STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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

SUPPLEMENTAL MEMORANDUM

Comes Now the Respondent, by and through counsel, and respectfully submits the following Supplemental Memorandum in support of his prayer that the Board dismiss the instant complaint as unproved.

Memo

Whether or not Mr. Fink's phone call to Nathan Marshall violated Rule 4.2 depends, in turn and in part,[1] upon whether or not his call was placed *knowing* that Mr. Marshall was "represented" at the time of the call. If there is reason to doubt that Mr. Fink "knew" Mr. Marshall was represented, this complaint must fail. VT.R.PROF.COND. 1.01(f); §4.2; COMMENT, VT.R.PROF.COND. §4.2(8). See, ABA, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013 at 566; ABA. Ann.Mod.Rules.Prof.Cond. §4.2 (2019) (Annotation "How does the lawyer 'know' someone is represented?")

Here, two experienced lawyers had divergent views as to whether or not Ms. Benelli continued to represent Mr. Marshall in a pending divorce action. It seems as if both views find some support in the underlying facts. The situation's ambiguity flows

[1] Even if the call was placed under circumstances establishing Mr. Fink knew Mr. Marshall was represented, the contact must also have involved communications about the subject matter of the representation. VT.R.Prof.Con. 4.2. Here, it is uncontested that the August 17th conversation between Mr. Fink and Mr. Marshall did not involve any substantive discussion of divorce related issues.

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from the uncertain definition of limited or "unbundled" representation and the resulting consequences pertaining to permissible contact between lawyers and "*pro se*" parties.

The Board has been previously provided with *ABA Standing Committee of Ethics and Professional Responsibility Formal Opinion 472* (Formal Op. 472) (2015). The opinion recognized that:

> …in limited scope of representation, the Model Rules in general, and the 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.

The quandary that limited scope representation presents to an opposing lawyer has been recognized broadly but not addressed specifically in Vermont. For example, in Indiana, the Executive Secretary of the Indiana Court Disciplinary Commission wrote under the heading *Dilemma for Opposing Counsel*:

> Limited scope representation raises potential ethical quandaries for opposing counsel. Is the opposing party represented by counsel or not?

51-JUN Res Gestae 19.

In deciding whether or not "ghost writing" lawyers need to identify themselves when drafting pleadings in a limited scope representation, the Rhode Island Supreme Court acknowledged:

> We are mindful…that any attorney's limited representation of a client may raise myriad ethical and procedural concerns. We can envision a host of Rules of Professional Conduct potentially implicated…Rule 4.3 concerning interaction with unrepresented persons….

FIA Card Services v. Pichette, 116 A.3d 770, 784 (2015)

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Some states have amended their conduct rules to specifically address the quandary opposing counsel faces when litigating with a party who is partially represented. In Florida, for example, after the issue arose in the context of family court proceedings, the Supreme Court amended both Family Court Rules and Rules of Professional Conduct to clarify the requirements attending both the opposing lawyer and the limited represented party. See, *Amendments to Rules Regulating the Florida Bar and Florida Family Law Rules of Procedure (Unbundled Legal Services)*, 860 So.2d 394 (2003). See, also amended Rule regulating Florida Bar 4-4.2.

The amended rule provides:

> An otherwise unrepresented person to whom limited representation is being provided in accordance with [Rule 1.2] is to be considered *unrepresented* for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which…the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

Florida Bar Rule 4-4.2(b)(emphasis added.)

The instant situation was made murkier by Ms. Benelli's conduct. There is no evidence that Ms. Benelli and Mr. Marshall entered into an issue specific limited-scope agreement and no limited notice of appearance delineating her role in assisting Mr. Marshall with the divorce was ever filed.[2] Furthermore, Ms. Benelli's view that a notice of limited appearance applies only to in-court related activities is contradicted both by the language V.R.F.P. 15 itself and the explanatory notes accompanying the Rule and the related rule of civil procedure. See, Rprt's. Notes, V.R.F.P 15, and compare, Rprt's. Notes. V.R.C.P. 79.1. Rule 15 allows for limited appearances on behalf of *pro se* parties

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[2] See, *Formal Op. 472* at p. 4, ¶ 1 for a survey of other jurisdiction's requirements pertaining to written limited scope representation agreements and required filing of limited appearances.

in order to conduct discovery, participate in alternative dispute resolution, and, with leave of the court, to assist a *pro se* party on a specific issue. V.R.C.P. 15 (h)(1)(B)(C)(F).

Rather than comply with the notice requirements of Rule 15 (h)(2), Ms. Benelli notarized Mr. Marshall's *pro se* appearance which stated, in pertinent part:

> I intend to represent myself and hereby enter my appearance with the Court. No attorney will represent me in this case unless an attorney or I notify the Court otherwise.

DC Ex. 10.

During her testimony, Ms. Benelli acknowledged that the foregoing statement by Mr. Marshall was true.[3] Benelli testimony, Transcript, p. 74 et seq. A reasonable reader of the appearance would conclude that Mr. Marshall was proceeding alone.

On the other hand, Mr. Fink and Ms. Benelli had exchanged emails and letters on behalf of the divorce parties seeking to settle the matter without a court contest. Mr. Fink understood throughout early June until the end of July that Ms. Benelli was representing Mr. Marshall in an attempt to settle the case without formal litigation. Those negotiations were not fruitful. The attempt to settle without litigation was apparently ended by Mr. Marshall when he filed his answer and *pro se* appearance. Mr. Fink, receiving the *pro se* appearance after his last correspondence with Ms. Benelli and having not heard from her since the filing, called Mr. Marshall to set-up a meeting to renew settlement discussions.

As noted earlier, it is uncontested that no issue of substance was discussed during that phone conversation. Marshall Testimony, Transcript at p. 47, ln. 2-5. Thus, there was no overreaching, interference, or uncounseled disclosure of information relating to the representation resulting from the phone conversation. See, Comment 1, VT.R.Prof.Con.

[3] Albeit, her acknowledgement of the truthfulness of the notarized Notice of Appearance was conditioned upon her insistence that such an appearance only applied to in-court hearings. See, discussion about the scope of Notices of Limited Appearances filed pursuant to V.R.F.P. 15, infra.

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4.2. Within hours of the complained phone call, Ms. Benelli informed Mr. Fink by email that she was representing Mr. Marshall. A prickly email exchange ensued between the two lawyers in which each stated their divergent views of what had been the effect of Mr. Marshall's *pro se* appearance. Notably, however, all agree Mr. Fink did not subsequently contact Mr. Marshall. See, Fink testimony, Transcript, p. 35, ln. 24 – p. 35, ln.3; Marshall testimony, Transcript, p. 47, ln. 7 – 9.

It is readily apparent that Ms. Benelli's view of limited representation and Mr. Fink's understanding of a *pro se* appearance were conflicted and lead to a misunderstanding of Mr. Marshall's status. It is a misunderstanding that is endemic to the current state of "unbundled" representation in Vermont. Misunderstandings of this sort are likely to reoccur so long as Vermont's procedural and ethics rules fail to address the ambiguities attending "unbundled" representation that other jurisdictions have recognized and adapted to.

In any event, Mr. Fink had a reasonable basis to believe Mr. Marshall was handling his divorce *pro se* based on Mr. Marshall's notarized Notice of Pro Se Appearance. That conclusion was buttressed by, and consistent with, the cessation of communication from Ms. Benelli on Mr. Marshall's behalf following filing of the Notice. When it appeared that was not the case during the August 17 phone call, Mr. Fink avoided speaking about divorce related issues. When he was later informed unambiguously by Ms. Benelli that she was, in fact, representing Mr. Marshall, Mr. Fink never again contacted him. Not long afterward, Ms. Benelli filed a Notice of

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Appearance, clarifying her role as counselor to Mr. Marshall for all purposes.

Respondent's Exhibit 3. There was no violation of Rule 4.2[4].

DATED at St. Johnsbury, Vermont on October 15, 2021.

Respectfully submitted,

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[4] The maxim, *deminimis non curat lex* seems to apply even if the Panel finds a technical violation of Rule 4.2. given the offending conversation resulted in no harm. See, *Schramm v. Frontiervision Operating Partners, L.P.*, 2003 WL 22181946 (Vt.P.S.B.) (Public Service Board application for maxim.)