IN THE SUPREME COURT OF THE STATE OF VERMONT

In Re Thomas Melone	)	APPEAL FROM THE
	)	PROFESSIONAL
	)	RESPONSIBILITY BOARD
	)	
	)	No. 120-2025
	)	
	)	January 20, 2026

MOTION FOR PERMISSION TO APPEAL FROM THE PROFESSIONAL RESPONSIBILITY BOARD

THOMAS MELONE ("Respondent"), who is the Respondent in Professional Responsibility Board ("PRB") Case No. 120-2025, 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 ("HP Order"). Appendix ("A.") A1. On December 15, 2025, Respondent timely filed a motion for permission to appeal the HP Order with the Hearing Panel. A14. Mr. Hanley filed opposition to that motion. A64. Mr. Hanley argued that "in very limited circumstances, [this] Court may hear all or part of case before the Hearing Panel has entered a final order." A65. He then discussed three possible bases for interlocutory appeal. Respondent agreed that the three bases described by Mr. Hanley are appropriate (but not necessarily the entire universe of) bases for interlocutory appeal in this case, and are so ingrained in federal and state practice as to be an essential element of fair process.

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.")

Respondent intended to file a reply to Mr. Hanley's opposition, but prior to Respondent's deadline for filing a reply, 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. A12. 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, A73, which the HP denied on January 15, 2026. A92. The HP Order's conclusion

that there is no right to appeal any interlocutory order, including a collateral order that would qualify as a final order under universal federal and state civil practice, is itself a collateral order under the collateral order doctrine regarding the right of appealability. This motion for permission to appeal follows.

The Respondent respectfully requests that this Court reverse the HP Order and the HP Denial Order and direct the HP to consider the merits of Respondent's motion for permission to appeal under the criteria of VRAP 5 and 5.1.

BASIS FOR APPEAL

1. THE QUESTION OF LAW ASSERTED TO BE CONTROLLING.

The original question presented by the Respondent in his motion for permission to appeal related to the question of whether certain rules in the Vermont Rules of Professional Conduct ("VRPC") apply when Respondent is not representing a client but rather is acting in his own interests, and if so, whether application in this case would violate Respondent's First and/or Fifth Amendment constitutional rights. But now that the Hearing Panel has held that no interlocutory appeal of any variety is permitted, there is a second issue, which is the right to bring an interlocutory appeal.

2. THE FACTS NECESSARY TO UNDERSTAND THE QUESTIONS.

As to the first question, the "Preamble and Scope" of the VRPC talks about the different roles of a lawyer. The "Preamble: A Lawyer's Responsibilities" states that "[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Paragraph [2] then talks about the lawyer as a "representative of clients":

> [2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.
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> ***

> [17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.
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> [21] The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The preamble and this note on scope provide general orientation. The comments are intended as guides to interpretation, but the text of each rule is authoritative.

Those provisions simply do not make sense when the lawyer represents his own interests and there is no third party client. 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.

Moreover, 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."

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). A95. 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, A98, 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." A116.

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] A147. 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

[1] *See*, A141, Ms. Bent's reply memorandum in support of motion to strike, PUC docket 24-3517 at 7 (February 11, 2025).

Town's law firm year after year as an exception to the Town's Purchasing Policy.") A134. 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 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.

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[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).

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 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). A154. 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.

[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.

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.:*

> 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

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 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

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> 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.

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.

3. THE REASONS WHY AN INTERLOCUTORY APPEAL SHOULD BE PERMITTED.

The reasons why an interlocutory appeal should be permitted here is three-fold.

First, if this Court chose to follow the analysis of the Connecticut Supreme Court, then at a minimum, a large chunk of charges against the Respondent would fall away, which would have the add-on benefit of avoiding constitutional challenges to those counts. At a minimum, Count I (para. 114(b)), Count III (para. 119(b)), Count V (paras. 123(b) & (c)), Count VI entirely and Count VII should be thus eliminated. 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.

Second, 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 interests in response to ABA Formal Opinion 502, discussed below. And if they are not to

be applied as written, then those rules result in a trap because the application of the rule would be contradicted by the language of the rule. A37.

Third, Respondent will be making constitutional challenges to every count, and would expect to be able to file an interlocutory appeal regarding those constitutional challenges if turned away by the Hearing Panel. As discussed above, in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 102 S. Ct. 2515 (1982), the United States Supreme Court considered the right to file interlocutory appeals involving constitutional challenges as being a fundamental factor in applying *Younger* abstention. *See also*, *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 77 (2d Cir. 2003) and *Esso Std. Oil Co. v. Lopez-Freytes*, 522 F.3d 136 (1st Cir. 2008) discussed herein.

The HP Order rejected Respondent's position that he was not representing a client, even though the main tribunal related to many of the counts in the PUC, which has expressly held that Respondent is acting pro se. The HP Order cites two cases, both of which are inapposite, and one of which did exactly the opposite of what the case is cited for as explained at A14.

Under Vt. R. App. P. 5 "[o]n any party's motion in a civil action, the superior court must permit an appeal from an interlocutory order or ruling if the court finds that: (A) the order or ruling involves a controlling question of law about which there exists substantial ground for difference of opinion; and (B) an immediate appeal may materially advance the termination of the litigation."

Respondent's motion satisfies all three requirements. As far as meeting the "controlling" question requirement, at a minimum, a reversal of the HP Order would eliminate Count I (para. 114(b)), Count III (para. 119(b)), Count V (paras. 123(b) & (c)), Count VI entirely and Count VII entirely. As far as meeting the substantial ground for difference of opinion, one need look no further than Bar Counsel Michael Kennedy's commentary on ABA Formal Opinion 502, which is discussed below. As far as meeting the requirement that the appeal may materially advance the termination of the litigation, elimination of the Counts tied to the *pro se* issue would dramatically reduce the litigation time because as it stands now, Respondent would need to subpoena dozens of

witnesses related to Bennington in order to prosecute the claims that the Complaint asserts were false.

A. The HP Order Involves a Controlling Question of Law.

"[A]n order may [also] be 'controlling' if reversal would have a substantial impact on the litigation, either by saving substantial litigation time, or by significantly narrowing the range of issues, claims, or defenses at trial." *Rivard v. State*, 2023 Vt. Super. LEXIS 135 *9 (October 26, 2023) citing *In re Pyramid Co. of Burlington*, 141 Vt. 294, 303, 449 A.2d 915 (1982).

All of the Counts that Mr. Hanley presents in the Complaint are based upon Respondent acting in respect of his own interest. 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."

A reversal of the HP Order on the issue of Respondent not representing a client issue would certainly have a substantial impact on the litigation, either by saving substantial litigation time, or by significantly narrowing the range of issues, claims, or defenses at trial.

For example, at a minimum, a reversal of the HP Order would eliminate Count I (para. 114(b)) and Count III (para. 119(b)) both of which wrongly accuse Respondent of making a false statement. Elimination of those Counts would dramatically reduce the litigation time because as it stands now, Respondent would need to subpoena dozens of witnesses related to Bennington in

order to defend against the falsity claims. In addition, at a minimum, a reversal of the HP Order would eliminate Count V (paras. 123(b) & (c)), Count VI entirely and Count VII entirely.

B. The HP Order involves a controlling question of law about which there exists substantial ground for difference of opinion.

As discussed below, ABA Formal Opinion 502 and the other authority discussed below 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. [8]
>
> 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?
>
> ***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

[8] *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 & 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").

> 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.
>
> (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:[9]

> 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,

[9] 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 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.

(Emphasis added).

C. Vermont Bar Counsel Michael Kennedy has recognized there exists substantial ground for difference of opinion.

Vermont Bar Counsel Michael Kennedy has recognized that a rule amendment would be in order to address a situation involving a lawyer representing his own interests. *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?**
>
> 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*.[10] 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.
> 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:

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

- "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.

D. An Immediate Appeal May Materially Advance The Termination Of The Litigation.

The final requirement is that "an immediate appeal may materially advance the termination of the litigation." This requirement is clearly satisfied. Here, "reversal would have a substantial impact on the litigation, either by saving substantial litigation time, or by significantly narrowing the range of issues, claims, or defenses at trial." *Rivard v. State*, 2023 Vt. Super. LEXIS 135 *9 (October 26, 2023) citing *In re Pyramid Co. of Burlington*, 141 Vt. 294, 303, 449 A.2d 915 (1982).

For example, at a minimum, a reversal of the HP Order would eliminate Count I (para. 114(b)) and Count III (para. 119(b)) both of which wrongly accuse Respondent of making a false statement. Elimination of those Counts would dramatically reduce the litigation time because as it stands now, Respondent would need to subpoena dozens of witnesses related to Bennington in order to prosecute the claims that the Complaint claims were false. In addition, at a minimum, a reversal of the HP Order would eliminate Count V (paras. 123(b) & (c)), Count VI entirely and Count VII entirely.

E. 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.

As discussed above, 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 is appropriate 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*.

Also as noted above, 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. *See also, Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 77 (2d Cir. 2003).

Another example is *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.")

4. THE WRITTEN ORDER, IF ANY, FROM WHICH AN APPEAL IS SOUGHT.

The HP Order is found at A1 and the HP Denial Order is found at A12.

5. THE SUPERIOR COURT ORDER DENYING PERMISSION TO APPEAL.

The HP Denial Order is found at A12 and the HP order denying the motion to vacate is found at A92.

CONCLUSION

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

Dated: January 20, 2026

Respectfully Submitted,

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