THE ETHICS OF NON-LAWYER ADVOCACY: EXPECTATIONS, RULES, AND COMPLICATIONS

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I. INTRODUCTION

The role of non-attorney advocacy in the field of labor relations and the ethical ramifications of such advocacy are seldom expressly addressed. Although this is the case, non-attorney advocates (whether management representatives, or more commonly union representatives or Labor Relations Specialists ("LRS"), who may or may not be lawyers) play key functions in collective bargaining, the administration of contracts, and even grievance and improper practice (also called unfair labor practice) proceedings.[1] Union "members frequently turn to these

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1 Mitchell H. Rubinstein, *Is a Full Labor Relations Evidentiary Privilege Developing?*, 29 BERKELEY J. EMP. & LAB. L. 221, 237 (2008) ("Under the NLRA and analogous state public sector labor relations statutes, unions are the exclusive representatives of employees . . . [and] non-lawyer union representatives often administer the collective bargaining agreement.").

non-lawyer representatives for explanation and advocacy of their rights."[2]

Similarly, from initial calls for information through the closing of the record, cases brought by self-represented parties raise special ethical questions and conundrums. Adjudicators have to balance the need to ensure equal access to justice with the reality and perception of maintaining neutrality. Advocates are likewise confronted with conflicts between making the best record for their clients, and ethical obligations toward the process.

Neutral agencies have an obligation to compile a complete record, and to render a fair determination, but self-represented parties, especially those who are acting in such a capacity for the first time, are often at a structural disadvantage in a system that relies heavily on the parties' own knowledge of the facts of their cases, and the applicable law. Experienced advocates—whether or not they are lawyers—have a wealth of understanding and knowledge to draw from that the self-represented party simply lacks.[3] The conflicting responsibilities of the neutral to remain clearly neutral while ensuring due process to the disadvantaged party and creating a full record presents significant difficulties to even the most experienced neutral.

This Article examines each of these three scenarios and endeavors to suggest sources and frameworks to provide some guidance for non-attorney advocates who appear in front of labor boards and/or administrative law judges ("ALJs"). From there, the focus turns to the ethical issues confronting experienced advocates—predominantly lawyers, but also non-attorney representatives. Finally, various perspectives on the ethical situation of neutrals are presented. This last topic, while directly addressing the concerns of labor board members and ALJs, is relevant to practitioners, who can benefit from informed expectations as to the strategies that neutrals may adopt to balance their ethical and quasi-judicial responsibilities.

II. DETERMINING THE APPROPRIATE ETHICAL PARAMETERS

A large part of the difficulty in discerning the appropriate ethical parameters for either non-admitted advocates, self-represented parties, or

2 *Id*.

3 Rubinstein notes that he has "appeared in several arbitrations where an employer or a union was represented by a nonlawyer labor relations professional," who "often did an excellent job." Rubinstein, *supra* note 1, at 224 n.8. My own experience, both as an advocate, and in over a dozen years as a neutral, is that a high level of performance by trained non-attorney advocates has been the rule, with very few exceptions.

those advocates—lawyers or not—who defend against claims by either group is ascertaining what body of law and precedent, if any, is applicable. For example, the National Labor Relations Board ("NLRB") has essentially elided the difficulty by holding all representatives to the standard applicable to attorneys by Rule: "Any attorney or other representative appearing or practicing before the Agency must conform to the standards of ethical and professional conduct required of practitioners before the courts, and the Agency will be guided by those standards in interpreting and applying the provisions of this section."[4] The NLRB's Rules further provide that "[m]isconduct by any person at any hearing before an Administrative Law Judge, Hearing Officer, or the Board may be grounds for summary exclusion from the hearing."[5] Under this Rule, "the Administrative Law Judge, Hearing Officer, or Board has the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing."[6] For both "an attorney or other representative," the Rule provides that "misconduct of an aggravated character may be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions."[7] The Rule promulgates procedures for the bringing of claims of misconduct, investigation, charges, hearing, determination of fault and appropriate sanction, as well as judicial review.[8]

Procedurally, not all administrative tribunals are empowered or willing to entertain questions of breaches of attorney ethics. Within New York State, for example, the Public Employment Relations Board ("PERB"), which administers the New York State comprehensive labor relations statute, the Public Employees' Fair Employment Act (more commonly known as the "Taylor Law"),[9] takes the position that it is simply not responsible for enforcing attorneys' obligations under the Code of Professional Responsibility Disciplinary Rules promulgated thereunder.[10] Indeed, the courts have affirmed that representation of the

4 29 C.F.R. § 102.177(a) (2017).

5 § 102.177(b).

6 *Id*.

7 § 102.177(d).

8 §§ 102.177 (e) & (f).

9 N.Y. CIV. SERV. L. § 205 (McKinney 2018).

10 *See, e.g.*, Union-Endicott Cent. Sch. Dist., 28 PERB ¶ 3029, 3071 (1995); Bd. of Educ. of the City Sch. Dist. of the City of Buffalo, 24 PERB ¶ 3033 (1991).

collective bargaining agent by an LRS at a hearing conducted by PERB did not constitute unauthorized practice of law.[11]

By contrast, the New York City Board of Collective Bargaining, administering the New York City Collective Bargaining Law, a substantially similar law, has held that "this Board has the authority to disqualify counsel from appearing before it when such practice would violate the Disciplinary Rules of the Code of Professional Responsibility."[12] Depending on the rules of the forum, perceived violations of ethical rules may not be properly raised before the tribunal hearing the charge but may require bringing separate proceedings before the appropriate licensing or disciplinary bodies. In the context of labor relations, the ethical duty to report such misconduct may complicate the ability of parties to resolve disputes or settle contracts, and thus pose a conflict between that duty and the best interests of the client for the advocate who believes impropriety has taken place.

However, PERB has taken some limited jurisdiction over instances of misconduct before the agency. PERB has found the secret recording of a hearing or a prehearing conference to constitute misconduct warranting an appropriate sanction.[13] Sanctions vary based upon the seriousness of the conduct. Where a non-lawyer representative engaged in repeated intimidating and threatening verbal outbursts and physical gestures directed at an ALJ during and after a conference, the representative was barred from appearing before PERB for six months.[14] By contrast, where a motion for leave to appeal to the Board was part of a party's strategy to delay the outcome of the administrative process, the Board found the application did not warrant any sanction.[15] In an intermediate step, the Board has not levied any official sanction against an advocate for impugning the character or motives of an ALJ or other finder of fact and law, but has in recent years publicly reprimanded advocates for such behavior.[16]

11 *See generally* Bd. of Educ. v. N.Y. State Pub. Emp't Rels. Bd., 649 N.Y.S.2d 523 (N.Y. App. Div. 1996).

12 James-Reid, 79 O.C.B. 9 (Mar. 29, 2007) (citing N.Y. CODE OF PROF'L RESPONSIBILITY DR 5-108 (N.Y.S. BAR ASS'N 2007), codified at N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.27 (2007)).

13 *See* Hirsch, 46 PERB ¶ 3035 (Oct. 15, 2013).

14 *See* Munafo, 31 PERB ¶ 3012 (July 1, 1998).

15 *See* Grassel*,* 44 PERB ¶ 3034 (Sept. 26, 2011).

16 *See, e.g.*, Ithaca Police Benevolent Ass'n, Inc., 50 PERB ¶ 3006, 3031 (Apr. 10, 2017) (citing United Pub. Serv. Emps. Union, 49 PERB ¶ 3017, 3066 (Apr. 13, 2016)).

In its 2017 revision of its Rules of Procedure, PERB added a new section to codify its existing practice regarding misconduct.[17] The first provision concerns misconduct by any person, and states that, "Misconduct by any person at any stage of a case before the board, an administrative law judge or other person designated by the board to conduct proceedings, may be grounds for summary exclusion by the board, administrative law judge, or other designee before whom the misconduct occurred."[18] The second part relates to suspension and other sanctions.[19] It finds that misconduct—which may include but is not limited to misconduct at a hearing—by an attorney or another representative before the agency will be grounds for discipline.[20] If such misconduct is of an "aggravated character" the misconduct may constitute not only grounds for suspension, but also for prohibiting the attorney or representative from future practice before the agency.[21] The provision stipulates that the attorney or representative may be subject to further sanctions after receiving notice and a hearing before either the board or its designee.[22] The provision further provides that any order "imposing discipline under this section will be appealable to the board as part of an appeal of the ultimate disposition of the underlying proceeding," or, "upon a showing of extraordinary circumstances," as an interlocutory appeal.[23]

The NLRB and the New York State models stand in stark contrast to each other; while the NLRB holds all advocates to the standards expected of lawyers by the judiciary, PERB does not itself enforce those standards even on lawyers, preferring to generally bar "misconduct," but to flesh out on a case-by-case basis just what constitutes misconduct. Between these two models, non-lawyer advocates seeking some clarity as to what ethical responsibilities they bear find guidance rather thin on the ground.

In looking to flesh out the ethical responsibilities of non-attorney advocates, one source of minimum requirements, at least for union-side advocates, can be found in the duty of fair representation. The details of the duty of fair representation, as a creature of statute, vary from state to state, and in the federal forum. However, the basic parameters are fairly

17 *See* N.Y. PERB RULES OF PROC. § 214 (2017).

18 N.Y. PERB RULES OF PROC. § 214.1 (2017).

19 N.Y. PERB RULES OF PROC. § 214.2 (2017).

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

consistent. To take the statute of widest application, "[t]he duty of fair representation is a statutory obligation under the NLRA, requiring a union to serve the interests of all members without hostility or discrimination . . . , to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."[24] The "objective of the duty of fair representation is to provide substantive and procedural safeguards for minority members of the collective bargaining unit."[25]

A "union breaches its duty of fair representation if its actions with respect to a member are arbitrary, discriminatory, or taken in bad faith."[26] As the Supreme Court held in *Air Line Pilots Association v. O'Neill*, "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." [27]

"A court's examination of a union's representation 'must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities.'"[28] Neither conclusory allegations nor "mere negligence" by the union in its enforcement of a collective bargaining agreement is sufficient to state a claim.[29] Some courts have found, under specific circumstances, that "[w]hile it is true that ordinarily negligence or mistaken judgment by the union in failing to pursue a grievance is not actionable, recklessness or gross negligence by the union can constitute a breach of the duty of fair representation."[30] In particular, courts have found that a union's conduct may be deemed arbitrary, and thus a breach of the duty of fair representation, based on "evidence of a missed filing deadline that is left unexplained."[31] This standard, which normally excludes liability

24 Napoleoni v. New York City Dep't of Parks & Rec., No. 18-CV-2578 (MKB), 2018 WL 3038502 at *4 (E.D.N.Y. Jun. 18, 2018) (citations and internal quotations omitted).

25 Flight Attendants in Reunion v. Am. Airlines, Inc., 813 F.3d 468, 473 (2d Cir. 2016) (quoting Jones v. Trans World Airlines, Inc., 495 F.2d 790, 798 (2d Cir. 1974)).

26 Figueroa v. Foster, 864 F.3d 222, 229 (2d Cir. 2017) (quoting Fowlkes v. Ironworkers Local 40, 790 F.3d 378, 388 (2d Cir. 2015)); *see also* Flight Attendants in Reunion, 813 F.3d at 473.

27 Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 67 (1991) (internal citations omitted).

28 *Napoleoni*, No. 18-CV-2578 (MKB), 2018 WL 3038502, at *4 (quoting Alen v. U.S. Airways, Inc., 526 F. App'x 89, 91 (2d Cir. 2013).

29 United Steelworkers of Am. v. Rawson, 495 U.S. 362, 372 (1990); *see also* Mancus v. Pierre Hotel, 45 Fed. App'x 76, 77 (2d Cir. 2002).

30 Lipton v. United Parcel Serv., 15 F.3d 1365, 1370 (6th Cir 1994).

31 Young v. United States Postal Serv., 907 F.2d 305, 308 (2d Cir. 1990); *see also* Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1273 (9th Cir. 1983); Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975); Ruzicka v. General Motors Corp., 649 F.2d 1207, 1211 (6th Cir. 1981). This decision was affirmed, citing the same cases by United Fed'n of Teachers, Local 2, AFT, AFL-CIO v. New York City Bd. of Collective Bargaining, 28 N.Y.S.3d 848, 855 (N.Y. Sup. Ct. 2016).

for negligence, even gross negligence,[32] lays out what actions on the part of a union toward a member, are considered sufficiently wrongful as to constitute a violation of law.

Beside the body of law delineating the scope of the duty of fair representation, there is little concrete guidance for non-attorney advocates appearing in front of labor boards and ALJs, or engaged in mediation, grievance arbitration, or interest arbitration. Several academic articles have delineated some basic standards that can illuminate what reasonable expectations boards, mediators, factfinders and arbitrators may have of advocates, whether or not they are lawyers. The extensive overlap of two such articles, one from the perspective of Canadian litigator George Tsakalis,[33] and the other more specifically geared toward conduct at the bargaining table,[34] suggest that the basic norms are not terribly difficult to discern.

Tsakalis distinguishes between two styles of negotiation, "aggressive" or "competitive," and "interest-based and cooperative."[35] While "competitive" or "aggressive" negotiation may have some efficacy in litigation, it has its risks even there. As Carrie Menkel-Meadow has pointed out, "even those who wilt at the negotiation table may be resentful later and exercise their power either by failing to follow through on the agreement or by seeking revenge the next time the parties meet."[36] In labor relations, where the parties are, of necessity, in an ongoing relationship, and often recommence negotiations shortly upon the conclusion of reaching a contract, such brinkmanship and bad blood as may be excusable in litigation can be profoundly counterproductive.

The "interest" style of negotiation "promotes mutual problem solving in order to maximize the welfare of all parties to a negotiation."[37] After analyzing the benefits of this approach, even for parties who are not fated to continually deal with each other on a recurring basis, Tsakalis

32 *See* Amalgamated Transit Union Local No. 1498 (Jefferson Partners L.P.), 360 N.L.R.B. 777 (2014). The same standard applies under New York State's Taylor Law. *See, e.g.*, Civil Serv. Employees Ass'n, Inc. v. Pub. Empl. Relations Bd., 522 N.Y.S.2d 709, 711 (N.Y. App. Div. 1987) ("reject[ing] the standard applied by PERB that 'irresponsible or grossly negligent' conduct may form the basis for a union's breach of the duty of fair representation").

33 George Tsakalis, *Negotiation Ethics: Proposals for Reform to the Law Society of Upper Canada's Rules of Professional Conduct*, 5 W. J. LEGAL STUD. 4 (2015).

34 Roger Fisher, *A Code of Negotiation Practices for Lawyers*, 1 NEGOT. J. 105 (1985). While this Article is ostensibly directed only at lawyers, it refreshingly avoids technical jargon, a complex structure, and manages to cover the ground in five pages of clear language. *See id.*

35 Tsakalis, *supra* note 33, at 3.

36 Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 778 (1984); *see also* Fisher, *supra* note 34, at 108, 110.

37 Tsakalis, *supra* note 33, at 3.

suggests an approach of "good faith" negotiations, and recommends ethical reforms that would provide "clear guidance regarding ways to adopt problem-solving approaches to negotiation focused on mutual gain."[38] These proposed reforms, adapted to the circumstances of representation in labor relations cases, match up surprisingly well with the recommendations, over three decades ago, of Roger Fisher in the inaugural volume of the *Negotiation Journal*.[39]

The first proposed norm is simple and straightforward: *Advocates may not lie to each other, even to preserve confidences.*[40] They may refuse to divulge information, decline to answer questions, or, if need be, assert privilege. But they may not deliberately make a false representation of fact. The second proposed norm follows logically on the first: *Advocates may not mislead neutrals*.[41] Whether appearing before boards, ALJs, mediators, factfinders, or arbitrators, an advocate "cannot engage in puffing and must either answer honestly or decline to answer."[42] Tsakalis adds that "[i]n mediation, this requirement increases trust, which is difficult to obtain if [advocates] are permitted to be dishonest with one another."[43]

As a third norm, Tsakalis proposes a broader one, which requires some unpacking: *Advocates "shall be fair and act in good faith during negotiations.*"[44] Two concepts of good faith may be used to flesh out this norm. First, the duty to negotiate in good faith under the legal standard of the applicable statute provides, not unlike the duty of fair representation did for unions, some basic minimum norms for both employer and union. Thus, under New York State's Taylor Law, that duty at a minimum "means that both parties approach the negotiating table with a sincere desire to reach an agreement, as evidenced by their actions.[45] Violation of that duty can be shown by unilateral actions that effectively preempt bargaining, or either party seeking to thwart conciliation proceedings with an eye to reaching interest arbitration and an imposed resolution, rather than reaching an agreed-upon one. Where an advocate deliberately engages in such action, falling short of such statutory requirements, the advocate may fall afoul of the ethical standards expected of advocates. Likewise, the well-established doctrine that every contract carries with it

38 *Id.* at 8.

39 *See* Fisher, *supra* note 34, at 108, 110.

40 Tsakalis, *supra* note 33, at 8; Fisher, *supra* note 34, at 110.

41 Tsakalis, *supra* note 33, at 9; Fisher, *supra* note 34, at 110.

42 Tsakalis, *supra* note 33, at 9; Fisher, *supra* note 34, at 110.

43 Tsakalis, *supra* note 33, at 9.

44 *Id.*; *see also* Fisher, *supra* note 34, at 109.

45 County of Broome, 3 PERB ¶ 3103 (1970).

an implied duty of good faith and fair dealing bars either party to "do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."[46] Thus, an advocate who asserts that an improper practice charge must be deferred to arbitration while simultaneously challenging arbitrability of the same dispute before the state court may be violating the duty to negotiate in good faith and even the duty of good faith and fair dealing.[47]

The fourth proposed norm, that advocates need not press for every possible advantage for their clients, may seem counterintuitive, but is a fundamental principle of the "interest" style of negotiation.[48] As Fisher notes, the "client's interests should be well-satisfied," but also the "interests of other parties and the community should be sufficiently satisfied to make the outcome acceptable to them and durable."[49] As a fifth norm, Tsakalis proposes that advocates shall not "in any action or communication associated with representing a client, make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates other parties."[50]

As already described, Tsakalis's sixth norm has found a place in the jurisprudence of PERB: advocates shall not "in any action or communication associated with representing a client, use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person."[51] Frustration "includes actions that serve no substantial purpose other than to delay or burden another party."[52] Finally, Tsakalis proposes a norm that will occupy much of the latter part of this Article: that an advocate must not take advantage of unsophisticated or unrepresented parties.[53] The role of the neutral in ensuring compliance with this norm will also be addressed.

While these broad ethical norms have not been enacted, their simplicity and ready applicability to labor relations (without creating unduly complex and intricate provisions that could easily entrap the

46 Dalton v. Educ. Testing Serv., 663 N.E.2d 289, 291 (N.Y. 1995); Singh v. PGA Tour, Inc., 79 N.Y.S.3d 149 (N.Y. App. Div. 2018).

47 *See, e.g.*, Suffolk Cty. Deputy Sheriffs Police Benevolent Ass'n, 49 PERB ¶ 3005, 3022 (Jan. 25, 2016).

48 Tsakalis, *supra* note 33, at 9; Fisher, *supra* note 34, at 110.

49 Fisher, *supra* note 34, at 107.

50 Tsakalis, *supra* note 33, at 11.

51 Tsakalis, *supra* note 33, at 10; *see* Munafo 31 PERB ¶ 3012, *supra* note 14; *see also* Grassel, 44 PERB ¶ 3034, *supra* note 15.

52 *Id.* at 11; Fisher, *supra* note 34, at 109.

53 Tsakalis, *supra* note 33, at 12.

talented and well-meaning lay advocate) suggest that such proposed norms, as refined through labor relations experience might provide a beginning toward giving non-lawyer advocates a better understanding of their ethical obligations.

III. GHOST STORIES: ASSISTING THE PRO SE LITIGANT IN PREPARING PAPERS

An improper practice charge is filed before a neutral administrative agency with jurisdiction over violations of public sector labor law. The charge asserts that a union-represented discharged employee has been the victim of discriminatory discipline, and that her union has breached its duty of fair representation by failing to raise discrimination as a defense in her due process hearing. The charge is written with a surprisingly high level for an unrepresented party with no legal or labor relations background, as is the member's (mostly successful) papers in opposition to the union's motion to dismiss. After the motion was denied, a notice of appearance was filed by a firm that had previously represented the union, but whose representation had ended over five years prior to the disciplinary charges at issue. At a conference, it becomes clear that the law firm had prepared the charge and the response to the motion for her without signing it or otherwise indicating that the ostensibly pro se charging party had assistance in preparing the papers.[54]

In 2010, Professor Ira Robbins wrote that: "[t]he federal courts have almost universally condemned ghostwriting.[55] He gave the example of *Ricotta v. California*, in which the United States District Court for the Southern District of California warned that "[a]ttorneys cross the line . . . when they gather and anonymously present legal arguments, with the actual or constructive knowledge that the work will be presented in some similar form in a motion before the Court."[56] In *Ligouri v. Hansen*, the United States District Court for the District of Nevada gave several reasons, drawn in part from *Ricotta*, reaching the conclusion that "ghostwriting . . . is an inappropriate practice."[57] The *Ligouri* Court also

54 The hypothetical is based on a case before the New York City Board of Collective Bargaining. *See* James-Reid, 79 O.C.B. 9 (Mar. 29, 2007). For the opinion denying the motion to dismiss, see James-Reid, 77 O.C.B. 29 (Sept. 12, 2006). For the final decision on the merits appears, see James-Reid, 1 O.C.B.2d 26 (July 30, 2008).

55 Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 Geo. J. LEGAL ETHICS 271, 285-288 (2010) (footnotes and citations omitted)..

56 Ricotta v. State of Calif, 4 F.Supp.2d 961, 986 (S.D.Cal.1998); *see also* Walker v. Pacific Maritime Assoc., No. C07-3100 BZ, 2008 WL 1734757, at * 2 (N.D. Cal. Apr. 14, 2008).

57 Ligouri v. Hansen, No. 2:11-cv-00492-GMN-CWH, 2012 WL 760747, at * 6 (D. Nev. Mar. 6, 2012).

found that "because the standard practice of federal courts is to interpret pro se filings liberally, allowing 'ghost-writing' would disadvantage the opposing party;" and that the practice is also "a deliberate evasion of responsibilities imposed by Rule 11, which requires attorneys to personally represent that there are grounds to support assertions made in each filing."[58] Third, the Court found that "ghostwriting implicates the Rules of Professional Responsibility," infringing the bar against a lawyer "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."[59] The *Ligouri* Court determined that "[a]n attorney participating in 'ghost-writing' is engaged in conduct involving misrepresentation to the Court because another individual is signing pleadings that the attorney drafted."[60] Moreover, "having a litigant appear to be *pro se* when in truth an attorney is authoring pleadings . . . is far below the level of candor which must be met by members of the bar."[61]

As Robbins concludes, "[t]o many federal courts, ghostwriting is an act of deception that thwarts their efforts to oversee pro se litigation and allows attorneys to escape the ethical and legal obligations that normally attach to participation in litigation."[62] However, he notes, "[t]he states are

58 *Id.* (citing *Ricotta*, 4 F.Supp.2d at 986).

59 *Id.* (citing NEV. RULES OF PROF'L CONDUCT, r. 8.4 (2018)).

60 *Id.*

61 *Id.*, quoting Ricotta, 4 F.Supp.2d at 986.

62 Robbins, *supra* note 55, at 286-287. Robbins cited a number of court decisions. *See* Duran v. Carris, 238 F.3d 1268, 1272-73 (10th Cir. 2001) (finding that ghostwriting constitutes a "misrepresentation to this court"); Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971) ("If a brief is prepared in any substantial part by a member of the bar, it must be signed by him."); Delso v. Trs. for the Ret. Plan for the Hourly Employees of Merck & Co., No. 04–3009 (AET), 2007 WL 766349 (D.N.J. Mar. 5, 2007) at **12-18 (holding that undisclosed ghostwriting violates several ethics rules and the spirit of Fed. R. Civ. P. 11 and should not be permitted in the District of New Jersey); Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884, 887 (D. Kan. 1997) (requiring pro se defendant to disclose whether she was represented by attorney); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1077 (E.D. Va. 1997) ("[T]he Court considers it improper for lawyers to draft or assist in drafting complaints or other documents submitted to the Court on behalf of litigants designated as pro se."); United States v. Eleven Vehicles, 966 F. Supp. 361, 367 (E.D. Pa. 1997) ("Important policy considerations militate against validating an arrangement wherein a party appears pro se while in reality the party is receiving legal assistance from a licensed attorney."); Johnson v. Bd. of Cty. Comm'rs, 868 F. Supp. 1226, 1232 (D. Colo. 1994) ("Having a litigant appear to be pro se when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is ingenuous to say the least; it is far below the level of candor which must be met by members of the bar."); In re Brown, 354 B.R. 535, 545 (Bankr. N.D. Okla. 2006) ("[I]f an attorney writes a pleading, he or she has a duty to make sure that the Court knows he or she wrote it. The Court is not required to play a game of 'catch-me-if-you-can' with a ghostwriter. All counsel owe a duty of candor to every court in which they appear. Inherent in that duty is the requirement that counsel disclose his or her involvement in the case."); In re Mungo, 305 B.R. 762, 767 (Bankr. D.S.C. 2003) ("The act of anonymously drafting pleadings

more evenly divided over the propriety of ghostwriting."[63] Robbins's 2010 survey found that, of the twenty-four states that had addressed ghostwriting, "thirteen states explicitly permit ghostwriting of legal pleadings."[64] He noted that in ten of these states, attorneys will draft pleadings that their clients will file in the courts pro se, without indicating to the court that an attorney worked on the documents.[65] Robbins also found that the other three states allow attorneys to prepare pleadings without signing them, but the documents must clearly indicate that they were "prepared with the assistance of counsel."[66] Lastly, Robbins found that "[o]n the other side of the debate, ten states expressly forbid ghostwriting," noting that "[i]n Nevada, the State Bar Association issued an ethics opinion banning ghostwriting, but recently withdrew this opinion in light of other state bars' concerns about the effect of such a prohibition on the availability of pro bono legal services."[67]

Since then, several decisions have demonstrated increased support for ghostwriting. In *In re Fengling Liu*, the Second Circuit Court of Appeals (governing New York, Connecticut and Vermont) had before it a recommendation than an attorney be sanctioned for, among other acts, ghostwriting pleadings for pro se parties.[68] After canvassing the cases both federal and state, the Court acknowledged that "this Court has not yet addressed the issue of attorney ghostwriting," and "conclude[d] that

for which a client appears and signs pro se is often termed 'ghost-writing.' . . . [T]he Court recognizes the act of ghost-writing as a violation of Local Rule 9010-1(d) and in contravention of the policies and procedures set forth in the South Carolina Rules of Professional Conduct and the Federal Rules of Civil Procedure."); Ostrovsky v. Monroe, 230 B.R. 426, 435 n.12 (Bankr. D. Mont. 1999) (holding that court rules, particularly Fed. R. Civ. P. 11, as well as ABA Standing Committee Opinion 1414, prohibit ghostwriting).

63 *Id.* at 287.

64 *Id.* at 287-288.

65 *Id.* at 288.

66 *Id.*

67 *Id.* In the years since the publication of Robbins's Article, the pressure to supply services to unrepresented parties had led to further support for "unbundled" legal services, allowing for more varied and prevalent limited legal representation by attorneys, whether by anonymous drafting or in court. *See* David L. Hudson, Jr., "Ghostwriting Controversy: Is There an Ethical Problem with Attorneys Drafting for Pro Se Clients?", 104 JUN. A.B.A. J. 24 (2018) (finding no consensus on the propriety of ghostwriting); Erika Ricard, The Agile Court: Improving State Courts in the Service of Access to Justice and the Court User Experience, 39 WEST. N. ENG. L REV. 227, 234-235 (2018) ("Limited scope representation or unbundling is often viewed as the next best alternative after full representation," and noting that "[j]urisdiction-specific quirks and peculiarities can strengthen or stifle uptake of limited representation by private practitioners," or weaken them, as in the absence of "clear rules on "ghostwriting" legal pleadings."); Jessica K. Steinberg, Demand-Side Reform in the Poor People's Court, 47 CONN. L. REV. 741(2015).

68 *In re* Fengling Liu, 664 F.3d 367, 369-371 (2d Cir. 1986).

[counsel's] ghostwriting did not constitute sanctionable misconduct."[69] In doing so, the Second Circuit did not ratify the practice; it instead stated that "in light of the importance of the ghostwriting issue, and the fact that the effect of ghostwriting on disqualification issues is not discussed in the ethics opinions described in the text, we recommend to the Court that it consider the amendment of its rules to resolve the matter."[70]

The traditional view was well indicated by the First Circuit's decision in *Ellis v. State of Maine*, bluntly stating that, "If a brief is prepared in any substantial part by a member of the bar, it must be signed by him [or her]. We reserve the right, where a brief gives occasion to believe that the petitioner has had legal assistance, to require such signature, if such, indeed, is the fact."[71] *Ellis* remains good law in the First Circuit, binding federal courts in Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico.[72]

By contrast, the Second Circuit has noted an evolution in favor of recognizing ghostwriting as ethically permissible.[73] The Court in *Liu* contrasted a 1987 opinion of the New York City Bar's Committee on Professional and Judicial Ethics ("City Bar Opinion") with a 1990 ethics opinion of the New York State Bar Association Committee on Professional Ethics ("NYSBA Opinion"). The City Bar Opinion required "an attorney who drafts 'any pleadings' for a pro se litigant, other than a previously prepared form devised particularly for use by pro se litigants, to disclose that role to adverse counsel and the court, although the pleading need only note that it had been prepared by counsel without identifying the attorney."[74] The NYSBA Opinion, however, permits attorneys to advise and prepare pleadings for pro se litigants, but only if: (1) the name of the attorney is disclosed to the court and opposing parties; (2) the scope and consequences of the limited representation are disclosed to the client; and (3) the attorney adequately investigates the pleadings and prepares them in good faith.[75] The NYSBA Opinion disagreed with

69 *Id.* at 269.

70 *Id.* at n.7. The Appellate Division ratified the discipline, and censured Ms. Liu, but did not address the ghostwriting claim other than to quote the Second Circuit's holding and rationale. *In re* Fengling Liu, 969 N.Y.S.2d 57, 61 (N.Y. App. Div. 2013).

71 Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971).

72 *See e.g.*, Diaz v. First Horizon Home Loan Corp., No. 12-178 ML, 2012 WL 4855202, at n.2 (D.R.I. Oct. 12, 2012); Pease v. Burns, 679 F. Supp. 2d 161, 165 (D. Mass. 2010); *In re* Compact Disc Minimum Advertised Price Antitrust Litig., 456 F. Supp. 2d 131, 165 (D. Me. 2006).

73 *In re* Fengling Liu, 664 F.3d 367, 369-371 (2d Cir. 2011).

74 *Id.*

75 *Id.*

the City Bar Opinion in that the City Bar Opinion did not require disclosure of the attorney's name.[76]

The *Liu* Court also cited a 2007 opinion of the ABA's Standing Committee on Ethics and Professional Responsibility (the "ABA Committee"), which concluded that "[a] lawyer may provide legal assistance to litigants appearing before tribunals 'pro se' and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance." The Court cited the ABA Committee's rejection of three traditional rationales used to proscribe ghostwriting. First, the ABA Committee found that, pursuant to ABA Model Rule of Professional Conduct 1.2(c)[77]—providing that "[a] lawyer may limit the scope of the representation [of a client] if the limitation is reasonable under the circumstances and the client gives informed consent"—the provision of undisclosed legal assistance to pro se litigants constitutes a form of limited representation.[78] Second, the Court quoted the ABA Committee to the effect that "the benefit of liberal construction afforded to pro se pleadings" would not be improperly granted to pleadings drafted by effective counsel, as there is no reason to apply liberal construction when a pleading is of higher quality.[79] Likewise, the Court quoted the ABA Committee, "[i]f the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage."[80] Thus, the ABA Committee reasoned that, "[b]ecause there is no reasonable concern that a litigant appearing *pro se* will receive an unfair benefit from a tribunal as a result of behind-the-scenes legal assistance, the nature or extent of such assistance is immaterial and need not be disclosed."[81]

Finally, the *Liu* Court recited the the ABA Committee opinion's conclusion that "[w]hether it is dishonest for the lawyer to provide undisclosed assistance to a pro se litigant turns on whether the court would be misled by failure to disclose such assistance." Since the opinion concluded that such a dishonesty does not exist so as long as the client does not make an affirmative representation which may be attributable to the attorney, the pleadings were deemed prepared without an attorney's assistance.[82]

76 *Id.*

77 *Id.* (citing ABA Comm. on Ethics & Prof'l Resp., Formal Op. 446 (2007) (discussing undisclosed legal assistance to pro se litigants).

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

Some states, including Maine and Vermont, have issued ethics opinions or rules suggesting that unattributed attorney-drafted pro se pleadings are proper.[83] In New Hampshire, the rule is to the contrary; pursuant to Rule 15 of the New Hampshire Court Rules:

> When an attorney provides limited representation to an otherwise unrepresented party, by drafting a document to be filed by such party with the Court in a proceeding in which (1) the attorney is not entering any appearance, or (2) the attorney has entered a limited appearance which does not include representation regarding such document, the attorney is not required to disclose the attorney's name on such pleading to be used by that party; any pleading drafted by such limited representation attorney, however, must conspicuously contain the statement, *"This pleading was prepared with the assistance of a New Hampshire attorney."*[84]

Rule 15 further requires that the unrepresented party comply with the disclosure requirement.[85] Although the rule does not require disclosure of the identity of the drafting attorney, "by drafting a pleading to be used in court by an otherwise unrepresented party, the limited representation attorney shall be deemed to have made those same certifications as set forth in Rule 15(A) despite the fact the pleading need not be signed by the attorney."[86]

More recently, the Supreme Court of Rhode Island recently attempted to steer a middle course in *FIA Card Services, N.A. v. Pichette*.[87] The court cited Rhode Island's rule that permits an attorney to provide legal assistance to pro se litigants, "provided the scope of the attorney's representation is reasonable and the litigant gives informed consent."[88] This informed consent must be in writing, and must also set

83 See Robbins, *supra* note 67, at 287 n.81 (citing Me. State Bar Ass'n, Ethics Op. 89 (1988) (concluding that an attorney who prepared a complaint for a client was not ethically required to sign the document or enter an appearance on behalf of the client); VT. RULES OF PROF'L CONDUCT r. 1.2 cmt. 3 (2008) ("Lawyers may limit the scope of their representation by providing advice and counsel to pro se litigants and assisting with the preparation of pleadings for litigants to sign and file on their own behalf"). However, Rule 1.2 Comment 3, relied upon by Robbins, has since been modified to read, "The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client." VT. RULES OF PROF'L CONDUCT r. 1.2 cmt 6 (2015). The removal of the specific example of drafting pro se pleadings may be deemed significant by that state's courts.

84 N.H. SUP. CT. R. 15 (emphasis added).

85 *Id.*

86 *Id.*

87 *See* FIA Card Servs., N.A. v. Pichette, 116 A.3d 770, 784 (R.I. 2015).

88 R.I. State Court Rules, Rule 1.2(c); *see id.*

forth the nature and extent of the attorney-client relationship.[89] However, attorneys are disallowed from assisting a pro se litigant through the preparation of "pleadings, motions, or other written submissions unless the attorney signs the document and discloses thereon his or her identity and the nature and extent of the assistance that he or she is providing to the tribunal and to all parties to the litigation."[90] If applicable, the attorney also must indicate on the document that his or her signature does not constitute an entry of appearance.[91] The Court further held:

> Unless and until we are persuaded otherwise, we believe that full disclosure of the attorney's involvement, albeit limited, is the better practice. An attorney who helps prepare a pleading, motion, or other paper with the expectation that it will be submitted and filed in court on behalf of a *pro se* litigant should be held to the same standard of good faith as an attorney of record. We are mindful, however, that an attorney's limited representation of a client may raise myriad ethical and procedural concerns.[92]

The Court explained the policies it sought to balance.[93] First, the Court acknowledged that a policy allowing attorneys to provide even a limited-scope of representation to a pro se litigant provides greater access to justice than if a pro se litigant had no attorney. "The PBC contends that the current uncertainty surrounding the permissibility of ghostwriting may be inhibiting attorneys who would otherwise be willing to help a pro bono client 'if their participation could be limited and targeted in a more predictable and ethically safe manner.'"[94] Further, the Court pointed out that while allowing attorneys to provide limited services to pro se litigants promotes greater access to justice, it is important to assist attorneys by providing clear guidelines regarding their representation.[95] The Court sought to balance the need for access to justice with the potential ethical issues raised by ghostwriting.[96] There are four main categories of concerns regarding ghostwriting:

89 *Supra* note 87, at 784.

90 *Id.*

91 *Id.*

92 *Id.*

93 *See id.* at 783.

94 *Id.*

95 *Id.*

96 *Id.*

> (1) that those who appear in court pro se after filing pleadings ghostwritten by licensed attorneys may be benefiting from an unfair advantage because courts often construe the content of pleadings filed by pro se litigants more leniently;
>
> (2) that those who appear in court pro se after filing pleadings ghostwritten by licensed attorneys are left to discuss either counterclaims or defenses that they do not understand;
>
> (3) that, if ghostwriting attorneys are not required to reveal their identity, then they will not be held accountable for potential violations of the Rules of Civil Procedure and Rules of Professional Conduct; and
>
> (4) that opposing counsel are placed in a precarious position because they may not communicate directly with a party that they know is represented.[97]

At least one New York State lower court has reached a similar conclusion as the Supreme Court of Rhode Island, for similar grounds.[98] In *Citibank (South Dakota), NA v. Howley*, the court found that:

> [I]t is necessary for an attorney providing "unbundled" legal services to disclose this fact to the court. This is especially needed in these consumer credit transactions where unrepresented litigants often have difficulty in understanding the legal process and then find they have failed to properly assert their rights owing to this lack of understanding or unwarranted reliance on third parties such as debt settlement or debt negotiation organizations to protect their interests.[99]

In Connecticut, a finding by the Statewide Grievance Committee that an attorney was not guilty of the unauthorized practice of law by ghostwriting pleadings was allowed to stand as no appeal was taken from it.[100] However, the decision is unclear as to whether the Committee's ruling was based upon deficiency of proof, or upon a finding that ghostwriting does not violate the ethical rules.[101]

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97 Jona Goldschmidt, *In Defense of Ghostwriting,* 29 FORDHAM URB. L.J. 1145, 1159-65 (2002); Steinberg, 18 GEO. J. ON POVERTY L. & POL'Y at 465-68; Halley Acklie Ostergard, *Unmasking the Ghost: Rectifying Ghostwriting and Limited-Scope Representation with the Ethical and Procedural Rules,* 92 NEB. L.REV. 655, 659-64 (2014); *see id.*

98 *See* Citibank (S.D.) N.A. v. Howley, 927 N.Y.S.2d 815 (N.Y. Civ. Ct. 2011).

99 *Id.*

100 *See* Saas v. Statewide Griev. Comm., No. HHDCV116024609S, 2013 Conn. Super. LEXIS 19 (Ct. Super. Ct. Jan. 2, 2013).

101 *See id.*

In determining the ethical implications of attorney ghostwriting before neutral labor relations agencies, an additional question is whether appearing before such an agency constitutes the practice of law within the state. In New York, an intermediate appellate court has held that appearing before PERB does not constitute the practice of law.[102] Subsequent to that decision, the court's holding was codified in the Public Employees' Fair Employment Act (the "Taylor Law"), providing that "a party shall have the right to appear in person, by counsel or by other authorized representative."[103] However, the very next sentence provides that "[n]othing contained herein shall restrict the right of the board to exclude, suspend, or disbar any representative for misconduct in accordance with the board's rules."[104]

While this area is clearly still evolving, the weight of more recent authority appears to be heading in the direction of allowing for the "unbundling" of legal services yet requiring such services to be performed on the record when done by attorneys. In the absence of clear guidance by the forum state labor board, which would be ideally affirmed by the courts, this is the most prudent position for counsel to take at this time.

IV. A DELICATE BALANCE: ETHICAL ISSUES FOR NEUTRALS

Neutral labor relations agencies may have their own policies addressing issues posed by dealing with unrepresented parties. Often, however, they do not. In the absence of such policies, useful sources are codes or policies relating to arbitrators, judges, or mediators. These codes or policies tend to address the following issues: (1) preservation of the neutral role; (2) providing information and otherwise ensuring access to administrative processes; (3) ensuring the development of an appropriate record; and (4) post-decision interaction with the unrepresented party.[105]

A. Keeping the Role Clear

It is imperative that that every employee, agent, or representative of the neutral agency make clear to the unrepresented party that she cannot

102 *See* Bd. of Educ. of Union-Endicott Cent. School Dist. v. New York State Pub. Emp't Relations Bd., 649 N.Y.S.2d 523, 524 (N.Y. App. Div. 1996); Bd. of Educ. of Union-Endicott Cent. School Dist., 29 PERB ¶ 7020 (Nov. 7, 1996).

103 N.Y. CIV. SERV. LAW § 205.50(j) (McKinney 2018).

104 *Id.*

105 *See* 1 SARAH R. COLE ET AL., MEDIATION: LAW POLICY AND PRACTICE § 10:2 (rev. ed. 2014).

and will not provide legal representation to the pro se party. In 2002, the ABA added a new provision to the *Model Rules of Professional Conduct* addressing the responsibilities of lawyers acting as third-party neutrals:

> (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
>
> (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.[106]

Thus, "[t]he rule also recognizes the possibility that parties, particularly those who are not represented, may become confused regarding the role and obligations of the lawyer-neutral,"[107] while nonetheless requiring that the lawyer explain the difference between their role as a third-party neutral and as one who represents a client.[108]

While not all neutrals are lawyers—indeed, even administrative law judges are not required to be currently admitted attorneys in all jurisdictions—the Rule makes sense, avoiding confusion on the part of the less sophisticated party, who may otherwise be inappropriately passive, mistakenly relying on the neutral to defend her rights. The lack of such a provision in either the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, or in the Model Code for State Administrative Law Judges, should not dissuade a non-lawyer

106 MODEL RULES OF PROF'L CONDUCT r. 2.4. (AM. BAR ASS'N 2002). Connecticut, Massachusetts, New York, Rhode Island, and Vermont have adopted Rule 2.4. *See* CONN. RULES OF PROF'L CONDUCT r. 2.4 (2007); N.H. RULES OF PROF'L CONDUCT r. 2.4 (2009); MASS. RULES OF PROF'L CONDUCT r. 2.4 (2015); N.Y. RULES OF PROF'L CONDUCT r. 2.4 (2009); R.I. RULES OF PROF'L CONDUCT r. 2.4 (2018); VT. RULES OF PROF'L CONDUCT r. 2.4 (2009). Within the geographic area represented by the Consortium, the Model Rules have been adopted by: Connecticut (1986); New Hampshire (1986); Rhode Island (1988); Massachusetts (1997); Vermont (1999); New York (2009); and Maine (2009). *See Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (Aug. 7, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.

107 1 COLE ET AL., *supra* note 84, § 10:2.

108 *See supra* note 76.

neutral, whether mediator, arbitrator or administrative law judge from following the Rule as a matter of best practices.[109]

The importance of this division of roles is a recurring problem for neutrals, whether they are serving in an adjudicatory capacity—deciding improper practice or unfair labor practice claims, or acting as arbitrators—or as mediators. While identification of the different roles played by a neutral, and ensuring that the difference is clearly explained to the pro se litigant is a critical first step, it is not in itself sufficient.

When a party appears at the hearing without representation and it is apparent that the party has little understanding as to the nature of the hearing, and lacks familiarity with its procedures, the ALJ must act carefully.[110] On the one hand, the ALJ cannot become the party's advocate.[111] That would cast the ALJ in an adversary role rather than as a neutral.[112] On the other hand, the ALJ cannot just sit back and the unrepresented party be taken advantage of or lose the hearing merely because the party did not know what to do.[113]

B. Information and Access

Based on an assessment of various methods of providing information to unrepresented litigants adopted by the courts, Richard Zorza recommended several proposals for administrative adjudicative agency reform.[114] First, he finds that there is no inconsistency between the neutrality of a forum and providing detailed and engaged information to assist parties.[115] Second, he argues that while technology can provide

109 *See* CODE OF PROF'L RESPONSIBILITY FOR ARBITRATORS OF LABOR-MGMT. DISPUTES (AM. ARBITRATION ASS'N 2007); MODEL CODE FOR STATE ADMIN. LAW JUDGES (NAT'L ASS'N OF ADMIN. LAW JUDICIARY 1993). Although the National Academy of Arbitrators provides ethical guidance in the form of advisory opinions, none of those published to date addresses such cases. *See generally* Kristen M. Blankley, *Taming the Wild West of Arbitration Ethics*, 60 U. KAN. L. REV. 925 (2012); Barry Winograd, *Developing Standards of Professional Responsibility in Mandatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 61 (2014). Accordingly, while some of the considerations addressed here may reasonably be applied to arbitration, no specific reference will be made to arbitration here. It should be noted that, although some scholars have characterized arbitration ethics as the "Wild West," proposals for continued development of ethical rules for arbitrators are ongoing.

110 N.Y. MANUAL FOR ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS ch. 5 (N.Y.S. DEP'T OF CIVIL SERVICE 2002).

111 *Id.*

112 *Id.*

113 *Id.*

114 Richard Zorza, *Self-Represented Litigants and the Access to Justice Revolution in the State Courts; Cross-Pollinating Perspectives Toward a Dialogue for Innovation in the Courts and the Administrative Law System*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 63, 76-78 (2009).

115 *Id.* at 76.

access to information, its deployment must always consider the human needs of its users.[116] Third, courts must take greater management responsibility in self-represented cases to ensure that cases are moving along.[117] Fourth, court managers and innovators should assess the entire system from the perspective of the litigant.[118] Lastly, the best way to make change is to ensure the front end of the system is operating effectively.[119]

C. Conduct at the Hearing

Very little concrete guidance exists regarding the ethical duties of administrative law judges and similarly situated neutrals in obtaining a complete record in a case in which one or more of the litigants appears pro se.

One well known manual for administrative law judges focuses predominantly on the potential risks to an orderly hearing that can be presented by pro se litigants.[120] This manual cautions that "[t]he unrepresented party is more likely to be encountered in the 'simple' cases."[121] When such is the case, it may call for an ALJ with significant skill to properly deal with the inexperienced pro se party, and this is especially so for proceedings which are structurally more adversarial than Social Security disability cases.[122] Moreover, the manual cautions that a pro se party may have never been in a courtroom or hearing room before their case.[123] Due to these facts surrounding a pro se party's experience with the court system, an ALJ may be "whipsawed between complying with the mandate of reviewing courts—take the unrepresented party's circumstances into consideration—and the simple fact that the unrepresented party may be difficult to control." Simply put, "[t]his party may present the volatile combination of a weak case and strong feelings about the righteousness of his or her cause . . . [f]urthermore, pro se cases occasionally involve conflicting claims and

116 *Id.* at 77.

117 *Id.* at 77.

118 *Id.* at 78.

119 *Id.* at 78.

120 *See* Morell E. Mullins, *Manual for Administrative Law Judges*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES (2004).

121 *Id.* at 75.

122 *Id.* at 75.

123 *Id.*

personal animosity."[124] With the slightly bemused tone of personal experience, the manual wryly notes that "[a] relatively small amount of benefits or penalty sometimes generates more ill-will and hard feelings than larger sums."[125] More significantly, and even ominously, the manual warns that the ALJ "sometimes must make special efforts to calm witnesses who are frightened, confused, or angry and must be prepared to cope with intemperate outbursts and, if worse comes to worse, even physical violence."[126]

These problems may be particularly acute, the manual states, in enforcement cases brought by federal agencies, where the pro se party may be angry.[127] The manual claims that an even worse case exists where a pro se party tries to act like a lawyer based on how a lawyer is portrayed in the media, but has no actual understanding of what lawyers do and how they do it.[128]

While the difficulties sketched by this manual can eventuate in proceedings in which a party is self-represented, the manual does not address how to deal with these difficulties, nor with the duties of the ALJ in compiling a record.[129] Acknowledging the potential difficulties, one school of thought has frankly called for an active, situational balancing of the parties' interests in the context of the hearing.[130] This entails several things. First, it means guiding an unrepresented party through the hearing—without favoring them—by ensuring that a complete record of all relevant facts are made.[131] In doing so, this requires the ALJ to ask the party what their arguments are and what they want to prove.[132] Then, the party's response can guide the ALJ through the hearing.[133]

"The ALJ may also find it necessary to explain to such party the significance of references to statutes, rules and regulations referred to in

124 *Id.* at 75-76. However, pro se cases may be both meritorious and well presented, or even meritorious despite flawed presentation, as was the case in Gideon v. Wainwright. 372 U.S. 335 (1963).

125 *Id.* at 76.

126 *Id.*

127 *Id.* While the manual is directly addressing enforcement proceedings by "federal agencies," the concerns expressed are applicable to the more complex, and often lengthy, proceedings labor boards often conduct in improper practice or unlawful labor practice cases.

128 *Id.*

129 *See generally id.*

130 *See* N.Y. MANUAL FOR ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS ch. 5 (N.Y.S. DEP'T OF CIVIL SERVICE 2002).

131 *Id.* at 119.

132 *Id.* at 119-120.

133 *Id.* at 120.

the Notice of Hearing and the testimony."[134] Furthermore, the ALJ may find it necessary to clearly convey to the party the testimony of other witnesses if the ALJ believes that the pro party does not understood the testimony's meaning and significance.[135] According to the New York Manual, the key to effectively dealing with pro se parties is to present them with simple and short questions, and "making certain that they understand each stage of the hearing before proceeding to the next."[136] Then the ALJ can proceed while ensuring "the parties feel at ease and more readily responsive to all questions."[137]

The New York Manual further points out that, additionally, the ALJ may need to question the pro se party to both develop all the facts, and to assist the party in full presenting their case.[138] The ALJ may have a similar role with witnesses called by the pro se party, "especially when it is obvious the party does not know how to conduct a meaningful examination."[139] The New York Manual provides that such "responsibility extends to cross-examination of the represented party and that party's witnesses."[140] The ALJ may also have to protect the represented party from objectionable cross-examination.[141] Finally, the New York Manual stresses the importance that the ALJ remember "the distinction between the limited role of assisting the unrepresented party and the partisan role of advocate for the party."[142]

Professor Paris Baldacci has set out several models for an ALJ's proper role in ensuring the fair presentation of a case and the development of a full record: (1) "a more active role for ALJs within the strictures of the present system;" (2) taking full advantage of the informality and lack of technical rules in administrative hearings; and (3) adoption of an

134 *Id.* at 120.

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 *See id.*; *see also* Mullins, *supra* note 96, at 101-102 ("However, a witness may be comparatively inexperienced, unacquainted with judicial procedures, frightened, or nervous. In that case, the ALJ should tactfully put such witnesses at ease, protect them from improper questioning of counsel, interrupt when necessary to simplify or clarify questions, permit a certain amount of wandering and meandering testimony, and review with the witness any testimony that has become confused.").

inquisitorial system in which the ALJ has an affirmative duty to develop the record and identify controlling law.[143]

Like the New York Manual, Baldacci calls upon ALJs to not only prevent technical objections and rules from obstructing the development of a factual record, but to assist the unrepresented party to reach a sufficient level of comfort that she can articulate her claims fully.[144] His third option—the adoption of an inquisitorial system—would, as he concedes, represent a significant departure from the norms of judicial conduct expected of ALJs.[145] However, he contends that it might be productive in states where agencies have investigatory powers.[146]

V. CONCLUSION

The ethical concerns and rules applicable when a party is self-represented—or one or more parties are represented by non-lawyer union representatives or Labor Relations Specialists—are quite simply not settled. The NLRB's straightforward policy of holding such representatives to the ethical rules applicable to attorneys imports a highly complex regulatory scheme with many pitfalls for the unwary, in addition to canons or Code provisions that are of dubious applicability, and yet which might be invoked strategically.[147] Moreover, it puts the administrative agency in the position of enforcing the Code or the Canon on non-attorneys not directly subject to the strictures of either, which some agencies have demonstrated significant reluctance to administer.

However, the evolution of simpler norms, clearly understandable and more closely tethered to the actual practice at the bargaining table or before ALJs and boards, and enforceable by the neutral agencies, offers a potentially viable alternative. While the building up of such norms is nowhere near complete, resorting to the fundamental values embodied in the applicable labor relations statute—and, in particular, the reciprocal duties imposed on all parties under these statutes—can help to provide minimum baselines of the ethical duties owed by all, advocates and neutrals alike.

Finally, the rendering of unbundled legal services to pro se litigants and the sometimes-wavering line experienced advocates and neutral agencies are required to walk with respect to ensuring that such

143 *See* Paris R. Baldacci, *A Full and Fair Hearing: The Role of an ALJ in Assisting the Pro Se Litigant*, 27 J. NAT'L ASS'N ADMIN. L. JUDGES 447, 457, 465, 482 (2007).

144 *See id.*

145 *See id.*

146 *See id.*

147 *See ante*, text at notes 4-8.

unrepresented parties are afforded due process, without unbalancing their proper roles, demonstrate that solutions, however imperfect, can be found to such ethical challenges.