

**STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY PROGRAM**

In re: Melvin Fink, Esq.  
PRB File No. 012-2019

**ORDER DENYING DISCIPLINARY COUNSEL'S  
MOTION TO AMEND PETITION OF MISCONDUCT**

On March 28, 2019, the Hearing Panel stayed the proceedings in this disciplinary matter. On February 13, 2024, Disciplinary Counsel filed a Motion to Amend Petition of Misconduct (“Motion”) to be decided once the Panel lifted the stay. On July 31, 2024, the Panel lifted the stay. Accordingly, the Panel has considered Disciplinary Counsel’s Motion, his filings in support thereof, and Respondent’s filings in opposition thereto and is issuing this order denying the Motion for the reasons set forth below.

On February 20, 2019, former Disciplinary Counsel filed a one-count Petition of Misconduct (“Petition”) charging that Respondent Melvin Fink, Esq., violated Vermont Rule of Professional Conduct 8.4(b) by engaging in the felony crime of lewd and lascivious conduct towards J.H. on July 17, 2017. The Petition alleged five paragraphs of facts in support of the charge.

Disciplinary Counsel seeks to amend the Petition to allege two additional counts. First, the Proposed First Amended Petition of Misconduct (“Proposed Amended Petition”) charges that Respondent violated Vermont Rules of Professional Conduct 8.1(a) and 8.4(c) by falsely stating to former Disciplinary Counsel in an August 2018 letter that he did not touch J.H.’s buttocks or have any non-consensual physical contact with J.H. on July 17, 2017. Second, the Proposed Amended Petition charges that Respondent violated Vermont Rules of Professional Conduct 3.3(a)(1) and 8.4(c) by making a false statement or misleading omission of fact to the Bennington County Superior Court in November 2023 about the extent of his non-consensual

conduct towards J.H. on July 17, 2017. The Proposed Amended Petition alleges 19 paragraphs of additional facts spanning from July 12, 2018, through November 7, 2023, in support of the two additional charges.

The Vermont Rules of Civil Procedure generally govern disciplinary matters. A.O. 9, Rule 20(B) (“Except as otherwise provided in these rules, the Vermont Rules of Civil Procedure and the Vermont Rules of Evidence apply in discipline and disability cases.”). The Vermont Rules of Civil Procedure provide that after a responsive pleading is served, “a party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” Vt. R. Civ. P. 15(a). Here, Respondent has opposed the proposed amendment; therefore, Disciplinary Counsel may amend the Petition only if the Hearing Panel finds that justice requires granting him leave to do so.

Under Vermont law, a hearing panel must grant a party leave to amend a pleading liberally if no prejudice to the other party would result. *See In re PRB No. 2013- 145*, 2017 VT 8, ¶ 1, 165 A.3d 130, 136. The Hearing Panel concludes that the proposed amendment would result in prejudice to Respondent.

The Supreme Court provides important procedural safeguards to attorneys facing charges of professional misconduct. Rule 13 of Administrative Order No. 9 sets forth procedures for initiating formal disciplinary proceedings against an attorney. Among those safeguards is the requirement that a probable cause review precede formal charges of misconduct.<sup>1</sup>

#### Disciplinary counsel’s decision to proceed with a petition of misconduct

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<sup>1</sup> Rule 12 of Administrative Order No. 9 outlines procedures for handling complaints concerning attorney conduct, such as having Screening Counsel conduct a pre-investigation review. The Professional Responsibility Board Policies, however, permit Disciplinary Counsel to “investigate any conduct that comes to their attention which appears to constitute misconduct that might require a disciplinary sanction.” Pro. Resp. Bd. Policies (eff. March 25, 2022), ¶ 10. In addition, Rule 13(A) of Administrative Order No. 9 generally requires Disciplinary Counsel to give Respondent written notice of a matter under investigation but permits Disciplinary Counsel to forego such notice with good cause. To the extent these steps were not taken here, the Hearing Panel does not find any resulting prejudice to Respondent.

shall be reviewed for probable cause by a hearing panel assigned by the chair of the Board pursuant to a fixed rotation, and such review shall be based upon written application and affidavit setting forth a factual basis for the charges. If the panel finds probable cause to believe that a violation has occurred, disciplinary counsel shall present formal charges to a different hearing panel assigned by the chair of the Board...

A.O. 9, Rule 13(C).

The Petition in this matter charged Respondent with violating Vermont Rule of Professional Conduct 8.4(b) by engaging in lewd and lascivious conduct towards J.H. on July 17, 2017. The Proposed Amended Petition does not merely, for example, allege that Respondent's July 17, 2017, conduct towards J.H. violated other provisions of the Vermont Rules of Professional Conduct, or allege additional facts that support the charge that Respondent violated Vermont Rule of Professional Conduct 8.4(b). Rather, in the Proposed Amended Petition, Disciplinary Counsel seeks to formally charge Respondent with violating Vermont Rules of Professional Conduct 8.1(a) and 8.4(c) by making a false or misleading statement of fact to former Disciplinary Counsel in August 2018 and with violating Vermont Rules of Professional Conduct 3.3(a)(1) and 8.4(c) by making a false or misleading statement or omission of fact to a tribunal in November 2023.

The nature of the charges, dishonesty, is wholly dissimilar from the nature of the initial charge, criminality. The charges are based on a wholly separate constellation of facts – indeed, 19 paragraphs of newly-alleged facts – than the initial charge. In particular, while the alleged August 2018 conduct occurred in the course of this disciplinary matter, the alleged November 2023 conduct occurred in the course of a Bennington County Superior Court proceeding more than six years after the July 17, 2017, conduct for which Respondent was charged in the Petition.

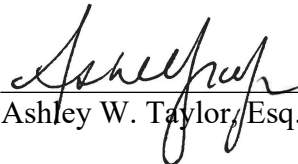
There is no indication in Disciplinary Counsel’s filings that a different hearing panel has found probable cause to believe Respondent committed these distinct violations. Permitting Disciplinary Counsel to formally charge Respondent with the violations without submitting a written application and affidavit setting forth a factual basis for them to a different hearing panel to conduct a probable cause review would circumvent this requirement, deprive Respondent of the process he is due under Administrative Order No. 9, and prejudice his legal rights.<sup>2</sup>

Accordingly, Disciplinary Counsel’s Motion to Amend Petition of Misconduct is DENIED.

Dated August 29, 2024.

Hearing Panel No. 3

By:   
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Gary F. Karnedy, Esq., Chair

By:   
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Ashley W. Taylor, Esq.

By:   
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Peter Zuk, Public Member

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<sup>2</sup> The Hearing Panel recognizes that making a false statement in a disciplinary matter can constitute an aggravating factor for purposes of determining sanctions if an underlying charge of misconduct is proven. *See* ABA Standards for Imposing Lawyer Sanctions (1986, amended 1992), Part III, §§ 9.21-9.22, at 25-27.