The Ethical Exploitation of the Unrepresented Consumer

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I. INTRODUCTION

The scales of justice suggest a fairness in the law – an implied warranty, perhaps, that what will weigh in the legal process is only that which should, and outcomes will be blind to that which should not. The reality is very different. In a system based on advocacy by champions, differences in talent, education or experience tilt the scales against the less competent, the mistaken, or the unlucky. These differentials are tolerated because the system is generally fair, and as a practical matter, inequities cannot be fully eradicated. An institutional distinction may be drawn, however, when a very different kind of thumb tilts the scales, and a distortion occurs that is not only knowingly exploited but is explicitly authorized by the rules of the system themselves. The professional ethics of the American bar overtly permit attorneys to knowingly exploit the ignorance and inexperience of unrepresented litigants. Something is foundationally amiss.

In a general sense, this observation is hardly new. Calls for a "civil *Gideon*"[1] have long been heard, and the debates have been fulsome between

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1. The single biggest change to our criminal justice system occurred on March 18, 1963, when Justice Black read the following excerpt aloud to the Court:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

those who believe that truth and right emerge from the unremitting clash of adversaries and those who believe otherwise. This Article examines some of those same questions, but in a particular setting that has not previously been discussed – civil actions brought by attorney-represented debt buyers against unrepresented debtors, to collect debts against which the statute of limitations has already run. The significance of this one setting is several-fold. Debt buying is, first, a surprisingly robust industry affecting a large and growing proportion of individual consumers.[2] More to the point, the collection actions which follow the purchase of stale debts typify a larger class of cases, in which the presumptions underlying the adversary system of justice fail more patently than elsewhere. And, finally, developing a solution for exploitative attorney conduct in this context is a useful contribution to the continuing examination of the larger problem of which this is a particularly pressing instance.

The following paradigm is typical[3]: An attorney is retained to represent a wealthy investor who purchases distressed assets. Specifically, the client purchases large portfolios of charged-off credit card debt at steeply discounted prices, after the applicable statutes of limitations have expired.[4] One-half of the attorney's business is attributable to this client. Among the purchased debts is a $10,000 Visa account on which the last payment had been made nine years earlier.[5] The limitations period in this state is five

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Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)); *see also* John A. Lentine, Gideon v. Wainwright *at Forty – Fulfilling the Promise?,* 26 AM. J. TRIAL ADVOC. 613, 618-19 (2003).

2. For 2007, net charge-offs totaled $43.9 billion – up 62.5% from $27 billion in 2006. FED. DEPOSIT INS. CORP., QUARTERLY BANKING PROFILE tbl.II-A, *available at* http://www4.fdic.gov/QBP/2007dec/all2a.html. The industry projects the sale of charged-off consumer debt to exceed $86 billion by 2010. Asset Acceptance Capital Corp., Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 10-K) 26, *available at* www.ticker.com/Annualreport/AACC/AACC-2003.pdf.

3. Civil litigation rates vary widely from state-to-state. *See* Richard M. Hynes, *Broke But Not Bankrupt: Consumer Debt Collection in State Courts,* 60 FLA. L. REV. 1, 4 (2008) (presenting evidence that Virginia courts average one civil filing per year for every five individuals residing in the state, and the majority of these civil filings seek to collect debt; further, most of these complaints result in entry of judgment in favor of the plaintiff).

4. Such investors are colloquially referred to in the industry as "debt buyers." Debt Buyers' Ass'n v. Snow, 481 F. Supp. 2d 1, 3 (D.D.C. 2006) (Debt buyers are "in the business of purchasing and collecting delinquent consumer loans and receivables. Rather than originating loans themselves, Debt Buyers generally purchase portfolios of consumer loans and receivables that have been in default for a significant period of time at a discount from lending institutions." (citations omitted)).

5. *See* Hynes, *supra* note 3, at 3 (explaining how most debtors refuse to pay and seek relief in a system of "informal bankruptcy" and that "[a]bout two-thirds of consumer-credit loans that banks charge off as uncollectible are not owed by consumers in bankruptcy").

years. The debt is therefore four years "out of statute" – a fact known to the client who owns the account, and to the lawyer retained to collect it. If the debtor were represented, the statute – an affirmative defense[6] – would be a complete bar to collection if it were raised, and malpractice on the part of the debtor's attorney if it were not. The consumer debtor, however, is almost always unrepresented[7] and unlikely to know much, if anything, about the statute of limitations or how to employ it in defense of the claim, even if it were understood. The debtor sees only this: an attorney (a professional licensed by the state) bringing a claim in a court (an extension of the state tasked to the cause of justice and application of the rule of law) asserting the validity of a debt. The typical consumer debtor would find it difficult to believe that a creditor's attorney could knowingly, and ethically, bring a lawsuit and obtain a judgment on an out-of-statute debt. But he can.[8]

It is ironic that an unrepresented debtor would rely on the superior knowledge and expertise of the opposing attorney. Bringing a lawsuit on an out-of-statute debt is, of course, nothing but bluffing. While such "bluffing" might be acceptable behavior between two professional advocates, each of whom presumably has the ability to assess the threat for themselves, against a layperson it is unsporting and coercive.[9] Even if a layperson does understand that some time limit might restrict the legal viability of an old debt, the mere fact that an attorney has filed a claim with a court is too often a persuasive representation that *this* debt is not time-barred. The result, most often, is a judgment against the consumer debtor who typically defaults or, less typically, appears *pro se*[10] but without the knowledge or skill to use the statute effec-

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6. *See* FED. R. CIV. P. 8(c) (providing that failure to plead an affirmative defense in federal court results in a waiver of that defense and exclusion of it from that case); *see also* 28 C.F.R. § 76.9(c)(1) (2007) (maintaining that facts supporting affirmative defenses must be included in the responsive pleadings).

7. Beth Healy, *Dignity Faces a Steamroller: Small-claims Proceedings Ignore Rights, Tilt to Collectors*, BOSTON GLOBE, July 31, 2006, at A1 (estimating that 80% of people sued for debts in Massachusetts courts fail to appear at all).

8. Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA,* 79 S. CAL. L. REV. 711, 746 (2006) ("Debt-collection industry leaders firmly deny that they have engaged in any misconduct and claim that all of their suits are backed by the necessary documentation."). *But see infra* note 137 and accompanying text.

9. Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice,* 58 B.U. L. REV. 337, 385 (1978) ("Psychological manipulation and control are no less coercive because they are subtle.").

10. BLACK'S LAW DICTIONARY 1258 (8th ed. 2004) (defining pro se as "[f]or oneself; on one's own behalf; without a lawyer," which means a person who represents himself or herself in a court proceeding without assistance of counsel; also termed pro persona, abbreviated pro per); *see, e.g.*, Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance,* 40 FAM. CT. REV. 36, 36 n.1 (2002) (identifying the interchangeable use

tively within the narrow "raise it or waive it" time.[11] The judgment gives new life to the debt, and supports collection efforts no longer barred by the passage of time. The judgment of the court has blessed the unethical exploitation of unrepresented consumer debtors. The unrepresented consumer[12] is thus the source of a financial windfall[13] to the consumer debt industry, and the behavior of attorneys working in the industry is ethically approved in the name of zealous advocacy.[14]

This result cannot be easily dismissed as the ineradicable difference in skill between opponents.[15] It is an unjust tilting of the scale in favor of the represented party – *contrary to the legal policies underlying the period of limitations*[16] – flowing simply from disparate means, opportunity, and know-

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between the terms pro se and pro per); *see also* 28 U.S.C. § 1654 (2000) (granting civil litigants the statutory right to appear pro se or by counsel).

11. Attorneys are privately paid professionals who wield the power of the default judgment, which once entered is enforced by the state. *See* Paul Taylor, *The Difference Between Filing Lawsuits and Selling Widgets: The Lost Understanding that Some Attorneys' Exercise of State Power Is Subject to Appropriate Regulation*, 4 PIERCE L. REV. 45 (2005). For default rates, see *supra* note 3.

12. The complexities of multi-party litigation are not relevant to this Article. The terms plaintiff and defendant will be used in their simplest form – the former describing the filing party and the latter referring to the party defending the filed claim.

13. Windfall is defined as "[a]n unanticipated benefit, [usually] in the form of a profit and not caused by the recipient." BLACK'S LAW DICTIONARY, *supra* note 10, at 1631. Such a judgment is a windfall because minimally competent representation of the defendant would preclude the entry of this judgment.

14. Duties were qualified by the ABA as "zealous" in both the 1908 Canons of Professional Ethics and the 1969 Code of Professional Responsibility. *See* ABA CANONS OF PROF'L ETHICS Canon 15 (1908); MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1969). The latest iteration of ABA ethical rules (Model Rules of Professional Conduct) requires no duty of zealous representation. The emphasis has shifted to "competent" and "diligent" representation. MODEL RULES OF PROF'L CONDUCT R. 1.1 & 1.3 (2007). However, the concept of "zealous representation" has not been completely excised from the Rules: it appears twice in the Preamble (in reference to litigation) and again in the Comment of Rule 1.3. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. & pmbl. (2007).

15. ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 122 (2001) ("In a lawyer-dominated litigation system even small differences in opposing counsel can make a big difference. Gerald Williams divided forty Iowa lawyers into pairs, gave them identical case files . . . and asked them to negotiate a settlement. Among the fourteen pairs who completed the exercise and were willing to submit a signed statement of results, settlements ranged from $15,000 to $95,000, and none were within 20 percent, plus or minus, of the average settlement.").

16. Statutes of limitation are justified as serving three overarching purposes: fairness, efficiency, and institutional legitimacy. Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation,* 74 GEO. WASH. L. REV. 68, 74-75 (2005). Statutes of limitation promote fairness by limiting plaintiff misconduct, offering repose for the defendant, fostering accurate fact finding,

ledge. It supports the truism that justice is more available to those who can afford it.[17] Worse still, it is like fishing with dynamite – as the unrepresented consumer does not have a sporting chance.[18]

The attorney's conduct in the debt-buying vignette rests on the false premise that lies at the core of the American civil justice system: The foundational myth[19] is that the adversarial process works because the robust advocacy by the interests on opposing sides will illuminate for the neutral decision-maker the errors and excesses of each. A core presumption fails when one party is represented and the other is not. In the face of this foundational failure, the complex rules of engagement make no concession to modify an attorney's behavior or alter professional ethics. To the contrary, an irony inheres when the adversarial system itself is perverting the laws that allow, nay encourage, an unrepresented party to be exploited by counsel. When an attorney is expected to capitalize upon every opportunity to advance the client's case, including the advantage born of the opponent's mistakes, foibles, or incompetence, and the codes of professional responsibility and the structure of the adversarial system provide normative standards by which exploitation is not just tolerated, but effectively encouraged, exploitation of the unrepresented party is sanctioned.[20] Such a flaw is not a mere blemish, but a founda-

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protecting fairness for the defendant, and encouraging diligence. *Id.* at 75-78; *see also* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 457 (1997). Commentators criticize the sometimes harsh effect of these statutes, in that a party with an otherwise valid claim is precluded from seeking legal remedies. Justice Holmes observed, "[I]f a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897). It is important to discourage intentionally dilatory or inadvertently negligent conduct, while rewarding expediency. *See* Malveaux, *supra* at 78; *see also* Ochoa & Wistrich, *supra* at 456.

17. Max B. Baker, *Justice Should Not Be a Matter of Money, Judge Tells Law Students*, FORT WORTH STAR-TELEGRAM, Aug. 25, 2001, at 2, 2 ("'If our justice system is not available to everyone, if the doors are closed because someone cannot afford it, then we have no justice system, and it doesn't work' . . . .").

18. For the reader upon whom this analogy is lost, see A. Charlotte de Fontaubert et al., *Biodiversity in the Seas: Implementing the Convention on Biological Diversity in Marine and Coastal Habitats*, 10 GEO. INT'L ENVTL. L. REV. 753, 782 (1998) (explaining the fishing practice of throwing dynamite in the water to catch large numbers of fish).

19. *See* Franklin Delano Strier, *The* Real *Crisis in the Courts*, HUMANIST, Mar.-Apr. 1988, at 5, 6-7 ("The theoretical cornerstone of the adversary system is that the opposing sides are *roughly equally matched*. Critics refer to this dubious supposition as 'the adversary myth.' As the gap between the ideal and reality of equality widens, the putative benefits of the system correspondingly diminish. Yet, the gap is undeniable.").

20. For more than forty years, ethical opinions issued by the American Bar Association have established that it is ethical and permissible to file an action in the face of a dispositive affirmative defense, such as the statute of limitations. *See, e.g.,* ABA

tional crack. The result is not merely injustice to the unrepresented and a windfall to the unscrupulous, but a perversion of applicable law that is effected by the justice system itself. The bottom line is plain: these distortions will continue to occur until lawyers' professional ethics are made to accommodate the failure of the core assumptions underlying the adversarial system itself.

This article begins in Section I with a brief overview of the debt industry. Section II describes the circumstances of an unrepresented defendant in the adversarial system of justice. The conventional codes of professional responsibility are weighed against a broader framework of normative ethics in Section III. Section IV illustrates how the particulars of the debt-buying setting are emblematic of broader issues. Two solutions are then discussed in Section V: One broadly targets the failure of attorneys' ethical codes to account for the collapse of the adversarial myth in cases involving unrepresented litigants; the other is a more tailored solution that addresses the specific abuses in the industry which serves as the concrete setting for this Article.

II. DEBT-BUYERS AND THEIR ATTORNEYS

The focus of this Article is debt-buying, "'one of the sexiest, one of the most financially lucrative businesses you can get into.'"[21] It is nevertheless a segment of the debt industry[22] that has received virtually no legislative or scholarly attention.[23] Flourishing in this relative obscurity, the industry's attorneys (representing debt buyers or buying debts themselves) engage in behaviors unknown to anyone other than industry insiders.[24] Large debt-

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Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) (stating that an attorney is not barred legally or ethically from bringing a claim because the statute of limitations has run); *see also* MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975) (supporting the ethic of zealous advocacy). *But see* David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83 (David Luban ed., 1983) (arguing for limitations on the ethic of zealous advocacy).

21. Walter V. Robinson & Beth Healy, *Regulators, Policy Makers Seldom Intervene,* BOSTON GLOBE, Aug. 2, 2006, at A1 (quoting Donald Friedman, the chief operating officer of debt buyer Liberty Point Corporation).

22. The "debt industry" is a broad term with a myriad of definitional possibilities. This Article uses "debt industry" to reference the segment of the debt industry that buys, resells, and collects charged-off credit card debt. For a general discussion of the debt collection industry, see Goldberg, *supra* note 8.

23. The majority of attention has come from newspaper and media. The debt-buying industry has received little scholarly attention. *See, e.g.*, Goldberg, *supra* note 8; Baker, *supra* note 17; Healy, *supra* note 7; Robinson & Healy, *supra* note 21.

24. Sewell Chan, *An Outcry Rises as Debt Collectors Play Rough,* N.Y. TIMES, July 5, 2006, at A1. The Federal Trade Commission received 66,627 consumer complaints concerning improper debt collection practices in 2005, increased from 11,820 in 1999. *Id.*

buyers in today's debt industry reap staggering profits by methodically cleaning financial carcasses left abandoned as recently as a decade ago.[25]

The opportunities come about easily enough. A consumer (or "debtor") has a credit card issued by the originator of the account, referred to as the credit grantor or credit card issuer.[26] The debtor tenders the card at the point of sale to pay for goods or services, and in turn the credit grantor sends a statement to the consumer itemizing the debits incurred and the outstanding balance owed. For financial accounting purposes, the outstanding balances are treated as current assets or "accounts receivable."[27] Inevitably, a percentage of debtors fail to pay part or all of their outstanding balances. After a period of continued non-payment, the unpaid accounts are categorized as worthless assets to the credit grantor.[28] To be entitled to a bad-debt deduction under the Internal Revenue Code, the credit grantor must "charge-off" the portion of any debt that becomes worthless.[29] To satisfy this requirement, the credit grantor must remove the debt from the assets on its balance sheet.[30]

These charged-off credit card receivables[31] are the debt instruments at the focus of this Article. A credit card account is characterized as a "charge-off" account (or worthless account for taxable purposes) when no payment has been received on the account for 180 days. Approximately 6% of all

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25. *See, e.g.*, ASSET ACCEPTANCE CAPITAL CORP., 2005 ANNUAL REPORT 3, *available at* http://library.corporate-ir.net/library/14/148/148416/items/191918/2005AR.pdf (discussing how the AAC was founded over forty years ago and between 1996 and 2005 had grown from an corporation who had only thirty-seven employees to employing over 2,000 employees in eleven offices nationwide and spending a staggering $102.3 million to purchase consumer debt portfolios with a face value of $4.2 billion); *see generally* Suein Hwang, *Small Claims: Once-Ignored Consumer Debts Are Focus of Booming Industry --- Asset Acceptance, a New Type of Collector, Hits Paydirt Suing for Modest Sums --- Some Fight Back -- and Win*, WALL ST. J., Oct. 25, 2004, at A1 (identifying three debt buying industry giants but dubbing Asset Acceptance Corporation (AAC) "king of debt buyers").

26. For purposes of this Article, the term "credit grantor" is used synonymously with the term "credit card issuer." Both terms are used in this article to refer to an originator of a consumer credit account, e.g., Discover Card, American Express.

27. *See* Treas. Reg. § 301.6323(c)-1(c)(2)(ii) (2007) (defining "[a]n account receivable" as "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper").

28. *See* Treas. Reg. § 1.593-1(a) (2008) (referring to bad debts as "specific debts which become worthless in whole or in part").

29. Michael G. Frankel et al., *Real Estate Workouts -- A Step by Step Analysis,* 699 PRACTISING L. INST., TAX L. & ESTATE PLAN. COURSE HANDBOOK SERIES 139, 168 (2006); *see* 26 I.R.C. § 166(a)(2) (2000) (allowing for the deduction).

30. Frankel et al., *supra* note 29, at 168.

31. Credit card receivables are debt instruments that represent a present debt obligation that is due and owing. From this point forth, the term "credit card receivables" will be used only in the context of "charged-off credit card receivables." *See* Treas. Reg. § 301.6323(c)-1(c)(2)(ii) (2007).

personal credit card accounts are charged off annually.[32] This percentage is generally within the control of the credit card issuers and therefore remains relatively static.[33] Nevertheless, as American consumers utilize credit cards to pay for almost one of every four purchases, the growing reliance on credit card debt results in a corresponding rise in both the number of credit card accounts and the number of accounts charged off. [34]

Although charged-off credit card accounts are removed from the books of the credit grantor as worthless, the credit issuer will either retain ownership of the supposedly "worthless" accounts or sell the accounts to a third-party assignee.[35] The third-party assignees who pay pennies on the dollar[36] to purchase bundles or "portfolios" [37] of charged-off credit card accounts are referred to in the industry as "debt-buyers."[38]

The debt-buying industry is a rapidly growing infant compared to other areas of financial investment.[39] It has been less than twenty years since the first debt portfolio sales, in which time debt buying has become a lucrative industry of its own.[40] It now ranks among the fastest growing sectors of all

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32. Darren Waggoner, *Debt Buyers in the Public Eye,* CREDIT & COLLECTIONS WORLD SPECIAL REP., June 2004, at 56, *available at* http://www.creditcollectionsworld.com/cgi-bin/readstory2.pl?story=20040601CCRU262.xml.

33. Mark H. Adelson, *Trends in Securitization: Commentary From a Rating Agency Perspective*, 747 PRACTISING L. INST., COM. L. & PRACTICE COURSE HANDBOOK SERIES 91, 109 (1996).

34. This predilection to use credit cards for consumer purchases is not typical of other industrialized nations, and there is no indication that global stasis is forthcoming, as American reliance upon credit cards increases with each generation. *See* Ronald J. Mann, *Credit Cards and Debit Cards in the United States and Japan*, 55 VAND. L. REV. 1055, 1057 (2002) ("[A]t least in the United States, leading scholars associate the credit card with an embarrassingly high rate of consumer bankruptcy – generally the highest of any industrialized country.").

35. *See* Stephen L. Sepinuck, *Classifying Credit Card Receivables Under the U.C.C.: Playing with Instruments?*, 32 ARIZ. L. REV. 789, 790 (1990).

36. *See* Goldberg, *supra* note 8, at 725.

37. For purposes of this Article, a portfolio is a compilation of two or more charged-off credit card accounts. The portfolio may be arranged by a static attribute, such as state of residence or date of last payment. There are endless ways in which a portfolio may be artfully compiled, in an attempt to maximize its value.

38. A partial loss deduction is available to the credit card lender for any amounts not recouped through the sale, which offsets the tax obligation owed by the credit card lender.

39. *See, e.g.*, Waggoner, *supra* note 32, at 56 (Rising purchase prices directly impact profit margins and astronomical profit margins of the 1990s have faded into memory. According to Dr. Gary Wood, president of one of the leading privately held debt buyers in the United States, "'[I]t's not unexpected. We've said that this is inevitable. A free marketplace won't sustain the kinds of margins that existed three or four years ago.'").

40. Goldberg, *supra* note 8, at 725.

financial services,[41] and is projected by the Bureau of Labor and Statistics to grow by 21% to 35% by the year 2010.[42] Portfolio sales that amounted to $660 million in 1993 grew by 2003 to include $53.7 billion dollars of charged-off credit debt.[43] Overall consumer debt increased 37% between 1997 and 2002, totaling $1.7 trillion.[44] Of the roughly 6% of all consumer accounts that are charged off each year, fully half are sold to investors.[45] The significance of the actions of debt-buyers – and of their attorneys – can be seen in the industry's own projection that sales of charged-off consumer debt will exceed $86 billion by 2010.[46]

The details of how the debt-buying marketplace evolved are beyond the scope of this Article, but for one important development.[47] Despite the meteoric profit margins available during the early years, blue-chip investors did not participate in the debt-buying marketplace until the end of the 1990s.[48] Around the turn of the millennium, the impressive profit margins of the 1990s, combined with increased consumer spending and burgeoning portfolio sales, attracted the attention of institutional investors.[49]

The arrival of the institutional investors caused a dramatic market shift. The flood of institutional capital – by cause, effect or coincidence[50] – marked

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41. Michael Rezendes & Francie Latour, *No Mercy for Consumers, Firms' Tactics Are One Mark of a System that Penalizes Those Who Owe,* BOSTON GLOBE, July 31, 2006, at A1.

42. Goldberg, *supra* note 8, at 727.

43. *Compare* Hwang, *supra* note 25 (reporting that charged-off credit card sales in 2003 reached an estimated $57.3 billion), *with* Waggoner, *supra* note 32, at 56 (reporting that charged-off credit card sales in 2003 reached an estimated $43 billion, an increase of 19% from total sales in 2002), *and* Ellen Florian Kratz, *Profiting From the Bankruptcy Bill*, FORTUNE, May 2, 2005, *available at* http://www.pbs.org/wsw/news/fortunearticle_20050502_01.html ("In the past two years Asta [Funding] has spent $254 million to purchase $7.3 billion of debt obligations, more than any of its peers.").

44. Goldberg, *supra* note 8, at 727 (discussing consumer debt statistics provided by the Federal Reserve).

45. Waggoner, *supra* note 32, at 56.

46. Asset Acceptance Capital Corp., *supra* note 2 ("According to The Nilson Report, net charge-offs of credit card debt have increased from $8.2 billion in 1990 to $51.1 billion in 2002," a compound annual growth rate of 16.5%.").

47. Few are aware that the heavily criticized bankruptcy bill was a coup to the debt-buying and collection industries. New bankruptcy laws make it more difficult for consumers to escape their obligations and promise a growing supply of charge-off accounts to debt buyers. Charged-off accounts are cornerstone of the debt buying industry, and debt buyers have a political interest in preserving their inventory. Kratz, *supra* note 43.

48. *See* Waggoner, *supra* note 32, at 56.

49. *Id.*

50. It is outside of the scope of this Article to discuss and debate the merits of cause, effect, or pure coincidence in its relationship to the rise of debt portfolio purchase prices to record highs.

a rise in the purchase price of debt portfolios to an historical apogee.[51] The staggering rise in purchase price and the corresponding decrease in profits were anything but gradual.[52]

Increased demand and burgeoning prices squeeze profit margins, which in turn move industry leaders to exercise ingenuity and creativity to develop innovative collection strategies.[53] Litigation – a collection tactic heavily subsidized by the public – proved to be a lucrative and easily available tool by which to mulct payment from charged-off accounts.[54] Asset Acceptance Corporation (dubbed the "king of debt buyers" by the Wall Street Journal)[55] recently reported that legal collections account for almost one-third of its revenues,[56] which quadrupled from $12.2 million to $51.3 million between 2001 and 2005.[57] If imitation is the highest form of flattery, the early entrants must be pleased. Debt-buyers are relying more heavily upon legal actions than ever before,[58] often maintaining nationwide networks of attorneys to whom accounts are referred and by whom lawsuits are filed and remedies pursued.[59]

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51. Darren Waggoner, *Bad Debt's Mind Games,* CREDIT & COLLECTIONS WORLD REPORT, April 2005, at 38, *available at* http://goliath.ecnext.com/coms2/gi_0198-216320/Bad-Debt-s-Mind-Games.html ("[I]t's not unexpected. We've said that this is inevitable. A free marketplace won't sustain the kinds of margins that existed three or four years ago."); *see also* Waggoner, *supra* note 32, at 56 (Purchasing price for a portfolio hinges upon market conditions and account attributes. Aging of the accounts in the portfolio is one attribute that will substantially impact and reduce the value of the portfolio.).

52. In 2002, freshly charged-off credit card receivables were being sold directly by the largest nationwide credit card issuers for a price of 4.75 cents. At an industry convention in July 2006, a veteran debt buyer confided that these same accounts are being sold for all-time highs ranging between 11 cents and 15 cents.

53. Waggoner, *supra* note 32, at 56 ("[T]he nature of more investor money seeking growth opportunities has upped demand and ultimately pushed prices higher . . . . But when prices inch higher, they can also squeeze profit margins for the majority of less-than-well-heeled buyers.").

54. Goldberg, *supra* note 8, at 744.

55. Hwang, *supra* note 25, at A1.

56. Hwang, *supra* note 25, at A1; *see also* ASSET ACCEPTANCE CAPITAL CORP., *supra* note 25, at 3 (disclosing company revenues at $252.7 million in 2005).

57. ASSET ACCEPTANCE CAPITAL CORP., *supra* note 25, at 3 (reporting a substantial increase in net revenues from $12.2 million to $51.3 million, and gross income up to $252.7 million in 2005).

58. Goldberg, *supra* note 8, at 742; *see, e.g.*, Hwang, *supra* note 25, at A1 (reporting 4% increase in profits generated from legal collections in the second quarter after Portfolio Recovery Associates, a debt buyer, went public).

59. Capital One Financial Corporation is a well-known nationwide credit card issuer. In the past four years, on balances below $2,000, Capital One has filed more than 38,000 small-claims lawsuits in the state of Massachusetts alone. Healy, *supra* note 7, at A1.

Conservative estimates suggest that 70% to 90% of debt collection lawsuits brought against unrepresented defendants result in default judgments.[60] The debtor is unrepresented by counsel, fails to appear, and judgment by default is entered as a matter of course, without any judicial scrutiny of the validity of the debt.[61] Post-judgment remedies may include property seizure, residential liens, or wage garnishment.[62] With added interest, costs, and fees, the judgment may amount to more than 300% of the balance originally owed.[63]

Civil lawsuits to recover charged-off credit card debt are limited by state statutes of limitation.[64] After the specified time has passed, an otherwise meritorious action to recover a debt is time-barred, without consideration of the substantive merits, thereafter averting creditors' efforts at collection.[65] In the majority of states, the running of the statute does not extinguish the under-

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60. *See* Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 119 (1997) (referring to consumer cases); *see also* DAVID CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 8-9, 215-21 (1974) (discussing interviews of more than 1,000 consumers who were sued in Chicago, Detroit, and New York City and how default judgments were entered on approximately 91% of cases filed in Chicago, 91% in Detroit, and 92% in New York City); Healy, *supra* note 7, at A1 (clerks and lawyers in Massachusetts estimate that 80% of people sued for debts in Massachusetts courts fail to appear at all).

61. Engler, *supra* note 60, at 118 & n.174.

62. *See* Healy, *supra* note 7, at A1; Editorial, *Small Claims, Big Abuses*, BOSTON GLOBE, Aug. 1, 2006, at A12 ("Roughly 80 percent of people sued for debts don't show up and lose by default, making them vulnerable to property seizure, wage attachments, and arrest warrants.").

63. Goldberg, *supra* note 8, at 744 n.205. ("For example, one woman defaulted on $1500. Asset Acceptance obtained a judgment for over $7000. Another woman defaulted on $3000 and Asset Acceptance was awarded a judgment of $9500, including legal fees.")

64. Statutes of limitation are procedural rules that affix a time limit during which a civil suit must be filed. Paul D. Rheingold, *Solving Statutes of Limitation Problems*, 4 AM. JUR. TRIALS 441, § 2 (1966 & Supp. 2008) (asserting that every state has a comprehensive set of statutes that limits the timeframe in which each specific type of claim may be brought); *see* Ochoa & Wistrich, *supra* note 16, at 454; *see also* Note, *Developments in the Law: Statutes of Limitations,* 63 HARV. L. REV. 1177, 1179 (1950).

65. *See* Ochoa & Wistrich, *supra* note 16, at 454 (in limited circumstances, a number of limiting principles and equitable considerations will soften the otherwise harsh application of these statutes). Some commentators believe that statutes of limitations have an overall harsh effect, in that a party with an otherwise valid legal claim is precluded from seeking legal remedies merely due to the passage of time. More than a century ago, the esteemed Justice Oliver Wendell Holmes questioned, "[W]hat is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?" Holmes, *supra* note 16, at 469.

lying debt – it merely bars the right to collect it through judicial procedures.[66] A barred debt is therefore worth less to a debt buyer than the same debt would be if the statute had not run.[67] If the debt can be collected nevertheless, it has some market value; as prices of saleable debt rise, debt-buyers have come to purchase less desirable but less expensive portfolios of accounts, including those on which the statute of limitations has already run.[68]

The Fair Debt Collections Practices Act ("FDCPA") and parallel statutes in the states prohibit debt collectors from making false or misleading statements in the collection of a debt.[69] Consumer advocates have argued that any collection activity on a time-barred debt misrepresents the legal status of the debt and therefore violates the FDCPA.[70] There is some authority for that proposition,[71] but the issue has not been definitively resolved. It remains an occasion for caution among some debt collectors and their lawyers.[72] The absence of a definitive answer also remains an occasion for permission – as if only positive law defines ethical boundaries, and all that matters is the inapplicability of a federal statute that would outlaw suing to collect debts for

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66. Charles V. Gall, *Proceeding with Caution: Collecting Time-Barred Debts,* 56 CONSUMER FIN. L.Q. REP. 244, 249 (2002), *available at* http://www.dltattorneys.com/CM/Articles/ProceedingwithCaution.pdf (distinguishing a debt collector's legal right to collect the debt from filing an action in a court of law to enforce the debt).

67. *See, e.g.*, The Sagres Company, We Buy Debt, http://www.sagresco.com/spages/sbuying.asp (last visited July 12, 2008). The company claims to be an experienced investor purchasing over one billion dollars of debt. *Id.* The company provides that the following data is needed for them to effectively review and price a portfolio: account number, principal balance, address (only state required), *charge-off date*, *loan pen date*, and *last Pay date*. *Id.*

68. Jim Gillies, *The Best Small Cap for 2007: Portfolio Recovery Associates*, MOTLEY FOOL, Dec. 7, 2008, http://www.fool.com/investing/small-cap/2006/12/07/the-best-small-cap-for-2007-portfolio-recovery-ass.aspx. ("Bad debt buyers, by definition, buy someone else's problems. This requires a shrewd understanding of which debts may truly be worthless, and which may yet yield cash.").

69. *See* Gall, *supra* note 66, at 244. *See, e.g.*, 15 U.S.C. §§ 1692e(2)(A), 1692f (2000) (prohibiting debt collectors from falsely representing "the character, amount, or legal status of a debt" or using "unfair or unconscionable means to collect or attempt to collect any debt").

70. *See also* ACA Int'l, Fastfax, Statutes of Limitations: Setting the Record Straight (Mar. 29, 2005).

71. *See, e.g.*, Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1487 (M.D. Ala. 1987).

72. *See* Gall, *supra* note 66, at 244 (considering if collection or legal action upon a time-barred debt rises to the level of false, deceptive, or misleading representations prohibited under the FDCPA); *see also* ACA Fastfax, Statutes of Limitations: Setting the Record Straight, Mar. 29, 2005 ("Since the controversy surrounding a debt collector's ability to collect a time-barred debt has not yet been completely settled, collectors should consult their own attorneys and exercise due diligence in collecting on accounts where the statute of limitations has expired.").

which suit is known to be barred.[73] As a way to isolate and highlight the issues of professional ethics this setting poses, the following analysis considers only the conduct of attorneys who believe that such efforts at collection do *not* violate the FDCPA.[74]

The ethical environment of stale debt buying has a number of dramatic dimensions: The debt-buying industry is still in its infancy and is not heavily regulated; the consumers, who for whatever reason have shunned the protections of bankruptcy, are delinquent and, one could rationalize, irresponsible if not venal. They lack the ability to retain counsel, yet they are not politically attractive. Most pointedly, however, the ethical situation is neither accidental nor artifactual. While many ethical issues arise for lawyers in the course of a representation, the general outlines of which may be beyond fault, in this setting the remedy of legal collection is known to be barred from the moment the debt is acquired; and the attorney who agrees to represent the debt-buyer has undertaken ab initio to act as counsel in a matter which that attorney knows would be fruitless, that is, if the debtor were anything other than unrepresented. This is not the paradigm of the debates that generally populate the literature of lawyers' ethics. It is not a question of cross-examining a

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73. In 2007, 4,195 FDCPA lawsuits were filed nationally. FDCPA Case Listing Service LLC, http://www.fdcpacases.com (last visited Mar. 6, 2008). The website provides that the industry has "a new class of 'professional debtor' and attorneys that represent them." *Id.* The industry created a national FDCPA litigation tracking resource known as the FDCPA Case Listing Service LLC. *Id.* The average consumer with bad debt has accumulated more than four charged-off accounts. *Id.* Subscription to this service will provide a debt collector with the name(s) of the debtors who have retained counsel and filed an FDCPA suit. *Id.* The other debt collectors may then check their files to determine if they have additional accounts pertaining to this debtor. *Id.* This will allow debt collectors to proceed carefully (or not at all) on the accounts of consumers with "a higher propensity for litigation." *Id.*

74. *Compare* Abels v. JBC Legal Group, 428 F. Supp. 2d 1023, 1026 (N.D. Cal. 2005), *and* Freyermuth v. Credit Bureau Servs., Inc., 248 F.3d 767, 771 (8th Cir. 2001) (failing to dismiss debt collection actions solely because the statute of limitations had run), *with* Goins v. JBC & Assocs., 352 F. Supp. 2d 262 (D. Conn. 2005), *and* Perretta v. Capital Acquisitions & Mgmt. Co., No. C-02-05561 RMW, 2003 WL 21383757 (N.D. Cal. May 5, 2003) (dismissing collection proceedings against the debtor, the court found it persuasive yet not dispositive that the statute of limitations had run). Regardless, the remote threat of a class action is not deleterious for many attorneys in this industry. Debtors are not well heeled and are likely unrepresented. Assuming an FDCPA violation has occurred, it will not likely be pursued because the debtor is not represented. Therefore, the ethical considerations raised in this Article would go unnoticed. *See* Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 NEB. L. REV. 762, 825 (2005) (Existing since 1977, the FDCPA continues to possess numerous provisions which ultimately pose problems or remain unclear.). The presently unanswered question, as to whether applicable provisions of the FDCPA are violated when the attorney initiates legal action upon a time-barred debt, will be considered in a subsequent Article. *See generally* Gall, *supra* note 66.

truthful witness in a way calculated to make the witness appear to be lying. It is not a question of defending against criminal charges a client suspected or known to have committed the acts alleged. All of that occurs in court, before a neutral umpire, in a clash of roughly matched champions – namely, in a setting in which the premises of adversarial adjudication are close to being true. The "ethical" pursuit of stale debts on behalf of debt buyers and against unrepresented consumer debtors, on the other hand, does not occur in court, is not exhibited to a neutral umpire, is not burnished by the clash of champions, and is *intended* to exploit the very absence of those same foundational presumptions. Could this possibly be "ethical"?

III. THE ADVERSARIAL SYSTEM & THE UNREPRESENTED LITIGANT

A. The Adversarial System of Justice

The Anglo-American adversary system[75] has been described as a "sporting" system of justice.[76] Its roots lie in classical philosophy, which has long embraced debate and argument as the method of deriving truth.[77] Truth, or at least justice where truth cannot be ascertained, is found in evidence and argument offered to a court by contending partisans, each parsing and refuting – and thereby showing the flaws in – the version of reality painted by his opponent.[78] The process is governed by a set of complex rules of engagement, enforced by a neutral referee who may not arm or assist either side.[79] Other than actively enforcing the rules of the tribunal, the judge is expected to be passive rather than inquisitorial, leaving to each party the job of responding to the assertions of the other. Judges respond to affirmative requests made to the court,[80] often in the form of objections or motions; but, with ex-

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75. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World,* 1 J. INST. FOR STUDY LEGAL ETHICS 49, 65 (1996).

76. Goldschmidt, *supra* note 10, at 41 (asserting that our adversarial system of justice has borrowed perhaps too heavily from the language and concepts of both sports and war); *see* Menkel-Meadow, *supra* note 75, at 52 n.21.

77. *See* Menkel-Meadow, *supra* note 75, at 52 n.21.

78. *Id.* at 54 n.25; *see also* Brian C. Haussmann, Note, *The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic,* 89 CORNELL L. REV. 1218, 1224-25 (2004).

79. Haussmann, *supra* note 78, at 1224-25. The role of judge in the adversarial system is that of a passive referee – he is employed to enforce the rules of play without embroiling himself in combat. *See* Goldschmidt, *supra* note 10, at 40. As with a duel or competition, it is often the more clever and skillful combatant will often claim victory.

80. *See* Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 971-72 (2004); *see also* Goldschmidt, *supra* note 10, at 44. A judge must adhere to judicial canons of ethics that mandate

ceptions not germane to the present point, they do not initiate actions on their own. [81] That includes not raising affirmative defenses *sua sponte* against a party's offer of a prima facie case, even in a default, when the defendant fails to appear.[82] The expiration of a statute of limitations is, again, just such an affirmative defense.

An adversary system functions well enough when the knowledge and skills of both contending advocates are, if not roughly equal, then at least above some threshold level.[83] The competent presentation of claims and defenses and the effective maneuvering through complex procedural rules rests fully on the advocates' skills and resources.[84] As equality between them declines, so too does the system's ability to redeem the promises implicit in Lady Justice's scales. This inequality reaches its maximum when an unrepresented litigant is matched against a trained attorney. By that point the premise of the system is proven false – a failure described by the system's critics as the "adversary myth."[85]

B. The Unrepresented Litigant

The consumer debtor has four choices when served with a summons and complaint alleging the validity of an old debt: Hire counsel to defend it, try to attain representation by counsel from a no-fee source, appear and defend *pro se*,[86] or simply default.

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the appearance of impropriety to foster public confidence in the impartiality in the judiciary.

81. Goldschmidt, *supra* note 10, at 40-41. When plaintiff and defendant are represented by attorneys of differing skill or competence, a judge may not ordinarily intervene to assist the disadvantaged party. Judicial impartiality is a relatively recent historical development. *Id.* at 40-42 (After the Revolutionary War, procedural and evidentiary rules were developed to curtail the American judiciary's independent initiative and forcibly impose the role of passive and unbiased neutrality upon the trier of fact. "In . . . the early 1800s, judges were openly partisan, resulting in limits being placed on their political activism.").

82. *See* Michael Asimow, *Popular Culture and the Adversary System*, 40 LOYOLA L.A. L. REV. 653, 654, 668 (2007) ("Because of the preeminence of the adversary system in the United States, most lawyers . . . oppose various innovations that would enhance the role of the judge . . . .").

83. *See* Goldschmidt, *supra* note 10, at 37.

84. *Id.* at 41; *see, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 321 (1972); *see also* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

85. Strier, *supra* note 19, at 6-7; *see also* text accompanying note 19.

86. "*Pro se* is defined as '[f]or himself; in his own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court.'" Goldschmidt, *supra* note 10, at 36 n.1. The term pro per means "in one's own proper person" and is often interchangeable. Civil litigants have a statutory right to appear *pro se* under 28 U.S.C. § 1654 which is a right similarly afforded in most

Default is by far the most common action, occurring in 70% to 90% of all cases. Exactly why that happens is not entirely clear. Perhaps when the underlying debt is (presumptively) valid, the prospect of complaining without "clean hands" discourages consumers from exploring their legal rights.[87] Further, people who have unpaid debt are typically not among those best able to engage private counsel.[88] The choice not to do so is involuntary for most civil defendants.[89] Those without the financial ability to retain counsel may attract the attention of contingency counsel if they have a valuable claim, or a meritorious *counterclaim*.[90] Since the debt-buyer bringing the collection action has standing as an assignee of the original debt, it is exceedingly unlikely that any counterclaim exists. A successful defense therefore generates no funds from which counsel can be paid. While most scholars focus on the legal needs of the poor, there is less recognition of the fact that working families above the poverty line are also unable to afford representation.[91] Paradoxically, the plaintiff's claim is worthless on its face if the debtor retains counsel – and conversely, if the debtor had the means to retain counsel, the debt would have certainly been paid before suit was filed.

There is very likely an additional factor causing the high rate of default. Despite the lawyer jokes and their related social antipathies,[92] most people respect at least the power of the legal system, if not its virtue. A summons and complaint calls the debtor to come to a *court* to have the case heard. Even if the debtor does not know that a lawyer is technically an "officer of the court," the fact that the summons signed by the lawyer invokes the hegemony of a court gives the call the appearance of judicial sanction. The popular idea that "if it were dangerous the government wouldn't allow it" has special application here: "If this lawyer is lying and if my debt isn't really legally

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state courts either by statute or constitution. Julie M. Bradlow, Comment, *Procedural Due Process Rights of Pro Se Civil Litigants,* 55 U. CHI. L. REV. 659, 660-61 (1988) (citing the 1982 version, which is still applicable in 2006).

87. Alan K. Chen, *Due Process as Consumer Protection: State Remedies for Distant Forum Abuse*, 20 AKRON L. REV. 9, 14 (1986).

88. *See* Symposium, *Racial Bias in the Judicial System, IV. Access to Representation and Interaction, and General Civil Process*, 16 HAMLINE L. REV. 665, 666 (1993).

89. Bradlow, *supra* note 86, at 669-70.

90. Judge Richard Posner suggests that the dilemma of the pro se litigant is best left in the hands of the free marketplace, in that a poor and unrepresented litigant possessed of a meritorious claim will find counsel to tender services on a contingency-fee basis. *Id.* at 670 (citing Merritt v. Faulkner, 697 F.2d 761, 769-70 (7th Cir. 1988) (Posner, J., concurring in part and dissenting in part)).

91. Symposium, *supra* note 88, at 666.

92. *See generally* M. Dylan McClelland, *"Mount Up": A Self-Policing Proposal for the Self-regulating Profession,* 30 RUTGERS L. REC. 78, 78 (2006) ("Lawyers are an embarrassment. . . . The profession has its moments of beneficence to be sure, but by and large lawyers deserve every bit of contempt which the public and popular culture attributes to them.").

owed, how could a lawyer collect it in a court?" The adversary's summons, that is to say, carries a suggestion of legitimacy that may well be disarming to those – like many consumer debtors – who know no better.

Public sympathy is not on the side of defaulting debtors, and it may therefore be difficult to find attorneys willing to donate their pro bono efforts to assist debtors being sued for defaulting on a credit card debt.[93] Four-fifths of the civil legal needs of low-income individuals are unmet.[94] Many working families are unable to qualify for legal aid programs because of family income,[95] while also not possessed of the financial wherewithal to afford representation.[96] Additionally, LEGAL aid attorneys accepting Legal Services Corporation ("LSC") funding must abide by the restriction prohibiting the filing of class-action lawsuits,[97] a powerful tool available to consumers to curb abusive collection tactics.[98]

The remaining choice for the debtor is to appear *pro se.* While appearing in court at all is infrequent for debtors in the kinds of cases considered here, such pro se appearances are a large and growing part of the total number of appearances that consumers do make.[99] A *pro se* appearance is challeng-

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93. Susan Block-Lieb, *A Comparison of Pro Bono Representation Programs for Consumer Debtors*, 2 AM. BANKR. INST. L. REV. 37, 45 (1994).

94. David S. Udell & Rebekah Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts*, 95 GEO. L.J. 1127, 1129-30 (2007) (According to Jimmy Carter, ninety percent of our lawyers represented ten percent of the people in the United States.).

95. George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm,* 70 FORDHAM L. REV. 775, 775 (2001) ("Recent empirical surveys by bar associations tend to confirm that middle-class Americans often lack access to affordable legal services. These studies suggest that, more often than not, 'ordinary' people with a need for legal services go without.").

96. *See generally* ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE (2003). These families have little-to-no disposable income, and as a result, no savings account to rely upon in crisis situations (such as illness, divorce or job loss). *See also* Elizabeth Warren, *The Over-Consumption Myth and Other Tales of Economics, Law, and Morality*, 82 WASH. U. L.Q. 1485, 1485 (2004) ("Economist Robert Frank claims that America's newfound 'luxury fever' forces middle-class families to 'finance their consumption increases largely by reduced savings and increased debt.'").

97. Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187, 2189 (1999).

98. Goldberg, *supra* note 8, at 729 n.115 ("It is important to note that more debt-buying companies are eager to go public, but IPO issuers fear that the companies may become bogged down in class action liability suits should they ever be found to have violated FDCPA.").

99. Drew A. Swank, *The Pro Se Phenomenon,* 19 BYU J. PUB. L. 373, 376 (2005); *see also* AM. JUDICATURE SOC'Y, A NATIONAL CONFERENCE ON PRO SE LITIGATION: A REPORT AND UPDATE 24 (2001) ("Virginia surveyed clerks, deputy clerks, magistrates, mediators, juvenile and domestic relations court service person-

ing for a court. On the one hand, American civil judges, as passive neutrals, are tightly constrained in their ability to rebalance the equation in favor of a litigant who simply lacks the knowledge or skill to raise and pursue legal points that might make all the difference.[100] Without regard to the underlying merits of the case, [101] an unrepresented party stands an uneven chance of successfully litigating a claim against a trained attorney. But the judiciary's warranty of neutrality is just that; it would be unpoliceable and arbitrary at best if judges were expressly allowed to act as counselors to any of the parties who appear before them.[102] That some of this goes on *sub rosa* may be beyond doubt, but it is neither part of the official tradition nor a reliable balm for the problem. On the other hand, access to justice, not just access to the courts, is a competing governmental guarantee.[103]

The challenges presented to the courts by the growth of *pro se* litigation are difficult to ignore, but more difficult still to resolve in a system built on contrary, if empirically false, premises.[104] The resulting judicial treatment has been mercurial, conflicting and inconsistent.[105] The United States Supreme Court has extended flexibility to the self-represented when necessary to protect a meaningful right to be heard and to prevent an otherwise meritorious claim from being dismissed,[106] while at the same time holding that self-

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nel, and legal aid personnel. An overwhelming majority of respondents (69%) stated that over half of all litigants whom they serve are self-represented. The majority of respondents also reported that the types of cases that involve pro se parties most frequently are traffic, support, domestic relations (custody and visitation), suits in dentinue, *suits in debt*, and landlord/tenant." (emphasis added)).

100. *See* Galanter, *supra* note 84, at 97. The author identifies two groups involved in the legal process: repeat players and one-shotters. *Id.* While this is admittedly an over-simplified approach it highlights the disparities that may be present between parties during litigation. Repeat players will have advantages such as knowledge, expertise, economic resources, access to specialists, etc., that give them a noticeable advantage over the laymen. *Id.* at 98-103.

101. Goldschmidt, *supra* note 10, at 37; *see* Healy, *supra* note 7, at A1 ("Russell Engler, a professor at the New England School of Law who studies the way people are treated in civil court, said unrepresented parties often get steamrolled. While it can be tricky for clerk-magistrates and judges when only one side has a lawyer, he said, those are precisely the cases in which court officials should act to redress the imbalance.").

102. Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (Oct. 2003) (discussing generally the role of judges within the modern court system).

103. Goldschmidt, *supra* note 10, at 37.

104. *Id.* at 36.

105. Bradlow, *supra* note 86, at 659-60 (acknowledging that the procedural treatment of pro se litigants in the American justice system can uniformly be characterized as inconsistent – with the end result varying dramatically from case to case).

106. *Id.* at 678 (imposing this requirement with the purpose of protecting a litigant's meaningful right to be heard and preventing an otherwise meritorious claim from being dismissed).

representation cannot devolve into "a license not to comply with the relevant rules of procedural and substantive law."[107] As a result, the *pro se* civil[108] litigant drifts through the system in isolation,[109] facing procedural and evidentiary obstacles, which, while routine for the skilled litigator, can be fatal – there are claims and defenses, such as the statute of limitations, of which the *pro se* debtor is entirely unaware. At the heart of this conundrum lies an erosion of every litigant's constitutionally protected right to a meaningful opportunity to be heard.[110]

IV. ATTORNEYS' PROFESSIONAL ETHICS: CONTENDING WITH AN UNREPRESENTED CIVIL DEFENDANT

The expiration of the statute of limitations extinguishes judicial remedies previously available. When the defendant is unrepresented, as is the case in most consumer debt cases, the affirmative defense will not be raised by the defendant – and a defense not raised is a defense waived. An attorney always stands in a position of disparate power when facing a *pro se* litigant, and the question becomes whether or not exploitation arising from this disparate relationship is ethical.

The term "legal ethics" is broad in meaning and can easily suggest any number of things. The term may be used to refer to attorney conduct outside of the stricture of an ethical code section – an attorney decision resting upon

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107. Faretta v. California, 422 U.S. 806, 834 n.46 (1975). In *Faretta*, the Supreme Court noted in dicta that self-representation does not relieve a party of the burden of compliance with procedural requirements. Commentators and courts seem to take the path of least resistance and accept this footnote as established law on the issue of the *pro se* litigant, likely because it offers some type of a solution in an area of growing inconsistency and turmoil. The "rule" derived from the *Faretta* case makes sense in the context of a criminal case, as the defendant has made an affirmative choice to self-represent and should therefore receive no special treatment as a result of his decision. In the civil context however, most unrepresented litigants have not been offered the assistance of counsel and have opted to instead appear *pro se*. *See* Bradlow, *supra* note 86, at 665; *see also* Russell Engler, *And Justice for All -- Including the Unrepresented Poor: Revisiting the Role of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2015 (1999) (cautioning that "[u]nrepresented litigants must not be permitted to 'capitalize' on their unfamiliarity with court procedure, because of a possibility that litigants will forego representation to gain a tactical advantage").

108. Bradlow, *supra* note 86, at 669 (identifying the difference in treatment betweens unrepresented civil and criminal defendants despite the reality that civil lawsuits often put at risk family, home, personal safety, and financial support). *See generally* Symposium, *supra* note 88.

109. Goldschmidt, *supra* note 10, at 38 (pointing out the sense of distrust and cynicism self-represented litigants feel when assistance by the court is not forthcoming).

110. Bradlow, *supra* note 86, at 664.

personal conscience, as influenced by individual morals and values.[111] More commonly, however, the American bar considers questions of legal ethics in terms of mandatory and enforceable rules that define allowable and prohibited attorney conduct.[112] The overworked practitioner rarely waxes poetic on questions of legal ethics, instead limiting consideration to the four corners of the applicable codes and statutes. The dismal truth is that most practitioners do not contemplate ethics beyond reading a statute or code to determine if there is a violation.[113]

A. The Standards of the Organized Bar

The history of professional ethics covers an eight hundred year span, with consistency in the core precepts guiding attorney conduct – fairness in litigation, loyalty, confidentiality, competence and service to the poor.[114] The American Bar Association's ("ABA") model standards date back to the 1908 ABA Canon of Ethics, consisting of thirty-two ethical ideals with little specificity or substantive content.[115] General tenets have guided attorney conduct in the past,[116] though over time complexity and detail have been added.[117] Contemporary ethical strictures are increasingly statutory in form, [118] mean-

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111. Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions,* 10 GEO. J. LEGAL ETHICS 317, 318 (1997).

112. *Id.* at 319.

113. *Id.* at 319; *see also* Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 365 (2002) ("[L]egal ethics really is the law governing lawyers, and lawyers approach legal ethics for themselves in the same way they consider regulatory schemes that affect the rights of their clients.").

114. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution,* 57 SMU L. REV. 1385, 1415 n.206 (2004) ("'You shall do no falsehood, nor consent to any being done in the court . . . . You shall delay no man for lucre or malice, but you shall use yourself in the office of an attorney within the court according to the best of your learning and discretion, and with all good fidelity as well to the courts and to the client. So help you God.'"); *see also* Joy, *supra* note 113, at 322.

115. *See* Chris G. McDonough & Michael L. Epstein, *Regulating Attorney Conduct: Specific Statutory Schemes v. General Regulatory Guidelines,* 11 TOURO L. REV. 609, 610 (1995). An evolution of borrowing and modeling can be traced back to professional oaths taken by advocates in thirteenth century Europe. Andrews, *supra* note 114, at 1386.

116. *See* McDonough & Epstein, *supra* note 115, at 609.

117. James M. Fischer, *External Control over the American Bar,* 19 GEO. J. LEGAL ETHICS 59, 108 (2006) (citing an example that "statutory whistleblowing protection [may] operate to trump the bar's requirement of confidentiality").

118. *Id.* at 60 n.1 (referencing Andrews, *supra* note 114); *see* Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527, 528 (2003) (Ethical regulation has evolved from its previous structure of "'fraternal norms

ing that historically vague standards have given way to clearly defined and detailed affirmative rules.[119]

The rules of attorney conduct vary from one state to the next, though virtually everywhere the codes of professional conduct are based upon regulations promulgated by the ABA.[120] Some version of the ABA Model Rules has been adopted by forty-four states and the District of Columbia. [121] Most of the remaining states' standards are largely derived from or based upon the ABA Model Code.[122] In those jurisdictions that have not formally adopted some version of the ABA Model Rules, courts continue to reference and cite the Rules, and law schools continue to teach the Rules in professional responsibility classes.[123] Most federal courts have directly or indirectly adopted the Model Rules as their governing standard.[124]

B. Looking to the ABA Rules for Guidance: When the "Statute of Limitations" Defense is Dispositive

The ABA's Standing Committee on Ethics and Professional Responsibility[125] publishes opinions offering interpretive guidance on specific legal questions.[126] When the governing ethical codes, opinions and case law provide insufficient guidance, both practicing attorneys and the courts take these opinions as authoritative on the questions they address.[127]

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issuing from an autonomous professional society.'" (quoting Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1241 (1991))); *see also* McDonough & Epstein, *supra* note 115, at 609.

119. *See* Levine, *supra* note 118, at 529.

120. Hellman, *supra* note 111, at 317.

121. Andrews, *supra* note 114, at 1451; *see* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1-1(e)(4) (2005) (stating that at the turn of the millennium, more than 80% of states and the District of Columbia have adopted the 1983 ABA Model Rules of Professional Conduct and on a state-by-state basis, there has been a non-uniform adoption of the many amendments to the Model Rules).

122. Andrews, *supra* note 114, at 1451.

123. *See* ROTUNDA & DZIENKOWSKI, *supra* note 121, § 1-1(e)(4).

124. Andrews, *supra* note 114, at 1451. Either the federal court has directly adopted the ABA Model Rules, or alternatively, the federal court has indirectly adopted the ABA Model Rules when adopting the local state's rules of conducts.

125. *See* Hellman, *supra* note 111, at 335 (The ABA Ethics Committee has been referred to "the most authoritative voice on the interpretation of ethics rules.").

126. *Id.* at 317 (setting forth that "the cavalier approach to interpretation employed over time by the ABA Ethics Committee threatens to undercut the Bar's respect for the legitimacy of the 'ethics rules' as binding constraints on the practice of law").

127. *Id.* at 325-26; *see* Joy, *supra* note 113, at 345-46 ("[Q]uantitative analysis demonstrates that federal and state courts at every level rely on ethics opinions [with increasing frequency when] deciding cases . . . ." In fourteen cases, the United States

The matter of the unrepresented debtor and the out-of-statute debt has been considered by the ABA Ethics Committee twice, in a 1963 informal opinion interpreting the ABA Canons of Professional Ethics[128] and again in a 1994 formal opinion interpreting the ABA Model Rules.[129] On both occasions the Committee reached the same conclusion: bringing the lawsuit despite knowing that the debt is barred is not unethical. The 1994 Formal Opinion[130] asserts without equivocation that the intentional filing of a time-barred claim does not violate the Rules:

> [A] lawyer [is not] constrained by the rules of ethics from filing suit to enforce a time-barred claim . . . . While the lawyer is not ethically obligated to reveal to opposing counsel the fact that her client's claim is time-barred in the context of negotiations, she does have an obligation to inform her *own* client of this fact, and of the likelihood that the action will be defeated *if the defendant realizes that the statute has run* and asserts this defense.[131]

To understand the philosophical foundations that support the ABA's long held position requires looking no further than the influence of the premises of adversarial justice on the codes of professional conduct. The two are inextricably intertwined as principles of our adversarial system.[132] This confluence of ethics and the adversarial premise produces unjust results for the unrepresented defendant. It is not merely "ethically permissible" for the attorney knowingly to set the trap for the *pro se* defendant, knowing that the defendant will step into it; doing so seems to be regarded positively, as an example of the duty of diligent and zealous representation.

Supreme Court cited thirty ethics opinions–twenty-one state or local ethics opinions, six ABA Formal opinions, and three ABA Informal opinions.).

128. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 694 (1963); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) ("This Committee reached the same conclusion under the Canons of Professional Ethics in Informal Opinion 694 (1963) ('Instituting Suit Barred by Statute of Limitations'), relying on the statement in Canon 15 that 'in the judicial forum the client is entitled to the benefit of any and every remedy or defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense.'").

129. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387.

130. "These opinions, especially those designated as 'formal opinions,' are quite influential; . . . When state and local authorities have not officially construed a particular rule, lawyers are taught to treat ABA ethics opinions as one of the best sources of guidance available. In actuality, however, ABA opinions are binding upon no one." Hellman, *supra* note 111, at 325-26.

131. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (emphasis added).

132. Haussmann, *supra* note 78, at 1223-24.

In arriving at the conclusions set forth in ABA Formal Opinion 94-387, the Committee relied on the premise that adversarial advocates are entitled to harvest windfalls from the mistakes or odd judgments of their party opponents.[133] The advocate, after all, must represent the client zealously, seeking every legal advantage without hindrance from his own moral misgivings.[134] The attorney's role as an officer of the court and a truth-seeker stands at odds with the role of zealous advocate, but as always, the zealous advocate wins.[135]

V. THE DILEMMA

Time-barred portfolios of consumer debt are sold at steeply discounted prices.[136] In theory, the expiration of the statute of limitations extinguished judicial remedies previously available to the owner of the account.[137] In reality, the timeliness of the suit is a moot point: While the statute of limitations defense must be affirmatively raised to be effective, in an estimated 80% to 90% of collection cases there is no one to do so.[138] The debtor is unlikely to unravel the complexities of burden-shifting and affirmative defenses within the short "raise it or waive it" timeframe.[139] After the entry of the default judgment, the plaintiff has a myriad of post-judgment remedies available to compel payment, regardless of the debt's age and regardless of the social

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133. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (citing Geoffrey C. Hazard, Jr. & W. William Hodes, THE LAW OF LAWYERING § 3.1:204-2 (3d ed. 2001) ("'the whole point of the adversarial system is that parties are entitled to harvest whatever windfalls they can from the miscues or odd judgments of their opponent'")).

134. Haussmann, *supra* note 78, at 1227-28.

135. Stephan A. Landsman, *A Brief Survey of the Development of the Adversary System,* 44 OHIO ST. L.J. 713, 734-35 (1983).

136. For a brief recap, see *supra* Section I.

137. Gall, *supra* note 66, at 247 (explaining that in a majority of states, the expiration of the statute of limitations does not extinguish the underlying debt but does extinguish judicial remedies available to the plaintiff).

138. On a time-barred debt, the failure to assert the statute of limitations defense will result from ignorance, negligence, or incompetence. If the affirmative defense is not asserted at the outset, a judgment will be entered against the debtor without regard to the timeliness of the suit. The affirmative defense will only be raised by a small number of debtors who procure representation.

139. Rezendes & Latour, *supra* note 41, at A1 ("'The creditors are all repeat players. They know exactly how the game works,' said Elizabeth Warren, a Harvard Law School professor who studies consumer debt. 'We're watching a fight between two players, one with a skilled repeat gladiator, and one who's thrown into the ring for the first time and gets clubbed over the head before they even get a sense of what the rules are.'"). In the rare circumstance that the defense is raised, plaintiff's counsel will be unable to advance any argument for extension, modification or reversal of existing law and will simply dismiss the case.

policies underlying the laws of limitations. In effect, the default judgment "re-ages" the underlying debt.[140]

This strategy is so commonly employed in the consumer-debt industry that investigations have been launched in several states.[141] Still, collection lawyers are unable to agree on the answer to a basic question: Is the filing of a time-barred suit for debt collection ethical?[142] In the absence of a definitive answer, zealous advocates ask for forgiveness rather than permission, and will continue to file these suits until a statute or ruling deprives them of this moral safe harbor and their clients of this unjust windfall.

The adversarial ethic provides a soothing balm for the conscience of the troubled advocate and an escape from an otherwise unpleasant ethical quan-

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140. The ever-present fear of the abusive debt collector is the class action lawsuit. The business practice of suing on stale debt is not without the risk of being sued in class action. However, in a cost-benefit analysis, the steeply discounted purchase price for stale debt is not outweighed by the threat of a class action lawsuit.

141. It is not possible to estimate the number of civil suits filed annually against unrepresented consumers. Evidence of the timeliness of the suit is not submitted to the courts in the majority of cases upon which judgment is entered against an unrepresented consumer. However, an e-mail posted to an industry email list entitled "State investigations – a call for coordination," implicitly communicates the depth of the problem. *See* Posting of Rozanne M. Andersen, Gen. Counsel/Senior Vice President, ACA Int'l, Andersen@acainternational.org, to maplist@lists.acainternational.org (Sept. 26, 2006 05:28) (on file with author) ("During the past two months many of you have called me to discuss the collection agency and debt buyer investigations taking place in the states of New York, West Virginia and Massachusetts and the city of New York. Apparently a number of our members have received subpoenas calling them to appear before the authorities and produce information about their collection and debt buying business practices. The focus of these investigations has been on *practices regarding the collection of debts after the statute of limitations has expired* and the ability of debt buyers and the collection agencies they retain to service the purchased debt to produce verification information upon the written request of a consumer. The purpose of this email is to invite you to contact me if you or any of your client(s) have received these subpoenas and you would like to *participate in a coordinated effort to formulate an action plan to combat efforts by the authorities to pursue legislative or regulatory action that would curtail ones* [sic] *ability to collect or service purchased debt*." (emphasis added)).

142. Posting of Kevin Giberson, Attorney, Law Offices of Kevin S. Giberson, kevin@giberson.net, to maplist@lists.acainternational.org (Oct. 4, 2006 11:55) (on file with author) ("[W]e've had this discussion before. Some attorneys, including me, believe that pursuing such borders on unethical (the usual attorneys on the other side disagree) as it is an affirmative defense that if stated bars you from collecting on it. Knowing that fact, you must be very, very careful about what you state so that there is no misleading whatsoever, especially to a lay person that may not know this on their own. Seems you are far better spending your time pursuing in statute claims as opposed to having to work so hard and careful to pursue a claim that may come back to haunt you, and surely pursuing out of statute claims doesn't help your reputation or that of the collection industry as a whole.").

dary[143]: Actions that might not pass ethical muster in ordinary life cannot be "unethical" for an attorney so long as they remain within the boundaries of established rules and administrative opinions interpreting those rules.[144] What might otherwise have to be a compromise of the duty owed to the client is freed from the ethical constraint.[145] The advocate must, of course, counsel his client candidly and fully; but having done so, the client's business decision trumps the lawyer's ethical choice:[146]

> [M]oral integrity is threatened when persons must abandon or betray their free-standing first-personal ideals and ambitions in the service of third-personal impartial morality. . . . [T]he professional obligations of adversary lawyers require that lawyers betray ordinary first-personal ideals of honesty, fair-play, and kindness, and therefore place adversary lawyers' integrity under threat.[147]

Even more than this, once the client's decision is made the attorney is required to pursue victory, even when that pursuit would clearly fail if the presumptions of the system were true.[148] An attorney *may not* articulate the weaknesses of the case to the tribunal.[149] Even when nondisclosure is the functional equivalent of deceit, deception is a valid tactic inherent in the attorney's adversarial role.[150] To put it in the most favorable light, advocates employing silent deception are merely acting out the role the system expects

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143. Daniel Markovits, *Further Thoughts About Legal Ethics from the Lawyer's Point of View,* 16 YALE J.L. & HUMAN. 85, 112 (2004).

144. Eric E. Jorstad, Note, *Litigation Ethics: A Niebuhrian View of the Adversarial Legal System*, 99 YALE L.J. 1089, 1099 (1990).

145. The normative value that drives Freedman's ethic is freedom and autonomy. Each individual has a right to live according to his first-person morality and need not be subject to the paternalistic concern or guidance of his attorney. *See* Thomas L. Shaffer, *Ethics and the Good Client,* 36 CATH. U. L. REV. 319, 322-23 (1987). "The adversary ethic was invented in New York City after the Civil War; it had as its purpose the vindication of lawyers who helped the robber barons bribe judges and sell watered securities. The ethic says that lawyers have no moral responsibility for what their clients do." *Id.* at 323.

146. *Id.* at 328 ("Freedman looks at his client and says, I will tell you what I think you should do, but if you decide to do something else-even something I regard as immoral for you *and* for me-I will help you do it; otherwise I will be depriving you of your ability to carry out your lawful decisions.").

147. Markovits, *supra* note 143, at 113-14.

148. *Id.* at 112.

149. *Id.*

150. *Id.* ("[L]awyers may overstep their roles in seeking to make a position more persuasive than it deserves to be - for example, by appealing to emotion or even prejudice - the intent to persuade apart from truth does not itself violate but is instead required . . . .").

of them.[151] And in a loop of institutional symbiosis, the system is validated by assuring the unalloyed robustness of the advocate's acts.[152] Filing a lawsuit on a time-barred debt against an unrepresented debtor simply is not a dilemma after consideration of the operative adversarial principles.[153] The adversarial ethic is both professional sword and moral shield.[154] Justice, then, is determined by the business necessities of the debt-buying marketplace.[155]

All of this evidences an empirical and a normative failure at the foundation of the adversarial system itself. The moral validity of professional ethics relies on the legitimacy of the adversarial system.[156] Its legitimacy rests ultimately on the factual accuracy of its presumptions. In the case of the unrepresented debtor, those presumptions are false. In the case of out-of-statute debts, the results are unjust. Perhaps more problematic, a circular structure of blame arises wherein neither the attorney nor the client may be held ethically accountable for exploitation: The client blames the attorney for espousing this legal strategy, while the attorney refrains from limiting representation according to his personal morality.[157]

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151. *Id.* (considering legal scholars Schneyer and Walen who so narrowly define the act of lying as applied to attorney conduct that the normal act of deception may not rise to the level that first-person morality would condemn as intentional deception).

152. Monroe H. Freedman, *Professionalism in the American Adversary System,* 41 EMORY L.J. 467, 470 (1992); *see* Shaffer, *supra* note 145.

153. It seems that ethical discussion is often couched in abstract philosophy, possibly explained by the difficulty to frame discussion within a specific factual context. Ethical discourse serves what good purpose if the practitioner, for whom ethics are a pressing consideration, dismisses the abstract words of the scholar as intellectual detritus that are not easily applied to any practical practice scenario.

154. "The lawyer, who has made not only the scales of right but also the sword of justice his symbol, generally uses the latter not merely to keep back all foreign influences from the former, but, if the scale does not sink the way he wishes, he also throws the sword into it (*vae victis*), a practice to which he often has the greatest temptation because he is not also a philosopher, even in morality." IMMANUEL KANT, PERPETUAL PEACE 33-34 (Lewis White Beck ed., The Liberal Arts Press 1957) (1795).

155. Shaffer, *supra* note 145, at 323 (The system does not operate on, or succeed based upon, the individual morals of each practicing attorney. The role of the attorney allows them to dispense with "ordinary moral restraint."). Under principles of ordinary morals, to assist someone in performing an evil makes you complicit in the evil and therefore an accomplice. The role of the attorney, who often defends the rapist, murderer, or wrongdoer, requires a dispensation from ordinary morals. This dispensation is necessary for attorneys to serve our justice system and aid the state.

156. In the United States, the adversarial system of justice represents far more than an administrative system of dispute resolution. *See, e.g.*, Freedman, *supra* note 152, at 467 (identifying the extent to which the adversarial system is incorporated into the value system of this country).

157. Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice,* 40 S. TEX. L. REV. 181, 189 (1999).

This is not, however, cause for a wholesale deconstruction,[158] but it is cause for rethinking the possibility of a style of carve-out that responds to identifiable flaws. The flaw in the case of stale debt is patent: Pursuing the claim violates the spirit and purpose of the laws of limitation by exploiting the self-represented litigant, yet this exploitation is completely consistent with the rules of professional ethics[159] (though not with the ordinary moral sensibilities to which lawyers are not immune[160]). That discordance calls for a correction.

VI. TOWARD SOLUTIONS

Three kinds of solutions might be considered to halt attorney exploitation of the unrepresented consumer: a regulatory proscription barring the sale of stale debts; a change in the substantive law; and a change in the ethical rules.[161] Two of these solutions are narrowly tailored to address attorney

158. There is an endless supply of valuable scholarship on the adversary system. For a general discussion of the adversarial system, see John S. Dzienkowski, *Lawyering in a Hybrid Adversary System,* 38 WM. & MARY L. REV. 45 (1996). Some scholars suggest that the adversarial system be replaced. *See* Menkel-Meadow, *supra* note 75, at 49 ("I want to suggest the heretical notion that the adversary system may no longer be the best way for our legal system to deal with all of the matters that come within its purview.").

159. "The consumer advocates against the credit card industry is really David vs. Goliath. We're David, with our little bag of rocks, and Goliath is crushing and influencing peddling. They're massively powerful compared to the few consumer advocates." Interview with Edmund Mierzwinski, http://www.pbs.org/wgbh/pages/frontline/shows/credit/interviews/mierzwinski.html (last visited July 13, 2008).

160. "A king may move a man. A father may claim a son. But remember that even when those who move you be kings or men of power, your soul is in your keeping alone. When you stand before God you cannot say, 'But I was told by others to do' thus, or that virtue was 'not convenient at the time.' This will not suffice." (statement by the Prince of Jerusalem to Balian) KINGDOM OF HEAVEN (20th Century Fox 2005); *see* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1034 (1968) (promoting the maxim that an attorney should "obey his own conscience and not that of his client" in the course of representation).

161. Some states allow a non-attorney to sue on behalf of a corporation. *See, e.g.*, VA. SUP. CT. R. 6:1-1-101. Marketplace reforms such as substantive regulation would address collections in those cases in which non-attorneys are involved, while the Proposed Rule deals only with attorneys. Collections by attorneys are, however, a part of the problem and a significant part. Regulatory change and changes in professional ethics are not mutually exclusive; both play a useful role. Given the difficulties of achieving federal legislation, however, attention to this part of the problem is certainly warranted. It is, in addition, warranted for other reasons as well – the damage to the profession done by the erring attorneys, and the fact that debt collection is only an example of a larger set of problems at whose common core lies the behavior of counsel.

conduct within the debt industry, whereas the final solution is broadly designed to regulate attorney conduct across the breadth of the legal community when faced with a growing number of *pro se* litigants.

A. Industry Regulation

There is an irony in the legislation governing the debt industry.[162] Congress has regulated in-the-street collection tactics and abuses, yet debt collectors are free to commit equally egregious abuses in the courts. Default judgments are achieved without documentation to substantiate the underlying debt, allowing the debt collector to pursue post-judgment remedies without impediment.[163] After presiding over such cases for twenty years, one judge asserts that "'the court . . . is primarily the court of the skilled lawyer representing large debt collection companies, credit stores, corporate defendants and insurance companies. The pro se party is at a definite disadvantage when he appears in court.'"[164] More so, when he does not.

After the statute of limitations has lapsed, the pursuit of legal remedies is prohibited, but the underlying debt is not extinguished in most states.[165] A debt collector may continue non-legal collection efforts. It is worth noting, however, that a consumer who makes one nominal payment on the stale account will inadvertently renew the statute date on the account; legal remedies may once again be pursued.[166] This behavior is exploitative of ignorance – although to a different degree and of a dissimilar type than discussed elsewhere in this Article.

By making the knowing purchase of stale debt unlawful, a multi-faceted problem would be entirely removed from ethical debate. But although regulation that would bar the underlying transactions could solve this particular

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162. *See* Interview with Edmund Mierzwinski, *supra* note 159 ("It's partly that some bad laws are being passed, but it's more with this particular industry, credit cards, they have managed to prevent Congress from investigating and conducting the oversight that Congress is supposed to do of their practices. . . . The courts and the regulators have taken away the right of the states to investigate or regulate the credit card companies, but Congress has fallen down on the job. . . . They operate in a cowboy economy with the loosest regulation that I could possibly think of." (first omission in original)).

163. Jillian Jonas, *Watching the Collectors: Debtor Protection in Works*, CITY LIMITS, July 31, 2006, http://www.citylimits.org/content/articles/weeklyView.cfm?articlenumber=1955 (quoting Staff Attorney Claudia Wilner with the Neighborhood Economic Development Advocacy Project that without tendering proof that a debt exists and substantiating the amount owed, collectors are "'racking up default judgments and freezing bank accounts'").

164. Engler, *supra* note 60, at 118 (omission in original).

165. *See* 4 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 8:29, at 450 (4th ed. 1992).

166. *Id.* § 8:29, at 463-65.

problem, it is not further considered in this article. It is, first, *too* particular. Suing unrepresented debtors on stale debts is one of a set of problems whose common denominator lies in the architecture of professional ethics, and it is that common theme that calls for attention. Anything else would be piecemeal and ineffective – even if the criteria for "knowingly" and "stale" could be worked out, the broader problem would persist someplace else. The better approaches therefore would address the problem at its analytical sources.[167] One would reverse the rule of substantive law that creates the opportunity for the ethical dilemma. The other would even more directly craft an ethical norm that responds in a measured way to the failure of the adversarial myth, tailored to situations involving unrepresented litigants.

B. Shifting the Burden from the Shoulders of the Unrepresented, State by State

The exploitation[168] of unrepresented debtors is made possible by the fact that it is the debtor who bears the burden of pleading the statute of limitations defense.[169] A substantive reform would be the most narrowly fashioned solution, and would shift the burden of pleading timeliness from the shoulders of the defendant.[170]

Recall that the "silent deception" lying at the heart of the problem arises because the passing of the limitations period extinguishes the remedy, but not the debt. Though recovery by the plaintiff may be barred by an affirmative defense, the burden is on the defendant to raise the lapsed statute of limitations in a responsive pleading.[171] If it is not raised, it is unnoticed as a practical matter and waived as a legal matter. Other elements of the action – the components of the prima facie case – must be pleaded by the plaintiff.[172] Competent plaintiff's counsel is never unmindful of the existence of any and

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167. See *supra* Section IV. for a discussion of these analytical sources.

168. *See* Rezendes & Latour, *supra* note 41, at A1 (identifying the ease and high rate of successful outcomes of suits filed by the debt collectors).

169. Healy, *supra* note 7, at A1 (reporting The Boston Globe's results of hand-counted cases filed in the state of Massachusetts and asserting that as many as sixty percent of civil cases filed in their state courts are brought by debt collectors); *see supra* note 59 (stating that Capital One Financial Corporation filed more than 38,000 cases in the past four years).

170. Few attorneys outside of the debt industry are aware of this abuse identified in this Article. Therefore, in some sense, publicizing the abuse seems to be as important as promulgating potential solutions.

171. David H. Taylor, *Filing with Your Fingers Crossed: Should a Party Be Sanctioned for Filing a Claim to Which There Is a Dispositive, Yet Waivable, Affirmative Defense?,* 47 SYRACUSE L. REV. 1037, 1042 (1997).

172. *Id.* at 1041.

all affirmative defenses.[173] The duty to advise the client by itself mandates an assessment of the probability that a defense might exist. Anything else would be professional incompetence.[174]

If, therefore, it were an element of the affirmative cause of action that a debt not be older than some stated age, then for an attorney knowingly to plead a fact that is false would be unquestionably a violation of both professional ethics and the rules of court. In that case the client's decisions would be irrelevant: An attorney cannot affirmatively deceive the tribunal. Period.

Some states have already made this change: Wisconsin and Mississippi now provide for out-of-statute debts an "extinguishment of right as well as remedy."[175] In Mississippi, the right to collect a private debt extinguishes upon the expiration of the statute of limitations. Section 15-1-3 of the Mississippi Code Annotated states: "The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy."[176] Similarly, two statutes in Wisconsin operate together to extinguish the right to collect a debt within the state if the relevant statute of limitations has expired. Section 893.05 of the Wisconsin Statutes provides that "[w]hen the period within which an action may be commenced on a Wisconsin cause of action has expired, the right is extinguished as well as the remedy." Section 427.104(1)(j) of the Wisconsin Consumer Act generally prohibits a debt collector from collecting a debt if it has either knowledge or reason to know that the right to collect the debt does not exist. In *Klewer v. Cavalry*

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173. "Missed statute cases" often give rise to attorney malpractice claims. The competent attorney calculates the statute date immediately upon receipt of the claim and certainly before filing the claim.

174. *See* Brubaker v. City of Richmond, 943 F.2d 1363, 1384 (4th Cir. 1991) (imposing sanctions when a time-barred claim was filed). The court determined that a case is "groundless in law" when the merits of a time-barred case hinge upon the "ignorance of one's adversary." *Id.* at 1385. *But see* Souran v. Travelers Ins. Co., 982 F.2d 1497, 1510 (11th Cir. 1993) (reversing an imposition of sanctions against the plaintiff, stating that "[a]n unasserted defense is no defense at all," implying that an unequivocable affirmative defense (unlike the one at issue in the case) would warrant sanctions).

175. In *Davis v. Mills*, 194 U.S. 451, 456 (1904), the Supreme Court asserted that an expired statute of limitations may bar the use of judicial remedies to enforce a right, but it does not eliminate or extinguish the underlying right.

176. This statute applies to only private debts. *See* MISS. CONST. art. 4 § 104; MISS. CODE ANN. § 15-1-5; s*ee also* Parish v. Frazier, 195 F.3d 761, 764 (5th Cir. 1999) (holding that debt was owed to a governmental entity and was therefore not time barred pursuant to section 15-1-51 of the Mississippi Code Annotated). Unless a Mississippi debtor promises to pay a debt after the statute of limitations has expired, collecting on a time-barred private debt is a violation of Mississippi law. *See* MISS. CODE ANN. § 15-1-3.

Investments, LLC, the Wisconsin court held that the expiration of the statute of limitations "extinguishes a debt and renders it nil."[177]

Such a change could easily be incorporated into federal law, *e.g.* the FDCPA. The practical reality however is that

> Congress rarely acts to protect consumers unless the states act first or there is a scandal. . . . So consumer groups believe that federal law only functions well when the states are coming up with new ideas to make federal law better. Congress is a very big ball to push up a hill, and it's easier to get a push on it if we have several state ideas pushing as well.[178]

A congressional hearing to discuss credit card debt or potential regulation of the industry draws a room full of powerful lobbyists and a small handful of consumer advocates.[179] Significant changes in federal statutes are unlikely given the banking industry's powerful lobby, yet state-by-state legislation can be time-consuming.[180] It is, moreover, difficult to predict all of the implications that might follow a reversal of the burden. Substantive solutions are therefore analytically feasible, but pragmatically difficult.

C. Ethical Reform: Creating an Ethical Provision to Guide Attorney Conduct with the Unrepresented

ABA ethical opinions, issued to address questions "of widespread interest,"[181] are technically not authoritative – they are the product of a private association of professionals and are purely advisory.[182] While not binding authority, they are an important source of guidance for the practitioner or the

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177. 2002 WL 2018830, at *3, *4 (W.D. Wis. 2002) (ruling that the "[d]efendant's attempt to collect plaintiff's time-barred debt clearly constitutes an attempt to enforce a right that defendant should have known did not exist.").

178. Interview with Edmund Mierzwinski, *supra* note 159 (omission in original) ("California is a real hotbed of new consumer laws, for example. If California passes a new privacy law, other states copy the exact California law.").

179. *Id.* ("Congress has been afraid to deal with any kind of bad credit card company practices for years. . . . Congress hasn't done anything about credit card companies' unfair practices because the credit card companies have enormous power and sway with the Congress. . . . Credit card companies have power over the entire Congress.").

180. Original credit grantors do not fall within the definition of "debt collector" in the FDCPA; however, these substantiation requirements require documents in the possession of the original credit grantor and an increased burden would inevitably trickle upwards.

181. Hellman, *supra* note 111, at 324 n.22.

182. Joy, *supra* note 113, at 318; Hellman, *supra* note 111, at 325-28.

judge ruling on a case with legal responsibility issues.[183] The Committee issuing these opinions has a deep responsibility to ensure that they are responsibly written and well-reasoned.[184]

In a 1994 Formal Opinion,[185] the ABA asserted without equivocation that the intentional filing of a time-barred claim does not violate the ethical rules.[186] In the absence of "additional defects . . . [such as] affirmative misstatements or misleading concealment of facts," the mere filing of a time-barred claim does not in and of itself result in "'inevitable deception.'"[187] The ABA reached the same conclusion in 1963 under the Canons of Professional Ethics in its Informal Opinion 694, and thus for over fifty years the ABA Committee's interpretive guidance has permitted attorneys to exploit an unrepresented litigant, intentionally and knowingly. It was only the dissent which opined that:

> [G]overnment lawyers owe a higher duty to the public. This duty transcends those found in the Model Rules. Frequently government lawyers are, in fact, government. They have great power. Their position in the scheme of things far transcends the day-to-day market place ethical problems . . . . They cannot be allowed to hide behind the old excuse: 'I was only following orders.'[188]

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183. Joy, *supra* note 113, at 317, 347-48 (reporting data from an eleven year computerized survey finding that 176 district court opinions cited 330 ethics opinions).

184. *Id.* at 318.

185. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) (cautioning that there may be an obligation to disclose if the limitation period affects jurisdiction); *see also* Hellman, *supra* note 111, at 325-26 (identifying importance of ABA formal opinions with respect to legal ethics in situations where local authorities have not construed a particular rule or as guidance to practicing attorneys).

186. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (advising that an attorney "may be constrained from discontinuing negotiations over a [time-barred] claim simply because the limitations period for its judicial enforcement has run, [even] in the absence of directions from her client").

187. *Id.* at n.10 (listing several cases in which Rule 11 sanctions were imposed on the lawyer who files a time-barred claim when "clearly barred" by the statute of limitations); ABA MODEL RULES OF PROF'L CONDUCT R. 3.1 (2007) (Meritorious Claims and Contentions); ABA MODEL RULES OF PROF'L CONDUCT R. 3.3 (2007) (Candor Toward the Tribunal).

188. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387. The dissent further states that some courts agree that government attorneys should be held to a higher standard and provides a particularly poignant quote: "We find it astonishing that an attorney for a federal administrative agency could so unblushingly deny that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission." *Id.* (emphasis added) (quoting Freeport-McMoran Oil & Gas Co. v. Fed. Energy Regulatory Comm'n, 962 F.2d 45, 48 (D.C. Cir. 1992)).

The distinction for government lawyers made by the dissent is rooted in a power disparity that, if abused, would distort the role of government in the public eye. This same distinction exits between the unrepresented consumer and the represented debt-buyer. While debt collection attorneys are privately paid, they wield the power of the government after obtaining a default judgment without opposition.

The 1994 Dissent noted that if the Committee "needs a Model Rule to operate within its mission . . . it should write one."[189] This Article proposes exactly that; to wit, the following new rule of professional conduct:

> Duty of Fairness Toward an Unrepresented Party Opponent[190]
>
> A lawyer appearing against an unrepresented opponent shall not unfairly exploit his opponent's ignorance of the law or the practices of the tribunal, nor take advantage of the opponent's misinformation, ignorance or inexperience. In dealing with an unrepresented party, a lawyer must not take advantage of economic disparities to harass the unrepresented party or bring about unjust results. Upon learning that a party is appearing *pro se*, a lawyer shall not continue litigation that is inconsistent with applicable law. A lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation.

Elsewhere in the Rules we find evidence of precedence, and necessity, for the amendment suggested above. While ethical rules traditionally prohibit affirmative acts of dishonesty before a tribunal, Model Rule 3.3(d) imposes a unique requirement upon counsel in ex parte proceedings:[191] the obligation to

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189. *Id.* The dissent further describes the Formal Opinion as "Julia Child would regard a fly in her soup. It is unneeded, unwanted, and too much to swallow." *Id.*

190. A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action . . . has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (1980) (aspiring to hold government lawyers to a higher ethical standard); *see also* Bellow & Kettleson, *supra* note 9 (proposing a series of ethical rules, never adopted by the ABA, which govern adversarial behavior when dealing with a pro se party).

191. "(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed

disclose relevant, even clearly determinative, information. Comment 14 notes that

> [T]here is no balance of presentation by opposing advocates. . . . The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts . . . that the lawyer believes are necessary to an informed decision.[192]

Rule 3.3(d) is justified on the grounds that there is no "balance of presentation by opposing advocates."[193] If one accepts that the defendant's decision to appear *pro se* is not a choice,[194] the logic underlying Rule 3.3(d) must necessarily be extended.

Prior to the ABA's Model Code and Rules, ethical regulation was painted in broad strokes, offering high-level, precatory moral and ethical guidance.[195] The rules have over time become increasingly detailed, which is a style that provides clearer guidance on fewer questions. At the same time, this affords lawyers their familiar heuristic – the hunt for loopholes and exceptions.[196] The Proposed Rule adopts a middle course. It is neither so specific as to allow for the clipping of corners, nor so general as to "say nothing with words."[197]

Substantively, the Proposed Rule adopts a principle analogous to the moral philosophy of "ordinary language"[198]: *viz.*, the normative proposition that professionals must respect and not exploit the "layperson intuition" of the

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decision, whether or not the facts are adverse." MODEL RULES OF PROF'L CONDUCT R. 3.3(d) (2007) (Candor Toward the Tribunal).

192. *Id.* cmt. 14.

193. *Id.*

194. *See supra* Section III.B.

195. Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons,* 83 N.C. L. REV. 411, 472 (2005).

196. *Id.* at 453 (A "heuristic" is the path by which the brain processes and orders a complex situation. Attorneys are taught during law school to find the boundaries of applicable law, along with loopholes, exceptions and grey areas.).

197. *Id.* at 470-71 (The author suggests that lawyer regulators are either consciously or subconsciously against clarifying underlying problems and identifying goals for addressing those problems because the lack of clarity and conflation of goals serves to hide certain unpleasant truths about lawyer regulation.); *see also* Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229.

198. Ordinary language philosophers believe philosophical problems arise because philosophers have not used ordinary English, but instead, have misused the language by using terms jargonistically; therefore, a myriad of problems would not arise if only terms were used in accordance with their plain and ordinary meaning. George A. Martinez, *The New Wittgensteinians and the End of Jurisprudence*, 29 LOY. L.A. L. REV. 545, 551-52 (1996).

layperson opponent.[199] Certain notions well accepted in the law, and perhaps for juridically respectable reasons, nonetheless run contrary to this "lay intuition." A non-attorney will rely upon the reasonable notion that justice does not run contrary to basic precepts of common sense, and that the courts will not permit their officers to represent what they know is a falsehood. An ethical provision pertaining to laypersons – who ultimately do not have the special assistance of counsel from which to request an interpretation of ethical precepts – should both conform to the reasonable expectations of the ordinary *pro se* litigant, and also be drafted in language comprehensible to the class of litigants it is meant to protect.

The conduct of attorneys in the debt-buying industry, which potentially affects millions of unrepresented consumers, provides a litmus test for the Proposed Rule. Lay intuition runs contrary to the attorney's ordinary expectation that a case may be filed and a judgment entered against a debtor even if the action is legally barred. It is ironic, but an unrepresented party will often rely on the perception of superior knowledge and expertise in the opposing attorney. Attorneys in the debt industry are "bluffing" when they file a lawsuit on an out-of-statute account. While that may be acceptable between two professionals, each of whom has enough ability to evaluate the other's cards, against a layperson it is quite simply unfair. To allow it – indeed, to condone it – is inconsistent with lay intuition.[200] While the average layperson may understand, in a vague way, that some time period limits how old a debt can be before it becomes legally stale, the mere fact that the claim is filed in court acts as some evidence that on this particular claim that time period has not yet run.

Thus when dealing with an unrepresented party, the professional advocate should be held to a higher level of honest behavior. The existing ethical codes encourage zealous representation without concern for the ordinary sensibilities of fair and just conduct. While that may be permissible in most situations, manipulating the ignorance of the unrepresented defendant corrupts the public opinion of the American bar. Behavior that carries too far, though legally allowable, chips away at the public confidence that allows the profession to be self-governing. If lawyers cannot responsibly govern themselves, eventually they will be governed by others.[201]

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199. This normative concept has been explored in other contexts. For example, Bruce Ackerman identified that layperson intuition is relevant to the constitutional problem of takings law and the protection of property, in that the layperson does not conceive of fragmented property ownership (i.e., "the bundle of rights"). *See generally* Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis,* 82 COLUM. L. REV. 1545 (1982).

200. Bellow & Kettleson, *supra* note 9, at 385 ("Psychological manipulation and control are no less coercive because they are subtle.").

201. The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regula-

The conduct of collections attorneys, who prey upon typically unrepresented defendants, illustrates a broader failure of the present codes of professional responsibility – their insensitivity to the realities of dealing with unrepresented litigation opponents. The Proposed Rule addresses that more general failing. Born of the need to protect lay litigants from attorneys' exploitation of their trust, and to forfend public disdain and contempt for the bar, it is long past time for the Bar to consider a provision like the Proposed Rule.[202]

VII. CONCLUSION

The abuse of unrepresented consumers is made possible by a combination of factors – their disenfranchised status, the unregulated infancy of the debt industry, and failed assumptions at the foundation of the adversarial system.[203] The specific dilemma of debt buyers and stale claims demonstrates an even broader failure of the adversarial justice system. So long as advocates tread within the articulated boundaries of the legal process, they are held morally blameless for the client's goals or the means used to attain them.[204] Such blanket immunization from the expectations of ordinary lay morality is troubling at best, [205] reducing attorneys to "technicians without moral compass."[206] Further, those ethical rules derived from the system's presumptions cannot operate as moral dispensation when the system's foundational presumptions are false. Thus the ethical rules of the present code cannot continue to justify the actions of the attorneys who exploit unrepresented consumers, and the American bar must be held accountable for the exercise of sound ethical judgment. The Proposed Rule, addressing attorneys' duties with respect to unrepresented litigation opponents, will prevent

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tions are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. . . . Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.
Neil W. Hamilton, *The Ethics of Peer Review in the Academic and Legal Professions,* 42 S. TEX. L. REV. 227, 235 (2001).

202. *See* Engler, *supra* note 60, at 139.

203. *See* MARVIN E. FRANKEL, PARTISAN JUSTICE 101-18 (1980) (suggesting that justice will become more civilized when complex and hoary procedures are untangled – such as exclusionary rules of evidence).

204. David Luban, *Introduction to* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS, *supra* note 20, at 10 (arguing for limitations on the ethic of zealous advocacy).

205. "The law was made for one thing alone, for the exploitation of those who don't understand it, or are prevented by naked misery from obeying it." Bertolt Brecht (German poet and playwright 1898-1956).

206. *Roy Cohn . . . on Roy Cohn*, NAT'L L.J., Dec. 1, 1980, at 13, 46. "Your job is to protect your client and the nonsense they hand out in these ethics courses today – if the young people listen to this kind of nonsense, there isn't going to be such a thing as an intelligent defense in a civil or criminal case." *Id.*

exploitation of a *pro se* litigant's misinformation, ignorance or inexperience, and put the moral compass where it belongs.