STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re: Melvin Fink, Esq.
PRB File No. 2021-018

HEARING MEMO TO THE BOARD

Respondent, Melvin Fink, is accused of knowingly communicating with a represented party in violation of Vermont Rule of Professional Conduct 4.2. In order to prove a violation, Disciplinary Counsel must produce evidence which clearly and convincingly proves that the Respondent knowingly communicated with a represented party about the subject of the relevant representation. See, A.O. 9, Rule 16(c); V.R.Pr.C.1; 4.2; *In Re PRB Docket No. 2016-042*, 2016 VT 94.

In the instant case, Disciplinary Counsel will be unable to prove either that the Respondent *knowingly* communicated with a represented party or that he communicated with the allegedly represented party about the *subject* of the relevant representation.

Facts

Respondent was retained by Wife in connection with her desire to divorce Husband. In furtherance of that task, Respondent initiated contact with Husband by sending him a letter on May 13, 2020, DC Ex. 1. Included within that correspondence was a proposed written divorce settlement agreement Id. Husband did not respond to the May 13th letter.

On May 22nd, Respondent again wrote Husband after having learned from Wife that Husband had contacted her about the proposed settlement document, DC Ex. 2.

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On June 1, 2020, Attorney Patricia Benelli email Respondent and informed him that "…I am working with [Husband] on his divorce matter. Accordingly, please send all correspondence to me from now on." DC Ex. 3.

Between June 1 and June 12, 2020, Respondent and Ms. Benelli exchanged approximately six emails attempting to resolve a property settlement attendant to the divorce action. DC Ex. 3 – 6.

On June 17, 2020, Husband was served with a Divorce Complaint and Summons drafted by Respondent on behalf of Wife. DC Ex. 7. The documents were "e-filed" with the Court on June 26, 2020. On July 17, 2020, the Windsor Superior Court, Family Division, "accepted" the divorce complaint, Respondent's Notice of Appearance and other related documents. Respondent's Ex.1.

There was no communication between Respondent and Ms. Benelli between June 12 and July 17. On July 31, 2020, Respondent emailed Ms. Benelli proposing Husband and Wife divide the proceeds of a stimulus check Wife had received on behalf of herself and her husband. DC Ex. 11. Later on July 31st, Ms. Benelli emailed Respondent about aspects of the previously discussed property settlement. DC Ex. 13.

On, or about, August 4, 2020, Respondent received Husband's Answer to the divorce complaint, together with Notice of his Pro Se appearance. DC Ex. 10. Between August 4th and August 17th, there was no communication between Respondent and Husband or Ms. Benelli. Ms. Benelli did not file a Notice of Limited Appearance simultaneously with Husband's Answer and Pro Se Appearance. See, V.R.F.P. 15(h). Nor did she file a Notice of Limited Appearance prior to August 17th.[1]

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[1] Ms. Benelli never filed a Notice of Limited appearance in the divorce action. She entered a Notice of Appearance on, or about, October 6, 2020.

On August 17, 2020, Respondent called Husband and invited him to meet and discuss proposed settlement terms. As Husband describes the call:

> Q. When Mr. Fink contacted you on August the 17th, the prosecutor has said in paragraph 22 that during the call, Mr. Fink invited you to his office to, quote, sit down and talk. That you responded that that was fantastic and that you really wanted to move forward to try to get the matter resolved. She further represents that you then said, let me get a hold of my lawyer. And Mr. Fink said, technically, she doesn't have to be here, and quote, I see you filed a pro se appearance. Is that a fair summary of what the conversation consisted of?
> A. Yes.

Respondent's Ex. 2,Deposition of Husband at p. 16, ln. 10 -23.

Husband acknowledges there was no substantive discussion involving the divorce:

> Q. During the phone call when he -- when Fink invited you to sit down and talk, was there any substantive discussion about the divorce itself or did you say, look, pretty much right away, I'll call Penny and see if we can work this out? I'm just trying the get the nature of it.
> A. I was -- there was no real talk of the divorce. It was just trying to come in and, and talk and get things settled. But there wasn't a discussion of, of the divorce. It was just, hey, let's set up an appointment.

Id. at p. 18, ln. 12 – 23.

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Respondent recalls Husband telling him during the phone call that he intended to "use an attorney only if the divorce action went to Court." Respondent understood this to mean that Husband would proceed *pro se* until such time as it appeared the divorce would not be resolved by agreement.

Shortly after the conclusion of their conversation, Husband called Ms. Benelli and informed her of Respondent's call. Ms. Benelli emailed Respondent and told him not to contact her client in the future. DC Ex14. Respondent replied that he had not violated any ethics rules because Husband had appeared *pro se*. *Id.* Respondent has had no communication with Husband since the August 17th phone call:

> Q. So after that call on August 17th, you have had no conversation with Mr. Fink?
> A. No.
> Q. No emails?
> A. No.
> Q. No texts?
> A. No.
> Q. No communication whatsoever?
> A. No.

Id. at p.20, ln 10- 18.

Ms. Benelli never filed a Notice of Limited Appearance in the divorce action. She filed a Notice of Appearance in the case on October 6, 2020. Respondent's Ex. 3

Argument

1 - Intro

Vermont's Rules of Professional Conduct are derived from, and largely identical to, the American Bar Association's Model Rules of Professional Conduct.[2] Here, Respondent is accused of violating V.R.Pr.C. 4.2. Vermont's Rule 4.2 is identical to

[2] See, by way of history, Taylor, A.J., *Work in Progress: The Vermont Rules of Professional Conduct,* 20 Vt.L.Rev. 901 (1996).

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ABA Model Rule 4.2. Each prohibits a lawyer from communicating "…about the *subject of the representation* with a person the lawyer *knows* to be represented by another lawyer in the matter." (Emphasis added) Thus, communication with a represented person, even if knowing, is not violative of the Rule if it does not involve the subject of representation. And, even if communication does involve the subject of representation, there is no violation if the lawyer does not actually know the person is represented.[3]

II – "Knowledge of Representation"

In order to prove a lawyer knew the person communicated with was represented, it is not enough to show that there existed "a substantial reason for the lawyer to believe the person was represented." It is now clear that Rule 1.0(f) requires actual knowledge. See, ABA, *A Legislative History*: *The Development of the ABA Model Rules of Professional Conduct*, 1982-2013 at 566 (2013); ABA.Ann.Mod.Rules. Prof.Cond. §4.2. (2019) (Annotation "How does the lawyer "know" someone is represented?)

Here, Respondent and counsel for Husband recognized that, prior to August 1, 2020, each was representing a person involved in the divorce. But, on or about August 3, 2020, Husband filed an Answer in the divorce together with a *Pro Se* appearance. Ms. Benelli acknowledged the obvious when she was asked to define "pro se," to wit: "It means the party is representing himself." Respondent's Ex. 4, Benelli Deposition, p. 24, ln 16-19. See, *Black's Law Dictionary* (11th ed. 2019) (*pro se* - For oneself; on one's own behalf; without a lawyer.)

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[3] See, comment 8 to both the Vermont and ABA rule citing to their identical definition of "knowing." Vt.R.Pr.C. 1.02(f); ABA Model Rule 1.0(f).

Husband's entry of a "pro se" appearance – a public notice he was representing himself – was consistent with the fact that there was no communication between Respondent and Ms. Benelli in the two weeks following Husband's filing. It was also consistent with Ms. Benelli's failure to file either a Notice of Appearance or a Notice of Limited Appearance.

Respondent's call to Husband and invitation to meet to discuss settlement thus was made at a time when circumstances suggested that Ms. Benelli was not representing Husband. It is important to note that when Ms. Benelli emailed Respondent to chide him for the alleged unauthorized contact with Husband, Respondent noted that Husband had filed *pro se*. See, DC Ex. 14 *infra*. It is equally important to note that after Ms. Benelli's admonishment, Respondent never again contacted Husband.

Apparently, Disciplinary Counsel and Ms. Benelli view the entry of a "pro se" appearance as irrelevant in assessing whether or not Respondent actually knew Ms. Benelli represented Husband in the divorce. Ms. Benelli described a practice she avers to be common place in the Family Division – limited representation. Respondent's Ex.4, Benelli Deposition, p. 26, ln 17 et seq.

Both the Vermont Rules of Professional Conduct and the ABA Model Rules recognize the legitimacy of "limited representation." See, V.R.Pr.Con. 1.2(c); ABA Model Rules of Prof. Con. 1.2(c). However, V.R.F.P. 15(h)(2) requires attorneys in family court proceedings to file a notice of their limited appearance. One salutatory aspect of the requirement to file notices of limited appearance is to alert other parties and counsel that a person is represented.

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The tension between "limited appearances" and the guidelines in Vermont/ABA Mode Rules 4.2 and 4.3 have been recognized by ABA's Standing Committee on Ethics and Professional Responsibility. In ABA, *Standing Committee on Ethics and Professional Responsibility Formal Opinion 472* (attached hereto), the committee noted and posited a query, "Lawyers confronted with a person who appears to be managing a matter pro se but have received legal assistance are often left in a quandary. May the lawyer assume the person is proceeding without the aid of counsel, and therefore speak directly to them about a matter or should the lawyer first ask if they are represented in the matter?" ABA, *Standing Committee on Ethics and Professional Responsibility Formal Opinion 472* at p. 6.

The committee then opined that a lawyer in such a situation may contact the person and determine whether they are, in fact, represented. *Id* at 6. Here, Respondent called Husband to invite him to discuss settlement. Husband said he wanted to discuss the offer with his attorney. Respondent then said something to the effect of that was not necessary if he was representing himself. Husband reiterated that he wanted to consult with Ms. Benelli and the conversation ended. Nothing of substance related to the divorce was discussed in the aforementioned phone conversation.

III – Communicated About the Subject of the Representation

On August 17, 2020, Respondent called Husband to invite him to discuss settlement. Husband told Respondent he wanted to talk to his lawyer. After Respondent said Husband didn't need a lawyer if he was handling the divorce pro se, Respondent maintained that he wanted to consult with his lawyer. The phone call ended without any discussion of issues in the divorce case. See, Ex. Husband's

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Deposition, infra. There was no communication about the subject of the representation. Id. At worst, there was an invitation to communicate about the subject of the representation that was unanswered after Respondent learned unequivocally that Husband was, in fact, represented.

As seen above, the quandary un-noticed limited appearances present to lawyers is real and the ABA authorizes limited contact with noticed *pro se* persons who have, in the past, received legal assistance to discuss the nature of their status, i.e.; truly *pro se*; "unbundled"[4]; or fully represented. Nothing more than that occurred in the August 17th phone call from Respondent to Husband. Respondent did not gain, or seek to gain, any advantage over Husband. Once it was clear to Respondent that Husband was represented, despite Husband's entry of a pro se appearance, his communication with Husband was terminated. It cannot be said that their limited conversation involved the substance of divorce related issues. Cf. *In re Illuzzi*, 160 Vt. 474 (1993) (repeated contacts with insurance adjuster after filing of suit in attempt to settle PI cases in spite of several admonitions by Company's counsel violated DR 7 -104 – predecessor to V.R.Pr.Con 4.2)

WHEREFORE, this Honorable Board should dismiss the instant complaint as unproved.

DATED at St. Johnsbury, Vermont on July 26, 2021.

Respectfully submitted,

David C. Sleigh
Counsel for Melvin Fink

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[4] "Unbundled" is a term used to describe a lawyer's providing partial or limited services to a client. See, https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/unbundled_legal_services/

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 472 **November 30, 2015**

Communication with Person Receiving Limited-Scope Legal Services

Under Model Rule 1.2(c), lawyers are authorized to provide limited-scope legal representation. Although not required by Rule 1.2(c), the Committee recommends that lawyers providing limited-scope representation confirm the scope of the representation in writing provided to the client.

Although Rule 4.2 does not require a lawyer to ask a person if he or she is represented by counsel before communicating with that person about the subject of the representation, a lawyer's knowledge that the person has obtained assistance from another lawyer may be inferred from circumstances. If the lawyer has reason to believe that an unrepresented person on the opposing side has received limited-scope legal services, the Committee recommends that the lawyer begin the communication with that person by asking whether that person is or was represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3. When a lawyer has knowledge that a person is represented on the matter to be discussed, the lawyer must obtain the consent of counsel prior to speaking with the person.

If the person states that he or she is or was represented by counsel in any part of a matter, and does not articulate either that the representation has concluded or that the issue to be discussed is clearly outside the scope of the limited-scope representation, the lawyer requesting information should contact the lawyer providing limited-scope services to identify the issues on which the inquiring lawyer may not communicate directly with the person receiving limited-scope services.

The lawyer must comply with Rule 4.2 and communicate with the person's counsel when the communication concerns an issue, decision, or action for which the person is represented. Under Rule 4.3, however, the lawyer may communicate directly with the person on aspects of the matter for which no representation exists. On aspects of the matter for which representation has been completed and the lawyer providing limited-scope services is not expected to reemerge to represent the client, a lawyer may communicate directly with the other person. Communication with a person who received limited-scope legal services about an issue for which representation has concluded should not include inquiries about protected communications between the person and the lawyer providing limited-scope services.

In this opinion the Committee addresses the obligations of a lawyer under ABA Model Rule of Professional Conduct 4.2, *Communication with Person Represented by Counsel*, commonly called the "no contact" rule, and ABA Model Rule of Professional Conduct 4.3,

Dealing with Unrepresented Person, when communicating with a person who is receiving or has received limited-scope representation under ABA Model Rule of Professional Conduct 1.2, *Scope of Representation and Allocation of Authority Between Client and Lawyer.*[1] We also provide recommendations for lawyers providing limited-scope representation.

Like all the Model Rules of Professional Conduct, Rules 1.2, 4.2, and 4.3 are intended to be rules of reason and must be construed and applied "with reference to the purposes of legal representation and the law itself."[2] In a limited-scope representation, the Model Rules in general, and Model Rule 4.2 specifically, must be interpreted accordingly because limited-scope representations do not naturally fit into either the traditional full-matter representation contemplated by Model Rule 4.2 or the wholly pro se representation contemplated by Model Rule 4.3.

Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer

Model Rule 1.2(c) reads: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[3] Today lawyers increasingly represent clients on a limited-scope basis.

Limited-scope representation may include assisting a litigant who is appearing before a tribunal pro se, by drafting or reviewing one or more documents to be submitted in the proceeding. "This is a form of 'unbundling' of legal services, whereby a lawyer performs only specific, limited tasks instead of handling all aspects of a matter." *See* ABA Formal Ethics Opinion 07-446 (2007).[4]

Although limited-scope representation is not restricted to low-income clients or small claims matters, the ABA Ethics 2000 Commission explained that the proposed amendments to Model Rule 1.2(c) and its Comments regarding limited-scope representations were in part "intended to provide a framework within which lawyers may expand access to legal services by providing limited but nonetheless valuable legal services to low- or moderate-income persons who otherwise would be unable to obtain counsel."[5]

Rule 1.2(c) requires a lawyer to secure the informed consent of a client when providing limited-scope services. Informed consent is defined as: "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and

1. This opinion is based on the Model Rules of Professional Conduct as amended by the American Bar Association House of Delegates through February 2013. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdiction are controlling.

2. MODEL RULES OF PROF'L CONDUCT, Preamble & Scope [14].

3. MODEL RULES OF PROF'L CONDUCT R. 1.2(c).

4. ABA Formal Op. 07-447 (2007) addressed the scope of representation of a client in a collaborative law setting. In that Opinion, the Committee determined that "[A] lawyer may provide legal assistance to litigants appearing before tribunals 'pro se' and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance." The Committee rejected the argument that courts are deceived by lawyers who "ghostwrite" legal documents for pro se litigants or that such conduct is "dishonest," noting that the conduct does not mislead the court or any party.

5. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 59 (Art Garwin ed., 2013).

explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[6] The Colorado Bar Association advised in Formal Ethics Opinion 101 that a lawyer providing limited-scope services to a client should "clearly explain the limitations of the representation, including the types of services which are not being provided and the probable effect of limited representation on the client's rights and interests."[7] The D.C. Bar Legal Ethics Committee advised in its Opinion 330 (2005) that the "client's understanding of the scope of the services" is fundamental to a limited-scope representation.[8] Opinion 330 recommended that lawyers reduce such agreements to writing:

> Because the tasks excluded from a limited services agreement will typically fall to the client to perform or not get done at all, it is essential that clients clearly understand the division of responsibilities under a limited representation agreement . . . Particularly in the context of limited-representation agreements, however, a writing clearly explaining what is and is not encompassed within the agreement to provide services will be helpful in ensuring the parties' mutual understanding.[9]

Similarly, the Ethics 2000 Commission recommended adding a formal Comment to Rule 1.2 that a "specification of the scope of representation will normally be a necessary part of the lawyer's written communication of the rate or basis of the lawyer's fee as required by Rule 1.5(b)." However, because the House of Delegates rejected the Commission's parallel proposal to amend Rule 1.5(b) — which would have required written fee agreements that included an explanation of the scope of the representation, the basis or rate of the fee, and the expenses for which the client will be responsible — this proposed Rule 1.2 Comment language was not advanced.[10]

Therefore, although not required by Rule 1.2(c), the Committee nevertheless recommends that when lawyers provide limited-scope representation to a client, they confirm with the client the scope of the representation — including the tasks the lawyer will perform and not perform — in writing that the client can read, understand, and refer to later. This guidance is in accord with Model Rule 1.5(b) which explains:

> The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the

6. MODEL RULES OF PROF'L CONDUCT R. 1.0(e).
7. Colorado Bar Ass'n Formal Op. 101 (1998, rev. by addendum 2006).
8. D.C. Bar Op. 330 (2005).
9. *Id.*
10. A LEGISLATIVE HISTORY, *supra* note 5, at 61-62.

> same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

The Committee notes that some state rules of professional conduct require a written agreement when a lawyer provides limited-scope services. *See, e.g.*, Maryland Lawyers' Rules of Professional Conduct, Rule 1.2(c)(3); Missouri Rule of Professional Conduct 1.2(c); Montana Rule of Professional Conduct 1.2(c)(2); and New Hampshire Rule of Professional Conduct 1.2(c) and 1.2(g). Other states explain that a written agreement is preferred. *See* Ohio Rule of Professional Conduct 1.2(c) and Tennessee Rule of Professional Conduct 1.2(c). Additionally, some state rules of civil procedure require a limited-scope appearance filing with the court identifying each aspect of the proceeding to which the limited-scope appearance pertains. *See, e.g.*, Illinois Supreme Court Rule 13(c)(6). Therefore, lawyers providing limited-scope representation are advised to review their state rules to determine whether a written agreement is required for their limited-scope representation.[11]

If a lawyer who is providing limited-scope services is contacted by opposing counsel in the matter, the lawyer should identify the issues on which the inquiring lawyer may not communicate directly with the person receiving limited-scope services. A lawyer providing limited-scope legal services to a client generally has no basis to object to communications between the opposing counsel and the client receiving those services on any matter outside the scope of the limited representation.

These issues would best be resolved at the inception of the client-lawyer relationship by the client giving the lawyer providing limited-scope representation informed consent to reveal to opposing counsel what issues should be discussed with counsel and what issues can be discussed with the client directly.

Model Rule 4.2, Communication with Person Represented by Counsel: Is there a duty to ask?

The ABA ethics rules have included a "no-contact" rule since the 1908 adoption of the ABA Canons of Professional Ethics.[12] Current Model Rule 4.2 reads:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be

11. Because a tribunal may require disclosure of the scope of the services performed by the lawyer, and because a client receiving limited-scope services may desire to disclose to opposing counsel the scope of services performed by the lawyer, the Committee cautions lawyers providing limited-scope services to draft their limited-scope legal service agreement so that the agreement does not reveal information beyond that necessary for the client, opposing counsel, or the tribunal to determine the scope of the representation. For an example of a limited-scope agreement that lists services to be performed, see Reporter's Notes to Maine Rule of Professional Conduct 1.2 Limited Representation Agreement. The agreement lists 20 categories of legal services.

12. ABA Canon 9: "Negotiations with Opposite Party. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law." Canon 9 is available at: http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf.

> represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Model Rule 4.2 protects clients who have chosen to be represented by a lawyer from having another lawyer interfere with the client-lawyer relationship by, for example, seeking uncounseled disclosure of information and/or uncounseled concessions and admissions related to the representation.[13] A lawyer directly communicating with an individual, however, will only violate Rule 4.2 if the lawyer *knows* that the person is represented by another lawyer in the matter to be discussed.[14] "Knows" is defined by the Model Rules as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."[15]

ABA Model Rule 4.3 reads:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Lawyers confronted with a person who appears to be managing a matter *pro se* but may be receiving or have received legal assistance, often are left in a quandary. May the lawyer assume that such persons are proceeding without the aid of counsel and, therefore, speak directly to them about the matter under Model Rule 4.3, or should the lawyer first ask whether they are represented in the matter and then proceed accordingly under either Rule 4.2 or 4.3?

Interpreting Model Rule 4.2 in July 1995, ABA Formal Ethics Opinion 95-396, noted:

> It would not, from such a practical point of view, be reasonable to require a lawyer *in all circumstances* where the lawyer wishes to speak to a third person in the course of his representation of a client first to inquire whether the person is represented by counsel: among other things, such a routine inquiry would unnecessarily complicate perfectly routine fact-finding, and might well

13. MODEL RULES OF PROF'L CONDUCT R. 4.2, cmt. [1].

14. *See, e.g.*, Okla. Bar Ass'n v. Harper, 995 P.2d 1143 (Okla. 2000) (lawyer did not violate Rule 4.2 without actual knowledge of the representation. "Ascribing actual knowledge to a lawyer based on the facts is not the same as applying the rule under circumstances where the lawyer should have known.").

15. MODEL RULES OF PROF'L CONDUCT R. 1.0(f).

> unnecessarily obstruct such fact-finding by conveying a suggestion that there was a need for counsel in circumstances where there was none, thus discouraging witnesses from talking.[16] (Emphasis added.)

Thus, while the black letter of Model Rule 4.2 does not include a duty to ask whether a person is represented by counsel, this Committee reiterates the warning of Comment [8] to Rule 4.2 that a lawyer cannot evade the requirement of obtaining the consent of counsel before speaking with a represented person by "closing eyes to the obvious."[17]

In circumstances involving what appears to be an unrepresented person, but in fact may be a person represented by a lawyer under a limited-scope agreement, a lawyer's knowledge that the person has obtained some degree of legal representation may be inferred from the facts.[18] Such circumstances include, for example: when a lawyer representing a client faces what appears to be a pro se opposing party who has filed a pleading that appears to have been prepared by a lawyer or when a lawyer representing a client in a transaction is negotiating an agreement with what appears to be a pro se person who presents an agreement or a counteroffer that appears to have been prepared by a lawyer.[19]

Therefore, the Committee recommends that, in the circumstances where it appears that a person on the opposing side has received limited-scope legal services, the lawyer begin the communication by asking whether the person is represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3. This may assist a lawyer in avoiding potential disciplinary complaints, motions to disqualify, motions to exclude testimony, and monetary sanctions, all of which could impede a client's matter.[20] It is not a violation of the Model Rules of Professional Conduct for the lawyer to make initial contact with a person to determine whether legal representation, limited or otherwise, exists.

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16. ABA Formal Op. 95-396, fn. 39 (1995). Immediately after the release of Formal Opinion 95-396, Rule 4.2, Comment [5] was amended to read: "The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Terminology. Such an inference may arise in circumstances where there is a substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious." However, the Ethics 2000 Commission recommended to the ABA House of Delegates that the sentence explaining "inference" be deleted, and the House adopted this recommendation in 2002. According to the "Reporter's Observations" document submitted to the House with the Ethics 2000 Commission resolution, this description of the knowledge requirement was "inconsistent with the definition of 'knows' in Rule 1.0(f), which requires actual knowledge and involves no duty to inquire." *See* A LEGISLATIVE HISTORY, *supra* note 5, at 566, citing ABA House of Delegates Report 401 (Feb. 2002).

17. MODEL RULES OF PROF'L CONDUCT R. 4.2, cmt. [8].

18. MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (defining "knows").

19. *See generally* State Bar of Arizona Op. 05-06 (2005) (filing of documents prepared by lawyer but signed by client receiving limited-scope representation is not misleading because ". . . a court or tribunal can generally determine whether that document was written with a lawyer's help.").

20. *See, e.g.*, Weeks v. Independent School Dist. No. I-89, 230 F.3d 1201 (10th Cir. 2000) (affirming district court's disqualification of lawyer who interviewed members of control group in violation of Rule 4.2).

If the person discloses representation under a limited-scope agreement and does not articulate either that the representation has concluded (as would be the case if the person indicates that yes, a lawyer drafted documents, but is not providing any other representation), or that the issue to be discussed is clearly outside the scope of the limited-scope representation, then the lawyer should contact opposing counsel to determine the issues on which the inquiring lawyer may not communicate directly with the client receiving limited-scope services.[21]

When the communication concerns an issue, decision, or action for which the person is represented, the lawyer must comply with Rule 4.2 and communicate with the person's counsel.

The lawyer may communicate directly with the person on aspects of the matter for which there is no representation.[22] For these communications, the lawyer must comply with Rule 4.3. On aspects of the matter for which representation has been completed and the lawyer providing limited-scope services is not expected to reemerge to represent the client, a lawyer may communicate directly with the other person. We note that Rule 1.6 and the confidentiality of communications between a lawyer and the lawyer's client does not end when the limited representation concludes. Therefore, any communication with a person who received limited-scope legal services about an issue for which representation has concluded should not include inquiries about communications between the person and the lawyer providing limited-scope services.

If at any point in the matter the person — or the lawyer providing the limited-scope representation to that person — notifies the communicating lawyer that the scope of the representation was expanded, the communicating lawyer must act in accordance with Rule 4.2 as to any issues, decisions, or actions implicated by the expansion of the scope of services.

Conclusion

Under Model Rule 1.2(c), lawyers are authorized to provide limited-scope legal representation. Although not required by Rule 1.2(c), the Committee recommends that lawyers providing limited-scope representation confirm the scope of the representation in writing provided to the client.

Although Rule 4.2 does not require a lawyer to ask a person if he or she is represented by counsel before communicating with that person about the subject of the representation, a lawyer's knowledge that the person has obtained assistance from another lawyer may be inferred from circumstances. If the lawyer has reason to believe that an unrepresented person on the opposing side has received limited-scope legal services, the Committee recommends that the

21. MODEL RULES OF PROF'L CONDUCT R. 4.2, cmt. [3] ("A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.").

22. MODEL RULES OF PROF'L CONDUCT R. 4.2, cmt. [4] ("This Rule does not prohibit communication with a represented person ... concerning matters outside the representation.").

lawyer begin the communication with that person by asking whether that person is or was represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3. When a lawyer has knowledge that a person is represented on the matter to be discussed, the lawyer must obtain the consent of counsel prior to speaking with the person.

If the person states that he or she is or was represented by counsel in any part of a matter, and does not articulate either that the representation has concluded or that the issue to be discussed is clearly outside the scope of the limited-scope representation, the lawyer requesting information should contact the lawyer providing limited-scope services to identify the issues on which the inquiring lawyer may not communicate directly with the person receiving limited-scope services.

The lawyer must comply with Rule 4.2 and communicate with the person's counsel when the communication concerns an issue, decision, or action for which the person is represented. Under Rule 4.3, however, the lawyer may communicate directly with the person on aspects of the matter for which no representation exists. On aspects of the matter for which representation has been completed and the lawyer providing limited-scope services is not expected to reemerge to represent the client, a lawyer may communicate directly with the other person. Communication with a person who received limited-scope legal services about an issue for which representation has concluded should not include inquiries about protected communications between the person and the lawyer providing limited-scope services.