

intersect

servicing + foreclosure

COMMUNICATION IS KEY

Escalate PROBLEMATIC ISSUES through
Counsel, not Staff

Provide PROPOSED SOLUTIONS
along with Problematic Issues

Presented by [Name] [Title]

i n t e r s e c t

BREAKOUT SESSION 4 **Complex Litigation Track**

Mandalay West

Time 10:45 - 11:45AM

Litigation Tips, Tricks and Skills

- This session will begin with a discussion of *Obduskey v. McCarthy & Holthus, LLP*, its potential effect on FDCPA violation claims and exposure to lenders and servicers.
- We will then move to a discussion of procedural issues which arise in contested judicial foreclosure matters Including applying the rules of evidence and discovery as well as tips for deposition and witness examination.
- Finally, we round out the session with a discussion on Pro Se cases and why a case handled by a borrower as his/her own attorney can be time consuming and costly.

INTERSECT | PRESENTERS



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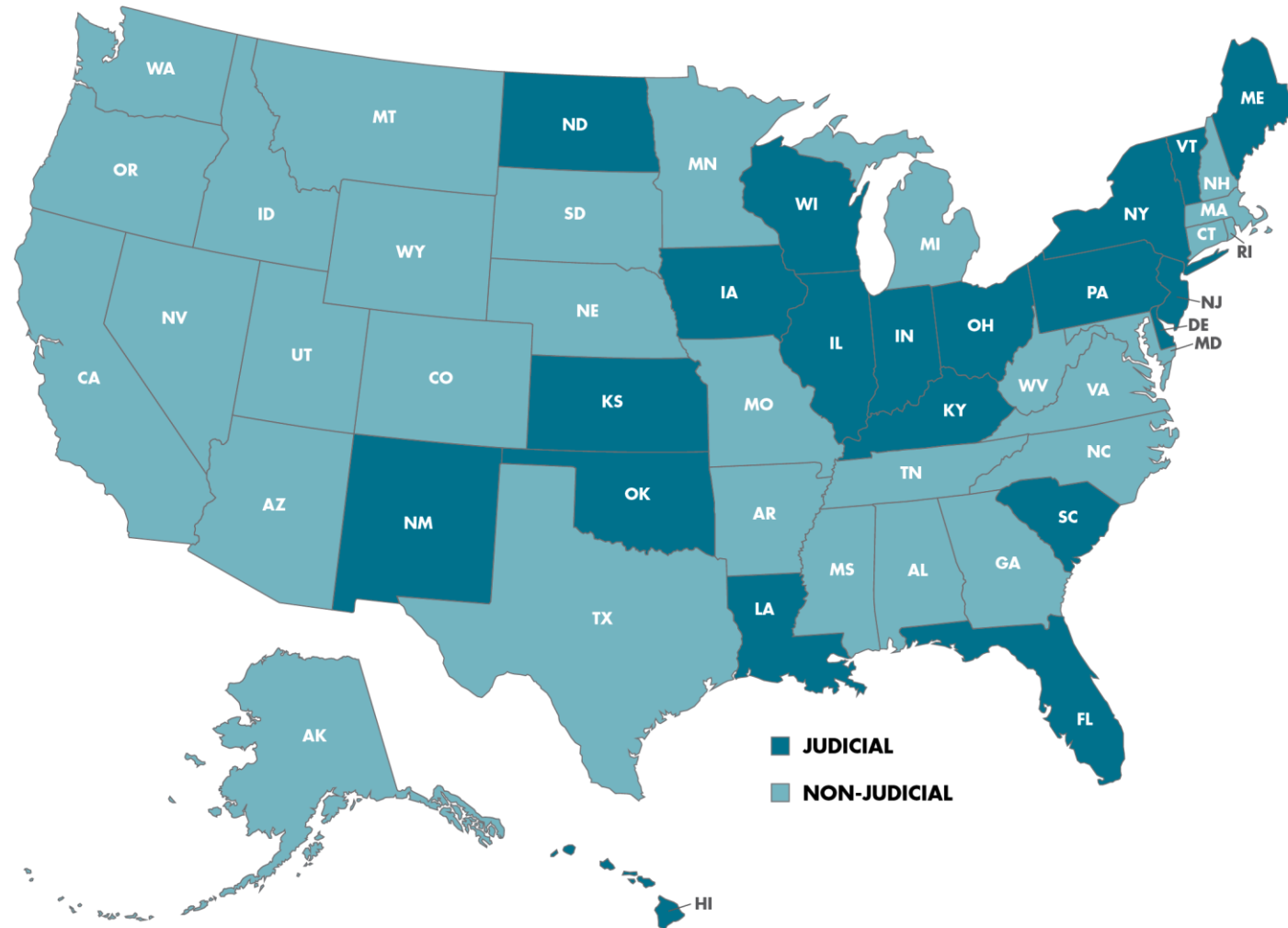
Speaker



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JUDICIAL OR NON-JUDICIAL?



OBDUSKEY V. MCCARTHY & HOLTHUS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

ISSUE PRESENTED

- Whether the non-judicial foreclosure process and the act of conducting a trustee's sale qualify as “debt collection” under the Fair Debt Collection Practices Act



FORECLOSURE LITIGATION, GENERALLY

Answer

- Response to the allegations in the complaint
- Asserts affirmative defenses and/or counterclaims
- If no answer received, proceed with default judgment

Motion for Summary Judgment

- On papers, avoids necessity of a formal trial
- Requires an affidavit from the Plaintiff and admissible evidence proving there is no issue of fact

Discovery

- Pertains to any information or documents that may be exchanged between the adverse parties during litigation in preparation for trial
- Information must be disclosed where the evidence is material and necessary, and no objection applies (example, confidential or privilege)

Trial

- Court room presentation before adjudicating officer
- Parties present testimony and documentary evidence
- Opportunity to cross-examine witnesses
- Plaintiff must prove case by a preponderance of the evidence

AFFIDAVIT OF MERIT

Fully responds to allegations and defenses raised in the answer.

Example: payment history is evidence of an alleged default.

Affiant should be familiar with record keeping procedures, mailing procedures, and servicer's maintenance and business records.



Transferee servicer or third parties (subservicers or agents) may have difficulty attesting to mailing procedures or its predecessor (i.e., default notice was mailed in accordance with the mortgage).



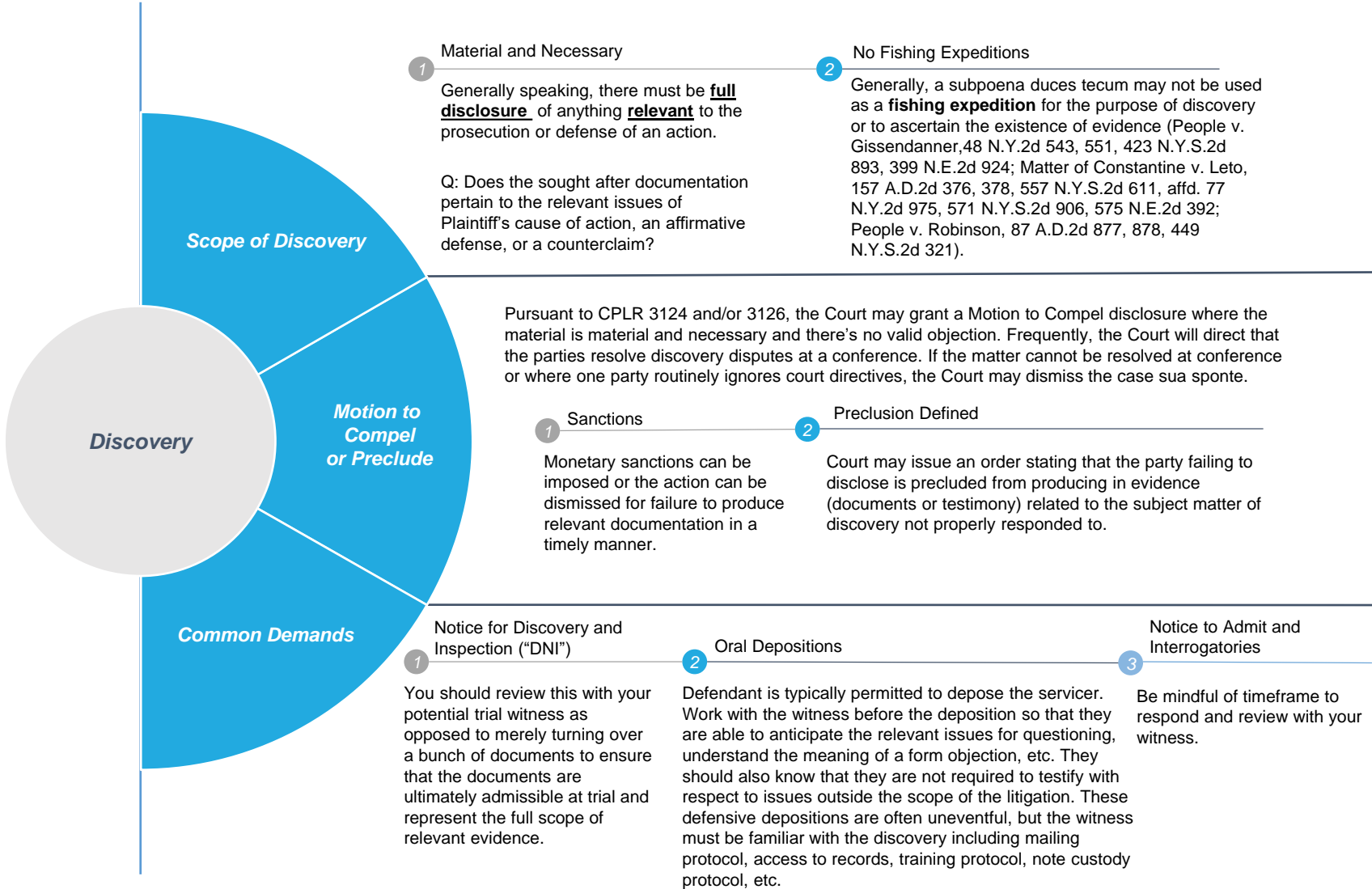
VERIFIED COMPLAINT EXPEDITED PROCEDURE

In New York, for example: A “verified pleading” may be utilized as an affidavit whenever the latter is required.

Best practice is to provide a client verified, rather than an attorney verified complaint:

-  Allows the firm to file for default judgment without requesting an additional affidavit.
-  Reduces the timeline, alleviates work for the document execution team, and firmly establishes standing at the commencement of the litigation.

FORECLOSURE LITIGATION, DISCOVERY





FORECLOSURE TRIAL

If the summary judgment application is denied, the Court may direct the parties to conduct a framed issue hearing or full blown trial.

| High-Level | Step | Objective | Benefit |
|--|--|--|--|
| Request a Conference | <ul style="list-style-type: none"> Request a conference to narrow issues. | <ul style="list-style-type: none"> Clarify the summary judgment decision and order Focus on which affirmative defenses are stricken from the Answer | <ul style="list-style-type: none"> Prevents litigation of unnecessary items |
| Bench Memo | <ul style="list-style-type: none"> Prepare a bench memo that (1) helps the Court to narrow the focus and (2) anticipates likely evidentiary objections. | <ul style="list-style-type: none"> Makes clear that the Court is considering the issues using a preponderance of the evidence standard. Vast majority of foreclosure case law pertains to summary judgment practice – which requires a more exacting standard. | <ul style="list-style-type: none"> Provides a roadmap to rule in your favor! Reminds the Court, that even though a particular threshold of evidence was not sufficient in a major appellate decision, a lesser showing at trial should not necessarily be deemed insufficient. |
| Select the Proper Witness | <ul style="list-style-type: none"> Select the proper witness, as opposed random selection by a loan servicer. | <ul style="list-style-type: none"> Witness will be expected to review and explain business records, proper chain of custody. Witness must have personal knowledge of the events and/or transactions that are the subject of the testimony. | <ul style="list-style-type: none"> A witness with personal knowledge is a stronger witness. <input type="checkbox"/> Mailing procedure: Witness must be familiar with mailing procedure and should actually generate the print screens, etc before it is entered into evidence <input type="checkbox"/> Note custody screens may show the initials of the System User in the corner of the document. Experienced defense counsel will study the document, ask about these initials, and can make the argument that a different user cannot lay the foundation for the document. |
| Certified Records | <ul style="list-style-type: none"> Certified Records are admissible. | <ul style="list-style-type: none"> Certified records include Mortgage, CEMA, Assignments, Powers of Attorney. Court will take judicial notice for certified records to be admitted. | <ul style="list-style-type: none"> Court may require originals if certified records are not provided. |
| Prepare to be pushed towards settlement | <ul style="list-style-type: none"> Prepare to be pushed towards settlement or to compromise. | <ul style="list-style-type: none"> Bring payoff and reinstatement figures, and broker price opinion so the servicer can evaluate and negotiate. Make the best offer at the last possible moment. | <ul style="list-style-type: none"> If you know the facts, you won't be pressured by court attorneys who emphasize any weakness in your case and demand negotiations. |
| Supplement and amend discovery | <ul style="list-style-type: none"> Supplement and amend discovery. | <ul style="list-style-type: none"> Assess initial submission and determine if any additional documents must be presented at trial. | <ul style="list-style-type: none"> Allows you to be fully prepared at trial and have all necessary documents. |

CONTESTED REFEREE HEARINGS

A Referee's hearing date will only be set if the Referee finds merit with the Defendant's objections and the information provided by Plaintiff was not sufficient to clarify the Defendant's objections.

Before the hearing:

Firm will request a witness to appear for the hearing (bank representative).

Attorney will review all of the payment history.

Attorney will request a court reporter.

Attorney must be main point of contact for the client, the referee, and opposing counsel.

To prevent issues at the hearing, the Firm and witness should review the figures extensively before the hearing. For example, the witness should understand how to calculate the interest due based on the interest rate, unpaid balance, and months from default.

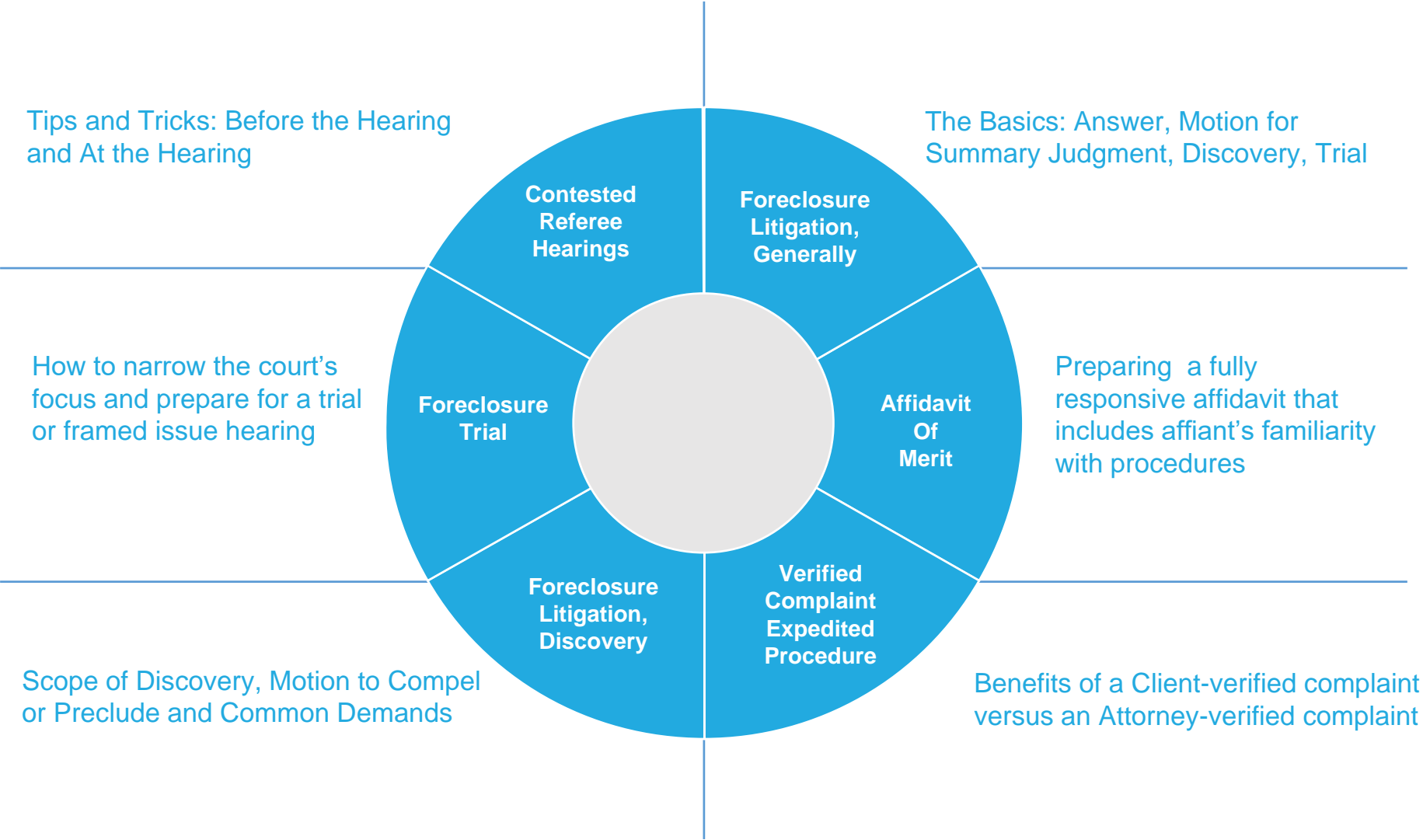
At the hearing:

Typical issues that may arise:

1. Admissibility of records – specifically, foundation, hearsay and best evidence objections. The Certified Mortgage and Certified Power of Attorney (to prove that the witness can actually testify for the Plaintiff) are generally required.
2. Subdivision – Witness must be able to make the prima facie statement that the property should not be subdivided into parcels. Helpful documentation supports that the value of the collateral would be jeopardized by the subdivision or that subdivision is not practical.
3. Original Documents – Defendant will demand original documents of receipts, checks, etc. Typically, best practice is that this information is **not** provided, particularly if the information is not complete. A detailed payment history and judgment figures are generally sufficient to prove entitlement to the judgment amount.
4. Allowable fees– Witness must be familiar with the provisions of the mortgage that permit the collection of late fees, fees of appraisals, etc.

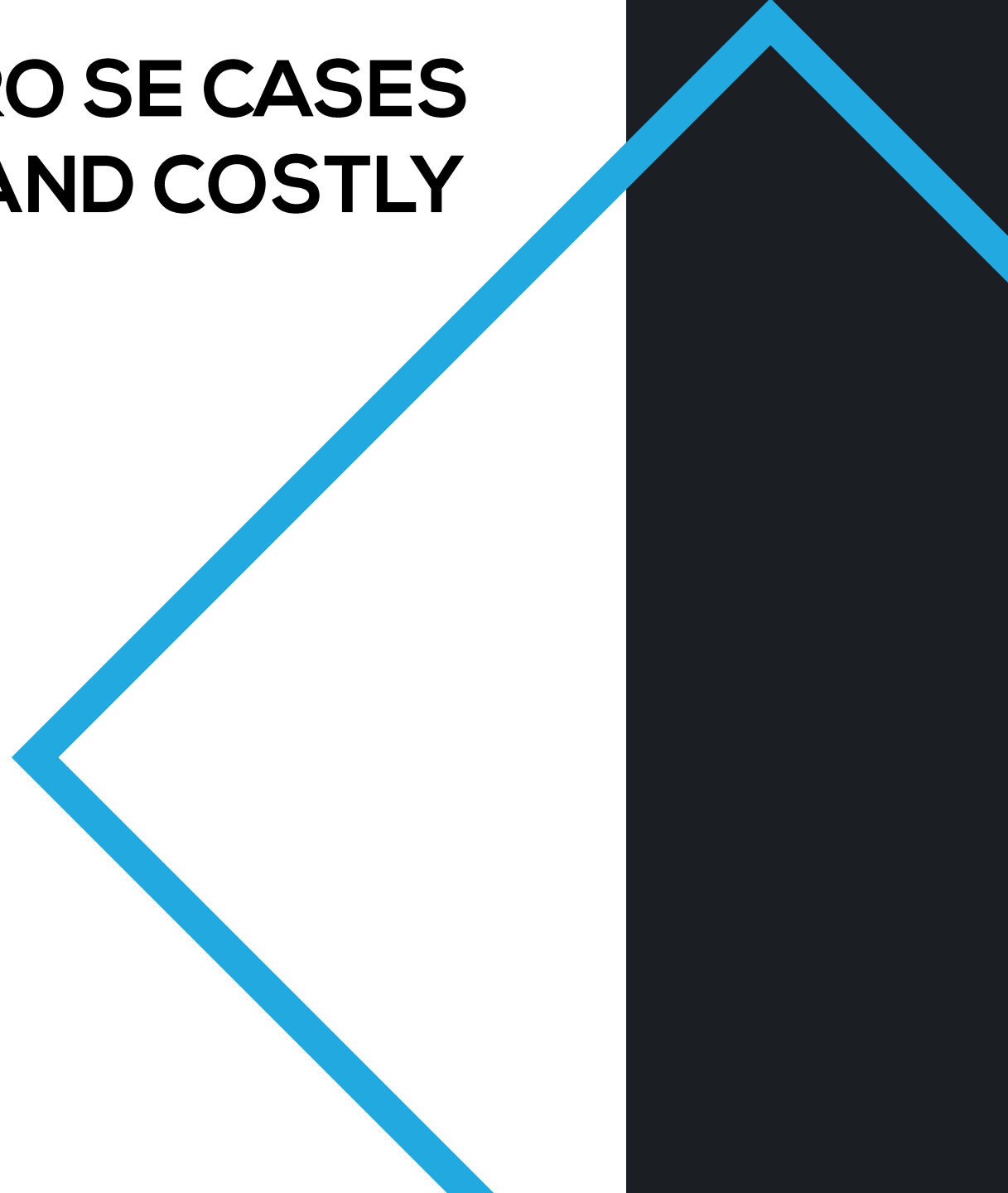


CONCLUSION – Q&A



PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY

Pro se: Also called self-represented litigants (SRLs) or “pro per,” the latter being taken from “in propria persona.” Both pro se and pro per are from Latin, meaning “for one’s own person” or one’s own sake.



PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)

The right of a party to represent his or her own self has long been recognized in United States, and even predates the U.S. Constitution:

Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed, provided that “in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of counsel.”

PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)

The U.S. Supreme Court has held that the Sixth Amendment, in addition to guaranteeing the right to retained or appointed counsel, also guarantees a defendant the right to represent himself. *Faretta v. California*, 422 U.S. 806, 813 (1975).

Right to retained or appointed counsel only for indigent criminal defendants in state court felony cases. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

In civil cases, right is significantly more limited: generally, physical liberty must be at stake.

Every state has created, either by legislative or judicial process, right to counsel in certain civil matters:

- Termination of parental rights
- Dependency
- Cases where personal liberty is threatened (involuntary civil commitments, quarantine, paternity)

PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)

Foreclosure and Eviction (though pro se may claim otherwise) do NOT meet right to counsel criteria for due process considerations.

BUT

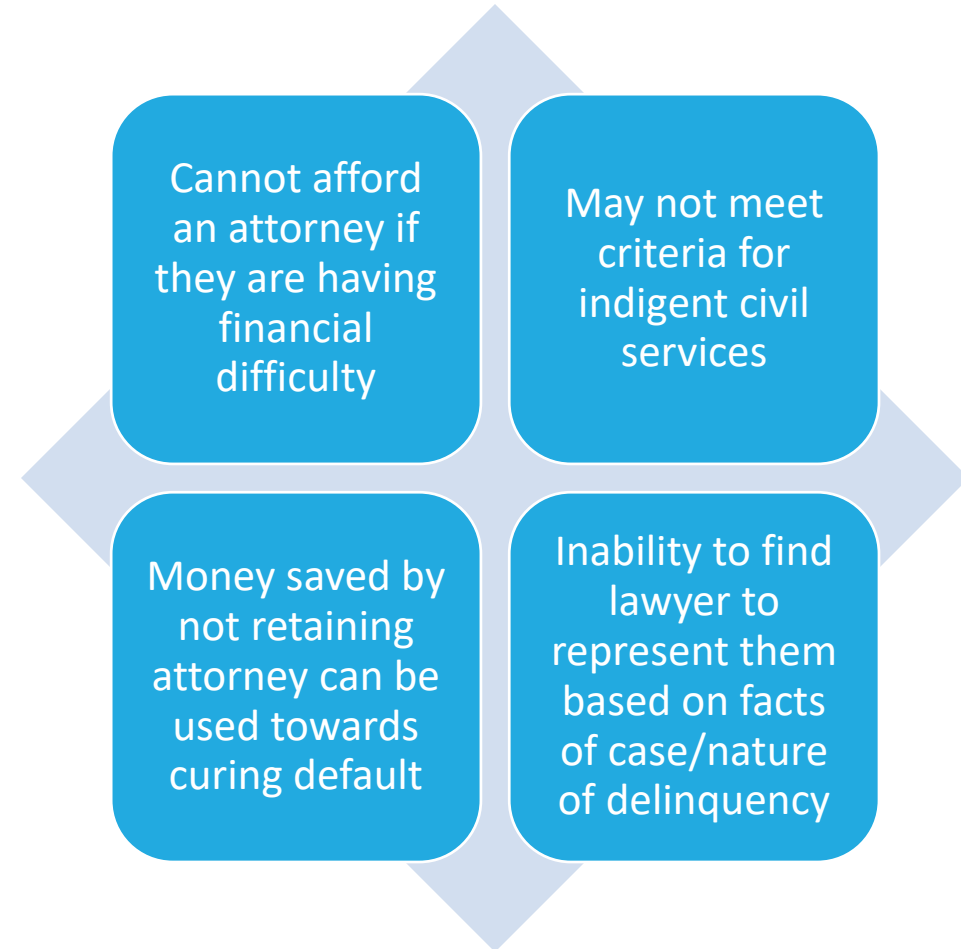
States do offer indigent legal services in civil cases, including foreclosure, if party can satisfy income or other state-specific guidelines.



“A man who is his own lawyer has a fool for his client.”

PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)

Not surprisingly, we see many pro se litigants in judicial foreclosures...



PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)

What does that mean for the mortgagee or servicer?

PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)

Great! They won't know what they are doing and this will be to our benefit.

PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)



Think again....

PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)



PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)



Expect
increased
DELAY and
COST of
litigation.

PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)



While federal and state civil procedure rules hold pro se litigants to same standard as an attorney, in practice, judges will give much more leeway to a pro se than a (subpar) attorney.

PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)

Rule 11, Federal Rules of Civil Procedure:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

1. it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
2. the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
3. the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
4. the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

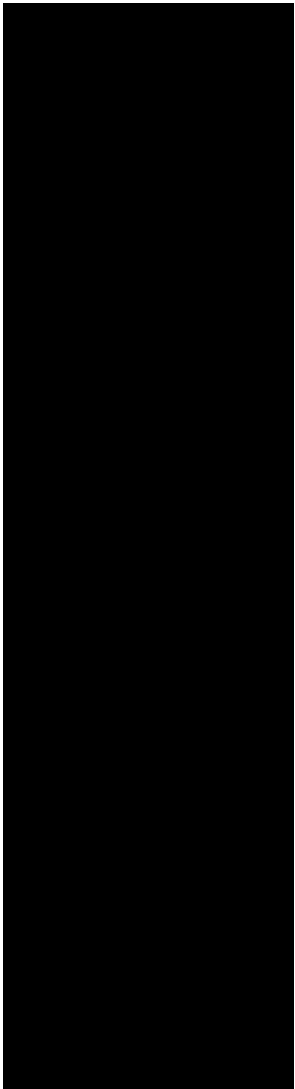
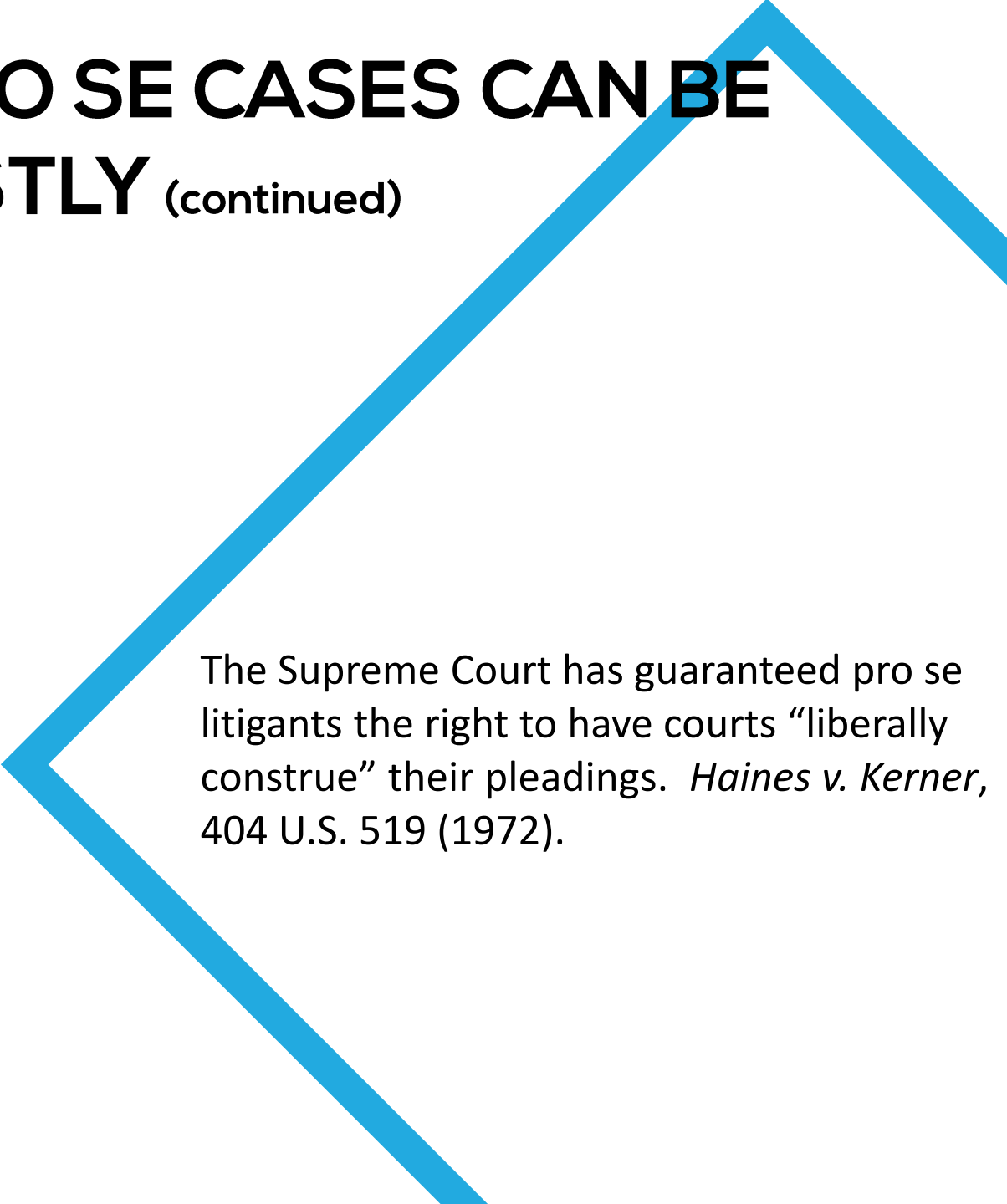
PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)

Sanctions for Violating Rule 11(b):

If court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.

A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)



The Supreme Court has guaranteed pro se litigants the right to have courts “liberally construe” their pleadings. *Haines v. Kerner*, 404 U.S. 519 (1972).

PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)

Implications:

- Lack of knowledge of law, but also procedural aspects of case
- Challenges in basic scheduling considerations (depositions, mediations, scheduling orders, etc.)
- Pro se may seek legal advice from opposing lawyer, which raises a number of ethical considerations for lawyer
- Challenges in negotiating a settlement, distrust of opposing attorney as adversary
- No cost considerations for pro se → more work for your attorney

PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)

Not all pro ses are created equal...

Some may have very sophisticated pleadings, either that they were able to prepare from a variety of free resources, or they may just be more knowledgeable about legal process than most.

Best way to address is to treat with respect, civility and kindness, in all communications (especially when before the court).

PRO SE LITIGANTS: WHY PRO SE CASES CAN BE TIME-CONSUMING AND COSTLY (continued)

Specifics: South Carolina

Out of 25 decisions issued in SC in the past year involving allegations of FDCPA violations, guess how many of those claims were asserted by pro se litigants?

And out of those cases, guess how many times the pro se litigant prevailed on the issue asserted?

CONCLUSION – Q&A





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