STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re Thomas Melone	)	PRB No. 25-120
	)	
	)	December 16, 2025

RESPONDENT'S MOTION TO REVISE HP ORDER

Respondent THOMAS MELONE ("Respondent") filed a motion to dismiss and a motion for a more definite statement (the "Motions") in response to the Petition for Misconduct (the "Complaint" or "Petition") filed by Michael Hanley against Respondent on September 26, 2025. Those Motions were denied on December 2, 2025 ("HP Order").

Respondent hereby respectfully moves that the HP Order be revised. "[A] motion to revise an interlocutory order, appropriate under the general power of revision contained in V.R.C.P. 54(b) … is within the plenary power of the court to afford such relief as justice requires." *Dudley v. Snyder*, 140 Vt. 129, 131 (1981). Rule 54(b) provides that any order which resolves fewer than all of the claims or rights and liabilities of fewer than all the parties "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." V.R.C.P. 54(b). The court also has the inherent power to revise such an order. *Kelly v. Town of Barnard*, 155 Vt. 296, 307, 583 A.2d 614, 620 (1990) ("[U]ntil final decree the court always retains jurisdiction to modify or rescind a prior interlocutory order.") (quoting *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1121 (10th Cir. 1979)).

I. RESPONDENT MOVES TO HAVE THE HP ORDER ON COUNT I REVISED.

Regarding Count I the HP Order states:

> Count I asserts that Respondent violated Rules 3.5(d), 4.3, 4.5, and 8.4(d) by claiming before the Public Utility Commission (PUC) that agents and employees of the Town of Bennington had engaged in criminal conduct. He alleged that they "were engaged in an active 'cover-up conspiracy' and committed acts 'forgery,' engaged in 'counterfeiting,' filed 'false certifications to the state and federal government in violation of criminal statutes,' and filed at least one 'false statement with the [Public Utility] Commission.'"
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> The Respondent's claims against the Town are set forth in paragraph 61 of the Petition. In paragraph 62, it is alleged that Respondent threatened to file a RICO complaint in federal court. Although the RICO complaint is civil, it must allege "predicate acts" which must be linked to a criminal enterprise. *See e.g., In re*

> *Testosterone Replacement Therapy Products*, 159 F.Supp.3d 898, 910-11 (N.D. Ill. 2016). In this case, the threat of civil litigation included a threat to report criminal violations. Allegations in paragraphs 61 through 64 of the Petition provide adequate support for Count I.

The HP Order states "the threat of civil litigation included a threat to report criminal violations." But nowhere in any document is there a threat to report criminal violations. Neither the Complaint, nor the HP Order can point to any threat to report criminal violations. If the HP Order is concluding that a civil RICO complaint always carries with it a threat to report criminal violations, then the HP Order's conclusion is contrary to express Second Circuit precedent as argued by Respondent. In *Revson v. Cinque & Cinque*, 221 F.3d 71, 81 (2d Cir. 2000), the Second Circuit held "the threat of a civil RICO claim [is not] a threat to bring criminal charges" within the meaning of New York's equivalent attorney disciplinary rule. As the Second Circuit observed, if Mr. Hanley's view "were correct, no attorney could ever threaten to bring a civil RICO suit without violating the ethical rules."

Beyond that the January 10, 2025 PUC filing, which is the sole basis for Count I, does not threaten any particular person with any criminal charges. The HP Order fails to address that fatal disconnect. As argued by Respondent, the Complaint misstates what the January 10, 2025 PUC filing actually says. As clearly stated in the January 10, 2025 PUC filing, Respondent stated that the members of the Select Board (other than two) were engaged in "multi-faceted conspiracy to cover up" *the expiration of the Town Plan*. No allegations against any specific person or the Town were made with respect to the "forgery," "counterfeiting," filing of "false certifications to the state and federal government in violation of criminal statutes" or "false statement with the [Public Utility] Commission." Only the "cover-up" was alleged against the members of the Select Board (other than two).

The HP Order's statement that "the threat of civil litigation included a threat to report criminal violations," has no basis in fact and the HP Order does not point to where there was any threat against any particular person.

Additionally, the January 10, 2025 PUC filing says Respondent was finalizing a civil complaint against the Town and others (including unidentified does) that would include *various*

civil claims, including breach of contract, declaratory and injunctive relief related to the Town Plan, civil rights violations and a civil RICO count. But the Respondent did not state what defendants would be charged in which Count. In other words, as to the Town, the two claims that were certain to be directed to the Town were the breach of contract and the declaration that the Town Plan expired. The allegations in the Complaint and now the HP Order misrepresent what was actually said. Because there is no threat against any person that either Mr. Hanley nor the Hearing Panel can point to, Count I should be dismissed.

II. RESPONDENT MOVES TO HAVE THE HP ORDER ON COUNT II REVISED.

Regarding Count II the HP Order states:

> Count II asserts that the Respondent violated Rule 4.5 by threatening to present criminal charges against the individuals identified by the initials ML and DG. It also asserts that this misconduct ran afoul of Rule 8.4(d). The allegations made in paragraphs 46 through 55 support these claims. The Petition alleges that ML and DG were opponents of at least one of the applications for a Certificate of Public Good (CPG) filed by one of Respondent's companies. It alleges that Respondent discovered a potentially criminal omission in a bankruptcy petition filed by DG and that he advised ML and DG, "I do want you to be aware that we will be asking about it in your deposition." Subsequently, ML and DG withdrew from the PUC proceedings. Nevertheless, in an email Respondent advised, "I think the only way that the various lingering issues from your involvement [in the PUC proceeding] can be removed is if you send letters to the PUC, the Planning Commission and the Select Board supporting both projects.. . ." It can be inferred from Respondent's communications with ML and DG that he was threatening to report them for criminal conduct,

Vt. Rule 4.5 entitled "Threatening criminal prosecution," states: "A lawyer shall not … threaten to present criminal charges in order to obtain an advantage in a civil matter."

No threat of criminal prosecution was made in any communications with ML or DG. And neither Mr. Hanley nor the HP Order point to any particular communication that threatened to present criminal charges. Instead, without pointing to any communication(s), the HP Order states that: "[i]t can be inferred from Respondent's communications with ML and DG that he was threatening to report them for criminal conduct." The HP Order's allowing Count II to proceed shows that Rule 4.5 is so vague that it does not provide fair notice as to what is proscribed. There is a single communication from Respondent, *see* Compl. ¶55, that occurred while Respondent and

ML/DG were in the Complaint's words "opponents to at least one of the applications by at least one of the companies owned and controlled by Thomas Melone for a Certificate of Public Good." Compl. ¶50. In the May 3, 2024 email, Respondent said "I do want you to be aware that we will be asking about it in your depositions." Compl. ¶52. No criminal charges were threatened there. The communications thereafter occurred when neither ML/DG were a party of any civil proceeding. The HP Order fails to engage the actual facts. And the HP Order fails to explain how threating to present criminal charges is even possible when the statute of limitations had expired. Count II is a clear example of it being beyond doubt that there exist no circumstances that justify Count II and it should be dismissed.

III. RESPONDENT MOVES TO HAVE THE HP ORDER ON COUNT VI REVISED.

Regarding Count II the HP Order states:

> Count VI asserts that the Respondent violated Rules 3.3(a)(1), 4.4(a), and 8.4(d) by engaging in the following conduct. Investigation of the Respondent's conduct was initiated by a letter of complaint filed by Attorney Merrill Bent to the Professional Responsibility Program. The Petition alleges that in response, the Respondent sent a letter to Screening Counsel in which he stated that Ms. Bent's allegations in her letter of complaint constituted "actionable defamation per se." Reports of misconduct are privileged, so long as the statements are official and so long as the report about them is fair and accurate. *See, e.g*., Wolsfelt v. Gloucester Times, 98 Mass.App.Ct. 321, 330, 155 N.E.3d 737 (2020).
>
> It further alleges that he complained that Ms. Bent herself was guilty of misconduct by mistreating an employee of her firm. He later admitted that he had no direct knowledge about this conduct or even if Ms. Bent was the member of her firm who was involved. He also asserted that the Rules of Professional Conduct prohibited her from representing a certain client, the Bennington School Board. Despite Respondent's complaints to Screening Counsel, he allegedly did not file a report with the Professional Responsibility Program as he would be required to do under Conduct Rule 8.3(a) if these were, in fact, fair and accurate accusations. Paragraphs 95 through 102 of the Petition support these claims.

First, the HP Order fails to address the fact that Screening Counsel is not a "tribunal" under the VRPC. The fact that Screening Counsel is not a tribunal is fatal to the Complaint's alleged violation of VRPC 3.3(a)(1). Vt. RPC 3.3(a)(1) entitled "Candor Toward The Tribunal" states "(a) A lawyer shall not knowingly: (1) make a false statement of fact or law *to a tribunal* or fail to correct a false statement of material fact or law previously made *to the tribunal* by the lawyer."

(emphasis added). Because the Screening Counsel is not a tribunal, there is no possibility that the charge under VRPC 3.3(a)(1) can succeed. It is therefore required to be dismissed.

Second, the HP Order states: "Reports of misconduct are privileged, so long as the statements are official and so long as the report about them is fair and accurate. *See, e.g*., Wolsfelt v. Gloucester Times, 98 Mass. App. Ct. 321, 330, 155 N.E.3d 737 (2020)." *Wolsfelt* did not involve disciplinary complaints. Rather it involved the "fair report privilege." *See Wolsfelt* at 330:

> "The fair report privilege establishes a safe harbor for those who report on statements and actions so long as the statements or actions are official and so long as the report about them is fair and accurate." *Howell v. Enterprise Publ. Co*., 455 Mass. 641, 651, 920 N.E.2d 1 (2010). *See Butcher,* 483 Mass. at 750. (discussing history of fair report privilege). Where, as here, police undertake an official response to a complaint, such as an arrest, both that response and the allegations that gave rise to it fall within the privilege. *See Jones v. Taibbi*, 400 Mass. 786, 795, 512 N.E.2d 260 (1987) ("The publication of the fact that one has been arrested, and upon what accusation, is not actionable, if true" [citation omitted]). Wolsfelt does not contest that he was arrested as reported by article two. Nonetheless, he asserts that the omission of certain details strips the article of the protections afforded by the fair report privilege.

In other words, Massachusetts' "fair report privilege" has no relevance to Count VI and the HP Order does not show any relevance of Massachusetts' fair report privilege to Count VI. Regardless, the Complaint is not based upon the "fair report privilege," but rather Rule 12 of The American Bar Association's *Model Rules for Lawyer Disciplinary Enforcement. But that Rule is not enforceable in Vermont (or anywhere) unless it is adopted by a State. And in Vermont it has not been.* For that reason too, there is no possibility that the charge under VRPC 3.3(a)(1) can succeed. It is therefore required to be dismissed.

Third, Vt RPC Rule 4.4(a) provides: "(a) *In representing a client*, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." Regardless of what Respondent said to Screening Counsel, he was not representing a client when responding to a complaint filed by Ms. Bent.

Fourth, the HP Order states: "Despite Respondent's complaints to Screening Counsel, he allegedly did not file a report with the Professional Responsibility Program as he would be required

to do under Conduct Rule 8.3(a) if these were, in fact, fair and accurate accusations." But that conclusion is contrary to Rule 8.3(a) in two ways. First, contrary to what the Complaint assumes, and the HP Order states, Rule 8.3(a) limits what is reportable and requires a measure of judgment. The professional conduct issue involved RPC 3.7. That did not rise to the level requiring a report. Second, even if it did, the report was made to the PUC which in Respondent's judgment was "more appropriate in the circumstances" as expressly provided by RPC 8.3. *See*, Comment [3] to VRPC 8.3 which states: "This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as the court in which the violation occurred, is more appropriate in the circumstances."

IV. RESPONDENT MOVES TO HAVE THE HP ORDER ON COUNT VII REVISED.

Regarding Count VII the HP Order states:

> Count VII asserts that Respondent sent email communications to employees and officials of the Town of Bennington. The Town was represented by Attorney Merrill Bent at the time. The Petition asserts that the emails constitute violations of Rules 4.2 and 8.4(d). The Petition asserts that by sending emails to town officials who did not have authority to take any action in connection with the complaint that Attorney Bent sent to the Professional Responsibility Program violated the two rules set forth above. The allegation in paragraphs 103 through 113 of the Petition support the assertions in Count VII.

The HP Order, like the Complaint, suffers from a fatal disconnect. Even assuming Rule 4.2 applied (it does not), it is *matter* specific. *See* ABA Formal Opinion 502 ("it is important to remember that Model Rule 4.2 applies only when a communication is 'about the subject of the representation,' i.e., the Rule is matter specific, and a lawyer may speak with another represented person about matters that do not constitute the subject of the representation. See Model Rules R. 4.2, cmt. [4] ('This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.').)" *See also*

VRPC Comment [4]: ”This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.”

Therefore, even assuming Rule 4.2 applied, it is only when the person (here the Town officials) were represented by counsel with *respect to the matter* involved, *i.e*., the PRB complaint filed by Ms. Bent. In other words, in order for Count VII to begin to make any sense, the town officials would have to be the “client” and the matter would have to be the complaint filed by Merrill Bent. But the Complaint alleges, paras. 92 and 93, that Ms. Bent was acting alone and not on behalf of the Town. The complaint filed by Ms. Bent alleges the same. Said another way, both Ms. Bent and the Complaint allege that the Town officials were not represented in connection with Bent’s PRB complaint because the Town officials did not file the PRB complaint. In other words, there is no basis for the rule to apply.

Otherwise, the Hearing Panel must conclude that the Town (including all the officials communicated with) together with Ms. Bent are the complainants in this matter. And if that is the case, then there could not have been any violation of confidentiality because all of those people were complainants and were being told of something they already knew. And if that were the situation (which it must be in order for Count VII to move forward and not be dismissed), then at various times Ms. Bent would have made the alleged defamatory statements third parties to all of the town officials that she would be allegedly representing in connection with the PRB complaint. Count VII must be dismissed.

V. RESPONDENT MOVES TO HAVE THE HP ORDER REGARDING WHETHER RESPONDENT WAS REPRESENTING A CLIENT WITH RESPECT TO ALLEGED VIOLATIONS REVISED.

The Respondent argued that he was not representing a client with respect to alleged violations. The HP Order rejected Respondent’s position citing two cases, both of which are inapposite, not Vermont cases, and one of which did exactly the opposite of what the case is cited for. The HP Order cites *In re Morisseau*, 763 F. Supp. 2d 648, 652 (S.D.N.Y. 2010). HP Order at 9. *Morisseau* involved an attorney as a *pro se* litigant and the court held that *pro se* status would not exempt her from the Disciplinary Rules and Rule of Professional Conduct because “Local Civil

Rule 1.5(b)(5) [of the Southern District of New York] applies to 'any attorney,' not only those appearing for a client." 763 F. Supp. 2d at 652. But the Vermont Rules of Professional Conduct do not all apply to any attorney *by their own terms*. Thus, *Morisseau* is inapposite. The fundamental question is whether the rules should be applied to Respondent as written or strained into some other interpretation and then applied retroactively. Vermont Bar Counsel Michael Kennedy in 2022 raised the question of whether Vermont's Rules of Professional Conduct should be amended to cover attorneys representing their own interest. See below.

The HP Order then states: "In accord, *Robinson v. Howard University, Inc*., 335 F.Supp. 3d 13, 22 (D.D.C. 2018) (lawyers are not entitled to any special protection when they appear pro se)." *Robinson* is not in accord at all. *Robinson* involved a tenured law professor that was issued a letter of reprimand. "He was also required to participate in sensitivity training, to submit future quiz and exam questions to the Dean's Office for approval, and to have a few of his future lectures monitored. Impenitent, Mr. Robinson sued the University and various University officials. He allege[d] breach of contract, bad faith, violations Title IX of the Education Amendments Act of 1972 ("Title IX"), sex discrimination, intentional infliction of emotional distress, and other claims." 335 F. Supp. 3d at *18.

The HP Order cites *Robinson* for the proposition that "lawyers are not entitled to any special protection when they appear pro se." HP Order at 9. But *Robinson* never held that. In fact, the court did the opposite. The context was whether on a motion to dismiss, the court should provide the normal leeway provided to *pro se* parties. The court observed that question was undecided in the D.C. Circuit, but that the court need not decide the issue because even though professor Robinson was an attorney, the court would still afford Professor Robinson the leeway typically afforded pro se parties. In other words, the court in that case did the exact opposite of what the HP Order claims. In any event, that case had nothing to do with disciplinary rules.

The HP Order then cites V.R.C.P. 83(a)(3),[1] which provides "(3) The term 'plaintiff's attorney' or 'defendant's attorney' or any like term shall include any party appearing without counsel." The HP Order then states: "[t]hus, a self-represented litigant is deemed to be an attorney for the purposes of the Rule of Civil Procedure and, by extension, disciplinary proceedings." HP Order at 9. The HP Order's conclusion does not follow from Rule 83. Respondent has found one reported case under Rule 83, which illustrates the point of the Rule (which is not to amend the Vermont Rules of Professional Conduct). In *Smith v. Brattleboro Reformer*, 147 Vt. 303, 304 (1986), Rule 83 was referenced in connection with service of a summons. *Id.* ("Defendants correctly point out that under V.R.C.P. 4(a) it is the responsibility of the plaintiff to deliver to the person who is to make the service the necessary complaint and summons with appropriate copies. … Although the rule places this responsibility on the plaintiff's attorney, in the absence of any contrary indication, the term 'plaintiff's attorney' includes the party appearing without counsel. See V.R.C.P. 83(3); Reporter's Notes, V.R.C.P. 4(a)." (Internal citations and quotations omitted.) In other words, Rule 83(3) is a gap-filler for when there is no "plaintiff's attorney." There is no such gap-filler in the Vermont Rules of Professional Conduct and such Rules differentiate between a lawyer and a lawyer "representing a client".

The Connecticut Supreme Court has long held to the specific attorney disciplinary rules that suggest that they are applicable to an attorney only when the attorney is representing a client as opposed to his own interests (such as the no-contact rule) do not apply to a lawyer representing his own interests. *See, e.g., Pinsky v. Statewide Grievance Committee*, 216 Conn. 228, 236, 578 A.2d 1075 (1990) (by its express terms, rule 4.2 of Rules of Professional Conduct, which proscribes communication between an attorney and a represented party, applies only when the attorney is representing a client).

The Vermont rules in that way are the same as the comparable rules in Connecticut. There is no contrary authority in Vermont, and the Hearing Panel should not create any. At a minimum,

[1] The Reporter's Notes indicate that Rule 83 "has no equivalent in the Federal Rules but is based on Maine Rule 83."

a Count I (para. 114(b)), Count III (para. 119(b)), Count V (paras. 123(b) & (c)), Count VI entirely and Count VII entirely should be dismissed.

All of the Counts that Mr. Hanley presents in the Complaint are based upon Respondent representing his own interests. In other words, none are based upon Respondent representing a third-party client. Respondent thus argued that as a general matter the Vermont Disciplinary Rules that Mr. Hanley alleges have been violated simply do not apply in the first place on their own terms, and certain rules expressly only apply when representing a client. *See, e.g.*, Rule 3.3, Comment [1]: "This rule governs the conduct of a lawyer *who is representing a client* in the proceedings of a tribunal."; Rule 4.1: "*In the course of representing a client* a lawyer shall not knowingly make a false statement of material fact or law to a third person."; Rule 4.2: "*In representing a client*, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter." Rule 4.4: "(a) *In representing a client*, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

As discussed below, ABA Formal Opinion 502 provides ample illumination of the substantial ground for difference of opinion. Vermont Bar Counsel Michael Kennedy's commentary, *see* below, reinforces that substantial ground or difference of opinion, with Mr. Kennedy recommending a rule change to match Oregon's Rule 4.2. *See*, ABA Formal Opinion 502 (dissent):

> Applying Rule 4.2 to pro se lawyers is supported by compelling policy arguments. It is not the result I object to, it is the mode of rule construction that I cannot endorse. Self-representation is simply not "representing a client," nor will an average or even sophisticated reader of these words equate the two situations. See *In re Haley*, 126 P.3d 1262, 1267, 1272 (Wash. 2006) (majority and concurring opinions referencing definitions and authorities). Rather, this is an "ingenious bit of legal fiction." *Haley*, at p. 1272 (Sanders, J., concurring). Further, this approach to construing the rule's language renders the phrase "in representing a client" surplusage, contrary to a basic canon of construction. [2]

[2] *See* "Surplusage canon," BLACK'S LAW DICTIONARY (11th ed. 2019) ("if possible, every word and every provision in a legal instrument is to be given effect"), citing ANTONIN SCALIA

> It is also simply wrong to perpetuate language that was clear but has been made misleading by opinions effectively reading that language out of the rule. When an attorney consults the rule, it is highly unlikely that the phrase "in representing a client" will be considered to include self-representation. If the attorney goes further and consults Comment [4], the Comment will assure the attorney that, "Parties to a matter may communicate directly with each other." Given this apparent clarity, what will tip off the attorney that further research is required? The lesson here must be that nothing is clear. Clear text cannot be relied upon but may only be understood by reading ethics opinions and discipline decisions. Does the text mean what it actually says, as it does in Connecticut, Kansas, and Texas? n3 Or, does it mean what we wish it said, as several other states have declared?
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> ***Model Rule 4.2's plain language making it applicable only to lawyers who represent clients has also been recognized by the Restatement, cases applying the rule prospectively because to do otherwise would amount to a deprivation of due process, and by courts modifying the Model Rule to make it expressly applicable to pro se lawyers***.
>
> Thoughtful commentators have identified the problems with Model Rule 4.2's language and inconsistent interpretations, and have recommended fixing the rule rather than straining to achieve its purposes when lawyers represent themselves. By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion.
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> (emphasis added).

Even in cases like *Haley*, where the Washington Supreme Court concluded that the rule should be interpreted as applying to a pro se lawyer, the Washington Supreme Court following the Nevada Supreme Court held that it would be an unconstitutional violation of due process to do so in the case in which the question was presented. Rather, the Washington Supreme Court followed the principle of *In re Discipline of Schaefer*, 117 Nev. 496, 507-08, 25 P.3d 191 (2001) that the Rule "was unconstitutionally vague on 'the absence of clear guidance' from the Nevada State Supreme Court and on 'the existence of conflicting authority from other jurisdictions.'"

Also of note is the discussion in *Haley* regarding certain authority from other jurisdictions, particularly California:[3]

& BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) ("it is no more the court's function to revise by subtraction than by addition").

[3] https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Previous-Rules/Rule-2-100#:~:text=(A)%20While%20representing%20a%20client,consent%20of%20the%20other%20lawyer.

The comment to rule 2-100 of the California RPC, a rule identical to RPC 4.2(a) in all material respects, explicitly permits a lawyer proceeding pro se to contact a represented party:

> [T]he rule does not prohibit a [lawyer] who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Cal. RPC 2-100 []. Likewise, a comment to the restatement specifically provides that "[a] lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals." RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 99 cmt. e at 73 (2000).

Alongside these explicit statements permitting the questioned contact, other authorities supported a reasonable inference that our RPC 4.2(a) did not foreclose a pro se lawyer's communication with a represented opposing party. For example, the comparable rule in Oregon, DR 7-104(A)(1), put lawyers acting pro se squarely within the rule's ambit:

(A) During the course of the lawyer's representation of a client, a lawyer shall not: (1) Communicate or cause another to communicate . . . with a person the lawyer knows to be represented by a lawyer. . . . *This prohibition includes a lawyer representing the lawyer's own interests.*

The absence of an explicit prohibition in RPC 4.2(a) could have suggested that Washington's rule was narrower in scope than Oregon's and did not apply to lawyers acting pro se. Additionally, the commentary to model rule 4.2 includes the statement that "[p]arties to a matter may communicate directly with each other." ABA, ANNOTATED MODEL RULES rule 4.2 cmt. 4, at 417. Unlike the commentary to the restatement and to California's RPC 2-100, this comment does not pointedly refer to a lawyer-party acting pro se; consequently, the breadth of the statement permits an inference that all parties may communicate unreservedly with each other. Finally, the holding in *Pinsky v. Statewide Grievance Committee*, 216 Conn. 228, 578 A.2d 1075 (1990), appears to call into question the policy concerns supporting the application of RPC 4.2(a) to lawyers acting pro se. In *Pinsky,* the Connecticut State Supreme Court concluded that a represented lawyer-party had not violated an identical version of RPC 4.2(a) when he directly contacted his landlord, who was also represented by counsel, during an eviction matter. The *Pinsky* court took note that "(c)ontact between litigants . . . is specifically authorized by the comments under rule 4.2" and concluded that Pinsky was not "'representing a client'" as stated in the rule. *Id*. at 236. The *Pinsky* court thus determined that communication between a represented lawyer-party and a represented nonlawyer party did not conflict with a key purpose of RPC 4.2(a)--the protection of a represented nonlawyer party from "possible overreaching by other lawyers who are participating in the matter." ABA, ANNOTATED MODEL RULES rule 4.2 cmt. 1, at 417. Because the *Pinsky* decision did not address why contacts from a lawyer acting pro se would pose a greater threat of overreaching

than would contacts from a represented lawyer-party, *Pinsky* provides further equivocal authority on the application of RPC 4.2(a) to lawyers acting pro se.

Vermont Bar Counsel Michael Kennedy has recognized that a rule amendment would be in order to address a situation involving *pro se* representation. *See* Kennedy, M., *"ABA opinion concludes that the 'no-contact' rule applies to self-represented lawyers. Should we amend Vermont's rule?"* September 29, 2022. *See*, https://vtbarcounsel.wordpress.com/2022/09/29/aba-opinion-concludes-that-the-no-contact-rule-applies-to-self-represented-lawyers-should-vermont-amend-its-rule/. Bar Counsel Kennedy's post is reproduced below proposed following Oregon's Rule 4.2, which says: "In representing a client **or the lawyer's own interests**," instead of simply "in representing a client." (Emphasis supplied by Mr. Kennedy.

> **ABA opinion concludes that the" no-contact" rule applies to self-represented lawyers. Should we amend Vermont's rule?**
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> The issue of whether a self-represented lawyer is subject to Rule 4.2's "no-contact" provision is not one with which I have much experience. Whether as disciplinary counsel or when I was the screener, if I ever reviewed a single complaint alleging such a violation, I don't remember it. Nor has the topic ever been broached in the context of an ethics inquiry. My only real work on the topic was in this post about the first decision ever issued after Vermont adopted a formal professional responsibility program.[1]
>
> Yesterday, the ABA Standing Committee on Ethics and Professional Responsibility issued *Formal Opinion 502: Communication with a Represented Person by a Pro Se Lawyer*.[4] The Committee concluded that a self-represented lawyer is bound by Rule 4.2. That is, when self-representing, a lawyer cannot communicate about the matter with another person who the lawyer knows to be represented in the matter without the consent of the represented person's lawyer or unless the communication is otherwise authorized by law.
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> I appreciate the opinion for several reasons.
> For one, the opinion is well-researched and provides interesting and informative detail about the history of the debate as to whether Rule 4.2 applies to a self-represented lawyer. For another, I don't necessarily disagree with the conclusion. As the Committee notes, "[t]he key evils intended to be managed by Model Rule 4.2 are (1) overreaching and deception; (2) interference with the integrity of the client-lawyer relationship; and (3) elicitation of uncounseled disclosures, including inappropriate acquisition of confidential lawyer-client communications." Thus, it makes sense to apply the rule to a self-represented lawyer.

[4] https://www.americanbar.org/news/abanews/aba-news-archives/2022/09/aba-formal-opinion-502/.

Still, the opinion gives me pause. While I support the general conclusion, I'm drawn to the dissenting members' view. That pull leaves me wondering if we should amend V.R.Pr.C. 4.2. Alas, before I discuss the dissent, a bit more background is required.

Comment [4] to both the ABA Model Rule and Vermont's rule includes the following statement:

- "Parties to a matter may communicate directly with each other and a lawyer is not prohibited from advising a client concerning a communication that the client is legally justified to make."
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The tension between this statement and the text of the rule drives the debate. Is the self-represented lawyer fish or fowl? That is, a "lawyer" subject to Rule 4.2? Or a "party" to whom Comment [4] applies? In Formal Opinion 502, the Committee answered by stating:

- "It is not possible for a pro se lawyer to 'take off the lawyer hat' and navigate around Rule 4.2 by communicating solely as a client."

Again, I don't necessarily disagree. However, as I indicated, I remain drawn to the dissent.

Like me, the dissent doesn't disagree with the Committee's conclusion, stating:

- "It is not the result I object to, it is the mode of rule construction that I cannot endorse. Self-representation is simply not 'representing a client,' nor will an average or even sophisticated reader of these words equate the two situations."

The dissent continues:

- "When an attorney consults the rule, it is highly unlikely that the phrase "in representing a client" will be considered to include self-representation. If the attorney goes further and consults Comment [4], the Comment will assure the attorney that, 'Parties to a matter may communicate directly with each other.' Given this apparent clarity, what will tip off the attorney that further research is required?"

Perhaps the same could be said for the represented person's lawyer. Which might explain why I don't remember this topic having come up very much over the past 24 years.

Finally, the dissent argues:

- "By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion."

I tend to agree. And amending the rule wouldn't be difficult.[2] Here's the relevant portion of Oregon's Rule 4.2, with my emphasis added.

- "In representing a client **or the lawyer's own interests**, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless: (a) the lawyer has the prior consent of a lawyer representing such other person; (b) the lawyer is authorized by law or by court order to do so . . ."

In any event, that's why I post today. To raise the question of whether to amend Rule 4.2.

To me, it's an interesting question. Again, I don't disagree with the conclusion that a no-contact rule should apply to self-represented lawyers.[3] However, many of the rules include phrases like "when representing a client" or "in representing a client." If, for the purposes of Rule 4.2, a self-represented lawyer is "representing a client," it's interesting to consider the ramifications of construing other rules with like phrases to apply similarly.

> "By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion."
> I tend to agree.

To his credit, as discussed above, Bar Counsel Michael Kennedy agrees that the Rule should be clear, which means it should be changed if it were to capture Respondent's conduct. Otherwise, as noted below, it is simply a trap because the plain language of the Vermont rule *does not* cover a lawyer representing his own interests, as is the case with Respondent. There is no contrary authority in Vermont, and the Hearing Panel should not create any. At a minimum, a Count I (para. 114(b)), Count III (para. 119(b)), Count V (paras. 123(b) & (c)), Count VI entirely and Count VII entirely should be dismissed.

Dated: December 16, 2025

Respectfully Submitted,

/s/ Thomas Melone

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Pinsky v. Statewide Grievance Committee

Supreme Court of Connecticut

May 2, 1990, Argued ; August 14, 1990, Decided ; August 14, 1990, Released

No. 13828

Reporter
216 Conn. 228 *; 578 A.2d 1075 **; 1990 Conn. LEXIS 317 ***; 1990 LX 68116

Irving J. Pinsky v. Statewide Grievance Committee et al.

Prior History: [*1]** Action for review of a reprimand issued by the named defendant for the plaintiff's alleged violation of the Rules of Professional Conduct, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, Purtill, J.; judgment for the plaintiff, from which the named defendant appealed.

Disposition: Affirmed.

Counsel: Christine M. Whitehead, for the appellant (named defendant).

Roger J. Frechette, with whom was Matthew E. Frechette, for the appellee (plaintiff).

Judges: Peters, C. J., Shea, Callahan, Glass and Covello, Js.

Opinion by: COVELLO

Opinion

[*229] [1076]** COVELLO, J. This is an appeal from a judgment of the trial court that rescinded the reprimand of an attorney issued by the named defendant, the Statewide Grievance Committee (defendant). The issues presented are: (1) whether an attorney has the right to appeal a reprimand issued by the defendant to the Superior Court; (2) if the right to such an appeal exists, should the Superior Court proceedings be limited to a review of the record before the defendant or should the trial court conduct a trial de novo; and (3) whether the trial court correctly concluded that the plaintiff **[***2]** had not violated the Rules of Professional Conduct. We conclude that: (1) an attorney has the right to appeal a reprimand; **[*230]** (2) such an appeal is limited to a review of the record of the proceedings before the defendant; and (3) a review of that record supports the trial court's conclusion that the plaintiff had not violated the Rules of Professional Conduct.

Examination of that record discloses the following: The plaintiff, Irving J. Pinsky, is an attorney. During the time in question, he maintained his office in a New Haven building owned by the Bank of Boston/Connecticut. Eric Connery, the bank's employee, managed the building. The bank, represented by a New Haven law firm, began a summary process action against the plaintiff, seeking to evict him from the building. The plaintiff did not enter his own appearance, but rather retained counsel to represent him in the summary process action.

On at least one occasion, the bank's attorneys contacted the plaintiff directly by mail, returning his tender of rent with a covering letter. On March 29, 1988, the plaintiff sent a letter addressed to Connery's home. The letter did not indicate the plaintiff's status as an **[***3]** attorney, but it **[**1077]** did contain his name and post office box number. In his letter to Connery, the plaintiff expressed his frustration with the events surrounding the eviction, and threatened to initiate a legal action against Connery.

On April 19, 1988, Connery filed a complaint with the defendant, alleging, inter alia, that the plaintiff knew the bank was represented by counsel and had therefore improperly communicated directly with Connery, an employee of the

bank, in violation of Rule 4.2 of the Rules of Professional Conduct. [1] **[***4]** Pursuant to Practice **[*231]** Book § 27F(a)(1), [2] the defendant referred the complaint to the grievance panel for the New Haven judicial district. On May 27, 1988, the grievance panel concluded that there was insufficient evidence to support a finding of probable cause that the plaintiff was guilty of misconduct.

On September 15, 1988, however, contrary to the finding of the grievance panel, the defendant found that there was probable cause to believe that the plaintiff had violated Rule 4.2. Pursuant to Practice Book § 27J(a) [3] the defendant then referred the complaint to a reviewing committee. On March 28, 1989, the reviewing committee recommended that the complaint **[***5]** be dismissed. On April 20, 1989, despite the reviewing **[*232]** committee's recommendation to the contrary, the defendant concluded that the plaintiff had violated Rule 4.2, and reprimanded him.

On May 25, 1989, the plaintiff began this action **[***6]** in the Superior Court seeking judicial review of the defendant's actions. The plaintiff claimed, inter alia, that because he was not representing a client at the time of his communication with Connery, his activities were not governed by the Rules of Professional Conduct. On October 5, 1989, after conducting a trial de novo concerning the defendant's actions, the trial court, sustained the plaintiff's appeal, rescinded the reprimand, and ordered that an appropriate publication to that effect be published in the Connecticut Law Journal. The defendant appealed to the Appellate Court. We thereafter transferred the matter to ourselves pursuant to Practice Book § 4023.

I

The defendant's first claim is that the Superior Court lacked jurisdiction to review the reprimand issued by the defendant. The defendant argues that while the rules of practice and the General Statutes empower the defendant to issue reprimands to attorneys, there are no provisions for appeal from such a disciplinary action. See General Statutes § 51-90 et seq. and Practice Book § 27B et seq. We agree that there is no statutory right of appeal from a reprimand, but conclude nevertheless that the trial court **[***7]** has authority to **[**1078]** review such an order by virtue of its inherent supervisory authority over attorney conduct.

"Judges of the Superior Court possess the 'inherent authority to regulate attorney conduct and to discipline members of the bar.' *Heslin* v. *Connecticut Law Clinic of Trantolo & Trantolo,* 190 Conn. 510, 523, 461 A.2d 938 (1983). 'It is their unique position as officers and **[*233]** commissioners of the court . . . which casts attorneys in a special relationship with the judiciary and subjects them to its discipline.' Id., 524." *Statewide Grievance Committee*

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[1] "[Rules of Professional Conduct] Rule 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

"In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

[2] "[Practice Book] Sec. 27F. -- FILING COMPLAINTS; ACTION; TIME LIMITATION

"(a) Any person, or a grievance panel on its own motion, may file a written complaint alleging attorney misconduct whether or not such alleged misconduct occurred in the actual presence of the court. Complaints against attorneys shall be filed with the statewide bar counsel. Within seven days of the receipt of a complaint the statewide bar counsel shall:

"(1) forward the complaint to a grievance panel in the judicial district in which the respondent maintains his principal office or his residence, provided that, if the respondent does not maintain such an address in this state, the statewide bar counsel shall forward the complaint to any grievance panel."

[3] "[Practice Book] Sec. 27J. ACTION BY STATEWIDE GRIEVANCE COMMITTEE OR REVIEWING COMMITTEE

"(a) Upon receipt of the record from a grievance panel, the statewide grievance committee may assign the case to a reviewing committee which shall consist of at least three members of the statewide grievance committee, at least one third of whom are not attorneys. The statewide grievance committee may, in its discretion, reassign the case to a different reviewing committee. The committee shall regularly rotate membership on reviewing committees and assignments of complaints from the various grievance panels. An attorney who maintains an office for the practice of law in the same judicial district as the respondent may not sit on the reviewing committee for that case."

v. *Presnick,* 215 Conn. 162, 166, 575 A.2d 210 (1990); *Statewide Grievance Committee* v. *Rozbicki,* 211 Conn. 232, 238, 558 A.2d 986 (1989).

General Statutes § 51-90 et seq. and Practice Book § 27B et seq. "are not restrictive of the inherent powers which reside in courts to inquire into the conduct of their own officers, and to discipline them for misconduct." *State* v. *Peck,* 88 Conn. 447, 457, 91 A. 274 (1914). "[D]isciplinary [proceedings] are taken primarily for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice **[***8]** in them. . . . The end result of these proceedings is a judgment from which an appeal lies to this court. *In re Application of Dodd,* 131 Conn. 702, 707, 42 A.2d 36 [1945]; *O'Brien's Petition,* [79 Conn. 46, 59, 63 A. 777 (1906)]." *Heiberger* v. *Clark,* 148 Conn. 177, 183, 169 A.2d 652 (1961).

In *Grievance Committee of the Bar of New Haven County* v. *Sinn,* 128 Conn. 419, 422, 23 A.2d 516 (1941), we concluded that "[i]n [*presentment*] proceedings . . . a defendant is entitled to notice of the charges against him, to a fair hearing, and a fair determination, in the exercise of a sound judicial discretion, of the questions at issue, *and to an appeal to this court* for the purpose of having it determined whether or not he has in some substantial manner been deprived of such rights." (Emphasis added.) Since the public notice of a reprimand is just as damaging to an attorney's reputation as the publicity attending a presentment proceeding, it is inconsistent and inequitable to deny an attorney the right to a review of a reprimand issued by the defendant while affording the right to a review **[*234]** of the trial court's decision in presentment **[***9]** proceedings. *Statewide Grievance Committee* v. *Presnick,* supra, 170. [4]

[*10]** II

The defendant next argues that even if the trial court had the authority to review its actions, the trial court should have limited the proceedings to a review of the record rather than conducting a trial de novo. We agree.

Appeals to the court from the determinations of administrative, legislative and quasi-judicial bodies are limited to a review of the record to determine if the facts as found are supported by the evidence contained within the record and whether the conclusions that follow are legally and logically correct. See, e.g., *Levinson* v. *Board* **[**1079]** *of Chiropractic Examiners,* 211 Conn. 508, 560 A.2d 403 (1989) (chiropractors); *State Medical Society* **[*235]** v. *Board of Examiners in Podiatry,* 208 Conn. 709, 546 A.2d 830 (1988) (podiatrists); *Stern* v. *Medical Examining Board,* 208 Conn. 492, 545 A.2d 1080 (1988) (physicians); *Leib* v. *Board of Examiners for Nursing,* 177 Conn. 78, 411 A.2d 42 (1979) (nurses); *Board of Education* v. *Commission on Human Rights & Opportunities,* 176 Conn. 533, 409 A.2d 1013 (1979) (teachers); *Obuchowski* v. *Dental Commission,* 149 Conn. 257, 178 A.2d 537 (1962) (dentists); **[***11]** *Jaffe* v. *State Department of Health,* 135 Conn. 339, 64 A.2d 330 (1949) (physicians); *Lieberman* v. *State Board of Examiners in Optometry,* 130 Conn. 344, 34 A.2d 213 (1943) (optometrists); *U.S. Vision, Inc.* v. *Board of Examiners for Opticians,* 15 Conn. App. 205, 545 A.2d 565 (1988) (opticians). Although there is no statutory provision for an appeal from the reprimand ordered by the defendant, we see no reason why the right of

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[4] In *Sobocinski* v. *Statewide Grievance Committee,* 215 Conn. 517, 576 A.2d 532 (1990), we recently concluded that the defendant, as an adjunct of the judicial branch, is not an administrative agency within the meaning of the Uniform Administrative Procedure Act; General Statutes § 4-166 et seq.; and that a complainant was therefore not entitled to appeal under that act from decisions of the defendant. Although the second count of the plaintiff's complaint purports to be an appeal from the defendant as an "agency" as defined in General Statutes § 4-166, the remaining four counts set forth grounds supporting the equitable relief claimed. In rendering judgment the trial court appears to have ignored the second count and simply ordered as equitable relief a rescission of the reprimand and an appropriate publication of the rescission.

It is not clear that the plaintiff in *Sobocinski* could have used this equitable avenue to obtain judicial review of the decision of the defendant dismissing her complaint against her former attorney from which she had appealed pursuant to General Statutes § 4-183. As a complainant, her interest in that decision was not equivalent to the right of an attorney, such as this plaintiff, in preserving his professional reputation. There may be situations, however, where a decision of the defendant so affects the constitutionally protected interests of a complainant that an appeal to court may be warranted. Cf. *Circle Lanes of Fairfield, Inc.* v. *Fay,* 195 Conn. 534, 542-43, 489 A. 2d 363 (1985).

an attorney to judicial review in a disciplinary matter should be any different than the process accorded other professionals in disciplinary matters before licensing and/or disciplinary boards.

The fact that the trial court conducted a trial de novo, however, does not compromise the result in the present instance. The undisputed facts contained in the record of the disciplinary proceedings conducted by the defendant establish that a review of the record would have produced the same result. The trial court proceedings, although described as a trial de novo, in fact did not produce any additional evidence that was not contained within the record before the defendant. These predicate facts support the legal conclusion reached by the **[***12]** trial court.

Rule 4.2 provides that "[*i*]*n representing a client,* a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the **[*236]** lawyer has the consent of the other lawyer or is authorized by law to do so." (Emphasis added.) The purpose of this restriction is to preserve the integrity of the lawyer-client relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer. The rule is designed to prevent situations in which a represented party may be taken advantage of by opposing counsel. See ABA/BNA Lawyer's Manual on Professional Conduct (1989) § 71:303.

Contact between litigants, however, is specifically authorized by the comments under Rule 4.2: "This Rule does not prohibit communication with a party . . . concerning matters outside the representation. . . . Also, *parties to a matter may communicate directly with each other* and *a lawyer having independent justification for communicating with the other party is permitted to do so*." (Emphasis added.) The language of Rule 4.2 and the comments thereto, limit **[***13]** the restriction on communications with represented parties to those situations where the attorney is "representing a client." Here, the plaintiff was not "representing a client."

The grievance panel, the reviewing committee and the trial court all correctly concluded that the plaintiff's letter was a communication between litigants and that the plaintiff had a right to make such a communication because he was not representing a client. There was no evidence that suggests that the letter was written by the plaintiff in a representative capacity. While the plaintiff's conduct may have been less than prudent, it did not violate Rule 4.2.

"Where the trial court reaches a correct decision but on mistaken [procedural] grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it. *Morris* v. *Costa,* 174 Conn. 592, [597-98,] 392 A.2d 468 [1978]; *DiMaggio* v. *Cannon,* **[*237]** 165 Conn. 19, 24, 327 A.2d 561 [1973]." *Favorite* v. *Miller,* 176 Conn. 310, 317, 407 A.2d 974 (1978). "This court is not required to reverse a ruling of the trial court which reached a correct result, albeit [from] a wrong [procedural **[***14]** posture]. *Favorite* v. *Miller,* [supra]." *Herrmann* v. *Summer Plaza Corporation,* 201 Conn. 263, 274, 513 A.2d 1211 (1986).

[1080]** The judgment of the trial court is affirmed.

In this opinion the other justices concurred.

End of Document

Ethical Grounds

The Unofficial Blog of Vermont's Bar Counsel

ABA opinion concludes that the ” no-contact” rule applies to self-represented lawyers. Should we amend Vermont’s rule?

SEPTEMBER 29, 2022APRIL 16, 2024 MICHAEL 5 COMMENTS

The issue of whether a self-represented lawyer is subject to Rule 4.2’s “no-contact” provision is not one with which I have much experience. Whether as disciplinary counsel or when I was the screener, if I ever reviewed a single complaint alleging such a violation, I don’t remember it. Nor has the topic ever been broached in the context of an ethics inquiry. My only real work on the topic was in this post (https://vtbarcounsel.wordpress.com/2016/12/22/tbt-1990-is-a-self-represented-lawyer-subject-to-rule-4-2/) about the first decision ever issued after Vermont adopted a formal professional responsibility program.[1]

Yesterday, the ABA Standing Committee on Ethics and Professional Responsibility issued *Formal Opinion 502: Communication with a Represented Person by a Pro Se Lawyer (https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-502.pdf)*. The Committee concluded that a self-represented lawyer is bound by Rule 4.2. That is, when self-representing, a lawyer cannot communicate about the matter with another person who the lawyer knows to be represented in the matter without the consent of the represented person’s lawyer or unless the communication is otherwise authorized by law.

I appreciate the opinion for several reasons.

(https://vtbarcounsel.wordpress.com/wp-content/uploads/2022/01/legal-ethics.jpg)

For one, the opinion is well-researched and provides interesting and informative detail about the history of the debate as to whether Rule 4.2 applies to a self-represented lawyer. For another, I don't necessarily disagree with the conclusion. As the Committee notes, "[t]he key evils intended to be managed by Model Rule 4.2 are (1) overreaching and deception; (2) interference with the integrity of the client-lawyer relationship; and (3) elicitation of uncounseled disclosures, including inappropriate acquisition of confidential lawyer-client communications." Thus, it makes sense to apply the rule to a self-represented lawyer.

Still, the opinion gives me pause. While I support the general conclusion, I'm drawn to the dissenting members' view. That pull leaves me wondering if we should amend V.R.Pr.C. 4.2. Alas, before I discuss the dissent, a bit more background is required.

Comment [4] to both the ABA Model Rule and Vermont's rule includes the following statement:

- "Parties to a matter may communicate directly with each other and a lawyer is not prohibited from advising a client concerning a communication that the client is legally justified to make."

The tension between this statement and the text of the rule drives the debate. Is the self-represented lawyer fish or fowl? That is, a "lawyer" subject to Rule 4.2? Or a "party" to whom Comment [4] applies? In Formal Opinion 502, the Committee answered by stating:

- "It is not possible for a pro se lawyer to 'take off the lawyer hat' and navigate around Rule 4.2 by communicating solely as a client."

Again, I don't necessarily disagree. However, as I indicated, I remain drawn to the dissent.

Like me, the dissent doesn't disagree with the Committee's conclusion, stating:

- "It is not the result I object to, it is the mode of rule construction that I cannot endorse. Self-representation is simply not 'representing a client,' nor will an average or even sophisticated reader of these words equate the two situations."

The dissent continues:

- "When an attorney consults the rule, it is highly unlikely that the phrase "in representing a client" will be considered to include self-representation. If the attorney goes further and consults Comment [4], the Comment will assure the attorney that, 'Parties to a matter may communicate directly with each other.' Given this apparent clarity, what will tip off the attorney that further research is required?"

Perhaps the same could be said for the represented person's lawyer. Which might explain why I don't remember this topic having come up very much over the past 24 years.

Finally, the dissent argues:

- "By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion."

I tend to agree. And amending the rule wouldn't be difficult.[2] Here's the relevant portion of Oregon's Rule 4.2, with my emphasis added.

- "In representing a client **or the lawyer's own interests**, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless: (a) the lawyer has the prior consent of a lawyer representing such other person; (b) the lawyer is authorized by law or by court order to do so . . ."

In any event, that's why I post today. To raise the question of whether to amend Rule 4.2.

To me, it's an interesting question. Again, I don't disagree with the conclusion that a no-contact rule should apply to self-represented lawyers.[3] However, many of the rules include phrases like "when representing a client" or "in representing a client." If, for the purposes of Rule 4.2, a self-represented lawyer is "representing a client," it's interesting to consider the ramifications of construing other rules with like phrases to apply similarly.

I'm at risk of going on and on. So, I'll stop. Please feel free to share thoughts, either in the comment section or by email to Michael.Kennedy@vermont.gov (mailto:Michael.Kennedy@vermont.gov)

As always, let's be careful out there.

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[1] PCB Decision 1 issued in August 1990, the same month that I began my first year in law school. While ostensibly about the application of no-contact rule to a self-represented attorney, the post was an excuse for me to include a picture taken around the same time. In that legions of Vermont lawyers may not now about my former flow, I'm sharing it again.


(https://vtbarcounsel.wordpress.com/wp-content/uploads/2022/09/image-4.png)

[2] Nor would it be the first time the rule was amended in response to a debate over its meaning. For many years, the rule prohibited communication with a "represented party." Indeed, in 1994, the VBA issued this advisory opinion (https://www.vtbar.org/wp-content/uploads/2021/03/94-03.pdf) in which it stated that "[t]he use of the term 'party' . . . read in light of the purpose of the rule is reasonably interpreted as extending to any person represented by counsel in matters closely related to the subject matter of the client's representation." The next year, and in response to the debate, the ABA changed the Model Rule to "represented person." Vermont followed suit when it adopted the Model Rules in 1999.

[3] There are situations that make me wonder if the rule, either as currently written or amended, should include safe harbors that allow a self-represented lawyer to communicate with a represented person in specified situations. For instance, if a lawyer is self-represented in a contested divorce, can the lawyer communicate with their spouse about issues that, arguably, fall under the umbrella of "parental rights & responsibilities" that are at issue in the litigation? The safe harbors are a topic for another day.
COMMUNICATING WITH A REPRESENTED PERSON

5 thoughts on "ABA opinion concludes that the " no-contact" rule applies to self-represented lawyers. Should we amend Vermont's rule?"

1. **Monday Morning Honors #262 – Ethical Grounds** says:
   October 3, 2022 at 9:32 am
   […] with a represented person without the consent of the represented person's lawyer. See, this blog post. The post generated significant feedback. Then, we had an interesting discussion of […]

2. **The no-contact rule, represented organizations, and . . . basketball? – Ethical Grounds** says:
   October 20, 2022 at 11:58 am
   […] ABA Opinion concludes that the no-contact rule applies to a self-represented lawyer. Should we amend… […]

3. **Update on the no-contact rule and represented organizations. – Ethical Grounds** says:
   November 16, 2022 at 12:03 pm
   […] ABA Opinion concludes that the no-contact rule applies to a self-represented lawyer. Should we amend… […]

4. **With an assist from facial recognition software, a lawyer was kicked out of a holiday show at Radio City Music Hall because she works at a firm that is suing the corporation that owns the venue. – Ethical Grounds**
   says:
   January 3, 2023 at 2:33 pm
   […] ABA Opinion concludes that the no-contact rule applies to a self-represented lawyer. Should we amend… […]

5. **Identified by facial recognition software, a lawyer was kicked out of a holiday show at Radio City Music Hall because she works at a firm that is suing the corporation that owns the venue. – Ethical Grounds**
says:
January 3, 2023 at 2:36 pm
[…] ABA Opinion concludes that the no-contact rule applies to a self-represented lawyer. Should we amend… […]

Comments are closed.