying text. Furthermore, the summary judgment rule is not the greatest culprit in pro se litigants' lack of success on the federal trial court level. It is instead the nature of pro se litigants' economic situation that most hinders their success in court. See Jacobsen, 790 F.2d at 1167-68 (Reinhardt, J. dissenting) (pro se status is a matter of necessity rather than choice); McLaughlin, supra note 3, at 1132 ("few individuals able to afford assistance of counsel choose to proceed pro se. It is not surprising, then, that most pro se litigants represent themselves because of an economic inability to procure counsel.") (footnote omitted); cf. Hudson v. Hardy, 412 F.2d 1091, 1094-95 (D.C. Cir. 1968) (even when aware of the responding affidavit requirement, the pro se litigant could become exasperated easily at his inability to gather facts supporting the affidavit and fail to respond). Merely informing a pro se litigant of his obligations under Rule 56(e), therefore, may not safeguard his claim sufficiently. This economic disadvantage is a hurdle best cleared utilizing public funding and
other non-procedural reforms that do not bend the well-established and effective rules of procedure.

The very fact that pro se litigants are, in most instances, at an economic disadvantage, "hampers the pro se litigant's ability to comply with the affidavit requirement under Rule 56(e). Testimony crucial to presenting an issue of material fact often is unobtainable because the pro se litigant cannot afford to pay for a deposition before trial." See McLaughlin supra note 3, at 1132 n.149. In addition, being at an economic disadvantage can be prohibitive to the success of a pro se litigant throughout the discovery phase, in that expenses of discovery are the primary costs of litigation after attorney's fees. See Zeigler & Hermann supra note 2, at 192.

Further, the federal in forma pauperis statute does not provide discovery costs for pro se litigants. See 28 U.S.C. § 1915 (1994 & Supp. V 1999). This statute was intended to benefit indigent litigants and to provide them with meaningful access or equality of participation. The statute provides, among other things, that a party who proceeds under the statute may do so "without prepayment of fees and costs or security therefor. . . . " Id. § 1915(a). In 1996, the Prison Litigation Reform Act amended the statute, requiring a prisoner bringing a civil action or appealing in forma pauperis to pay the full amount of a filing fee. Id. § 1915(b)(1). This amendment was designed to deter frivolous prisoner litigation in courts by making all prisoners seeking to bring lawsuits or appeals feel the deterrent effect created by liability for filing fees. See In re Smith, 114 F.3d 1247, 1249 (D.C. Cir. 1997); Jackson v. Stinnett, 102 F.3d 132, 133-34 (5th Cir. 1996); In re Nagy, 89 F.3d 115, 118 (2d Cir. 1996); Rivera v. DisAbato, 962 F. Supp. 38, 40 (D.N.J. 1997). For a collection of Supreme Court cases analyzing this statute, see David B. Sweet, Annotation, Supreme Court's Construction and Application of 28 USCS § 1915, Providing for Federal Court Proceedings in Forma Pauperis, 121 L. Ed. 2d 817 (1999). See also Robert S. Catz & Thad M. Guyer, Federal in Forma Pauperis Litigation: In Search of Judicial Standards, 31 Rutgers L. Rev. 655 (1979).

Once a person has obtained leave to proceed in forma pauperis, they may apply to the court for appointment of an attorney. Appointment of counsel in these cases is at the judge's discretion. Generally, however, it will only occur in "exceptional circumstances." Miller v. Simmons, 814 F.2d 962, 966 (4th Cir. 1987); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986); Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980). Some circuits have adopted less demanding tests. See, e.g., Hodge v. Police Officers, 802 F.2d 58, 60-61 (2d Cir. 1986) (noting factors that point in favor of appointing counsel such as: likelihood of success on the merits, need for detailed investigation, presence of important credibility issues, pro se litigant's ability, and complex legal issues); Maclin v. Freeke, 650 F.2d 885, 887-88 (7th Cir. 1981) (noting factors that lend towards appointment of counsel).

The definition of "costs" and "fees" is not supplied in 28 U.S.C. § 1915, lending support for the view that expenses of discovery are not within contemplation of the statute. Therefore, courts can and do deny payment of such on the basis that there is no statutory authority for prepayment of expenses such as those
A. Summary Judgment’s Requirements Are Clear and Not Unduly Burdensome to a Pro Se Plaintiff

While scholars and several courts have been quick to assume that the requirements of Rule 56 are complex and difficult for a pro se litigant to understand, the Rule is not, in and of itself, intricate or confounding. Courts have recognized this fact in holding that the requirements listed in the text of the Rule itself provide sufficient notice to pro se litigants of their obligations when faced with a motion for summary judgment.

Rule 56 is divided into seven components. Rules 56(a) and (b) provide the guidelines for when and how a summary judgment motion may be submitted to the court. Rule 56(c) states that the motion requesting summary judgment must be served on an opposing party “at least 10 days before the time fixed for the hearing.” In addition, Rule 56(c) mandates associated with taking a deposition. See Beard v. Stephens, 372 F.2d 685, 690 (5th Cir. 1967) (holding, without reference to fees or costs under § 1915, that leave to proceed in forma pauperis did “not carry with it any such affirmative assistance from the court in the conduct of this civil case”); Toliver v. Cmty. Action Comm’n to Help the Econ., Inc., 613 F. Supp. 1070, 1072 (S.D.N.Y.) (“no clear statutory authority for the prepayment of discovery costs” such as the expense of taking a deposition), aff’d without opp., 800 F.2d 1128 (2d Cir. 1985); Ebenhart v. Power, 309 F. Supp. 660, 661 (S.D.N.Y. 1969) (expressing “doubt[ ] ... as to whether Section 1915 authorize[d] [the] Court to order the appropriation of Government funds in civil suits to aid private litigants in conducting pre-trial discovery”); see also United States v. Wilson, 690 F.2d 1267, 1271 (9th Cir. 1982) (the right to appear pro se does not include the right to research claims at the state’s expense).

Thus it is not surprising that only 6.5% of pro se litigants attempt to obtain discovery. Zeigler & Hermann, supra note 2, at 204.

117 See Jacobsen, 790 F.2d at 1368 (Reinhardt, J., dissenting); Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982); Madyun v. Thompson, 657 F.2d 868, 877 (7th Cir. 1981); McLaughlin, supra note 3, at 1110.


119 See Martin v. Harrison County Jail, 975 F.2d 192, 193 (5th Cir. 1992) (per curiam); Jacobsen, 709 F.2d at 1366.

120 FED. R. CIV. P. 56.

121 Id. 56(a)-(b).

122 Id. 56(c).
that the motion be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The party moving for summary judgment has the burden of establishing the absence of an issue of material fact and must provide adequate notice of the motion to the opponent. Rule 56(d) states that a court may either dismiss the entire case or part thereof on a motion for summary judgment and lists the procedure for an order directing further proceedings for those dismissed only in part. Rule 56(e) is most important for a party opposing the motion for summary judgment in that it describes the party's obligations in answering the motion. Rule 56(e) is titled "Form of Affidavits; Further Testimony; Defense Required." This simple language, on its face, is enough to initially inform even a layperson of her obligation to defend the motion. Rule 56(e) further provides that when a motion for summary judgment is supported by affidavits and other evidentiary materials, the opponent "must" respond with affidavits in opposition or evidentiary materials of his or her own:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The body of Rule 56(e) completely lists the obligations of a party who is opposing a motion for summary judgment. In no uncertain terms, the Rule

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125 FED. R. CIV. P. 12(b)(6).
126 Id. 56(d).
127 Id. 56(e).
128 Id.
lists what must be done to avoid the motion, specifically stating that evidentiary materials are required, and furthermore lists the exact consequences of failing to respond in the prescribed ways.

Under Rule 56(f) a trial judge is given discretion to refuse the motion, grant a continuance, or "make such other order as is just" when faced with a litigant who cannot respond with affidavits containing "facts essential to justify the party's opposition."\[^{130}\] Rule 56(g) provides that a judge may hold a party requesting a motion for summary judgment in contempt and may order the payment of costs to the opposing party should it be determined that affidavits have been made "in bad faith or solely for the purpose of delay."\[^{131}\] Therefore, Rules 56(f) and 56(g) provide procedural safeguards for pro se litigants, preventing the use of a motion for summary judgment made with the sole intention of harassment\[^{132}\] and granting a degree of leniency to those who may not be able to provide affidavits or other evidentiary materials at the summary judgment stage.\[^{133}\] In fact, many cases

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\[^{130}\] *Fed. R. Civ. P. 56(f).*

\[^{131}\] *Id. 56(g).*

\[^{132}\] *Id.*

\[^{133}\] Although not exclusively in contexts involving pro se litigants, Rule 56(f) has been used by several courts to provide time for a party opposing summary judgment to obtain opposing affidavits when the court feels the party has not had an adequate opportunity to do so. Several courts have held that when a party has not had sufficient time to gather contradicting affidavits, it is a sufficient reason to deny the motion for summary judgment until such can be done. See, e.g., SEC v. Spence & Green Chem. Co., 612 F.2d 896, 901 (5th Cir. 1980) (summary judgment decisions rest within the discretion of the trial court); Schaffer v. Kissinger, 505 F.2d 389, 390-91 (D.C. Cir. 1974) (per curiam) (granting the plaintiff an opportunity to conduct discovery before making a decision on summary judgment); Ward v. United States, 471 F.2d 667, 670-71 (3d Cir. 1973) (holding that plaintiffs should have been given a continuance on a summary judgment motion and allowed to conduct discovery which may have uncovered evidence to support their claims); Slagle v. United States, 228 F.2d 673, 678-79 (5th Cir. 1956) (finding that there is a difference between discovering whether there is an issue of fact and deciding that issue and that summary judgment is inappropriate until an opportunity for such discovery has been given); OKC Corp. v. Williams, 461 F. Supp. 540, 545-46 (N.D. Tex. 1978) (refusing to grant summary judgment until the parties had an opportunity to conduct discovery); Goldboss v. Reimann, 44 F. Supp. 756, 759-60 (S.D.N.Y. 1942) (courts may set aside a summary judgment motion until the parties have an opportunity to support their claims through evidence obtained during discovery).

Some courts, however, have refused to deny a motion for summary judgment in spite of the fact that the opposing party claims they have not had enough time to collect evidentiary materials to oppose the motion. *But cf.* King v. Nat'l Indus., Inc.,
reflect the propensity of trial judges to take a plaintiff's pro se status into consideration when affording remedies under Rule 56(f). The discretion afforded a trial judge in applying the protections of Rule 56(f) and 56(g) is essential to an equitable application of the rules and equitable treatment for litigants, pro se and non-pro se alike, during the summary judgment phase.

512 F.2d 29, 34 (6th Cir. 1975) (court determined that a year was more than enough time for a plaintiff to conduct discovery and that a decision on a motion for summary judgment was not premature); Robin Constr. Co. v. United States, 345 F.2d 610, 613-14 (3d Cir. 1965) (uncertainty of facts by itself will not forestall a decision on summary judgment, there must be a good reason for granting a continuance before a court will be compelled to do so).

One author notes:
While not a formal "reason" stated for inability to present facts essential to justify opposition to a motion for summary judgment, the significance of a pro se appearance in opposition by a layman has not been overlooked by the courts, not only in connection with forgiveness of the procedural requirement of an affidavit under Rule 56(f) of the Federal Rules of Civil Procedure, but in connection with the sufficiency of the reasons shown for inability to present such facts.

Jean F. Rydstrom, Annotation, Sufficiency of Showing, Under Rule 56(f) of the Federal Rules of Civil Procedure, of Inability to Present by Affidavit Facts Justifying Opposition to Motion for Summary Judgment, 47 A.L.R. FED. 206, 243-44 (1980 & Supp. 2001); see also Harris v. Pate, 440 F.2d 315, 318 (7th Cir. 1971) (finding that district court erred in not granting a prisoner pro se plaintiff extra time, pursuant to Rule 56(f), to gather evidentiary materials needed to withstand a motion for summary judgment requested by defendant jailer. The court stated that because the plaintiff was not represented by counsel and, because of his incarceration, he was less able than ordinary parties to gather evidence quickly and that denial of his request for additional time to do so effectively denied him a reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.); Ahmad v. Burke, 436 F. Supp. 1307, 1313-14 (E.D. Pa. 1977) (pro se plaintiff filed an inadequate affidavit in response to a motion for summary judgment and the court, recognizing his pro se status, granted him an extension of sixty days to engage in discovery and deferred the decision of the motion until then). But see Nickens v. White, 622 F.2d 967, 970-71 (8th Cir. 1980) (pro se prisoner's affidavit that he could not gather the needed information to oppose a motion for summary judgment due to his incarcerated status inadequate to support denial of the motion).

One author concludes:
The courts often cite the Rule [56(f)] to grant more time but make no mention of affidavits having been filed or of their sufficiency, or assert the remedies of Rule 56(f) on their own motion. Although a proper showing has not been made under Rule 56(f), it permits a court to order a continuance
Federal District Judge Kleinfeld was joined by four others in a vigorous dissent to the Ninth Circuit’s holding in *Rand v. Rowland*, in which the majority opinion had verified the circuit’s requirement that a form explaining Rule 56 be provided to prisoner pro se litigants. In his dissent, Kleinfeld rebukes the court for following a rule that requires the delivery of a boilerplate form listing the requirements of Rule 56 when the mandates of the Rule itself are clear on their face. He criticizes:

There is already a clear explanation of summary judgment procedures in plain English. It is the text of Rule 56. . . . Our new form . . . does not tell prisoners about partial summary judgments, as does Federal Rule of Civil Procedure 56(c). It fails to warn prisoners that affidavits must be “made on personal knowledge,” and that they must state “facts such as would be admissible in evidence” . . . as Rule 56(e) does.

Later in his dissent, Kleinfeld points out that there is no reason to assume that a pro se litigant who does not understand the requirements of Rule 56 will understand a form listing those requirements and that following such a procedure will not make the process any fairer. Fairness, he posits, is most frequently achieved by leaving trial court judges to examine the issues on a case-by-case basis: “Individualized processes have practical utility in identifying and fairly adjudicating prisoners’

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or to make such other order as is just, and where it would be unjust to grant summary judgment without allowing the opposing party an opportunity to present his opposing evidence, the courts waive technicalities.

*Rydstrom, supra* note 134, at 210-11 (footnotes omitted); *see also* *Fimex Corp. v. Barmatic Prods. Co.*, 429 F. Supp. 978, 981 (E.D.N.Y.) (court, on its own motion, ordering depositions of witnesses before granting defendant’s motion for summary judgment in order to fully develop the facts under 56(f)), *aff’d* by 573 F.2d 1289 (2d Cir. 1977); *Warner-Lambert Pharm. Co. v. Sylko*, 320 F. Supp. 1074, 1076 (E.D. Pa. 1970) (court, on its own motion, ordering further discovery before a motion for summary judgment would be entertained, in order to more fully disclose the legal issues and defenses involved); *Dale Hilton, Inc. v. Triangle Publ’ns, Inc.*, 27 F.R.D. 468, 475-76 (S.D.N.Y. 1961) (court calling a conference of counsel because of plaintiff’s noncompliance with Rule 56(f) to determine if it should grant time for discovery to be conducted by plaintiff.).


137 *Id.* at 958.

138 *Id.* at 968 (Kleinfeld, J., dissenting).

139 *Id.* at 967-68 (Kleinfeld, J., dissenting).

140 *Id.* at 968 (Kleinfeld, J., dissenting).
complaints. . . . Today's decision may discourage useful district court initiatives to promote fairness, because . . . some district judges may think it too dangerous to experiment.\(^\text{141}\) Individualized processes such as those espoused by Judge Kleinfeld are provided for in the summary judgment context in the body of Rules 56(f)\(^\text{142}\) and 56(g)\(^\text{143}\) and will sufficiently protect the interests of the pro se litigant.

The requirements of Rule 56 are succinctly embodied in the text of the rule.\(^\text{144}\) In clear language, Rule 56(e) states that a party opposing summary judgment "must" respond with contradicting affidavits or risk the consequence of dismissal pursuant to the entry of an order granting summary judgment.\(^\text{145}\) In addition, the Rule itself has procedural protections which, at the discretion of the trial judge, can be used to aid pro se litigants presenting meritorious claims. An attempt to alleviate perceived obstacles faced by pro se litigants through a distortion of the Rules of Procedure does not help the pro se litigant but instead oversteps the bounds of circuit court authority and does injustice to the adversarial system and traditional role of the trial judge.

IV. REQUIREMENT OF JUDICIAL NOTIFICATION OF SUMMARY JUDGMENT PROCEDURES IS OUT OF LINE WITH THE RULE-MAKING AUTHORITY OF CIRCUIT COURTS AND THE NATURE OF THE ADVERSARIAL SYSTEM

A rule established by federal circuit courts of appeals that requires district court judges to provide notice of the procedures of the summary judgment rule to pro se litigants oversteps the authority of circuit courts to make rules. Congress gave the power to promulgate rules of procedure for the federal district courts expressly to those courts themselves and to the Supreme Court.\(^\text{146}\) Circuit courts also exceed their authority in creating a judicially mandated notification requirement because such a requirement, in effect, is an addition to the summary judgment rule itself. Such an

\(^{141}\) Id. (Kleinfeld, J., dissenting).

\(^{142}\) FED. R. CIV. P. 56(f).

\(^{143}\) Id. 56(g).

\(^{144}\) Id. 56. The Rules of Civil Procedure may even be more accessible to prisoner pro se litigants than non-prisoner pro se litigants. The Supreme Court, in Bounds v. Smith, 430 U.S. 817 (1977), held that at a minimum prisoners had to be provided with access to a law library to comport with the requirements of due process. See id. at 825-28.

\(^{145}\) FED. R. CIV. P. 56(e).

addition, if needed, can only properly be achieved through a formal amendment to Rule 56. Furthermore, requiring district court trial judges to provide specialized summary judgment instructions to a particular segment of litigants impermissibly skews the trial judges’ traditional and crucial impartial role in the American adversarial system.

A. Congress’s Delineation of Rule-making Authority With Respect to District Courts: No Room For Circuit Court Interference

Congress, through various statutes, has developed a scheme for allocating rulemaking authority among the courts. Nowhere in this scheme is there room for circuit court interference with the ability of district courts to promulgate their own rules of procedure in accordance with the Federal Rules of Civil Procedure and the United States Code.

Congress clearly gives the Supreme Court the power to create rules of practice and procedure for cases in the federal district courts. In addition,
under 28 U.S.C. § 2071, "[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business." This rulemaking authority is limited, however, in that rules cannot enlarge or restrict jurisdiction or abrogate substantive law. The federal district courts also find authority to establish their own rules of practice and procedure pursuant to the Federal Rules of Civil Procedure. The rule states in pertinent part, "[e]ach district court, acting by a majority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice."

The above statutes, taken together, show that Congress intended that the Supreme Court and the district courts themselves be given the authority to promulgate rules of procedure for district court trials and that the courts of appeals likewise have the power to develop rules to govern their various procedures, as long as such rules are in compliance with the Federal Rules of Civil Procedure and with the United States Code. The word "their" in the text of § 2071 means that the federal district and circuit courts of appeals may establish rules to govern their own business and presupposes no authority on behalf of circuit courts to mandate such rules for any other courts. The Supreme Court, in Crawford-El v. Britton, struck down a

(f) No rule may be prescribed by a district court other than under this section.

Id.

148 Id. § 2071(a).
149 See Concord Cas. & Sur. Co. v. United States, 69 F.2d 78, 80 (2d Cir. 1934); Clymer v. United States, 38 F.2d 581, 582 (10th Cir. 1930).
150 See FED. R. CIV. P. 83(a)(1).
151 Id. 83(a)(1).
152 See 28 U.S.C. § 2071; FED. R. CIV. P. 83; Rand v. Rowland, 154 F.3d 952, 965 (9th Cir. 1998) (Kleinfeld, J., dissenting) ("Congress gave the authority to make procedural rules for the district courts to the Supreme Court and the district courts, not to the courts of appeal."); Rodgers v. U.S. Steel Corp., 508 F.2d 152, 163 (3d Cir. 1975) ("The only statutory sources of district court rule making power are Rule 83, Fed. R. Civ. P. and 28 U.S.C.§ 2071. These statutes, which probably must be read in pari materia are broad enough to permit district court rule making with respect to the conduct of attorneys in their practice before the court . . . [section] 2071 permits rules 'consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.'") (citations omitted). See also United States v. Hvass, 355 U.S. 570, 574-76 (1958); The Philadelphian, 60 F. 423, 427 (1st Cir. 1894) (courts of appeals have no power to prescribe rules for district court).

153 Rand, 154 F.3d at 965 (Kleinfeld, J., dissenting).
circuit court rule that, as they perceived, impeded the important discretionary role of the trial judge at the summary judgment stage by establishing a uniform rule involving standards of proof. The Court noted:

It is the district judges rather than appellate judges like ourselves who have had the most experience in managing cases.... Given the wide variety of civil rights and "constitutional tort" claims that trial judges confront, broad discretion in the management of the factfinding process may be more useful and equitable to all the parties than the categorical rule imposed by the Court of Appeals.

The guidelines as to who may create rules of procedure for the federal courts reflect Congress's consideration of several factors and evidence no support for the circuit courts' imposition upon the district court trial judges of a requirement of judicial notification of summary judgment procedures to pro se litigants. The Ninth Circuit, in Rand v. Rowland, imposed such a rule upon district court trial judges, making it reversible error for failing to provide notification of summary judgment requirements to pro se litigants. In his dissent in Rand, Judge Kleinfeld discussed the above statutory provisions allocating the authority to create rules of procedure among the various courts:

Under this unambiguous scheme, the general rules are uniform nationally, made after consideration of views from many sources. Congress takes advantage of local knowledge by enabling courts to make rules not inconsistent with the national scheme for governance of their own affairs, about which their judges have direct knowledge. Circuit judges are in between those who have direct local knowledge and those who can make uniform national rules; we do not have much to contribute.

While circuit courts do have certain "supervisory powers" over the courts in their district, these supervisory powers do not allow circuit courts to

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155 Id. at 594-97.
156 Id. at 600-01.
157 Rand, 154 F.3d at 965 (Kleinfeld, J., dissenting).
158 Id. at 952.
159 Id. at 961.
160 Id. at 965 (Kleinfeld, J., dissenting).
161 The Ninth Circuit, in Rand, relied partially on their "supervisory powers" to justify a rule requiring notice of summary judgment procedure for pro se prisoner litigants. See id. at 959; see also La Buy v. Howes Leather Co., 352 U.S. 249, 259-
disregard established Rules of Civil Procedure. In adopting a rule that requires district court judges to give additional notice of summary judgment requirements, circuit courts do just that.

B. Requirement of Judicial Notification of Summary Judgment Procedures is an Impermissible Addition by the Courts to the Federal Rules of Civil Procedure

The circuit court of appeals-created requirement that district court judges provide particularized instructions of summary judgment requirements effectively operates as an amendment to the existing Federal Rule of Civil Procedure 56. The Rule itself provides for notice to all parties of

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60 (1957) (supervisory power of circuit courts over district courts in their jurisdiction proper when "necessary to proper judicial administration in the federal system."); Burton v. United States, 483 F.2d 1182, 1187 (9th Cir. 1973) (finding that it was the court's duty under its supervisory power to ensure strict compliance with FED. R. CRIM. P. 11).

162 See United States v. Widgery, 778 F.2d 325, 328-29 (7th Cir. 1985). In Widgery, the court explains the meaning of supervisory power: "Supervisory power sometimes means the authority to announce new rules that promote the administration of justice, even though neither constitution nor statute requires such rules." Id. at 328. However, the court in refusing to reverse a judgment without showing of harmful error, noted that the supervisory power could not be used in contravention of existing rules. "The supervisory power is part of the common law, and no court has a common law power to disregard a rule or statute that was within the authority of Congress to enact." Id. at 329. Circuit courts may use supervisory powers to "fill in interstices," id., but may not, in using its supervisory powers, "disregard the considered limitations of the law it is charged with enforcing." Id. (quoting United States v. Payner, 447 U.S. 727, 737 (1980)). See also Rand, 154 F.3d at 966 (Kleinfeld, J., dissenting) ("We do not have 'supervisory power' over district courts so broad that we can exercise authority that Congress expressly gave only to other institutions.").

163 The Ninth Circuit, in Jacobsen v. Filler, 790 F.2d 1362 (9th Cir. 1986), justified their refusal to expand pro se rights under the summary judgment rule by stating that even if such an extension were deemed necessary, it would be outside the authority of the court to amend the Rules of Procedure:

Finally, even if a substantive notice requirement were desirable, it should be enacted through formal amendment rather than piecemeal adjudication. Rule 56's separate notice provision (compare Rule 56(c) with Rule 6(d)) and description of summary judgment (compare Rule 56(e) with Rule 12(b)) indicate that the Supreme Court and its Advisory Committee have considered the special problems raised by the summary judgment procedure and, by failing to require specific notice of the nature of summary
the summary judgment motion and further provides various procedural safeguards, to be applied at the trial judge's discretion, that ensure fairness to all litigants. Therefore, requiring particularized notice to be given to a specified segment of litigants is clearly outside the scope of the Rule and thus is an impermissible exercise of circuit courts of appeals' rulemaking/supervisory powers.

One scholar notes: "The ideal of nationally uniform procedural rules promulgated by the Supreme Court after consideration by expert committees—commonly known as 'court rulemaking'—has been the cornerstone of civil rulemaking in the federal courts since adoption of the Rules Enabling Act in 1934." The "cornerstone" of judicial rulemaking judgment, have concluded that the present federal rules . . . already apprise litigants of their summary judgment obligations. Requiring additional notice to pro se litigants would be an accretion onto Rule 56(c), not an interpretation of it; and as an ad hoc amendment it would not be standardized, codified, or subject to collective decision making.

Id. at 1366 (emphasis in original) (footnote omitted).

164 FED. R. CIV. P. 56(c); see also Turner v. Johnson, 106 F.3d 1178, 1185 (5th Cir. 1997) ("The purpose of the notice provision in Rule 56(c) is to give the nonmoving party a reasonable opportunity to submit opposing material to create a genuine issue of material fact."); Dillard v. Blackburn, 780 F.2d 509, 515 (5th Cir. 1986); Kibort v. Hampton, 538 F.2d 90, 91 (5th Cir. 1976) (failure to provide either notice or hearing to plaintiff before granting summary judgment to defendant improperly cuts off plaintiff's opportunity to develop a record (through submission of additional materials or request of an extension of time to develop such materials though discovery) on which court may fairly rule on the merits of his complaint).

165 FED. R. CIV. P. 56(f)-(g); see Pine Ridge Coal Co. v. Local 8377, United Mine Workers of Am., 187 F.3d 415, 421-22 (4th Cir. 1999) (motion may be made at any time for summary judgment, but in the event that extra time is needed to secure evidentiary material through discovery Fed. R. Civ. P. 56(f) provides for allowance of time to secure these materials); Groover v. Magnavox Co., 71 F.R.D. 638, 639-41 (W.D. Pa. 1976); see also In re Gioioso, 979 F.2d 956, 960 (3d Cir. 1992) (given the wrongful character of the debtor's affidavits in opposition to summary judgment, in that they flatly contradicted earlier sworn depositions and failed to raise material issues of fact, Rule 56(g) required bankruptcy court to order debtors to pay reasonable expenses and fees. Once the court has found bad faith, it must assess costs and fees); Clark v. Hancock, 45 F.R.D. 512, 514-15 (S.D. Ga. 1968) (awarding costs associated with travel, lodging, board, witness fees and attorney's fees to party opposing motion for summary judgment that had been made in bad faith).

166 See supra note 165.

is indeed the Supreme Court’s authority under 28 U.S.C. § 2072168 “to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.”169 This power to create uniform national rules of procedure is vested exclusively in the Supreme Court, making attempts by circuit courts to extend and alter the purpose and meaning of the Federal Rule of Civil Procedure 56 impermissible.170 The Supreme Court has struck down various attempts of circuit courts to extend the meaning of rules of procedure in contexts other than that of summary judgment.171 In Crawford-El v. Britton,172 the Supreme Court addressed a rule created by the D.C. Circuit requiring a plaintiff to meet a higher burden of proof than is normally required in suits involving public officials.173 Crawford-El involved a pro se prisoner plaintiff alleging several violations of his constitutional rights by a corrections officer. The district court, reasoning that it needed to protect public servants from the burdens of trial and discovery that may impair the performance of their duties, established a rule requiring the plaintiff to

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§ 2072. Rules of procedure and evidence; power to prescribe
(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Id.

169 Id. § 2072(a).

170 See cf. Woodbury v. Andrew Jergens Co., 61 F.2d 736, 738 (2d Cir. 1925) (holding that in exercising rulemaking power, a district court could not restrict or enlarge rules made under predecessor to 28 U.S.C. § 2072).

171 See Crawford-El v. Britton, 523 U.S. 547 (1998); Woodbury, 61 F.2d at 736. In addition, at least one circuit court has recognized that its powers are limited to construing the Rules of Procedure, precluding alteration or extension. See Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir. 1975). The court refused to require notice prior to a determination of liability of all the members in a class action. Id. at 256-57. It stated, “[w]e will not presume to exercise supervisory powers . . . to mandate notice which the Federal Rules of Civil Procedure, promulgated by the Supreme Court under authority from Congress, 28 U.S.C. § 2072, specifically do not require.” Id. at 254.

172 Crawford-El, 523 U.S. at 574.

173 Id. at 580.
show clear and convincing evidence of improper motive on the part of the corrections officer in order to defeat a motion for summary judgment. Chief Judge Edwards concurred when the case was heard en banc by the D.C. Circuit Court of Appeals: "These opinions offer judgments that are in complete defiance of the Federal Rules of Civil Procedure. ... The net result is judicial activism at its most extreme. ... I believe that this court has no authority to amend the Federal Rules." The Supreme Court, citing to Chief Judge Edward's concurrence, struck down the heightened standard, listing the various rules of procedure already in existence that would provide adequate protection from suit for public officers, finding that a heightened burden of proof would effectively and impermissibly strip the trial court judge's discretion under the Rules of Procedure in applying these well-established remedies.

The importance of the Rules of Procedure—a body of law to be amended through designated statutory procedures—to the stability of the judicial system was highlighted by the Supreme Court in Miner v. Atlass. In Miner, the Court affirmed an appellate decision that struck down an exercise of local rulemaking power by a district court. The Court reasoned that rulemaking power could not be used to effectuate basic changes in the Rules of Procedure. The Court expanded on the importance of the Rules:

[T]he choice of procedures adopted to govern various specific problems arising under the system was in some instances hardly less significant than the initial decision to have such a system. ...
The matter is one which, though concededly "procedural," may be of as great importance to litigants as many a "substantive" doctrine. . . .

The Court went on to note that strict adherence to the statutory procedures for the rulemaking authority of the courts is "designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords."

On a policy level, a haphazard addition to Rule 56 may guard poorly the judicial policy, espoused by the Supreme Court in Miner, behind maintaining a stable canon of the Rules of Procedure. Furthermore, as in Crawford-El, the decisions of the circuit courts requiring mandatory judicial notification of summary judgment instructions to pro se litigants seem to represent "judicial activism at its most extreme" and are effectively extending the Federal Rules of Procedure. By creating a notice requirement above and beyond that which is required in the Rule on the basis that such notice is needed to ensure pro se litigants equal access to law, the circuit courts are effectively stripping the district court trial judge of his discretion to apply provisions in Rules 56(f) and (g) that were presumably enacted to safeguard the same principles of justice. The denial of a district court judge's ability to apply procedural safeguards within his own discretion was struck down in Crawford-El and may not withstand the scrutiny of the Supreme Court in the summary judgment context.

C. Requiring District Court Judges to Inform Pro Se Litigants of the Requirements of the Summary Judgment Rule Distorts the Adversarial System and the Role of Trial Judges

American courts operate under the adversarial system of dispute resolution. Under this system, each player in the courtroom performs a specific role. The judge's role, which is at the heart of the system, is that

181 Id. at 649-50.
182 Id. at 650.
of a neutral and passive arbiter. Beyond this, "[t]he proper scope of the court's responsibility [to a pro se litigant] is necessarily an expression of careful exercise of judicial discretion and cannot be described fully by specific formula." However, in order to fulfill the duty of impartiality, a judge must refrain from becoming an advocate for the pro se litigant. The adversarial system is based on the notions that both parties will be held to the same standards and that a judge will remain neutral. A rule requiring judges to give pro se litigants summary judgment instructions threatens to undermine this system.

Adversarial principles are eroded when a pro se litigant is afforded special status and a standard of conduct to be followed that would not be acceptable for an attorney. Many scholars argue that fundamental to the view of the adversary system is that the parties are on equal footing, and therefore, affording pro se litigants special solicitude at the summary judgment stage will not affect adversarial policies. However, others urge

186 See, e.g., Model Code of Judicial Conduct Canon 3 (1990) ("A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.").
187 See, e.g., United States v. Trapnell, 512 F.2d 10, 12 (9th Cir.1975) (per curiam) ("The trial judge is charged with the responsibility of conducting the trial as impartially and fairly as possible."); Mazur v. Pennsylvania, 507 F. Supp. 3, 4 (E.D. Pa. 1980) ("[A] judge may not become the surrogate attorney for a party, even one who is proceeding pro se.").
188 See generally Scott L. Garland, Avoiding Goliath's Fate: Defeating a Pro Se Litigant, 24 Litig. 45 (1998).
189 See Bradlow, supra note 3, at 671 ("[E]xtending too much procedural leniency to a pro se litigant risks undermining the impartial role of the judge in the adversary system."); id. at 681 ("[P]reserving the impartial role of the judge in the adversary system... is an important interest, important enough to justify strict enforcement of compliance by pro se criminal defendants with procedural rules under Faretta and Wiggins.").
190 See Cornelius D. Helfrich, Facing a Pro Se Opponent, 14 Compleat Law. 41, 42 (1997) ("In theory, statutes, prevailing case law, and the rules of court apply to all litigants equally. In practice, this doesn't happen. The lawyer is held to the standards that the court knows the lawyer is aware of, while frequently the unrepresented litigant is not held to any standards at all.").
191 See, e.g., McLaughlin, supra note 3, at 1124 ("The effective operation of the adversary system relies on the assumption that the parties to a lawsuit are approximately equal in their legal representation. This rough balance, however, is entirely upset when one side appears pro se.") (footnotes omitted); see also Bounds
that this has never been an assumption. Judge Posner, in his dissent in \textit{Merrit v. Faulkner},\textsuperscript{193} states:

\begin{quote}
We do not put a cap on the amount of money that a litigant can spend on lawyers; we do not inquire whether the litigants had roughly equal resources; we allow one to outspend the other by as much as he pleases. We count on the courts not to be overawed by the litigant with the higher-priced counsel.\textsuperscript{194}
\end{quote}

While a pro se litigant is not necessarily on equal terms with a litigant who is well represented, he may well be on such terms with a litigant who is poorly represented.\textsuperscript{195} If a represented litigant will be held accountable for the procedural mistakes of his lawyer, then why afford a pro se litigant more protection by allowing her to rely on judicial notification of procedural requirements? The seeming response is that a pro se litigant should not be afforded such preferential treatment.\textsuperscript{196} Requiring particular

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\textsuperscript{93} \textit{Merritt}, 697 F.2d at 761. In \textit{Merritt}, the Seventh Circuit found that while there was no right to counsel for indigent civil litigants, the plaintiff in the suit had a right to meaningful access to the courts to pursue his claim. \textit{Id.} at 763. This included the right to counsel evaluated on a case-by-case basis using several factors established by the court. \textit{See id.} at 764.

\textsuperscript{194} \textit{Id.} at 771 (Posner, J., concurring in part, dissenting in part).

\textsuperscript{195} Cf. Rand v. Rowland, 154 F.3d 952, 964 (9th Cir. 1998) (Thomas, J., concurring) ("[M]any prisoners have greater access to law libraries and legal assistance" following the Supreme Court’s opinion in \textit{Hudson v. Hardy}, "than do those without financial means."); Jacobsen v. Filler, 790 F.2d 1362, 1364-65 (9th Cir. 1986) ("[P]ro se litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record. Trial courts generally do not intervene to save litigants from their choice of counsel, even when the lawyer loses the case because he fails to file opposing papers. A litigant who chooses himself as legal representative should be treated no differently. In both cases, the remedy to the party injured by his representative’s error is to move to reconsider or to set aside; it is not for the trial court to inject itself into the adversary process on behalf of one class of litigant.") (footnotes omitted) (emphasis in original).

\textsuperscript{196} \textit{See Faretta v. California}, 422 U.S. 817, 826 (1977); \textit{Haines v. Kerner}, 404 U.S. 519, 520-21 (1972) (per curiam); \textit{United States ex rel. Smith v. Pavich}, 568 F.2d 33, 40 (7th Cir. 1978) ("The fact that a defendant represents himself does not alter the judicial role nor does it impose any new obligation on the trial judge."); \textit{Unites States v. Pinkey}, 548 F.2d 305, 311 (10th Cir. 1977) ("He

ized summary judgment instructions for pro se litigants goes against the
great weight of policy within the courts to hold pro se litigants to substan-
tially the same standards as non-pro se litigants. Additionally, the judicial

who proceeds pro se with full knowledge and understanding of the risks does so
with no greater rights than a litigant represented by a lawyer, and 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.”); see also Ira P. Robbins & Susan N. Herman,
Pro Se Litigation—Litigating Without Counsel: Faretta or For Worse, 42 BROOK.
L. REV. 629, 681-82 (1976) (judge not proper party to represent the pro se litigant);
Westling & Rasmussen, supra note 107, at 310 (it is not the job of the court to
represent the litigant); cf. Guidroz v. Lynaugh, 852 F.2d 832, 834 (5th Cir. 1988);

197 See, e.g., LoSacco v. City of Middletown, 71 F.3d 88, 93 (2d Cir. 1995)
(“Granted, appellate courts generally do not hold pro se litigants rigidly to the
manufacture claims of error for an appellant proceeding pro se, especially when he
has raised an issue below and elected not to pursue it on appeal.”) (citation
omitted); Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985)
(Requiring pro se complaints to be constructed generously, but within limits. “It
does not require those courts to conjure up questions never squarely presented to
them. . . . Nor should appellate courts permit those same fleeting references to
preserve questions on appeal. . . . To do so . . . would also transform the district
court from its legitimate advisory role to the improper role of an advocate seeking
out the strongest arguments. . . .”); United States v. Trapnell, 512 F.2d 10, 12 (9th
Cir. 1975) (per curiam) (“For the trial judge to assume the responsibility of
examining witnesses for either party would change the judicial role from one of
impartiality to one of advocacy.”); United States v. Dujanovic, 486 F.2d 182, 188
(9th Cir. 1973) (“One of the penalties of the appellant’s self-representation is that
he is bound by his own acts and conduct and held to his record.”); Watts v. United
States, 273 F.2d 10, 11-12 (9th Cir. 1959) (defendant representing himself cannot
be heard to complain that his Sixth Amendment rights have been violated); Young
v. Jenne, 661 F. Supp. 1, 3 (S.D. Miss. 1986) (noting that the policy of construing
pro se complaints liberally by the policy of denying a motion to
amend a complaint “submitted a full year after the filing of the original complaint,
which asserts new allegations not germane to the original action, and which, if
allowed, would cause prejudice to the non-moving party or undue delay in the
are not required, however, to stretch our imagination to manufacture allegations to
supplement the complaint or to assume facts inconsistent with it after finding that
the facts alleged preclude relief. In considering pro se complaints, we will not hold
them to a high standard in pleading matters of law, and will liberally infer facts
which pro se plaintiffs through lack of knowledge and experience might omit. We
will not, however, infer facts as important, basic, and obvious as those necessary
here to avoid the defense of the statute of limitations.”).
mandate creates even greater incentive for pro se litigants to rely on their pro se status to excuse mistakes made during trial, excuses not available to represented litigants. The unfortunate result of a judicial responsibility to provide pro se litigants with particularized summary judgment instructions is that it indeed advances pro se parties' interests beyond those of represented parties while at the same time distorting the role of the district court judge in the trial process.

While providing notice of the summary judgment requirements to pro se litigants might not place a judge directly in a role as advocate, it creates an air of unfair permissiveness with respect to the pro se litigant that can permeate an entire court proceeding and may well open the floodgates to procedural exceptions for pro se litigants at each turn. The

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198 See, e.g., Akra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852, 856 (8th Cir. 1996) (stating that attempt of appellant to hide behind his pro se status will not avail him, and that pro se litigants are not excused from complying with procedural requirements); Phillips v. Tobin, 548 F.2d 408, 413 (2d Cir. 1976) ("This plaintiff, under the cloak of a pro se applicant, has engaged in conduct in the past which has evoked judicial rebuke and reprimand and has demonstrated his complete disregard of the standards, propriety, discipline or accountability required of members of the bar.").

199 See McLaughlin, supra note 3, at 1126 n.104 ("The practice of calling and examining witnesses approaches judicial advocacy far more than apprising pro se litigants of their summary judgment obligations. By assuming an active role at trial, the judge inevitably will be perceived by the jury as sponsoring one cause. Informing pro se litigants of summary judgment obligations merely helps to ensure that the litigant is heard at trial.") (citation omitted) (emphasis in original).

Many courts discussing impermissible judicial advocacy have stated that it is most important for the judge to preserve an appearance of impartiality in front of the jury. See Geders v. United States, 425 U.S. 80, 86-87 (1976) (The notification of the obligation is not mentioned at trial. The judge is only furthering the goal of eliciting the truth.); Jacobsen v. Filler, 790 F.2d 1362, 1369 (9th Cir. 1986) (Reinhardt, J., dissenting) (When a judge informs a pro se litigant of a procedural obligation, the issue of impartiality does not even arise. The informing judge is not advocating the pro se litigant's claim before the jury.).

200 See Terry Carter, Self-Help Speeds Up: While Courts Work to Become More Friendly to Pro Se Litigants, the Justice System Struggles to Address Difficult Issues Raised By Their Presence, 87 A.B.A. J. 34, 36-37 (2001) ("Critics say that some help for pro se litigants—from detailed guidance by court staffers to judges bending strict rules of evidence—undermines the core of the judicial system and damages the legal profession itself. There is the perception and the mixed message, they argue, that pro se litigants might have an unfair advantage over those who bring lawyers to court. . . . One critic of making it easier for people to represent themselves in court is Edward P. Ryan Jr., president of the Massachusetts Bar Association, who calls it 'the fast food approach.' It staves off hunger in the short
Ninth Circuit, in refusing to extend the grant of summary judgment instructions to non-prisoners, noted:

Imposing an obligation to give notice of Rule 56’s evidentiary standards would also invite an undesirable, open-ended participation by the court in the summary judgment process. It is not sensible for the court to tell laymen that they must file an “affidavit” without at the same time explaining what an affidavit is; that, in turn, impels a rudimentary outline of the rules of evidence.  

Through a judicially-created mandate, the circuit courts strip trial judges of their discretion in dealing with pro se litigants at the summary judgment stage. Using discretion, a trial judge can apply the procedural safeguards provided in Rule 56 to ensure that meritorious claims brought by pro se litigants and represented litigants alike achieve resolution in court. Utilizing discretion and procedural safeguards, a trial judge may take into account a pro se litigant’s status without assuming an impermissible advocatory role. The trial judge, under the Rules of Civil Procedure and common law, properly has broad discretion in applying procedural standards to achieve justice. This discretion achieves the greatest level of procedural fairness in that it allows the court to grant certain leniency to litigants with meritorious claims while helping a judge “weed out truly insubstantial lawsuits.”

CONCLUSION

It is clear that most circuit courts of appeals eschew granting leniency to pro se litigants in many areas of procedural compliance. Maintaining
procedural integrity in court proceedings is in keeping with the Supreme Court’s statements in *McNeil v. United States*:208 "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law,"209 and in *Faretta v. California*:210 "[t]he 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."211 In light of general adherence to procedural standards by circuit courts and the admonitions of the Supreme Court regarding this issue, a uniform rule requiring a district court trial judge to inform a pro se litigant in specific terms of his obligations when faced with a summary judgment motion is illogical. A more sensible approach is found in the decisions of the minority of circuit courts that, after consideration of the explicit nature of Rule 56, as well as the overriding concern that to provide such instructions would give pro se litigants an advantage over represented litigants that does not comport with notions of equal treatment under the law, do not espouse such a rule.212

Indeed, a pro se litigant, like any other, has a right to equal access to justice, and thus equal access to the courts.213 Access to the courts is adequately protected at the summary judgment stage by Rule 56.214 The Rule provides in clear terms the obligations of parties and allows trial judges to utilize various provisions as safeguards against abuse.215 If pro se notification of summary judgment requirements is needed, it should be enacted through an amendment to the Rules of Procedure and not through twisting existing rules and distorting the adversary system.

If deemed appropriate, an amendment to the Rules of Procedure will likely be required to effect this change because a circuit court of appeals-created rule requiring district court judges to inform pro se litigants of their obligation to submit reply affidavits in response to an opponent’s motion for summary judgment is an impermissible and unnecessary addition to the Rules of Procedure, a misuse of the court's rulemaking powers, and an illogical infringement on the important discretionary powers of a trial judge.216 Without the ability to exercise discretion on issues involving pro se litigants, a federal district court trial judge who deals with pro se

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209 *Id.* at 113.
211 *Id.* at 835 n.46.
212 See supra notes 100-14 and accompanying text.
213 See supra notes 4-5, 26-30 and accompanying text.
214 See supra notes 115-45 and accompanying text.
215 See supra notes 115-45 and accompanying text.
216 See supra notes 147-206 and accompanying text.
litigants on a daily basis will be at the mercy of the federal courts of appeals. The courts of appeals should facilitate the district court judges' duties, rather than promulgate needless and burdensome rules from on high.