Outline for Pro-Se Ethics CLE

1. What this program is not.

   a. A review of the legal ethics for advising or assisting those who wish to represent themselves in any litigation.
   b. A review of the ethical questions that arise in limited scope representations.
   c. A review of the ethical issues involved in "ghost writing" legal pleadings for *pro se* parties.
   d. A review of the ethical issues involved in contacting unrepresented witnesses in either civil or criminal matters.

2. Rights of *Pro Se* parties

   a. "A pro se litigant in a civil case is required to follow the same rules of procedure and evidence which are binding upon a litigant who is represented by counsel. A party in civil litigation cannot expect the trial judge or an attorney for the other party to advise him or her of the law or court rules, or to see that his or her case is properly presented to the court. A pro se litigant in a civil case cannot be given either an advantage or a disadvantage solely because of proceeding pro se. *In re Estate of Broderick,* 34 Kan. App. 2d 695, 696, 125 P.3d 564, 566 (2005); *aff'd* 286 Kan. 1071, 1073, 191 P.3d 284, 287 (2008)

   b. "Our legal system cannot function on any basis other than equal treatment of all litigants. To have different rules for different classes of litigants is untenable." *Mangiaracina v. Gutierrez,* 11 Kan.App.2d 594, 595–96, 730 P.2d 1109 (1986).

   c. "*Pro se* pleadings are to be liberally construed to give effect to their content rather than adhering to any labels and forms used to articulate the pro se litigant's arguments." *State v. Gilbert,* 326 P.3d 1060, 1061 (Kan. 2014)

   d. Pro se pleadings are to be liberally construed.' [Citation omitted.]"*Bruner v. State,* 277 Kan. 603, 605, 88 P.3d 214, 217 (2004).

   e. "Pro se pleadings of laymen are entitled to such a liberal construction so that relief may be granted if warranted by the facts alleged, without regard to the form of the pleading." *Jackson v. State,* 1 Kan. App. 2d 744, 745-46, 573 P.2d 637, 639 (1977)

f. Standard for all: It is the substance of the motion that controls, not the form. See, *e.g., Ten Eyck v. Harp,* 197 Kan. 529, 533, 419 P.2d 922. (1966).

g. Court governs procedure, but how helpful should a judge be?

3. Problems dealing with *pro se* parties:

a. Don't understand or know court rules and procedures.
b. Can't articulate facts, causes of action or relief they seek.
c. Misunderstand the role of judges, clerks, even opposing counsel.
d. Complete lack of understanding rules of evidence.
e. Belief from television that anything goes.
f. Problems of legal information v. legal advice.

4. Problems resulting from *pro se* representation

a. Additional litigation or delay
b. Additional costs
c. Setting aside of negotiated agreements

5. Ethical rules at issue

a. **1.1 Competence** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

b. **3.3 Advocate: Candor Toward the Tribunal** (a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered

material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

c. **3.7 Advocate: Lawyer as Witness** (a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.

d. **4.1 Transactions with Persons other than Clients: Truthfulness in Statements to Others** In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by or made discretionary under Rule 1.6.

e. **4.2 Transactions with Persons other than Clients: Communication with Person Represented by Counsel** In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

f. **4.3 Transactions with Persons other than Clients: Dealing with Unrepresented Person** 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.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

g. **4.4 Transactions with Persons other than Clients: Respect for Rights of Third Persons** (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

6. Purpose of Rule 4.3:

   a. Shield adverse party from improper advances
   b. Improperly or unfairly obtaining information (privileged or otherwise)
   c. Take unfair advantage of unrepresented party
   d. Prevent lawyer from becoming a witness
   e. Avoid giving unrepresented party feeling lawyer is helping
   f. Protect current client from damages if efforts are set aside for abuse of the rule

7. Following the Rules: What contact is ok?

a. To ask if party is represented by counsel.
b. Advise you represent client's interests, working for client.
c. Advise get an attorney.
d. Silence under some circumstances error too. Silence can mislead. "Failure to intercede when the self-represented person is acting under a misapprehension may adversely affect the interests of the lawyer's client."
e. Identify legal issues unrepresented party may not recognize?

8. Following the Rules: Concerns before going to court, information gathering, negotiations, written communications and settlement.

9. Following the Rules: Concerns in court, testimony, presentation of evidence, objections.

10. Following the Rules: additional concerns including client's issues, client's communications with unrepresented party.

11. Following the Rules: Procedure to consider to protect client and obtain court approval of agreements with *pro se* parties.

    i. Put it on the record
    ii. Have both parties present
    iii. If Court doesn't do so, ask yourself or have Judge ask *pro se* party if that party understands risks of going forward without counsel – is this your free and voluntary decision?
    iv. See, *Strecker v. Selman*, unpublished, 143 P.3d 421 (Kan. Ct. App. 2006)(in materials)(judge does not have to take evidence or testimony to find agreement fair and equitable).

12. Following the Rules: Other matters:

    a. Use of "lay advocates" (parents assisting children; or 3rd parties

        i. Not permitted in Kansas
        ii. Object to unauthorized practice of law

    b. Appearance by telephone:

        i. K.S.A. 60-243(a) states: At trial, the witness' testimony must be taken in open court, unless otherwise provided by law. For good cause in compelling circumstances and with appropriate

safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

ii. Kansas Supreme Court Rule 145 states: The court may use a telephone or other electronic conference to conduct any hearing or conference other than a trial on the merits. For a trial on the merits, K.S.A. 60-243(a) applies. The court may require the parties to reimburse the court for any costs incurred.

iii. How do proffer hearings fit in this landscape?
(1) Clearly hearing on merits;
(2) But, No "testimony" offered

c. Should Kansas require self-representation training or provide formal assistance?

i. Missouri does: www.selfrepresent.mo.gov
ii. New York state and federal courts have opened office to aid *pro se parties.*

13. Conclusion

Comment, PRO SE LITIGANTS IN DOMESTIC RELATIONS CASES

I. Introduction

The American courtroom is undergoing a transformation. Gone are the days of competing lawyers battling for rights and property in domestic relations cases. Instead, the parties in a domestic matter often find themselves facing off before the judge, without the assistance of an attorney. While national estimates of the number of self-represented parties in domestic relations cases are not available, a 2002 study in California showed a range of thirty-one to ninety-five percent of all litigants appeared pro se, with a state mean of sixty-seven percent appearing without the assistance of counsel.[1] In the eight year period from 1996 to 2004, the Tenth Judicial District of Wisconsin faced a twenty percent increase in the number of self-represented litigants in family cases, from forty-three percent to sixty-three percent.[2] This is due to the dramatic increase in the number of people who forgo legal counsel and represent themselves, appearing pro se in courts of law across the country. This pro se phenomenon[3] has had a large impact on court systems throughout the country as dockets are changing, uses of limited resources are being altered and attorneys are encountering new roles at every corner.

This Comment will take a look at the background of the pro se phenomenon, explore some of the issues that have arisen due to the increase in self-representation, including ineffective resolution of domestic relations cases, increased frustration of parties and court personnel and look at the changing role of the attorney in domestic relations cases. The Comment will conclude with a look toward the future of domestic relations law in the United

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1 JUD. COUNCIL OF CAL., STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS, at 87 (2003), available at http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full_Report.pdf.

2 Gregg More, TENTH JUDICIAL DISTRICT SELF-REPRESENTED LITIGANTS INITIATIVE: A FIVE-YEAR RETROSPECTIVE, at 1 (2005), available at http://www.wicourts.gov/about/organization/programs/docs/10distlitigants.pdf.

3 Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373 (2005).

States and suggest ways that the legal system may assist in the resolution of all domestic relations matters through the provision of community resources, pro bono assistance and unbundled legal services.

II. The Rise of Pro Se Litigation

Every attorney has that dreaded case, the one he took on without completely understanding what it was he was up against. The facts may vary, but for many family law attorneys, that case is arising with increasing frequency. In the family law arena, one of those dreaded cases is one where the other party is unrepresented. These cases tend to be driven by unrepresented parties,[4] who appear in courtrooms with greater frequency, often taking up more time and greater resources than trying a case against opposing counsel.

A. *The Increase in Pro Se Litigants*

Black's Law Dictionary defines "pro se" as "one who represents oneself in a court proceeding without the assistance of a lawyer."[5] Across the country, there has been a significant increase in the number of parties who appear in court pro se. The increase in self-representation is changing the legal system. While statistics vary by state, depending on the type of proceeding, studies show that in between fifty-five and eighty percent of domestic relations matters, at least one party appears pro se.[6]

Pro se litigants are a variety of people, ranging from indigent to upper class and from high school dropouts to the most educated members of society. The poor and middle class are increasingly unable to afford adequate legal representation, yet their need for adequate representation continues to increase.[7] In addition to not being able to afford adequate legal services, many

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4 Sondra I. Harris, THE JOY OF SETTLEMENT 42-44 (Gregg Herman ed., ABA 1997).

5 BLACK'S LAW DICTIONARY (8th ed. 2004)

6 M. Sue Talia, *Engaging the Private Bar: A Path to Reducing the Need for Self-Represented Litigation Support*, Paper Eight in the Summit on the Future of Self-represented Litigation 97 (2005) [hereinafter Talia, *Engaging the Private Bar*], available at http://ncsconline.org/WC/Publications/Res_ProSe_Fut SelfRepLitfinalPub.pdf.

7 *Id.*

people in this group are above the income guidelines to qualify for legal aid or other pro bono projects that provide legal services to the truly indigent members of a community.[8] Pro se litigants appear that way for many reasons. For some, it is simply a matter of being unable to afford legal representation, but for others the reasons vary from not wanting to complicate a relatively simple matter, such as a short-term marriage with no children and little property to be divided, to wanting to maintain control of their situation or simply the impulse to take advantage of the increased availability of resources, such as online forms, that make self-representation an easier task than in the past.[9] Regardless of the reason, the number of litigants who are trying to "go it alone" instead of seeking traditional legal services has increased dramatically in recent years. These pro se litigants are finding resources from other sources, seeking the advice of the judiciary and court personnel, visiting self-help centers, signing up for prepaid and unbundled legal services, finding local legal assistance services and utilizing the Internet.[10]

B. *The Impact of Pro Se Litigation on Court Resources*

Pro se litigants put intense strain on the courts.[11] Court personnel spend their time providing information to pro se litigants or deflecting question which they are not permitted to answer due to ethical restrictions limiting who may provide legal assistance. Judicial proceedings are prolonged and continuances must be granted when incorrect or improper paperwork is filed, providing the court with little or nothing on which to proceed.[12] When proceedings occur, unrepresented parties often find it difficult to abide by procedural or evidentiary rules or to present

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8 *Id.* at 101.

9 Carolyn D. Schwarz, *Pro Se Divorce Litigants: Frustrating the Traditional Role of the Trial Court Judge and Court Personnel,* 42 FAM. CT. REV. 655, 656 (2004).

10 Conference of Chief Justices & Conference of State Ct. Adm'rs, FINAL REPORT OF THE JOINT TASK FORCE ON PRO SE LITIGATION 5-8 (2002), available at http://www.ncsconline.org/WC/Publications/Res_ProSe_FinalReportProSeTaskForcePub.pdf.

11 Talia, *supra* note 6, at 99.

12 *Id.*

adequate and relevant information for the judge to make a final determination.[13]

Frustration arises for all parties when, despite the desire to do so, a litigant has not been able to obtain counsel. Those litigants may not qualify for free legal services yet they often do not have the means to obtain private counsel. They are frustrated with the legal system and the frustration is compounded at every turn, from their initial attempts to obtain counsel, to the inability of the court to hold the pro se litigant to a lower standard during trial.[14] These individuals are held to the same standards as lawyers who appear in the courtroom. Under the ABA Model Code of Judicial Conduct, judges are required to remain "faithful to the law" and shall "accord to every person who has an interest in a legal proceeding . . . the right to be heard according to the law.[15] Accordingly when representing themselves, pro se litigants may be held to the same rules of evidence and procedure as a party who is represented by an attorney.[16] Without some knowledge and assistance along the way, the unrepresented party has no chance of "living up to the standard set for attorneys."[17]

Despite the frequent frustration, self-representation is not always harmful to the legal system. Some pro se litigants are correct in their assumption that their case is simple enough that they do not need professional legal assistance. Pro se litigants are less likely than attorneys to request continuances, and are less likely to have hearings or trials in their cases.[18] When comparing the length of time it takes for final disposition in a legal matter, the Washington State Judicial Services Division found that the more legal representation in the case, the longer it will take to reach

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13 *Id.*

14 Sabouri v. Ohio Dep't of Job & Family Services, 763 N.E.2d 1238, 1240 (Ohio Ct. App. 2001), (stating, that "[i]t is well established that *pro se* litigants are presumed to have knowledge of the law and legal procedures and that they are held to the same standard as litigants who are represented by counsel.")

15 Model Code of Judicial Conduct Canon 3(B) (2004).

16 *Sabouri*, 763 N.E. 2d at 1240.

17 Waine Riches, *Creating Access to Justice: Moving Toward Success: A View from the Trenches*, 17 UTAH B.J. 7, 11 (2004).

18 John M. Greacen, *Self-Represented Litigants and Court and Legal Services Responses to Their Needs, What We Know,* at 10 (2002), available at http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/SRLwhatweknow.pdf.

final disposition.[19] This may be attributed to many things, including the complexity of the matter, which is often a factor in deciding to obtain counsel, and the availability of resources, including forms and assistance for pro se litigants.[20]

Despite positive aspects of self-representation, the practice has some dangers as well. The cases in which parties are choosing or are forced to appear pro se often have serious consequences that extend beyond the two named parties to the case. In family court, paternity, parenting time, and child support are often resolved without the assistance of counsel. These determinations have prolonged consequences for the parties when children are involved and the court orders some type of continuing relationship between the parties. In matters such as these, representation can be especially beneficial since an attorney is more removed from the emotions and hurt feelings experienced by the parties. Family law is rarely a happy area of practice. Most matters leave the parties with hurt feelings and an altered life. If the matter goes to trial, a judge is suddenly telling the parties how and when they will see their children, how their property will be divided or what to do with their money. The issues are personal, and often the parties will be more content with a resolution they have helped obtain with the assistance of counsel.[21]

Despite increased efforts of the judiciary and the legal profession to resolve matters out of court, some matters need a judicial decision. Without the advice of counsel, many unrepresented parties may not be aware of the opportunities available to assist in party-determinative resolution. To facilitate pre-trial resolution among pro se litigants, courts should ensure that all parties are given notice of and access to any court-sanctioned or community resources that may assist in dispute resolution.

Unless a jurisdiction has adopted special rules related to pro se proceedings, pro se litigants are held to the same standards and rules as attorneys, yet very few, if any pro se litigants would

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19 Judicial Services Division, Administrative Office of the Courts, An Analysis of Pro Se Litigants in Washington State 1995-2000, 8-15, available at http://www.courts.wa.gov/wsccr/docs/Final%20Report_Pro_Se_11_01.pdf; *see also* Greacen, *supra* note 18, at 11.

20 *Id.*

21 Riches, *supra* note 17, at 12.

be able to meet this standard.[22] Pro se pleadings may be viewed with tolerance, but the court is not required or technically permitted to provide any other assistance.[23]

III. When Opposing Pro Se Litigants

In addressing the influx of pro se litigants, the legal system needs to consider both how to help those who are capable of proceeding without legal assistance and how to provide adequate assistance to those who cannot proceed on their own. As members of a professional organization, attorneys need to actively pursue means to "uphold legal process" and ensure equal access to courts, as is mandated by the Model Rules of Professional Responsibility.[24]

Providing assistance to pro se litigants will result in a variety of benefits for the legal system, including saved time in courtrooms, minimized unproductive court appearances, expeditious handling of cases and an increased ability of the court to deal with its overflowing caseload.[25] By protecting the legal system, the overall community will also benefit from the more efficient handling of legal matters by the court system, cases will be resolved sooner, workers will need less time away from work to handle their legal matters and the public will have greater confidence in the legal system.[26] Despite the benefits of providing limited assistance to an unrepresented party, attorneys must use extreme caution in their dealings with these parties, since there exists a great potential for malpractice or ethical complaints.[27]

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22 Brian L. Champion, *Defending Against a Pro Se Plaintiff: When the Plaintiff is David and You're Goliath*, 20 ME. B.J. 236, 237 (2005); *see also* Riches, *supra* note 17, at 11.

23 Champion, *supra* note 22, at 237.

24 MODEL RULES OF PROF'L CONDUCT . (2004).

25 Executive Summary, California Judicial Council's Task Force on Self-Represented Litigants, at 2 (2003) [hereinafter Task Force on Self-Represented Litigants], available at http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Executive_Summary.pdf.

26 *Id.* at 3.

27 Cornelius D. Helfrich, *Facing a Pro Se Opponent*, 14 COMPLEAT LAW 41, 42 (Sum. 1997).

A. *When Opposing Pro Se Litigants*

As litigants increasingly appear pro se in family law matters, it is important for all attorneys to follow the lead of the best lawyers in the field. The Model Rules mandate that attorneys "zealously" advocate on behalf of clients, but the same standards also suggest promotion and improvement of the law to strengthen the entire system.[28] Attorneys need education on how to maintain the integrity of the system through providing competent representation to their clients and treating the opposing party in a manner that is courteous, fair and forthcoming with necessary and relevant information. Courts also need to create channels through which unrepresented parties may obtain the assistance they need to fully access the legal system in an expeditions and reasonable manner.

In addition to basic guidelines to ensure justice, attorneys are required to comply with certain obligations in their contact with their opponents. When dealing with anyone, but especially an unrepresented party, an attorney should "not state or imply that the lawyer is disinterested."[29] For the sake of justice, it is imperative that an attorney correct any misunderstanding that an unrepresented party may have as it relates to the role of the attorney in the proceeding.[30] The attorney must take precautions to ensure that the unrepresented party fully understands the adversarial nature of the court system and knows that the attorney is representing someone whose interests may directly conflict with the interests of the unrepresented party. The attorney dealing with unrepresented parties shall not give legal advice other than to suggest obtaining the advice of independent counsel, especially when the interests of the opposing party are in direct conflict with the interests of the attorney's client.[31]

An attorney, however, is not prohibited by this rule from negotiating a settlement with an unrepresented party.[32] Under those circumstances, attorneys should again disclose their relationship with their clients and recommend obtaining independent

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28 MODEL RULES OF PROF'L CONDUCT . (2004).

29 MODEL RULES OF PROF'L CONDUCT R. 4.3 (2004).

30 *Id.*

31 *Id.*

32 ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS Sec. 4.3.4 (2002), *at* http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf.

legal advice to the unrepresented parties, but after that attorneys are permitted to inform unrepresented parties of the terms under which their clients will settle, prepare any settlement documents and explain the attorney's views of the meaning of the document and any associated legal obligations.[33] Any settlement that is reached should be put on the record in front of a judge with the attorney questioning the unrepresented party to ensure that party's full understanding of the agreement and to determine their satisfaction with the agreement at the time it is reached.[34]

When an attorney is opposing a pro se litigant, the attorney should consider having a conversation with the client about the some of the differences that may arise in a dispute with a self-represented opponent, including potential delays that may arise and the common difficulties that pro se parties encounter in the judicial system.[35] In addition to having a discussion with the client about the opposing party, it may be necessary to write a letter to the opposing pro se party, making sure that the letter contains a suggestion to retain counsel, and clearly stating that as an attorney for their opposition, the lawyer will not be providing any advice and will in fact be in an adversarial relationship with them due to the nature of the court process.[36] When writing this letter, or sending any other information on the matter, attorneys should make sure that the documents are sent in a manner that can be traced and that copies are kept in the file in the event that disputes arise in the future.[37] Despite the inherently adversarial nature of the relationship, an attorney should treat a pro se opponent with the same courtesy, respect and patience that is due to any courtroom opponent.[38] Other suggestions to continue the natural progression of the matter may include providing pro se parties with copies of appropriate rules of evidence and procedure.[39]

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33 Harris, *supra* note 4, at 43-44.

34 Helfrich, *supra* note 27, at 42.

35 Champion, *supra* note 22, at 238.

36 Harris, *supra* note 4, at 42.

37 *Id.*

38 Laura W. Morgan, *Ethical Consideration for an Attorney Dealing with a Pro Se Party*, 10 DIVORCE LITIG. 94 (1998).

39 Champion, *supra* note 22, at 238.

If the matter goes to trial, attorneys will likely face additional problems in determining how to both zealously advance the interests of their clients and ensure timely resolution of the conflict. The pro se litigant is unlikely to fully understand the nature and requirements of the proceeding. If possible, in trial or in pre-trial discussions, begin with a statement of procedural or evidentiary issues that may arise. This will often create a roadmap to assist all parties in advancing the proceedings.[40] Additionally, attorneys have a duty to their clients and to the court to preserve the record. If the unrepresented party is presenting inadmissible testimony or evidence, it may be best to use some discretion and object to testimony that will be damaging to the attorney's case but allowing in neutral or helpful evidence, so as to not irritate the court or anger the unrepresented party.[41] In all matters both in and out of court, the unrepresented party will, like anyone else, respond to the tone that is set. As the only representative of the legal profession, it is the duty of the attorney to keep all matters professional and respectful. This will ensure a happier resolution for all involved.

IV. The Role of the Bar in the Future of Domestic Relations Law

In addition to interacting with unrepresented opponents, the bar has other opportunities to shape the development of the "pro se phenomenon."[42] This can be accomplished in many ways, including the expansion of unbundled legal services, increased pro bono assistance, and the provision of more resources, including the provision of both financial assistance and educational information about the court system and specific legal processes.

A simple web search for a common legal term, such as "dissolution" or "child custody" will bring up a variety of websites. The information and forms provided may or may not be proper for the circumstances or the jurisdiction. By providing assistance to the unrepresented party, either through unbundled services, limited advice, research assistance or through the provision of

40 Helfrich, *supra* note 27, at 43.

41 *Id.* at 42-43.

42 Swank, *supra* note 3, at 373, 385.

simple forms on a court's website, time, effort, money and other resources can be preserved.

Providing assistance to pro se litigants will result in a variety of benefits for the legal system, including saved time in courtrooms, minimized unproductive court appearances, expeditious handling of cases and an increased ability of the court to handle its overflowing caseload.[43] By protecting the legal system, the overall community will also benefit from the more efficient handling of legal matters by the court system, cases will be finally resolved sooner, workers will need less time away from work to handle their legal matters and the public will have greater confidence in the legal system.[44]

In a paper for the future of self-represented litigation, M. Sue Talia lists several ways to "engage the private bar," in the development of programs to assist parties who are unwilling or unable to pay for full legal counsel. Included in the list are permitting the expansion of unbundled legal services, seeking attorneys who would be interested in providing limited scope legal services, and providing training and resources to those attorneys.[45]

A. *Unbundled Legal Services*

Despite financial restrictions, many people are willing and able to pay for some type of limited assistance as they prepare for their day in court.[46] When people have been permitted to purchase limited scope legal services, they have been pleased with the assistance and attorneys tend to report equal satisfaction in providing unbundled services.[47]

While full legal representation may be impractical and unnecessary for many pro se litigants, limited scope or unbundled services are often viable options.[48] Unbundled services that may prove to be beneficial may include coaching a client for trial, preparing pleadings for a client to file (sometimes referred to as ghostwriting), or providing information to a client about an area

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43 Task Force on Self-Represented Litigants, *supra* note 25, at 2.

44 *Id.* at 3.

45 Talia, *supra* note 6, at 100.

46 *Id.* at 99-100.

47 *Id.* at 100.

48 *Id.*

of particular concern, such as custody or property division.[49] The provision of limited legal services tends to improve the satisfaction of otherwise unrepresented parties with the legal system.[50] Many attorneys who provide limited services find that this area provides as much or more satisfaction than their regular service clients.[51] Additionally, limited representation may open up the market for legal clients, providing legal assistance to those members of society who can pay or are willing to pay for legal services, but on a somewhat limited basis.[52]

Some areas of unbundled services have presented problems for the attorneys who engage in them. Across the country courts have looked at "ghostwriting"—the drafting of pleadings for a pro se litigant to file with the court without acknowledgment of the attorney having drafted the document—with disfavor.[53] The disapproval stems from the more lenient standards that are imposed by the court when a pro se pleading faces a motion to dismiss or a motion for sanctions: if the court is not informed that the document was prepared by an attorney, the court does not have all of the facts necessary to make an informed decision.[54] Courts have dealt with the practice of ghostwriting in different ways. Colorado, for example, requires the drafting attorney to include his or her name, address telephone number and registration number on the pleading, but says that the inclusion of this information on the document does not create an entry of appearance.[55]

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49 Margaret Graham Tebo, *Loosening Ties: Unbundling of Legal Services Can Open Door to New Clients*, 89 A.B.A.J. 35 (2003).

50 Talia, *supra* note 6, at 100.

51 *Id.*

52 *Id.*

53 Kerry Hill, *Meeting the Challenge of Pro Se Litigation; An Update of Legal and Ethical Issues,* American Judicature Society, (2000), (update of the 1999 document by Nancy Biro), available at http://www.ajs.org/prose/pro_legal_ethical.asp. The American Bar Association issued an opinion in 2007 stating that the fact that a litigant submitting papers to a tribunal had received legal assistance "behind the scenes" is not material to the merits of the litigation and therefore no disclosure of the "ghostwriting" is required. ABA For. Op. 446 (May 5, 2007). (Undisclosed Legal Assistance to Pro Se Litigants).

54 James M. McCauley, *The Ethics of Making Legal Services Affordable and Making the Legal System More Accessible to the Public,* Virginia State Bar, available at http://members.aol.com/jmccauesq/ethics/articles/probono.htm.

55 Hill, *supra* note 53.

Through the expansion of unbundled services, attorneys may be better able to offer pro bono services on a limited basis. This would enable more attorneys to offer funding or some specific limited services such as the donation of several hours each month to assist pro bono clients through research assistance or providing a general understanding of the court system and the particular type of proceeding in which the pro se party will be participating.[56]

B. *Self-Help Centers*

A 2002 report prepared for the Center for Families, Children & the Courts California Administrative Office of the Courts found that current self-help programs only serve a small proportion of the pro se litigants in any jurisdiction, but that these programs are "universally appreciate[d]" by the self-represented litigants who do utilize them.[57] The appreciation of the public often stems from the generally higher levels of preparation, self-confidence and better case presentation.[58]

By providing services to pro se litigants, the legal system will receive many benefits. Unrepresented parties may be better prepared when they come into the courtroom. They will have a better understanding of the proceeding and their evidence may be in better order than if they had proceeded completely on their own. Additionally, through support, some litigants may discover that the legal system is not the best route through which to achieve their desired results.[59] Additionally, through client contact, self-help centers may help individuals determine that their cases are too complex or too important (e.g., cases involving denial of parenting time or significant division of property) to not have additional assistance from a professional and provide referrals to state bar associations or pro bono organizations if the individual is unable to pay for legal services.[60]

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56 Riches, *supra* note 17, at 8-11.

57 Greacen, *supra* note 18, at 2.

58 *Id.*

59 Tina Rasnow, *Where We Are and Where We Should be Going: Helping People Before the Court,*. Paper Three in the Summit on the Future of Self-Represented Litigation 38, available at http://ncsconline.org/WC/Publications/Res_ProSe_FutSelfRepLitfinalPub.pdf.

60 *Id.*

In viewing self-help centers, which are found in many jurisdictions across the country, a public court-based self-help center seems to be most effective in assisting pro se litigants and increasing consumer confidence in the legal system.[61] In creating these centers, it is recommended that an attorney supervise the center in order to best serve the public.[62] The centers seem to best serve the public when they are able to work with the litigant up front and conduct an initial "triage" assessment to help move the case in the best direction.[63] After providing the initial information, the service should remain open to litigants throughout the entire process, including helping the litigant obtain post-judgment relief, if necessary.[64]

To be most effective, the self-help centers should be implemented on the same basis across a jurisdiction, in a manner that would allow the center in one location to provide support throughout the state.[65]

Court systems can provide additional assistance for the community they serve by offering outreach and education programs. These programs can be useful in educating the public on the general court process, how to proceed in different types of cases, where to find additional assistance and realistic court expectations.[66] Such programs have been developed through public access television, educational facilities and libraries across the country.

C. *Internet Services*

Many web sites offer legal forms or legal services with the click of a button. Unfortunately, many for-profit on-line services create additional problems for the pro se litigant. They may charge exorbitant prices for a simple form. They may misrepresent the services that will be provided, such as providing a ge-

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61 *See generally* Maryland Administrative Office of the Courts, FINAL REPORT: AN EXECUTIVE PROGRAM ASSESSMENT FOR STATE COURT PROJECTS TO ASSIST SELF-REPRESENTED LITIGANTS, (2005), (providing an assessment of client satisfaction, program assets and areas of improvement of nine programs developed to assist pro se litigants in various jurisdictions across the country).

62 Task Force on Self-Represented Litigants, *supra* note 25, at 4.

63 *Id.*

64 *Id.*

65 *Id.* at 4-5.

66 *Id.* at 6.

neric form when the service paid for was jurisdiction specific, leaving the purchaser with an expensive but inadequate document that the court cannot accept.

Many court systems across the country have developed comprehensive information online.[67] These web sites are valuable sources of information for pro se litigants, providing forms, local rules, procedural information and other standards related to litigation preparation. The sites generally have standardized information, but they do not provide legal advice or individualized assessment.

V. Conclusion

The influx of pro se litigants is changing the American court system. To provide equal access to justice and maintain work for the profession, the legal system must take steps to preserve its integrity when dealing with the self-represented opposing party and it must continue to pursue alternative to traditional legal services that are available to pro se litigants at realistic prices. The number of pro se litigants will continue to increase and place additional burdens on the courts. Attorneys still have a valuable role to play in indirectly assisting these litigants and thereby promoting the interest of justice.

Leslie Feitz

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67 Mary Flaherty, *How Courts Help You Help Yourself: The Internet and the Pro Se Divorce Litigant*, 40 FAM. CT. REV. 91, 94 (2002). Examples of comprehensive court-administered self-help websites include California Courts Self-Help Center at www.courtinfo.ca.gov/selfhelp/ and the Superior Court of Arizona, Maricopa County's Self-Service Center at http://www.superiorcourt.maricopa.gov/ssc/.

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ETHICALLY SPEAKING

Dealing with an Opposing Party Who is Proceeding *Pro Se*

By John M. Burman

When I was in law school, I thought having a client whose opponent did not have an attorney would be a great thing. Such a case would, I thought, be easy. It would be sort of like playing a game with no opponent–an almost guaranteed win with little or no opposition. I could not have been more wrong.

The reality is that representing a client against a party proceeding *pro se* presents challenges much greater than representing a client against a party who has an attorney. Everything is harder, not easier, both for the lawyer and the judge when one party is *pro se.* Unfortunately, neither the rules which govern lawyers' behavior[1] nor the code which regulates judicial conduct[2] address in any detail the issues which arise, leaving the question of how to deal with a party who does not have a lawyer largely unanswered. This column is an attempt to provide some guidance to lawyers and judges when they find themselves in the inherently awkward position of dealing with an unrepresented party.

Defendants in criminal matters are entitled to lawyers paid by the government if the potential outcome is incarceration and they cannot afford their own (they also have a right to represent themselves[3]).[4] In most civil cases, however, there is no such right. (There are exceptions. For example, a parent in a termination of parental rights case[5] or a parent in certain juvenile cases also has a right to counsel.[6]) The absence of a right to counsel does not mean, of course, that the issues in a lawsuit or other legal matter do not involve vitally important matters, such as custody of a child in a divorce or paternity action, or significant financial liability for something. Rather, such actions involve critically important issues, but one simply does not have a right to an attorney (an indigent person may qualify for the services of a legal aid lawyer, but qualifying does not create a right to counsel. Most such offices cannot come close to meeting the demand for their services.) In addition to persons who qualify for, but cannot obtain legal assistance from legal aid offices, the sad truth is that many persons who are not eligible for civil legal assistance are not able to pay for an attorney to represent their interests. (I often joke that I could not afford to hire myself. It's not really a joke. While I could afford some of my time, I would be very hard pressed to retain myself for any length of time, such as to represent me in a contested divorce case).

As a consequence of the high cost of legal representation, eighty percent of the legal needs of low-income Americans go unmet.[7] The same is probably true of the legal needs of low and

lower-middle class Americans. It has become fairly common, therefore, for one party to a lawsuit or other legal matter to be without representation.

Natural persons have a right to represent themselves. "Any person may appear, prosecute or defend any action pro se. Partnerships and sole proprietorships may appear through the owners."[8] By contrast, "Corporations and unincorporated associations (other than partnerships and individual proprietorships) may appear only through an attorney licensed to practice in Wyoming."[9] (In Small Claims Court, "corporations, partnerships, associations or other organizations may litigate actions on behalf of themselves in person or through authorized employees, with or without an attorney . . ."[10])

The Preamble to the Wyoming Rules of Professional Conduct (the "Rules") provides "general orientation" to the Rules.[11] It reminds lawyers that they "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."[12] Because of these deficiencies, "all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel."[13] To try and meet that need, the Rules contain an aspirational goal for each lawyer to provide fifty hours of *pro bono* service per year.[14] In addition, that same sense of professionalism should carry over into lawyers' treatment of persons who are proceeding *pro se*. Finally, lawyers should never forget that the Rules "do not . . . exhaust the moral and ethical considerations that should inform a lawyer."[15]

The Ethical Framework for Lawyers

The Rules are premised, for the most part, on a lawyer representing a client[16] whose interests are adverse to those of another party who is also represented by a lawyer. With two exceptions, the Rules do not address the responsibilities of a lawyer who either represents a client proceeding against another party who is proceeding *pro se* or a lawyer who is dealing with one or more parties whom the lawyer does not represent (while the Preamble and Scope of the Rules also mention persons proceeding *pro se*; the Rules, not the Preamble, Scope or Commentary, bind lawyers. "[T]he text of each Rule is authoritative."[17]).

The first, and most important, time the Rules address a lawyer's responsibility when representing a client against a person proceeding without an attorney is in Rule 4.3, which is entitled "Dealing with unrepresented persons." It says:

> 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.[18]

Six phrases in the Rule are in bold, as each of them articulates an important duty for a lawyer representing a client against a person proceeding *pro se.*

First, the Rule applies when a lawyer is "dealing on behalf of a client with a person who is not represented by counsel."[19] It applies, therefore, whenever a lawyer is representing a client whose adversary does not have a lawyer. The Rule does not say that a lawyer must inquire whether he or she has a lawyer, but it should be read as though it did. The reason is simple. The Rule applies whether the lawyer knows or not. By contrast, if the lawyer "knows"[20] that the other person is represented by a lawyer, the lawyer "shall not communicate about the subject matter of the representation" with that person, unless the lawyer has the permission of the other lawyer, or is authorized to make the communication "by law or court order."[21] In other words, if the person does not have a lawyer, Rule 4.3 applies. If he or she does, Rule 4.2 applies. The only way for a lawyer to know which Rule to follow is to ask if the person has a lawyer. Accordingly, Rule 4.3 should be read to include a duty to ask if the person with whom the lawyer is communicating is represented by a lawyer.

Second, when a lawyer is dealing with a person proceeding *pro se*, the lawyer "shall not state or imply that the lawyer is disinterested."[22] Again, the reason is simple. Often, if not usually, a non-lawyer assumes that a lawyer is looking after his or her interests, even when the lawyer has been retained by the other party. While that makes no sense to lawyers, it is a common misconception. In particular, an unrepresented person may not understand that the duty of the lawyer retained by the other party is to act "zealously"[23] on behalf of the other party. Instead, the lawyer may be incorrectly viewed as a disinterested professional whose job is to seek justice (although a prosecutor has the duty to act as a "minister of justice,"[24] other lawyers do not.).

The simple fact is that a lawyer is not disinterested, and to state or imply that he or she is violates a lawyer's obligation not to "make a false statement of material fact of law to a third person."[25] A lawyer should, therefore, assume that an unrepresented person does not understand the lawyer's role, and he or she should always take steps to make sure the unrepresented party knows who the lawyer represents, and that the lawyer's job is to get the best deal possible for his or her client. Those efforts should be documented in any phone conversation, forms or letters that the lawyer prepares.

Third, even if the lawyer does not make the foregoing assumption, there are times when the lawyer must clear up any misunderstanding about the lawyer's role. That is when "the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role."[26] The Rule's use of both "know" and "reasonably should know" imposes additional obligations on the lawyer. "Knows" is subjective, meaning "actual knowledge . . . [although a] person's knowledge may be inferred from circumstances."[27] (The last clause simply means that a lawyer may not close his or her eyes to the obvious.[28]) The use of the phrase "reasonably should know" brings in the objective, reasonable lawyer standard: "Reasonably should know" means that "a lawyer of reasonable prudence and competence would ascertain the matter in question."[29] The only way to "ascertain" whether the person has a lawyer is to ask. The only way, therefore, that a lawyer can discharge his or her duties under Rule 4.3 is to inquire if the apparently unrepresented person has a lawyer. The first statement out of a lawyer's mouth,

therefore, when the lawyer is dealing on behalf of a client with any other person, should be to ask whether that person has a lawyer. If the answer is "no," Rule 4.3 applies. If the answer is "yes," Rule 4.2 (the anti-contact with represented parties' rule) applies.

Fourth, if the lawyer learns that the unrepresented person misunderstands the lawyer's role, "the lawyer shall make reasonable efforts to correct the misunderstanding."[30] The inclusion of "reasonable" in the obligation, once again, brings in the objective standard of "a reasonably prudent and competent lawyer."[31] Such a lawyer would explain the identity of the lawyer's client, as well as how he or she is looking after the lawyer's client's interests, and not those of the unrepresented person.

Fifth, the lawyer must be careful not to give legal advice, for which the unrepresented person is likely to ask. A lawyer who represents a client and is dealing with an unrepresented party "shall not give legal advice to an unrepresented person, other than the advice to secure counsel."[32] This prohibition makes sense as the giving of legal advice may give rise to an attorney-client relationship.[33] If that happens, the lawyer will have two clients, with interests that are likely to be directly adverse. That will result in a concurrent conflict of interest which is probably one that may not be waived, and the attorney will have to withdraw from representing both clients. (It is unethical to even ask for a waiver of a conflict that is not waivable.[34])

Finally, the advice to obtain counsel is to be given "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."[35] There will be few times that a lawyer dealing with an unrepresented party will not "know" or "reasonably should know" that the interests of the lawyer's client and those of the adverse party "are or have a reasonable possibility of being in conflict." Accordingly, a lawyer should assume a conflict, or at least a potential conflict, and advise the unrepresented party to retain an attorney.

Read as a whole, the Rule boils down to a simple proposition. A lawyer should not take unfair advantage of an unrepresented party. While the argument may be made that a lawyer ethically must do so to benefit the lawyer's client, as part of being a zealous advocate, that argument does not fly very far. It is based on the premise that a represented client will "benefit" by his or her lawyer taking unfair advantage of an unrepresented party. That is not always the case. Sometimes the wiser, and safer, course is to not push the envelope and run the risk that an apparently advantageous agreement or result is thrown out.

Although the case has not arisen in Wyoming, it has elsewhere.

In *In re Matter of the Marriage of Foran*,[36] the Washington Supreme Court considered the enforceability of a pre-nuptial agreement which had greatly benefitted one party who had been represented, at the expense of the other, who had not. The agreement had been drafted by the lawyer for the husband-to-be.[37] The day before the parties were to leave for their wedding trip, they came in to read and sign the agreement.[38] The lawyer advised the wife-to-be that he was not her lawyer, and that she should seek the advice of another lawyer.[39] She declined and signed the agreement. At the time of the divorce some years later, the wife challenged the

agreement, which was found to be unenforceable. The Washington Supreme Court upheld that determination.

One reason for its ruling was that the then prospective wife "did not have sufficient time to consult with independent counsel . . . . The only realistic choice would have been to postpone the wedding . . ."[40] The court discussed the reason for providing such an opportunity. Its reasoning is apt to the issue of a lawyer negotiating a deal with an unrepresented client that significantly favors the lawyer's client. "The purpose of independent counsel is more than simply to explain just how unfair a given proposed contract may be; **it is for the primary purpose of assisting the subservient party to negotiate an economically fair contract.** "[41]

A *Foran* type analysis is likely similar to how a court will review a one-sided transaction in which the unrepresented client makes a claim that he or she misunderstood the lawyer's role, and thought the lawyer was there to help both. The lawyer better be able to show that he or she complied with Rule 4.3, or the formerly unrepresented party will have a good argument to set aside the agreement. (Agreements entered into in violation of the rules may be voidable.[42])

To avoid such a situation, a lawyer should advise the client that an unfair agreement negotiated under inappropriate circumstances may not be enforceable. Only with such advice can the client make an "informed decision" about whether to proceed with the agreement.[43] If the client insists on pursuing such a path, even after being advised that the agreement may not be enforceable, that decision should be followed, so long as it does not involve a fraudulent or criminal act.[44]

The other mention in the Rules of an unrepresented party is in Rule 2.4, a new Rule that describes the duties of a lawyer serving as a "third party neutral," the Rule's term for "mediator." As in Rule 4.3, which addresses a lawyer's duties when dealing with an unrepresented party and is described above, Rule 2.4 strives to prevent an unrepresented party from misunderstanding the role of a lawyer acting as a "third party neutral."

Traditionally lawyers represent clients, and that is still their primary function.[45] Now, however, they often play other, non-representational roles: "[A] lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. . . ."[46] The key to acting as a "third-party neutral" is that the lawyer does not represent any of the parties to the dispute. Rather, the lawyer "assists two or more persons who are not clients . . . to reach a resolution of a dispute . . ."[47]

It is increasingly common for cases to go to mediation. Wyoming even has a rule that allows either party or the judge to ask that a case go to some type of ADR. If that happens, the lawyer who is acting as the third-party neutral has duties similar to a lawyer for a client who is dealing with an unrepresented party: The lawyer

> [S]hall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer **shall explain the difference** between the lawyer's

> role as a third-party neutral as opposed to a lawyer's role as one who represents a client.[48]

The goal is the same. That is, unrepresented persons should understand that the third-party neutral does not represent them, and is not, therefore, looking after their interests as an attorney would. Unlike an attorney who represents another party, however, the third-party neutral is a disinterested professional, from whom all parties can properly expect something different.

Beyond Lawyers' Ethics

As noted earlier, the Rules "do not . . . exhaust the moral and ethical considerations that should inform a lawyer."[49] Instead, they establish, for the most part, the floor, beneath which a lawyer may not sink, and the ceiling, above which a lawyer may not rise. In between is a lot of room, in which a lawyer can ethically decide how to practice. It is, unfortunately, ethical to be a jerk. It is also ethical to be a professional, treating everyone, clients, lawyers, judges, court personnel, unrepresented parties, and others, with dignity and respect.

Far too often, lawyers decide that it is in their interests, or their clients', or both, to unfairly take advantage of an unrepresented party. While it is certainly ethical to get a good deal for one's client, that can be done professionally and civilly. Perhaps the ultimate question a lawyer should ask of a proposed course of conduct is "how will this benefit my client and the legal system in the long run?" Too often, the question is confined to whether there is some short-term gain. And while there might be, that should not be the question.

A good guide to how lawyers should behave, not just what is or is not ethical, is contained in the Litigation Standards adopted by the United States District Court for the District of Wyoming.[50] Though the standards are designed primarily for lawyers interacting with other lawyers and the court, they apply, in part, to lawyers' treatment of non-lawyers, and their general standards should apply to everyone.

For the most part, the Litigation Standards are common sense. The standards were "specifically designed to apply to those attorneys who perceive themselves solely as combatants or believe they are retained to win at all costs without regard to fundamental principles of justice."[51] The standards contain what should be self-evident guidelines, such as "[a]ttorneys shall treat each other, the opposing party, the Court and members of the court staff with courtesy and civility, and conduct themselves in a professional manner at all times"[52] Similarly, it should go without saying, but "[a]ttorneys shall not engage in obnoxious or antagonistic behavior."[53] Finally, while the guidelines contain numerous other admonitions, I particularly like the statement that "[c]ursing, sarcastic commentary, use of an attorney's voice in a loud, angry or hostile manner in the course of out-of-court depositions or other proceedings are violations of this [litigation] standard."[54]

Why a lawyer would need to be told to be a decent human being in dealing with others, including judges and lawyers, is a mystery, but the standards were obviously enacted for a reason. And while the vast majority of Wyoming lawyers don't need to be told to behave, there

are a few who do. Similarly, the vast majority of lawyers will treat *pro se* parties with the respect and dignity they deserve. There will be those, however, who do not, somehow thinking it is in their, or their clients' best interests not to. They are wrong. There is no benefit, and a lot to lose, by acting otherwise.

The Ethical Framework for Judges

Having one party unrepresented places a judge in an inherently awkward position. On the one hand, judges do not want to penalize parties who have retained counsel by helping unrepresented parties too much. On the other, judges are understandably reluctant to see injustice or unfairness happen to anyone, and yet judges cannot intervene too much. How to balance those competing considerations is a challenge.

The Wyoming Code of Judicial Conduct (the "Code") places great importance on the independence and integrity of the judiciary.[55] The Code makes it clear that judges should afford everyone the chance to be heard, but it doesn't provide much guidance on how that is to be done. Canon 2, which says that a judge "Shall Avoid . . . the Appearance of Impropriety," places a higher burden on judges than on lawyers (the "appearance of impropriety" standard was part of the Wyoming Code of Professional Responsibility. That code, however, was replaced in 1986 by the Wyoming Rules of Professional Conduct, which did not contain the appearance standard. The current Rules are the same in that respect.) Avoiding the appearance of impropriety seems to include treating all litigants, whether represented or not, with dignity and respect.

The Code also directs that every litigant, represented or not, should get his or her day in court. "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law."[56] At times, that right is more important than the outcome. One, even a lawyer, has a much easier time accepting a negative result if one feels that he or she has been heard and treated fairly. As the United States Supreme Court has noted, "the courts have an independent interest in assuring compliance with ethical standards and the appearance of fairness . . . ."[57]

Courts generally follow fairly formal, prescribed procedures. The Wyoming Rules of Civil Procedure generally apply in civil proceedings. They "govern procedure in all courts of record in the State of Wyoming, in all actions, suits or proceedings of a civil nature and in all special statutory proceedings" unless otherwise specified.[58] In criminal cases, the Wyoming Rules of Criminal Procedure generally apply.[59] Similarly, the Wyoming Rules of Evidence also usually apply to most judicial proceedings.[60] Having the Rules of Procedure and the Rules of Evidence apply makes it difficult, at best, for a non-lawyer to know what to do or how to do it.

The most important exception to the applicability of the rules of procedure and evidence is Small Claims Court. In contrast to most courts, which are designed for lawyers, Small Claims Courts are designed for lay persons. "No formal pleading other than the claim and notice is necessary. The hearing and disposition of the hearing shall be informal."[61] Furthermore "strict" rules of evidence "shall not apply" in Small Claims Court.[62] Judges in Small Claims Courts, therefore, have substantially more leeway to provide assistance to *pro se* litigants.

Beyond Judicial Ethics[63]

How far a judge should go in assisting a *pro se* litigant will always be a difficult decision. It will not be difficult, however, to treat everyone with dignity and respect. Just as there should be no need to tell lawyers they should behave decently, there is no reason to tell judges that either.

Perhaps one of the better suggestions I heard from a judge was that a judge should, at the outset of a trial involving a *pro se* litigant, explain the procedure to be followed. As the perception that most folks, including many law students, have of court is based on what they have seen in the media, explaining how things really work will accomplish a couple of things. First, it will correct any misperception that the lay person has about court. Second, it may convince a lay person that he or she will have the chance to be heard, and, in the meantime, keep quiet (or at least quieter).

Beyond explaining procedural matters, it may help if a judge explains his or her ruling. Telling a person why he or she "lost," or why the judge cannot do what the person wants, may help a great deal.

Finally, when all is said and done, patience and courtesy go a long way. While we all get impatient and want to get on with whatever is next, allowing a person to vent may be the reason he or she is in court. While the time may come that a judge owes it to everyone to put a stop to inappropriate behavior, that time is probably later, rather than sooner.

Summary

Whether we want to admit it or not, we are all, lawyers and judges alike, part of the system. How we behave and treat others will have a lasting impact. It will determine whether the unrepresented persons with whom we interact respect the system or despise it. As lawyers, the words of the preamble to the Wyoming Rules of Professional Conduct should ever be in our minds. "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[64] The quality of justice depends, in significant part, on how participants, whether represented or not, are treated.

Similarly, "[t]he role of the judiciary is central to American concepts of justice and the rule of law. . . . [J]udges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system."[65] Treating all litigants with patience and courtesy will do much to enhance the public's confidence in the legal system.

At the end of the day, we lawyers and judges can choose how we treat others, including *pro se* litigants. We can choose to treat them with dignity and respect, or with impatience, as some lesser beings who are not blessed (or cursed) with a legal education or a black robe. And after all, "it is the choices we make . . . . that show who we truly are, far more than our abilities."[66]

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[1] Lawyers are subject to the Wyoming Rules of Professional Conduct.

[2] Judges are subject to the Wyoming Code of Judicial Conduct.

[3] McKaskle v. Wiggins, 465 U.S. 168, 174, 104 S. Ct. 944, 949 (1984)("The Counsel Clause itself, which permits the accused "to have the Assistance of Counsel for his defense," implies a right in the defendant to conduct his own defense . . .")

[4] *See e.g.* Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 796 (1963); *and* Dean v. State, 931 P.2d 942 (Wyo.1997) ("The Sixth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment to the United States Constitution and Article 1, Section 10 of the Wyoming Constitution, guarantees a criminal defendant the right to have effective assistance of counsel.")

[5] WYO. STAT. § 14-2-318(a) (LexisNexis 2007) ("The court may appoint counsel for any party [in a termination of parental rights case] who is indigent.").

[6] *Id.* at § 14-3-211(b) ("The court may appoint counsel for any party [in a child protection case] when necessary in the interest of justice.")

[7] The Current Crisis in the Delivery of Legal Services to the Poor, Excerpts from ABA Committee Report Supporting 1993 Amendments to Rule 6.1, *reprinted in* S. GILLERS & R.D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 2004 334 (Aspen 2004)

[8] UNIFORM RULES FOR DISTRICT COURTS OF THE STATE OF WYOMING, 101(a) (LexisNexis 2007). The District Court Rules also apply in Circuit Courts. UNIFORM RULES FOR THE CIRCUIT COURTS OF WYOMING, R. 1.02 (LexisNexis 2007)

[9] UNIFORM RULES FOR DISTRICT COURTS OF THE STATE OF WYOMING, 101(b) (LexisNexis 2007)

[10] WYO. STAT. § 1-21-202(b) (LexisNexis 2007).

[11] WYOMING RULES OF PROFESSIONAL CONDUCT, Scope [20] (LexisNexis 2007)

[12] *Id.* at Preamble [6].

[13] *Id.*

[14] *Id.* at Rule 6.1. "A lawyer should aspire to tender at least fifty (50) hours of pro bono legal services per year." *Id.* at Rule 6.1(a).

[15] WYOMING RULES OF PROFESSIONAL CONDUCT, Scope [15] (LexisNexis 2007).

[16] *See e.g. Id.* at Preamble [1] ("A lawyer . . . is a representative of clients . . .")

[17] *Id/* at Scope [20].

[18] *Id.* at Rule 4.3 (emphasis added).

[19] *Id.*

[20] "Knows" is a defined term. It means "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.." *Id.* at Rule 1.0(f).

[21] WYOMING RULES OF PROFESSIONAL CONDUCT, R. 4.2 (LexisNexis 2007).

[22] *Id.*

[23] Although the word "zealously" no longer appears in the Rules themselves, it is included in the Preamble (paragraph [2]) and Comment [1] to Rule 1.3.

[24] *Id.* at Rule 3.9, cmt. [1].

[25] *Id.* at Rule 4.1(a).

[26] *Id.* at Rule 4.3.

[27] *Id.* at Rule 1.0(g).

[28] *See e.g.* United States v. Nicholson, 677 F.2d 706, 710-11 (9th Cir.1982) (One who is aware of a high probability of the existence of a fact, but deliberately ignores the fact, is deemed to have knowledge of the fact).

[29] WYOMING RULES OF PROFESSIONAL CONDUCT, R. 1.0(k) (LexisNexis 2007).

[30] *Id.* at Rule 4.3.

[31] *Id.* at Rule 1.0(i).

[32] *Id.* at Rule 4.3.

[33] *See e.g.* Carlson v. Langdon, 751 P2d 344, 347 (Wyo. 1998). (The attorney-client relationship in Wyoming is contractual. The contract may be an express one; it may also, however, "be implied from the conduct of the parties.")

[34] WYOMING RULES OF PROFESSIONAL CONDUCT, R. 1.7, cmt. [14] (LexisNexis 2007) (Some conflicts are not subject to waiver, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's decision.)

[35] *Id.* at Rule 4.3.

[36] 834 P.2d 1081 (Wash. 1992).

[37] *Id.* at 1084.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 1088, n. 10.

[41] *Id.* at 1089 (emphasis in original).

[42] ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 148 (5th ed. 2003).

[43] WYOMING RULES OF PROFESSIONAL CONDUCT, R. 1.4(b) (LexisNexis 2007).

[44] A lawyer "shall abide by a client's decisions concerning the objectives of the representation . . ." *Id.* at Rule .1.1(a). A lawyer may not, however, "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ." *Id.* at Rule 1.2(d).

[45] *See e.g. Id.* at Preamble [2] ("A lawyer performs various functions. As advisor . . . . As an intermediary . . . . As advocate . . . . As negotiator . . . . As an evaluator . . . . As a guardian ad litem . . . .")

[46] *Id.* at Preamble [3].

[47] *Id.* at Rule 2.4(a).

[48] *Id.* at Rule 2.4(b).

[49] WYOMING RULES OF PROFESSIONAL CONDUCT, Scope [15] (LexisNexis 2007).

[50] The standards are codified at 83.12.1 and are available at the home page of the United States District Court for the District of Wyoming.

[51] *Id.* at Rule 83.12.(b).

[52] *Id.* at Rule 83.12.1(a)(4).

[53] *Id.* at Rule 83.12.1(a)(10).

[54] *Id.* at Rule 83.12.1(a)(12).

[55] WYOMING CODE OF JUDICIAL CONDUCT, Canons 1 ("A Judge Shall Uphold the Integrity and Independence of the Judiciary. ") *and* 2 ("A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities.")

[56] *Id.*, at Canon 4B(7) (LexisNexis 2007).

[57] Wheat v. U.S., 486 U.S. 153, 108 S. Ct. 1692, 1693 (1988).

[58] WYO. R. CIV. P. 1 (LexisNexis 2007).

[59] Wyo. R. Crim. P 1(a) (LexisNexis 2007) (Except as otherwise specified, "these rules govern the procedures to be followed in all criminal proceedings in all Wyoming courts. . . .")

[60] WYO. R. EVI. 101 (LexisNexis 2007) ("These rules govern proceedings in the courts of this state" except as otherwise specified.)

[61] WYO. STAT. § 1-21-205 (LexisNexis 2007).

[62] RULES AND FORMS GOVERNING SMALL CLAIMS CASES, R. 6 (LexisNexis 20 07).

[63] Before writing this section, the author spoke with several judges or former judges about *pro se* litigants.

[64] WYOMING RULES OF PROFESSIONAL CONDUCT, Preamble [1] (LexisNexis 2007).

[65] WYOMING CODE OF JUDICIAL CONDUCT, Preamble (LexisNexis 2007).

[66] Albvbus Dumbledore to Harry Potter, J. K. Rowling, HARRY POTTER AND THE CHAMBER OF SECRETS 333 (Scholastic 1999).

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Law Trends & News

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LITIGATION

Dealing With *Pro Se* Litigants

By Evan L. Loeffler

> *I was reminded the other night ... of Clarence Darrow when he was prosecuted for trying to fix a jury. The first thing he realized was that he needed a lawyer—he, one of the country's great criminal lawyers.*
> Abe Fortas, quoted from *Gideon's Trumpet*, Lewis, A., p. 171 (1964).

The goal of litigation is supposed to be to resolve the problem. Sometimes that goal is obscured by the desire to grind the opposition into the dirt, to heap ashes on the dirt, to spit upon those ashes, and finally to build a monument upon the resting place of the opposition as a testament to the virility of the prevailing party and dangers of opposing him. The job description of a lawyer involved in litigation is not only to assist one's client in achieving the goal of the litigation, but to keep the litigant's attention focused on the goal. As a trained professional, the lawyer is supposed to know better than to sling insults at the other side, to waste time in producing discovery, and to take the proceedings personally. This is why we have lawyers.

Unfortunately, not everyone can afford a lawyer. Some people who are able to do so choose not to employ one. The increasingly prevalent specter of the *pro se* litigant requires litigators to re-think trial strategies and methods of

communication. Those who believe they may simply run over a helpless *pro se* litigant will be unpleasantly surprised by the results of this strategy.

As anyone with litigation experience can attest: litigation sucks. An inordinate amount of time and effort goes into drafting pleadings, discovery, research and preparation, seemingly for the purpose of documenting why an underpaid and overworked judge's decision is wrong. Litigation is not perfect, but it is still considered far better than other less-civilized methods of dispute resolution including dueling and the time-honored tradition of open warfare. In an effort to make litigation less expensive and streamlined, bar associations the world over have implemented rules of procedure. For the most part, professional litigators embrace these rules. The rules assume, however, that the adverse parties are acting as mature adults. Unfortunately, this is not always the case (even among professionals). The *pro se* litigant is generally not as noble-minded as an attorney. By definition the *pro se* is in it for himself and the outcome will affect him in a very real manner in the immediate future. This is not an intellectual exercise; the *pro se* is playing for keeps.

The basic axiom in dealing with *pro se* parties is contained in the Rules of Professional Conduct:

Rule 4.3 of the Model Rules of Professional Conduct: Dealing With Unrepresented Person

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.

Put simply, Rule 4.3 states that a lawyer should not give advice to the *pro se* other than to get a lawyer. State rules and local rules put additional burdens on the attorney, such as identifying the parties and the issues in dispute.

In practice, this is not as easy as it sounds. Frequently, a *pro se* party who has been served with legal documents will call the lawyer who signed them and demand an explanation. The answer, "get a lawyer" is unlikely to resolve the problem or result in anything other than ill will.

In my practice, I deal with *pro* se parties on a regular basis. I have developed some guidelines:

Always Be Polite and Respectful

Don't be rude or nasty to a *pro se*. This should really go without saying. The rules of professional conduct and basic rules of civility apply to all communications (something some lawyers would do well to remember), but this can be difficult when a *pro se* is screaming obscenities at you or questioning your place on the food chain. While it's no excuse, the fact is the *pro se* does not understand the adversary nature of the system and takes everything personally. The fact that you do not agree with her position, mean, in her opinion, you are (a) stupid, (b) evil, (c) unethical, and (d) all of the above, again.

Responding rudely to a *pro se* may occasionally be satisfying, but it does not help your case. The enraged *pro se* will be incented to file motions for sanctions, bar grievances and appeals. Responding to these motions take up valuable time and resources. Whether a lawyer can charge his time to his client for responding to a motion for sanctions is a question for one's conscience and possibly one's malpractice carrier. It is far better to keep it civil pretend not to hear the insults.

Make Your Role Clear

In settlement communications and any other discussion, the *pro se* may ask questions that cross the line into asking for help. Some examples:

- How do I respond to the summons and complaint?
- What should I say if I want to fight this?
- How do I issue a subpoena?
- What happens at a show cause hearing?
- What happens if I file for bankruptcy?

Be firm that you will not give help. The answer to these questions, in summary, as follows:

"My ethical duty as a lawyer requires that I make very clear my role in this matter. I represent the other side, not you. I cannot and will not give you legal advice. You should get a lawyer. I will not refer a lawyer to you." Polite but firm adherence to these rules during communications usually gets the point across.

This does not mean you cannot discuss the merits of the case with a *pro se* litigant. I will explain what relief I am seeking on behalf of my client, and why I believe my client is entitled to that relief. I am careful, however, to keep the discussion away from discussions of civil procedure. I will mention the possibility of settlement and attempt to determine if this is a possibility.

Don't Rely on Using Courtroom Procedure to Win the Case

The lawyer is ill-advised to rely on the court to limit the *pro se* litigant from putting on her case due to the failure to fully comply with pre-trial procedures. It may be a surprise to some attorneys, but judges really are aware of the rule that *pro se* litigants are supposed to be held to the same standards as lawyers.

The fact is many judges will not rigorously enforce this rule. Judges are aware of the high likelihood of *pro se* litigants appealing. They want the record to show that the case was resolved on the merits despite procedural irregularities caused by the *pro se* party's acts and omissions. In Washington State, for example, tenants are required to pay disputed rent into the court registry or to file a sworn statement there is no rent due including the reason why. Even though the rule specifically requires it, a judge will rarely keep the tenant from presenting a defense if the statement fails to meet all the requirements of a sworn statement.

Get Everything in Writing

Of course, this rule applies to all communications relating to litigation, but it is more important when dealing with a *pro se* party. The lack of trust between the parties, coupled with the fact the *pro se* usually does not understand all the legal concepts behind waiver, makes it difficult enough to settle. Proving there was, in fact, a meeting of the minds by following up with a letter or a signed settlement agreement makes a record the lawyer was not "playing lawyer tricks" with the *pro se* litigant and solves a lot of problems.

Don't Take the *Pro Se* Lightly

Prepare for the case as you would against a seasoned litigator. As with attorneys, *pro se* litigants can be of varying degrees of competency. Generally an incompetent attorney is not difficult to spot. On the other hand, in many cases the presumption is that a *pro se* litigant is incompetent. This is a dangerous and frequently incorrect assumption. Many *pro se* litigants are a hell of lot smarter and more experienced than you think. I have seen several attorneys swagger into court assuming they would run roughshod over the hapless *pro se* only to be caught unawares by a well-prepared opposition. Also, it is always possible an attorney may appear at the last minute. It is never too late to hire a lawyer, even on the day of trial in order to secure another delay in the proceedings.

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ABA Journal Podcast

How can you deal with pro se litigants and keep your cool? (Podcast with transcript)

Posted Feb 4, 2013 10:00 AM CDT
By Stephanie Francis Ward

Have you ever had a pro se litigant demand to conduct their cross-examination from an air mattress? With more and more cash-strapped litigants choosing self-representation, there's little doubt lawyers will find themselves across the table or aisle from someone going pro se. Guests trade war stories and offer tips in an interview with ABA Journal's Stephanie Francis Ward.

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- How can you deal with pro se litigants and keep your cool? (Podcast with transcript) - Download audio file

In This Podcast:

Evan Loeffler has a real estate and landlord-tenant practice in Seattle. He's a coauthor of the third edition Real Estate Closing Deskbook, published by the American Bar Association in 2012.

Evan Loeffler

Deanne Medina, a staff attorney with Chicago's Legal Assistance Foundation, co-runs the William J. Hibbler Memorial Pro Se Assistance Program in the Northern District of Illinois U.S. District Court.

Deanne Medina

Leah Ward Sears, the former chief justice of the Georgia Supreme Court, is a litigation partner with Schiff Hardin. She is based in Atlanta.

Leah Ward Sears

Corrected: Podcast Transcript

Stephanie Francis Ward: Lawyers often make other lawyers' lives difficult, but the tribulations are nothing compared to what pro se litigants might bring.

Evan Loeffler: She had to be allowed to lie on an air mattress in the middle of the courtroom to do her cross examination.

Stephanie Francis Ward: I'm Stephanie Francis Ward and on today's ABA Journal podcast we're discussing how you can keep things professional and get the best result for your clients when opposing counsel does not have a law license

Announcer: This ABA Journal podcast is brought to you by WestlawNext, the legal platform chosen by over 40,000 lega organizations for the tradition of editorial excellence combined with the most advanced technology. Learn more at WestlawNext.com.

Stephanie Francis Ward: Joining me are Justice Leah Ward Sears, a retired Georgia Supreme Court Chief Justice who is now a partner of Schiff Hardin; Evan Loeffler, a Seattle lawyer who has a landlord/tenant practice; and Deanne Medina, a legal aid lawyer who runs the Northern District of Illinois Pro Se Program. My first question I will have for all of you, Justice Sears if you could take this first: If you're dealing with a pro se litigant who is being completely unreasonable, how can you as opposing counsel ensure that you remain reasonable?

Leah Ward Sears: Well, the first thing–that's a very, very good question. The first thing is that you just have to decide that you are going to remain reasonable. A lot of pro se litigants, they fumble and bumble and some don't know what they're doing and some take the advantage of being a pro se to appear as if they don't know what they're doing. I've noticed over the years that the most successful lawyers dealing with pro ses never lose their temper, stay calm, let the court handle any problems. If there's a problem you bring it to the attention of the judge and let the judge handle it.

Stephanie Francis Ward: Okay. And Deanne, what do you think?

Deanne Medina: What we find in our program is the biggest frustration for pro ses is they just don't understand the procedural process of what they need to be doing, and sometimes just taking a minute and explaining "this is the process, this is the rule, and this is why I'm doing what I'm doing," that that can be really helpful.

Stephanie Francis Ward: Are there times though that you might tell the person three or four times? Is it hard to get ther to hear it or to accept it, perhaps?

Deanne Medina: Well, I think I'm in a different position because they're coming to me for advice, but yes, absolutely there are some people that just don't understand the process, the procedure. They're going to listen to me probably mor likely than opposing counsel because they're coming to me for advice, but even then sometimes they don't listen to me either. But I do find that that's–I just find that that's the biggest frustration for most pro ses.

Stephanie Francis Ward: Okay. And Evan, what do you think?

Evan Loeffler: Well, as the opposing party that has to deal with a pro se party there's some ethical concerns involved, a least in Washington. I believe it's the same for all the states that Rule 4.3 of the Rules of Professional Conduct has a comment on dealing with unrepresented persons. The thing that the lawyer has to be careful about is you must not say anything or do anything to imply that you are disinterested, so I frequently get phone calls or maybe I'll be at the courthouse and the pro se party is asking me, "Well, how do I do this or what do I do now?" Probably the most common question I get is, "How do I file an answer to this complaint?" You have to be careful.

I mean, you can't give legal advice and you must make it clear that you cannot do that. I have frequently stated you're going to have to get a lawyer. About as far as I'll take it is I'll explain to them, "You've received two documents, a summons and a complaint, and the answer to your question is actually in the summons" and I'll show them where the language is or read it to them. But other than that, you have to be very careful about that because it's improper and it's not fair either to your client or to the pro se who may feel that you're kind of helping him out a little bit and then they get resentful and rightfully upset when you use the information, or they feel like you used information they gave you against them in a subsequent hearing.

Stephanie Francis Ward: Keeping all that in mind, do you find that being kind to the person as much as you can will pa off down the road?

Evan Loeffler: Yes, I do. As a young attorney it was generally my strategy or I would just lose my temper and say right back to them whatever they said about me or my ancestors. I quickly learned that playing that game was not professional; it didn't help me, it didn't help me in the eyes of the court or in front of my clients, so I would, for the most part, ignore it now and just go and either try to defuse the situation or just let the person be angry to me in front of the judge. Most of the time the judge will take care of it and remind them, "Don't make personal remarks to counsel." Not always. A couple of times I've had to remind the court that, look, opposing party is taking shots and usually at that point they'll take over and make it stop.

Leah Ward Sears: You've got to be careful. Civility is very important but you have to be careful with pro ses because I'v noticed over the years that they tend to be more likely to file sanction motions, appeals, and grievances. In our court we often call them frequent filers because they were just constantly filing. If you're a lawyer, if you've not made it really clea what role in a matter is, that is to say that you don't represent them, that you represent the other side, you could end up all wrapped up in bar complaints and that sort of thing. So, you should be kind, but you have to be very clear that you cannot and will not give them legal advice and perhaps recommend that they get a lawyer and make it clear that you can't even make a referral of a lawyer to them.

Evan Loeffler: I teach a CLE on this on occasion with a friend of mine and my friend, he recommends that every written communication with a pro se litigant is to remind them and make the following points: "1.) I'm not your lawyer, 2.) I represent Jane Doe, the other party and I'm going to assist her in obtaining the following relief against you. I cannot, I wi not give you legal advice. If you want to consult with a lawyer, here's a way to find a lawyer, like, maybe go to the State Bar website or a referral service."

I have struggled a lot with the other comment you made, though, about making referrals. I've been challenged on this that if I make a referral to, say, an attorney who I know to be an excellent attorney who may know what's wrong with my case, my client will resent it.

On the other hand, if I send a pro se to a lawyer that I believe is not very good or completely incompetent, then pro se will resent it, believing that I sent them to somebody who was competent. So, generally what I do is I say, "Here are a couple of places where you can find attorneys but I won't recommend any particular lawyer."

Stephanie Francis Ward: Let's back up a bit to what Evan was talking about. You mentioned about bringing issues to the judge. I'm going to ask this question to Justice Sears first. If you don't think the judge is handling things in a way that's in your client's best interest in terms of an issue with a pro se litigant, what's your advice on raising objections or maybe handling it other ways to get the result that you want for your client in court?

Leah Ward Sears: Gosh. Well, the first thing I would do is try to get the judge to understand the dilemma that you're in and maybe a status conference or a chat, of course with the pro se, would be important to let the judge be very aware that you're frustrated. This is a very hard job. Sometimes judges just aren't tuned in to the facts of what you're going through. Otherwise, I can't tell you–I really wouldn't–I'd be uncomfortable making an across-the-board recommendation because it depends on the case, you know, how many objections to make, whether to object all the time, and also, pro ses are so different.

Some pro ses really don't know what's going on and the stakes are not so high. Some pro ses are extremely sophisticated, know exactly what's going on, may not be attune to the procedure of the court, but definitely are very smart and know what's going on. So, it would depend on the case.

Stephanie Francis Ward: Okay. Do you think–and maybe this doesn't come up a lot in your practice, Evan–but do you think if you have a pro se litigant as opposing counsel, is it harder to preserve the appeal?

Evan Loeffler: No, but you have to be disciplined about the way that you approach the [eviction] case. This also will depend on the part of the landlord. If I can indulge in another war story. I did a case last year–an eviction case takes

about a month at the most, and this case took six months. The tenant was a pro se and she filed some 400 exhibits with over 3,000 pages. I was–it was a county about 100 miles away so I was commuting up there with a big box of her exhibits and they were just a mess.

The judge, this particular judge I have long said is one of the best judges in the state, if not the best, and he made sure that we had a very careful record and really required the tenant to properly introduce exhibits into the record and when they weren't properly introduced he would give her a little bit of leeway to get them properly introduced. He made absolutely sure that I made my objections on the record the way that the book says that you're supposed to. He would yell at me when I didn't stand and button my suit jacket first and let the pro se get away with quite a bit.

It all worked out to the benefit of my client, because when we got the ruling he noted he had a page of "here are all the reasonable accommodations that the pro se defendant requested and the court granted every one." And he did. The reason why it took six months was because she continued to ask for continuances and she was claiming various disabilities, she had to be allowed to lie on an air mattress in the middle of the courtroom to do her cross examination because she wasn't feeling well that day. He made a record on his own to make sure that the record was good in case c an appeal, and actually, the defendant surprised everybody by not filing an appeal, which we all fully expected based on what she had done to that point.

Stephanie Francis Ward: Deanne, you mentioned that most of the people you work with are plaintiffs. What are the most common areas in your court that you see pro se litigants?

Deanne Medina: Well, in Illinois it's employment discrimination just because our state laws are not great, so the federal laws tend to be the ones that most employment lawyers want to file under. So, in our program, I think statistically it's about 70 to 75 percent are going to be under some form of employment discrimination, and then second to that is going to be 1983 constitutional violation cases. I think statistically for the court, our particular court in Chicago, the prisoner cases are the highest number of pro ses, but our program doesn't work with the prisoner cases, so in our program it would be employment discrimination and the civil rights. Then in the last year we've seen an onslaught of foreclosure cases.

There's a couple firms in Chicago because of some of the moratoriums we've had here on foreclosure cases in the state court system, they've been coming to federal court because it's a faster process and it's cleaner, frankly. So, we've actually–that's been a real interesting thing because I know nothing about foreclosure. We've been doing a lot of training trying to get up to speed on that because that's just something we weren't prepared for.

Stephanie Francis Ward: I would imagine the rules are different than they would be in state court.

Deanne Medina: It's very different. Actually–

Stephanie Francis Ward: Especially if you're representing yourself.

Deanna Medina: Right, it's–you know, because there's all these defenses to foreclosure. I have to say–this is really horrible to say, but I had a little fun when they were first filing because they were not following the rules of civil procedure and we were getting a lot of stuff stricken and dismissed. Now they've figured out what they're doing so it's gotten better but there was–I did a little–

Evan Loeffler: Yeah, the rules changed after the Protecting Tenants at Foreclosure Act was passed. There were a lot o cases that just got bounced out immediately as a result.

Deanne Medina: Yeah, well this was just the federal and civil procedure. We have our own local rules, we do things strangely here on certain motions and they just weren't following procedurally so we had some fun with that, but they quickly figured it out.

Stephanie Francis Ward: On that note, I'm curious Deanne, do you see situations where lawyers they might try to railroad a pro se litigant and it backfires on them perhaps?

Deanne Medina: Sometimes. It actually still surprises me when I see lawyers taking advantage of some of our customers. I had one guy in particular that I'd been working with for a couple of years, very intelligent. In fact, I'm trying t encourage him to go to law school because his mind just works in such a way. But to look at him you would never guess that this guy was as bright as he was. He just didn't physically come across as, you know–

Stephanie Francis Ward: But that could be a very good tactic if you're a lawyer.

Deanne Medina: It can. So, they sort of assumed, made assumptions about how intelligent he was based on the way he looked and he has–you know, it's a great case. He argued it very well. The judge–I have found in my experience, particularly in a federal court, that if you follow the rules and you are respectful of the court and the court's time and the process that the judges are really, really going to do everything they can to help you. I mean, to the limited extent that they can. They're going to listen to you more, they're going to be more respectful. I don't think that's true so much, at least in Chicago in the state court system, but over here if you–and that's what I tell people all the time.

If you follow the rules and you do what I tell you to do and you listen to the judge, you're going to be okay. You may not win but you're not going to get in trouble. But, it always astonishes me when people will come in and say, well, the lawye told me this and I'm like, "That is not true, that is not even remotely true." I'll be like, "Well, maybe that's not what they said," and they're like, "Oh, here's the letter." I'll look at it and just be astonished, you know, the stuff they're telling some of these pro ses is just out and out wrong.

Leah Ward Sears: Who is giving the advice, the opposing counsel or–?

Deanne Medina: Well, you know, just the opposing counsel will say something like "you can't get compensatory damages under this statute" and it's like, that's absolutely not true, or "you can't do this type of thing, that's not how the rule is." It's just bizarre some of the things that they'll tell them they have to do. It's actually one firm in particular I've noticed that it's sort of a trend.

Evan Loeffler: Yeah, it could be one firm or one attorney who either doesn't know any better or is trying to gain an advantage.

Deanne Medina: They're just trying to gain an advantage, yeah.

Stephanie Francis Ward: It could be they don't know.

Deanne Medina: I've worked with this particular firm before, so I think they're trying to get an advantage.

Evan Loeffler: But I think that we can all agree that that's just unethical.

Deanne Medina: It is.

Leah Ward Sears: I agree.

Evan Loeffler: I mean, but you see attorneys tell each other stuff [inaudible] also, and that's unethical but I would say that maltreating an opposing party is bad enough–but to actually take advantage of the fact that you're a lawyer and the other side is not just sort of underscores how unethical it is. I don't know if it's more unethical, but to the extent that you're giving legal advice and saying, "You should strike this because you're not allowed to do it," that's a violation of Rule 4.3.

Deanne Medina: Yeah. It always really surprises me when I see it because I just assume most lawyers are going to follow the rules of professional conduct, but I mean, it's–you know, it doesn't happen very often, but there are definitely moments where–or they just do something that, maybe it's not a full on ethical violation, but it's just shady. There's just something, like, well that's not really how that–I mean, they'll tell the pro se something that's not completely inaccurate but really not maybe the practice of this court or the practice of this area of law or whatever.

Stephanie Francis Ward: But there's nothing under the Rule of Professional Conduct that they couldn't be shady like you're mentioning, right?

Deanne Medina: Exactly, yeah.

Stephanie Francis Ward: Okay. I'm curious too, Deanne, if an attorney is in a court that has a help desk like yours and they're having problems with the pro se, would it be helpful for that lawyer to speak with the person at the help desk who's been working with the pro se?

Deanne Medina: I think it depends on the help desk. Our help desk is a true advice desk. We don't represent the pro se people but we do create an attorney/client relationship for the 45 minutes that they're in our office, so I will not speak to opposing counsel on a case just because I can't. It's not something that–I have to say I have, I think in maybe one or two cases, I have called opposing counsel when I've been confused by something and said "what is this particular thing" or "do you know the date for this?" Something technical, but when it's not clear either from the record or from the customer In five years, four and a half years, I've maybe done that once or twice and those were on real extreme situations, but I would not talk to opposing counsel.

Stephanie Francis Ward: Okay. The other thing that I wanted to ask all of you about is what is your advice on client management when opposing counsel is a pro se litigant? How do you keep your client calm and maybe understanding that things may not go as quickly as they had planned? Justice Sears, do you want to take that first?

Leah Ward Sears: Yeah, I think the best thing to do is work with your client in advance. Try to explain how the process goes so when they go to court they understand what's going on so that there are no bad expectations, so that everybody understands we're with a pro se litigant, this might be a little bit more difficult. Sometimes the judge might bend over backwards, you can understand this, or sometimes they won't and you just keep the communication going so that you can make them stay calm.

Stephanie Francis Ward: Okay. Evan, would you like to add something to that?

Evan Loeffler: I think to reiterate what Justice Sears said, it has to do with managing client expectations. Sometimes it's good for your case when you're dealing with a pro se litigant because they're practical and they're not going to file a whole bunch of nonsense, or maybe because they just have no idea what to do and they're just hoping that the judge will be nice to them if they're nice to the judge. Sometimes you have pro ses–just like the same way sometimes you have opposing counsel–who are going to engage in dilatory practice and make the case take longer.

I am regularly just updating my clients on "here's what to expect, here's what's going on," and before we go into a hearing I tell my client, "Here's three things that can happen. We can win, we can lose, or the case is continued and I don't know what's going to happen until the judge tells me."

I don't necessarily treat pro se cases differently than I do cases where there are attorney's involved, but I do try and keep my client advised as to exactly what's happening and they'll see the pleadings, when I get them anyway.

Stephanie Francis Ward: All right, and I think that's everything that I have for today. Does anyone want to add anything else?

Deanne Medina: I –

Evan Loeffler: I was going to–oh I'm sorry, go ahead.

Deanne Medina: I was just going to say that the one thing that–because I am sort of the pro se advocate, the one thing that I try to express particularly when I speak to judges in our district is that there is this stereotype of what a pro se person is and that–you know, I actually was talking to a judge one day and she said, "oh, the foil hat wearers, the tin-foil hat wearers," and I was really taken aback by that, because I think there's definitely a component where you're dealing with mental illness a lot of the time when you're talking about pro ses, but I think more and more, particularly as the economy has become troublesome and like Evan was saying, there's a lot of people–or I think as Justice Sears was saying, you can't afford an attorney.

Maybe you're working full-time but you're not in a position to pay for an attorney, or as Evan was saying, if you're getting evicted that means you can't pay your rent which means you probably can't afford a lawyer. The assumption that they don't have a case or the assumption that they have mental illness or are going to be difficult is an assumption, and it's not always accurate. I've worked with so many people here. We see over 1,200 people a year in our program and I am amazed at the level of competence of some of these pro ses.

Now, of course, you have your people with mental illness, and I'm always amazed by that too, but there's definitely–that stereotype, I think, is changing and needs to change so that people understand that these are people that are–maybe they don't have law degrees, but they are intelligent, they are able to comprehend certain things, that they're not always going to be as difficult, or maybe they are, but generally it's just not the same, I think, as it has been in the past.

Stephanie Francis Ward: All right. Well, thank you all so much for your time; I appreciate it.

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Updated on Feb. 6 to correct the spelling of Evan Loeffler's name.