Fordham Law Review

Volume 92 | Issue 4 Article 3

2024

Asymmetry of Representation in Poor People's Courts

Tonya L. Brito
University of Wisconsin Law School

Daniela Campos Ugaz
University of Wisconsin-Madison, Department of Sociology

ASYMMETRY OF REPRESENTATION IN POOR PEOPLE'S COURTS

Tonya L. Brito & Daniela Campos Ugaz***

* Jefferson Burrus-Bascom Professor of Law, University of Wisconsin Law School. The authors thank David J. Pate, Jr., Amanda Ward, Jia-Hui Stefanie Wong, Garrett Grainger, Chloe Haimson, Sarah Ishmael, Rachel Johnson, Emily Frank, and Kathleen Wood for their many valuable insights and contributions during our collaboration on the qualitative study described in this Essay. This study is supported by two research awards provided by the National Science Foundation (NSF) under Grant No. SES-1323064 and Grant No. SES-1421098. This study would not have been possible without the support of NSF and other funders, including the University of Wisconsin Law School, the Institute for Research on Poverty, the Russell Sage Foundation Visiting Scholars Program, the Sheldon B. Lubar Research Chair, and the University of Wisconsin-Madison Graduate School. We also acknowledge with appreciation the assistance of the officials of the courts where this research was conducted. Finally, we are especially grateful to the many participants in this study who have been willing to share their experiences and perspectives on access to justice for low-income litigants in child-support enforcement proceedings. This study was approved by the University of Wisconsin Institutional Review Board. All research subjects provided their informed consent to their participation in the study, and all research ethics requirements have been met. This Essay was prepared for the Colloquium entitled *The Legal Profession's Response to Social Change*, hosted by the *Fordham Law Review* and co-organized by the Stein Center for Law and Ethics on October 20, 2023, at Fordham University School of Law.
** Ph.D. Candidate, University of Wisconsin-Madison, Department of Sociology.

INTRODUCTION

This Essay examines the asymmetry of representation in poor people's courts, specifically in child support enforcement cases involving the State. The asymmetry of representation is a common occurrence in various civil law fields, but it is notably prominent in family law, which has the highest number of unrepresented parties.[1] As one of the authors has previously explained,[2] we use "poor people's courts" to refer to state civil courts that hear family, housing, administrative, and consumer cases.[3] These courts present severe challenges to the civil justice system because they are characterized by a substantial volume of cases, socioeconomically disadvantaged litigants, and an absence or asymmetry of representation.[4] Of increasing concern are the problematic outcomes in poor people's courts; the pro se, low-income litigants in these cases typically lose out to the creditors, landlords, and municipalities that they come up against.[5] This asymmetry in representation also presents a challenge for government attorneys who have to negotiate with these litigants on a daily basis.[6]

This Essay is the first of two pieces that empirically investigates the role of government attorneys in civil cases in which they are up against unrepresented litigants. The Essay analyzes several questions: How do government attorneys understand their role in child support cases in which parents are typically unrepresented? Moreover, according to government attorneys, how do they communicate their roles to unrepresented parties? And from their perspective, what confusion exists about their roles, and what factors contribute to this confusion?

To answer these questions, this Essay draws from empirical data and from extensive, in-depth interviews with child support attorneys. These interviews were conducted as part of a larger qualitative study conducted by the main author and her research team.

Over five years, the research team collected qualitative data across six counties within two Midwestern states. To ensure study participant confidentiality, pseudonyms are assigned to individual names, and the two states are designated State A and State B. Data collection across the six

1. Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL'Y REV. 91, 134–35 (2017).

2. *See* Tonya L. Brito, *Producing Justice in Poor People's Courts: Four Models of State Legal Actors*, 24 LEWIS & CLARK L. REV. 145, 162–72 (2020).

3. *See* VICKI LENS, POOR JUSTICE: HOW THE POOR FARE IN THE COURTS (2015); Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. ON POVERTY L. & POL'Y 473, 475 (2015).

4. The characteristics of poor people's courts are increasingly found on a more widespread basis in state court litigation. *See* Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 258 ("Twenty-five years ago, nearly every party in state court litigation was represented. Today, the vast majority of people who appear in state court have no counsel and defendants are the party least likely to be represented. In seventy-six percent of cases, at least one party lacks counsel." (footnotes omitted)).

5. *See id.* at 259.

6. *See infra* Part III.

counties encompassed exploratory fieldwork, ethnographic observations of child support enforcement hearings, and over 145 in-depth group and individual interviews. These interviews involved lawyers, litigants, and judges, all central to child support proceedings. The insights gained from government attorneys shed light on the functioning of civil justice within child support enforcement cases.[7]

This Essay consists of three parts. Part I provides an overview of the prevalence and rise of unrepresented litigants in civil cases in the United States, focusing on family law cases. Part II addresses the ethical concerns in asymmetrical representation cases and the ethical guidelines that attorneys must consider. Ethics rules and scholarly commentary emphasize the importance of attorneys clearly defining who they represent in any given case. Part III examines government attorneys' roles in child support cases involving asymmetrical representation. It examines, first, how child support attorneys perceive their roles and communicate them to unrepresented litigants. Second, it explores whether there is any confusion about an attorney's role on the part of the litigants and other actors in the legal process, including judges, and it analyzes the factors that contribute to attorney role confusion.

I. THE PREVALENCE OF SELF-REPRESENTED LITIGANTS IN CIVIL SUITS

The rise in pro se litigants in state civil courts has been tremendous and is expected to continue to accelerate.[8] Although both the judiciary and scholars acknowledge the rising trend of self-represented litigants in civil suits,[9] comprehensive data on state courts remains elusive compared to the federal system.[10] The bulk of the literature on this topic underscores the necessity

7. For a more detailed account of the ethnography conducted in this study, see Tonya L. Brito, Daanika Gordon & David J. Pate Jr., *Focused Ethnography: A Methodological Approach for Engaged Legal Scholarship*, *in* LEGAL SCHOLARSHIP FOR THE URBAN CORE: FROM THE GROUND UP 141, 143–44 (Peter Enrich & Rashmi Dyal-Chand eds., 2019) and Brito, *supra* note 2, at 162–72.

8. *See* Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 105 (2001).

9. *See, e.g.*, Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 FORDHAM L. REV. 2689, 2700–02 (2022) (discussing the Judicial Conference of the United States' recognition of the rise of civil pro se litigants); Jona Goldschmidt & Don Stemen, *Patterns and Trends in Federal Pro Se Defense, 1996–2011: An Exploratory Study*, 8 FED. CTS. L. REV. 81, 82 (2015) ("A surge in pro se civil litigation was documented beginning in the late 1990s.").

10. *Compare* Christine E. Cerniglia, *The Civil Self-Representation Crisis: The Need for More Data and Less Complacency*, 27 GEO. J. ON POVERTY L. & POL'Y 355, 369 (2020) ("Despite multiple attempts by the National Center for State Courts (NCSC) to encourage states to report, the effort to report is dismal."), *with* Goldschmidt & Stemen, *supra* note 9, at 89–110 (reporting data on pro se criminal litigation from the Federal Judicial Center's Integrated Database); *see also Integrated Database (IDB)*, FED. JUD. CTR., https://www.fjc.gov/research/idb [https://perma.cc/7LHU-7H3E] (last visited Feb. 9, 2024).

of a standardized data collection mechanism.[11] Intriguingly, recent studies have begun detailing the patterns of self-representation and the rationale behind it.[12] It is noteworthy that housing cases predominantly feature self-represented defendants.[13] Moreover, family law cases frequently involve self-representation from both parties.[14] Despite a significant 66 percent of Americans facing civil justice situations[15] (a figure that jumps to 70 percent for low-income individuals[16]), only about 20 percent decide to pursue formal legal assistance.[17] The prohibitive cost of legal aid emerges as a primary deterrent,[18] aggravated by legal aid organizations' strained capacities.[19] The 2008 economic downturn further exacerbated this trend, particularly in matters of foreclosure and debt.[20]

The public's legal needs have continued to rise, with a corresponding drop in represented litigants. For instance, the American Bar Association (ABA) studied the legal experiences of low- and moderate-income Americans in 1992.[21] The study found that 40 percent of low-income and 46 percent of moderate-income participants experienced a legal need during that year.[22] Personal finance and consumer issues were the highest category of legal issues for both groups at 13 percent.[23] The study also measured the number of times that participants turned to legal resources. When facing legal issues, low-income participants turned to the civil justice system 29 percent of the time, and moderate-income participants turned to the civil justice system 39 percent of the time.[24] When facing legal issues, low-income participants took no action 38 percent of the time, and moderate-income participants took no action 26 percent of the time.[25]

---

11. *See, e.g.*, Cerniglia, *supra* note 10, at 369; Richard Schauffler & Shauna Strickland, *The Case for Counting Cases*, 51 CT. REV. 52, 52 (2015).

12. *See, e.g.*, LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017); NAT'L CTR. FOR STATE CTS., CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 31–33 (2015); REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 5 (2014).

13. Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, FAST FOCUS, March 2015, at 5.

14. Carpenter et al., *supra* note 4, at 253, 257 n.29.

15. SANDEFUR, *supra* note 12, at 3.

16. LEGAL SERVS. CORP., *supra* note 12, at 13, 44–45.

17. *Id.* at 32.

18. *Id.* at 13.

19. *Id.*

20. Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 752 (2015).

21. AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 1, 7 (1994).

22. *Id.* at 9.

23. *Id.* at 14.

24. *Id.* at 17.

25. *Id.*

ABA studies shed light on several crucial aspects of the pro se phenomenon.[26] For example, an ABA study on legal needs determined that "only twenty percent (20 percent) of the civil legal needs of low-income Americans were being met by legal aid or pro bono attorneys."[27]

The federally funded Legal Services Corporation (LSC) has released a series of Justice Gap reports, in 2005, 2009, 2017, and 2022.[28] According to the 2005 and 2009 reports, for every person helped by a legal aid program, another needy person was declined due to insufficient available attorneys.[29] This gap in available representation and the subsequent rise in pro se litigants has caused an imbalance, which in turn has created an uneven playing field throughout our court system and denied many people access to just outcomes.[30] For example, LSC's 2017 Justice Gap report, involving a national survey of low-income households, determined that 86 percent of the civil legal problems reported by low-income Americans did not receive enough (or any) legal assistance.[31] LSC's most recent Justice Gap Report, released in 2022, calculated that 74 percent of low-income households experienced at least one civil legal problem in the prior year and that they did not receive enough (or any) legal assistance for 92 percent of these problems.[32]

State court caseloads are mostly comprised of cases in which litigants are unrepresented. In a 2015 survey, the National Center for State Courts measured the caseload of various structured state courts in ten counties (representing 5 percent of state civil cases nationally).[33] Most cases (64 percent) were contract cases involving relatively low sums, split about evenly between debt collection and landlord-tenant cases.[34] High-value cases were only a small portion of cases: 75 percent of judgments were greater than zero but less than $5,200.[35] In 76 percent of cases, at least one party, usually the defendant, represented themselves.[36]

Low-income households grapple with a distinctive set of challenges within the civil legal system, often in landlord-tenant, debt collection, family law, bankruptcy, and small claims actions.[37] Scholars have identified an increase

---

26. *See generally* Marco Poggio, *Gap in Access to Legal Assistance Remains Wide, ABA Finds*, LAW360 (Nov. 30, 2023, 4:07 PM), https://www.law360.com/articles/1768674/gap-in-access-to-legal-assistance-remains-wide-aba-finds [https://perma.cc/3SN5-MSCC].

27. Tori R.A. Kricken, *The Justice Gap: The Impact of Self-Representation on the Legal System and Judicial System (and Beyond)*, WYO. LAW., Oct. 2018, at 16, 18.

28. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA (2005); LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA (2009); LEGAL SERVS. CORP., *supra* note 12; LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2022) [hereinafter LEGAL SERVS. CORP. (2022)].

29. *See* Kricken, *supra* note 27, at 18.

30. *Id.*

31. LEGAL SERVS. CORP., *supra* note 12, at 6.

32. LEGAL SERVS. CORP. (2022) *supra* note at 8.

33. NAT'L CTR. FOR STATE CTS., *supra* note 12, at iii.

34. *Id.* at 17.

35. *Id.* at 35.

36. *Id.* at 33.

37. *Id.* at 32 tbl.11.

in pro se litigants in "poor people courts," which involve large numbers of low-income individuals in such cases.[38] State court statistics from the National Center for State Courts show that most cases involve unrepresented litigants, commonly seen in debt collection and landlord-tenant disputes.[39] In sum, despite frequently encountering legal problems, legal representation remains out of reach for many individuals, primarily due to prohibitive costs, limited resources, and an inability to discern the legal dimensions of their everyday justiciable problems.

Rates of representation are wildly disparate in housing issues. In housing court, landlords typically have attorneys 90 percent of the time, whereas tenants have representation only 10 percent of the time.[40] This discrepancy is crucial, as representation typically correlates with more favorable outcomes, particularly for low-income tenants.[41] Even in courts in which landlords are less frequently represented, rates are comparatively high. For example, legal scholar Russell Engler reports that the lowest rate of representation for landlords is 52 percent.[42] The outcome of housing cases varies less with the representation of landlords than with tenants. "For example, in Chicago, landlords won at the same rate regardless of whether they were represented."[43] In contrast, reports have shown that tenants are anywhere from three to nineteen times more successful with representation.[44]

Proponents of a right to civil counsel in housing and eviction cases point to the vast disparity of outcomes between unrepresented tenants and represented landlords.[45] They also emphasize the importance of housing as a fundamental human right and the loss of stable housing as affecting physical health, mental health, and even one's perception of self.[46] Indeed, the right to counsel for tenants is a growing movement: in recent years, fifteen cities and three states have "adopted a right to counsel for tenants facing eviction."[47] In particular, major cities like New York, San Francisco,

38. *Id*. at 33.

39. *Id.* at 17, 17 tbl.2.

40. Desmond, *supra* note 13, at 5.

41. *Id.*

42. *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 47 n.44 (2010) (noting that from 1998 to 1999, according to the Massachusetts Law Reform Institute, landlords were represented 52 percent of the time, whereas tenants were represented only 7 percent of the time).

43. *Id.* at 48 n.46 (citing Anthony J. Fusco, Jr., Nancy B. Collins & Julian R. Birnbaum, *Chicago's Eviction Court: A Tenant's Court of No Resort*, 17 URB. L. ANN. 93, 116 (1979)).

44. *Id.* at 48–49, 49 n.51.

45. *See, e.g.*, Ericka Petersen, *Building a House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. C.R. & C.L. 63, 67–68 (2020).

46. *See* Kathryn A. Sabbeth, *Housing Defense as the New* Gideon, 41 HARV. J.L. & GENDER 55, 67–68 (2018).

47. ACLU & NAT'L COAL. FOR CIV. RIGHT TO COUNS., NO EVICTION WITHOUT REPRESENTATION: EVICTIONS' DISPROPORTIONATE HARMS AND THE PROMISE OF RIGHT TO COUNSEL 8 (2022), https://www.aclu.org/wp-content/uploads/publications/no_eviction_without_representation_research_brief_0.pdf [https://perma.cc/VG2S-V2SK]. Moreover, "[s]ome jurisdictions have provided sufficient funding for universal representation but have not passed an ordinance, including Milwaukee County, Wisconsin." *Id.*

and Cleveland are recognized and studied for these laws.[48] New York City became the first jurisdiction to enact a right to counsel for low-income tenants in eviction cases.[49] In passing the law, the city found that the right to counsel would not just improve litigation outcomes for tenants, but also save the city millions of dollars on costs related to homeless shelters and unhoused residents.[50]

In arguing for a universal right to counsel in housing cases, Professor Kathryn Sabbeth argues that New York City's law parallels *Gideon v. Wainwright*[51] because both work to further racial and gender equality.[52] Just as *Gideon*'s reforms benefitted Black men disproportionally affected by the criminal justice system, this civil right to representation benefits Black women, who are disproportionally affected by housing issues and eviction.[53] Specifically, women are evicted at twice the rate of men from the same neighborhoods, and at three times the rate of women from white neighborhoods.[54]

Moreover, the justice system struggles to manage the overwhelming number of debt collection cases, and litigation often highly favors the debt collector. One-third of American adults (77 million) "have a debt that has been turned over to a private collection agency," and "[o]ver 95 percent of debt collection suits end in favor of the collector . . . ."[55] However, most defendants do not have representation, and many do not even know that they have been sued.[56] Furthermore, debts are often for very low amounts of money,[57] which may disincentivize defendants and lawyers from defending against the claim.

In the wake of the 2008 recession, the advocacy group New York Appleseed analyzed the consumer debt docket in the New York City Civil Court to study the consumer credit crisis and better understand rates of defendant representation.[58] Consumer debt collections constituted 40 to 60

48. *Id.*

49. Luis Ferré-Sadurní, *How New Rent Laws in N.Y. Help All Tenants*, N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/nyregion/rent-laws-new-york.html [https://perma.cc/HJ3H-K6CW] (noting that New York City became the first city to "implement a universal right to counsel, guaranteeing free legal assistance for tenants facing eviction"); Sabbeth, *supra* note 46, at 60.

50. Sabbeth, *supra* note 46, at 60.

51. 372 U.S. 335 (1963). In *Gideon*, the U.S. Supreme Court held that the Sixth Amendment requires that "counsel . . . be provided for defendants unable to employ counsel unless the right is competently and intelligently waived." *Id.* at 340.

52. Sabbeth, *supra* note 46, at 83.

53. *Id.* at 95–96.

54. *Id.* at 89 (citing Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIO. 88, 98–99 (2012)).

55. ACLU, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT 4–5 (2018), https://www.aclu.org/wp-content/uploads/legal-documents/022118-debtreport.pdf [https://perma.cc/YWJ7-PC7J].

56. *Id.*

57. *Id.* at 7.

58. *See* N.Y. APPLESEED, DUE PROCESS AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER CREDIT CASES 1, 6–7 (2010), https://www.ftc.gov/sites/default/files/doc

percent of cases filed.[59] Plaintiffs almost always had representation, whereas defendants did not even always know that they were being sued, and more than 40 percent of cases resulted in default judgment.[60] In the three years studied (2006, 2007, and 2008), defendant response rates ranged from 0.8 to 7.2 percent.[61]

Predatory practices by debt collectors have a disparate impact on low-income, non-white communities, which are targets for payday loans and other high–interest rate products.[62] For example, the ten New York zip codes with the highest concentration of default judgments were predominantly non-white, and six were middle-income Black communities.[63] After a collection agency has won a judgment, it can garnish wages, seize personal property, or ask a judge for a civil warrant for arrest.[64] Proposed reforms focus on leveling the playing field with plain language explanations,[65] better service notifications,[66] and enhanced legal assistance programs for debtors.[67]

In addition, studies have found that instances in which one or more parties lack representation are higher in family law cases than in any other area of the law.[68] For example, a study by the National Center for State Courts using data from sixteen large urban courts found that 72 percent of all domestic relations cases between 1991 and 1992 involved one unrepresented party.[69]

The Institute for the Advancement of the American Legal System also studied representation in family law.[70] The qualitative empirical study conducted interviews in four states with self-represented litigants in family law cases to determine why litigants choose to self-represent.[71] The study

---

uments/public_comments/protecting-consumers-debt-collection-litigation-and-arbitration-series-roundtable-discussions-august/545921-00031.pdf [https://perma.cc/G4CN-3MHV].

59. *Id.* at 1.

60. *Id.* at 2.

61. *Id.*

62. NEW ECON. PROJECT, THE DEBT COLLECTION RACKET IN NEW YORK 5 (2013), https://www.neweconomynyc.org/wp-content/uploads/2014/08/DebtCollectionRacketUpdated.pdf [https://perma.cc/WH4S-2V5B].

63. *Id.*

64. ACLU, *supra* note 55, at 5, 12, 16–17.

65. PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 23 (2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf [https://perma.cc/9MWF-BQ2B].

66. Stifler, *supra*, note 1, at 134–35.

67. *Id.* at 135.

68. *See, e.g.*, JUD. COUNCIL OF CAL., STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS 2 (2004), https://www.courts.ca.gov/documents/selfreplitsrept.pdf [https://perma.cc/H6NW-UX6R].

69. *See* FAM. JUST. INITIATIVE, THE LANDSCAPE OF DOMESTIC RELATIONS CASES IN STATE COURTS 20 (2018), https://www.ncsc.org/__data/assets/pdf_file/0018/18522/fji-landscape-report.pdf [https://perma.cc/5R9L-CXSP].

70. *See* NATALIE ANNE KNOWLTON, LOGAN CORNETT, CORINA D. GERETY & JANET L. DROBINSKE, INST. FOR THE ADVANCEMENT OF THE AM. SYS., CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT 1 (2016), https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf [https://perma.cc/L225-PK3Z].

71. *Id.*

found several overarching reasons for self-representation, with the average litigant citing about three reasons motivating them to proceed pro se.[72]

Financial considerations were a main factor in self-representation, with over 90 percent of participants citing it as a reason.[73] Many individuals who cited money as a reason treated self-representation as a necessity: rather than deciding to self-represent, it was the only option.[74] Court staff who were interviewed cited the uncertainty around legal fees as part of the financial reasons not to hire an attorney.[75] Litigants also cited horror stories of extreme fees from friends and family.[76] Finally, participants explained that they had alternative financial priorities and did not see an attorney as necessary.[77] Some reported that they would put the money toward their children.[78]

Cost was not the only reason cited by litigants. Litigants' assessment of their ability to self-represent was also common: sixty percent of participants cited their confidence in their ability to represent themselves as a reason for not obtaining counsel.[79] Relatedly, 40 percent of participants talked about the complexity of their case.[80] Participants who described their cases as straightforward were more confident in their ability to self-represent.[81] For example, factors related to straightforwardness included having no assets, having no children, or being married for a short time.[82] Level of education was also connected to a litigant's confidence in self-representation.[83] Seventy-eight percent of self-represented litigants had at least some college education, with 41 percent holding a degree.[84]

Participants also cited a variety of other factors influencing their decision to self-represent. For example, they cited alternative access to help, such as turning to friends and family members.[85] Litigants also cited a preference for not involving attorneys; their reasons included wanting to preserve relationships between parties, especially when children were involved, and a desire to maintain control over the case.[86] Some litigants cited their preference for coming to an agreement independently.[87] In fact, 42 percent of participants reported having reached some degree of agreement before or during proceedings.[88] Participants' perceptions of attorneys were also

72. *Id.* at 12.
73. *Id.*
74. *Id.* at 13.
75. *Id.* at 14.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 16.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 17.
84. *Id.*
85. *Id.* at 16.
86. *Id.* at 18.
87. *Id.* at 19.
88. *Id.*

related to their decision to self-represent. Twenty percent of participants cited their prior experience with attorneys influencing their decision.[89] Some felt that attorneys escalated tensions and cited a desire to keep divorce proceedings amicable.[90] Others felt that attorneys did not actually do much work or did not listen to their clients' wishes.[91] Others felt that including an attorney added more complications to the process.[92]

II. ETHICAL CONCERNS OF ASYMMETRICAL REPRESENTATION

The dramatic increase in self-represented litigants has prompted legal scholars and state bar associations to emphasize the significance of ethical guidelines that attorneys must consider in cases of asymmetrical representation.[93] The ABA's Model Rule of Professional Conduct 4.3 titled "Dealing with Unrepresented Parties"[94] is particularly significant.[95] It mandates that an attorney must clarify misunderstandings about their role and refrain from offering legal advice, except suggesting that the pro se litigant secure counsel, especially if there is a potential conflict of interest.[96] Furthermore, the U.S. Department of Health and Human Services (HHS) recommends adherence to additional ABA Model Rules, including Rules 1.7 to 1.11,[97] which emphasize avoiding conflicts of interest and ensuring a clear demarcation of responsibilities toward clients.[98]

Scholars continually stress the importance of attorneys clearly defining whom they represent in any given case.[99] This practice is especially important in family court, particularly in child support enforcement cases involving three parties—two unrepresented parents and the child support enforcement agency. In its handbook for child support attorneys entitled *Essentials for Attorneys in Child Support Enforcement*, the HHS stated that the first ethical question that arises in the child support program is "who is

89. *Id.* at 21.
90. *Id.*
91. *Id.*
92. *Id.*
93. *See, e.g.*, ANNETTE T. BURNS, ASS'N OF FAM. & CONCILIATION CTS., A PRACTICAL GUIDE FOR ATTORNEYS OPPOSING SELF-REPRESENTED LITIGANTS IN FAMILY COURT (2017), https://www.afccnet.org/Portals/0/Committees/Guide%20for%20Attorneys%20SRLs.pdf?ver=u_LSN-UwshMm0h8OAnf5Gw%3D%3D [https://perma.cc/U9CF-CPTQ]; Michael D. Roundy, *The Proper Approach to Pro Se Litigants*, AM. BAR ASS'N (July 30, 2020), https://www.americanbar.org/groups/litigation/resources/newsletters/pretrial-practice-discovery/proper-approach-pro-se-litigants/ [https://perma.cc/Z5CL-G6G8]; Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79 (1997).
94. MODEL RULES OF PRO. CONDUCT r. 4.3 (Am. Bar Ass'n 2020).
95. *See* BURNS, *supra* note 93, at 1–3.
96. *See id.* at 1.
97. *See* MODEL RULES OF PRO. CONDUCT rr. 1.7–1.11.
98. U.S. DEP'T OF HEALTH & HUM. SERVS., ESSENTIALS FOR ATTORNEYS IN CHILD SUPPORT ENFORCEMENT 4-8 to -11 (2021), https://www.acf.hhs.gov/css/training-technical-assistance/essentials-attorneys-child-support-enforcement [https://perma.cc/2LKL-MLF2].
99. John L. Saxon, *Who Are the Parties in IV-D Child Support Proceedings?: And What Difference Does It Make?*, FAM. L. BULL., Jan. 2007, at 1.

the client?"[100] For example, when a government attorney is working at the behest of the state child support agency to modify a parent's child support order, the attorney's client is the agency itself, not either of the individual parents.[101] This attorney-client relationship is important because it means that in most states there are no privileged communications between the parents and the child support enforcement attorney.[102] Due to the importance of defining one's client, the HHS recommends that the government attorney provide written documents to parents in a child support enforcement action explaining the relationship between the attorney and the recipient of child support.[103] The document should explain that the attorney represents the child support agency, not the recipient.[104]

Not only have scholars explained the importance of attorneys defining their clients in family law cases, but they have also emphasized the importance of doing so in other areas of law in which attorneys are working to support low-income individuals through government-funded programs.[105] Professor Barbara Glesner Fines emphasizes that it is the attorney's job to explain their role to the parties fully.[106] Fines also recommends that when deducing who the client is, "[b]ecause attorneys do not normally advocate for interests that they do not represent, one method of identifying the client is to ask: 'Who owns the rights being asserted?' Rather than focusing on the expectations of the parties, this approach looks to the ownership of the rights."[107] However, no matter which method is used, scholars invariably emphasize the importance of attorneys making their representation interests known when the other party is a pro se litigant.[108] Doing so can avoid many ethical dilemmas that may arise.[109]

Aside from ethical rules, the legal community offers guidance concerning proper attorney conduct when opposing pro se litigants. For instance, attorneys are urged to put themselves in the pro se litigant's shoes.[110] In doing so, an attorney should understand that the pro se litigant is likely overwhelmed by the entire court process. For instance, one scholar cautions that for self-represented parties, "[t]he forms, rules, and procedures that attorneys take for granted can look like a foreign language."[111]

---

100. U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 98, at 4-2.
101. *Id.* at 4-3.
102. *Id.*
103. *Id.* at 4-5.
104. *Id.*
105. *See generally* Barbara Glesner Fines, *From Representing "Clients" to Serving "Recipients": Transforming the Role of the IV-D Child Support Enforcement Attorney*, 67 FORDHAM L. REV. 2155 (1999).
106. *Id.* at 2167.
107. *Id.*
108. *See, e.g.*, U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 98, at 4-5.
109. *See id.*
110. BURNS, *supra* note 93, at 4.
111. *Id.* at 2.

Common guidance for asymmetrical representation cases encourages attorneys to propose alternative dispute resolution (ADR).[112] ADR in this context is not without its risks, however. In the context of a negotiation with a pro se litigant, lawyers have to be careful not to give legal advice to the pro se litigant.[113] "[T]he family law lawyer must walk a careful path in finalizing the agreement, stating his 'own view of the meaning of' the settlement documents and his own 'view of the underlying legal obligations,' while not giving legal advice."[114]

Overall, the guidance for attorneys opposing pro se litigants encourages attorneys to remain professional and calm during their interactions.[115] This guidance states that attorneys should treat pro se litigants with dignity, respect, fairness, and care.[116] This is important in recognizing the ethical dilemmas at the forefront when opposing pro se litigants and remaining diligent that one is adhering to an attorney's ethical obligations.[117]

Many states have their own authority governing attorney conduct in cases of asymmetrical representation.[118] State ethics opinions reiterate the importance of following the ABA Model Rules or their state counterparts.[119] State ethics opinions also emphasize the importance of being mindful when opposing self-represented litigants, especially in the context of case law within their jurisdictions.[120]

For instance, in *Duran v. Carris*,[121] which addressed the attorney's role in aiding pro se litigants, the U.S. Court of Appeals for the Tenth Circuit examined whether an attorney aiding a pro se litigant in filling out legal paperwork violated ethics rules.[122] According to the court, when attorneys help by drafting pleadings for pro se litigants, they "necessarily guide[] the

112. *Id.* at 3–4.
113. *Id.* at 5–6.
114. *Id.* at 3.
115. Roundy, *supra* note 93.
116. BURNS, *supra* note 93, at 4–5; Jordan Esbrook, Meghan Gavin & Laura Lockard, *The Ethics of Working with Pro Se Litigants & Judicial Review Practice Pointers*, https://www.iowaattorneygeneral.gov/media/cms/Esbrook_Gavin_Lockard_Outline_D77BD7890E442.pdf [https://perma.cc/J3YC-GJFS] (last visited Feb. 9, 2024).
117. Alison Buchanan, *Ethics Spotlight: Dealing with Self-Represented Litigants*, CAL. LAWS. ASS'N (Apr. 2022), https://calawyers.org/california-lawyers-association/ethics-spotlight-dealing-with-self-represented-litigants/ [https://perma.cc/GQK4-2LJE].
118. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 (2023) ("In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.").
119. *E.g.*, N.Y. State Bar Comm. on Pro. Ethics, Op. 956 (2013).
120. *See, e.g.*, N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 879 (2011).
121. 238 F.3d 1268 (10th Cir. 2001).
122. *Id.* at 1271.

course of the litigation with an unseen hand."[123] Describing this type of assistance as "substantial," the court found that the attorney had violated their ethical obligations and identified two areas of impropriety.[124] First, the assisting attorney's failure to enter an appearance in the case would cause the court to liberally construe the pro se party's pleadings, a benefit that they were arguably not entitled to receive.[125] Additionally, such actions would "inappropriately shield[] [the attorney] from responsibility and accountability for his actions and counsel."[126] The facts in *Duran* are very similar to those in *Hopkins v. Troutner*,[127] in which the Idaho Supreme Court found that the attorney overreached with a pro se litigant when he gave an "opinion" on the case's value.[128]

Finally, in *Ballowe v. City of Black Hawk*,[129] a Colorado state court affirmed that attorneys should treat pro se litigants no differently than an opposing counsel for court-related purposes.[130] In *Ballowe*, the court stated that "pro se litigants are bound by the same rules of civil procedure as attorneys licensed to practice law in the state" and "are entitled to no greater safeguards or benefits than if represented by counsel."[131]

All of these various decisions have shaped the way that attorneys in these states interact with pro se litigants. In turn, various authorities from each of these states use this case law in their guidance advising attorneys on how to go about fulfilling their ethical obligations while opposing pro se litigants.

III. EXAMINING ASYMMETRICAL REPRESENTATION IN CHILD SUPPORT ENFORCEMENT CASES

Although much scholarship exists surrounding the rise in pro se litigants along with concerns for attorneys opposing unrepresented individuals, much of this scholarship surrounds family law and child support cases.[132] As stated previously, the rise in pro se representation is driven in no small part by family law.[133]

Many family law cases involve pro se litigants and create much confusion over whom an attorney represents, which can lead to ethical dilemmas for

123. *Id.* (alteration in original) (quoting Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1231 (D. Colo. 1994), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996)).
124. *Id.* at 1271–72.
125. *Id.* at 1272.
126. *Id.*
127. 4 P.3d 557 (Idaho 2000).
128. *Id.* at 558.
129. No. 08-CV-12, 2008 WL 1826754 (Colo. Dist. Ct. Apr. 18, 2008).
130. *Id.* at 3.
131. *Id.*
132. *See, e.g.*, Katherine L.W. Norton, *Mind the Gap: Technology as a Lifeline for Pro Se Child Custody Appeals*, 58 DUQ. L. REV. 82, 87 (2020).
133. *See* Deborah J. Chase, *Pro Se Justice and Unified Family Courts*, 37 FAM. L.Q. 403, 404 (2003) ("[F]amily law itself comprises 35% of the total civil filings nationally and that these filings are increasing at a rate of 1.5% per year."); *supra* note 68 and accompanying text (noting that the percentage of cases in which at least one party is unrepresented is higher in family law than in any other area of the law).

attorneys. This is especially true when an attorney represents a government agency such as the state child support enforcement agency, while benefiting one of the parents in the action and the child.[134] In this section, we evaluate how child support attorneys see and communicate their roles to unrepresented litigants, as well as the issues that arise during these interactions.

A. How Government Child Support Attorneys See Their Role

One consistent point of agreement among attorneys when they explain their roles is that they represent the State. This is illustrated with statements such as: "I'm an attorney for the State."[135] "We . . . are all . . . employees of [the State] and assistant state's attorneys of [the county], and we are contracted with, um, Healthcare Family Services as their attorney."[136] "We don't represent them. We represent the agency."[137] "[W]e don't represent either the mom or the dad. We represent the department. So, in a sense, you know, we're no one's lawyer, and at least as [with respect to] the two people that are there in court."[138]

Other statements about their roles or goals demonstrate a self-laudatory characterization by State attorneys. For example, child support attorney Shirley Hardy stated: "My job is to do justice. My job is not to throw people in jail. My job is to make sure I get the best results for the parties."[139] Similarly, child support attorney Sharon Edwards described her role as follows:

> There is no winning. So, I've always been taught, [] that . . . even though we represent [the Department of Health and Family Services], really, we're representing a family and a child—[a child] that needs support. And if you go in with that mindset, then you just do the right thing[.] And I think parties need to be reminded this isn't about you. It's about taking care of a child. And that's why I think that the system is fairly fair with or without representation.[140]

Hardy does not equate "best results for the parties" with simply achieving a mediated settlement to which the parents freely consent.[141] She posits a more fulsome role for government attorneys whereby they "do justice" when

---

134. Chase, *supra* note 133, at 404.

135. Interview by Rachel Johnson with Ariel Whiting, Child Support Agency Att'y, in County A, State A (May 19, 2016) (on file with author).

136. Interview by Tonya L. Brito with Alice Crum, Child Support Agency Att'y, in County A, State B (Aug. 1, 2016) (on file with author).

137. Interview by Tonya L. Brito with Child Support Agency Att'ys (Group 1), in County B, State B (Jan. 30, 2015) (on file with author).

138. Interview by Tonya L. Brito with Child Support Agency Att'ys, in County A, State B (Feb. 25, 2014) (on file with author).

139. Interview by Garrett Grainger with Shirley Hardy, Child Support Agency Att'y, in County B, State B (Feb. 27, 2015) (on file with author).

140. Interview by Tonya L. Brito with Child Support Agency Att'ys (Group 1), *supra* note 137.

141. Interview by Garrett Grainger with Shirley Hardy, *supra* note 139.

enforcing child support orders.[142] The State has conflicting interests in litigated child support cases, which primarily involve poor families.[143] For instance, the State pursues poor fathers in nonpayment cases to ensure that custodial mothers receive child support *and* to reimburse itself for cash assistance and other government welfare benefits provided to the custodial mother.[144] In many cases, most or all of the child support funds collected are recouped by the State rather than provided to the custodial mother and her children.[145] A claim that the job of government attorneys is to "do justice" elides the State's mixed interests in child support cases, which may not necessarily align with what is best for all parties.[146] Statements like Hardy's prompt confusion because attorneys sometimes admit multiple purposes associated with representing the State, which can overstate their roles, intentions, or optimism about the legal process.[147]

Likewise, Edwards's perspective on the role of child support attorneys reflects a widespread belief among legal actors in the field that litigant representation is unnecessary in child support cases, as (1) the process is unquestionably perceived to be fair and just and (2) government attorneys are committed to achieving a favorable outcome.[148] Such beliefs coexist alongside and in tension with competing statements, particularly those acknowledging scenarios in which having counsel *can* make a significant difference in litigant outcomes.[149]

Government attorneys also characterize part of their roles as mediators in child support cases. As child support attorney Rebecca Roe put it, "I think that as attorneys working for [state agencies], we do a lot of negotiation ourselves . . . . I look at part of our job as being mediation as well to give the best resolution to the people that are involved even though we don't represent them."[150] Although government attorneys engage in a substantial amount of negotiation with parents in child support cases and mediation of such

142. *Id.*

143. *See* Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1032 (2007).

144. Federal law requires custodial parents who receive public aid to assign to the State their right to collect child support as a condition for receiving such assistance, and the State then brings child support actions against noncustodial parents to reimburse itself for the welfare payments made to the custodial parent. *See* Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 625 (2012).

145. *See* Hatcher, *supra* note 143, at 1045 ("Successful collections of the assigned child support are generally kept by the state and federal governments to reimburse the cost of providing welfare assistance.").

146. *See id.* at 1032 ("Reimbursing welfare costs directly conflicts with serving the best interests of the children, long recognized by the courts as the paramount purpose of child support.").

147. Interview by Garrett Grainger with Shirley Hardy, *supra* note 139; Interview by Tonya L. Brito with Child Support Agency Att'ys (Group 1), *supra* note 137.

148. Brito, *supra* note 2, at 172–76.

149. *Id.* at 147.

150. Interview by Tonya L. Brito with Child Support Agency Att'ys (Group 1), *supra* note 137.

cases,[151] their role as mediators is worrying. Mediators are neutral and uninterested individuals who assist the parties in arriving at a mutually agreeable resolution of their contested dispute.[152] By contrast, child support attorneys are not neutral individuals who lack a stake in the case's outcome. Their client, the child support agency, is a party with a financial interest in the case.[153]

The State gets involved in child support enforcement proceedings when one party receives government assistance.[154] As Ariel Whiting explained: "Well, . . . parents who are receiving TANF, Temporary Assistance and Needy Family benefits, which includes [cash benefits and] childcare assistance, [are] required to cooperate with our office to establish support and to establish paternity."[155] The State may also become involved when the custodial parent receives other government benefits, such as state medical insurance, kinship care, foster care aid, or caretaker supplement.[156] Whiting further explained the legal basis for the State's involvement in child support cases:

> So we are allowed to come in by statute, the federal government dictates . . . to the states that they have to have a program and an agency in place . . . to establish paternity and establish support . . . . [S]o we're obligated to be involved and have an interest in those cases.[157]

In these cases, the State becomes a party of interest in the case, the custodial parent's right to collect support is assigned to the State as a condition for receiving government benefits, and the custodial parent is required to cooperate with the child support agency's efforts to collect support from the noncustodial parent.[158] Consequently, the State has a monetary motivation to be involved in the case, as Whiting acknowledged: "If a mom is receiving [cash welfare] or caretaker supplement, then a portion of this child support that's paid, twenty-five percent, will go to the State."[159] A serious ethical question thus emerges regarding the propriety of a child support attorney mediating a dispute between pro se parents when their client, the child support agency, has a financial interest in the outcome.

---

151. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 98, at 4-8 to -11.

152. *See, e.g.*, *Mediation/ADR*, U.S. DIST. CT.: S. DIST. OF N.Y., https://www.nysd.uscourts.gov/programs/mediation-adr [https://perma.cc/E2ZX-UN9E] (last visited Feb. 9, 2024).

153. *See* Hatcher, *supra* note 143, at 1054 n.128.

154. *See* Brito, *supra* note 144, at 659.

155. Interview by Rachel Johnson with Ariel Whiting, *supra* note 135.

156. Interview by David J. Pate, Jr., with Ariel Whiting, Child Support Att'y, in County A, State A (Dec. 7, 2016) (on file with author).

157. *Id.*

158. *See* Tonya L. Brito, *Nonmarital Fathers in Family Court: Judges' and Lawyers' Perspectives*, 99 WASH. U. L. REV. 1869, 1884 (2022).

159. *Id.*

B. How Government Attorneys Communicate Their Roles to Pro Se Parties

Attorneys employ several strategies to explain what the roles of child support attorneys are and what their relationship with the litigants is. Due to the prevalence and complexity of family law and child support enforcement cases, a wide breadth of guidance exists for attorneys navigating this system.[160] In response, various states have also provided guidance explaining their family court and child support enforcement systems.[161] This has created a network of information intended to inform attorneys opposing pro se litigants on the best approaches to take not only for themselves, but also for pro se individuals and our justice system as a whole.[162]

The data reveal that their approaches vary according to their jurisdiction. Some jurisdictions have a more formal and explicit process. For example, attorneys in one county reported that their relationship with the parties is established at the start of their intake meeting at the Department of Healthcare and Family Services office.[163] Child support attorney Jeremy Poole explained:

> [W]e make sure that that relationship is established at the very beginning because . . . we don't go forward unless they complete . . . a notice of disclosure, which explains our relationship and the fact that we're not their attorney. We don't represent them. We represent the agency.[164]

Poole's colleague, child support attorney Earl St. Pierre, further elaborated: "[A]s part of our training for each new group of [government attorneys] coming in, one of the first things they learn is there is only one client. That is literally the first day of training, that they're taught."[165]

The training in their jurisdiction institutionalizes the practice of documenting that the parties have been apprised of the roles of child support attorneys. Moreover, attorneys provide clarifications not only at the beginning of the interaction: "they make it part of their routine or habit to explain to the parties as they come into either the hearing rooms or the courtrooms that we are not here on behalf of either of you directly," and continue to do so repeatedly during the process.[166]

In some jurisdictions, child support attorneys follow a less formal approach, often explaining their roles to the parties informally or in a rushed manner, just before their case is called or while walking to the courtroom.[167] This approach is riskier because many pro se litigants lack knowledge about

---

160. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 98, at 4-1 to -2.

161. *See, e.g.*, *Child Support*, FLA. CTS. (Oct. 25, 2023), https://www.flcourts.gov/Resources-Services/Office-of-Family-Courts/Family-Court-in-Florida/Child-Support [https://perma.cc/A8P2-JMNK].

162. *See, e.g.*, *id.*; U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 98, at 4-1 to -32.

163. Interview by Tonya L. Brito with Child Support Agency Att'ys (Group 1), *supra* note 137.

164. *Id.*

165. *Id.*

166. *Id.*

167. *See* Interview by Rachel Johnson with Ariel Whiting, *supra* note 135.

the legal process. Child support attorney Connie Berg explained that confusion about the attorney's role is common among litigants:

> We find ourselves explaining our role too, because some people sit down and think, . . . I see these ladies, that's it [laughter]. Well, you know, they don't think there's a judge, or . . . they're like, I'm supposed to have a hearing today. And you're like, this is your hearing [laughter] . . . . [B]ut I think so we spend a lot of time . . . explaining our role as attorneys for [state agencies].[168]

However, due to the heavy caseloads and fast-paced nature of family court, child support attorneys acknowledge that it is only sometimes possible to explain their roles to the parties thoroughly. For example, Whiting explained the difficulty of relaying that information when court is in session. She stated:

> [W]e have a lot of volume, so [when] we're walking into a courtroom some of us will say, okay, I'm so-and-so. I'm an attorney for the State. I don't represent moms or dads on these cases, but we're the ones who filed this case . . . . [S]ometimes you say what you can in just those few minutes walking from . . . a packed waiting room to a courtroom . . . . [S]ometimes there just isn't that ability.[169]

Attorneys also provide clarifications later, during the hearing, if they determine through verbal or visual cues that the parties are confused about their roles. For instance, Whiting explained that she makes a point of clarifying her role as the State's attorney "if somebody is confused and verbally states that or if I can see it on their faces in a hearing."[170]

C. Inconsistencies and Confusion in Child Support Attorneys' Roles

Child support lawyers often encounter confusion about their roles among pro se litigants, which can be attributed to several reasons. One of the major factors is the legal position taken by attorneys. When the State's interests are aligned with one party, the other party may mistakenly assume that the attorney represents their opponent.[171] This misunderstanding is common in child support enforcement cases in which the State seeks to establish or enforce the custodial mother's order for support.[172] Whiting explained that when she, as the State's attorney, weighs in on what support should be, then the noncustodial father will question her role: "[Dad] know[s] that [Mom] wants a support order and you're making a recommendation for a support order, so they'll literally say, oh, well, you're Mom's attorney. Well, you're representing her, aren't you?"[173]

168. Interview by Tonya L. Brito with Child Support Agency Att'ys, *supra* note 138.
169. Interview by Rachel Johnson with Ariel Whiting, *supra* note 135.
170. *Id.*
171. *Id.*
172. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 98, at 4-2 to -7.
173. Interview by Rachel Johnson with Ariel Whiting, *supra* note 135.

The "close quarters" of some hearing rooms can contribute to pro se litigants' confusion about the role of the child support attorneys.[174] In smaller hearing rooms, the parties and the government attorney may be tightly clustered around a single table, rather than seated far apart at separate tables.[175] It is not surprising that pro se fathers assume that child support attorneys represent mothers given the lack of any physical separation between government counsel and the custodial mother, with whom their interests are often aligned.

Litigants' circumstances also influence how well they understand the roles of child support attorneys. To begin with, litigants' emotional and mental state during hearings can make it harder for them to process the information being handed to them. Child support attorneys described pro se parents as "stressed, distracted[,] . . . focused on what they want to achieve that day[, and concerned] about their day-to-day stresses."[176] Other attorneys attribute pro se litigants' challenges to "a confusing process [that they] are going through for the first time."[177] When pro se litigants are familiar with the court process because of their prior experiences in court, child support attorneys may find it easier to communicate with them.[178] Child support attorney Jackie Becker asks litigants if they have been through the process before and said that if they have "[i]t saves [her] a lot of time . . . . And you know you're dealing with somebody who doesn't need educating from me from the beginning."[179]

The child support agency's procedures for accessing its services and the terminology used to describe those services can also contribute to a misunderstanding of the child support attorney's role. Custodial parents generally receive services directly from the agency, but when they go to court, they encounter a government attorney representing the agency's interests rather than their own. Their confusion is compounded by the fact that attorneys sometimes use the term "clients" when talking about people referred by the Department of Healthcare and Family Services.[180]

Berg refers to pro se litigants as agency "clients" in the following statement:

> [A] lot of the dads, the first time they hear about child support is when they get served to come to court. So, they have never been to the HFS . . . . [T]he moms don't have to do anything. *We do it all for them*. The guys, or the noncustodial parent is the one who usually, in our experience, has to

174. *Id.*
175. *Id.*
176. *Id.*
177. Interview by Tonya L. Brito with Alice Crum, *supra* note 136; *see also* Russell Engler, *Approaching Ethical Issues Involving Unrepresented Litigants*, 43 CLEARINGHOUSE REV. 377, 377 (2009) ("Many unrepresented litigants are indigent, silenced by court process and power imbalances, and ill-positioned to distinguish between permissible and impermissible conduct.").
178. Interview by Tonya L. Brito with Child Support Agency Att'ys, *supra* note 138.
179. *Id.*
180. *Id.*

> do his own work. And that's why some of them we encourage, go to HFS, become a client. We'll work for you just as hard as we work for her.[181]

In this instance, the language of "client" generates confusion about whose interests the attorney represents. And the "we do it all for them" remark is particularly misleading because child support attorneys neither represent the custodial parent nor take their direction. However, at the direction of their actual client—the child support agency—attorneys will file petitions "on behalf of" pro se litigants.[182] Child support attorney Alice Crum provides a lengthy explanation of what it means in this context to file petitions on behalf of other parties:

> [W]e don't ever represent a party directly. But, you know, the State will file on behalf of—most often—the custodial parent unless it's a downward modification, in which case they'll sometimes petition to determine arrears. They file on the noncustodial parent, so like they'll do all the intake with the party. They'll see if it meets their criteria, and then they will turn around and file a petition. They'll send the petition to our office. We'll review it and make sure there's a legal basis for filing it.[183]

She continues further:

> [I]f we file it, we are bringing it on behalf of the State, . . . so that just is really confusing to a lot of people, um, because we're not their private attorneys. There's not confidentiality between us and that individual, the custodial parent or noncustodial parent. And, so, they get confused by that, and I can see why.[184]

Thus, even though government child support attorneys are not pro se litigants' "private attorneys," they nonetheless file petitions "on behalf of" pro se litigants at the direction of their actual client, the child support agency, of which the pro se litigant is a client. It is no wonder that pro se litigants in family court need clarification regarding government attorneys' role in their cases.[185]

Finally, it bears mentioning that trained legal professionals, including judges, hearing officers, and other attorneys, express confusion and suspicion about the roles of government attorneys in child support cases.[186] For example, child support attorney Shirlee Rose said that judges "have to be constantly reminded because they see it as though it's like a veil that we hide behind . . . . [T]hey really think that we represent [the custodial parent's] interests, and we don't."[187] Similarly, attorney Jeremy Poole described how judges and hearing officers "go to the opposite extreme" in response to their

---

181. *Id.* (emphasis added).
182. Interview by Tonya L. Brito with Alice Crum, *supra* note 136.
183. *Id.*
184. *Id.*
185. *Id.*
186. *See* Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 374 (2008).
187. Interview by Tonya L. Brito with Child Support Agency Att'ys, *supra* note 138.

"efforts to educate" parents about their role.[188] According to Poole, the hearing officers and sometimes judges challenge the legal basis for the attorney's participation in the case, saying:

> Okay. You don't represent the petitioner that's here in court. Well, you don't represent anybody . . . . Well, you don't even have standing as far as we're concerned to even proceed because you don't represent the party that's before me. Therefore, you shouldn't say anything." And it's a matter of education because the private bar is also confused as to what our role is, particularly the ones that don't appear in our cases very often. They are not sure exactly why we [are] there [or we] who . . . we represent.[189]

Rose and Poole describe their experiences of judges and hearing officers having two polar opposite understandings of government attorneys' roles in child support cases at various points in time. At one end of the spectrum, Rose recounts instances in which judges accuse attorneys of using their role as attorneys for the child support agency to shield themselves from responsibility for representing the interests of pro se litigants.[190] At the other end, some hearing officers and judges—as reported by Poole—contend that, since these attorneys do not represent the parties before them, they do not represent anyone.[191]

CONCLUSION

The rise of pro se litigants in civil cases in the United States has been, and continues to be, dramatic. Their increasing presence in court presents many challenges for the civil legal system, particularly for state courts adjudicating high-volume civil claims. The stakes are high for the self-represented litigants involved in these cases. In such cases, often involving debt collection, child support enforcement, eviction, and housing foreclosure, pro se individuals face devastating consequences.

The pro se phenomenon is especially problematic in cases in which there is an asymmetry of representation. Attorney ethics rules provide guidance for attorneys litigating against unrepresented parties. For example, the rules direct attorneys to clearly define whom they represent and to correct any misunderstandings about their role. Compliance with these directives is especially important when there are conflicts of interest.

This Essay closely examined how government attorneys describe their experiences litigating opposite pro se individuals in child support enforcement cases. Drawing from extensive interview data with government child support attorneys, our findings demonstrate that attorneys handling these cases employ various approaches when informing litigants that they represent the state child support agency. In some instances, such disclosures

188. Interview by Tonya L. Brito with Child Support Agency Att'ys (Group 1), *supra* note 137.

189. *Id.*

190. Interview by Tonya L. Brito with Child Support Agency Att'ys, *supra* note 138.

191. Interview by Tonya L. Brito with Child Support Agency Att'ys (Group 1), *supra* note 137.

are rushed as the parties hurry to their hearing. In other instances, attorneys relay the information more formally and repeatedly. Regardless, government attorneys report that there is a high degree of role confusion in child support enforcement actions.

Government attorneys describe unrepresented parents as often mistakenly believing that they represent the other parent rather than the agency and relate how the positions that they take in court and the inconsistencies in their actions likely contribute to pro se litigants' confusion. They also point out that part of the confusion stems from the fact that litigants are "clients" of their client, the child support agency. Notably, some judges presiding over child support enforcement cases similarly lack a clear understanding of the government attorney's role in the case. According to the government attorneys interviewed as part of this study, the confusion persists—both with judges and pro se litigants—despite their efforts to clarify their roles. The troubling confusion prevalent in child support enforcement cases involving asymmetric representation is heighted by the conflicts of interest present in these high-stakes cases.