MAY ATTORNEYS IN A LAW FIRM REPRESENT THEMSELVES WHEN BEING SUED BY FORMER CLIENTS? AN EXAMINATION OF THE APPLICABILITY OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

I. INTRODUCTION

A litigant’s right to self-representation has long been largely unquestioned in the American judicial system. The legal profession, however, has been questioning this right in regard to attorneys who want to represent themselves. The debate over whether attorneys should be able to appear in court pro se has been quietly circulating through the court system without much attention being placed on the issue outside of the courtroom. The American Bar Association’s Model Rules of Professional Conduct (Model Rules) are silent on the issues surrounding pro se attorney litigants. The Model Rules presuppose the existence of clients who are independent of the advocate. This presupposition results in courts discerning the applicability of the Model Rules to the pro se attorney litigant on a case by case basis. The lack of attention given the ethical considerations surrounding the pro se attorney has led to uncertainty within the legal community concerning the proper conduct that must be exhibited in situations where attorneys want to represent themselves against claims by former clients.

Modern courts have invariably relied on analogies to the Model Rules in determining their applicability to the pro se attorney. Most jurisdictions are without a set precedent concerning this issue. In Farrington v. Law Firm of Sessions, the Louisiana Supreme Court examined the applicability of Model Rules 3.7, 1.7, 1.9, and 1.6 to the role of the

2. Model Rule 3.7 prohibits a lawyer from acting as an advocate in a trial where she is likely to be called as a necessary witness.
3. Model Rule 1.7 requires an attorney to avoid representing another client when it would create a conflict of interest with a present client, unless the present client consents.
4. Model Rule 1.9 provides that a lawyer should not represent another client in the same or substantially related manner as a former client if the new client's interests are materially adverse to those of the former client.
5. Model Rule 1.6 prohibits an attorney from revealing information about the representation of a former client, unless the former client consents.
pro se attorney litigant.\textsuperscript{6} \textit{Farrington} involved a malpractice suit by a corporate shareholder against two members of a firm who represented the corporation.\textsuperscript{7} The plaintiff argued that Model Rule 3.7 acted as a prohibition against the attorneys' appearing before the court on their own behalf.\textsuperscript{8} The plaintiff further argued that even if Model Rule 3.7 was not applicable, Model Rules 1.7 and 1.9 disqualified the attorneys from representing themselves based on their former attorney-client relationship with her.\textsuperscript{9} In upholding the attorneys' right to self-representation in light of Model Rule 1.6, the court found that Model Rules 1.7 and 1.9 did not apply to attorneys representing themselves against a legal malpractice action.\textsuperscript{10}

The holding of the court in \textit{Farrington} coincides with the general movement of the legal system toward a recognition that attorneys have the same unrestricted right of self-representation as any other citizen. Although many courts quickly recognize that an attorney's acting in a \textit{pro se} capacity against a former client is not ideal and could elicit unwanted problems, they have begun to recognize that one's capacity as an attorney alone should not preclude her right of self-representation. These possible problems include legal harassment and abuse of the judicial system.

\textbf{II. Model Rule 3.7}

Model Rule 3.7 prohibits a lawyer from acting as an advocate in a trial where she is likely to be called as a necessary witness. The plaintiff in \textit{Farrington} argued that Rule 3.7 of the Louisiana Rules of Professional Conduct, which is identical to Rule 3.7 of the Model Rules, precluded an attorney from acting as her own counsel.\textsuperscript{11} Although courts are divided over whether this advocate-witness rule applies to the \textit{pro se} attorney,\textsuperscript{12} the annotations to the Model Rules favorably cite the decisions that have excepted the \textit{pro se} attorney from this rule.\textsuperscript{13} The \textit{Farrington} court

\begin{itemize}
  \item \textsuperscript{6} 687 So. 2d 997 (La. 1997).
  \item \textsuperscript{7} \textit{Id}.
  \item \textsuperscript{8} \textit{Id}. at 998.
  \item \textsuperscript{9} \textit{Id}. at 1000.
  \item \textsuperscript{10} \textit{Id}. at 1002.
  \item \textsuperscript{11} \textit{Id}. at 998.
  \item \textsuperscript{12} \textit{See} Farrington v. Law Firm of Sessions, 687 So. 2d 997 (La. 1997) (comparing Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985), with United States v. Johnston, 609 F.2d 638 (7th Cir. 1982)).
  \item \textsuperscript{13} ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 362 (3d ed. 1996).
\end{itemize}
pointed out that "the Comments to Rule 3.7 . . . state that the rationales of the advocate-witness rule do not apply to the pro se lawyer litigant." The court relied on the following rationales behind Rule 3.7 found in Presnick v. Esposito: (1) that it may be unfair to the client to be represented by an attorney who also provides testimony necessary to the case because the jury or court may see the attorney as having an added interest in the outcome of the case; (2) that allowing an attorney to also be a witness in the same case could cast doubt on the truthfulness of the case as presented; and (3) that there may be an appearance of wrongdoing by the advocate-witness. After finding these rationales not applicable, the court in Presnick upheld an attorney's right to represent himself in an action for the collection of legal fees and in defense of a counterclaim for malpractice in the same action.

The Farrington court also looked at precedent from other jurisdictions concerning Rule 3.7 in the context of a party's right to counsel of her own choosing. In Borman v. Borman, the issue centered around whether or not the husband in a divorce case could be represented by other attorneys in his firm when the husband would obviously be a necessary witness in the case. The court examined Disciplinary Rule 5-102(A), which is a predecessor to Rule 3.7, and stated:

DR 5-102 regulates lawyers who would serve as counsel and witness for a party litigant. It does not address that situation in which the lawyer is the party litigant. Any perception by the public or determi-

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14. Farrington, 687 So. 2d at 999 (citing ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 362 (3d ed. 1996)).
16. Id. at 167.
17. Id.
19. Disciplinary Rule 5-102(A) reads as follows:

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

The enumerated exceptions in DR 5-101(B)(1)-(4) are similar to those in Model Rule 3.7.
nation by a jury that a lawyer litigant has twisted the truth surely would be due to his role as litigant and not, we would hope, to his occupation as a lawyer. As a party litigant, moreover, a lawyer could represent himself if he so chose. Implicit in the right of self-representa-
tion is the right of representation by retained counsel of one's choosing. A party litigant does not lose this right merely because he is a lawyer and therefore subject to DR 5-102.20

Observing that an application of DR 5-102 to pro se attorneys would essentially deny a litigant of the right to counsel of their own choosing,21 the Borman court vacated the lower court’s order of disqualification.22 The Borman decision supports the Farrington court’s determination that Model Rule 3.7 does not apply to pro se attorney litigants.

III. MODEL RULES 1.7, 1.9, AND 1.6

In deciding the applicability of these rules to the pro se attorney litigant, the Farrington court relied on the annotations following the Model Rules.23 This is yet another avenue by which courts have dealt with the lack of attention given the role of the pro se attorney in the context of her professional responsibilities. Creative arguments put forth by opponents of pro se attorneys have forced courts to frequently make determinations about the applicability of the Model Rules without the aid of law from either their own or other jurisdictions.

A. Model Rule 1.7

Model Rule 1.7 requires an attorney to avoid representing another client when it would create a conflict of interest with a present client, unless the client consents. The Farrington court recognized this rule as one of loyalty, which is an essential element to any attorney-client relationship.24 In determining that Rule 1.7 did not apply to the case, the court stated that the plaintiff was no longer an ongoing client of the defendants.25 However, assuming arguendo that the plaintiff was still an

20. Borman, 393 N.E.2d at 856 (citations omitted).
21. Id. at 855.
22. Id. at 858.
24. Farrington, 687 So. 2d at 1000.
25. Id.
ongoing client, the attorneys would not be considered to be representing “another client” solely because of their choice to represent themselves.  

B. Model Rule 1.9

Model Rule 1.9 provides that a lawyer should not represent another client in the same or substantially related manner as a former client if the new client’s interests are materially adverse to those of the former client.  

The *Farrington* court emphasized that this is a rule of confidentiality, but that the phrase “represent another person” “connotes that the lawyer is representing someone other than the lawyer appearing on his or her own behalf.” Thus, the rule does not apply when a client brings a lawsuit against their former lawyer, and presumably, it also does not apply when the lawyer himself brings suit against a former client.

C. Model Rule 1.6

Model Rule 1.6 provides that an attorney may not reveal information about a former client unless the client consents after consultation. There are exceptions to this general rule, however. Rule 1.6(b)(2) allows an attorney to reveal information relating to past representation of a former client to the extent that the attorney believes the information is necessary to establish a claim or defense on his or her own behalf in a former client-attorney controversy. The *Farrington* court observed that “[t]he waiver of confidentiality specifically applies in the context of a former client’s malpractice claim against the lawyer.” Thus, Model Rule 1.6 may abrogate the applicability of Model Rules 1.7 and 1.9 in a former

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26. *Id.*
28. Model Rule 1.9 (1995) reads as follows:
   (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation.
29. *Farrington*, 687 So. 2d at 1001.
30. *Id.*
32. *Id.*
client-attorney malpractice action.

IV. ABUSE OF THE LEGAL SYSTEM

The role of the *pro se* attorney litigant becomes especially difficult to examine when the scope of the inquiry is limited to the basic obligations to which every attorney is held by the Model Rules. More than one provision of the Model Rules reiterates the general obligation that every attorney has to remain objective both in giving legal advice and in deciding whether to take legal action. A *pro se* attorney could easily violate this requirement, even if unintentionally. As an example of the worst case scenario, consider the case of *Schild v. Rubin*.

In *Schild*, two neighbors, both attorneys, represented themselves in a dispute over basketball playing in the driveway of one of their homes. Rubin claimed that the basketball playing at the Schild’s home “interfered with [his family’s] ability to rest and relax in their own home.” After many verbal altercations between the two attorneys, including two episodes where Rubin sprayed the Schild family with a water hose while they were playing basketball, the Schilds filed a complaint against Rubin, and Rubin subsequently cross-complained. The litigation that ensued

33. *See* Alicia Downey, *Fools and Their Ethics: The Professional Responsibility of Pro Se Attorneys*, 34 B.C. L. REV. 529, 537 (citing Model Rule 1.2 cmt. (“A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client’s conduct.”)); MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1995) (“In representing a client, a lawyer shall exercise independent and professional judgment and render candid advice.”).

34. Downey, *supra* note 33, at 539.


36. Id. at 534.

37. *See id.* at 535. The Schilds’ complaint was for assault, battery, trespass, nuisance, and intentional infliction of emotional distress. The Rubins’ cross-complaint was for nuisance and intentional infliction of emotional distress. After further alterca-
involved experts in acoustical engineering, real estate appraisal, and architecture. The appellate court quoted the trial court's observation that

"what we have [are] lawyers utilizing their own unlimited resources to accelerate petty neighborhood squabbles . . . the lawyers here are abusing the limited resources of the Court, which has a myriad of truly difficult matters pending before it crying out for resolution . . . [y]ou have by your conduct and by your position as lawyers embarrassed the Bar and the judicial system as a whole." 39

V. ALTERNATIVES

The debate over the applicability of the Model Rules to pro se attorney litigants is not limited to legal malpractice cases. Farrington is just a recent example of the uncertainty surrounding the role of the pro se attorney. The issue has been raised in cases involving disputes over divorces40 and fraud, as well.41 The controversy over the applicable professional conduct remains the same, however. This has lead some courts to examine other possible alternatives to deciding these cases under the Model Rules.

The court in Johnston v. Aderhold,42 for example, decided that while "the rules of professional conduct preclude attorneys from engaging in certain behavior . . . when . . . representing others, such prohibitions do not necessarily apply when attorneys exercise their right . . . to represent themselves . . . ."43 Most jurisdictions, however, believe that the appropriateness of an attorney appearing pro se should be determined on a case by case basis. The Farrington court stated that the plaintiff in the case could have simply filed a complaint for disciplinary action due to alleged professional misconduct.44 But where the plaintiff seeks damages, or where the attorney himself is bringing the suit, the court said that "[i]f during the course of these proceedings, the combined role of lawyer

38. See Downey, supra note 33, at 559 n.17.
39. Schmid, 283 Cal. Rptr. at 536 n.2.
40. See Borman, 393 N.E.2d at 847.
42. Id.
43. Id.
44. 687 So. 2d at 1001.
and party is abused, the trial judge, in his discretion, may impose whatever sanctions are necessary to insure the orderly conduct of the proceeding including requiring [the attorney-party] to procure independent counsel to conduct the adversarial proceedings.\textsuperscript{45}

VI. CONCLUSION

The role of the \textit{pro se} attorney as it stands today is one riddled with uncertainty. Although attorneys possess the same rights to self-representation as other Americans, attorneys also have certain restrictions on these rights in their capacity as protectors of the judicial system. Until the Model Rules affirmatively speak to the issues surrounding the \textit{pro se} attorney, courts will have to continue to make decisions through analogy. Courts are allowing more freedom to attorneys who choose to represent themselves, but this freedom does not come without a warning: "He who is his own lawyer has a fool for a client."\textsuperscript{46}

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\textsuperscript{45} \textit{Id.}

\textsuperscript{46} M. FRANCES MCNAMARA, RAGBAG OF LEGAL QUOTATIONS 22 (1960).