ARTICLE

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Professional Responsibility for the Pro Se Attorney

Abstract. This Article considers how pro se lawyers should be treated under the law of professional responsibility. While courts have addressed whether various aspects of the law of lawyering should be applied to lawyers acting pro se, they have not done so systematically. The Article first demonstrates that the law is not consistent in its treatment of pro se lawyers. It then argues that a purpose-based approach to the issue provides a consistent, rational, and reproducible way to analyze the question. It concludes that whether a particular rule of professional responsibility should apply to a pro se lawyer should be driven by the rule's intended beneficiary. If the rule is intended to protect third parties, it should apply to lawyers regardless of whether they are representing clients or appearing pro se; by contrast, a rule that is intended to protect clients should not be applied to pro se lawyers.

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I. INTRODUCTION

Notwithstanding the proverb strongly urging the contrary, lawyers regularly represent themselves. When they do, issues routinely arise about what professional responsibility rules ought to be applied to them. Should we treat them like lawyers, whose client happens to be . . . themselves, or should we treat them like parties? The rules of professional conduct and, more broadly, what has come to be called the law of lawyering distinguish between lawyers and others in terms of both privileges and obligations. Knowing which of those rights and duties apply to pro se lawyers is, therefore, critically important.

Interestingly enough, hardly anyone seems to have thought about this problem systematically.[1] There has been a fair amount of case law and commentary in two specific areas—whether pro se lawyers should be able to claim attorney's fees,[2] and whether pro se lawyers should be subject to the so-called no-contact rule prohibiting communications with represented persons.[3] Yet most courts considering these issues typically do so looking

1. One student note attempted a more global analysis. *See generally* Alicia L. Downey, Note, *Fools and Their Ethics: The Professional Responsibility of Pro Se Attorneys*, 34 B.C. L. REV. 529 (1993). The author proposed a new model rule that would address pro se lawyers. *See id.* at 556. The article, however, did not address, in a systematic way, the types and variety of issues that might implicate professional responsibility concerns or suggest an overarching thematic approach that could be applied to these problems.

2. *See generally* Peter Bagley, Note, *Attorney Fees: Compensating the Attorney Pro Se Litigant in Civil Rights Cases*, 44 OKLA. L. REV. 695 (1991); Gregory Paul Barbee, Note, *Attorney's Fee Awards to* Pro Se *Attorney Litigants After* Kay v. Ehrler*: No Fees. It's Simple. But Is It Absolute?*, 69 S. CAL. L. REV. 1795 (1996); Kathy Laughter Laizure, Case Comment, *Civil Rights*—Kay v. Ehrler*: The Eligibility of the Pro Se Attorney Litigant for Award of Attorney's Fees Under 42 U.S.C. § 1988*, 21 MEM. ST. U. L. REV. 575 (1991); Cathy Seibel, Note, *Fee Awards for Pro Se Attorney and Nonattorney Plaintiffs Under the Freedom of Information Act*, 52 FORDHAM L. REV. 374 (1983); Jeremy D. Spector, Note, *Awarding Attorney's Fees to Pro Se Litigants Under Rule 11*, 95 MICH. L. REV. 2308 (1997); Vincent M. Waldman, Note, *Pro Se Can You Sue?: Attorney Fees for Pro Se Litigants*, 34 STAN. L. REV. 659 (1982); Deborah Weinstein, Recent Decision, *Attorneys Fees—Award of Attorney Fees to Pro Se Litigant Who Is an Attorney*—Jones v. Lujan*, 883 F.2d 1031 (D.C. Cir. 1989)*, 63 TEMP. L. REV. 865 (1990).

3. *See* Pinsky v. Statewide Grievance Comm., 578 A.2d 1075, 1079 (Conn. 1990) (declining to reprimand a party-attorney for communicating with the opposing party because he was not "representing a client"); *In re* Segall, 509 N.E.2d 988, 990 (Ill. 1987) (suspending an attorney-party for communicating with an opposing party represented by counsel); Sandstrom v. Sandstrom, 880 P.2d 103, 108–09 (Wyo. 1994) (upholding an order barring a pro se attorney from having ex parte contact with his spouse during a divorce proceeding). The no-contact rule is currently embodied in ABA Model Rule 4.2. For commentary on the issue of the Rule's applicability to pro se lawyers, see, for example, Stephen J. Langs, Note, *The Question of Ex Parte Communications and Pro Se Lawyers Under Model Rule 4.2—Hey, Can We Talk?*, 19 W. NEW ENG. L. REV. 421 (1997), which "examines

narrowly and, at times, not very thoughtfully at the particular prohibition under discussion. There is little recognition that this is a systematic problem with substantial policy implications that would benefit from a more considered approach. And because this is not, for the most part, an area that rule drafters or statutory framers have considered, traditional textual analysis of rules and statutes provides inconsistent and unsatisfying answers to these questions.

This Article undertakes to explore the problem of regulating pro se attorneys in more depth and detail. First, it demonstrates why the problem is a perplexing one and why issues about pro se lawyering continue to arise. Pro se lawyers behaving badly, as reported cases suggest they often do, militates in favor of aggressive regulation. However, because pro se lawyers are also litigants, concerns sometimes arise that their rights as parties may be sacrificed to their obligations as lawyers. This Article demonstrates that there currently is not a clear analytical approach that unifies the resolutions in these cases and provides adequate guidance for courts and pro se lawyers.

Next, this Article argues that a purpose-based approach to analyzing whether a given rule of professional responsibility should apply to the pro se attorney would provide a more consistent, rational, and reproducible approach to these issues. Ultimately, whether a particular rule of professional responsibility should apply to the pro se lawyer depends on the underlying purpose of the rule. Rules that are intended to protect third parties (such as represented opponents or the court) should apply with equal force to lawyers, whether they are representing themselves or other clients. By contrast, rules that are intended to protect clients should not be applied to lawyers acting pro se; a lawyer representing himself may have a fool for a client, but that foolish client can protect himself if he chooses, without the help of professional responsibility rules.

This approach has both normative and predictive value. That is to say, it provides both an appropriate means for determining which professional responsibility rules should be applied to pro se lawyers and the approach satisfactorily explains the actions taken by the courts that have actually

the uncertainty and confusion surrounding the applicability of ex parte standards to pro se lawyers." *Id.* at 423.

considered these issues.

II. WHY IT MATTERS: ETHICAL RULES AND THE PRO SE LAWYER

A. *Setting Out the Problem: Textual Ambiguity and Competing Interests*

To some, the answer to the problem presented in this Article may seem obvious: pro se lawyers are lawyers, and the obligations of lawyers should, of course, apply to them. This approach ignores the fact that there are two distinct types of professional responsibility rules (and a set of more ambiguous ones). Professional responsibility rules can effectively be divided into two categories: rules that apply to lawyers when they are acting in the role of lawyer, and rules that apply to all lawyers at all times, regardless of whether those lawyers are engaged in the practice of law.

Rules that apply only to lawyers when they are behaving as lawyers might be called "role rules"—the obligations the rules impose are contingent on the lawyer being in the role of lawyer. These rules can sometimes be identified by language that indicates specifically the preconditions necessary for the rule to apply, typically language like "In the course of representing a client."[4]

By contrast, rules that apply to lawyers simply because they are lawyers are "identity rules." The lawyer's identity as an attorney admitted to practice in the jurisdiction imposing the rule suffices to impose the rule on the attorney. Such rules typically are phrased very differently; they might say something like "A lawyer shall not . . ."[5] or "It is professional misconduct for a lawyer to . . . ."[6] The prevalence of identity rules is somewhat surprising to law students, but this categorization of the rules is obvious when a body of rules like the ABA's Model Rules of Professional Conduct is considered in its entirety. A provision like Model Rule 8.4(c), which provides that it is "professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or

4. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2010) ("In the course of representing a client a lawyer shall not . . . ."); *see also id.* R. 4.2 ("In representing a client . . . ."); *id.* R. 4.3 ("In dealing on behalf of a client . . . ."); *id.* R. 4.4 ("In representing a client . . . .").

5. *E.g.*, *id.* R. 8.2 (forbidding a lawyer from knowingly or recklessly making false statements against judical and legal officials).

6. *E.g.*, *id.* R. 8.4.

misrepresentation," applies without question to lawyers in their personal lives[7] as well as their professional lives, even if they never practice law.[8] Prohibitions on committing a crime,[9] committing fraud,[10] or failing to report a lawyer's misconduct[11] plainly apply to lawyers in all aspects of their lives.

It is clear that identity rules apply to lawyers who are acting as pro se litigants in the same way that they apply to lawyers acting as realtors or trust officers or as ordinary citizens. It is far less clear what to do about role rules. A simple answer might be to conclude that role rules simply do not apply to pro se attorneys, and pro se lawyers typically make these textual arguments to support their claims that rules of professional conduct that involve lawyers in the role of lawyer should not be applied to them when they are acting pro se.

Several complexities with this straightforward analysis render it an unsatisfactory answer to the pro se lawyer puzzle. One is that the language of a rule is not always a clear guide to whether it is a role rule or an identity rule. Some rules of professional responsibility, which appear from their language to be identity rules, are actually anchored much more firmly in practice-related activities. This is most apparent in considering rules relating to in-court conduct. Rules on examining witnesses,[12] offering evidence,[13] or preparing pleadings,[14] which appear to apply to all lawyers,

7. *See, e.g.*, *In re* Grew's Case, 934 A.2d 537, 540, 544 (N.H. 2007) (noting that committing insurance fraud adversely reflected on an attorney's fitness to practice law, even though the attorney was acting as a private citizen).

8. *See, e.g.*, *In re* Bosse's Case, 920 A.2d 1203, 1205, 1208 (N.H. 2007) (suspending a lawyer acting as a real estate agent for falsifying a seller's name on a listing agreement to sell property).

9. MODEL RULES OF PROF'L CONDUCT R. 8.4(b) (2010).

10. *Id.* R. 8.4(c).

11. *See, e.g.*, *In re* Riehlmann, 2004-B-0680 (La. 1/19/05), 891 So. 2d 1239, 1241, 1243, 1249 (per curiam) (imposing discipline on a lawyer for failure to report misconduct of a former colleague that he learned about when the two had a social conversation at a bar).

12. Model Rules 3.3 and 3.4 both contain provisions relevant to the examination of witnesses. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2010) (prohibiting lawyers from knowingly offering false evidence through witnesses); *id.* R. 3.4(e) (adopting rules related to a lawyer's conduct in trial). Both are, on their face, identity rules, not role rules. Rule 3.3 begins, "A lawyer shall not knowingly . . . ." *Id.* R. 3.3. Rule 3.4 provides, "A lawyer shall not . . . ." *Id.* R. 3.4.

13. *Id.* R. 3.3(a)(3) (applying to the offering of evidence in court, but nonetheless phrased as an identity rule).

14. Model Rule 3.1 imposes a prohibition on "bring[ing] or defend[ing] a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous." *Id.* R. 3.1. The Rule is nonetheless phrased as an identity rule; it begins simply, "A lawyer shall not . . . . " *Id.*

have a significant component of advocacy inherent in the conduct being regulated.[15] This ambiguity is reflected in the text of some of those rules, which use language that could be interpreted to impose both identity and role rules.[16] It is therefore not clear that the line between identity rules and role rules resolves the problem of the pro se lawyer. This means that we may need to look more closely at the character of some rules to determine the appropriateness of their application in the pro se context.

There is also a textual ambiguity with this approach. Defining a rule as a role rule does not make clear what the correct answer is to the pro se attorney question. Even if we can identify rules that clearly apply to a lawyer who is representing a client, we still need to address whether a rule that applies only to a lawyer "[i]n the course of representing a client"[17] applies to a lawyer who is representing herself. The text of the role rules typically does not provide a clear answer. Courts struggle to deal with this ambiguity; some conclude that, by definition, the term "client" implies an agency relationship, meaning that a "client," for purposes of such a rule, must be someone other than the lawyer herself.[18] Others, by contrast, apply even role rules to pro se attorneys, often without specific attention to the textual problem.[19] The problem is not simple. Consider, for example,

15. This might argue for separate treatment of conduct related to "advocacy." For a discussion of this concept, see *infra* notes 24–26 and accompanying text.

16. Consider, for example, Model Rule 3.3. It is a prohibition directed simply to "[a] lawyer" ("A lawyer shall not knowingly . . . ."). MODEL RULES OF PROF'L CONDUCT R. 3.3 (2010). At the same time, elements of the Rule suggest that the lawyer is acting in a representative capacity and as a client. *See, e.g.*, *id.* R. 3.3(a)(2) ("A lawyer shall not knowingly . . . 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* . . . ." (emphasis added)); *see also id.* R. 3.3(a)(3) ("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 . . . ." (emphasis added)). Some other subsections of the rule use role rule language. *See, e.g.*, *id.* R. 3.3(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 . . . ."). If we adopted a pure textual approach in which role rules did not apply to pro se attorneys and identity rules did, we would need to conclude that certain subparts of Rule 3.3 applied to such lawyers and others did not, even though there is no discernible evidence that such an outcome was intended or furthers the justification for the rule.

17. *Id.* R. 4.1.

18. This was the Supreme Court's view in *Kay v. Ehrler*, discussed *infra* notes 58–59 and accompanying text, though the court did not view this textual analysis as dispositive. *See infra* note 58 and accompanying text.

19. *See In re* Richardson, 792 N.E.2d 871, 873 (Ind. 2003) (per curiam) (finding that the respondent violated Rule 4.4, which prohibits frivolous, dilatory, or harassing conduct "during the

the Model Rule that governs the duty of loyalty to former clients; it prohibits "[a] lawyer who has formerly represented a client in a matter" from "thereafter represent[ing] another person in the same or a substantially related matter."[20] Would pro se representation adverse to a former client violate this prohibition?[21] The fact that there is no

course of a representation," without addressing the textual implications of the respondent's pro se status). Richardson sued a former girlfriend to get back property he claimed she owed him. *Id.* at 872. He inflated the estimate of its value, sought treble damages and attorney's fees, and got a default judgment. *Id.* He refused to settle the lawsuit even after the girlfriend returned all of his belongings, and he appealed the jury verdict for the girlfriend. *Id.* He also lied in answers to interrogatories about his assets during proceedings supplemental in execution of the judgment. *Id.* at 873. He was charged with violating Rule 4.4. *Id.* The Indiana version of Rule 4.4 contained the language, "[i]n representing a client," and Richardson had appeared pro se throughout the proceedings. *Id.* at 872. The court, nonetheless, held that Richardson had violated Rule 4.4 by "'pressing his lawsuit against [(the former girlfriend)] primarily for the purpose of harassing [(her)].'" *Id.* at 873. The court did not discuss the pro se issue except to state, in discussing the sanction, that it was, in fact, worse for a lawyer to engage in misleading behavior when he was not doing so to try and assist a client. *Id.* at 874. The court stated:

> [W]e view the respondent's acts as more serious [than cases cited by respondent in which the misconduct sought to avoid client harm or obtain an advantage for a client]. The respondent chose to abuse the legal process, which ultimately led to the imposition of attorney fees against him. He then deceived the adverse party in order to shield his own assets from judgment collection . . . .

Id. at 874.

20. MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2010).

21. While I have not located any cases presenting this precise issue, its concerns are implicated by the recent California case of *Oasis West Realty, LLC v. Goldman*, 106 Cal. Rptr. 3d 539 (Ct. App.), *review granted and opinion superseded by* 232 P.3d 612 (Cal. 2010). Goldman, as a member of a law firm, represented Oasis West Realty in its efforts to advance a redevelopment project through the Beverly Hills City Council. *Id.* at 542. Oasis hired Goldman partly because of his extensive involvement in city politics. *Id.* at 543. Goldman worked on the matter for about a year. *Id.* After the firm's representation of Oasis ended, a group of citizens opposed to the project circulated a petition to place a referendum regarding the project on the ballot. *Id.* at 544. Goldman, acting as a private citizen, spoke out at a council meeting against a restrictive rule that was proposed to be applied to petition circulators and urged several of his neighbors to sign the petition. *Id.* Oasis sued Goldman and his firm, alleging violations of the duty of loyalty. *Id.* at 543. The court held that Goldman did not violate California's rule on subsequent representations because "there was no second representation"; Goldman's activities on his own behalf did not involve any client representation. *Id.* at 547–48. If Goldman had decided to bring a pro se lawsuit against Oasis, however, it is not clear whether that would constitute successive representation under Rule 1.9. *See* MODEL RULES OF PROF'L CONDUCT R. 1.9(a)–(b) (2010) (prohibiting a lawyer who has "formerly represented a client in a matter" from representing "another person" whose interests are adverse to those of the former client in the "same or a substantially related matter"). California's rule, which provides that a lawyer may not "accept employment adverse to the client or former client," CAL. RULES OF PROF'L CONDUCT R. 3-310(E) (2010), involves different but equally perplexing ambiguities. There are cases holding that bringing suit against a current client violates Rule 1.7, but they are not clear about whether the suits were brought pro se or not. *See In re* Szymialis, 557 N.W.2d 554, 555–56 (Minn. 1997) (per curiam) (imposing an indefinite suspension on an attorney

indication that drafters of professional responsibility rules had the issue of pro se lawyers in mind when they created the distinction between role rules and identity rules limits the extent to which pure textual analysis can answer this question satisfactorily. Because the treatment of pro se lawyers has not typically been considered when rules are drafted or revised,[22] the text of the rules accordingly should not, standing alone, be deemed dispositive in deciding these issues.[23]

Another distinction is sometimes suggested as relevant to the problem but does not, ultimately, provide a clear resolution of the pro se issue. This is whether a lawyer is acting as an advocate. There are rules that explicitly refer to the advocacy status of the lawyer; Model Rule 3.7, for example, is a prohibition on a lawyer acting "as [an] advocate at a trial in which the lawyer is likely to be a necessary witness."[24] More generally, the ABA Model Rules, and some state rules based on that model, categorize a group of rules under the heading of "Advocate."[25] One might argue that while pro se lawyers do not have separate clients, they are "advocates," and prohibitions applying to advocacy should apply to them. Again, while it is

for numerous acts of professional misconduct, including filing a suit against a client while still representing the client); Lisi v. Pearlman, 641 A.2d 81, 82–83 (R.I. 1994) (per curiam) (suspending attorney from the practice of law for continuing to represent the client while they were engaged in a fee dispute). Because under Model Rule 1.7 a conflict can be created by concerns other than representation of an adverse client, the cases that deal with Model Rule 1.7 are not directly dispositive of the 1.9 issue.

22. For an exception, see the discussion of the revisions of Model Rule 4.2, *infra* note 36 and accompanying text. The issue was raised but not addressed; the Rule, as drafted, remains ambiguous as to whether it should be applied to lawyers acting pro se.

23. At least, that is the case where the drafters of the rule have not explicitly considered the treatment of pro se lawyers. Where they have, of course, that express language should be dispositive. *See* OR. RULES OF PROF'L CONDUCT R. 3.1 (2010) ("In representing a client *or the lawyer's own interests*, a lawyer shall not . . . ." (emphasis added)); *id.* R. 4.2 (beginning with the same language as Oregon Rule 3.1); *id.* R. 4.3 ("In dealing on behalf of a client *or the lawyer's own interests* . . . ." (emphasis added)); *id.* 4.4(a) (same language as Oregon Rule 3.1); *see also* CAL. RULES OF PROF'L CONDUCT R. 2-100 (2010) (exempting lawyers who are also parties to the matter from a rule prohibiting direct contact with a represented party without the consent of that party's attorney). However, such situations are rare.

24. MODEL RULES OF PROF'L CONDUCT R. 3.7(a) (2010). The language of the rule is rendered more complex by the fact that an exception to the rule, Model Rule 3.7(a)(3), applies if "disqualification of the lawyer would work substantial hardship on the client." *Id.* R. 3.7(a)(3). Again, one might argue here that the text of the rule implies that the client is someone other than the lawyer.

25. See the heading to the Rules preceding Model Rule 3.1.

a logical analysis, it is not consistent with what courts are actually doing.[26]

Two other concerns need to be taken into account in determining whether a role rule ought to be applied to a pro se lawyer. One is the perception that pro se lawyers behave badly. This is only an anecdotal perception, but it is a persistent one, and one borne out by the facts of some distinctive disciplinary cases involving pro se lawyers.[27] In view of this concern, we might hesitate to interpret a rule in a way that would exempt pro se lawyers, already at risk for misbehavior because of their personal involvement in their cases, from the rules that apply to other lawyers.[28] One could view the courts' approach, in this light, as applying to pro se lawyers all of the restrictions associated with lawyering but none of the privileges.

At the same time, there is an equity concern with regulating pro se lawyers who are uniquely situated because they are both lawyers in their own causes and parties to them. Such actors may be concerned that applying the rules of professional responsibility to them will result in treating them differently, and less favorably, than similarly situated individuals—either parties who have lawyers or parties who are representing themselves but are not lawyers. This argument, too, is routinely offered when courts consider whether to impose role rules on lawyers who are also parties.[29] Pro se lawyers typically argue that they are

26. See the discussion of Rule 3.7, *infra* notes 143–48 and accompanying text.

27. *See* Zerman v. Jacobs, 751 F.2d 82, 85 (2d Cir. 1984) (per curiam) (imposing sanctions on a pro se attorney for bringing a frivolous appeal in a securities fraud action); *In re* Richardson, 792 N.E.2d 871, 873–74 (Ind. 2003) (per curiam) (suspending a lawyer for engaging in frivolous, harassing litigation against a former girlfriend and lying in interrogatories during proceedings in execution of judgment); *In re* O'Meara's Case, 834 A.2d 235, 236 (N.H. 2003) (sanctioning a pro se attorney for making false statements of fact to a tribunal in his own divorce and custody case); Barrett v. Va. State Bar, 611 S.E.2d 375, 382 (Va. 2005) (affirming sanction against pro se attorney for violating the prohibition on ex parte contacts in his divorce case).

28. As one of my colleagues put it, a lawyer acting pro se "should not be able to get away with something that should otherwise be prohibited." Thanks to Nicholas Johnson for this insight.

29. *See* Pinsky v. Statewide Grievance Comm., 578 A.2d 1075, 1077 (Conn. 1990). The attorney-party claimed that the ability of parties to communicate, whether represented or not, constituted an entitlement of party status that should not be denied to lawyer-parties. *See id.* at 1079 ("The purpose of this restriction is to preserve the integrity of the lawyer–client relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer."). The court held that lawyers who are represented are not bound by the no-contact rule simply because of their status as lawyers. *See id.* (rejecting disciplinary charges against an attorney-litigant under Rule 4.2 because "[c]ontact between litigants . . . is specifically authorized by the comments under Rule 4.2").

lawyers, but they are also parties, and the rules of professional responsibility should not deprive them of any rights that they, as parties, should have simply because they are lawyers engaged in self-representation.[30]

Accordingly, the pro se lawyer question is a complex one, but one whose answer is critically important to pro se lawyers, to disciplinary authorities, and to courts adjudicating matters in which lawyers appear pro se. This is not a purely theoretical problem; the issue has come up and been addressed extensively in limited areas.[31] The difficulty and complexity of these issues is reflected in two situations in which the courts have extensively considered the treatment of pro se attorneys. One is the application of the no-contact rule to pro se lawyers; the other is the eligibility of pro se lawyers for awards of attorney's fees.

B. *Judicial Experience with Applying the Law of Lawyering to Pro Se Attorneys*

1. The No-Contact Rule

The no-contact rule, embodied in Model Rule 4.2, provides:

> 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.[32]

The Rule is intended to protect the represented person from approaches by other lawyers.[33] The problem here is that the Rule applies to lawyers,

30. Plaintiffs have been unsuccessful in asserting that it is a violation of equal protection to treat lawyer-parties differently than parties who are not lawyers. *See, e.g.*, Shearer v. Mundt, 36 P.3d 1196, 1199 (Alaska 2001) (per curiam) (explaining that because an attorney litigant and a non-attorney litigant are so differently situated, their disparate treatment would not allow for an equal protection claim). The courts have routinely concluded that their status as lawyers provides a rational basis for distinguishing between pro se lawyers and non-lawyer pro se litigants. *See, e.g.*, *id.* ("[A]ttorney and non-attorney pro se litigants are not similarly situated.").

31. *See In re* Lucas, 789 N.W.2d 73, 76 (N.D. 2010) (per curiam) (discussing one such issue: the application of the no-contact rule to pro se lawyers).

32. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2010).

33. This is evident from Comment [1] to the Rule, which provides, "This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the

but not to clients; clients are ordinarily free to talk to their counterparts on the other side even if those counterparts are represented.[34] The question under Rule 4.2 is whether a lawyer who is pro se is constrained by the no-contact rule when the opposing party is represented by counsel.[35] The drafters considered the issue when undertaking the most recent significant revisions of the Model Rules; however, it was not specifically addressed in the Rule.[36] A very small number of jurisdictions have addressed the problem explicitly in their professional responsibility rules, reaching opposing conclusions about the issue.[37] A number of jurisdictions without an explicit rule have confronted and decided the issue.[38]

Authority on this question is somewhat divided. Most courts and attorney disciplinary authorities apply the Rule to pro se attorneys.[39]

matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation." *Id.* R. 4.2 cmt. 1.

34. *See, e.g.*, *id.* R. 4.2 cmt. 4 ("Parties to a matter may communicate directly with each other . . . .").

35. For scholarly comment on this issue, see Stephen J. Langs, Note, *The Question of Ex Parte Communications and Pro Se Lawyers Under Model Rule 4.2—Hey, Can We Talk?*, 19 W. NEW ENG. L. REV. 421, 421 (1997).

36. Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part II)*, 70 TENN. L. REV. 321, 323–25 (2003).

37. For a jurisdiction exempting pro se attorneys from the rule, see CAL. RULES OF PROF'L CONDUCT R. 2-100 (2010), stating "the rule does not prohibit a [lawyer] who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status." By contrast, Oregon Rule of Professional Conduct 4.2 explicitly applies the prohibition to a lawyer "representing a client or the lawyer's own interests." OR. RULES OF PROF'L CONDUCT R. 4.2 (2010); *see In re* Knappenberger, 108 P.3d 1161, 1163–64 (Or. 2005) (en banc) (per curiam) (applying the rule to a lawyer; unclear whether the lawyer was acting pro se at the time of communication).

38. *See, e.g.*, *In re* Segall, 509 N.E.2d 988, 989 (Ill. 1987) (applying the state no-contact rule to pro se attorneys).

39. *See* Runsvold v. Idaho State Bar, 925 P.2d 1118, 1120 (Idaho 1996) (holding that Rule 4.2 includes "the situation in which an attorney is acting pro se because this interpretation better effectuates the purpose of Rule 4.2"); *Segall*, 509 N.E.2d at 990 (applying the Rule on the ground that "[a]n attorney who is himself a party to the litigation represents himself when he contacts an opposing party"); Fishelson v. Skorupa, No. CIV.A 2001-3173-A, 2001 WL 888369, at *2 (Mass. Super. Ct. July 31, 2001) (granting a motion for a protective order precluding pro se attorney from contacting opposing party who was represented by counsel and applying a reciprocal obligation on the part of the opposing party not to contact the pro se attorney party); *In re* Lucas, 789 N.W.2d 73, 76 (N.D. 2010) (per curiam) (applying North Dakota Rule 4.2 to a lawyer appearing pro se); *In re* Haley, 126 P.3d 1262, 1269 (Wash. 2006) (en banc) (applying Rule, but prospectively only in view of vagueness of the Rule); Comm. on Legal Ethics of the W. Va. State Bar v. Simmons, 399 S.E.2d 894, 898 n.2 (W. Va. 1990) (per curiam) (noting that it violated DR 7-104(A)(1) for the lawyer to contact his former client to offer her a settlement after she brought a suit against him); Sandstrom v.

While the *Restatement* expresses the view that the rule does not apply to pro se attorneys,[40] there is little authority for this position in the case law.[41] Some courts, addressing claimed disciplinary violations for breaches of Rule 4.2, viewed the lack of clarity of their state rule on this issue as so significant as to present a due process issue; they resolved the matter by holding that the rule would apply to pro se attorneys, but only prospectively.[42]

Sandstrom, 880 P.2d 103, 108–09 (Wyo. 1994) (applying Rule on the ground that "'[a]n attorney who is himself a party to the litigation represents himself when he contacts an opposing party'" (quoting *Segall*, 509 N.E.2d at 990)). For ethics opinions applying the rule to pro se attorneys, see, for example, The Ethics Committee, *Can Pro Se Lawyer Speak with a Represented Party over the Objection of the Party's Lawyer?*, 39 MD. B.J. 57 (2006). This was a request for an opinion by a lawyer in a divorce case; he argued that he ought to be able to contact his spouse directly in order to settle the matter. *Id.* at 57. The Committee concluded that the contacts were prohibited. *Id.* at 60. "The Rule was intended to prevent lawyers from taking advantage of persons not skilled in the practice and rules of law when the party opponent has legal representation." *Id.* at 57; *see also* D.C. Bar, Ethics Op. 258 (1995) (applying Rule to pro se attorneys); Haw. Disciplinary Bd., Formal Op. 44 (2003) (same); State Bar of Nev. Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 8 (1987) (same).

40. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99(1)(b) (1998). Comment (e) provides, "A lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals." *Id.* § 99 cmt. e.

41. *Pinsky v. Statewide Grievance Committee*, 578 A.2d 1075, 1079 (Conn. 1990) is sometimes cited for this proposition. See, for example, *In re* Schaefer, 25 P.3d 191, 199 (Nev. 2001) (en banc) (per curiam), *modified*, 31 P.3d 365 (Nev. 2001) and Alaska Bar Ass'n Ethics Comm., Ethics Op. 7 (1995), but that is a misinterpretation of *Pinsky*. The opinion makes clear that Pinsky, who was involved in a dispute with his landlord, was represented by counsel at the time he communicated with the opposing party. *Pinsky*, 578 A.2d at 1076. *Pinsky* accordingly raises a somewhat different issue: whether the no-contact rule should apply to an attorney who is a party to litigation even if that attorney-party is represented by separate counsel. *See id.* (holding that the no-contact rule did not apply to an attorney-litigant who was represented). The conclusion of the court in *Pinsky*, that the rule did not apply, turned expressly on the recognized right of litigants to communicate with one another:

> Contact between litigants, however, is specifically authorized by the comments under Rule 4.2 . . . .
>
> The grievance panel, the reviewing committee and the trial court all correctly concluded that the plaintiff's letter was a communication between litigants and that the plaintiff had a right to make such a communication because he was not representing a client. There was no evidence that suggests that the letter was written by the plaintiff in a representative capacity. While the plaintiff's conduct may have been less than prudent, it did not violate Rule 4.2.

Id. at 1079.

42. *See, e.g.*, *Schaefer*, 25 P.3d at 202–03 (concluding that the Nevada no-contact rule applied to pro se attorney-litigants). In *Schaefer,* the court concluded that to advance the purposes of the rule, which were to "prevent[] lawyers from taking advantage of laypersons, and . . . preserve[] the integrity of the attorney–client relationship," the rule should be applied to attorneys appearing pro se. *Id.* at 199. "The lawyer still has an advantage over the average layperson, and the integrity of the

How do courts applying the no-contact rule reach this result? They typically do so using a purpose-based analysis, concluding that the underlying justifications for the rule merit its application in the pro se context.[43] Those purposes include the protection of the represented person against inadvertent or impudent disclosures, as well as the prospect of being manipulated by the opposing lawyer.[44] The rule recognizes that approaches to a represented person by opposing counsel pose dangers to the protection of confidential information and to the trust and confidence of the lawyer–client relationship.[45]

The courts seem happy with this solution even though it is not at all clear that it resolves the problem posed by the no-contact rule. If the pro

relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se." *Id.* The court, nonetheless, concluded that, because the rule was unclear, it would violate due process to apply it to Schaefer. *Id.* at 202–03; *see also Haley*, 126 P.3d at 1267–69 (relying on *Schaefer* to hold that Washington's no-contact rule would be applied to pro se attorneys prospectively only).

43. *See Runsvold*, 925 P.2d at 1120 ("If Runsvold's position that he must be treated only as a party and that his status as an attorney should be ignored is accepted, the intent of I.R.P.C. 4.2 would be frustrated. His ex-wife would lose 'the protection a represented person has achieved by obtaining counsel,' and her attorney would lose the ability to control access to his client, a fundamental element of the attorney–client relationship."); *Segall*, 509 N.E.2d at 990 ("Rule 7-104(a)(1) is designed to protect litigants represented by counsel from direct contacts by opposing counsel. A party, having employed counsel to act as an intermediary between himself and opposing counsel, does not lose the protection of the rule merely because opposing counsel is also a party to the litigation."); Alaska Bar Ass'n Ethics Comm., Ethics Op. 7 (1995) (adopting Rule 4.2 as "the better rule . . . . This resolution is indicated by examining the purposes of Rule 4.2"); D.C. Bar, Ethics Op. 258 (1995) (noting that Rule 4.2 is motivated by a need to protect lay persons from being overwhelmed and exploited by lawyers and that "[t]hese societal concerns and interests have no less validity when the lawyer positioned to do the coaxing is a lawyer-party proceeding pro se"); *see also* Pierce, *supra* note 36, at 327 (arguing that Rule 4.2 or its comments should be modified to provide expressly that the rule applies to lawyers representing themselves because "'represented persons are no less in need of the protections afforded by Rule 4.2 when the lawyer who would communicate with them is represented by another lawyer in the matter or is proceeding pro se'").

44. One state bar ethics opinion put it this way:

> One rationale for [Rule 4.2] is that the contacted client may make unwise voluntary statements . . . . Another reason for these provisions is that the lawyer may use presumably more refined negotiating skills to the disadvantage of the nonlawyer . . . .
>
> . . . .
>
> In the situation in which a lawyer is acting pro se, the rationale supporting [Rule 4.2] does not change. The lawyer contacting the represented party may use superior negotiating and interrogating skills to the disadvantage of the nonlawyer.

Mich. Bar, Ethics Op. CI-1206 (1988) (citations omitted).

45. *See* D.C. Bar, Ethics Op. 258 (1995) (explaining that the primary purpose of the rule is to protect represented persons).

se attorney secures legal representation, at that point, presumably, he is a party only, not a lawyer, and should regain his privilege of speaking directly with the opposing party.[46] Rule 4.2 is not an identity rule, and at least one case indicates clearly that it does not apply to a lawyer-party who is represented by counsel.[47] However, the lawyer still has the capacity to overreach and use his superior skills to manipulate and mislead the opposing party. Perhaps the assumption is that a represented lawyer might be counseled to avoid the worst excesses of such techniques; in any event, the courts do not discuss this issue.

By contrast, those arguing that the Rule should not apply typically apply a narrower, textual approach; the Rule applies to lawyers only "representing a client," and they argue that a lawyer appearing pro se is not "representing a client."[48] This textual issue rarely delays the courts. Some also base the argument for non-application on equity grounds; a lawyer who is also a party to litigation should not have to relinquish any of his rights as a party, including the right to speak directly to the opposing party without the permission of its counsel.[49]

While the no-contact rule problem seems to have shaken down (interestingly, not in the direction articulated in the *Restatement*), the differing approaches suggest that it is not clear to anyone what the

46. *See Pinsky*, 578 A.2d at 1079 (determining that a represented attorney litigant was not bound by the no-contact rule).

47. *See id.* (holding that the no-contact rule did not apply to an attorney-litigant who was represented).

48. Pierce, *supra* note 36, at 325 ("On its face, the reference in the Rule to a lawyer 'representing a client' can be read to suggest a negative inference that it does not apply to communication by a lawyer who is acting pro se . . . in a matter in which she is interested."); *see also In re* Haley, 126 P.3d 1262, 1272 (Wash. 2006) (en banc) (Sanders, J., concurring) ("The plain language of RPC 4.2(a) unambiguously exempts self-represented lawyers . . . . [A] 'client' is a *third party* who engages a lawyer. Because self-represented lawyers have no client, under RPC 4.2(a), they may contact a represented party." (citation omitted)).

49. *See, e.g.*, *Pinsky*, 578 A.2d at 1079. Pinsky, a lawyer, rented an office from the Bank of Boston and an employee of the bank managed the building. *Id.* at 1076. The bank began eviction proceedings, and Pinsky retained counsel to represent him in the proceedings. *Id.* The bank's attorneys contacted Pinsky by mail. *Id.* Pinsky, in turn, sent a letter to the bank employee's home, in which Pinsky indicated his frustration with the events surrounding the eviction and threatened legal action against the employee. Pinsky v. Statewide Grievance Committee, 578 A.2d 1075, 1079 (Conn. 1990) This contact resulted in a disciplinary complaint; the allegation was that Pinsky had violated Rule 4.2. *Id. at* 1077. The court concluded that this was "contact between litigants," which was specifically authorized by the comments to the Rule, and that since Pinsky was not representing a client when he wrote the letter, he did not violate Rule 4.2. *Id.* at 1079.

appropriate methodological approach to the problem is. This is equally clear with regard to the second issue that has received significant attention: the propriety of allowing pro se attorneys to recover attorney's fees.

2. Fees

Whether a pro se attorney should be entitled to claim fees under a statute providing for attorney's fees has, at times, been the subject of considerable comment.[50] This question was sometimes subsumed under the broader question whether any pro se litigant—whether a lawyer or not—should be eligible for attorney fee awards under various fee-shifting statutes.[51] There was a ripple of legal scholarship about the issue[52] before, and shortly after, the Supreme Court, in *Kay v. Ehrler*,[53] held that pro se attorneys could not claim attorney's fees under 42 U.S.C. § 1988.[54]

50. *See generally* Peter Bagley, Note, *Attorney Fees: Compensating the Attorney Pro Se Litigant in Civil Rights Cases*, 44 OKLA. L. REV. 695 (1991); Gregory Paul Barbee, Note, *Attorney's Fee Awards to* Pro Se *Attorney Litigants After* Kay v. Ehrler*: No Fees. It's Simple. But Is It Absolute?*, 69 S. CAL. L. REV. 1795 (1996).

51. *See, e.g.*, Jeremy D. Spector, Note, *Awarding Attorney's Fees to Pro Se Litigants Under Rule 11*, 95 MICH. L. REV. 2308, 2310 (1997) (arguing that fees should be awarded to any pro se litigant, not just attorneys). Some non-attorney pro se litigants have argued that a rule denying fees to them, but not to pro se attorney-litigants, raised an equal protection issue. *See, e.g.*, Shearer v. Mundt, 36 P.3d 1196, 1199 (Alaska 2001) (per curiam) (rejecting pro se non-lawyer's claim that allowing pro se attorney claims for fees, but disallowing non-lawyer claims, violates equal protection: "[T]he argument is meritless, because attorney and non-attorney pro se litigants are not similarly situated. Attorneys' representational services have a 'clear and marketable value' whether they 'are directed to the representation of others or oneself,' whereas the representational services of non-lawyers have no such value." (quoting Pratt & Whitney Can., Inc. v. Sheehan, 852 P.2d 1173, 1181 (Alaska 1993))). The general rule, however, is that lay pro se litigants are not eligible to recover attorney's fees. *See* Sonja A. Soehnel, Annotation, *Recovery Under State Law of Attorney's Fees by Lay Pro Se Litigant*, 14 A.L.R. 5th 947 (2009) (compiling cases).

52. *See generally* Peter Bagley, Note, *Attorney Fees: Compensating the Attorney Pro Se Litigant in Civil Rights Cases*, 44 OKLA. L. REV. 695 (1991) (critiquing *Kay*); Gregory Paul Barbee, Note, *Attorney's Fee Awards to* Pro Se *Attorney Litigants After* Kay v. Ehrler*: No Fees. It's Simple. But Is It Absolute?*, 69 S. CAL. L. REV. 1795 (1996) (discussing *Kay*); Kathy Laughter Laizure, Case Comment, *Civil Rights*—Kay v. Ehrler*: The Eligibility of the Pro Se Attorney Litigant for Award of Attorney's Fees Under 42 U.S.C. § 1988*, 21 MEM. ST. U. L. REV. 575 (1991) (critiquing the court of appeals' decision in *Kay* and including a brief comment on the Supreme Court decision); Cathy Seibel, Note, *Fee Awards for Pro Se Attorney and Nonattorney Plaintiffs Under the Freedom of Information Act*, 52 FORDHAM L. REV. 374 (1983) (discussing propriety of fee awards for pro se plaintiffs under the Freedom of Information Act and arguing for a broad interpretation of who is entitled to a fee to serve the purpose of the fee provisions); Vincent M. Waldman, Note, *Pro Se Can You Sue?: Attorney Fees for Pro Se Litigants*, 34 STAN. L. REV. 659 (1982) (arguing that the goals of attorney fee statutes justified awarding fees to pro se plaintiffs, whether they are attorneys or not).

53. Kay v. Ehrler, 499 U.S. 432 (1991).

54. *Id.* at 438.

Kay resolved a conflict among the circuits.[55] The Court began its analysis by recognizing that pro se litigants who were not attorneys should not be entitled to recover attorney's fees, and concluded that the question was "whether a lawyer who represents himself should be treated like other *pro se* litigants or like a client who has had the benefit of the advice and advocacy of an independent attorney."[56]

The Court in *Kay* first considered the text of the fee provision but concluded that it did not provide a clear answer.[57] While it noted that "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney–client relationship as the predicate for an award under § 1988,"[58] the Court ultimately based its decision on the overriding legislative purpose of the fee provision.[59] It concluded that Congress was interested in "ensuring the effective prosecution of meritorious claims,"[60] and that pro se lawyers were less effective than parties represented by independent lawyers.[61] The Court stated:

> Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. . . . He is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom.[62]

The court viewed granting fees as creating an incentive to pro se representation, a less than optimal result.[63]

55. *Id.* at 435 ("We granted certiorari to resolve the conflict among the [c]ircuits on the question whether a [pro se] litigant who is also a lawyer may be awarded attorney's fees under § 1988.").

56. *Id.*

57. *Id.*

58. *Id.* at 435–36. The footnote for this proposition, however, includes only several dictionary definitions of the word "attorney." *Id.* at 436 n.6.

59. *Id.* at 436.

60. *Id.* at 437.

61. *Id.* at 437–38.

62. Kay v. Ehrler, 499 U.S. 432, 437 (1991). The Court went on, "The adage that 'a lawyer who represents himself has a fool for a client' is the product of years of experience by seasoned litigators." *Id.* at 437–38.

63. The Court stated:

> A rule that authorizes awards of counsel fees to *pro se* litigants—even if limited to those who

As *Kay* was limited to the availability of fees under § 1988, it did not answer the question of pro se attorney's fees for all times and all categories of claims. Courts accordingly continue to be presented with issues relating to pro se attorneys' entitlement to fees under various rules or fee-shifting statutes, including state statutes and procedural rules,[64] Federal Rules of

> are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

Id. at 438.

64. *See, e.g.*, Musaelian v. Adams, 198 P.3d 560, 561 (Cal. 2009). Musaelian sued Adams, claiming that Adams had engaged in abuse of process and malicious prosecution for bringing suit against Musaelian on behalf of a client. *Id.* Adams, representing himself, claimed that Musaelian's suit was frivolous and sought sanctions, including attorneys' fees, on that ground. *Id.* The California statute at issue permitted the court to order "payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation." *Id.* at 562 (citing CAL CIV. CODE § 128.7(d) (West 2006)). The court, viewing this as a matter of statutory interpretation, concluded that the use of the word "incurred" "implies an agency relationship under which the client and the party are not one and the same, and out of which the attorney expects remuneration." *Id.* It also noted that the reference to "fees and other expenses" meant that the attorney's fees should also be an expense, or something to pay, which suggested that the rule should not be applied to pro se attorneys. *Id.* The court noted:

> A party who acts on his or her own behalf does not thereby generate an expense that the party has become obligated to pay. And although such a party may lose earnings he or she might have obtained but for devoting time to the litigation, the loss of time from other employment is a loss, not an expense.

Id. at 563. The court also noted that the rule was based on Rule 11 of the FRCP and that, as of the court's writing, three federal courts had ruled that Rule 11 did not permit attorneys representing themselves to recover attorney's fees. *Id.* The court also indicated that it would seem unfair to provide fees only to pro se lawyers, but not other pro se litigants. *Id.* at 564. "[A]warding attorney fees to self-represented attorneys but not to other self-represented litigants 'would be to hold that the time and opportunity that an attorney gives up when he chooses to litigate a case in propria persona are somehow qualitatively more important and worthy of compensation than those of other pro se litigants.'" *Id.* (quoting Trope v. Katz, 902 P.2d 259, 285 (Cal. 1995)). "Such disparate treatment between attorney and nonattorney litigants would be viewed by the public as unfair, allowing only lawyer litigants to qualify for fee awards." Musaelian v. Adams, 198 P.3d 560, 564 (Cal. 2009); *see also* Frison v. Mathis, 981 A.2d 57, 60 (Md. Ct. Spec. App. 2009). Frison sued Mathis, a former client, pro se. *Id.* at 58. After prevailing at trial, he moved for attorney's fees under Maryland Rule 1-341. *Id.* The court held that he could not recover attorney's fees because he was pro se. *Id.* at 59. The appellate court affirmed. *Id.* at 58. While Frison argued that "'[t]he time spent responding to bad faith filings by Mathis interfered with cases Frison could have taken and earned fees," the court rejected the claim. *Id.* First, it held that its rule limited fees recoverable to those "incurred." *Id.* at 60. It also noted that in other contexts, Maryland courts had held that a pro se attorney litigant is not entitled to recover attorney's fees. *Id.* And, it noted the unfairness of compensating attorney pro se litigants, but not other pro se litigants, for fees. *Id.* at 63. "'[I]f both parties opt to litigate *pro se*, it would be palpably unjust for one of them (the lawyer litigant) to remain eligible for an attorney fee award, while the other becomes ineligible.'" *Id.* at 163 (quoting Swanson & Setzke, Chtd. v.

Civil Procedure 11[65] and 37,[66] other federal statutes,[67] and under contractual provisions entitling the parties to recover attorney's fees.[68] The general trend is away from awarding fees to pro se attorneys, though there are cases in the contracts context holding to the contrary.[69]

In assessing the claim for attorney's fees for pro se lawyer litigants, courts take two approaches. The first, a narrower textual approach, considers whether the plain language of the rule is susceptible to the interpretation that a pro se attorney could be awarded "fees" to compensate himself for the time spent litigating the issue in question.[70] Under the Federal Rules of Civil Procedure, for example, in considering whether the pro se attorney should be able to claim attorney's fees under various sanctions provisions, courts questioned whether that would be

Henning, 774 P.2d 909, 913 (Idaho Ct. App. 1989)).

65. *See, e.g.*, Massengale v. Ray, 267 F.3d 1298, 1302–03 (11th Cir. 2001) (per curiam) (holding that Rule 11 does not allow for an award of attorney's fees to a pro se litigant; "Because a party proceeding *pro se* cannot have incurred attorney's fees as an expense, a district court cannot order a violating party to pay a *pro se* litigant a reasonable attorney's fee as part of a sanction. . . . The award violated the plain language of Rule 11").

66. *See* Pickholtz v. Rainbow Techs., Inc., 284 F.3d 1365, 1375 (Fed. Cir. 2002) (concluding that the language of Rule 37, providing that a party may be required to pay to the moving party "the reasonable expenses incurred in making the motion," precluded an order of attorney's fees to a pro se attorney under Rule 37, but that such an award might be permitted under the court's inherent power).

67. *See, e.g.*, Pietrangelo v. U.S. Army, 568 F.3d 341, 343, 345 (2d Cir. 2009) (per curiam) (relying on *Kay* in denying pro se attorney's claim for attorney's fees under the Freedom of Information Act); Kooritzky v. Herman, 178 F.3d 1315, 1322, 1325 (D.C. Cir. 1999) (citing to *Kay* in denying pro se attorney's claim for attorney's fees under Equal Access to Justice Act). For a compilation of cases under the Freedom of Information Act, see Richard E. Kaye, Annotation, *Construction and Application of Freedom of Information Act Provision Concerning Award of Attorney's Fees and Other Litigation Costs*, 179 A.L.R. FED. 1, § 6(a)–(b) (2002).

68. *See In re* Tantiwongse, 863 N.E.2d 1188, 1191 (Ill. App. Ct. 2007) (holding that lawyers who brought suit to recover fees from a former client could not recover attorney's fees for their own efforts in bringing the fee collection action, even though the contract with the client provided for fees: "Lawyers representing themselves simply do not incur legal fees. Thus, attorneys who represent themselves in an action are not entitled to recover their own attorney fees").

69. *See* Robbins v. Krock, 896 N.E.2d 633, 635–36 (Mass. App. Ct. 2008) (allowing pro se attorney to recover attorney's fees under a contract provision); Winer v. Jonal Corp., 545 P.2d 1094, 1096–97 (Mont. 1976) (per curiam) (holding pro se lawyers are entitled to recover attorney's fees). *But see* Gorman v. Tassajara Dev. Corp., 100 Cal. Rptr. 3d 152, 193 (Ct. App. 2009) (denying attorney's fees under contract provision for lawyer's work representing himself and his wife in a suit against the builder of their home).

70. *See Massengale*, 267 F.3d at 1303 ("'[T]he word 'attorney' generally assumes some kind of agency (that is, attorney/client) relationship. The fees a lawyer might charge himself are not, strictly speaking, 'attorney's fees' [Therefore,] a lawyer represent[ing] himself, . . . [need not] be paid . . . .'" (quoting Ray v. U.S. Dep't of Justice, 87 F.3d 1250, 1251 n.2 (11th Cir. 1996))).

consistent with the plain meaning of the rule.[71] Where rules use the word "incurred," for example, courts have concluded that individuals representing themselves have not "incurred" a fee.[72] Others have found convincing the argument, discussed briefly in *Kay v. Ehrler*, that the use of the term "attorney" implies an agency relationship[73] and that such a relationship is missing where one person is both lawyer and client.[74]

71. *See, e.g.*, *id.* at 1302–03 (applying Rule 11). At the time *Massengale* was decided, the language of Federal Rule of Civil Procedure 11(c)(2) provided for a sanction that could include "'an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.'" *Id.* at 1302 (quoting FED. R. CIV. P. 11(c)(2)). The court concluded that, "[b]ecause a party proceeding *pro se* cannot have incurred attorney's fees as an expense, a district court cannot order a violating party to pay a *pro se* litigant a reasonable attorney's fee as part of a sanction." *Id.* at 1302–03.

The 2007 revisions to Rule 11 changed the language that is used to describe the sanctions available for a violation of Rule 11. Rule 11(c)(4) does not use the word "incurred" in describing the sanctions available for a violation (though, strangely, it uses the word with regard to recovering fees incurred in making a Rule 11 motion in Rule 11(c)(2)). Instead, the Rule indicates that "[t]he sanction may include . . . an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." FED. R. CIV. P. 11(c)(4). In view of the expressed intent that the "restyling" changes of the 2007 amendments not have a substantive effect, arguments that the omission of the word "incurred" in Rule 11(c)(4) should alter the outcome in the pro se attorney cases seem unlikely to succeed. Arguments similar to those under the prior language of the Rule were made with regard to Federal Rule of Civil Procedure 37(a)(4)(A). *See Pickholtz*, 284 F.3d at 1375 (considering the plain language of the Rule in determining that a pro se lawyer cannot collect fees for his own time). This language remains unaltered in the post-2007 Rule, now numbered 37(a)(5)(A). FED. R. CIV. P. 37(a)(5)(A); *see also* DiPaolo v. Moran, 277 F. Supp. 2d 528, 534 (E.D. Pa. 2003) (quoting similar language to support a ruling that an attorney cannot claim fees for representing himself under Rule 37 or 28 U.S.C. § 1927).

72. *See, e.g.*, Calhoun v. Calhoun, 529 S.E.2d 14, 17 (S.C. 2000) (holding pro se attorneys are not entitled to attorney fees under the section of the South Carolina code permitting attorney fee awards for fees "incurred" in divorce proceedings). For a related approach, see *Sellers v. Fourth Judicial Dist. Ct.*, 71 P.3d 495, 498 (Nev. 2003), where the court denied fees to a pro se attorney where the "Legislature's clear intent [was] that the prevailing party . . . be reimbursed by the losing party for out-of-pocket costs incurred to prosecute the suit. To interpret the statute otherwise would require us to redefine what is meant by an attorney fee, which is commonly understood to be the sum paid or charged for legal services."

73. The Court in *Kay* suggested this, though its citation for the proposition referred only to dictionary definitions of the word "attorney." Kay v. Ehrler, 499 U.S. 432, 435 & n.6 (1991); *see also Pickholtz*, 284 F.3d at 1375 ("[T]he word 'attorney' connotes an agency relationship between two parties (client and attorney), such that fees a lawyer might charge himself are not 'attorney fees.'").

74. *See* Connor v. Cal-Az Props., Inc., 668 P.2d 896, 899 (Ariz. Ct. App. 1983) ("In our opinion, the presence of an attorney–client relationship is a prerequisite to the recovery of attorneys' fees. . . . [A] party who represents himself in litigation has no right to be compensated by the payment of attorneys' fees because of the absence of an attorney–client relationship."); Omdahl v. W. Iron Cnty. Bd. of Educ., 733 N.W.2d 380, 384 (Mich. 2007) (concluding that there were no "actual attorney fees" to recover by close analysis of the textual definitions of "actual," "attorney," and "fee").

Some courts reached a decision by considering the equity issue, asking whether it would be fair to permit pro se attorneys to recover fees, but exclude non-attorney pro se litigants from recovery.[75] Courts have typically concluded that such an imbalance would be unjust.[76]

The second approach involves considering the purpose behind the rule or statute providing for a fee award and asking whether a grant of fees to a pro se attorney would advance the purpose underlying the provision.[77] This was the approach largely adopted by the Supreme Court in *Kay v. Ehrler*.[78] Notwithstanding the fact that the Court considered the textual argument, the Court's decision did not rest on it; rather, its analysis focused on the purpose of the fee provision and whether that purpose would be furthered by awarding fees to pro se litigants.[79]

The two examples discussed here reflect two principles. The first principle is that courts' analysis of the applicability of rules to pro se lawyers is rarely driven by explicit resort to text.[80] This may be because the drafters of the applicable rules have rarely considered the pro se problem, rendering the textual analysis ultimately unsatisfying. Nonetheless, it is interesting that textual analysis of the fee statutes and the no-contact rule would suggest similar outcomes in the two situations, and

75. *See, e.g.*, Young v. Midwest Family Mut. Ins. Co., 753 N.W.2d 778, 783 (Neb. 2008) ("Allowing a pro se attorney litigant to recover fees while barring nonlawyer litigants from collecting fees would 'create disparate treatment of pro se litigants on the basis of their occupations,' and we decline to adopt such a rule.").

76. *See Connor*, 668 P.2d at 899 ("We cannot . . . have one rule which provides for compensation to attorneys when acting on their own behalf and another rule for lay persons acting on their own behalf."); Swanson & Setzke, Chartered v. Henning, 774 P.2d 909, 913 (Idaho Ct. App. 1989) ("The system would be one-sided, and would be viewed by the public as unfair, if one party (a lawyer litigant) could qualify for a fee award without incurring the potential out-of-pocket obligation that the opposing party (a nonlawyer) ordinarily must bear in order to qualify for a similar award. Moreover, if both parties opt to litigate *pro se*, it would be palpably unjust for one of them (the lawyer litigant) to remain eligible for an attorney fee award, while the other becomes ineligible."); *Young*, 753 N.W.2d at 783 ("Allowing a pro se attorney litigant to recover fees while barring nonlawyer litigants from collecting fees would 'create disparate treatment of pro se litigants on the basis of their occupations,' and we decline to adopt such rule." (quoting Mix v. Tumanjan Dev. Corp., 126 Cal. Rptr. 2d 267, 271 (Ct. App. 2002))).

77. *See* Kay v. Ehrler, 499 U.S. at 435–37 (considering the purpose of § 1988).

78. *See supra* notes 58–63 and accompanying text.

79. *See Kay*, 499 U.S. at 437 ("A rule that authorizes awards of counsel fees to *pro se* litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf.").

80. *See id.* at 435 ("We do not think either the text of the statute or its legislative history provides a clear answer.").

yet, courts have, for the most part, rejected that result. Perhaps that reflects a broader principle, one that disfavors pro se representation by applying to pro se attorneys all the limitations of the attorney status, but none of the privileges. Even assuming that is the unspoken intention, textual analysis is rarely the vehicle used to achieve the desired result. The second principle is that the piecemeal resolution provided by this approach provides little in the way of clear or consistent guidance to the pro se lawyer or other interested stakeholders, particularly where the textual analysis and the purpose-based analysis tend in different directions (as is the case with the no-contact rule). Nor do they provide a clear template as to how to address other issues that arise with regard to the pro se lawyer.

Focusing on the underlying purpose of the rule, by contrast, provides a series of principles which are articulable and reproducible. Moreover, it is the way in which courts appear to be analyzing and deciding the pro se cases as they arise. The following section demonstrates that purpose-based analysis provides a reproducible, predictable, and equitable resolution to the problem of categorizing the pro se attorney.

III. PURPOSE-BASED ANALYSIS

The previous section demonstrates that textual analysis is not a particularly fruitful or consistent way of determining which rules of professional responsibility should properly be applied to pro se lawyers. It also explains only some courts' approaches in addressing pro se cases: in fee cases, while many court decisions have turned on the text of the particular fee provision at issue, in the no-contact cases, very few courts have focused significantly on the text of the rules they were parsing.[81]

Another approach—and one courts regularly employ—is to ask what purpose the rule in question serves.[82] That question may not always be easy to answer. Professional responsibility regulation furthers a broad range of policy interests. It may be hard in a given situation to figure out

81. *Compare Kay*, 499 U.S. at 435 (stating that the text of the statute in question lends no support), *with* Massengale v. Ray, 267 F.3d 1298, 1302 (11th Cir. 2001) (per curiam) (focusing more on the underlying policy concerns while still considering a textual analysis approach), *and* Kooritzky v. Herman, 178 F.3d 1315, 1323 (D.C. Cir. 1999) (relying on the textual definition of "attorney" as described in *Kay*).

82. *See infra* notes 86–87 and accompanying text.

the underlying purpose of the rule. Rules may also be motivated by multiple purposes, complicating the inquiry.[83] Nonetheless, analysis of the purpose served by a rule informs the appropriateness of applying the rule to a pro se lawyer. If a rule is intended to protect third parties—including opponents, unrepresented third parties, or the court—from the machinations of a lawyer, it will advance the purpose of such a rule to apply it to lawyers representing themselves. By contrast, a rule intended to protect clients or lawyers need not be applied to a pro se lawyer. The purpose-based approach both provides a satisfying framework for analyzing pro se lawyer issues and explains the courts' often unspoken behavior in handling these issues.

A. *Applying Purpose-Based Analysis to Established Law*

Consider how the purpose-based analysis would resolve the issues discussed in Part II. We begin with the no-contact rule.

1. The No-Contact Rule

As is shown in Part II, the purpose of the no-contact rule is to protect represented persons from unauthorized contacts by lawyers involved in a matter. The concern is that lawyers dealing with represented persons in the absence of their lawyers may overreach, may use their persuasive skills to extract confidential information or concessions, or may seek to undermine the trust and confidence the represented person has in his or her attorney.[84] Given that the represented person has chosen to deal with the matter through counsel, the rule guarantees protection of that choice.[85]

83. Consider, for example, the purpose of the conflicts rules. One might argue that the purpose of the conflicts rules is client protection—rules that require the lawyer to remain loyal to the client's interests assure that client interests will always be foremost. One might also argue that the conflicts rules are other-regarding—by assuring that the rules of professional conduct protect the lawyer's client from disloyal attorneys, courts and opponents need not worry about the loyalties of the client's attorney. Furthermore, one may view them as self-serving—by maintaining a rules regime that purports to place client interests ahead of all others, lawyers can argue that they are uniquely situated to protect client interests and that their services accordingly merit a high market price.

84. *See supra* notes 33–34 and accompanying text.

85. This explains the distinction between this rule and Model Rule 4.3: where a person is unrepresented and has not yet chosen to deal with the outside world through a lawyer, other attorneys are not prohibited from dealing directly with that person as long as certain constraints are satisfied. *See* MODEL RULES OF PROF'L CONDUCT R. 4.3 (2010) (establishing rules for interactions

Courts have regularly applied Model Rule 4.2 to pro se lawyers and have done so relying explicitly on the purpose of the Rule.[86] Purpose-based analysis thus produces a result consistent with the underlying justification of the Rule and reflects the way the majority of courts have resolved this issue.[87]

2. Attorney's Fees

Purpose-based analysis also satisfactorily resolves the question of whether pro se attorneys should be able to recover attorney's fees for self-representation.[88] Where the fee provision is statutory, courts have looked to the underlying purpose of the fee provision to determine whether applying it to a pro se attorney would advance the purpose of the provision.[89] If, as the Supreme Court concluded in *Kay v. Ehrler*, attorney fee provisions are designed to facilitate access to quality counsel, concerns about the quality of pro se representation and the equity of privileging lawyers relative to nonlawyer pro se litigants should result in denying the fee claim. This is logically satisfying, but also consistent with the way these cases are actually being decided.[90]

with unrepresented persons).

86. This is reflected both in ethics opinions and in disciplinary decisions. For ethics opinions, see, for example, The Ethics Committee*, Can Pro Se Lawyer Speak with a Represented Party over the Objection of the Party's Lawyer?*, 39 MD. B.J. 57 (2006), stating: "The Rule was intended to prevent lawyers from taking advantage of persons not skilled in the practice and rules of law when the party opponent has legal representation."; see also D.C. Bar, Ethics Op. 258 (1995), noting that Rule 4.2 is motivated by a need to protect lay persons from being overwhelmed and exploited by lawyers and that "[t]hese societal concerns and interests have no less validity when the lawyer positioned to do the coaxing is a lawyer-party proceeding pro se." For disciplinary decisions, see, for example, *Runsvold v. Idaho State Bar*, 925 P.2d 1118, 1120 (Idaho 1996), which held that applying Rule 4.2 to pro se lawyers "better effectuates the purpose of [the] Rule."

87. *See, e.g.*, *Runsvold*, 925 P.2d at 1120 (focusing on the underlying purpose of the Rule).

88. *See* Connor v. Cal-Az Props., Inc., 668 P.2d 896, 899 (Ariz. Ct. App. 1983) (noting the purpose of a rule allowing pro se counsel to receive attorney's fees).

89. See discussion of *Kay v. Ehrler*, *supra* notes 58–63 and accompanying text.

90. One might also argue that the purpose of an attorney fee provision is to discourage frivolous litigation by increasing the cost of bringing frivolous proceedings. That purpose might be furthered equally by granting fee claims to anyone bringing them, including pro se attorneys. Courts deciding the fee issue do not routinely articulate this as the purpose of the fee provisions, but this argument does suggest that purpose-based analysis is not without its own complexities.

B. *Applying Purpose-Based Analysis to Less-Developed Problems with Regard to Pro Se Lawyers*

It is easy to argue that purpose-based analysis proposed in the previous section is the correct approach when there is a developed body of case law to demonstrate its accuracy. The acid test comes when we ask whether it assists us in addressing less-developed areas of law with regard to the pro se attorney. As it turns out, purpose-based analysis is a useful approach in addressing relevant, but less-considered, issues regarding the pro se lawyer.

Consider, for example, the rules on contacts with unrepresented persons embodied in Model Rule 4.3.[91] Model Rule 4.3 imposes a limited set of constraints on the lawyer "dealing on behalf of a client with a person who is not represented by counsel."[92] The Rule imposes three limitations: (1) The lawyer may not "state or imply" that he or she is disinterested; (2) if 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"; and (3) "[t]he 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."[93] The purpose of the Rule is protection of the interest of the unrepresented third party: comments to the Rule explicitly express the concern that "the lawyer will compromise the unrepresented person's interests."[94] In light of that purpose, the Rule should plainly be applied to pro se lawyers.[95]

Another category of rules that might properly be applied to pro se lawyers are rules designed to protect the court or the integrity of the judicial process.[96] Without much comment, courts uniformly apply these

91. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2010).

92. *Id.*

93. *Id.*

94. *Id.* R. 4.3 cmt. 2.

95. There is one case rejecting the application of Rule 4.3 to a pro se litigant. Applying a textual argument, a Michigan appellate court concluded that, "because defendant was not dealing on behalf of a client," Rule 4.3 did not apply. Suck v. Sullivan, No. 207488, 1999 WL 33437564, at *2 (Mich. Ct. App. Aug. 27, 1999) (per curiam). The court also concluded that even if the Rule had applied, it would not have imposed on the defendant the obligation the plaintiff claimed that it did. *Id.*

96. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2010) (requiring a lawyer to bring only

rules to pro se lawyers.[97] Purpose-based analysis of the issue demonstrates the propriety of this approach. For example, prohibitions on the bringing of frivolous proceedings[98] have been applied to pro se litigants.[99] Because those rules are intended to protect the courts and third parties from the burden of responding to baseless litigation, application of the rule to pro se lawyers seems entirely appropriate.

There is, however, some confusion because courts are sometimes unclear about whether the lawyer-parties disciplined for such violations are represented parties or are appearing *in propria persona*.[100] The rule has also been applied to lawyer-parties, even if they are separately represented, apparently on the theory that all lawyers, whether acting as parties or advocates, owe an inescapable duty to the court.[101] Because the rule applies whether lawyers are appearing pro se or are simply parties, courts are often unclear about the explicit role of the attorney that led to the sanction.[102] Courts regularly appear to apply Rule 3.1 to lawyers who are

meritorious claims and contentions); *see also id.* R. 3.3 (discussing a lawyer's ethical duty of candor towards the tribunal).

97. *See* State *ex rel.* Okla. Bar Ass'n v. Bedford, 956 P.2d 148, 150–51 (Okla. 1997) (sanctioning a lawyer who "commenced an action . . . on his own behalf" against a bank when the action was frivolous); *In re* Wood, 526 N.W.2d 513, 515 (Wis. 1995) (per curiam) (applying Rule 3.1 to a pro se lawyer).

98. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2010) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.").

99. *See Bedford*, 956 P.2d at 150–51 (sanctioning a pro se lawyer for filing a frivolous lawsuit); *In re* Wood, 526 N.W.2d at 514–15 (suspending pro se lawyer's license for pursuing a frivolous lawsuit).

100. *See infra* note 103 and accompanying text.

101. *See, e.g.*, *In re* Yao, 661 N.Y.S.2d 199, 201–02 (App. Div. 1997) (per curiam) (rejecting an attorney's argument that he could not be disciplined for bringing a frivolous claim because that provision was limited "to actions by an attorney in the representation of a client"; the court held that he was "the principal force behind the prosecution of the case" and therefore "falls within the essence of these rules"); *see also In re* Sandvoss, 644 N.Y.S.2d 557, 559 (App. Div. 1996) (per curiam) (disciplining a lawyer who, inter alia, "knowingly advanced a claim or defense that is unwarranted under existing law" by bringing a defamation case against a former client who filed a disciplinary claim against the lawyer; the lawyer was represented in the defamation action). Consistent with this conclusion, some courts have held that a lawyer/client may claim reliance on advice of counsel as an adequate defense to a Rule 3.1 violation. *See In re* Ruffin, 610 S.E.2d 803, 808 (S.C. 2005) (per curiam) (finding no clear and convincing evidence of a violation of Rule 3.1 when the lawyer/client relied on advice of counsel as to whether he had a RICO claim, when RICO was outside his area of expertise). This suggests that, in the absence of a defense of reliance on counsel, lawyers would have disciplinary liability for pressing, as clients, frivolous claims or defenses.

102. *See, e.g.*, Att'y Grievance Comm'n v. Culver, 849 A.2d 423, 436 (Md. 2004) (sanctioning an attorney, but failing to state whether the attorney had violated the Rules by acting in a

parties in litigation, without specifying clearly whether the lawyer appeared *in propria persona* or was represented by counsel.[103] To benefit the clarity and development of doctrine regarding pro se lawyers, it would be better if the courts, in disciplinary proceedings, were clear about whether lawyers are being disciplined for their conduct as parties, as pro se lawyers, or both.

A similar analysis applies to the lawyer's obligation of candor towards the tribunal.[104] Model Rule 3.3 embodies the obligation not to make false statements or misstatements to the court.[105] It includes prohibitions on making a "false statement of fact or law to a tribunal"; "fail[ing] 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"; and "offer[ing] evidence that the lawyer knows to be false."[106] Textually, the Rule creates some ambiguity; on the one hand, it is a prohibition directed to "[a] lawyer," with no indication that it applies only to lawyers playing a representative role.[107] At the same time, it indicates that the obligation to disclose controlling legal authority applies where the authority is "known to the lawyer to be

representational capacity or *in propria persona*).

103. *See generally id.* at 423 (failing to identify whether an attorney was represented by counsel). While Culver was representing a client in a divorce case, the client alleged that Culver had forcible sexual relations with her. At that point, Culver "engaged in a pattern of conduct of obstruction and delay to interfere in . . . [the client]'s suit against him." *Id.* at 436. These activities included bringing a defamation suit against the client, evading discovery in that matter, then voluntarily dismissing it; filing a (subsequently dismissed) bankruptcy petition in order to stay the client's suit against him; and attempting to have the bankruptcy court reduce his agreed settlement payment to the client. *Id.* The court concluded that Culver had "exceeded the bounds of normal aggressive lawyering and by his conduct, violated Rule[ ] 3.1." *Id.* The court, however, did not state clearly whether Culver was represented in these various machinations or was proceeding pro se. For a similar problem, see *Fox v. Boucher*, 794 F.2d 34, 38 (2d Cir. 1986) (imposing Rule 11 sanctions on a lawyer for bringing a frivolous claim; not clear whether he brought it pro se or had counsel); see also *People v. Albright*, 91 P.3d 1063, 1066–67 (Colo. 2003) (sanctioning a lawyer for bringing frivolous claims and appealing adverse rulings; not clear whether lawyer was represented or pro se); *Att'y Grievance Comm'n v. Richardson*, 712 A.2d 525, 532 (Md. 1998) (imposing reciprocal discipline for, inter alia, bringing a frivolous claim for fees; court is unclear whether lawyer was represented in bringing the claim); *In re Selmer*, 568 N.W.2d 702, 704 (Minn. 1997) (per curiam) (disciplining lawyer for violations of Rule 3.1 for asserting frivolous defenses in creditor's litigation; not clear whether lawyer defended himself or had counsel); *In re Blasi*, 660 N.Y.S.2d 151, 153 (App. Div. 1997) (per curiam) (disciplining lawyer without addressing whether he was represented by separate counsel).

104. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 (2010).

105. *Id.* R. 3.3(a)(1).

106. *Id.* R. 3.3.

107. *See id.* R. 3.3(a).

directly adverse to the position of the client," suggesting that there must be a client for this provision to apply.[108]

Courts have explicitly applied this provision to pro se lawyers,[109] as well as to lawyer-parties who are separately represented.[110] Moreover, some courts have not specifically addressed the pro se issue, making it difficult to identify the role in which the lawyer is being disciplined.[111] Courts are divided about whether a lawyer may be disciplined under this section for giving false testimony as a witness.[112]

108. *See id.* R. 3.3(a)(2).

109. *See, e.g.*, *In re* O'Meara's Case, 834 A.2d 235, 237 (N.H. 2003) (disciplining a lawyer for making false representations to the court while representing himself in his divorce case). The court noted specifically that "an attorney representing himself is held to the same standards as an attorney representing a client, particularly the standard of candor toward the tribunal." *Id.* at 237; *see also* Sprauve v. Mastromonico, 86 F. Supp. 2d 519, 528–29 (D.V.I. 1999) (sanctioning a pro se attorney when he "willfully made untrue statements in a pleading that he signed and filed with the Court," and, in another instance, "knowingly misrepresented a material fact to the Court" in violation of Rule 3.3). Attorney Sprauve apparently argued that he should not be subject to discipline for this conduct because he was appearing pro se. The court found this unconvincing. "Contrary to the plaintiff's assertions . . . he cannot immunize himself from sanctions related to his status as an attorney merely because he signed his pleadings 'plaintiff pro se.' The plaintiff is an attorney whenever he appears before the Court, the public, or the mirror." *Sprauve*, 86 F. Supp. 2d at 530 n.37. This prohibition is sometimes applied to lawyers even when there is no judicial proceeding at all. *See, e.g.*, *In re* Diggs, 544 S.E.2d 628, 630 (S.C. 2001) (per curiam). Diggs was sanctioned under, inter alia, Rule 3.3 for submitting a false sworn statement of his compliance with CLE requirements. He argued that "certain rules are inapplicable to his disciplinary matter because they concern the representation of clients, and no clients were involved." *Id.* The court imposed discipline without addressing that argument. *Id.*

110. *See, e.g.*, *In re* Harris, 847 So. 2d 1185, 1194 (La. 2003) (per curiam) (detailing how a lawyer in a disciplinary proceeding "manufactured evidence and presented perjured testimony in an attempt to avoid lawyer discipline"); *In re* Kornreich, 693 A.2d 877, 883 (N.J. 1997) (per curiam) (disciplining a lawyer for making false statements to the court when she made such statements to her attorney, who repeated them to the court); Diaz v. Comm'n for Lawyer Discipline, 953 S.W.2d 435, 438 (Tex. App.—Austin 1997, no writ) ("Diaz contends the rule prohibiting false statements of material fact to a tribunal did not apply because his statements were made not as an attorney but as a party. . . . The Disciplinary Rules of Professional Conduct do not allow the distinction for which Diaz contends."). Citing to Texas Disciplinary Rule of Conduct 8.04(a)(1), the court in *Diaz* stated, "A lawyer shall not . . . violate these rules . . . whether or not such violation occurred in the course of a client-lawyer relationship." *Diaz*, 953 S.W.2d at 438.

111. *See, e.g.*, *In re* Barker, 572 S.E.2d 460, 461–62 (S.C. 2002) (per curiam) (sanctioning an attorney who gave false testimony in his own divorce proceeding in which he appeared pro se; unclear whether the court disciplined the attorney in his role as a witness or as a lawyer); *see also* People v. Albright, 91 P.3d 1063, 1067–68 (Colo. O.P.D.J. 2003) (imposing discipline under Colorado Rule of Professional Conduct 3.3 for making misrepresentations in bankruptcy petition; not clear whether lawyer represented herself in bankruptcy proceeding or had an attorney); *In re* Rumsey, 71 P.3d 1150, 1155–58 (Kan. 2003) (per curiam) (disciplining a lawyer for including false statements in a civil complaint; not clear whether lawyer was represented or was pro se in preparing the complaint).

112. *Compare In re* Whitney, 120 P.3d 550, 556 (Wash. 2005) (en banc) (concluding that an

A purpose-based analysis of the Rule suggests the correctness of this broad application. The lawyer's duty of candor to the court is intended to protect the court;[113] the lawyer's duties of zeal to a client must be secondary to her duty to the tribunal.[114] The lawyer's obligation to avoid misleading the tribunal protects both the tribunal[115] and, more broadly, the integrity of the judicial proceeding.[116] Since the Rule is intended to protect the court and the integrity of the process rather than the client, it is appropriate to apply the Rule with equal force to pro se attorneys.

Model Rule 3.4 sets out a range of obligations under the broad rubric of "Fairness to Opposing Party and Counsel."[117] The language of Rule 3.4 is not limited to lawyers acting in a representative capacity; it begins "A lawyer shall not"[118] and courts have applied the Rule to lawyers acting as parties.[119] If a lawyer acting only as a party, who is separately represented,

attorney who falsely testified while serving as a guardian ad litem was subject to disciplinary action as an attorney since "[t]he plain fact is that how one conducts himself or herself as a [guardian ad litem] reflects on their ability to practice law" and such work did not relieve Whitney "of the ethical obligations of his chosen profession"), *with* State *ex rel.* Okla. Bar Ass'n v. Dobbs, 94 P.3d 31, 51–52 (Okla. 2004) (holding that false testimony at a deposition, while a violation of Rules 8.4(b) and (c), was not a violation of Rule 3.3 because "[t]hat rule addresses professional misconduct *as an advocate* for making false statements to a tribunal, not false statements by a lawyer as a witness").

113. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 12 (2010) ("Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process.").

114. *See id.* R. 3.3 cmt. 2 (noting that a lawyer's duty to zealously represent his or her client "is qualified by the advocate's duty of candor to the tribunal").

115. The suggestion that the obligation exists for the protection of the tribunal is visible in the comments to Model Rule 3.3. *See, e.g.*, *id.* ("[T]he lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false."); *id.* R. 3.3 cmt. 4 ("Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal.").

116. *See id.* R. 3.3 cmt. 2 ("This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.").

117. *Id.* R. 3.4.

118. *Id.*

119. With regard to the destruction of evidence, see, for example, *Att'y Grievance Comm'n v. White*, 731 A.2d 447, 450 (Md. Ct. Spec. App. 1999), which imposed reciprocal discipline on a lawyer for destroying parts of an autobiographical manuscript relevant to the employment discrimination case in which she was a plaintiff. She argued that she "was never afforded the opportunity to defend herself against the bully tactics employed in the decision by the federal court due to the incompetent act of her counsel," indicating that she had representation. *Id.* at 451. On generating false evidence, see *In re Bennett*, 975 P.2d 262, 263–64 (Kan. 1999) (per curiam) (court disciplined a lawyer for making false reports to the police department and insurance company claiming items were stolen after a burglary when they were not); see also *In re Fuller*, 621 N.W.2d 460, 465–66 (Minn. 2001) (per curiam) (lawyer generated false evidence in his disciplinary case; not clear whether he was represented or pro se).

is subject to the requirements of Rule 3.4, then a lawyer who is both a party and his own counsel is likely to be as well. I have not, however, located any cases in which a Rule 3.4 violation is pursued against a lawyer based on conduct undertaken while the lawyer was pro se.[120]

The purpose of the Rule is evident from its title: "Fairness to Opposing Party and Counsel."[121] The Rule is intended to protect third parties—opposing parties and their attorneys—from improper conduct by a lawyer.[122] It is also intended more broadly to protect the integrity of the fact-finding process.[123] Because the prohibitions are designed to protect third parties and the integrity of the judicial process, application of these prohibitions to the pro se lawyer seems entirely appropriate.

Or consider Model Rule 3.5, captioned: "Impartiality and Decorum of the Tribunal."[124] This Rule prohibits lawyers from engaging in activities that might influence a decisionmaker.[125] It includes, inter alia, prohibitions on "seek[ing] to influence a judge, juror, prospective juror or other official by means prohibited by law"; on ex parte communications; and on "conduct intended to disrupt a tribunal."[126] As a matter of pure textual analysis, the rule applies to all lawyers. The Rule begins, "A lawyer shall not" and there is no textual suggestion that the Rule applies only to

120. The section of the Rule that prohibits disobeying an obligation to a tribunal, 3.4(c), is applied broadly to lawyers failing to meet their obligations to the court by, inter alia, violating conditions of probation. *See, e.g.*, *In re* Mitchell, 946 P.2d 999, 1000–02 (Kan. 1997) (per curiam) (ordering suspension of a lawyer who abused alcohol and drugs while on probation); Att'y Grievance Comm'n v. Minisohn, 846 A.2d 353, 359 (Md. 2004) (sanctioning disbarment when an attorney failed to appear in a proceeding he had been ordered to attend in expert witness's suit against the lawyer for fees). In *Minisohn*, the lawyer "admitted that as an officer of the court, he ha[d] an obligation to comply with court orders, whether representing a client or acting on his own behalf." *Id.* at 359; *see also* Fla. Bar v. Gersten, 707 So. 2d 711, 712, 714 (Fla. 1998) (per curiam) (imposing discipline on a lawyer under Rule 3.4(c) for failure to comply with a court order requiring him to give a statement about a claim that his car was stolen—a claim for which he was being criminally investigated); *In re* Giberson, 581 N.W.2d 351, 352, 354–55 (Minn. 1998) (per curiam) (ordering suspension under Rule 3.4(c) for a lawyer's willful failure to pay child support and spousal maintenance).

121. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2010).

122. *Id.* R. 3.4 cmt. 1.

123. *See id.* ("The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.").

124. *Id.* R. 3.5.

125. *Id.*

126. *Id.*

lawyers who are representing a client.[127] The comments to the Rule, however, indicate some ambiguity, suggesting that the Rule is premised on a lawyer's obligations as an advocate acting on behalf of a litigant.[128]

The purpose of the Rule is the protection of the integrity of the judicial process.[129] Permitting lawyers to seek to influence decisionmakers might tempt some decisionmakers to yield; in any event, permitting the conduct would suggest that the process was manipulable, which would derogate from the respect and esteem in which the judicial system would be held. It accordingly seems consistent with the purposes of the Rule to apply it to pro se lawyers. The courts have done exactly that, finding that pro se lawyers are constrained by this provision,[130] though lawyers not involved in a particular matter may not be.[131]

As a constraint on prohibitions on ex parte communications, this makes sense; it is difficult to define what would constitute an ex parte contact for a lawyer not involved in a proceeding. The definition of an ex parte communication seems to imply participation in the matter.[132] That such

127. *Id.*

128. *See id.* R. 3.5 cmt. 4 ("The *advocate's function* is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak *on behalf of litigants*." (emphasis added)).

129. *Id.* R. 3.5 cmt. 1.

130. *See* Barrett v. Va. State Bar, 611 S.E.2d 375, 382 (Va. 2005) (finding a violation of Rule 3.5's prohibition on ex parte contacts when a pro se lawyer wrote a letter to the judge in his divorce case arguing that his ex-wife should not be given custody and did not send a copy to opposing counsel); *see also* Corsini v. U-Haul Int'l, Inc., 630 N.Y.S.2d 45, 46–47 (App. Div. 1995) (dismissing a pro se lawyer's complaint as a sanction for harassing and belittling counsel and refusing to answer questions at his deposition). In *Corsini*, the court distinguished cases in which courts declined to punish litigants for the misbehavior of their attorneys. *Id.* at 47.

131. *See* State *ex rel.* Okla. Bar Ass'n v. Hine, 937 P.2d 996, 997 (Okla. 1997). Hine was a lawyer who wrote and, with other members of an advocacy group, signed and sent to the judge a letter about a pending matter. *Id.* She was not an advocate for either party before the court, nor was she a party to the matter. She argued that the prohibition on ex parte contacts did not apply to her because it applied only to advocates, and the court accepted this argument. *Id.* at 999. The court noted:

> The respondent correctly argues that the rules governing ex parte communications *by advocates* do not apply to her. The standards of practice enumerated in Rules 3.1 et seq., ORPC [(Oklahoma Rules of Professional Conduct)], are designed to govern the behavior of litigants and their counsel actively involved in the legal process. Otherwise, that section's caption, "ADVOCATE," is rendered meaningless.

Id. While the court concluded that Hine could not violate Rule 3.5, she could and did violate Rule 8.4(d) by seeking to influence a judge in a pending matter. *Id.* at 999–1001.

132. *See* BLACK'S LAW DICTIONARY 316 (9th ed. 2009) (defining "ex parte communication" as "[a] communication between counsel and the court when opposing counsel is not present").

conduct might not violate Rule 3.5 does not suggest its propriety; attempting to influence a judge in a pending matter, even by a lawyer not involved in the matter, has been held to be conduct prejudicial to the administration of justice.[133]

Purpose-based analysis offers the benefit of clarity here. Courts attempting to resolve this issue by looking to the text of the Rule and its context have the potential to reach diametrically different results. While one court concluded that the Rules 3.1 *et seq.* applied only to advocates,[134] others have concluded that a lawyer may act as an advocate when advocating for his own interests as well as those of a client.[135] Looking to the purpose of the Rule makes clear that the Rule is intended for the protection of the integrity of the fact-finding process and the legitimacy of the system; applying such a rule to a lawyer acting pro se seems entirely appropriate.

Another example is the prohibition on threatening criminal charges "to obtain an advantage in a civil matter."[136] While the Model Rules deleted this specific provision, the Model Code of Professional Responsibility

133. *See Hine*, 937 P.2d at 1000–01 (holding that a lawyer's contacts with the court about a pending matter in which she was not acting as an advocate for either side did not violate Rule 3.5, but did violate Rule 8.4(d)). The court concluded:

> Respondent intentionally interjected into a pending adjudicative process facts material to the issues before the court with the intent to influence the case's resolution. Although a non-advocate in the matter, as a licensed lawyer Hine had to appreciate the reasonable likelihood of prejudice to the administration of justice which her acts would wreak. While Rules 3.1 *et seq.*, ORPC, governing the conduct of lawyers as *advocates*, do not apply to the respondent's conduct, Rule 8.4(d) certainly does. As a licensed practitioner and an *officer of the court,* Hine was duty bound to avoid interjecting facts—which she knew had not been tested by the adversarial process—into a pending adjudicative proceeding.

Id.

134. *See id.* at 999 (suggesting that Ms. Hine did not violate Rule 3.5 since she was not representing any party to the proceeding, nor was she a party to it).

135. *See* Somers v. Statewide Grievance Comm., 715 A.2d 712, 718 (Conn. 1998) (holding that Rule 3.4 applied to a pro se litigant).

136. This language is found in DR [(Disciplinary Rule)] 7-105(A) of the Model Code, but has been deleted from the Model Rules. *See ABA/BNA Lawyers' Manual on Professional Conduct* § 71:601 (2003) (explaining that the old Rule, DR 7-105, prohibited attorneys "from using the threat of criminal proceedings solely as a pressure tactic in a civil matter"). Some states have retained such a rule, however. *See, e.g.*, CONN. RULES OF PROF'L CONDUCT R. 3.4(7) (2010) ("A lawyer shall not . . . [p]resent, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."); S.C. RULES OF PROF'L CONDUCT R. 4.5 (2009) (forbidding lawyers from engaging in threatening criminal prosecution "solely to obtain an advantage in a civil matter").

included it, and a range of state ethics codes have retained it.[137] In states that had (or continue to have) this specific prohibition, the question whether it should be applied to pro se attorneys has arisen. Courts have held that this prohibition applies to lawyers acting pro se.[138] One court based that conclusion on the purpose of the rule. "The conduct contemplated [by the Rule] is prohibited because it is deemed to be unfairly coercive and, therefore, an abuse of the criminal process; such conduct is no less coercive when it is engaged in by an attorney who is acting pro se rather than in a representative capacity."[139] The Rule was often invoked to respond to the use of threats by lawyers against their own present or former clients.[140] The purpose of the Rule in protecting such

137. *See supra* note 136.

138. *See, e.g.*, *Somers*, 715 A.2d at 714–15. In *Somers*, disciplinary charges were filed under Connecticut's Rule 3.4(7), which provided that "a lawyer shall not . . . [p]resent, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." *Id.* at 714 n.1. Discipline was imposed and Somers appealed, claiming, inter alia, that the Rule did not apply to a lawyer acting pro se. *Id.* at 717. This was a bit mysterious, as the dissenting justices contended that Somers was in fact "a party represented by an attorney." *Id.* at 723 (McDonald, J., dissenting). That would make him not a pro se attorney, but simply a party. *Id.* at 723–24. Despite this confusion, the court clearly stated that the Rule should apply to a pro se attorney. "Rule 3.4, which is entitled 'Fairness to Opposing Party and Counsel,' contains no contextual suggestion that it is applicable to an attorney only when the attorney is representing a client and not when he or she is acting pro se. . . . [T]here is no indication, either in the language of rule 3.4 or in the relevant commentary to the rule, that the rule's prohibitions are inapplicable when the attorney is acting pro se rather than representing a client." *Id.* at 718 (majority opinion) (footnote and citations omitted). Somers argued that since the Rule appeared under the heading "Advocate," it applied only when the lawyer was acting as an advocate for another. *Id.* at 718 n.16. The court rejected that interpretation and concluded:

> [A]n advocate need not be representing the interests of another but, rather, may be acting on his or her own behalf. We see no reason, therefore, why an attorney may not be considered an "advocate" when that attorney is representing his or her own interests and not those of a client.

Id. The court nonetheless remanded the case, on the ground that the court below had improperly considered irrelevant evidence. *Id.* at 723.

139. Somers v. Statewide Grievance Comm., 715 A.2d 712, 718–19 (Conn. 1998). The court also quoted EC [(Ethical Consideration)] 7-21 to the predecessor Rule, which stated:

> Threatening to use, or using the criminal process to coerce adjustment of private civil claims or controversies is a subversion of [the criminal] process [and] the person against whom the criminal process is so misused may be deterred from asserting his [or her] legal rights and thus the usefulness of the civil process in settling private disputes is impaired.

Id. at 719 n.18 (internal quotation marks omitted). The Rule thus protected a third party—"the person against whom the criminal process is so misused"— as well as "public confidence in our legal system." *Id.*

140. *See* People v. Farrant, 852 P.2d 452, 455 (Colo. 1993) (en banc) (per curiam) (imposing suspension on a lawyer who threatened to reveal confidences, which would lead to criminal charges

individuals from coercive conduct would doubtless be advanced by applying it to protect clients from their own pro se lawyers.

The purpose of the Rule, as set out in EC 7-21 to the former Code provision, was the protection of the system and the rights of the threatened party:

> Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting . . . legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.[141]

The Rule prevents coercive behavior: "The fear of criminal prosecution provides the leverage by which the lawyer hopes to coerce the recipient's decision."[142] In view of the purpose of the Rule—to protect third parties from improper coercion—the application of the Rule to pro se attorneys is appropriate.

As the analysis in this Article has demonstrated, the underlying purposes of some of the rules of professional conduct militate in favor of applying the Rule broadly to pro se lawyers. That is not uniformly the case, however. Consider, for example, the prohibition against a lawyer acting as a witness in a matter where she is also an advocate. Model Rule 3.7 provides that, with limited exceptions, "[a] lawyer shall not act as advocate

against his client, if his fee was not paid); People v. Smith, 773 P.2d 522, 528 (Colo. 1989) (en banc) (finding a violation of DR 7–105(A) after a lawyer threatened criminal charges to force a former client to pay his legal fee); State v. Rohrig, 139 N.W. 908, 912 (Iowa 1913) (upholding disbarment where an attorney invoked the criminal process to settle outstanding legal fees owed by a client); *In re* Yarborough, 488 S.E.2d 871, 874–75 (S.C. 1997) (per curiam) (ordering suspension for an attorney who threatened criminal charges against a client who owed him money); *see also In re* Porter, 393 S.W.2d 881, 882 (Ky. 1965) (per curiam) (mandating disbarment for an attorney who induced his secretary to make false accusations leading to a criminal charge against a client in an effort to deter the client from pursuing a monetary claim against the attorney). Instances of the application of the Rule are not limited to threats against former clients. *See* Marquette v. State Bar of Cal., 746 P.2d 1289, 1291 (Cal. 1988) (en banc) (ordering disbarment for an attorney who threatened to implicate a client's fiancée in criminal matters if the fiancée sought a refund of unused advance); Bluestein v. State Bar of Cal., 529 P.2d 599, 601 (Cal. 1975) (per curiam) (sanctioning an attorney who had filed criminal battery charges against a client's estranged husband and refused to drop the charges until the client's legal fees were paid); Fla. Bar v. Flynn, 512 So. 2d 180, 181 (Fla. 1987) (per curiam) (reprimanding an attorney who threatened to bring a judicial grievance against a judge).

141. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-21 (1980).

142. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 772 at 7 (2003).

at a trial in which the lawyer is likely to be a necessary witness."[143] Courts that have considered this issue have concluded that a pro se lawyer does not violate this Rule by testifying in his own case.[144] This point seems obvious; in the absence of such a rule, a lawyer would be precluded from appearing pro se in any case in which she anticipated being a witness.[145] The usual witness-advocate rule thus is not applied in situations involving pro se attorneys.[146]

143. MODEL RULES OF PROF'L CONDUCT R. 3.7(a) (2010). The exceptions are that "the testimony relates to an uncontested issue," "the testimony relates to the nature and value of legal services rendered in the case," or "disqualification of the lawyer would work substantial hardship on the client." *Id.*

144. *See, e.g.*, James W. Lawson, P.C. v. Nev. Power Co., 739 F. Supp. 23, 24 (D.D.C. 1990) (holding that the Code provision requiring a lawyer who appears as a witness to withdraw "applies only in cases in which counsel has been employed, *i.e.*, retained by a third-party client, and *not* in cases in which the lawyer is representing himself" (citing O'Neil v. Bergan, 452 A.2d 337 (D.C. 1982))); Walker & Bailey v. We Try Harder, Inc., 506 N.Y.S.2d 163, 164 (App. Div. 1986) (allowing the members of a two-person law firm appearing pro se to examine each other as witnesses at trial); *see also* D.C. Bar Ass'n, Ethics Op. 44 (1978) (discussing whether a lawyer may represent his or her own law firm in litigation when that lawyer—or another member of the firm—will be called as a witness in the litigation). In the D.C. ethics opinion, the prevailing rule at the time applied to "employment in contemplated or pending litigation," and the opinion concluded that "[s]ince the managing partner and the associate [were] representing their own firm rather than being retained by outside clients, . . . they ha[d] not been 'employed' for the purposes of the pending litigation and . . . the quoted disciplinary rules [the lawyer-witness prohibition] d[id] not, therefore apply." *Id.* The opinion parsed this language:

> The term "employment" typically refers to a service relationship between two distinct individuals or entities whose interests are not coextensive. Here, however, there is such an identity of interests between the firm and its own lawyers as to render the use of the term "employment" inappropriate. The proposed arrangement is in substance more properly viewed as analogous to *pro se* representation.

Id.; *see also* O'Neil v. Bergan, 452 A.2d 337, 344 (D.C. 1982) (finding that a potential lawyer-witness "had not accepted 'employment,' within the meaning of DR 5-101(B), since the firm, in effect, was representing itself").

145. *See* Grasso v. Gen. Motors Corp., 420 N.Y.S.2d 625, 626 (Sup. Ct. 1979) ("Obviously, the rule [(Code of Professional Responsibility 5-101(B), the precursor to Rule 3.7)] cannot apply to an attorney who appears pro se."). The complexity that occupies the courts is when the pro se analogy should be applied; common situations posing such an inquiry involve a lawyer in a law firm representing the firm, see, e.g., *O'Neil*, 452 A.2d at 344–45 (addressing the issue of whether a lawyer was representing a law firm), and the personal representative of an estate representing himself. *Compare In re* Estate of Walsh, 840 N.Y.S.2d 906, 911 (Sur. Ct. 2007) (applying the advocate-witness rule to disqualify a pro se personal representative), *with Grasso*, 420 N.Y.S.2d at 627 (rejecting application of the rule to an attorney-executor representing himself in a wrongful death action).

146. For the best evidence of this principle, see *Koger v. Weber*, 455 N.Y.S.2d 935, 936–37 (Sup. Ct. 1982). The court in *Koger* held that the motion to disqualify would have been well-taken, but for the fact that it granted the motion to add the attorney as a defendant, which rendered him a pro se defendant. *Id.* at 937. "The judicial reluctance to permit an attorney to place his own

How to get there, however, is less clear. While common sense clearly militates in favor of this result, the text of the Rule does not offer any particularly satisfactory resolution of the issue; the Rule refers to acting "as an advocate at trial," which pro se attorneys doubtless do. Courts have, however, deemed the purpose of this prohibition relevant to the analysis of whether it should apply in the pro se context. One ethics opinion, dealing with what it considered the analogous issue of whether a member of a law firm could represent the firm in litigation if that lawyer—or another lawyer from the firm—was a necessary witness, concluded that the purpose of the Rule was to protect the client.[147] "Because an attorney-witness can more easily be impeached for interest, his or her effectiveness as a witness for the client may be reduced."[148]

If the Rule is intended to protect the client, it is not necessary to apply it in the context of a pro se attorney. Any risk that flows from the decision to represent oneself—or an entity, like a law firm, of which one is a constituent—and serve simultaneously as an advocate, is a risk that a pro se lawyer assumes when making the decision to proceed with self-representation.[149]

IV. CONCLUSION

As this Article demonstrates, figuring out the professional responsibilities of the pro se attorney is a complex undertaking. Traditional textual analysis has the potential to produce clear answers, but sometimes—at least in the courts' view—wrong, or at the very least, inconsistent ones.

By contrast, an analysis that focuses on the purpose of the prohibition

credibility before the jury dissipates in the presence of the plaintiff's own demand that [the defendant's attorney] be a party-defendant." *Id.*

147. D.C. Bar Ass'n, Ethics Op. 44 (1978).

148. *Id.* The ethics opinion looked to former D.C. EC 5-9 for the purpose underlying the rule. *Id.* It noted that the EC also articulated another justification—that opposing counsel might be handicapped in challenging the credibility of an attorney-witness—but found that unconvincing. *Id.* The opinion noted another likely concern—"the awkwardness and seeming impropriety that can exist when attorneys conduct examinations of themselves at trial," which might "make a mockery of the process," and the fear that the trier of fact might be confused when a lawyer acts as both witness and advocate. *Id.* It noted, however, that such concerns were not operative in the matter posited, which involved a lawyer from the firm questioning other lawyers, not himself. *Id.*

149. *See id.* (discussing the right to self-representation and the many reasons why, despite the risks, one would choose to proceed pro se).

being applied to the pro se lawyer effectively addresses the diverse concerns at stake. It also winds up being consistent with the way courts have decided these issues as they have arisen. That is not, of course, an indication that it is a superior approach; courts at times do decide things incorrectly. But as a model that has both normative and predictive force, it is worth considering. As lawyers continue to represent themselves pro se, the likelihood is that issues involving such representation will continue to develop and courts will need to address them. [150] It would, of course, be optimal for rule drafters to consider explicitly whether particular rules apply to pro se lawyers; in the absence of such clarity, purpose-based analysis provides a better solution than the attempt to parse rules which were never designed to answer this complex question.

Purpose-based analysis also reflects a truism: that for the most part, questions about the applicability of rules of professional responsibility to pro se lawyers simply do not arise very often with regard to prohibitions that are designed to protect client interests or lawyer perquisites. A pro se lawyer will not be disciplined for violating his confidentiality obligations to himself, or for writing a fee agreement that failed to protect him as a pro se client. This suggests that in the end, thinking about the pro se lawyer in terms of common sense provides a pretty accurate compass. If you have to ask whether a particular rule applies to a pro se lawyer—if the circumstances of the problem cause a concern to arise—then the answer is probably that it does.

150. There are some areas in which I have not been able to locate any case law involving pro se litigants. One is Rule 3.2, the lawyer's obligation "to expedite litigation consistent with the interests of the client." MODEL RULES OF PROF'L CONDUCT R. 3.2 (2010). Since the party likely to complain about such a violation would be a client, it seems unsurprising that such cases do not arise. I have not located any cases applying Rule 3.4 explicitly to a pro se lawyer, though there are cases applying the Rule to discipline lawyers for their actions as parties to litigation, as is discussed *supra* note 119 and accompanying text. Nor have I located cases addressing the application of Rule 3.6 to a pro se lawyer. The problem of former client representation under Rule 1.9 remains unlitigated to my knowledge. *See supra* note 21 and accompanying text. But the potential that these situations will arise and present issues to the courts remains significant.