STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re Thomas Melone	)	No. 25-120
	)	
	)	January 20, 2026
	)	
	)	

RESPONDENT'S MOTION FOR PERMISSION TO APPEAL THE HEARING PANEL ORDERS OF JANUARY 5, 2026 AND JANUARY 15, 2026

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 on September 26, 2025 by Michael Hanley against Respondent. Those Motions were denied by the Hearing Panel ("HP") on December 2, 2025 (the "HP Order"). On December 15, 2025, Respondent timely filed a motion for permission to appeal the HP Order with the Hearing Panel. The Hearing Panel issued an order on January 5, 2026 (which was served on Respondent on January 6, 2026) (the "HP Denial Order") *sua sponte* holding that no interlocutory appeals of any variety are allowed. The HP Denial Order did not address any criteria related to the motion for permission to appeal. Respondent filed a motion to vacate the HP Denial Order, which the HP denied on January 15, 2026, reaffirming its holding that no interlocutory appeals of any variety are permitted in this proceeding. The HP Denial Order's conclusion that there is no right to appeal any interlocutory order is itself a collateral order under the collateral order doctrine regarding the right of appealability.

Respondent has filed a motion with the Vermont Supreme Court for permission to appeal the HP Order and the HP Denial Order. However, from a procedural perspective, specifically VRAP 5.1, a motion with the HP may be required to be made first in order to seek permission from the Vermont Supreme Court before it will consider the motion for permission to appeal the HP Denial Order. This motion is made to address that procedural issue, recognizing that the HP has already made up its mind on the issue of appealability. Respondent seeks permission to appeal the Hearing Panel's orders of January 5, 2026 and January 15, 2026.

As explained in Respondent's motion filed with the Vermont Supreme Court today, the ability to file an interlocutory appeal is crucial at least in cases in which constitutional rights are at issue (as here). *Will v. Hallock*, 546 U.S. 345, 352 (2006) explains that a collateral order appeal is essential when an individual is subject to (as here) "the enormous prosecutorial power of the Government to subject an individual 'to embarrassment, expense and ordeal . . . compelling him to live in a continuing state of anxiety.'" (internal citations omitted). The United States Supreme Court stated that "the only way to alleviate these consequences of the Government's superior position was by collateral order appeal." *Id*.

The importance of interlocutory appeals during the course of an attorney disciplinary proceeding was emphasized by the United States Supreme Court in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 102 S. Ct. 2515 (1982), which was a case (as here) involving an attorney disciplinary proceeding involving issues under the United States Constitution. The United States Supreme Court viewed the right to bring an interlocutory appeal as a crucial part of *Younger v. Harris*, 401 U.S. 37 (1971) abstention. In other words, without the right to file interlocutory appeals in an attorney discipline proceeding to consider constitutional issues, *Younger* abstention is inapplicable. *See, Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 77 (2d Cir. 2003):

> while the Supreme Court in *Middlesex* acknowledged that whether Hinds could seek judicial review of his constitutional claims during the course of state proceedings was initially unclear, the Court also recognized that the New Jersey Supreme Court had subsequently considered Hinds's claims *sua sponte* and formally amended its rules to permit interlocutory review of constitutional challenges to attorney disciplinary proceedings. *See id*. at 427, 436. Concluding that "there [was] no reason for the federal courts to ignore . . . subsequent development[s]" demonstrating that Hinds had had an opportunity to raise his constitutional claims during the course of state proceedings, the Supreme Court held that the mandatory abstention applied to Hinds's First Amendment claims. *See id*. at 436-37.

The First Circuit spoke to this issue in *Esso Std. Oil Co. v. Lopez-Freytes*, 522 F.3d 136 (1st Cir. 2008) where the First Circuit held that the inability to seek interlocutory review justified federal court intervention in the state proceeding. In that case, the First Circuit upheld a federal injunction enjoining the state proceeding while the federal case proceeded. *See, id*. at 148-149

("Esso faces irreparable harm in the absence of injunctive relief given the unavailability of avenues for interlocutory relief in the Puerto Rico courts.")

A. The HP Denial Order Is A Collateral Order.

The HP Denial Order satisfies all three requirements for a collateral order appeal. The HP Denial Order (A) conclusively determines a disputed question, which is whether any variety of interlocutory appeals are permitted. The HP Order (B) resolves an important issue completely separate from the merits of the action, which is whether any variety of interlocutory appeals are permitted. The HP Denial Order (C) will be effectively unreviewable on appeal from a final judgment because the ability to file an interlocutory appeal would be lost forever.

B. Respondent's First And Fifth Amendment Rights Are At Issue In This Case.

This case was initiated by a complaint filed by Attorney Merrill Bent during the middle of adversarial proceedings against her opponent—the Respondent. Ms. Bent filed the complaint shortly after two things happened. *First*, Respondent made a filing on January 10, 2025 (the "January 10 Comments") with Vermont Public Utility Commission ("PUC") *publicly* disclosing alleged Town of Bennington government malfeasance (which filing forms the sole evidence for Count I of the Complaint). The alleged malfeasance focused on the expiration of the Bennington Town plan and, *inter alia*, the actions of various government officials to cover up the expiration of the Town Plan. *Second*, in a subsequent filing with the PUC on January 29, 2025, Respondent disclosed that then Bennington Town Manager, Stuart Hurd, implicated an attorney in the alleged cover-up involving the expiration of the Bennington Town Plan (which filing relates to Count VI of the Complaint), where Stuart Hurd states: "We believe we have sufficient documentation and a legal opinion supporting our position. It's not a lie if one believes what one's saying."

Respondent's January 29, 2025 filing stated that "presumably" the opinion is from Merrill Bent. In her reply, Merrill Bent stated: "Petitioner speculates that this must mean that the undersigned counsel has provided a legal opinion to the Town relating to the validity of the Town

Plan. Town Counsel's communications with its client are protected by attorney-client privilege."[1] Attorney Bent neither admitted nor denied that she provided the legal opinion that Mr. Hurd claimed that it had. Merrill Bent's law partner Attorney John Stasny's recent motion to quash in this case, however, strongly implies that the "legal opinion" was in fact given by Merrill Bent or someone in her firm. *See* Stasny motion at 7 ("Attorney Bent's law firm, Woolmington, Campbell, Bent & Stasny, P.C. provides general legal services to the Town, and is listed as the Town's law firm year after year as an exception to the Town's Purchasing Policy.") Mr. Hurd's stated reliance on the legal opinion may have waived any attorney-client privilege that may have otherwise applied.[2] And if Ms. Bent was in fact involved in furthering the town's alleged malfeasance, then the crime-tort-fraud exception to the attorney-client privilege may apply in any event.[3]

Respondent (who has not yet filed his Answer to the Complaint) contends that Merrill Bent's complaint and Mr. Hanley's Complaint violate, *inter alia*, Respondent's rights under the First and Fifth Amendments to the United States Constitution. *All of counts* filed against Respondent are based upon statements made in each case in the course of the exercise by Respondent of his First Amendment rights to petition and to free speech. Respondent additionally claims that many of the VRPC that the Complaint alleges were violated, do not apply to a lawyer representing his own interests, would require a rule change in order to make them apply (as suggested by Vermont Bar Counsel Michael Kennedy), and retroactive application here without a rule change would violate Respondent's Fifth Amendment rights.

Respondent also contends that these Professional Responsibility Board ("PRB") proceedings were initiated by Ms. Bent and Mr. Hanley with, and are animated by, a retaliatory, harassing, or other illegitimate motive. Both the circumstances under which this proceeding was

[1] *See*, Ms. Bent's reply memorandum in support of motion to strike, PUC docket 24-3517 at 7 (February 11, 2025).
[2] *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.) (criminal defendant waived privilege when he asserted that he had a good faith belief that his actions were legal), *cert. denied*, 502 U.S. 813, 116 L. Ed. 2d 39, 112 S. Ct. 63 (1991).
[3] *See, e.g., United States v. Spinosa*, No. 21 CR 206, 2021 U.S. Dist. LEXIS 120141, *14-15 (S.D.N.Y. 2021).

initiated and the lack of merit in the counts of the Complaint support the Respondent's claim of retaliatory, harassing, or other illegitimate motive.

On that score, Mr. Hanley's lead count, Count I, is instructive. Respondent contends that Count I, like all the other counts, is government retaliation for Respondent's exercise of his First Amendment rights and is also designed to chill future exercise of Respondent's First Amendment rights.

Mr. Hanley's Count I alleges that the January 10 Comments contained "false statements of law and fact" and that such statements allegedly resulted in multiple VRPC violations as set forth in Count I. In order prove his claimed violation of Vermont Rule 3.3(a)(1), Mr. Hanley must prove with respect to each statement that (1) the identified statement was *in fact* false, (2) Respondent knew the statement was in fact false,[4] and (3) the statement was made by Respondent in "representing a client in the proceedings of a tribunal." Rule 3.3 Comment [1]. His alleged violation of Rule 3.5(d) is derivative of the alleged Rule 3.3(a)(1) violation. The basis on which he claims certain (still not specifically identified) statements were false is based solely on the fact that Respondent "never filed a complaint in any court alleging RICO violations by the Town of Bennington." In other words, he has no evidence at all, nor did he ask to see Respondent's evidence during Mr. Hanley's alleged investigation.

In *RESPONDENT'S REPLY TO MR. HANLEY'S OBJECTION TO RESPONDENT'S MOTION TO REVISE* filed January 12, 2026 in this case (the "Reply"))[5], Respondent provided the evidence that Mr. Hanley never wanted to see, which fully supports the statements made in the January 10 Comments. No valid Town Plan means forgery and counterfeiting when official documents are altered to cover-up that there is no valid Town Plan (as shown in the Reply), and obtaining or receiving grants or other benefits that require a valid Town Plan involves false certifications (also as shown in the Reply). The nuts and bolts of the expiration of the Town Plan

[4] Vt. RPC 1.0(f) (""Knowingly," "known," or "knows" denotes actual knowledge of the fact in question.")
[5] Available at: https://www.vermontjudiciary.org/media/19783.

are laid out in the complaint filed in *PLH Vineyard Sky LLC v. Town of Bennington*, 2:25-cv-469 (D. Vt. Filed May 2, 2025). In addition, to having no reasonable chance of proving the alleged statements were false in light of the evidence provided by Respondent, Mr. Hanley can offer no evidence that would have any chance of overcoming the immunity doctrines that protect Respondent's statements and disclosure of alleged governmental malfeasance.

The second part of Count I is the alleged violation of Vermont Rule 4.5. Mr. Hanley asserts that even if Bennington officials "were guilty of criminal conduct," Respondent's January 10 Comments violated VRPC 4.5. Count I is a clear example of weaponizing a vague and overbroad rule in order to chill and retaliate against Respondent's exercise of his First Amendment rights. Even assuming *arguendo* that Rule 4.5 is constitutional (which is a challenge Respondent intends to bring),[6] while Respondent disputes that there was any "threat" to bring any criminal action or that the other requirements of the rule have been met, the matter of government malfeasance which was disclosed in the January 10, 2025 Comments is not a "private civil matter" but one of public concern. VRPC 4.5 simply was not intended to apply to, and constitutionally cannot apply to, the *public* disclosure of government malfeasance in a litigation filing. Otherwise, the disciplinary rules can be turned, as here, into a weapon to chill the public disclosure of, and retaliation for public disclosure of, government malfeasance. In other words, Respondent's public disclosure is protected by two immunity doctrines, the first is the general litigation privilege, and the second is the First Amendment's right to be free from retaliation for publicly disclosing alleged government misconduct.[7] And stating that a party is preparing a civil RICO complaint is not a threat to report

[6] Rule 4.5 targets speech based on its expressive content. As such it is a content-based regulation which will trigger strict scrutiny analysis. Under strict scrutiny, a law is presumptively unconstitutional unless the government can show the challenged law is the least restrictive means of targeting speech while also serving a compelling governmental interest. The fact that the ABA Model Rules abandoned Rule 4.5 in 1983, and almost all States have as well, is compelling evidence that Rule 4.5 is ***not*** the least restrictive means of targeting speech while also serving a compelling governmental interest.

[7] Official retaliation for protected speech "offends the Constitution [because] it threatens to inhibit exercise of the protected right." *Hartman v. Moore*, 547 U.S. 250, 256, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006) (alteration in original) (citation omitted). *See also, id.:*

criminal violations as the Second Circuit has held. *Revson v. Cinque & Cinque*, 221 F.3d 71, 81 (2d Cir. 2000). Quite simply, there was and is no probable cause for bringing Count I. Mr. Hanley conducted no real investigation. He did not care if there were any facts that would support Respondent's statements. Mr. Hanley appears to have simply followed the direction of Merrill Bent (who highlighted for him passages from various filings with the PUC) and kept blinders on to any other information.

Count II charges a violation of Rule 4.5, which likewise targets speech. And as noted above, Rule 4.5 is a content-based regulation which will trigger strict scrutiny analysis. Count III targets speech as well, but this time it is Respondent's witness testimony regarding proposed clearing of land in Bennington for agricultural uses, witness testimony that is fully protected by the First Amendment. The mere fact that PUC commissioners that initiated the investigation made the comment that referred to Respondent's testimony regarding agricultural uses of the property in question as "not credible," does not make the Respondent's testimony false. After all, pleas to "the same body that approved the charges[] tend to go about as one might expect." *SEC v. Jarkesy*, 144 S. Ct. 2117, 2142 (2024) (Gorsuch, J., concurring). Mr. Hanley's claim that Respondent made "false" statements of fact and law (which he fails to identity), is based solely on a comment made

---

> Official reprisal for protected speech "offends the Constitution [because] it threatens to inhibit exercise of the protected right," *Crawford-El v. Britton*, 523 U.S. 574, 588, n. 10, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998), and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out, *id*., at 592, 118 S. Ct. 1584, 140 L. Ed. 2d 759; *see also Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) (noting that the government may not punish a person or deprive him of a benefit on the basis of his "constitutionally protected speech"). Some official actions adverse to such a speaker might well be unexceptionable if taken on other grounds, but when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution. *See Crawford-El, supra*, at 593, 118 S. Ct. 1584, 140 L. Ed. 2d 759; *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 283-284, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) (adverse action against government employee cannot be taken if it is in response to the employee's "exercise of constitutionally protected First Amendment freedoms"). When the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*. See 403 U.S., at 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619.

in a PUC order that referred to Respondent's testimony regarding agricultural uses of the property in question as "not credible." But that comment is not evidence. It is hearsay, and under both preclusion doctrines—"issue preclusion (sometimes called collateral estoppel)" and "claim preclusion (sometimes itself called *res judicata*)," *see Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc*., 590 U.S. 405 (2020), that off-hand "not credible" statement has no preclusive effect in these proceedings, and is not evidence of anything (other than that the PUC made that statement). In other words, Mr. Hanley has no evidence to support his targeting of Respondent's speech in Count III and thus never had probable cause or any reasonable chance of a positive outcome.

Count IV targets Respondent's free speech to a legislative committee commenting on testimony of Edward McNamara, who is chair of the PUC. Mr. McNamara's testimony was not a judicial function but an administrative one. Respondent's copying Mr. McNamara on the communication does not transform Mr. McNamara's role regarding that testimony into an *ex parte* communication in a separate proceeding. *See, e.g., Russell v. Harris County*, No. H-19-226, 2021 U.S. Dist. LEXIS 272642, *22-23 (S.D. Tex. 2021):

> Information about the felony judges' administrative and policymaking roles is nonjudicial and not shielded by judicial immunity. *See Forrester v. White*, 484 U.S. 219, 229, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988) (judicial immunity does not apply to administrative acts); *Morrison v. Lipscomb*, 877 F.2d 463, 466 (6th Cir. 1989) (a chief judge's declaration of a moratorium on issuing writs of restitution was an administrative, not a judicial, act); *Craig v. State Bar of Cal*., 141 F.3d 1353, 1354 (9th Cir. 1998) (per curiam) (a state supreme court's promulgation of general rules for bar admission is nonjudicial (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 487, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983))); *Swanston v. City of Piano, Texas*, No. 4:19-CV-00412, 2020 U.S. Dist. LEXIS 146508, 2020 WL 4732214, at *3 (E.D. Tex. Aug. 14, 2020) ("[T]he mental process privilege does not extend to deliberations regarding administrative or executive acts performed by judges." (quotation marks omitted)); *ODonnell v. Harris Cty., Texas*, 227 F. Supp. 3d 706, 757-58 (S.D. Tex. 2016) (explaining that judicial immunity did not apply to Harris County misdemeanor judges when they set bail rules and oversaw the "unwritten customs and practices" governing bail hearings), *rev'd on other grounds*, 882 F.3d 528 (5th Cir. 2018); *Cain v. City of New Orleans*, No. CV 15-4479, 2017 U.S. Dist. LEXIS 32041, 2017 WL 894653, at *4 (E.D. La. Mar. 7, 2017) (collecting cases and explaining that "discovery ... relevant to the Orleans Parish Criminal Court judges' policy-making function, which is administrative or executive rather than judicial in nature" did not implicate judicial immunity or mental process privilege).

Count V targets Respondent's free speech and right to petition. Respondent has explained that he had good faith arguments in support of the filings in the Environmental Division as well as expert testimony regarding the potential adverse environmental impacts of the Benn High project. Respondent appealed to the Environmental Division and then to the Vermont Supreme Court because an important jurisdictional question was at stake and one left open by the Vermont Supreme Court's opinion in *Gould v. Town of Monkton*, 2016 VT 84, which is are there some claims against a municipality that a person is "left without a remedy," *id*. at ¶12, under Vermont law. *See also, id*. at ¶13 ("First, the record does not show that landowner has no remedy in the Environmental Division. Landowner did not appeal the denial of his permit application and challenge the validity of the statute in the context of that appeal. Second, he did not actually bring a declaratory judgment action in the Environmental Division, so his presumptions about what the Environmental Division would do are merely speculative. They do not support his claim that he has no forum to challenge Monkton's compliance with 24 V.S.A. ch. 117.") What that language from *Monkton* meant to Respondent is that a litigant needs to first go to the Environmental Division (or else risk losing the claim for failure to first go to the Environmental Division) and see what the Environmental Division does, then appeal that to the Vermont Supreme Court, and then file as Respondent did, a suit in the Superior Court, Civil Division, because the Environmental Division has no guidance on transferring cases between divisions, even though that guidance is supposed to exist. In other words, the substantive claims against the Town and the project were valid, but where complete relief could be obtained was unclear, and Respondent did not want to be on the receiving end of a Vermont Supreme Court opinion (as in *Monkton*) where this Court said that you can't say that you had no ability to get relief in the Environmental Division because you didn't go there first. And because there is only one Superior Court, *see* 4 V.S.A. Ch. 3, 4 V.S.A. § 30, and "[t]he Supreme Court shall promulgate rules, subject to review by the Legislative Committee on Judicial Rules under 12 V.S.A. chapter 1, that establish criteria for the transfer of cases between divisions," it is only the absence of rules that were supposed to be in effect that enables Count V. And the Superior Court did have jurisdiction over the controversary.

Count VI targets Respondent's free speech. Count VI claims that Respondent made false statements because he should have been aware of "Rule 12 of *The American Bar Association's Model Rules for Lawyer Disciplinary Enforcement*." In other words, Count VI is based solely upon the baseless proposition that Rule 12 of *The American Bar Association's Model Rules for Lawyer Disciplinary Enforcement* represents a rule that constitutes the law in the Vermont. An ABA Model Rule has no legal effect.

Count VII targets Respondent's free speech and is baseless too. Count VII charges Respondent with communicating with elected officials. But simply communicating with elected officials is not the charged violation. Rather the charged violation of Rule 4.2 is that Respondent's "communications were not limited to Town officials who had authority to take or to recommend action in connection with Ms. Bent's complaint to the Professional Responsibility Program, as there was no Town official who had authority to take or recommend action in connection with Ms. Bent's complaint." That charge makes no sense at all. Rule 4.2 provides that "*[i]n 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*." First, there is no client. Second, the "matter" in Count VI as presented by Mr. Hanley is "Ms. Bent's complaint to the Professional Responsibility Program." But if Ms. Bent were representing the Town in connection with "Ms. Bent's complaint to the Professional Responsibility Program," that would mean that the Town knew about the complaint and was the client behind the complaint. But that contradicts Ms. Bent's position that she filed the complaint solely on behalf of herself.

Count VIII also targets Respondent's free speech and petitioning activity. It is based upon Rule 8.4(d), which is unconstitutionally vague. The phrase "prejudicial to the administration of justice" is undefined and vague. Chief Justice Reiber has observed that "[w]hether certain conduct 'reflects on an attorney's fitness to practice law,'…is much more vague — and subject to a much wider array of inconsistent applications — than simply determining whether conduct 'involv[es] dishonesty, fraud, deceit or misrepresentation,' Rule 8.4(c)." *In re PRB Docket No. 2007-046*, 2009 VT 115, P38 (*Reiber, C.J., concurring in part and dissenting in part*). "[V]ague[]

and ambigu[ous]" provisions "are not appropriate as ethics standards." *In re Supreme Court Advisory Comm. on Prof'l Ethics Opinion No. 697*, 188 N.J. 549, 911 A.2d 51, 59 (N.J. 2006). "If attorneys' violations of ethical rules are to have implications for litigation, as well as their own disciplinary status, the standards against which their conduct is to be measured should be consistent and clear." *Miano v. AC & R Adver., Inc*., 148 F.R.D. 68, 83 (S.D.N.Y. 1993) (emphasis added).

Likewise, in *O'Brien v. Superior Court*, 105 Conn. App. 774, 794, 939 A.2d 1223 & n.22 (2008), the court observed that "[a]cademic commentators have identified a serious problem in the open textured provisions of rule 8.4(4). . . . '[Subsection 4] rais[ing] the specter of a disciplinary authority creating new offenses by common law, and perhaps harassing an unpopular lawyer through selective enforcement.'" (quoting 2 G. Hazard & W. Hodes, at § 65.6). And that is exactly what is occurring here—harassing an unpopular lawyer.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that the HP grant Respondent permission to appeal on the question of interlocutory appeals decided in the HP Denial Order.

Dated: January 20, 2026

Respectfully Submitted,

/s/ Thomas Melone

Thomas Melone
601 S Ocean Blvd
Delray Beach, FL 33483
(212) 681-1120
Thomas.Melone@AllcoUS.com