

LAWYERS AND SELF-REPRESENTED LITIGANTS: AN ETHICAL CHANGE OF ROLE?

Jennifer A Leitch*

Despite efforts to improve access to justice, there has been an extraordinary growth in the number of self-represented litigants. Their presence offers both an obligation and an opportunity to examine the professional culture and governing rules that regulate lawyers. Because there are almost as many non-lawyers as lawyers handling civil litigation, the pressure on traditional models of professional responsibility has also increased. By focusing on the problems resulting from increased self-representation, it might be possible not only to refine the values and objectives underlying the professional rules generally, but also to ensure that the rules are relevant and reflective of the emerging and changed realities of the litigation process. It is the main contention of this paper that the adversarial system is and will continue to undergo a transformation that is occasioned by the recent growth of self-representation. This has important ramifications for lawyers' professional responsibilities. The goal is not to suggest that the adversarial system should be replaced by an inquisitorial system. Rather, I will recommend how key professional duties and responsibilities within the inquisitorial system might better inform a discussion about the workings of an adversarial system that now includes significant numbers of non-lawyers.

Malgré les efforts déployés en vue d'améliorer l'accès à la justice, on constate une hausse extraordinaire du nombre des parties à un litige non représentées par avocat. Leur présence accrue nous donne à la fois l'obligation et l'occasion d'examiner la culture professionnelle et les règles régissant les avocats. Le fait que les non-juristes soient presque aussi nombreux que les juristes à s'occuper des dossiers dans le cadre de litiges civils exerce une pression indue sur les modèles traditionnels de responsabilité professionnelle. En se penchant sur les problèmes qui découlent du phénomène croissant de l'auto-représentation, il serait possible non seulement de préciser les valeurs et les objectifs sous-tendant les règles régissant la profession en général, mais aussi de veiller à ce que les règles soient pertinentes et qu'elles reflètent les réalités émergentes et transformées qui s'opèrent au sein du contentieux civil. L'auteure soutient comme thèse principale que le système accusatoire a subi et subira une mutation occasionnée par la récente augmentation des parties non représentées. Il en résulte d'importantes répercussions sur la responsabilité professionnelle des avocats. Le but n'est pas de proposer que le système accusatoire soit remplacé

* Adjunct Professor, Osgoode Hall Law School, York University, Faculty of Law, University of Toronto, and Research Fellow at Canadian Forum on Civil Justice. I am grateful to Trevor Farrow, Allan Hutchinson, and Janet Mosher and other friends and colleagues for critical assistance and intellectual support.

par un système inquisitoire, mais plutôt de faire des recommandations quant aux façons dont les principales obligations et responsabilités tirées de ce dernier système pourraient mieux orienter la discussion sur les rouages d'un système accusatoire comprenant désormais un nombre important de non-juristes.

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In Canada, the legal profession is facing a pivotal moment. Access to justice has reached a critical tipping point.¹ Despite efforts to improve matters, there has been an extraordinary growth in the number of self-represented litigants. The presence of self-represented litigants, together with a recognition that there are serious challenges respecting lawyers' professional conduct within the adversarial context more generally, offers both an obligation and an opportunity to examine the professional culture and governing rules that regulate lawyers in an evolving adversarial system.

¹ Action Committee on Access to Justice in Civil and Family Matters, [Access to Civil & Family Justice: A Roadmap for Change](#), (Ottawa: Canadian Forum on Civil Justice, 2013), online: <www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> at iv [Action Committee]; Access to Justice Committee, [Reaching Equal Justice Report: An Invitation to Envision and Act](#) (Ottawa: Canadian Bar Association, 2013), online: <www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/CBA_equal_justice.pdf>; Dr Julie Macfarlane, [The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants](#), (Toronto: Treasurer's Advisory Group on Access to Justice Working Group, 2013), online: <www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf> [Macfarlane]; Social Science and Humanities Research Council of Canada, "[Everyday Legal Problems and the Cost of Justice in Canada: Overview Report](#)", by Trevor CW Farrow et al (Toronto: Canadian Forum on Civil Justice, 2016), online: <www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf> [Farrow et al, "Everyday Legal Problems"].

Because there are almost as many non-lawyers as lawyers handling civil litigation, the pressure on traditional models of professional responsibility has also increased. However, crisis creates both opportunities and challenges. By focusing on the problems resulting from increased self-representation, it might be possible not only to refine the values and objectives underlying the professional rules generally, but also to ensure that the rules are relevant and reflective of the emerging and changed realities of the litigation process.

In this article, I trace the circumstances that gave rise to and flow from these significant new challenges to the practice roles of lawyers. In particular, I concentrate on how this development does and should affect thinking about the ethical responsibilities and duties of lawyers within an adversarial system. The fact that self-represented litigants are the overwhelming majority of litigants in some legal settings alone warrants a serious re-appraisal of the structure and dynamics of the adversarial context. This is true in the context of the professional and ethical roles and duties of the lawyer. How lawyers' roles are conceptualized has a lot to do with how lawyers' ethical duties and responsibilities are framed within an adversarial legal system. If the new dynamics confronting the legitimacy of the lawyer's traditional role are given due weight, it becomes urgent to look at re-fashioning rules and practices to better incorporate these changes. Moreover, as the traditional professional model of lawyering is intricately linked to traditional conceptualizations of the adversarial system that is itself evolving with the influx of self-represented litigants, it is important to reflect on how certain assumptions about lawyering might also need to evolve. It is the main contention of this paper that the adversarial system is and will continue to undergo a transformation that is occasioned by attempts to address inequities in the adversarial model and the more recent growth of self-representation. This has important ramifications for lawyers' professional responsibilities.

I approach this analysis by first examining the main objectives associated with an adversarial framework. I then contrast the ethical responsibilities of lawyers within an adversarial system with the ethical responsibilities of lawyers in an inquisitorial system. The rationale for this is, while the two legal frameworks remain distinct in many respects, certain non-adversarial aspects that may be more inquisitorial in nature have been introduced into the adversarial system. In fact, it appears that in the civil context (as opposed to the criminal context), various procedural aspects of the adversarial and inquisitorial models have moved closer together and resemble each other to a greater extent.² Moreover, certain non-adversarial procedures have been

² JA Jolowicz, "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 52:2 ICLQ 281 at 295 [Jolowicz]; Jennifer Leitch, "Coming off the Bench: Self-Represented Litigants, Judges and the Adversarial Process" (2017) 47:1 Adv Q 309 [Leitch].

introduced into the adversarial system in order to address deficiencies in the dispute resolution process. In light of this incorporation, it is helpful to consider how non-adversarial systems frame and operationalize the corresponding ethical responsibilities of the legal profession. Such a comparison might, in turn, inform ethical discussions around the increased presence of self-represented litigants. The goal is not to suggest that the adversarial system should be replaced by an inquisitorial system. Rather, I will recommend how key professional duties and responsibilities within the inquisitorial system might better inform a discussion about the workings of an adversarial system that now includes significant numbers of non-lawyers.

The first section of this paper will introduce the scope of self-represented litigants' engagement with the civil justice system. The second section will examine the critiques that arise in the context of the traditional adversarial model in light of the newer challenges associated with self-representation. The third section will review qualitative research data that highlights self-represented litigants' experiences participating in the civil justice system and, more specifically, their experiences with opposing counsel. Following from this, I will discuss what lessons might be drawn from both a critical examination of the adversarial system as it pertains to self-represented parties and the roles and ethical practices of lawyers in an inquisitorial model. Finally, I suggest how to reformulate the way in which lawyers' roles and their ethical duties can be appreciated within a revised understanding of the adversarial model that is more sensitive to its non-adversarial dimensions. The focus throughout is to explore what this might mean for a reconstituted account of lawyers' ethical responsibilities as they relate to self-represented litigants.

1. The Rise of Self-Representation

In recent years, there has been a dramatic increase in the number of individuals who choose or are compelled to address a legal issue without the assistance of legal representation. Statistical data in Canada suggests that approximately 11.4 million people will experience at least one legal problem in a three-year period.³ It is also believed that approximately "50% of people try to resolve their problems on their own with no or minimal legal or authoritative non-legal assistance."⁴ In statistical terms, one recent report suggests that approximately 40% of civil law litigants represent themselves, and this percentage increases dramatically in certain legal fields, such as family law, where as high as 60–70% of litigants in certain family courts are

³ Farrow et al, "Everyday Legal Problems", *supra* note 1 at 6.

⁴ Action Committee, *supra* note 1 at 4.

self-represented.⁵ Low- and moderate-income individuals have historically been among those most likely to be self-represented.⁶ The combined effect of this data is that there is an increasing access to justice crisis in the Canadian legal system.⁷ Recently, a growing funding crisis for Legal Aid Ontario in 2017 points toward even more individuals being unable to obtain legal assistance, and as a result being obligated to enter the justice system as self-represented litigants.⁸

This access to justice crisis in Canada has resulted in a variety of policy initiatives. Many of these have been directed at attempting to assist the growing number of self-represented litigants who continue to enter the civil justice system without traditional legal representation.⁹ One of the practical realities of this data and the initiatives that have arisen in response to this phenomenon (e.g., duty counsel and self-help legal services) is that lawyers are often operating within a system that no longer resembles the legal system for which they were trained.

However, while low- and moderate-income individuals have historically been disproportionately self-represented, 50% of the self-represented litigants recently surveyed had a university degree, and approximately 40% of those surveyed had an income of over \$50,000 per year.¹⁰ In seeking to better understand who resolves their legal problems without legal representation, Ab Currie stated that:

In statistical terms, the relationship between the action taken to resolve problems and most socio-economic characteristics is statistically significant but extremely weak. There appears to be a slight tendency for self-helpers to be older, to have

⁵ Macfarlane, *supra* note 1 at 33–34. In the American context, the President of the American Bar Association recently commented that approximately “80% of litigants remain unrepresented in all civil matters: Victor Li”, “[William Hubbard Speaks about the Importance of Technology in Expanding Access to Justice](#)”, *ABA Journal* (17 March 2016), online: <www.abajournal.com/news/article/william_hubbard_speaks_about_the_importance_of_technology_in_expanding_access>. See also Ontario Bar Association, *Getting it Right: The Report of the Ontario Bar Association Justice Stakeholder Summit*, (Toronto: OBA, June 2007), online: <www.oba.org/en/pdf/Justice_Summit_sml.pdf>.

⁶ Macfarlane, *supra* note 1 at 28.

⁷ Farrow et al, “Everyday Legal Problems”, *supra* note 1.

⁸ Alex Robinson, “[More Self-Represented Litigants Due to Deficit?](#)”, *Law Times* (23 January 2017), online: <www.lawtimesnews.com>.

⁹ See Action Committee, *supra* note 1; Association of Canadian Court Administrators, “[Addressing the Needs of Self-Represented Litigants in the Canadian Justice System](#)”, by Trevor CW Farrow et al (Toronto: ACCA, 27 March 2012), online: <www.cfcj-fcjc.org/sites/default/files/docs/2013/Addressing%20the%20Needs%20of%20SRLs%20ACCA%20White%20Paper%20March%202012%20Final%20Revised%20Version.pdf> [Farrow et al, “Needs of Self-Represented Litigants”].

¹⁰ Macfarlane, *supra* note 1 at 8.

higher incomes, to be somewhat better educated and to be single or married or a couple with no children. Respondents who are self-helpers were less likely to report that they have a physical or mental health problem.¹¹

This signals a shift in the demographic makeup of self-represented litigants; self-representation is expanding to include members of the traditional middle class.¹² This shift is likely to have an impact on individuals' perceptions about the role that lawyers play in the legal system and the legal profession more generally. Historically, many individuals within marginalized communities were disengaged from the legal profession. However, a new generation of self-represented litigants not otherwise marginalized within society may now view the profession more critically. In adopting a more critical view of the legal profession's value, they may depreciate the legitimacy and authority of the profession.

In a nationwide survey, the Canadian Forum on Civil Justice suggested that 41% of individuals who spent money to resolve their legal problem (i.e. obtained legal services) thought that the outcome was fair, while 61% of those who did not spend money on legal services thought that the result was fair.¹³ While 81% of the group surveyed thought the legal advice that they obtained was helpful, 68% of the group who sought non-legal advice also found that the advice was helpful in resolving their legal issue.¹⁴ While this does not spell the end of lawyers, it does suggest that individuals' perceptions about the need for legal assistance and the type of assistance that they require may be evolving. More direct engagement in their own legal matters may well affect how individuals conceptualize their relationship with members of the legal profession and what they expect from the profession.

¹¹ Ab Currie, "[Self-Helpers Need Help Too](#)" (London, UK: Law for Life, 2010) at 8, online: <www.lawforlife.org.uk/research-and-theory/self-helpers-need-help-too/> [footnotes omitted].

¹² There are different ways to define the middle class. If you define it by income earned, it encompasses families that earn between \$32,000.00 and \$95,000.00 per year (approximately 40% of Canadians meet this criteria). However, it may also be defined in terms of the amount of discretionary income that a family has to save or spend on nonessential items. Research done by Statistics Canada in 1991 suggested that this only constituted 25% of the population (Tamsin McMahon, "[Who Belongs to Canada's Middle Class? That Depends on How You Define the Canadian Dream](#)", *Maclean's* (26 February 2014), online: <www.macleans.ca>). In the American context, see Sande L Buhai, "Access to Justice for Unrepresented Litigants: A Comparative Perspective" (2009) 42:4 *Loy LA L Rev* 979 at 983 [Buhai]; Comprehensive Legal Needs Study, *Legal Needs and Civil Justice: A Survey of Americans* (Chicago: American Bar Association, 1994), online: <www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/legalneedstudy.authcheckdam.pdf>.

¹³ Farrow et al, "Everyday Legal Problems", *supra* note 1 at 15.

¹⁴ *Ibid* at 10.

An expansion in the scope of cases in which individuals represent themselves, as well as a corresponding growth in the sheer number of self-represented litigants, has important implications for how the legal profession both thinks about and interacts with self-represented litigants. In many respects, the legal profession has defined the “terms of engagement” regarding access to justice. This has had far-reaching effects on how members of the profession view their responsibility to advance access to justice and engage with those individuals attempting to access justice.¹⁵ Historically, many lawyers tended to view self-represented litigants as nuisances in the legal system, “career litigants”, or individuals pursuing vexatious claims.¹⁶ The underlying assumption was that the self-represented litigant was an anomaly that was likely to delay the resolution of the matter due to his or her lack of knowledge and experience, increase the costs incurred by paying clients, and pursue claims that were not meritorious. In light of these historic assumptions, it is important that the legal profession take serious stock of how it has viewed self-representation, how self-representation operates within the adversarial model, and how the legal profession’s traditional ethical responsibilities in the adversarial system may be at odds with the growth of self-representation.

While attitudes may be slowly changing as more self-represented litigants enter into the legal system, the concern is that the traditional views continue to shape how legal professionals interact with self-represented litigants, as well as influence lawyers’ understanding of their duties and responsibilities to both clients and adversaries. At a minimum, the legal profession’s belief that the goal of access to justice should be legal representation for self-represented litigants raises concerns about how those legal professionals are likely to respond to self-represented litigants who they believe “do not belong” in the legal system without representation. This attitudinal challenge must also be examined in the context of the legal profession’s continued adherence to a model of professionalism that focuses on the lawyer as a zealous advocate for whom there is no one else in the world but her client.¹⁷ Together, historical views about the legitimacy of self-represented litigants and a singular commitment to neutral partisanship potentially undermines the fulfillment of the adversarial system’s objectives; this ultimately risks diminishing the legitimacy of the civil justice system as a means by which members of society might resolve disputes and enforce rights.

¹⁵ Alan Paterson, *Lawyers and the Public Good: Democracy in Action?* (Cambridge, UK: Cambridge University Press, 2012) at 71–77 [Paterson].

¹⁶ See Linda Perlis, “Death of a Divorce Lawyer”, *The Globe and Mail* (2 December 2015) (“lawyers don’t like dealing with angry, self-represented litigants. That is what articling students are for” at L6).

¹⁷ *The Trial at Large of Her Majesty Queen Caroline Amelia Elizabeth, Queen of Great Britain; In the House of Lords, on Charges of Adulterous Intercourse*, vol 2 (London, UK: T Kelly, 1821) at 3 [*The Trial of Queen Caroline*].

2. Critiques of the Adversarial Model

The standard or dominant conception of the lawyer's role assumes lawyers are "neutral" *vis-à-vis* the morality of their client's views or actions.¹⁸ While this is not the only conceptualization of a lawyer's role, and there are alternative perspectives, this still tends to inform current discourse on legal ethics.¹⁹ In accordance with the traditional model, lawyers are supposed to act on their client's behalf (within the confines of the law) without judging the morality of their clients' intentions or the means by which those intentions are operationalized; this course of conduct is justified in part on the basis of unpopular clients and causes. In a sense, the "lawyer's 'habitat' remains primarily one of partisan protectionism, looking out for the client's interest."²⁰ In many respects, Lord Brougham's characterization of his duty to Queen Caroline has not changed dramatically in over 190 years.²¹ While the various professional conduct rules outline a series of responsibilities that lawyers owe to the administration of justice and the public at large, in practice, lawyers often maintain a "heightened duty of partisanship toward their own clients and a [corresponding] diminished duty to respect the interests of their adversaries or of third parties" and the administration of justice.²² As a consequence, the tension between a duty to one's client and other competing duties is typically resolved in favour of the lawyer's duty to the client. This primacy of the duty to the client is internalized early in a lawyer's practice and informs much of the lawyer's decision-making. Often, in an attempt to address this tension, duties to the court are reduced to the application of legal rules and checks on behaviour that form the outer limit of acceptable conduct.²³

¹⁸ Trevor CW Farrow, "The Good, the Right and the Lawyer" (2012) 15:1 Leg Ethics 163 [Farrow, "The Good, the Right and the Lawyer"].

¹⁹ It is not the objective of this paper to engage in the debate between zealous advocacy versus a role-based ethical approach in the work of W Bradley Wendell and others. See Alice Woolley et al, "Philosophical Legal Ethics: Ethics, Morals and Jurisprudence" (2010) 13:2 Leg Ethics 165; Farrow, "The Good, the Right and the Lawyer", *supra* note 18.

²⁰ Carrie Menkel-Meadow, "The Lawyer as Problem-Solver and Third Party Neutral: Creativity and Non-Partisanship in Lawyering" (1999) 72:4 Temp L Rev 785 at 790 [Menkel-Meadow, "Lawyer as Problem-Solver"].

²¹ *The Trial of Queen Caroline*, *supra* note 17 at 3.

²² David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988) at xx [Luban].

²³ C Sampford & S Condlln, "Educating Lawyers for Changing Process" in Charles Sampford, Sophie Blencowe & Suzanne Condlln, eds, *Educating Lawyers for a Less Adversarial System* (Sydney: Federation Press, 1999) 173 at 180 [Sampford & Condlln].

The objectives and framework of the adversarial system serve to reinforce a hierarchy of duties that places zealous advocacy and client autonomy at the forefront of the lawyer's duties. To the extent that lawyers are not ethically accountable for the client's objectives or the means used to achieve those objectives, there is little incentive for lawyers to engage in a contemplative analysis of the steps they take in the client's name.²⁴ The result is the creation of an environment in which lawyers are "incentiv[ized] to exploit any advantages the system allows [on behalf of] their client."²⁵ The further consequence is a marginalization of lawyers' competing duties to the legal system and the public. This prioritization of a duty to the client and a corresponding rationalization of the means used to fulfill the duty (without any meaningful introspection) can presumably have a disproportionate effect on self-represented litigants' ability to participate in proceedings. Where there is a serious imbalance of knowledge, power, and resources between the parties, and the use of questionable—if legally permissible—tactics to maintain an advantage in litigation, there will be serious consequences for the weaker party. The prioritizing of the partisan commitment to client interests can obscure lawyers' responsibilities to engage in a consideration of their competing responsibilities, or worse, be used as a justification for conduct that may further the client's immediate interests and remain undetected by a party untrained or inexperienced in the process.

In adversarial frameworks, neutral partisanship is often used to justify lawyer behaviour that is unnecessary for them to do their job (e.g., adopting unreasonable positions or tactics that delay or obfuscate the process). Economic pressures further compound the influence on lawyers to place clients' wishes above all other considerations. As Sande Buhai has noted, "the adversarial system expects parties to be selfish in their arguments, creates incentives to hide evidence, and rewards parties whose attorneys are the most skilled and well-funded."²⁶ The role that lawyers play is further complicated by the fact that, even if lawyers attempt to express personal values that extend beyond the minimum requirements of their ethical codes or traditional adversarial role, "[e]veryday practice ... pushes the conscientious lawyer to engage in conduct that is unfair and unjust."²⁷ Thus,

²⁴ Again, while there are different perspectives on the role of the lawyer, particularly as it relates to the adoption of a morally neutral stance versus a morally engaged stance, I adopt a perspective that challenges the morally neutral stance. See Luban, *supra* note 22 at 174, 326; Farrow, "The Good, the Right and the Lawyer", *supra* note 18.

²⁵ Sampford & Condlin, *supra* note 23 at 178.

²⁶ Buhai, *supra* note 12 at 982; see also Jeanne Charn, "Celebrating the 'Null' Finding: Evidence-Based Strategies for Improving Access to Legal Services" (2013) 122:8 Yale LJ 2206 at 2230 [Charn].

²⁷ Roger C Cramton, "Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable" (2002) 70:5 Fordham L Rev 1599 at 1605.

even if lawyers attempt to engage in an adversarial practice in a fair and ethical manner, in certain circumstances, the very nature of an adversarial approach may be counterproductive. Jeanne Charn has noted that this is particularly true in certain practice contexts, such as domestic relations litigation, where the evidence suggests that a “lawyer-centric adversary system [is likely to do] more harm than good.”²⁸

Related to concerns regarding how the legal profession’s duties to the client are operationalized are further reservations about the efficacy of the “truth-finding” process within the adversarial system. While adversarial models place an importance on truth-seeking as an objective, it is the discovery of the truth “within strict evidential and procedural boundaries.”²⁹ The adversarial model assumes that if parties present their respective cases, the truth will emerge through a robust presentation and cross-examination of each side’s case before a neutral decision-maker.³⁰ However, in assessing the importance assigned to finding the truth, one judge noted that “[t]he advocate in the trial courtroom is not engaged much more than half the time—and then only coincidentally—in the search for truth. The advocate’s prime loyalty is to his client, not to truth as such.”³¹ The lawyer’s commitment to the client means that while lawyers may be participating in a truth-finding process, they are primarily concerned with the truth as it serves their client’s interests rather than any form of abstract truth derived from a comprehensive presentation of all of the relevant information.

This approach to truth-seeking in an adversarial system is problematic due to the fact that the truth-finding process is often idealized but not always functional. The reality is that the adversarial process tends to ignore inequalities within the system and between the parties.³² These inequalities may stem from a lack of resources (e.g., monetary) or a discrepancy in skills or experience such that one party is disadvantaged in terms of being able to investigate and present their best case and test the opposing party’s case. The result is that inequalities between the parties leave the truth-finding mechanism open to manipulation and this serves to undermine the objectives of the system as a whole. One example in this regard is cross-

²⁸ Rebecca Aviel, “Why Civil *Gideon* Won’t Fix Family Law” (2013) 122:8 Yale LJ 2106, cited in Charn, *supra* note 26 at 2230.

²⁹ Felicity Nagorcka, Michael Stanton & Michael Wilson, “Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice” (2005) 29:2 Melbourne UL Rev 448 at 462 [Nagorcka, Stanton & Wilson]; see also Jolowicz, *supra* note 2 at 285.

³⁰ Nagorcka, Stanton & Wilson, *supra* note 29 at 462.

³¹ Marvin E Frankel, “The Search for Truth: An Umpireal View” (1975) 123:5 U Pa L Rev 1031 at 1035.

³² Ellen E Sward, “Values, Ideology, and the Evolution of the Adversary System” (1989) 64:2 Ind LJ 301 at 312 [Sward].

examination. Notwithstanding that cross-examination is often touted as an essential component of the truth-finding process in an adversarial system, the benefits of cross-examinations may also be subverted through rhetorical manipulation and imbalances in lawyers' resources and/or skills. This further helps to discredit "opposing testimony known to be truthful."³³ At best, cross-examinations may discover and reveal untruths, but may be less effective at discerning the truth. At worst, the process of cross-examination reflects an affront to the dignity of those being cross-examined.³⁴ The consequence of this manifestation of adversarialism is that the legal system becomes "more and more removed from the substantive justice concerns of ordinary people."³⁵

3. Self-Represented Litigants and Opposing Counsel

Any discussion of lawyers' duties and responsibilities within a legal system that is experiencing an unprecedented growth in the number of non-lawyer participants must take account of non-lawyers' perspectives. More specifically, self-represented litigants' experiences of attempting to represent themselves, often in cases involving opposing counsel, provide an important lens through which to examine lawyers' evolving professional duties. In seeking out the self-represented litigants' perspective, the objective is to both contextualize the discussion and deepen the analysis of lawyers' professional duties in "real-life" practice. While historically the legal system has been the exclusive domain of lawyers, data now suggests that not only is there an increasing number of self-represented litigants in the legal system, but also that this trend does not show signs of slowing.

In an effort to incorporate self-represented litigants' perspectives in a critical discussion of lawyers' professional duties, this paper will draw on research that was undertaken at a self-help legal centre in downtown Toronto, LawHelp Ontario ("LHO").³⁶ One of the recurring themes that

³³ David Luban, "Twenty Theses on Adversarial Ethics" in Helen Stacy & Michael LeVarch, eds, *Beyond the Adversarial System* (Sydney: Federation Press, 1999) 134 at 144, cited in Nagorcka, Stanton & Wilson, *supra* note 29 at 454; see also David Luban, "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90:4 Colum L Rev 1004 at 1018.

³⁴ Neil Brooks, "The Judge and the Adversary System" in Allen M Linden, ed, *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, 1976) 89 at 113 [Brooks].

³⁵ Christine Parker & Adrian Evans, *Inside Lawyers' Ethics* (Port Melbourne: Cambridge University Press, 2007) at 71.

³⁶ The empirical research took place over a ten-month period during 2014–2015 and involved a variety of formal and informal interviews and discussions with self-represented litigants, staff, and volunteer lawyers at LHO [LHO Interviews]. Note that this research was part of my doctoral project—this section and the interview quotes referenced are taken from parts of my doctoral thesis: [Jennifer A Leitch, Having a Say: Democracy, Access to Justice and](#)

arose in the context of the interviews with the self-represented litigants was their general sense of wariness regarding opposing counsel—a sense that in some way, the lawyer would “get” them.³⁷ Not all of the self-represented litigants interviewed had a negative experience interacting with opposing lawyers; some of the participants characterized the lawyers’ actions as “just doing his job.”³⁸ However, many of the self-represented litigants expressed concerns about feeling tricked by lawyers and/or that the lawyers were generally unwilling to cooperate with the self-represented litigants in ways that they might not otherwise if dealing with an opposing lawyer.³⁹ The result was that the self-represented litigants felt intimidated and often powerless when dealing with opposing counsel.⁴⁰

Moreover, certain individuals felt that this behaviour was perpetuated or, at a minimum, overlooked by masters, judges, and even the Law Society of Upper Canada (“LSUC”).⁴¹ By virtue of the organization of the adversarial system or through the maintenance of an elite legal profession to which only lawyers and judges belong, some of the self-represented interviewees expressed a belief that the profession ultimately protected its own. One self-represented litigant interviewed had made a complaint to the LSUC about an opposing lawyer’s overly aggressive behaviour.⁴² The LSUC told her that there was no basis for her complaint and that, if she wished to pursue the matter, she did have recourse through the courts; this suggestion seemed absurd to an individual already defending a case as a self-represented litigant.⁴³ Indeed, it caused her to call into question whether lawyers should be judged by an impartial person and, “[n]ot someone that you golf with but maybe someone who’s a bit more impartial ... They all go to the same country clubs.”⁴⁴ As it pertains to the regulation of lawyers’ behaviour when acting against self-represented litigants, the interviewee challenged the notion that self-regulation is meant to “protect us from government tyranny. I think the government needs to protect us from lawyer tyranny.”⁴⁵

[Self-Represented Litigants](#) (PhD Dissertation, York University Osgoode Hall Law School, 2016), online: <digitalcommons.osgoode.yorku.ca/phd/23>.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Interview of SE (23 December 2104) at 17 [Interviewee SE]; while it is not contended that this perception reflects all members of the legal profession, it does speak to the concern about “insiders” and “outsiders” in the legal system and how such a distinction serves to undermine the legitimacy of the civil justice system.

⁴⁵ *Ibid.*

The self-represented litigant's comments regarding her belief that the LSUC is effectively unreceptive to self-represented individuals is reflective of a broader concern that judges and lawyers are "insiders", while self-represented litigants remain "outsiders" within the civil justice system. This division between insiders and outsiders was often manifest in self-represented litigants' observations of the interaction between lawyers and judges in the courtroom setting. While the participants expressed concerns about not having an opportunity to articulate their positions, there was also a corresponding anxiety about the ease with which lawyers and judges conversed, often to the exclusion of the self-represented litigant.⁴⁶ One self-represented litigant, who characterized lawyers as "insiders," felt that lawyers knew how the legal system operated and were comfortable functioning within it.⁴⁷ This creates a significant advantage for lawyers:

[I]t's still a case of a system by and for lawyers and where lawyers get preferential treatment by the nature of them providing the information to the decision-maker in a nice easy format, that's what they're looking for that you just get a natural advantage by serving the people [judges] what they like and what they're wanting.⁴⁸

In the course of discussions with the self-represented litigants, this advantage for lawyers was also characterized as a problem with the language of law. The stylized conversation that often happens between lawyers and judges in court has a significant impact on self-represented litigants' ability to participate in proceedings. From their perspective, it would appear that the lawyers and the judges are engaged in a conversation to which self-represented litigants are not privy (e.g., one individual's example involved opposing counsel and the judge repeatedly using the legal term "nunc" without pausing to explain its meaning to the non-lawyer during the hearing).⁴⁹ While these experiences are, at a minimum, frustrating for self-represented litigants, they raise more significant concerns about self-represented litigants' ability to participate in proceedings—a concern made more serious if there is an added belief that members of the profession engage in the use of legal terms in order to gain an advantage.

One interviewee, facing a motion with opposing counsel, typified this barrier to participation when, talking about the upcoming court proceeding, he said that the opposing lawyer could:

[S]ay certain things to the judge and just have something, and I don't know how to argue it. I have no idea how to argue anything on Monday. I'm going to be like

⁴⁶ LHO Interviews, *supra* note 36.

⁴⁷ *Ibid.*

⁴⁸ Interview of LM (21 May 2015) at 13.

⁴⁹ LHO Interviews, *supra* note 36.

okay. There's certain things that will be said and he [the opposing lawyer] could say something that could basically shut me down, and I have no idea, that's kind of frightening ... I'm talking about as far as lingo that might be over my head and him possibly being able to assert something that I don't even notice to argue.⁵⁰

In describing her experience dealing with opposing counsel, another self-represented litigant, detailing a feeling of intimidation based on the fear, said:

[B]eing up against experts in the law who are very crafty. How to work and manipulate the law to the benefit of the case they may be dealing with. I think crafty is a fair word to use, it's what I've been dealing with. And it's always like trying to be one step ahead of them or figure out where they're at, or where they're going. It's been troubling. To me in a fair and just system there should be no craftiness.⁵¹

This concern is further complicated by the additional fear that lawyers may purposefully manipulate their knowledge of the requisite procedural rules in order to mislead self-represented litigants. One individual articulated this fear when she said: "the rules are there for a reason so that people don't abuse the system which is the ultimate irony because people are using it [the rules] to abuse the system. You know what I mean?"⁵²

In a similar vein, there was a concern that the opposing counsel would assert positions or make demands that the non-lawyer would not be in a position to assess as valid or legitimate. In the context of opposing counsel's demands for a cross-examination in advance of a motion, the self-represented litigant stated:

I would like to have those navigational instructions [the rules of procedure], even if it's just in writing them down, just to be able to reference them over the weekend so I might know, because I didn't know whether he could just say he wants to cross-examine ... So it's like just little things like that. I don't know when people are playing tricks. That's the one thing that I don't have that knowledge base.⁵³

When pushed a little further about his distinction between someone acting within the purview of the rules and someone who is playing tricks, one interviewee responded that:

[B]efore when I was getting the Notice of Examination and I look at some of the documents, my gut feeling tells me that probably the process was not 100% on the

⁵⁰ Interview of BN (30 April 2015) [Interviewee BN] at 8–9.

⁵¹ Interview of KC (28 April 2015) [Interviewee KC] at 23.

⁵² Interviewee SE, *supra* note 44 at 13.

⁵³ Interviewee BN, *supra* note 50 at 7.

up and up as far as what they did. That's my gut feeling from reading it. Like I'd see judgments with different dates on them and crossed out. But I don't know for sure.⁵⁴

The worry that self-represented litigants are being tricked was further elaborated by one of the interviewees who said that once she filed a motion she would typically be inundated with emails and faxes from opposing counsel, whose objective she believed was to:

[T]ry to baffle me with bull* & # @, and I'll be "is it true?" Can I do this, can I not do this? Is [what] he's saying true? So I'll have to come here [LHO] and say "is it true?", can he do that? ... And then when I get these ridiculous emails from the other side threatening and saying "I'm going to do this and I'm going to do that", I'm going to come in [to LHO] and say "can he do this? Is what he's saying true or is it just more scare tactics."⁵⁵

The anxiety over opposing counsel's conduct was also reflected in a concern that the opposing lawyer would take steps against the self-represented litigant that they were unversed in and unable to address. In this regard, one self-represented litigant stated: "the speed at which I can go is not the speed at which the law firm would like me to go and they may get frustrated with me and throw the book at me but I do not know what is in the book."⁵⁶ As further articulated by several of the self-represented litigants, the concern was that they may be overwhelmed or manipulated by opposing lawyers who have all the legal knowledge and, therefore, the power.⁵⁷ More significantly, there was a perception that the lawyers were prepared to use self-represented litigants' lack of knowledge against them in order to advance their clients' case.⁵⁸ The self-represented litigants' feelings of intimidation that were based on a disparity in levels of legal knowledge and experience were compounded by an anxiety that lawyers would use loopholes or tricks to confuse and "trip" them in ways that they might not be able to use against other lawyers.⁵⁹

The problem was further complicated by the fact that when lawyers adopted overly aggressive positions with the self-represented litigant, the self-represented litigant felt that there was little or no recourse available because:

⁵⁴ *Ibid* at 8.

⁵⁵ Interviewee SE, *supra* note 44 at 23–24.

⁵⁶ Interview of BS (25 November 2014) reflects BS' reluctance to speak to opposing counsel on the phone and concern that he could not communicate with the lawyer until he was confident of the law and how he would articulate his position.

⁵⁷ LHO Interviews, *supra* note 36.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

[T]his is just someone [who's] playing the system, like he knows all the loopholes, he knows the games he can play, he knows that he will do whatever he wants and not be held to account because I can't afford to hold him to account. This is the thing I think I said when I met you a few weeks ago. I made an analogy to a hockey game. When there's a hockey game there's a ref, and there seems to be no ref here. So it's like he can do whatever he wants, slashing, hooking, smash me into the boards face first and then I can go to the ref but that's the court ... it could be months after the game's over and guess what, I'll end up having to pay.⁶⁰

For some self-represented litigant interviewees, their distrust of opposing counsel was reflected in opposing counsel's adoption of unreasonable positions that were only abandoned once a volunteer lawyer from the self-help centre became involved and spoke on the self-represented litigant's behalf.⁶¹ In one common example, opposing counsel would refuse to consent to the request for a first adjournment of a matter in order to allow the self-represented litigant to prepare responding materials. One self-represented litigant, speaking about a volunteer lawyer at LHO who was assisting the individual, noted:

[I was] able to apparently get her [the opposing lawyer] to be a bit more reasonable, whereas it was difficult for me to get her to just give anything ... when the volunteer lawyer called [opposing counsel] she was just like "you and I both know how this will go, so don't push anymore. He's going to get his adjournment and you're well aware of it."⁶²

Without the volunteer lawyer's intervention, the self-represented litigant was certain that the opposing counsel would not have agreed to the adjournment. The further problem in this case is that while a lawyer may be prepared to seek such an adjournment from the court when opposing counsel refuses to consent, the self-represented litigant may not even appreciate that she is entitled to make such a request of the court.

In another example, one of the interviewees also referenced a refusal by opposing counsel to cooperate with her as a self-represented litigant. Early in the proceeding she requested consent for a change of venue based on the fact that the action against her had been initiated in a court outside downtown Toronto.⁶³ She had advised the opposing lawyer that the "distance driving is painful for me. I have right leg injuries and back and neck injuries. And I also have an old car. So I sent a letter, when I eventually got onboard with Pro Bono asking them to transfer it to Toronto and there was a refusal

⁶⁰ Interviewee SE, *supra* note 44 at 8–9. This concern also highlights the challenges associated with regulating a lawyer's behaviour outside of the courtroom.

⁶¹ LHO Interviews, *supra* note 36.

⁶² Interview of QH (3 June 2015) at 4.

⁶³ *Ibid.*

and resistance.”⁶⁴ This refusal was despite the fact that the individual lived downtown, the bank branch at issue in the litigation was located downtown, and the opposing firm’s offices were downtown.⁶⁵ The assumption made by the self-represented litigant was that the plaintiff’s counsel wished to place the non-lawyer under as much hardship as possible in order to affect a particular result.⁶⁶

These concerns about opposing counsel’s conduct toward self-represented litigants were bolstered by some volunteer lawyers’ experiences at LHO. In describing her role at LHO, one volunteer lawyer said:

[A] lot of time it’s calling the opposing lawyer because the bank has a lawyer and the condo corporation has a lawyer, and just saying we need an adjournment. Because they won’t give it to the self-rep but they’ll give it to someone who says they are a lawyer. I have experienced that a lot ... I’ve done that a lot, called the other lawyer and just said, “are you going to be reasonable?”⁶⁷

The apprehension expressed by the self-represented litigants and corroborated by the volunteer lawyers was also reflected in the type of advice that the volunteer lawyers would provide the self-represented clients regarding their interaction with opposing lawyers. Namely, the advice often provided to the self-represented litigant by the volunteer lawyer was to “speak to the other side’s lawyer in writing or email—not on the phone.”⁶⁸ In several cases, this advice was provided in order that the self-represented litigant might avoid being bullied or out-manuevered by the opposing lawyer.

Another volunteer lawyer recounted that in the course of his work at the centre he would contact other lawyers on behalf of self-represented litigants:

[I would] pick up the phone and talk to a lawyer and say “what are you doing here? This person is self-representing here at the project, you’re treating them like – I don’t want to say – a lack of civility but it approaches that at times. And realistically this is what is going to happen so why don’t you give them the extra two weeks or whatever is it that they need and stop being so difficult.”⁶⁹

In expanding further on the difficulties faced by self-represented litigants when dealing with opposing counsel, he continued:

⁶⁴ Interviewee KC, *supra* note 51 at 4.

⁶⁵ LHO Interviews, *supra* note 36.

⁶⁶ *Ibid.*

⁶⁷ Interview of DE (3 April 2015) at 2–3.

⁶⁸ *Ibid.*

⁶⁹ Interview of ST (29 April 2015) at 3.

I think the biggest problem, and I see it in my files all the time, is I defend cases that self-reps bring, and I see a lot of lawyers spending a lot of time using procedural strategy to try and defeat a claim ... And I think that's a bit unfair, because I know that a motion to strike a claim that you receive from a self-rep is a great procedural strategy to see if they'll go away and to get a costs award etc, etc ... So I would say that one of the biggest challenges for them is lawyers and high paid law firms who are simply trying to put procedural blocks in front of them. Once they actually get their case before the court and have their case heard, I think for the most part the court will do its best to see justice. But there's [re] a lot of cases that I've seen where that isn't getting there.⁷⁰

Thus, a question that arises in the context of the self-represented litigants' and volunteer lawyers' experiences is whether summary procedures assist a self-represented litigant, or whether early in the proceeding complex procedural steps are particularly onerous for self-represented individuals likely struggling to understand the relevant procedural and substantive law and also prepare appropriate responding materials. This concern was reflected in the National Self-Represented Litigant Project's survey of summary judgment applications and judgments in reported decisions.⁷¹ Comparing the number of reported decisions in 2004 with 2015 (and taking account of increases in the number of self-represented litigants), the data from the survey suggest that there has been an increase in the use of summary judgment motions against self-represented litigants.⁷² The survey further indicated that in Ontario, 88% of the cases where a represented party brought a summary judgment application against a self-represented litigant, the represented party was successful in obtaining judgment against the self-represented litigant.⁷³

To the extent that summary judgment motions are brought by counsel early on in a proceeding when the self-represented litigant is likely to be unfamiliar with the legal process, it would seem that procedural reforms (i.e. expanded summary judgment procedures) aimed at providing expedient resolutions may actually work to the disadvantage of the self-represented litigant struggling to get up to speed. At the same time, these procedural reforms provide a potentially unfair advantage to opposing counsel who are better-versed in that particular procedural process. While action may also be taken to simplify and potentially streamline procedures in order to improve access, the action taken is often developed and administered by

⁷⁰ *Ibid* at 5–6.

⁷¹ Julie Macfarlane, Katrina Trask & Erin Chesney, "The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?" (Faculty of Law, University of Windsor: The National Self-Represented Litigants Project, November 2015) [Macfarlane, Trask & Chesney].

⁷² *Ibid* at 8.

⁷³ *Ibid* at 13.

lawyers and judges. As such, there is unlikely to be a corresponding account of the practical impact on non-lawyers. Thus, it is important to critically assess who is making use of such steps and whether the steps might afford certain groups—those operating within the system—a distinct advantage over others.

4. Impact of Adversarial Lawyers on Self-Represented Litigants

Within the existing adversarial framework, it is assumed that lawyers, as trained professionals, are exclusively skilled and knowledgeable about the process and substance of law. On this basis, they maintain control over the complexities of the litigation process. Nourit Zimmerman and Tom Tyler note: “as lawyers develop a greater role in the system, the legal process becomes more professionalized and complex and, when the procedural design assumes representation, the ability of individuals to actually proceed successfully without an attorney, or to directly participate when they do have an attorney, diminishes.”⁷⁴ Given the professionalization of law and the corresponding complexity of the legal process, it is assumed (often by lawyers and judges) that lawyers are the only individuals properly equipped or entitled to handle and resolve legal matters. This is further perpetuated by the mystification of legal practice whereby both lawyers and non-lawyers assume that there is a way of engaging in the practice of law that is only known to and operationalized by a professional caste of lawyers, trained first in law schools and then in legal practice through their work with and for other lawyers.⁷⁵

The specialized knowledge and training of lawyers that is supposed to make them uniquely positioned to engage in the practice of law also underlies a fundamental assumption about the current litigation model—that lawyers work with and against other lawyers who are equally trained and well-matched. In accordance with traditional notions of litigation within an adversarial framework, lawyers and the public more generally are somewhat comfortable with the notion that evenly matched legal representatives can act as “zealous advocates” for their clients.⁷⁶ This assumption about evenly matched opponents underscores the functioning of the adversarial system as well as the validity of the outcomes reached in that system. It also underscores a justification for lawyers advocating for their own client and proceeding aggressively against the opposing party.⁷⁷ However, the validity

⁷⁴ Nourit Zimmerman & Tom R Tyler, “Between Access to Counsel and Access to Justice: A Psychological Perspective” (2010) 37:1 *Forham Urb LJ* 473 at 477.

⁷⁵ Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, Mass: Harvard University Press, 2009) at 1.

⁷⁶ See critiques of this adversarial approach, see above, Part II.

⁷⁷ Luban, *supra* note 22 at 16.

of this assumption may be undermined by certain practical realities, such as whether most lawyers are evenly matched or, more fundamentally, whether a zealous approach to advocacy results in the best or most just legal outcome.⁷⁸

The recent influx of self-represented litigants into the legal system more urgently and pointedly calls the validity of these assumptions into question. In the context of self-representation, particularly where the opposing party is represented, one party is likely to have a very distinct advantage over the other. In fact, empirical research has tended to demonstrate that represented parties obtain different (and assumedly better outcomes) than self-represented parties.⁷⁹ This is particularly true in a complex and highly professionalized legal system. In fact, to the extent that trained lawyers are regularly appearing against self-represented litigants, the notion of zealous advocacy, and more specifically over-zealous advocacy within the adversarial system (already suffering from questions of legitimacy), becomes distinctly problematic. It is unfair when one side (the legally represented party) has a disproportionate advantage and continues to operate in an extremely partisan manner.

Despite the growing number of self-represented litigants, the reality is that a great number of self-represented litigants are litigating against trained and experienced lawyers. Cases involving both a represented and self-represented party possess some of the greatest ethical challenges in terms of ensuring that the process is fair to all parties. However, addressing these challenges demands recognizing the imbalance occasioned by the unique needs of the self-represented party. This is not a challenge that can be effectively unloaded on the adjudicator overseeing the particular legal process but must be addressed by the lawyers acting against self-represented litigants. This is particularly relevant considering that the bulk of litigation occurs outside the courtroom. Self-represented litigants' narratives suggest that they feel intimidated by opposing counsel and vulnerable to being

⁷⁸ See Trevor CW Farrow, "Sustainable Professionalism" (2008) 46:1 Osgoode Hall LJ 51 [Farrow, "Sustainable Professionalism"]; Robert K Vischer, "Legal Advice as Moral Perspective" (2006) 19:1 Geo J Leg Ethics 225; Menkel-Meadow, "Lawyer as Problem-Solver", *supra* note 20; Lloyd L Weinrib, "The Adversary Process is Not an End in Itself" (1999) 2:1 J Inst for Study Leg Ethics 59 at 61–62.

⁷⁹ Rebecca L Sandefur, "The Impact of Counsel: An Analysis of Empirical Evidence" (2010) 9:1 Seattle J Social Justice 51 at 69. This empirical research consisted of a meta-analysis of various research projects that examined outcomes in a variety of legal contexts including formal litigation and administrative processes. Interestingly, the conclusions reached in this research have more recently been challenged by research undertaken at Harvard Law School by James Greiner. See D James Greiner & Cassandra Wolos Pattanyak, "Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?" (2012) 121:8 Yale LJ 2118.

taken advantage of by opposing counsel. Russel Engler corroborated these perspectives:

[A]ttorney misconduct permeates the interaction between counsel and an unrepresented adversary. Lawyers routinely engage in impermissible advice-giving, often including a misleading presentation of the law or facts, and over-reaching. Lawyers present legal and factual issues in a strategically favorable light, selectively control the flow of information, and manipulate their unrepresented adversary by misusing argument, appeals, threats, and promises. Whatever assistance an unrepresented litigant has received may be undercut by the litigant's encounter with the opposing lawyer.⁸⁰

Critiques of lawyers' traditional professional roles within the adversarial process have even more significant ramifications for self-represented litigants who, as compared to clients who may be encumbered with inadequate or ill-matched legal representation, are more seriously disadvantaged.⁸¹ Within the professional framework, the partisan role of the advocate is conditioned by the accompanying duties not to take advantage of another party's slips and mistakes or mislead the court. In an adversarial system that assumes that lawyers are relatively evenly matched, these different duties may not cause significant issues. However, even if an issue arises, it is likely that the conduct will be "caught" by opposing counsel equally well versed in the professional rules of conduct, the rules of court, and the relevant substantive law.⁸² However, self-represented litigants are not as likely to notice these issues as they arise in court. Without a clear and unambiguous delineation of the ethical responsibilities expected of counsel in cases involving self-represented litigants, the dominance of the duties to the client leaves the lawyer, at best, unsure of how to engage with non-lawyers and, at worse, in a position to manipulate the process for the benefit of the client.

In the self-represented litigants' narratives, the individuals and the volunteer lawyers interviewed repeatedly expressed the concern that opposing counsel were often unwilling to extend the same courtesy to the self-represented litigant that they would extend to an opposing lawyer.⁸³ Leaving the self-represented litigant to her own devices may very well result in the self-represented litigants' failure to address the court's queries,

⁸⁰ Russell Engler, "And Justice for All—Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks" (1999) 67:5 *Fordham L Rev* 1987 at 1908 [footnotes omitted].

⁸¹ The disparity between wealthy and under-resourced represented litigants raises issues of fairness within the adversarial system. Thus, it can be presumed that the disparity may be more profound in cases involving self-represented litigants.

⁸² Monroe H Freedman & Abbe Smith, *Understanding Lawyers' Ethics*, 3rd ed (Newark: Matthew Bender & Co, 2004) at 2–10.

⁸³ LHO Interviews, *supra* note 36.

ultimately weakening the self-represented litigants' position and/or resolve to continue. This approach underscores the problems with a singular commitment to the dominant professional model in cases involving self-represented litigants. In this respect, the duty to the client can be used to justify a refusal to assist a self-represented litigant, and in effect, the court and the administration of justice. There are obvious distinctions between assisting an opposing party in making their case for them and assisting the process such that the administration of justice is promoted. The concern is that in cases involving self-represented litigants, lawyers may be unable or unwilling to engage in an exercise that distinguishes between these two forms of assistance. The consequence is that self-represented litigants are subject to conduct by lawyers that, while perhaps not clearly in violation of their ethical duties, pushes the envelope regarding "norms of practice". This is particularly problematic from an ethical standpoint when the lawyer would not engage in or abstain from similar action against an opposing lawyer. However, it is important to remember that in accordance with lawyers' duties to the administration of justice, lawyers must "[promote] the parties' right to a fair hearing in which justice can be done."⁸⁴

5. The Professional Rules and Self-Representation

From an ethical standpoint, the application of general principles contained in the provincial professional rules of conduct places little responsibility on lawyers acting against self-represented litigants.⁸⁵ Rule 7.2(9) of the *Rules of Professional Conduct* in Ontario deals expressly with a lawyer's duties to unrepresented litigants.⁸⁶ It is quite limited in its scope and comprises only two subsections with next to no commentary. As a preliminary matter, it is worth noting that the language used in this section makes reference to "unrepresented" litigants rather than self-represented litigants.⁸⁷ This terminology presupposes that the continuing norm is legal representation, but that there are a group of individuals (i.e. unrepresented individuals) who could not secure legal representation. The term "unrepresented" connotes a lack of representation due to an insufficiency of financial resources.

⁸⁴ The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: Law Society of Upper Canada, 2014, ch 5.1(1), commentary 1 [*Rules of Professional Conduct*]. The commentary respecting rule 5.1(1), *The Lawyer as Advocate*, states: "The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done".

⁸⁵ For the purposes of this discussion, I have focused on the rules of conduct that govern lawyers in Ontario, as these rules are directly relevant to the empirical research I undertook at LHO in downtown Toronto.

⁸⁶ *Supra* note 84, ch 7.2(9).

⁸⁷ *Ibid.*

Although this may be true in many instances, it serves to convey negative images of the litigants that tend to follow them through the civil justice system. A consideration of the appropriate nomenclature respecting non-lawyers engaged in the civil justice system ultimately caused the Civil Justice Council in England to adopt the term “self-represented litigant.”⁸⁸ This was, in part, because there is a desire to use language that both emphasizes that a party may be represented without the presence of traditional legal representation and acknowledge that the terms employed do not imply a deficiency in the fact of self-representation.⁸⁹

The main focus of the professional conduct rules addressing self-represented litigants is the lawyer’s obligation to ensure that a self-represented litigant does not mistakenly believe that he or she can rely on any advice given by the lawyer or that the lawyer is taking account of their interests.⁹⁰ This provision is repeated in provincial professional rules across the country. Outside these provisions, there are no other positive duties or restrictions imposed on lawyers in respect of self-represented litigants. By contrast, it is worth noting the rules that govern *ex parte* proceedings. When represented counsel are not present at a hearing, there is commentary that ensures that the lawyer appearing before the tribunal meet certain responsibilities. Specifically, the relevant commentary indicates:

When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client’s case so as to ensure that the tribunal is not misled.⁹¹

⁸⁸ Civil Justice Council, [Access to Justice for Litigants in Person \(or Self-Represented Litigants\)](#), A Report and Series of Recommendations to the Lord Chancellor and to the Lord Justice (London, UK: CJC, 2011), online: <www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/litigants-in-person/> at 6.

⁸⁹ *Ibid* at 13.

⁹⁰ *Rules of Professional Conduct*, *supra* note 84, ch 7.2(9). It is worth noting that these provisions are similar across all of the jurisdictions in Canada; see e.g. The Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, Vancouver: Law Society of British Columbia, 2013, ch 7.2(9); The Law Society of Alberta, *Code of Conduct*, Calgary: Law Society of Alberta, 2015, ch.7.2(12); The Law Society of Saskatchewan, *Code of Professional Conduct*, Regina: Law Society of Saskatchewan, 2015, ch 6.2(9); The Law Society of Manitoba, *Code of Professional Conduct*, Winnipeg: Law Society of Manitoba, 2015, ch 7.2(9); Nova Scotia Barristers’ Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers’ Society, 2015, ch 7.2(9); Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2017, ch 7.2(9).

⁹¹ *Rules of Professional Conduct*, *supra* note 84, ch 5.1, commentary 6.

In the context of this rule, the profession's governing body is eager to direct counsel on how best to proceed when opposing counsel are not physically present in court. Presumably, the rationale is that such direction is necessary to ensure that the process is fair to both parties and that the adjudicator is not misled in the course of her decision-making.

These obligations can be juxtaposed with the rules respecting counsel's interaction with self-represented litigants in which no such explicit duty is placed on counsel to avoid taking advantage of self-represented litigants. The fact is that the rules regarding self-represented litigants fail to include any meaningful instruction about how counsel might ensure that the "full proof and argument inherent in the adversarial system" is achieved as per the lawyer's duty to promote the administration of justice in cases involving self-represented litigants.⁹² The question that arises, therefore, is how the concerns underlying the commentary on *ex parte* proceedings might be applied in the context of self-representation.

Overall, the professional rules addressing self-representation provide little guidance in respect of the interaction between self-represented litigants and counsel, while focusing exclusively on the question of managing self-represented litigants' expectations. While perhaps not the express intent, a more cynical reading of this rule might suggest that the management of expectations also ultimately protects the lawyer from future complaints by a self-represented litigant who misunderstood or misconstrued the nature of the relationship with opposing counsel. As such, while it may be important to place an obligation on lawyers to ensure that self-represented litigants are not misled, this represents just part of what is needed to ensure the effective administration of justice in cases where there is a serious imbalance between parties. Overall, the failure to remind lawyers of their various ethical duties in the context of cases involving self-represented litigants and lack of other specific reference to the particular circumstances of self-representation reinforces the notion that the lawyer's primary duty remains that of the zealous advocate.

By further contrast to the rules outlining lawyers' responsibilities in cases involving self-represented litigants, it is also worth noting that the scope of lawyers' responsibilities to represented parties as well as corporate entities and governments is quite extensive.⁹³ This is problematic from an ethical standpoint because it sends a message about how lawyers should act when engaging with other lawyers and/or represented parties while, at the same time, downplaying the importance of distinct ethical concerns that may arise in the context of cases involving self-represented litigants. The

⁹² *Ibid.*

⁹³ See e.g. *ibid.*, ch 7.2(6), 7.2(8).

failure to articulate specific ethical obligations *vis-à-vis* self-represented litigants sends an implicit message that this is not something with which lawyers and the system at large need be concerned.

The absence of clearly defined and adequate professional rules that address self-representation raises an even more fundamental consideration. The concern is that the limited provisions about self-represented parties are situated in a professional culture that reflects a continued adherence to the neutral partisan model of lawyering—a model that already suffers from criticisms respecting its effect in operation. The problem is that the continued adherence to this model forecloses the recognition of other competing considerations. In the more specific context of self-representation, this professional model also tends to discount the deleterious effects that negative engagement with counsel can have on self-represented litigants' perceptions about being able to participate and be heard within the legal system. This effect runs contrary to the lawyer's duty to "encourage public respect for and try and improve the administration of justice."⁹⁴ Moreover, research suggests that self-represented litigants characterize their participation in very different terms—the ability to be heard and present their dispute before an adjudicator.⁹⁵ More specifically, self-represented litigants' ability to tell their story as well as present evidence to the adjudicator both become important criteria by which they assess the fairness of a particular proceeding.⁹⁶ This does not mean that the outcome is irrelevant, but only that there are other elements of the adjudicatory process that significantly affect self-represented litigants' overall perception of fairness and their willingness to accept the legitimacy of both the process and the outcome achieved. Thus, to the extent that a lawyer plays a negative role that consequently impacts the self-represented litigant's perceptions about the fairness of the justice

⁹⁴ *Ibid*, ch 5.6(1). Commentary 2 of rule 5.6(1) further states: "The admission to and continuance in the practice of law implies on the part of a lawyer a basic commitment to the concept of equal justice for all within an open, ordered, and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it".

⁹⁵ Hazel Genn, "Tribunals and Informal Justice" (1993) 56:3 *Mod L Rev* 393; E Allan Lind & Tom R Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988); E Allan Lind, Robin I Lissak & Donald E Conlon, "Decision Control and Process Control Effects of Procedural Fairness Judgments" (1983) 13:4 *J Applied Social Psychology* 338; Robin I Lissak & Blair H Sheppard, "Beyond Fairness: The Criterion Problem in Research on Dispute Intervention" (1983) 13:2 *J Applied Social Psychology* 45; John Thibault & Laurens Walker, *Procedural Justice: A Psychological Analysis* (Hillsdale, NJ: Lawrence Erlbaum Associates, 1975).

⁹⁶ Patricia Ewick & Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998) at 36.

system, such a role is contrary to the legal profession's duties to promote the administration of justice.

A further lesson that can be drawn from the self-represented litigants' experiences is that lawyers, through their actions and the positions they adopted, often undermined the self-represented litigants' attempts to participate and be heard. The perception by self-represented litigants that they are unable to participate in the legal system has further ramifications both for the legitimacy of the profession that administers and operates within the system and for the decisions made in that system. Moreover, strategic moves to discredit or dissuade self-represented litigants' voices in proceedings devalues their personal dignity and ultimately runs the risk of leaving individuals disaffected from the legal institutions that are meant to serve them.⁹⁷ As Sward noted, "[f]or the disaffected, the alternative to voice in any society that values the individual is exit."⁹⁸

6. Learning from an Inquisitorial Model

A comparative analysis of legal ethics is valuable in that it obliges a re-assessment of matters that are ordinarily taken for granted. It also offers other and perhaps better ways of tackling new or evolving challenges.⁹⁹ In considering how members of the legal profession might better address the influx of self-represented litigants, it is helpful to examine how lawyers' ethical responsibilities are framed in a system in which lawyers play a different role.¹⁰⁰ Again, while truth-seeking is certainly a sought-after ideal in the adversarial system, it is often compromised by an inequality of resources. Determining the truth as part of the dispute resolution process is a secondary concern to lawyers presenting a case that is advantageous to their clients.

Over time, both inquisitorial and adversarial systems have developed certain practices and procedures that seek to address their respective shortcomings. It is suggested that an inquisitorial framework justifies judicial engagement and intervention on the basis that it equalizes the parties.¹⁰¹ Historically, the French civil system was significantly less inquisitorial, but evolved away from an adversarial model as a result of criticisms about the workability of an adversarial approach.¹⁰² In the

⁹⁷ Sward, *supra* note 32 at 310–11; see also Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, Mass: Harvard University Press, 1970) [Hirschman].

⁹⁸ Sward, *supra* note 97 at 310, n 37; see generally Hirschman, *supra* note 97.

⁹⁹ Nagorcka, Stanton & Wilson, *supra* note 29 at 477.

¹⁰⁰ *Ibid* at 452.

¹⁰¹ Brooks, *supra* note 34 at 111.

¹⁰² Jolowicz, *supra* note 2 at 290.

French context, the consequence of this shift was the growth of an active judiciary and the establishment of different ethical responsibilities for lawyers.¹⁰³ In the Canadian context, one example of a non-adversarial shift in adjudication has been the development of a discovery procedure that seeks to equalize and balance the exchange of information between parties; the procedure places proactive duties on the parties to produce relevant documentation.¹⁰⁴ The expansion of procedures that govern litigants' obligations and responsibilities to provide as well as obtain information from opposing parties in the discovery process serves to advance the truth-seeking functions within the system at the expense of exclusive party control over the presentation of its case. In developing these types of procedures, there is a tacit recognition that certain tenets of the adversarial system can often work to undermine the truth-seeking function. Another example is the use of case-management where judges are more actively engaged in the progression and resolution of cases. Again, this engagement serves to remove exclusive control over the "packaging" of the case from the parties' perspectives. Specialized courts and the approval of settlements in class actions also serve to engage members of the judiciary more directly in the conduct and management of cases.¹⁰⁵

While it may be suggested that these initiatives are better discussed in the context of the judge's evolving role within a modified adversarial system, the reality is that all these processes are developed and administered by lawyers; presumably this is to benefit both their clients and the better administration of the adversarial process.¹⁰⁶ The implementation of such non-adversarial initiatives also provides a useful response to the challenge that lawyers cannot be expected to modify their behaviour having "grown up" in an adversarial system. The fact is that lawyers do regularly implement non-adversarial initiatives, and Alternative Dispute Resolution ("ADR") is the prime example of this. The reality of these reforms is that many lawyers already operate within a system that is not purely adversarial. Rather, they function within a hybrid model of dispute resolution; it contains varying degrees of adversarial and inquisitorial components. Operating within such a system should require that lawyers' ethical duties and responsibilities also shift in order to take better account of the values and objectives that are operationalized in a modified adversarial system. Such a shift would reflect a realignment of ethical duties in line with the new realities of legal practice and, in this sense, would be neither radical nor transformative in nature.

¹⁰³ *Ibid.*

¹⁰⁴ For an Ontario example, see *Rules of Civil Procedure*, RRO 1990, Reg 194, s 29.1-31.

¹⁰⁵ Sward, *supra* note 32 at 337-41; Jolowicz, *supra* note 2 at 286.

¹⁰⁶ Leitch, *supra* note 2.

The practical implication of these various modifications is that the integration of non-adversarial processes seeks to equalize each party's ability to present their case and ensure that the adjudicative process continues to meet its objectives of truth-seeking and dispute resolution. In the present context, it is this infusion of non-adversarial aspects that provides a basis for looking at alternative models of dispute resolution that are inquisitorial rather than adversarial. The recognition that a common ground exists between the different systems is particularly pertinent in the civil as opposed to criminal context. For instance, it is worth noting that, in both inquisitorial and adversarial systems, "civil litigation is commenced by private litigants."¹⁰⁷ Similarities between adversarial and inquisitorial systems suggest that "there is still a large and important area for debate in determining what should be the respective roles of the parties and the judge in civil litigation."¹⁰⁸

In terms of the operation of the adversarial and inquisitorial models in the civil context, it has been suggested that one of the main differences between adversarial models and inquisitorial models focuses on the how evidence is elicited from witnesses. In inquisitorial systems, the lawyers typically do not elicit evidence from witnesses by way of examination. Rather, the court plays an active role in eliciting the evidence.¹⁰⁹ In some inquisitorial systems, there is less distinction made between the pre-trial and trial stages of litigation; the litigation process is continuous and evidence is determined over a series of "conference-like hearings" that ultimately allow the adjudicator to make a determination.¹¹⁰ Typically, the less rigid a particular procedure, the more plausible it is that a non-lawyer will be able to engage in a more meaningful fashion. This is due to the fact that non-lawyers are not hampered by strict procedural requirements of which they are generally unaware. Thus, in looking for fresh approaches to the ethical challenges that continue to plague lawyers within an adversarial system dealing with self-represented litigants, the inquisitorial model may offer new angles from which to consider existing challenges. The suggestion is not that the adversarial model should be replaced with an inquisitorial model. Rather,

¹⁰⁷ Garry Downes, "The Movement Away from Oral Evidence: How Will This Affect Advocates?" in Charles Sampford, Sophie Blencowe & Suzanne Condlin, eds, *Educating Lawyers for a Less Adversarial System* (Sydney: Federation Press, 1999) 75 at 77 [Downes], cited in Nagorcka, Stanton & Wilson, *supra* note 29 at 469; Jolowicz suggests that the civil systems of continental Europe are similar to the adversarial systems in three main regards: (i) initiation of action; (ii) settlement of action; and (iii) decision to appeal (Jolowicz, *supra* note 2 at 289).

¹⁰⁸ Jolowicz, *supra* note 2 at 286.

¹⁰⁹ Michelle Flaherty, "Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law" (2015) 38:1 Dal LJ 119 at 129.

¹¹⁰ Nagorcka, Stanton & Wilson, *supra* note 29 at 469; see also Downes, *supra* note 107.

it is that the adversarial system should incorporate inquisitorial elements that better address the changing dynamics within the existing model. In this sense, the current system largely remains more adversarial than inquisitorial, but takes account of the benefits associated with inquisitorial approaches so as to ensure that, overall, the system remains fair to all those participating in it.¹¹¹ Elements of the inquisitorial model might be grafted on to the adversarial system in order to address some of the challenges facing self-represented litigants and the lawyers that encounter self-represented litigants in the course of their practice. Dimensions of an inquisitorial model can offer a better opportunity to reconcile self-represented litigants' needs and limitations than what the adversarial model currently offers.¹¹² A judicious mix of adversarial and inquisitorial elements might work best.

7. Fresh Approaches

Proponents of inquisitorial models maintain that lawyers practicing within inquisitorial systems are expected to facilitate truth-seeking and act independently of their clients. In so doing, lawyers are accountable for the professional decisions that they make in the course of providing legal services. The focus within the inquisitorial model on truth-seeking and the corresponding emphasis on lawyers' moral and ethical responsibility for the actions they undertake offers an alternative approach to lawyers' ethical responsibilities in the context of self-representation. Arguably, self-represented litigants could have a better chance of participating if the lawyers' duty to obtain a "victory" for the client is tempered by a renewed sense of professional responsibility and commitment to the administration of justice. Additionally, a reinvigorated approach to finding the truth has the potential to affect the ways in which individual lawyers interact with self-represented litigants. As reflected in the self-represented litigants' narratives discussed earlier, self-represented litigants often felt tricked or manipulated by counsel who use their knowledge and expertise to bring about strategic advantages irrespective of the merits of the case.

An example of such an approach is evidenced in the research conducted by Julie Macfarlane on summary judgment motions.¹¹³ By using summary judgment motions early in the proceeding, lawyers undoubtedly leverage a strategic advantage over unprepared and ill-informed self-represented litigants. Seasoned litigators would acknowledge that a case can often

¹¹¹ Jolowicz, *supra* note 2 at 281.

¹¹² Roger C Cramton, "A Comparative Look at the Ethics Rules and Professional Ideologies in a Time of Change" in John J Barceló III & Roger C Cramton, eds, *Lawyers' Practice and Ideals: A Comparative View* (The Hague: Kluwer Law International, 1999) 267 at 268.

¹¹³ See Macfarlane, Trask & Chesney, *supra* note 71 for a discussion of Julie Macfarlane's research on summary judgments.

evolve in a myriad of ways either gaining or losing strength as disclosure is accumulated and the relevant law is clarified. Such a strategic advantage early in the litigation, when there is a significant and perhaps greater imbalance of power, suggests a potential unfairness that undermines a commitment to truth-seeking and results in the de-legitimizing of the civil justice system.

Moreover, by placing a duty to the civil justice system at the forefront of the legal profession's ethical responsibilities, there is an opportunity for lawyers to begin to both shape processes that are reflective of a renewed commitment to truth-seeking and, in turn, operate in accordance with such newly developed processes.¹¹⁴ In other words, in recognizing the importance of such a function and incorporating that objective within their professional culture, lawyers have an opportunity to participate in the design of processes that are more fair and reflective of the new realities within the civil justice system. From an access to justice perspective, if lawyers do not engage in processes that deal with self-represented litigants more effectively, it is possible that "procedures will be introduced for the resolution of disputes which will bypass them."¹¹⁵ Finally, a reinvigorated ethical commitment to the system more generally is consistent with the legal profession's obligation to uphold the principles of natural justice and, more specifically, the right to be heard and have a fair hearing.

In conjunction with a fresh commitment to truth-seeking within the justice process, there is a value in lawyers more fully accounting for the moral and ethical decisions that they make in the course of their practice.¹¹⁶ For instance, in the French civil system, lawyers remain independent of their clients. French lawyers do not view themselves as representatives or agents of their clients nor are they always obligated to follow the client's instructions.¹¹⁷ Being responsible for their actions as lawyers, French lawyers are obligated to step beyond the client's instructions and consider

¹¹⁴ Carrie Menkel-Meadow, "Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve" (2004) 57:1 *Current Leg Probs* 85 at 106 [Menkel-Meadow, "Dilemmas"].

¹¹⁵ John Toulmin, "Ethical Rules and Professional Ideologies" in John J Barceló III & Roger C Cramton, eds, *Lawyers' Practice and Ideals: A Comparative View* (The Hague: Kluwer Law International, 1999) 377 at 390.

¹¹⁶ Farrow, "The Good, the Right and the Lawyer", *supra* note 18; Farrow, "Sustainable Professionalism", *supra* note 78.

¹¹⁷ John Leubsdorf, "The Independence of the Bar in France: Learning from Comparative Legal Ethics" in John J Barceló III & Roger C Cramton, eds, *Lawyers' Practice and Ideals: A Comparative View* (The Hague: Kluwer Law International Law, 1999) 275 at 280.

the potential implications of those instructions before acting.¹¹⁸ Arguably, this ethical exercise requires that the lawyer engage in a consideration of any competing duties and interests that might be implicated by a particular course of action, such as a duty to promote the public interest or a duty owed to a tribunal. Moreover, lawyers practicing within the French legal system place significant importance on the responsibilities that lawyers owe to the court; these responsibilities are acknowledged within an adversarial system, but often marginalized in the broader context of the client's needs or instructions.¹¹⁹

By contrast, neutral partisanship is justified, in part, on the basis that it ensures lawyers can and will represent unpopular clients and unpopular cases. However, this duty is more often than not misappropriated: the lawyer engages in little or no dialogue on the moral limits of their own actions or those actions that are carried out in conjunction with a client's instructions. As a consequence, certain scholars advocate a shift away from the dominant model and "non-accountable partisanship."¹²⁰ In the specific context of self-representation, it can be used to maintain unsustainable positions *vis-à-vis* self-represented litigants that might not be adopted if the opposing party was represented by counsel and in a position to respond more effectively. Again, drawing on the self-represented litigants' narratives, lawyers' conduct in this regard included refusals to grant reasonable adjournments and remaining silent in adjudicative settings when the non-lawyer, unversed in the appropriate procedure, failed to adequately inform the adjudicator.¹²¹ Often, the rationale used in these types of instances is that the lawyer owes no duty to assist an opposing party. Moreover, any such assistance may be contrary to the client's instructions. In such instances, the challenging consideration is that a continued and exclusive adherence to neutral partisanship allows lawyers to benefit from the natural advantage that a lawyer is likely to have over a non-lawyer; they do so in the name of their client without any ethical evaluation of their own actions or implications for the self-represented litigant or the tribunal.

Alan Paterson has noted that, over the past few years, the public has either directly or indirectly begun to insist on the re-negotiation of the traditional

¹¹⁸ Similar to the Canadian legal system, the French lawyer can charge her client an hourly rate, a flat fee for certain services, or a contingency fee. However, "no-win-no-fees" are prohibited.

¹¹⁹ William B Fisch, "Varieties of Professional Independence" in John J Barceló III & Roger C Cramton, eds, *Lawyers' Practice and Ideals: A Comparative View* (The Hague: Kluwer Law International Law, 1999) 363 at 392.

¹²⁰ Farrow, "Sustainable Professionalism," *supra* note 78 at 57; Luban, *supra* note 22 at 148; Robert K Vischer, "Legal Advice as Moral Perspective" (2006) 19:1 *Geo J Leg Ethics* 225; Menkel-Meadow, "Dilemmas," *supra* note 113.

¹²¹ LHO Interviews, *supra* note 36.

model of professionalism.¹²² In a sense, the public is demanding a hand in defining the public interest it is meant to serve.¹²³ While the magnitude of this engagement may be up for debate, the observation is certainly relevant in terms of self-representation. As more non-lawyers enter into the civil justice system and remain deeply dissatisfied with their experience with members of the legal profession, the presence of self-represented litigants compels the profession to engage in a reappraisal of some of its basic ethical tenets. It is incumbent on lawyers as both an institutional and ethical matter to respond positively and constructively to that challenge.

While these criticisms raise legitimate concerns that any reform process would need to address, there are a couple of preliminary considerations that should be remembered. First of all, the adversarial system in which many lawyers operate continues to evolve; it no longer looks nor acts like a fully traditional system. Moreover, the introduction of ADR models provides a good example of lawyers adapting to new procedures and, in turn, reconfiguring their ethical responsibilities within these new processes.¹²⁴ In effect, ADR is a non-adversarial process within an adversarial system.¹²⁵ While this transformation has not been without its challenges, it suggests that the legal profession is capable of adapting ethical responsibilities to new legal contexts. Secondly, much of the public's expectations of lawyers involve perceptions that are reinforced by lawyers and the popular media. Historically, lawyers have yielded a great deal of power. While the moral legitimacy of the profession has been questioned, the reality is that the profession continues to play a significant role in a highly professionalized law-centric society. Thus, to the extent that lawyers accept ownership of the image they wish to portray, it is likely that the legal profession itself will play a significant role in changing public perceptions and expectations. If public attitudes toward and perceptions about members of the legal profession are any indication of the need for change, lawyers' initiatives to change public expectations about them might be well received.¹²⁶

Finally, the response that the existing professional rules and responsibilities are sufficient and that the problem is more a failure to comply with the existing rules is unpersuasive. Differing views on the effectiveness and legitimacy of the dominant model of professionalism

¹²² Paterson, *supra* note 15 at 53.

¹²³ *Ibid.*

¹²⁴ Menkel-Meadow, "Lawyer as Problem-Solver", *supra* note 20.

¹²⁵ Sward, *supra* note 32 at 341; Carrie Menkel-Meadow, "Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83:7 *Geo LJ* 2663 at 2690-91.

¹²⁶ Rosalie Silberman Abella, "[The Law Society of Upper Canada Professionalism Revisited](http://www.ontariocourts.ca/coa/en/ps/speeches/professionalism.htm)" (Opening Address Benchers' Retreat delivered in Hockley Valley, Ontario, 14 October 1999), online: <www.ontariocourts.ca/coa/en/ps/speeches/professionalism.htm>.

suggest that even if the existing professional rules are complied with, there are significant and far-reaching challenges associated with the influx of self-represented litigants. Moreover, this influx of self-represented litigants calls in to question the sufficiency of reliance on a professional regulatory framework that depends on the members' knowledge and understanding of their respective responsibilities. For example, rule 5.1(2) and commentary 5.1(1) in the *Rules of Professional Conduct* indicate that lawyers are obligated not to engage in "sharp" practice, with the assumption being that opposing counsel made a "slip" or "oversight" not going to the merits of the matter.¹²⁷ The objective is that such sharp practice could bring the administration of justice into disrepute. However, this particular rule raises difficult questions in the context of self-represented litigants who may make a variety of errors and oversights due to a lack of experience or legal knowledge. These errors are less likely to be made in the context of trained legal professionals and are likely to go to the merits of the case. In these instances, the existing rules (even if complied with by legal professionals) are not similarly applicable when the case involves self-represented litigants.

In light of the current state of the professional rules pertaining to self-represented litigants, there is an urgent need to articulate the ethical responsibilities of lawyers practicing against self-represented litigants. So the question becomes what a fresh approach to lawyers' ethical responsibilities would look like if infused with inquisitorial norms. Practically speaking, reform is needed on two levels. The first level involves a broad and ambitious statement that sets the tone for the legal profession's engagement with self-represented litigants going forward. Consistent with the principles outlined in section 4.2 of the *Law Society Act*, such a provision would include a clear and unequivocal statement that re-framed lawyers' commitments to "maintain and advance the cause of justice and the rule of law" and to "act so as to facilitate access to justice" in the context of self-representation.¹²⁸ This type of statement would also serve to link the legal profession's duties to promote the administration of justice with the profession's responsibility to ensure fair and meaningful participation by non-lawyers in the legal matters that affect them. Moreover, delineating lawyers' responsibilities *vis-à-vis* self-represented litigants signals to the profession a shift in how its regulator approaches the presence of self-represented litigants. With such a reform, the presence of self-represented litigants would no longer be an anomaly to be rectified by calls for more funding for legal representation. Instead, it would become an accepted feature of the modern civil justice system.

Secondly, there is a need to devise new rules and new commentary that will begin to re-shape lawyers' interactions with self-represented parties.

¹²⁷ *Supra* note 84, ch 5.1(2), commentary 5.1(1).

¹²⁸ RSO 1990, c L-8, ss 4.2(2)–(3).

Drafting such rules and commentaries may benefit from a consideration of certain norms that can be found in the inquisitorial model. This is particularly relevant outside of the courtroom, where, without judicial oversight, there are more chances for a self-represented party to be disadvantaged. Continuing disparities in levels of knowledge and resources between a trained lawyer and a self-represented party will remain. However, the existence of concrete rules that map out the professional expectations and responsibilities placed on lawyers when dealing with self-represented individuals is likely to help address the impact of the disparities. To assume otherwise would undermine the efficacy of the existing professional rules that rely to a great extent on the self-regulation of individual lawyers to act in accordance with their duties and responsibilities. As such, it is important to think about those circumstances and situations within the existing rules, where the expectations and responsibilities placed on lawyers acting against self-represented litigants might be more particularly defined. In addition to better defining lawyers' professional obligations within the existing rules, it is important to consider how new professional duties and responsibilities might be added to more specifically address lawyers' duties to self-represented litigants.

Certain existing commentary might provide an interesting starting point from which to develop lawyers' duties in cases involving self-represented litigants. Under the Ontario rules, chapter five of the *Rules of Professional Conduct* references the lawyer's relationship to the administration of justice.¹²⁹ Commentary 6, below rule 5.1(1), defines the obligations of a lawyer in situations where the opposing party is not present before the tribunal.¹³⁰ In those instances, the lawyer is required to be accurate, candid, and comprehensive in order to ensure that the tribunal is not misled as a result of having only one party represented. The concern being addressed in commentary 6 is that, in such circumstances where there is only one party present, an adjudicator might not be provided with all of the relevant information that would presumably be presented with two robust advocates in an adversarial setting.¹³¹ In such a situation, any decision made would serve to bring the administration of justice into disrepute and, more immediately, be unfair to the party not present. Moreover, providing one party with an unfair advantage (by being the only party present in court) undermines the truth-seeking function of the dispute resolution process. This line of thinking could be extended to matters involving self-represented

¹²⁹ *Supra* note 84, ch 5.

¹³⁰ *Ibid*, ch 5.1(1), commentary 6 states: "When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled".

¹³¹ *Ibid*.

litigants. While the self-represented litigant may physically be present in courtroom, in most cases there is a distinct advantage to represented parties over self-represented parties. This is an advantage that is more difficult to reconcile when it is remembered that the main reason that most individuals represent themselves is an inability to afford lawyers' fees.

Thus, in accounting for unfair advantages between represented and self-represented litigants, draft commentary could place specific obligations on the lawyer to promote and protect the fairness of the proceeding—in a manner similar to the requirements placed on a lawyer acting *ex parte*. While the language of “accuracy” and “comprehensiveness” used in commentary 6 respecting *ex parte* proceedings may not be sufficient, requiring that lawyers be candid in cases involving self-represented litigants might be a good place to start.¹³² Additionally, adopting and perhaps expanding language similar to that used in commentary 8 on lawyers' obligations not to take advantage of slips or missteps could also serve to address some of the concerns expressed by self-represented litigants.¹³³ This would also be consistent with an enhanced commitment to equalizing the parties' ability to participate and the resolution of matters on their merits as per inquisitorial models.¹³⁴ Such language would also recognize that in the present legal system there is a risk of distinct disadvantage to self-represented parties that should not be exploited by lawyers.

By incorporating and expanding these themes, new rules, and commentary could serve to better define the duties that lawyers have in an evolving legal system. As the adversarial system evolves, so too should the roles and duties of the advocates operating within that system. Rather than being exclusively adversarial in theory and practice, it would incorporate non-adversarial components. The challenge is to balance the lawyer's duties to the client with the equally important responsibilities to promote the administration of justice and access to justice. The addition of new commentary respecting self-represented litigants reflects an evolving legal system that requires that the profession adapt accordingly. In this sense, new commentary might state:

When an opposing party is not represented by a lawyer or paralegal, it is incumbent on the lawyer or paralegal to ensure that the broader interests of justice are served. In such cases, the lawyer must take particular care not only to be fair and candid in

¹³² *Ibid.*

¹³³ *Ibid.*, ch 5.1(1), commentary 8.

¹³⁴ See *ibid.*, which states: “In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side”.

representing the client's case, but also not to take advantage of the opposing party's inexperience and lack of legal training.

Again, it should be emphasized that rather than being the solution to a very complex problem, this proposed language is the starting point for a continuing conversation about how lawyers and self-represented litigants might better inhabit the same legal system. This conversation needs to include more non-lawyers' perspectives; this would help shine more light on the limitations associated with the traditional professional model and also enable the legal profession to better understand how the operationalization of the traditional model (and the profession's continued commitment to this model) is perceived outside of the profession. The goal in engaging in such a conversation is to define new ethical duties and responsibilities for lawyers when working with and against self-represented litigants. Adopting an agenda that actively consults and engages with self-represented litigants and the public more broadly is also consistent with the professional regulatory bodies' mandate to act in the public interest. This mandate demands the involvement of that same public.

8. Conclusion

The absence of more comprehensive ethical guidelines regarding self-represented litigants is in serious need of correction. Given the influx of self-represented litigants in the civil justice system, it has become necessary to integrate self-represented litigants more directly within the rules of professional conduct frameworks. As I have sought to argue, this type of reform cannot be "mere tinkering". Instead, what is required is a more in-depth re-thinking about the condition of the adversarial framework and lawyers' roles within that framework. This will entail an inquiry into how the adversarial framework in which lawyers operate may require very different normative rules that take better account of self-represented litigants' legitimate participation within the legal system.¹³⁵

In developing new approaches that might better shape the legal profession's response to and interaction with self-represented litigants, one option is to explore other adjudicative frameworks that might infuse and alter the existing adversarial model. The rationale for adopting this approach is, in part, due to recognizing that the existing adversarial system does not operate as ideally as many in the legal profession believe it does. Indeed, over time, certain reforms have been undertaken to address inequalities in the existing system. Thus, as the legal system evolves, albeit at a snail's pace, so too must the corresponding ethical expectations of lawyers evolve in order to reflect the new realities and a continued commitment to a fair and

¹³⁵ Menkel-Meadow, "Dilemmas", *supra* note 114 at 105.

just legal system. An important component of this evolution will be the need for a broader engagement with individuals who are representing themselves in order that the legal profession and its regulators might better understand how the duties and responsibilities held by lawyers play out in this context. Part of this analysis will need to engage members of the profession in a more critical and reflective examination of their ethical responsibilities.