

**THE PROFESSIONAL RESPONSIBILITY OF FAIR PLAY  
WHEN DEALING WITH A PRO SE ADVERSARY\***

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## I. INTRODUCTION

Two former captains of the English national cricket team wanted to change the rules of the game.<sup>1</sup> While those rules had been revised and updated since their inception almost 250 years ago,<sup>2</sup> the changes these cricketers wanted were very different.<sup>3</sup> They were not calling for changing the size of the bat and ball or the distance of the cricket field called the “pitch.”<sup>4</sup> They wanted changes that went to the so-called Spirit of Cricket.<sup>5</sup>

This spirit involves respect for one’s opponents and for the game’s traditional values.<sup>6</sup> It also involves fair play.<sup>7</sup> The plays that are considered fair and those that are not would become Law 42 of the Laws of Cricket. Under that law, the distinction could depend on the relative skill of the players.<sup>8</sup> What play was fair against a professional cricketer might be unfair against the inexperienced, even when dealing with the exact same play.<sup>9</sup>

The cricketers who supported these changes would say that the concept of fair play has always been a part of the game. After all, the idiom—“It’s not cricket”—“embod[ies] the ideals of fair play, ‘gentlemanly’ behaviour, and ‘good sportsmanship’.”<sup>10</sup> The idiom further shows how cricket, by the early twentieth century, “had become a metaphor for honesty, selflessness,

1. *What is MCC Spirit of Cricket?*, LORD’S: THE HOME OF CRICKET, <https://www.lords.org/mcc/mcc-spirit-of-cricket/what-is-mcc-spirit-of-cricket/> (last visited Nov. 8, 2017) [hereinafter *Spirit of Cricket*].

2. Michael Rundell, *Introduction* to BODLEIAN LIBRARY, THE ORIGINAL LAWS OF CRICKET 9, 16 (2008) (“The first evidence of anything approximating a set of rules appears in 1727.”).

3. *Spirit of Cricket*, *supra* note 1.

4. *Id.*

5. *Id.*

6. MARYLEBONE CRICKET CLUB, THE LAWS OF CRICKET pmb1. (2000 Code 6th ed. 2015) [hereinafter LAWS OF CRICKET].

7. *Id.* at pmb1., Law 42.1.

8. DON OSLEAR, WISDEN’S THE LAWS OF CRICKET 179 (2000) (reproducing Law 42.6(a)(i), which provides that “[t]he relative skill of the striker shall be taken into consideration” to determine dangerous and unfair bowling).

9. MARYLEBONE CRICKET CLUB, OPEN LEARNING MANUAL: LAWS OF CRICKET at Laws 42-3c, -4c (2000 Code 4th ed. 2010), <https://www.lords.org/assets/Uploads/olm-4th-edition-2010-4-10-11-10712.pdf> [hereinafter LEARNING MANUAL].

10. DAVID FRASER, CRICKET AND THE LAW: THE MAN IN WHITE IS ALWAYS RIGHT 1 (2005).

and upright conduct.”<sup>11</sup> The modern-day players simply needed a reminder in the form of rule changes. At least that is what the two former captains thought in the late 1990s.<sup>12</sup>

In the legal field, attorneys are likely to face the equivalent of the inexperienced cricketer, namely the pro se adversary. The reasons for this likelihood are varied. They could be constitutional, socioeconomic, or strategic, for example.<sup>13</sup> Whatever the reason, they contribute to the rise of pro se litigation or what some refer to as the “pro se phenomenon.”<sup>14</sup> Dealing with this phenomenon presents challenges to the courts, while dealing with pro se litigants presents challenges to the lawyers opposing them.<sup>15</sup> But the paramount challenge for the pro se litigant is getting a fair and just outcome in the legal system.<sup>16</sup>

To militate against the potential for unfair and unjust results, the solutions thus far have been focused on strategies to level the playing field.<sup>17</sup> Those strategies might entail changing the Model Code of Judicial Conduct or promoting initiatives to increase access to justice.<sup>18</sup> Whatever the strategy, much of the focus has been on providing varying degrees of legal assistance to the pro se party.<sup>19</sup> Little focus has been on the attorney facing the pro se party.

To be sure, the law of lawyering includes Model Rule 4.3 of the ABA Model Rules of Professional Conduct and Section 103 of the Restatement of the Law Governing Lawyers. Both deal with ethics rules when dealing with a pro se adversary. These rules are nearly identical in providing safeguards against overreaching and undue influence in such dealings.<sup>20</sup> However, for two independent and valid reasons, the safeguards are minimal and not very robust. The first reason is that Model Rule 4.3, for example, does not work

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11. JACK WILLIAMS, *CRICKET AND ENGLAND: A CULTURAL AND SOCIAL HISTORY OF THE INTER-WAR YEARS* 74 (1999).

12. *Spirit of Cricket*, *supra* note 1.

13. See Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 104–06 (2002).

14. *E.g.*, *id.*; Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 374 (2005).

15. See, e.g., Yolanda F. Sonnier, *Approaching Your Case Against the Pro Se Litigant*, 36 FAM. ADVOC. 11, 11–12 (Fall 2013).

16. See, e.g., LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 9 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [hereinafter LSC, 2017 REPORT].

17. See *id.*

18. See *id.*

19. See *id.* at 13, 31, 32.

20. 2 GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* §§ 42.02, 42.03 (4th ed. 2017).

in isolation. Other rules—such as Model Rules 4.1, 4.4(a), and 8.4—provide additional safeguards in an attorney’s dealings with a pro se adversary. The second reason for the current minimalist approach is that an overly robust Model Rule 4.3 might antagonize an attorney’s ethical duties to the client.

Even so, in some situations, the safeguards are insufficient and ineffective. As Professor Bruce Green observed, “[l]awyers in civil practice may exploit their superior skill and expertise in dealing with unrepresented adversaries, as long as their role is clear and they do not suggest that they are disinterested.”<sup>21</sup> When winning is the focus, an attorney’s temptation is to employ a one-size-fits-all approach. That is, in dealing with a pro se adversary, the attorney is apt to use the same legal tactics and strategies she would use against a seasoned litigator.<sup>22</sup> She is apt to use the Federal Rules of Civil Procedure and the Federal Rules of Evidence, for example, in the same manner as she would against any adversary, whether pro se or not. The current law of lawyering does not account for this invariable and unchanging approach.

It should though. This Article advocates for a professional responsibility of fair play when dealing with a pro se adversary. Before delineating the contours of this ethical responsibility, I readily acknowledge the criticism of looking to the rules of a sport or game for guidance. The heckles and jeers can be especially loud when it comes to cricket, which has historic associations with colonialism, elitism, and androcentrism.<sup>23</sup> But even if it were some other game or sport, prominent jurists recoil at what Dean Roscoe Pound negatively characterized as the “sporting theory of justice, the ‘instinct of giving the game fair play.’”<sup>24</sup> To them, the “trial of a lawsuit is not a game where the spoils of victory go to the clever and technical regardless of the merits . . . .”<sup>25</sup> Scoring runs in a game, the critics would say, does not have the same import as the life, liberty, or property interests at stake in the law.

For all these reasons, the criticisms are correct. But they are also improvident. Looking to the rules of cricket for guidance is justified not because Dean Pound confused fair play with gamesmanship.<sup>26</sup> Nor is it

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21. Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 615–16 (1999).

22. *See id.*

23. *See WILLIAMS, supra note 11*, at 3, 7, 12–13, 93, 114.

24. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 738 (1906) (quoting 1 WIGMORE ON EVIDENCE 127 (1904)).

25. *Simon v. City & Cty. of San Francisco*, 180 P.2d 393, 399 (Cal. Dist. Ct. App. 1947).

26. *See infra* text accompanying notes 174–181.

justified because there are similarities between a sporting contest and litigation.<sup>27</sup> Indeed, both cricket and American law have British origins.<sup>28</sup> None of that matters, though. What matters, and what this Article argues, is that the pro se phenomenon is real, and potential solutions should not be confined to the legal field. As Nobel Laureate and philosopher Albert Camus<sup>29</sup> once famously noted, sports were from which he learned all that he knew about ethics.<sup>30</sup>

With that purpose in mind, this Article explores what the professional responsibility of fair play entails when dealing with a pro se adversary. Specifically, Part II of this Article elucidates the existence of the pro se phenomenon. Part III discusses the impact of this phenomenon on the justice system at the state and federal levels, as well as the systemic responses to level the playing field for the pro se litigant. Part IV examines Model Rule 4.3, Restatement Section 103, and the overall approach of the law of lawyering, especially in light of *Oskoui v. J.P. Morgan Chase Bank, N.A.*<sup>31</sup> Finally, Part V of this Article unveils the professional responsibility of fair play, explaining its concept, application, history, and justifications when dealing with a pro se adversary.

## II. UNDERPINNINGS OF THE PRO SE PHENOMENON

The pro se phenomenon can be distilled down to two explanations. The first is that a party wants an attorney, but is not entitled to or cannot afford one. There is, indeed, a limited right of access to counsel. Alternatively, the party does not want an attorney, even if he or she is entitled to or can afford one. There is, in other words, a general right to self-representation.

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27. See, e.g., Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1135 (1982).

28. *History of Cricket*, WIKIPEDIA, [https://en.wikipedia.org/wiki/History\\_of\\_cricket#Origin](https://en.wikipedia.org/wiki/History_of_cricket#Origin) (last visited Nov. 9, 2017); *Law of the United States*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Law\\_of\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Law_of_the_United_States) (last visited Nov. 9, 2017).

29. *Albert Camus*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/camus/> (last visited Nov. 9, 2017).

30. ALBERT CAMUS, *The Wager of Our Generation*, in RESISTANCE, REBELLION, AND DEATH 237, 242 (Justin O'Brien trans., 1st Vintage Int'l ed. 1995) (1961).

31. *Oskoui v. J.P. Morgan Chase Bank, N.A.*, 851 F.3d 851 (9th Cir. 2017), *rev'g*, *Oskoui v. JP Morgan Chase Bank, N.A.*, No. CV 12-3511 FMO (AGRx), 2015 WL 12656933 (C.D. Cal. Feb. 26, 2015).

A. *Limited Right or Access to Counsel*

Many litigants represent themselves in court not because they choose to, but because they cannot afford an attorney<sup>32</sup> or because they are worried about costs.<sup>33</sup> Their socioeconomic conditions limit their access to counsel. Forty to sixty percent of the middle class has its legal needs unmet.<sup>34</sup> Meanwhile, based on a 2009 report, “80 percent of low-income individuals in the United States cannot afford the legal assistance they need to avoid the loss of their homes, children, jobs, and liberty.”<sup>35</sup> In a report issued eight years later, nothing much has changed. The Legal Services Corporation, an entity established by Congress to promote equal access to justice, found that “[l]ow-income Americans receive inadequate or no professional legal help for 86% of the civil legal problems they face in a given year.”<sup>36</sup>

In contrast to access, the right to counsel depends on the type of case. That right is generally limited to criminal ones and is rooted in the United States Constitution. The Fifth Amendment affords a right to counsel during custodial interrogation,<sup>37</sup> while the Sixth Amendment affords that right to a criminal defendant in federal cases.<sup>38</sup> And the right provided in the Sixth Amendment is applicable to the states through the Fourteenth Amendment.<sup>39</sup> That is true not only for jury trials but also for appeals.<sup>40</sup> However, the right to counsel is limited to criminal prosecutions actually resulting in confinement<sup>41</sup> and to the first appeal as of right.<sup>42</sup>

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32. Chase T. Rogers, *Access to Justice: New Approaches to Ensure Meaningful Participation*, 90 N.Y.U. L. REV. 1447, 1451 (2015).

33. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS app. C (2009) [hereinafter LSC, 2009 REPORT].

34. Jennifer S. Bard & Larry Cunningham, Opinion, *The Legal Profession is Failing Low-Income and Middle-Class People*, WASH. POST (June 5, 2017), [https://www.washingtonpost.com/opinions/the-legal-profession-is-failing-low-income-and-middle-class-people-lets-fix-that/2017/06/02/e266200a-246b-11e7-bb9d-8cd6118e1409\\_story.html?utm\\_term=.8633d730fd24](https://www.washingtonpost.com/opinions/the-legal-profession-is-failing-low-income-and-middle-class-people-lets-fix-that/2017/06/02/e266200a-246b-11e7-bb9d-8cd6118e1409_story.html?utm_term=.8633d730fd24).

35. *Id.* (linking to *The Unmet Need for Legal Aid*, LEGAL SERVS. CORP., <https://www.lsc.gov/what-legal-aid/unmet-need-legal-aid> (last visited Nov. 9, 2017) (discussing LSC, 2009 REPORT, *supra* note 33)).

36. LSC, 2017 REPORT, *supra* note 16, at 2, 30.

37. *Miranda v. Arizona*, 384 U.S. 436 (1966).

38. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

39. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

40. *Douglas v. California*, 372 U.S. 353 (1963).

41. *Scott v. Illinois*, 440 U.S. 367 (1979).

42. *Rose v. Moffit*, 417 U.S. 600 (1974) (holding that the right to counsel for a discretionary appeal is not required under the Due Process or Equal Protection Clauses of the Fourteenth Amendment).

Unlike criminal cases resulting in confinement, the right to counsel is not always available in civil cases, as illustrated in *Turner v. Rogers*.<sup>43</sup> In that case, Michael Turner was a noncustodial party who was obliged to pay child support.<sup>44</sup> He failed to do so on a number of occasions.<sup>45</sup> Even after confinement, Mr. Turner remained in arrears.<sup>46</sup> The family court then issued an order to show cause why he should not be held in contempt.<sup>47</sup> When Mr. Turner finally made an appearance at the civil contempt hearing, an attorney did not represent him.<sup>48</sup> The family court found Mr. Turner in willful contempt and sentenced him to twelve months of confinement without making any finding as to his ability to pay or indicating in the contempt order form whether he was able to make support payments.<sup>49</sup>

In Mr. Turner's civil case, the touchstone for the right of counsel was not the possibility of confinement. As the Supreme Court held, the Due Process Clause of the Fourteenth Amendment does not automatically require the State to provide counsel at a civil contempt proceeding, even if it may lead to a deprivation of the indigent defendant's liberty.<sup>50</sup> "Civil contempt differs from criminal contempt."<sup>51</sup> The former seeks only to "coerc[e] the defendant to do' what a court had previously ordered him to do,"<sup>52</sup> and the latter is subject to the requirements—including the right to counsel—under the Sixth Amendment.<sup>53</sup> In short, while he was entitled to alternative procedural safeguards, Mr. Turner did not have a categorical right to counsel during his civil contempt hearing.<sup>54</sup>

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43. *Turner v. Rogers*, 564 U.S. 431 (2011).

44. *Id.* at 436.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 436–37.

49. *Id.* at 437–38.

50. *Id.* at 448.

51. *Id.* at 441.

52. *Id.* (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911)).

53. *Id.* (citing *United States v. Dixon*, 509 U.S. 688, 693 (1993); *Cooke v. United States*, 267 U.S. 517, 537 (1925)).

54. *Id.* at 448–49. The alternative procedural safeguards include "adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings." *Id.* at 447–48. They are based on the balancing of the factors announced in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), regarding individual interests, government interests, and risk of error for due process under either the Fifth or Fourteenth Amendment.

### B. General Right to Self-Representation

The obverse situation is that a party like Mr. Turner wishes to represent himself. The immediate predecessor to the ABA Model Rules of Professional Conduct recognized, as it must, that a party has a general right to self-representation.<sup>55</sup> That right has existed for over two centuries. It “has been protected by statute since the beginnings of our Nation.”<sup>56</sup> The current codified statute—28 U.S.C. § 1654—provides in relevant part: “In all courts of the United States the parties may plead and conduct their own cases personally . . . .”<sup>57</sup> Indeed, a criminal defendant has a right to knowingly and voluntarily opt for pro se representation at trial.<sup>58</sup> So even if one has the right to counsel under either the Fifth Amendment or the Sixth Amendment, one can waive it “so long as relinquishment of the right is voluntary, knowing, and intelligent.”<sup>59</sup>

### III. SYSTEMIC IMPACT AND RESPONSES

The general right to self-representation, along with the limited right of access to counsel, helps explain the existence of the pro se phenomenon. This phenomenon, in turn, has had a measurable or perceptible impact on the justice system.<sup>60</sup> Cases involving pro se litigants clog the courts on both the state and federal levels. Yet resources are scarce.<sup>61</sup> As such, pro se cases

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55. Ethical Consideration 3-7 of the ABA Model Code of Professional Responsibility provides:

The prohibition against a non-lawyer practicing law does not prevent a layman from representing himself, for then he is ordinarily exposing only himself to possible injury. The purpose of the legal profession is to make educated legal representation available to the public; but anyone who does not wish to avail himself of such representation is not required to do so. Even so, the legal profession should help members of the public to recognize legal problems and to understand why it may be unwise for them to act for themselves in matters having legal consequences.

MODEL CODE OF PROF'L RESPONSIBILITY EC 3-7 (AM. BAR ASS'N 1980).

56. *Faretta v. California*, 422 U.S. 806, 812 (1975) (referring to Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92).

57. 28 U.S.C. § 1654 (2012).

58. *Id.* at 821.

59. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (citing *Patterson v. Illinois*, 487 U.S. 285, 292 n.4 (1988)).

60. *See, e.g., Rogers*, *supra* note 32, at 1459.

61. *See, e.g., LSC*, 2009 REPORT, *supra* note 33, at 6; *see also Lee Rawles, The Fight for Legal Services*, 103 ABA J. 68, 68 (June 2017).



strain the already strained court budgets.<sup>62</sup> However, the toll is not just economic. Judges and court staff are “frustrated by the pro se litigant’s inability to grasp legal concepts or to comply with the rules of civil procedure.”<sup>63</sup> The emotional toll can be tied to the sheer number of cases in state courts and federal courts.

A. *SRL Data, Statistics, and Extrapolations*

1. *State Courts*

The vast majority of cases are filed in state courts rather than federal courts.<sup>64</sup> Even with an abundance of data, determining the exact number of pro se civil cases in state courts is difficult.<sup>65</sup> The states vary in the way they define a case with a “self-represented litigant” or SRL.<sup>66</sup> Besides the variations in definition, some states have case management systems that can track representation status over time, while others do not.<sup>67</sup> Suppose a party was self-represented for only part of the case or had the benefit of limited scope representation. Case management systems would be inconsistent in tracking this case; some, but not all, would count this situation as a pro se case.<sup>68</sup>

With that caveat in mind, the National Center for State Courts has data for 2012.<sup>69</sup> The number of civil cases and domestic relations cases in state courts totaled 23.1 million that year.<sup>70</sup> The Self-Represented Litigation Network estimated that 50% of these cases had only one attorney and that

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62. CIVIL JUSTICE IMPROVEMENTS COMM., NAT’L CTR. FOR STATE COURTS, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 4 (2016) [hereinafter NCSC, 2016 REPORT].

63. Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 306 (2002).

64. NAT’L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 6 (2015) [hereinafter NCSC, 2015 REPORT].

65. Richard Schauffler & Shauna Strickland, *The Case for Counting Cases*, 51 CT. REV. 52, 52 (2015).

66. *See id.*; *see also* NAT’L CTR. FOR STATE COURTS, DEVELOPING STANDARDIZED DEFINITIONS AND COUNTING RULES FOR CASES WITH SELF-REPRESENTED LITIGANTS 11 (2013); NCSC, 2015 REPORT, *supra* note 64, at 8–9.

67. Schauffler & Strickland, *supra* note 65, at 52.

68. *Id.*

69. COURT STATISTICS PROJECT, NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2012 STATE TRIAL COURT CASELOADS 8 (2014).

70. SELF-REPRESENTED LITIG. NETWORK, NATIONAL SRL ESTIMATES FROM SRLN.ORG (2015) [hereinafter NATIONAL SRL ESTIMATES], <https://www.srln.org/system/files/attachments/National%20SRL%20Estimates%20-%20Oct%202015%20srln.pdf>.

25% had no attorney at all, meaning that at least 75% of all civil cases included one SRL.<sup>71</sup> Based on these estimates and extrapolation, the number of pro se cases in state courts translated to 11.55 million cases in which an attorney faced a pro se adversary in 2012.<sup>72</sup>

Besides the number of cases, the data also can portend the type and manner of disposition of cases in which an attorney will encounter a pro se litigant. A 2015 study used case-level data from ten counties regarding all non-domestic civil cases disposed of between July 1, 2012, and June 30, 2013.<sup>73</sup> So while that study did not account for criminal cases and domestic civil cases, the data indicated that an attorney was very likely to deal with a pro se adversary in a “contract case,” which consisted primarily of debt collection, landlord/tenant, and foreclosure.<sup>74</sup> That attorney was also very likely to dispose of the case either by obtaining a default judgment or some unspecified judgment or by obtaining a dismissal from state court.<sup>75</sup>

## 2. Federal Courts

In the federal district court level, there were a total of 291,851 civil cases during the twelve-month period ending September 30, 2016.<sup>76</sup> Of those, close to 30% were pro se cases.<sup>77</sup> That trend is true for the past five fiscal years, as can be seen in the following table:

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71. *Id.* In another study, the data from the National Center for State Courts suggests that an attorney had up to a 76% chance of dealing with a pro se adversary for non-domestic civil cases disposed of between July 1, 2012, and June 30, 2013, by state courts in ten different counties. See NCSC, 2015 REPORT, *supra* note 64, at 14, 16, 31.

72. NATIONAL SRL ESTIMATES, *supra* note 70.

73. NCSC, 2015 REPORT, *supra* note 64, at 16.

74. *Id.* at 19, 32.

75. *Id.* at 32.

76. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2016, CIVIL PRO SE AND NON-PRO SE FILINGS tbl. C-13 (2016), [http://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_c13\\_0930.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2016.pdf).

77. *See id.*

<b>Twelve-Month Period Ending</b>	<b>Total Civil Cases</b>	<b>Pro Se Cases</b>	<b>Percentage as Pro Se Cases</b>
September 30, 2012 <sup>78</sup>	278,442	77,703	27.9%
September 30, 2013 <sup>79</sup>	284,604	77,311	27.2%
September 30, 2014 <sup>80</sup>	295,310	81,025	27.4%
September 30, 2015 <sup>81</sup>	279,036	73,745	26.4%
September 30, 2016 <sup>82</sup>	291,851	85,992	29.5%

On average, the federal district courts had about 79,000 pro se civil cases per year, which translates to almost 28% of the total civil cases.

The pro se phenomenon was not limited to federal district courts. During the twelve-month period ending September 30, 2016, there were 60,357 in the federal courts of appeals.<sup>83</sup> Of those, appeals involving pro se litigants accounted for 52% of the filings for the year ending September 30, 2016.<sup>84</sup> And for each year of the three years ending September 30, 2013, through September 30, 2015, appeals involving pro se litigants held steady at 51%.<sup>85</sup>

In sum, the number of pro se cases means that an attorney has a high likelihood of facing a pro se adversary at some point in the attorney's legal career.

78. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2012, CIVIL PRO SE AND NON-PRO SE FILINGS tbl. C-13 (2012), [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/C13Sep12.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/C13Sep12.pdf).

79. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2013, CIVIL PRO SE AND NON-PRO SE FILINGS tbl. C-13 (2013), [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/C13Sep13.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/C13Sep13.pdf).

80. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2014, CIVIL PRO SE AND NON-PRO SE FILINGS tbl. C-13 (2014), [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/C13Sep14.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/C13Sep14.pdf).

81. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2015, CIVIL PRO SE AND NON-PRO SE FILINGS tbl. C-13 (2015), [http://www.uscourts.gov/sites/default/files/data\\_tables/C13Sep15.pdf](http://www.uscourts.gov/sites/default/files/data_tables/C13Sep15.pdf).

82. *See supra* text accompanying notes 76–77.

83. CHIEF JUSTICE ROBERTS, 2016 YEAR-END REPORT ON THE FEDERAL JUDICIARY 12 (2016), <https://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf>.

84. *Id.*

85. *See* CHIEF JUSTICE ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 14 (2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>; CHIEF JUSTICE ROBERTS, 2014 YEAR-END REPORT ON THE FEDERAL JUDICIARY 14 (2014), <https://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf>; CHIEF JUSTICE ROBERTS, 2013 YEAR-END REPORT ON THE FEDERAL JUDICIARY 13 (2013), <https://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf>.

### B. *Current Strategies for Leveling the Playing Field*

The number of pro se cases also creates what some call the “justice gap.”<sup>86</sup> The concern is that compared to those represented by counsel, pro se litigants are less likely to experience fair and just outcomes.<sup>87</sup> To bridge this gap in accuracy of case outcomes, the courts and the legal community have promoted judicial accommodation and access-to-justice initiatives as strategies to level the playing field for the pro se litigant.

#### 1. *Judicial Accommodation*

Rule 2.2 of the ABA Model Code of Judicial Conduct provides: “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” In 2007, comment four to this “judicial impartiality” rule was updated to allow judicial accommodation of the pro se litigant.<sup>88</sup> Specifically, that comment provides: “It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.”<sup>89</sup>

Some states have adopted the exact language of comment four.<sup>90</sup> Others have included a list of permissible actions in the comment.<sup>91</sup> Such actions that a state judge may make include any or all of the following:

- Construing pleadings to facilitate consideration of the issues raised;
- Providing brief information about the proceeding and evidentiary and foundational requirements;
- Attempting to make legal concepts understandable;

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86. LSC, 2017 REPORT, *supra* note 16, at 9 (“The justice gap is the difference between the civil legal needs of low-income Americans and the resources available to meet those needs.”); *see also* Tonya L. Brito et al., *What We Know and Need to Know About Civil Gideon*, 67 S.C. L. REV. 223, 223 (2016).

87. *See* LSC, 2009 REPORT, *supra* note 33, at 26; *see also* Rogers, *supra* note 32, at 1459.

88. Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 BYU L. REV. 899, 931 (2016) (citing MODEL CODE OF JUDICIAL CONDUCT Canon 2, r. 2.2 cmt. 4 (AM. BAR ASS’N 2007)).

89. MODEL CODE OF JUDICIAL CONDUCT Canon 2, r. 2.2 cmt. 4 (AM. BAR. ASS’N 2007).

90. SELF-REPRESENTED LITIG. NETWORK, MODEL CODE OF JUDICIAL PROVISIONS ON SELF-REPRESENTED LITIGATION 2 (2013) [hereinafter MODEL CODE OF JUDICIAL CONDUCT PROVISIONS], [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_atj\\_jud\\_conduct\\_codes.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_jud_conduct_codes.authcheckdam.pdf).

91. *Id.* at 2–6.

- Asking neutral questions to elicit or clarify information;
- Modifying the traditional order of taking evidence;
- Refraining from using legal jargon;
- Explaining the basis for a ruling; and
- Making referrals to any resources available to assist the self-represented litigant in the preparation of the case.<sup>92</sup>

Like many of these other states, New Hampshire has also modified the model language in its version of comment four. But New Hampshire has gone a step further. It has also highlighted the self-represented litigant issue in the text of the rule.<sup>93</sup> Rule 2.2(B) of New Hampshire's Code of Judicial Conduct provides: "A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, *including self-represented litigants*, to be fairly heard."<sup>94</sup>

## 2. Access-to-Justice Initiatives

The courts and the legal community have made efforts to increase access to justice. Such efforts include extending to civil cases the right to counsel guaranteed in criminal cases under *Gideon v. Wainwright*.<sup>95</sup> This so-called Civil *Gideon* or civil right to counsel is usually not available to all civil litigants, but only to those who are indigent and who are a party to a certain category of suits, such as family law matters, involuntary commitment, and medical treatment.<sup>96</sup> Civil *Gideon* results from both "state legislation and court decisions . . . brought under state and federal constitutions."<sup>97</sup>

For other initiatives, some courts even authorize non-attorneys who meet certain educational and experience requirements to assist pro se litigants in certain types of cases.<sup>98</sup> Some courts also have self-help resource

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92. *Id.* at 5–6.

93. *Id.* at 2.

94. N.H. CODE OF JUDICIAL CONDUCT Canon 2, r. 2.2(B) (2011) (emphasis added).

95. Brito et al., *supra* note 86, at 243 app. I (regarding the number of states with laws providing for a categorical right to counsel in civil cases based on subject area).

96. *Id.* at 228–29.

97. *Id.* at 228.

98. ABA COMM'N ON THE FUTURE OF LEGAL SERVS., ISSUES PAPER CONCERNING NEW CATEGORIES OF LEGAL SERVICE PROVIDERS 5, 7 (2015); see Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C. L. REV. 429, 435 (2016).

centers with computers and printers to provide standardized legal forms and instructions in plain English.<sup>99</sup> Other courts, along with legal services organizations and various nonprofit organizations, go a step further by establishing programs through which lawyers volunteer to provide short-term limited legal services.<sup>100</sup> These volunteer attorneys can provide legal advice to self-represented parties. Or they can “ghostwrite” legal documents, that is, help self-represented draft documents to submit to the court.<sup>101</sup> All of these specific, limited tasks constitute “unbundling” of legal services in which the volunteer attorney does not handle all aspects of a matter.<sup>102</sup>

For the volunteer attorney, the ethics rules are not implicated when she is providing legal information, as opposed to legal advice.<sup>103</sup> Even when they are implicated, the ethics rules facilitate these various access-to-justice initiatives. Model Rule 1.2(c) authorizes attorneys to provide limited scope legal representation. It provides that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”<sup>104</sup>

Model Rule 6.1 promotes voluntary pro bono public service. It notes that every attorney has a professional responsibility to provide legal services to persons with limited means, either directly<sup>105</sup> or through organizations that are designed primarily to address the needs of such persons.<sup>106</sup> Model Rule 6.1 lists an aspirational goal of providing a minimum of fifty hours of pro bono service annually.<sup>107</sup> Such services can be at no fee or a substantially reduced fee,<sup>108</sup> the latter of which is often referred to as “low bono.”<sup>109</sup>

Model Rule 6.3 generally permits an attorney practicing in a law firm to serve as a director, officer, or member of a legal services organization, even if the organization serves persons having interests adverse to a client of the

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99. ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE SELF-REPRESENTED LITIGANTS 2 (2014).

100. MODEL RULES OF PROF'L CONDUCT r. 6.5 cmt. 1 (AM. BAR ASS'N 2002).

101. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 446 (2007).

102. *Id.*; see MODEST MEANS TASK FORCE, ABA SECTION OF LITIGATION, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 5 (2003), <http://apps.americanbar.org/litigation/taskforces/modest/report/pdf> [hereinafter HANDBOOK].

103. ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 99, at 27.

104. MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 2002).

105. MODEL RULES OF PROF'L CONDUCT r. 6.1(a)(1) (AM. BAR ASS'N 2002).

106. MODEL RULES OF PROF'L CONDUCT r. 6.1(a)(2) (AM. BAR ASS'N 2002).

107. MODEL RULES OF PROF'L CONDUCT r. 6.1(a) (AM. BAR ASS'N 2002).

108. MODEL RULES OF PROF'L CONDUCT r. 6.1(b)(1)–(2) (AM. BAR ASS'N 2002).

109. See, e.g., Luz E. Herrera, *Encouraging the Development of “Low Bono” Law Practices*, 14 U. MD. L.J. RACE RELIG. GENDER & CLASS 1, 3–4 (2014).

attorney. The goal of this model rule is to encourage “[l]awyers . . . to support and participate in legal service organizations.”<sup>110</sup>

Finally, Model Rule 6.5 deals with nonprofit and court-annexed limited legal services programs. It notes that the short-term limited legal services offered through these programs, regardless of the duration of the representation, can still establish a client-lawyer relationship.<sup>111</sup> However, Model Rule 6.5 offers peace of mind to volunteer attorneys whose short-term limited representation unknowingly presents an actual or imputed conflict of interest with current or former clients.<sup>112</sup>

### 3. *Shortcomings of the Current Strategies*

The attorney facing the pro se adversary may or may not welcome the current strategies to level the playing field.<sup>113</sup> For the naysayer, no two attorneys are equal in skill and experience.<sup>114</sup> So the naysayer’s argument is that access-to-justice initiatives like Civil *Gideon* do not truly alter the asymmetry of representation in pro se cases.<sup>115</sup> Others argue the opposite situation—that is, *symmetry* of representation—actually does more harm than good for most domestic relations cases.<sup>116</sup>

Even if one is in favor of the current strategies, one can acknowledge that they have shortcomings. Some of the current strategies provide for insufficient access to justice.<sup>117</sup> Court services to help self-represented litigants are unusable to those who have limited computer competence or limited English proficiency.<sup>118</sup> And, under the strategy of judicial accommodation, judges may not be comfortable with what constitutes a “reasonable accommodation” to a pro se litigant.<sup>119</sup> The Model Code of Judicial Conduct does not define the term.<sup>120</sup> Therefore, judges may, as one option, default to the passive norms of party control and of playing no

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110. MODEL RULES OF PROF’L CONDUCT r. 6.3 cmt. 1 (AM. BAR ASS’N 2002).

111. MODEL RULES OF PROF’L CONDUCT r. 6.5 cmt. 1 (AM. BAR ASS’N 2002).

112. MODEL RULES OF PROF’L CONDUCT r. 6.5 (AM. BAR ASS’N 2002).

113. See, e.g., Robert Bacharach & Lyn Entzeroth, *Judicial Advocacy in Pro Se Litigation: A Return to Neutrality*, 42 IND. L. REV. 19, 44–45 (2009).

114. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1577–82 (2005).

115. *Id.*

116. See generally Rebecca Aviel, *Why Civil Gideon Won’t Fix Family Law*, 122 YALE L.J. 2106 (2013).

117. Rhode, *supra* note 98, at 432.

118. *Id.* at 430.

119. See Steinberg, *supra* note 88, at 931.

120. *Id.*

independent role in shaping the context or outcome of cases.<sup>121</sup> Spelling out the actions that a judge may make is certainly helpful in a pro se case. But thus far, many courts have yet to change their codes of judicial conduct accordingly.<sup>122</sup>

The *main* shortcoming, though, is that the current strategies will never *completely* eliminate the pro se phenomenon. A court's constraints as to resources, as well as a party's right to self-representation, prevent that from happening. On the contrary, the pro se phenomenon shows no signs of abating.<sup>123</sup> So the focus cannot solely be on programs and ethics rules that promote legal assistance to the pro se party. The focus also needs to be on the attorney facing the pro se adversary and the ethics rules that pertain to such an attorney's professional conduct.

#### IV. CURRENT ETHICS APPROACHES FOR DEALING WITH THE PRO SE ADVERSARY

As discussed earlier, the law of lawyering includes rules to promote access-to-justice initiatives.<sup>124</sup> Those rules ease the ethical burdens on those willing to represent the indigent. Their ultimate and intended effect is to provide varying degrees of legal assistance to the pro se party.

However, the law of lawyering is not solely focused on arming an indigent party with an attorney. It also includes ethics rules to protect a party that proceeds on a pro se basis. The primary "shield" is Model Rule 4.3 and its equivalent under the Restatement of the Law Governing Lawyers, namely Section 103. But there are others. Model Rule 4.1, for example, prohibits an attorney from making false statements of fact or law. Meanwhile, Model Rule 4.4(a) prohibits an attorney either from using means that have no substantial purpose other than to embarrass, delay, or burden a third person or from using methods of obtaining evidence that violate the legal rights of such a person. And Model Rule 8.4 prohibits deceptive and misleading conduct by an attorney.

These protective rules, unlike Model Rule 4.3 and Restatement Section 103, do not specifically address an attorney's dealings with the pro se

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121. *Id.* at 901, 926–37. Professor Steinberg notes that while some judges default to passive norms, others resort to ad hoc judging in dealings with pro se litigants. *Id.* at 937, 940–43.

122. See MODEL CODE OF JUDICIAL CONDUCT PROVISIONS, *supra* note 90, at 2–5.

123. See HANDBOOK, *supra* note 102, at 8; see also LSC, 2017 REPORT, *supra* note 16, at 14 (finding that 86% of the civil legal problems faced by low-income Americans in a given year receive inadequate or no legal help).

124. See discussion *supra* Section III.B.2.



litigant. They have broader application. Model Rules 4.1 and 4.4(a) address an attorney's dealings with persons other than the client, of which the pro se litigant is only a subset. These rules may nonetheless serve as additional ethical safeguards from the attorney facing the pro se litigant if Model Rule 4.3 and Restatement Section 103 do not apply.<sup>125</sup>

*A. Model Rule 4.3 and Restatement Section 103*

The text of Model Rule 4.3 is only three sentences long.<sup>126</sup> Under the first sentence, an attorney dealing with a pro se adversary shall not state or imply that she is disinterested.<sup>127</sup> Under the second sentence, that attorney has an affirmative duty to correct any misunderstanding of the pro se adversary as to the attorney's role in the matter.<sup>128</sup> Under the third and final sentence, the attorney has a duty to refrain from providing legal advice to the pro se adversary, other than the advice to secure counsel.<sup>129</sup> Underlying each sentence of Model Rule 4.3 is a baseline concept of proper and clarifying disclosures to the pro se adversary.<sup>130</sup>

Restatement Section 103 is substantially identical to Model Rule 4.3,<sup>131</sup> except for two significant differences.<sup>132</sup> First, the duty to not mislead the

125. *See, e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010). This ethics opinion addressed the applicability of Rules 4.1, 5.3(b)(1), and 8.4(c). *Id.* However, it did not address the applicability of New York's version of Rule 4.3 when an attorney attempts to "friend" an unrepresented party in a pending litigation. *Id.* at n.1.

126. Model Rule 4.3, which is entitled "Dealing with Unrepresented Person," provides:

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

MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR ASS'N 2002).

127. *Id.*

128. *Id.*

129. *Id.*

130. *See* HAZARD ET AL., *supra* note 20, § 42.02.

131. Restatement Section 103, which is entitled "Dealings with an Unrepresented Nonclient," provides:

In the course of representing a client and dealing with a nonclient who is not represented by a lawyer:

(1) the lawyer may not mislead the nonclient, to the prejudice of the nonclient, concerning the identity and interests of the person the lawyer represents; and

pro se adversary as to the attorney's identity and client's interests in the case, as well as the duty to clarify any misunderstandings as to the attorney's role, are triggered only when the pro se adversary suffers prejudice from the omission of such duties.<sup>133</sup> Second, Restatement Section 103 does not have the proscription found in Model Rule 4.3 regarding the provision of legal advice to the pro se adversary.<sup>134</sup>

Regardless of their differences, Model Rule 4.3 and Restatement Section 103 are similar in that they serve as limitations on partisanship.<sup>135</sup> According to Dean Murray Schwartz, the principle of partisanship states: "When acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail."<sup>136</sup> In short, Model Rule 4.3 and Restatement Section 103 are in direct tension with the attorney's duties owed to the client.

#### B. *Tension with the Duties Owed to the Client*

In general, an attorney facing a pro se adversary has a duty to zealously represent the client.<sup>137</sup> That duty is limited, as evidenced by the following comment to Model Rule 1.3: "A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2."<sup>138</sup>

However, as noted by Professor David Luban, the current limitations on zeal are "very slight indeed."<sup>139</sup> The comment to Model Rule 1.3 expressly

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(2) when the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the nonclient.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 (AM. LAW INST. 2000).

132. HAZARD ET AL., *supra* note 20, § 42.02.

133. *Id.*

134. *Id.*

135. *Id.*

136. Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 150, 150 (David Luban ed., 1984). Dean Schwartz actually referred to this principle as the "Principle of Professionalism." But because other views of professionalism are possible, Professor David Luban changed the label—but not the text—of the principle to Professor Warren Simon's term of partisanship. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 7 n.6 (1988).

137. See MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2002) (regarding diligence). Model Rule 1.3 rephrased the requirement of zeal found in Canon 7 of the ABA Model Code of Professional Responsibility; LUBAN, *supra* note 136, at 393 app. 1.

138. MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2002).

139. LUBAN, *supra* note 136, at 394.

refers to Model Rule 1.2, which deals with the scope of representation and allocation of authority between a client and the attorney. Model Rule 1.2(a) provides in relevant part: “[A] lawyer *shall* abide by a client’s decisions concerning the objectives of representation and . . . *shall* consult with the client as to the means by which they are to be pursued.”<sup>140</sup> Use of the term “shall” in the text of Model Rule 1.2(a) means that the rule is an imperative, thereby defining proper conduct for purposes of professional discipline.<sup>141</sup> In other words, the attorney facing a pro se litigant must abide by the client’s ultimate authority to determine the purposes to be served by legal representation, subject only to the limitations imposed by law and the attorney’s professional obligations.<sup>142</sup>

An attorney also has a duty to consult with the client as to the means by which the client’s objectives are to be pursued.<sup>143</sup> As acknowledged by a comment to Model Rule 1.2, an attorney and a client may, on occasion, disagree about the means to be used to accomplish the client’s objectives.<sup>144</sup> However, Model Rule 1.2 “does not prescribe how such disagreements are to be resolved.”<sup>145</sup> And the preamble to the Model Rules offers only the following tepid assistance: “A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others.”<sup>146</sup> The practical reality is that if the disagreement cannot be resolved, the only choices are for the attorney to resign or for the client to fire the attorney.<sup>147</sup> Neither choice is appealing to the attorney facing the pro se adversary, especially in light of the attorney’s “own interest in remaining an ethical person while earning a satisfactory living.”<sup>148</sup>

### C. *Inadequacy of the Current Approaches: A Case Study*

*Oskoui v. J.P. Morgan Chase Bank* fits the profile of the SRL data on state courts.<sup>149</sup> It is a “contract case” involving a non-judicial foreclosure.<sup>150</sup>

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140. MODEL RULES OF PROF’L CONDUCT r. 1.2(a) (AM. BAR ASS’N 2002) (emphasis added).

141. MODEL RULES OF PROF’L CONDUCT scope 14 (AM. BAR ASS’N 2002).

142. MODEL RULES OF PROF’L CONDUCT r. 1.2 cmt. 1 (AM. BAR ASS’N 2002).

143. *Id.*

144. MODEL RULES OF PROF’L CONDUCT r. 1.2 cmt. 2 (AM. BAR ASS’N 2002).

145. *Id.*

146. MODEL RULES OF PROF’L CONDUCT pmb1. 5 (AM. BAR ASS’N 2002).

147. MODEL RULES OF PROF’L CONDUCT r. 1.2 cmt. 2 (AM. BAR ASS’N 2002).

148. MODEL RULES OF PROF’L CONDUCT pmb1. 9 (AM. BAR ASS’N 2002).

149. *See supra* Section III.A.1.

150. *Oskoui v. JPMorgan Chase Bank*, No. CV 12-3511-GW(AGRx), 2012 WL 10209725, at \*2–4 (C.D. Cal. Oct. 4, 2012), *rev’d*, 851 F.3d 851 (9th Cir. 2017).

In the beginning, Ms. Oskoui, a registered nurse,<sup>151</sup> had the benefit of counsel. They filed her complaint in state court, and in April 2012, the defendants successfully removed her case to the United States District Court for the Central District of California. A few months later, in July 2012, the federal district court granted Ms. Oskoui's request to proceed on a pro se basis.

On August 10, 2012, she filed a First Amended Complaint. While it was "not a model pleading" and was "somewhat inartfully pled,"<sup>152</sup> counsel for the defendants filed, on August 28, 2012, a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP). Instead of seeking a more definite statement under FRCP Rule 12(e), counsel argued that one claim in the First Amended Complaint was "nonsensical."<sup>153</sup> The federal district court denied defendants' motion to dismiss as to Ms. Oskoui's claims under the civil Racketeer Influenced and Corrupt Organizations Act (RICO) and under California's Unfair Competition Law, California Business and Professions Code Section 17000.<sup>154</sup>

The defendants' counsel next conducted discovery and filed a motion for summary judgment. As evidence of uncontroverted facts in support of the motion, defendants' counsel proffered their clients' declarations and Ms. Oskoui's interrogatory responses and deposition transcript. After Ms. Oskoui filed her objection to the defendants' motion for summary judgment, counsel for the defendants filed a reply. Counsel argued that Ms. Oskoui failed to comply with Local Rule 56-2, which required any party opposing a motion to file a concise Statement of Genuine Disputes.<sup>155</sup> Counsel also argued that Ms. Oskoui failed to introduce admissible evidence to defeat the motion for summary judgment.<sup>156</sup>

On February 26, 2015, almost three years since Ms. Oskoui's case was removed from state court, the federal district court granted the defendants'

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151. *Oskoui v. J.P. Morgan Chase Bank, N.A.*, 851 F.3d 851, 853 (9th Cir. 2017).

152. *Oskoui*, 2012 WL 10209725, at \*2.

153. Defendant JPMorgan Chase Bank, N.A. & U.S. Bank, N.A.'s Notice of Motion & Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to FRCP 12(b)(6); Memorandum of Points & Authorities at 9, *Oskoui v. JPMorgan Chase Bank*, No. 12-cv-03511GW(RZx) (C.D. Cal. Aug. 28, 2012), ECF No. 19.

154. *Oskoui*, 2012 WL 10209725, at \*5.

155. Defendant JPMorgan Chase Bank, N.A. & U.S. Bank, N.A., as Trustee's Reply Memorandum of Points & Authorities in Support of Motion to for Summary Judgment, or in the Alternative, Partial Summary Judgment at 2-3, *Oskoui v. JPMorgan Chase Bank*, No. 12-cv-03511GW(RZx) (C.D. Cal. Jan. 30, 2014), ECF No. 56.

156. *Id.* at 4-6.

motion for summary judgment.<sup>157</sup> However, the Ninth Circuit disagreed. It held that Ms. Oskoui had a viable claim under California's Unfair Competition Law on the ground that she was a victim of an unconscionable loan modification process.<sup>158</sup> It also held that the district court erred by failing to acknowledge her claim for breach of contract in her First Amended Complaint.<sup>159</sup> Finally, the Ninth Circuit remanded the case to permit Ms. Oskoui to amend her complaint to allege a right to rescind the loan pursuant to *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015).<sup>160</sup> According to the Ninth Circuit, the Supreme Court in *Jesinoski* held that the Truth in Lending Act (TILA) "gives a borrower the right to rescind certain loans, and that this right may be exercised by a written notice from the borrower to the lender within three years after the consummation of the transaction."<sup>161</sup>

The defendants then fired their attorneys and hired new ones.<sup>162</sup>

On April 28, 2017, Ms. Oskoui filed her Second Amended Complaint. This complaint appears to have been ghostwritten by an attorney, at least when compared to the First Amended Complaint. Consistent with the Ninth Circuit's opinion, Ms. Oskoui sought relief for rescission of the loan under the TILA. She also raised fraud, a claim that was not explicitly raised in her First Amended Complaint.

On May 17, 2017, the defendants' new counsel filed a motion to dismiss the claims for fraud and rescission of the loan under the TILA. For the fraud claim, counsel argued that the Ninth Circuit did not grant Ms. Oskoui leave to assert this new claim. And while the Ninth Circuit granted her leave to raise the TILA claim, counsel argued that the Financial Institutions Reform, Recovery and Enforcement Act and the statute of limitations under 15 U.S.C. § 1640 barred her claim for rescission under the TILA. After Ms. Oskoui filed an opposition to the defendants' motion to dismiss, counsel filed a reply on June 9, 2017.

In reviewing the history of this case, I am not accusing any of the defendants' attorneys of impropriety under the current law of lawyering. On the contrary, I believe many will agree with me that their actions constituted

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157. *Oskoui v. JP Morgan Chase Bank, N.A.*, No. CV 12-3511 FMO (AGR), 2015 WL 12656933, at \*8 (C.D. Cal. Feb. 26, 2015).

158. *Oskoui v. J.P. Morgan Chase Bank, N.A.*, 851 F.3d 851, 856–58 (9th Cir. 2017).

159. *Id.* at 858–59.

160. *Id.* at 859.

161. *Id.*

162. *See, e.g.*, Request for Approval of Substitution or Withdrawal of Counsel, *Oskoui v. J.P. Morgan Chase Bank, N.A.*, No. 2:12-cv-03511-FMO-AGR (C.D. Cal. Apr. 19, 2017), ECF No. 100.

zealous representation. But having started July 2012, this case is almost half a decade old and still ongoing. “Procedural complexity is often cited as a contributing cause of cost and delay,” but the problem does not necessarily fall upon the procedural rules that treat all cases exactly the same regardless of the complexity of the factual and legal issues underlying the dispute.<sup>163</sup> Rather, the problem is that attorneys have a great deal of discretion under these uniform procedural rules to determine the extent to which each case should be litigated, and the “bar has largely resisted proposals to restrict that discretion on grounds that any individual case might need an exceptional amount of time or attention to resolve and therefore all cases should be managed as if they need that exceptional treatment.”<sup>164</sup>

In cases like Ms. Oskoui’s, however, what an attorney would normally do procedurally against an opposing counsel may constitute unnecessary adversarial excess against a pro se adversary. While Ms. Oskoui surely contributed to the delay, for example, by seeking to continue the trial and discovery deadlines,<sup>165</sup> delay inured to her benefit in this non-judicial foreclosure case. Accordingly, the defendants’ counsel did not help their cause by filing replies objecting to a pro se adversary’s failure to comply with local court rules. They also did not help their cause by filing motions to dismiss for failure to state a claim upon which relief could be granted, especially as to the TILA claim after the Ninth Circuit granted Ms. Oskoui leave to raise it in her Second Amended Complaint. However, the actions of the defendants’ counsel can be excused because the current culture and mindset call for an aggressive one-size-fits-all approach.<sup>166</sup>

So if there is to be change, something more is needed. That something should be sensitive to resource limitations and should comport with—and certainly not conflict with—the current strategies to level the playing field. And that something should assume the continuing existence of the pro se

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163. NCSC, 2015 REPORT, *supra* note 64, at 36.

164. *Id.*

165. *See, e.g.*, Order Re: Second Joint Ex Parte Application and Protective Order, Oskoui v. J.P. Morgan Chase Bank, N.A., No. 12-cv-03511-FMO-AGR (C.D. Cal. July 18, 2013) (order denying in part and granting in part the Second Stipulation to Continue Trial and Discovery Deadlines to Accommodate Plaintiff’s Medical Needs); Order on Joint Ex Parte Application for Order Approving Stipulation and to Continue Trial and Discovery Deadlines to Accommodate Plaintiff’s Medical Needs, Oskoui v. J.P. Morgan Chase Bank, N.A., No. 12-cv-03511-FMO-AGR (C.D. Cal. Apr. 25, 2013) (order granting the Stipulation to Continue Trial and Discovery Deadlines).

166. AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., REFORMING OUR CIVIL JUSTICE SYSTEM: A REPORT ON PROGRESS AND PROMISE 3 (2015).

phenomenon. That something is a professional responsibility of fair play when dealing with the pro se adversary.

## V. THE PROFESSIONAL RESPONSIBILITY OF FAIR PLAY

Fair play is part of the English lexicon. *Webster's Third International Dictionary* defines it as “equitable or impartial treatment: Justice.”<sup>167</sup> Meanwhile, the *Oxford English Dictionary* defines the term as “[r]espect for the fair or equal treatment of all concerned, or for the rules of a game or sport; just or honest conduct.”<sup>168</sup> And *Black's Law Dictionary* defines fair play as “[e]quity, candor, honesty, and fidelity in dealings with another or others generally.”<sup>169</sup>

As these different dictionary entries illustrate, a universally agreed-upon definition of “fair play” does not exist. The reason is that the term is difficult to define with precision. It is a somewhat abstract concept, which in turn is defined by reference to other abstract concepts such as justice, honesty, and equity.<sup>170</sup> These other abstract concepts, like fair play itself, have an overall positive moral tone to them.<sup>171</sup> But the components of fair play—even if everyone can agree as to what those components are—also prove difficult to define with precision.<sup>172</sup> They may be multidimensional, depending on context and various facts and circumstances.<sup>173</sup>

The difficulty in precisely defining fair play is true even in the philosophy of sport. Although sports philosophers have discussed and debated fair play in great detail, the concept is still best defined by

167. *Fair Play*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (Philip Babcock Gove ed., 1961) [hereinafter WEBSTER'S, *Fair Play*].

168. *Fair Play*, OXFORD ENGLISH DICTIONARY, [https://en.oxforddictionaries.com/definition/fair\\_play](https://en.oxforddictionaries.com/definition/fair_play) (last visited Nov. 9, 2017) [hereinafter OXFORD, *Fair Play*].

169. *Fair Play*, BLACK'S LAW DICTIONARY (10th ed. 2014).

170. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (noting the implicit requirement of due process in providing “*fair play and substantial justice*”) (emphasis added); see WEBSTER'S, *Fair Play*, *supra* note 167 (“[E]quitable or impartial treatment”); OXFORD, *Fair Play*, *supra* note 168.

171. See, e.g., RUDOLF KIRCHER, FAIR PLAY: THE GAMES OF MERRIE ENGLAND 17 (R. N. Bradley trans., 1928) (noting that fair play was the “keynote of the English morality”); Željko Kaluđerović, *Sport Rules, Sport Moral Values and Fair Play*, 2 JAHR 43, 48 (2011) (characterizing honesty as a moral value); Gerald J. Postema, *Integrity: Justice in Workclothes*, 82 IOWA L. REV. 821, 845 (1997) (discussing the moral value of fidelity).

172. See, e.g., Scott C. Idelman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1316–28 (1995) (attempting to define “judicial candor”).

173. See *id.* at 1324.

contrast.<sup>174</sup> Fair play is antonymous to gamesmanship and akin to sportsmanship.<sup>175</sup> All three—fair play, gamesmanship, and sportsmanship—have some relationship with the compliance of the constitutive rules, that is, the written rules that help define the game, such as the number of rounds in a professional boxing match.<sup>176</sup> Constitutive rules can be changed, however, and they have over time.<sup>177</sup> So sportsmanship focuses instead on the unwritten moral rules based on virtues of righteousness and honesty.<sup>178</sup> In contrast, gamesmanship refers to actions that, while not directly violative of the constitutive rules, are contrary to the spirit in which the sport should be played.<sup>179</sup> The conception of fair play then fills in the lexical lacuna of sports philosophy by having two components.<sup>180</sup> The formal component requires a player to comply with the constitutive rules of the game, while the informal one requires the player to adhere to the ethos or spirit of the game.<sup>181</sup>

The sports concept of fair play has found acceptance in the law, especially in the area of due process.<sup>182</sup> Judge Learned Hand “has said that the requirement of due process is merely the embodiment of the English sporting idea of fair play.”<sup>183</sup> Similarly, Professor Barbara Babcock believed “that the concepts of fair play in sport and due process in criminal trials are in fact united.”<sup>184</sup> And the United States Supreme Court has relied on “traditional notions of fair play,” along with substantial justice, to determine

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174. See, e.g., Robert Butcher & Angela Schneider, *Fair Play as Respect for the Game*, in *ETHICS IN SPORT* 119, 119 (William J. Morgan ed., 2d ed. 2007); Graham McFee, *The Project of a Moral Laboratory; and Particularism*, in *THE ETHICS OF SPORTS: A READER* 347, 351 (Mike McNamee ed., 2010); ROBERT L. SIMON, *FAIR PLAY: SPORTS, VALUES, AND SOCIETY* 38–46 (1991).

175. EMILY RYALL, *PHILOSOPHY OF SPORT: KEY QUESTIONS* 177 (2016); Kaluderović, *supra* note 171, at 49.

176. RYALL, *supra* note 175, at 27; Kaluderović, *supra* note 171, at 45.

177. RYALL, *supra* note 175, at 162.

178. Kaluderović, *supra* note 171, at 46.

179. RYALL, *supra* note 175, at 177.

180. *Id.* (describing the potentially dichotomous goals of abiding by the explicit rules of a sport versus a commitment to the spirit of the sport).

181. Kaluderović, *supra* note 171, at 48.

182. See, e.g., *Galvan v. Press*, 347 U.S. 522, 530 (1954) (“[D]ue process bars Congress from enactments that shock the sense of fair play[,] which is the essence of due process.”).

183. FELIX FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* 32–33 (1938).

184. Babcock, *supra* note 27, at 1135.



the constitutional propriety of a court's exercise of personal jurisdiction under the Due Process Clause.<sup>185</sup>

*A. An Ethical Concept*

The sports concept of fair play can also serve as a guidepost for an ethical concept for dealing with the pro se adversary. A professional responsibility of fair play, like the sports conception, can have two components for an attorney to comply with. Both involve the constitutive rules of the dispute resolution forum. For litigation, they could be the Federal Rules of Evidence, Federal Rules of Civil Procedure, and the court's local rules. For alternative dispute resolution, the constitutive rules could be the mediator's ground rules.<sup>186</sup> But whatever the forum, the constitutive rules also include the rules of professional conduct that the attorney is subject to and any statute of limitations relevant to the case.

By focusing on constitutive rules, the attorney avoids having to determine which rules are "procedural," as opposed to substantive, in nature. This determination can be difficult.<sup>187</sup> For example, if a rule is considered "substantive" because it is outcome-determinative, then a statute of limitations is *not* procedural in nature, even though intuitive formalism suggests otherwise.<sup>188</sup> However, a statute of limitations is outcome-determinative because, when applicable, a plaintiff's claim is time-barred.<sup>189</sup>

While both components of fair play rely on the relevant constitutive rules, the difference lies in their focus. For formal fair play, the attorney's focus is on adherence to those rules. Her conduct with respect to the rules is ethical and legal; it is neither frivolous nor sanctionable. It is what we expect from all attorneys, regardless of whether they are facing a pro se adversary. In contrast, when there is discretion as to the legitimate use of those rules, informal fair play focuses on the ethos component.

This difference in focus can be illustrated with the statute of limitations. Such statutes are designed to "promote justice by preventing revival of claims that have been allowed to slumber until evidence has been lost,

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185. See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 609 (1990); see also Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441 (1991).

186. See, e.g., James Melamed, *Sample Mediation Group Rules*, MEDIATE.COM (Aug. 1998), <http://www.mediate.com/articles/melamed7.cfm>.

187. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 205, 215 (2004).

188. *Id.* at 195 n.31, 196.

189. See *id.* at 196-97.

memories have faded and witnesses have disappeared.”<sup>190</sup> Under formal fair play, an attorney will not file a lawsuit if the statute of limitations applicable to the client’s matter has expired.<sup>191</sup> Filing such a lawsuit would be frivolous, and the attorney could possibly be subject to sanctions under FRCP Rule 11.<sup>192</sup> Now assume an attorney may legitimately raise the statute of limitations as an affirmative defense. Further assume that doing so will result in favor of the client. For purposes of informal fair play, the focus is not on winning, but on the “spirit” of the dispute resolution method.

This ethos is not the same as the spirit of the law or the spirit of the ethics codes.<sup>193</sup> The attorney facing a pro se adversary need not worry, at least for purposes of fair play, about what the intent is behind an ambiguous statute or ethics rule. The attorney need only be mindful that the ethos component is about “justice.” In litigation, for example, the parties are said to go to trial to seek “justice,” and the judges are said to be the arbiters of “justice.” That is not to say that justice is the only ethos. Lower economic costs, a lower degree of publicity, and the potential for more amicable relationships could also be part of the ethos of mediation, for example.<sup>194</sup> However, “justice” in the broadest sense is the common spirit of all dispute resolution methods.<sup>195</sup>

To that end, an attorney adheres to the ethos component through the twin considerations of promoting procedural justice and not thwarting adversarial truth. While procedural justice, like justice itself, has many conceptions and meanings,<sup>196</sup> underlying all of these theories or definitions is the lodestar of “fairness.” From a psychological perspective, the pro se

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190. *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348 (1944)).

191. *See* FED. R. CIV. P. 11(b)(2) (“The claims . . . are warranted by existing law or by a nonfrivolous argument[.]”).

192. FED. R. CIV. P. 11(c).

193. *See* Samuel J. Levine, *The Law and the “Spirit of the Law” in Legal Ethics*, 2015 J. PROF. LAW. 1, 4–7, 14–22 (2015).

194. *See* NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, UNIFORM COLLABORATIVE LAW RULES & UNIFORM COLLABORATIVE LAW ACT 3 (2010), [http://www.uniformlaws.org/shared/docs/collaborative\\_law/uclranducla\\_finalact\\_jul10.pdf](http://www.uniformlaws.org/shared/docs/collaborative_law/uclranducla_finalact_jul10.pdf).

195. *See* John Thibaut & Lauren Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 544–45 (1978).

196. For example, the psychological conception of procedural justice is based on subjective perceptions about fairness of process. Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127 (2011). Meanwhile, Professor John Rawls has deconstructed procedural justice into perfect, imperfect, and pure procedural justice. JOHN RAWLS, *A THEORY OF JUSTICE* 74–75 (rev. ed. 1999). And under Professor Lawrence Solum’s theory of procedural justice, the important roles of accuracy, cost, and participation in civil disputes are based on the ordering of two main principles and various provisos. Solum, *supra* note 187, at 305–06.

party's perception of the process being fair is important to that party's satisfaction with the outcome.<sup>197</sup> So the ethos component depends on fairness.

It also depends on truth.<sup>198</sup> In an idealized version of formal dispute resolution, each side's attorney will issue discovery, depose witnesses, and serve subpoenas to get to the "truth" of the matter.<sup>199</sup> The practical reality is that ascertaining truth, even an "approximate" version of it,<sup>200</sup> is difficult when dealing with a pro se adversary. The unrepresented party with little to no legal sophistication usually has difficulties presenting her version of the relevant material facts, much less eliciting those from the other side.<sup>201</sup> So under the ethos component of fair play, an attorney must consider using the constitutive rules in a manner that does not prevent the pro se adversary from presenting her version of the truth.

To measure "fairness" in procedural justice and to determine whether the attorney is thwarting adversarial truth, the lens is recognition respect. As conceived by Professor Stephen Darwall, recognition respect requires an attorney to first recognize the nature of the adversary and claims at issue and to then act accordingly.<sup>202</sup> It is not about having the attorney treat the pro se adversary with esteem that is merited or earned by the latter's conduct or character.<sup>203</sup> Rather, recognition respect is about having the attorney avoid a one-size-fits-all approach. It is about how the attorney's relationship and dealings are to be regulated based on the pro se adversary's level of legal sophistication, the type of legal interest at stake in the case, and the degree to which the pro se claims are timely and legally cognizable.

Under recognition respect, no two pro se adversaries are equal. Some self-represented litigants are seasoned trial lawyers, while some have limited English proficiency and limited education. Their legal interest at stake may be grave and significant, such as a life or liberty interest that can result in confinement or in capital punishment. Or it may be a property interest of constitutional import or one of much less significance. Whatever the case, an

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197. Hollander-Blumoff, *supra* note 196, at 132.

198. See, e.g., W. Bradley Wendel, *Whose Truth: Objective and Subjective Perspectives on Truthfulness in Advocacy*, 28 YALE J.L. & HUMAN. 105, 144 (2016).

199. *Id.* at 116.

200. Geoffrey C. Hazard, Jr. & Dana A. Remus, *Advocacy Revalued*, 159 U. PA. L. REV. 751, 776, 771 (2011).

201. *Id.* at 778–79.

202. Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36, 40 (1977) ("To respect something in this way is just to regard it as something to be reckoned with (in the appropriate way) and to act accordingly.").

203. STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* 123 (2006).

attorney facing a pro se adversary can glean much of this information by reading the pleadings, by conducting Internet research, and by doing what is normally done in evaluating the other side's claims.

The nature of the pro se adversary and the claim then dictate the manner and type of procedures to be used. The level of legal sophistication of the pro se adversary might dictate a motion for a more definite statement rather than a motion to dismiss for failure to state a claim upon which relief can be granted, even though both motions are responsive pleadings. As another example, filing a motion for summary judgment<sup>204</sup> based on deemed admissions<sup>205</sup> is appropriate against a self-represented litigant who is also a seasoned trial lawyer, but not against a pro se adversary with no legal training whatsoever.

### *B. Application to Pro Se Cases*

Moving from ethical concept to application requires an amendment to Model Rule 4.3 to add a professional responsibility of fair play. This amendment is based on an attorney's roles as "an officer of the legal system and a public citizen having special responsibility for the quality of justice," and not as a representative of clients.<sup>206</sup> As a public citizen, a "lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance."<sup>207</sup>

Even so, inclusion of the word "fair" will be met with resistance, especially if there are not clear norms.<sup>208</sup> Thus, the comments to Model Rule 4.3 should also be amended. Those comments should begin by emphasizing that winning the case is not the only consideration in representing a client and that an attorney also has a consideration of fair play when dealing with a pro se adversary. The amended comments should further note that fair play depends on the level of legal sophistication of the self-represented litigant.

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204. See FED. R. CIV. P. 56.

205. See FED. R. CIV. P. 36(a)(3) ("A matter is admitted unless . . . the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter. . . ."); see also FED. R. CIV. P. 36(b) ("A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended.").

206. MODEL RULES OF PROF'L CONDUCT pmb1. 1 (AM. BAR ASS'N 2002).

207. MODEL RULES OF PROF'L CONDUCT pmb1. 6 (AM. BAR ASS'N 2002).

208. See, e.g., Megan McDermott, *Negotiating on Behalf of Low-Income Clients: The Distorting Effects of Model Rule 4.1*, 68 S.C. L. REV. 1, 32 (2016) (recounting the "firestorm of criticism" provoked by the proposed language requiring "fairness" in negotiations in Model Rule 4.1).

Indeed, courts do that already, and the comments can include a citation to “Mann v. Boatright, 477 F.3d 1140, 1148 n.4 (10th Cir. 2007) (declining to construe pro se attorney’s pleadings liberally).”<sup>209</sup>

The attorney would still have to clarify that she is not disinterested, but the comments could point to the fact that an attorney must exercise professional judgment at every phase of a dispute, such as the content of a discovery plan and what motions to file. When the attorney has discretion to determine the extent to which a case should be litigated, fair play is intended to promote fairness and justice in the process of dispute resolution, while still representing the client effectively.

As was suggested in the comments to the codes of judicial conduct,<sup>210</sup> advocates of fair play could list steps an attorney may consider in dealing with self-represented litigants, and which (an attorney might find) are consistent with this professional responsibility. Those steps could clarify what does not constitute legal advice to the unrepresented person and what procedural discretions are permissible. Specifically, the steps could include, but are not limited to, the following:

- (1) providing advice to the self-represented litigant related to promoting the use of alternative dispute resolution;
- (2) providing information to the self-represented litigant regarding any resources available to assist the litigant in the preparation of the latter’s case;
- (3) responding to general questions by the self-represented litigant about the proceeding and evidentiary and foundational requirements;
- (4) minimizing the use of legal jargon in pleadings, discovery, and correspondence with the self-represented party;
- (5) filing a motion for a more definite statement instead of a motion to dismiss for failure to state a claim upon which relief can be granted;
- (6) declining to file a motion for summary judgment or partial judgment based on deemed admissions of fact; and

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209. State Defendants’ Motion to Dismiss Plaintiffs’ Amended Complaint and Supporting Memorandum, at 16, *Sevier v. Thompson*, No. 2:16-cv-00659-DN-EJF (D. Utah Mar. 28, 2017), ECF No. 45 (“While courts generally construe pro se pleadings liberally, . . . the Court does not accord the same leniency to Mr. Sevier because he is an attorney . . .”).

210. *See* discussion *supra* Section III.B.1.

- (7) unless contrary to a court order or unless required by a court's procedural rules, declining to file a reply to every opposition or objection that a self-represented litigant files in response to a motion filed by the attorney on behalf of a client.

Finally, the comments should note that the professional responsibility is not a vehicle for the pro se litigant or any other party to accuse the attorney of unfair play. In that regard, making fair play a professional responsibility is analogous to Model Rule 6.1. Such responsibility would not be enforceable through the disciplinary process.<sup>211</sup> Yet making fair play a professional responsibility, like that of providing pro bono services, would recognize its value in an attorney's dealings with a pro se adversary.<sup>212</sup> And making fair play a professional responsibility would exhort a return to the historical notion of fair play as "the individual ethical commitment of each lawyer."<sup>213</sup>

### C. *History of Fair Play in the Law of Lawyering*

To be sure, the law of lawyering never used the words "fair play." But the concept has been there historically. The progenitors of Model Rule 4.3 are both the lectures of Judge George Sharswood, published in 1854 as *Professional Ethics*,<sup>214</sup> and the *Fifty Resolutions in Regard to Professional Deportment (Fifty Resolutions)* first included in the second edition of David Hoffman's *A Course of Legal Study* in 1836.<sup>215</sup> Specifically, Hoffman Resolution XLIV<sup>216</sup> was the basis for the second sentence of Canon 9 of the

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211. MODEL RULES OF PROF'L CONDUCT r. 6.1 cmt. 12 (AM. BAR ASS'N 2002).

212. MODEL RULES OF PROF'L CONDUCT r. 6.1 cmt. 8 (AM. BAR ASS'N 2002).

213. MODEL RULES OF PROF'L CONDUCT r. 6.1 cmt. 9 (AM. BAR ASS'N 2002).

214. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (Philadelphia, T. & J.W. Johnson Co. 3d ed. 1869).

215. MODEL RULES OF PROF'L CONDUCT preface (AM. BAR ASS'N 2002), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble.html) (last visited Nov. 9, 2017); James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2422 (2003).

216. Hoffman Resolution XLIV provides:

Should the party just mentioned have no counsel, and my client's interest demand that I should still commune with him, it shall be done in writing only, and no verbal response will be received. And if such person be unable to commune in writing, I will either delay the matter until he employs counsel, or take down in writing his reply in the presence of others; so that if occasion should make it essential to avail myself of his answer, it may be done through the testimony of others, and not by mine. Even such cases should be regarded

ABA's Canons of Professional Ethics,<sup>217</sup> which later served as the basis for Model Rule 4.3.<sup>218</sup>

Hoffman, without using the term itself, would recognize the concept of fair play.<sup>219</sup> His *Fifty Resolutions* emphasized the importance of the “due application of the law”<sup>220</sup> and “justice,”<sup>221</sup> two concepts that correspond to the constitutive rules component and ethos component, respectively, of the ethical concept of fair play. Within the ethos component, Hoffman's *Fifty Resolutions* recognized recognition respect to a certain degree. It differentiated the ethical demands of “civil cases” from situations “[w]hen employed to defend those charged with crimes . . . .”<sup>222</sup> His *Fifty Resolutions* recognized the pro se status of an adversary and that “such [a] person [might] be unable to commune in writing.”<sup>223</sup> They expected an attorney to “duly examin[e] a case,”<sup>224</sup> including whether the “client's . . . defense . . . [could] be sustained,”<sup>225</sup> thereby requiring the recognition of whether the adversary's claim was legally cognizable.<sup>226</sup> If the client's case could not be sustained, then Hoffman's *Fifty Resolutions* advocated for his version of procedural justice. The attorney was to neither “glean[] some advantage by an extorted compromise” nor resort to “a dishonorable use of *legal means* in order to gain a portion of that, the whole of which . . . would be denied to [the client] both by law and justice.”<sup>227</sup> Finally, Hoffman's *Fifty Resolutions* had a strong regard for “truth,” thereby evidencing the implicit

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as the result of unavoidable necessity, and are to be resorted to only to guard against great risk, the artifices of fraud, or with the hope of obviating litigation.

2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 771 (Baltimore, Joseph Neal, 2d ed. 1836).

217. The second sentence of Canon 9, which is entitled “Negotiations with Opposite Party,” provides: “It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.” AM. BAR ASS'N COMM. ON CODE OF PROF'L ETHICS, FINAL REPORT 578 (1908), [https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/professional\\_responsibility/1908\\_canons\\_ethics\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/1908_canons_ethics_authcheckdam.pdf).

218. Altman, *supra* note 215, at 2425 n.184.

219. See HOFFMAN, *supra* note 216, at 754–57 (regarding Hoffman Resolutions XI and XV).

220. *Id.* at 755–57 (regarding Hoffman Resolution XV).

221. *Id.* at 754–57 (regarding Hoffman Resolutions XI and XV).

222. *Id.* (regarding Hoffman Resolutions XI, XIV, and XV).

223. *Id.* at 755–57 (regarding Hoffman Resolutions XIV and XV).

224. *Id.* at 771 (regarding Hoffman Resolution XLIV).

225. See *id.* at 754 (regarding Hoffman Resolution XI).

226. *Id.*

227. *Id.* (emphasis added).

importance of adversarial truth over pure partisanship on behalf of the client.<sup>228</sup>

Sharswood, in formulating his own *Professional Ethics*, surely was familiar with Hoffman's *Fifty Resolutions*.<sup>229</sup> Sharswood echoed Hoffman's limits as to partisanship,<sup>230</sup> in particular, as to the means and manner of how an attorney should represent the client.<sup>231</sup> The attorney was to avoid "special pleading," "sharp practice," and "insisting upon the slips of the opposite party" if the attorney believed the opposite party's claim was honest and just.<sup>232</sup> Sharswood wrote:

[Counsel] may fall back upon the instructions of his client, and refuse to yield any legal vantage-ground, which may have been gained through the ignorance or inadvertence of his opponent. Counsel, however, may and even ought to refuse to act under instructions from a client to defeat what he believes to be an honest and just claim, by insisting upon the slips of the opposite party, by sharp practice, or special pleading—in short, by any other means than a fair trial on the merits in open court. There is no professional duty, no virtual engagement with the client, which compels an advocate to resort to such measures, to secure success in any cause, just or unjust; and when so instructed, if he believes it to be intended to gain an unrighteous object, he ought to throw up the cause, and retire from all connection with it, rather than thus be a participator in other men's sins.<sup>233</sup>

So for Hoffman and Sharswood, winning the client's case was not everything. How the attorney won, and to what purpose the attorney prevailed, also counted. To them, fair play mattered.

Undeniably, the times have changed since Hoffman's *Fifty Resolutions* and Sharswood's *Professional Ethics*. As the critics will correctly point out, just because the concept of fair play was present in the nineteenth century's version of legal ethics does not mean that it should continue in the current

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228. *Id.* at 755–57, 766–67, 769–71 (regarding Hoffman Resolutions XV, XXXV, XLI, and XLII).

229. Altman, *supra* note 215, at 2425 n.185.

230. SHARSWOOD, *supra* note 214, at 42–43.

231. Altman, *supra* note 215, at 2401.

232. SHARSWOOD, *supra* note 214, at 42.

233. *Id.* at 100–01.



law of lawyering.<sup>234</sup> Indeed, the regulatory environment has changed from the ABA Canons of Professional Ethics to the ABA Model Rules of Professional Conduct.<sup>235</sup> The theoretical underpinnings of legal ethics have moved from moral philosophy to a client-centered jurisprudence of lawyering.<sup>236</sup> So why should there be an express duty of fair play when dealing with the pro se adversary?

*D. Justifications for an Express Professional Responsibility*

When both parties are represented, the current rules need not have an express professional responsibility of fair play. If one attorney is being unfair in discovery, the other side's attorney will file a motion for protective order or a motion to compel. If one attorney is being unfair in questioning a witness, the other side's attorney will raise an evidentiary objection. And if one attorney is making unfair allegations in the pleadings, the other side's attorney will file a motion for sanctions. None of these protections from "unfair play" is evident when there is an asymmetry of representation.

As the Seventh Circuit observed, "[p]rosecutors must remember to live up to the code of professional ethics and *fair play* at all times or the American system of justice cannot endure, and ultimately our nation will lose confidence and trust in its rendering of justice . . . ."<sup>237</sup> The same reasoning justifies an express professional responsibility of fair play when dealing with a pro se adversary. Socio-psychologists have uniformly found that a party's perception of the process being fair was important to that party's satisfaction with the outcome.<sup>238</sup> An express professional responsibility of fair play thus furthers the public's confidence in the justice system.<sup>239</sup>

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234. Ted Schneyer, *How Things Have Changed: Contrasting the Regulatory Environments of the Canons and the Model Rules*, 2008 J. PROF. LAW. 161, 187 (2008).

235. *Id.*

236. Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493 (2011).

237. *United States v. Gonzalez*, 933 F.2d 417, 433 (7th Cir. 1991) (emphasis added).

238. See, e.g., E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 L. & SOC'Y REV. 953 (1990); E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest*, 39 J. PERSONALITY & SOC. PSYCHOL. 643 (1980); Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCHOL. 850 (1994); Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC'Y REV. 103 (1988); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 L. & SOC'Y REV. 51 (1984).

239. See MODEL RULES OF PROF'L CONDUCT pmbl. 6 (AM. BAR ASS'N 2002).

An express professional responsibility of fair play will also help change the culture and mindset that have more recently defined the process for civil cases.<sup>240</sup> It will hopefully shape that culture and mindset by promoting the avoidance of adversarial excesses. It will serve as a reminder that attorneys—all of whom have taken an oath to support the United States Constitution<sup>241</sup>—have an obligation to “establish Justice” on behalf of “We the People of the United States.”<sup>242</sup>

And to the represented parties, an express professional responsibility imposed on their counsel will let them know that fair play matters. That their attorneys are not here, as Professor Green put it, to simply “exploit their superior skill and expertise in dealing with unrepresented adversaries, as long as their role is clear and they do not suggest that they are disinterested.”<sup>243</sup> Because if all attorneys have a professional responsibility of fair play against a pro se adversary, then the represented party motivated solely by victory will soon itself become the pro se litigant seeking justice.

## VI. CONCLUSION

At the outset of this Article, I noted that two professional cricketers were worried that other players had essentially forgotten the true meaning behind the idiom: “It’s not cricket.”<sup>244</sup> So they sought to enshrine both the “Spirit of Cricket” and “fair play” into the game’s laws. Their “initiative proved successful.”<sup>245</sup> What is now considered fair play is dependent, in part, on the relative skill of the players.<sup>246</sup> And “cricketers, right across the world, are increasingly aware that they should not merely obey the game’s Laws but safeguard its Spirit.”<sup>247</sup>

The challenge, and the focus of this Article, was whether these cricket concepts could be adapted for use in the legal field. The straightforward part was seeing that a new strategy needs to be employed. The pro se phenomenon has shown no signs of abatement, even with the current strategies to level the playing field. Many of them focus on elevating and supporting the pro se party’s side. Those strategies, while laudable,

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240. Rogers, *supra* note 32, at 1451.

241. *See, e.g.*, CAL. BUS. & PROF. CODE § 6068(a) (West, Westlaw through 2017 portion of 2017–2018 Legis. Sess.).

242. U.S. CONST. pmb1.

243. Green, *supra* note 21, at 615–16.

244. *See* discussion *supra* Part I.

245. *Spirit of Cricket*, *supra* note 1.

246. LAWS OF CRICKET, *supra* note 6, Law 42.6(a)(i).

247. *Spirit of Cricket*, *supra* note 1.

ultimately prove to be incomplete because of a party's general right to self-representation and the practical reality of limited resources.

What more is needed is a change in culture and mindset of the attorney facing the pro se adversary. Those changes can be accomplished through an express professional responsibility of fair play. The ethical concept is comprised of formal and informal components to comply with the constitutive rules of the dispute resolution forum and the ethos of the dispute resolution method. Of the ethos component, the attorney facing the pro se adversary should promote procedural justice and not thwart adversarial truth, both through the lens of recognition respect. Moving from an ethical concept to application requires amending Model Rule 4.3 and its comments. While no strategy is foolproof, the hope is that an express professional responsibility of fair play will serve as a simple reminder—and perhaps even inspire a new idiom—as to how an attorney should deal with a pro se adversary.