STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

IN RE: MELVIN FINK PRB FILE NO. 012-2019

RESPONDENT'S POST HEARING MEMORANDUM: PROPOSED FINDINGS OF FACT, ARGUMENT, AND CONCLUSIONS OF LAW

COMES NOW the Respondent, by and through Counsel, David C. Sleigh, and respectfully submits his proposed findings of fact, standard of review, argument, and conclusions of law.

I. INTRODUCTION

This disciplinary proceeding is based on allegations that Respondent Melvin Fink violated 13 V.S.A. § 2601 by committing the offense of open and gross lewdness and lascivious conduct. Respondent acknowledges that he made an unwelcome romantic advance consisting of a kiss, embrace, and brief contact with Ms. Howell's clothed buttocks during a meeting at her residence in July 2017. However, the more serious allegation that Respondent digitally penetrated Ms. Howell's anus through her clothing is not supported by the record. Ms. Howell expressly denied the claim in her testimony before the panel, and the allegation otherwise depends entirely on disputed testimony lacking corroboration. Disciplinary Counsel must prove each element of the alleged crime by clear and convincing evidence before this Panel may find a violation. A.O. 9, Rule 13, § (D)(5)(b). The credible evidence admitted herein fails to prove Respondent committed lewd and lascivious conduct.

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a. Lewd and Lascivious Conduct (13 V.S.A. § 2601)

13 V.S.A. §2601 provides "[a] person guilty of open and gross lewdness and lascivious behavior shall be imprisoned for not more than 5 years or fined not more than $300.00, or both."

The current statute varies little from the initial codification, R.S. 1840, 99 § 8: "If any man or woman, married or unmarried, shall be guilty of open and gross lewdness and lascivious behavior…shall be punished by imprisonment…not more than two years, or by fine not exceeding three hundred dollars."[1]

The first Vermont Supreme Court case interpreting the statute noted, "The statute gives no particular definition, or what constitutes this crime." *State v. Millard*, 18 Vt. 574, 577 (1846). The same is true today.

This case turns on whether Disciplinary Counsel proved — by clear and convincing evidence — that Respondent's kiss and embrace of Ms. Howell rose to the level of "gross" lewdness. For more than 186 years, the Vermont Supreme Court has made clear that only willful, indecent conduct bearing sexual connotations flagrantly inconsistent with public decency qualifies.

The Vermont Supreme Court has consistently held that gross lewdness exists only where the conduct is sexual and so offensive that it violates settled community norms. *In re A.P.*, 2020 VT 86. See and compare: *In re A.P.*, 2020 VT 86 (Young man grabbed a classmate's breast over her clothes in the public hallway of a high school); *State v. Discola*, 2018 VT 7 (Unwanted grabbing of several children's and adult woman's buttocks while the victims attended the Vermont marathon amounts to lewd

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[1] The maximum sentence in 1840 being not more than two years would qualify a violation as a misdemeanor under current law.

and lascivious conduct); *State v. Penn*, 2003 VT 110 (Defendant unbuttoned and unzipped victim's pants in full view of her ten-year-old daughter); *State v. Benoit*, 158 Vt. 359 (1992) (Defendant's removal of first girl's clothing while both girls were asleep, and second girl observed first girl's naked body when second girl awoke); *State v. Ovitt*, 148 Vt. 398 (1987) (Holding that public masturbation is an act which may be said to affront the sensibilities of a substantial segment of the community); *State v. Purvis*, 146 Vt. 441 (1985) (Defendant knocked on window to draw attention of three young girls to his being naked); *State v. Millard*, 18 Vt. 574 (1846) (Defendant exposed his penis to an unwilling female).

No reported case has held that a kiss and touching of the clothed buttocks of an adult in a private place, even if unwelcome, is conduct that is flagrantly inconsistent with public decency standards.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

Attorney disciplinary proceedings require proof of misconduct by clear and convincing evidence. A.O. 9, Rule 13, § (D)(5)(b). Clear and convincing evidence requires a firm belief or conviction that the allegation is true, and it is a standard significantly higher than mere preponderance of the evidence. It is a "very demanding" standard, requiring somewhat less than evidence beyond a reasonable doubt, but more than a preponderance of the evidence. *In re E.T.*, 2004 VT 111, ¶ 12.

Where allegations of professional misconduct depend upon proof of a criminal act, the tribunal must carefully evaluate whether the elements of the alleged offense are established by clear and convincing evidence. When the evidence consists primarily of disputed testimony, credibility determinations become central to the

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analysis.

III. PROPOSED FINDINGS OF FACT

1) Respondent, Melvin Fink, is an attorney licensed to practice law in the State of Vermont.
2) The complainant, Jean Howell, is a former real estate broker, licensed in three States and a home "stager." Merits Hearing Transcript (herein referred to as "Tr."), p. 77-78.
3) Commensurate with her real estate experience, she is knowledgeable about some aspects of the law (e.g., purchase and sales agreements). Tr., p. 77-78.
4) In 2017, Respondent represented John Howell in a family court matter brought by John involving custody and visitation of his daughter, Mia. See, *Howell v. Pare*, 313-11-15 Wmdm.
5) Jeanne Howell is the mother of Respondent's former client, John Howell.
6) Respondent became acquainted with Ms. Howell through his representation of her son.
7) Respondent formally withdrew from representing John Howell in June 2017.
8) Respondent withdrew because John would not provide the information necessary to respond to Ms. Pare's discovery demands, his failure to make scheduled attorney-client appointments, and because of his persistent refusal to acknowledge Ms. Pare's desire to sever their familial ties. Tr., p. 27-30; 84-85; 152-153; 157.

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9) After withdrawing from the case, Respondent offered to guide John about how to respond to motions, etc. Tr., p. 160-161.

10) Respondent communicated with John several times after he withdrew and occasionally communicated with Ms. Howell about matters relating to her son's litigation. Tr., p. 161.

11) In that regard, Ms. Howell asked Respondent to review and explain several pleadings that were pending in John's case. *Id*.

12) Ms. Howell called Respondent and said that she and John would like to meet with him to discuss the pending motions. Tr., p. 162.

13) She asked Respondent, "Do you make house calls?" *Id*.

14) Despite his reticence formed from prior experiences, Respondent agreed to meet the two at the Howell property in Peru, Vermont. *Id*.

15) Ms. Howell told Respondent that John preferred to meet in Peru because he was afraid of encountering Brittany Pare in Ludlow, the location of Respondent's office. *Id*.

16) Respondent expected John to participate in the meeting. Before July 17, Respondent had never met with Ms. Howell without John being present. Tr., p. 163.

17) On July 17, 2017, Respondent visited Ms. Howell at her residence in Peru, Vermont. Tr., p. 167 et seq.

18) The day before, July 16, 2017, Ms. Howell had come to Vermont to return her granddaughter (John's daughter, Mia) to her mother. Tr., p. 39.

19) In addition to returning Mia, Ms. Howell's trip to Vermont was purposed

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to "stage" the Peru property for imminent sale. Tr., p. 109.

20) The meeting occurred in Ms. Howell's kitchen and dining area. Tr., p. 167 et seq.

21) No other individuals were present during the meeting. *Id*.

22) The parties initially discussed matters relating to the family court case involving Ms. Howell's son, John. *Id*.

23) The two were in close proximity, reviewing written materials related to John's case. Tr., p. 54.

24) At some point, Ms. Howell came very close to Respondent, crossing over into "his space." Tr., p. 170.

25) Respondent embraced Ms. Howell and kissed her on the mouth. Tr., p. 171.

26) During the embrace, Respondent touched Ms. Howell's clothed buttocks. *Id*.

27) Disciplinary Counsel asked Ms. Howell directly, "Do know whether Mr. Fink's hand or finger actually penetrated inside you?" She replied, "Not inside me, no." Tr., p. 59, ln. 7-9.

28) At the time, Ms. Howell was fully dressed, wearing heavy denim, below-the-knee camp shorts. Tr., p. 171.

29) Respondent stepped back and asked Ms. Howell, "Do you want me to pleasure you?" Ms. Howell said, "No. It's too soon after my husband's death," or words to that effect. *Id*.

30) Respondent replied, "I'm sorry for your loss." *Id*.

31) Respondent has acknowledged that this contact occurred. *Id*.

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32) After Ms. Howell told Respondent she was not interested, Respondent did not attempt to touch her. *Id*.

33) Respondent did not attempt to digitally penetrate Ms. Howell's clothed buttocks. Tr., p. 172.

34) At the time of their kiss, Ms. Howell was fully clothed and there was no contact between any part of Respondent's body and the anus of Ms. Howell. Tr., p. 121; 171-172.

35) At no time did Respondent touch Ms. Howell's breasts or vaginal area. Neither did he expose any portion of his genitals, attempt to disrobe Ms. Howell, nor place his hands underneath her clothing.

36) The meeting continued after the kiss and embrace. Respondent left the residence at one point to retrieve a volume of the Vermont statutes to discuss grandparents' contact rights. Tr., p. 172-173.

37) Ms. Howell invited Respondent to stay for lunch. He declined as he had a court appearance in White River Junction at 1:30 p.m. Tr., p. 173.

38) Thereafter, Respondent left Ms. Howell's residence and headed to court for an appearance in a criminal case. *Id*.

39) Respondent left the Peru house no later than 11:00 a.m. *Id*.

40) Ms. Howell stayed at the Peru home for a period of time after Respondent left. She made no phone calls to anyone before leaving the house. Tr., p. 111.

41) Ms. Howell did not report the alleged conduct to authorities until 2018. Tr., p. 73.

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42) Ms. Howell sent texts to Joe Coscia shortly after the meeting concluded. Her texts described Responent's verbal expression of romantic interest in her. Her texts did not contain any allegation or description of physical contact between the two. DC Ex. 5.

43) Ms. Howell sent the texts after pulling her car to the side of the road on her way to Connecticut. Tr., p. 64-65; 111 -112.

44) At the time she sent the texts, she was temporally and physically distant from the Peru house, and she had time to consider the content of her messages. *Id*.

45) The texts were not spontaneous declarations made close to the occurrence, rather, they were composed deliberately and contemplatively. *Id*.

46) The texts did not describe any physical contact between her and Respondent. DC Ex. 5.

47) Ms. Howell made no phone calls between the time of the kiss and her arrival at her parents' home in New Canaan, Connecticut. Tr., p. 66, ln. 21-24.

48) Ms. Howell reported her allegation to Vermont authorities in July 2018 – approximately one year after the meeting between herself and Respondent.

49) When asked during the Merits Hearing why she waited until 2018 to report the conduct, Ms. Howell testified that she did not know why she delayed. Tr. p. 76–77.

50) Mr. Coscia testified that Ms. Howell told him Respondent tried to put his finger "in her butt, through her clothes." Tr., p. 147–148.

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51) Mr. Coscia did not personally observe the alleged conduct and testified only to statements Ms. Howell made to him.

52) During Mr. Coscia's testimony, his description of the alleged act used the term "butt" rather than the anatomical term "anus." Tr., p. 147–148.

53) Mr. Coscia testified that Ms. Howell described the alleged physical contact in a phone call shortly after its occurrence, but no evidence corroborating any such call was produced.

54) Ms. Howell testified that she made no such calls on July 17. Tr., p. 66, ln. 21-24.

55) Mr. Coscia did not relate his version of the events to anyone until he went with Ms. Howell to speak to the police in September of 2018. Tr., p. 146.

56) Ms. Howell testified she told Mr. Coscia "everything" when she arrived in Florida on July 18. Tr., p. 68. However, she did not explain what "everything" meant. *Id*.

57) Upon arrival in New Canaan, she met with her son, John, and discussed the substance of her file review with Respondent. She said nothing about any untoward behavior. Tr., p. 67.

58) After the July 17th meeting in Peru, Ms. Howell continued to communicate with Respondent about John's case by email and by phone. Tr., p. 69.

59) The allegation of anal penetration is unsupported by physical evidence, eyewitness testimony, or contemporaneous documentation.

60) The allegation of anal penetration through clothed buttocks is contrary to common experience, inherently improbable, and inconsistent with ordinary

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human experience.

61) The only testimony suggesting penetration came from Ms. Howell, while the only corroborating witness, Mr. Coscia, repeated statements she made significantly after the alleged event. Tr., p. 147–148.

62) However, when asked directly if there had been penetration by Disciplinary Counsel at the Merits Hearing, Ms. Howell said, "No." Tr., p. 59.

63) Ms. Howell's initial account of her meeting with Mr. Fink was contained in text messages she sent after pulling her car to the side of the road. Tr., p. 111 -112. DC 5.

64) Ms. Howell delayed reporting the allegation for approximately one year and testified that she did not know why she delayed reporting the incident. Tr., p. 76–77.

65) Respondent's testimony acknowledging a kiss and brief contact with clothed buttocks remained consistent throughout the proceedings.

66) Ms. Howell blames Respondent for the adverse result in John's attempt to evade paying child support and to retain custody of his daughter. Respondent's Ex. D ("Justice for me to live with outrage over the theft of my ability to protect my family, it was stolen from me by Mr. Fink. I will again -- I will ask you again, where is the justice for my son, my granddaughter, and me?").

67) In her complaint, she stated that Respondent's actions in her son's case damaged her, her son, her granddaughter, and her family. She complained that his failures in the family court case caused all of them emotional pain

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and financial costs, and her a substantial amount of money. Tr., p. 107.

68) Her complaint was temporally proximate to an adverse decision in John's custody case. During that hearing, there was extensive evidence about John's substance abuse and psychiatric disorders. Tr., p. 99, 125.

69) However, Ms. Howell has a history of prevarication regarding John's shortcomings. For example, at her deposition in the collateral criminal case, she denied that John had ever been institutionalized for mental health treatment. She knew that was not true at the time of her deposition testimony. Tr., p. 98. She told this Panel that John was never treated for substance abuse. Tr., p. 97. But, when confronted with the evidence she heard while attending a hearing in John's case, she had to admit his treatment included that for substance abuse. Tr., p. 125. She acknowledged refusing to provide John's address to Counsel while testifying under oath in a transparent effort to shield John from participation in the State's prosecution of Respondent. Tr., p. 106-107. It is clear Ms. Howell's factual recitation is motivated and distorted by her animus towards Respondent.

70) The Panel should find that the allegation of anal penetration was not proven by clear and convincing evidence.

IV. ARGUMENT

To establish a violation of Rule 8.4(b), Disciplinary Counsel must prove that Respondent committed a criminal act. The alleged act is open and gross lewdness and lascivious conduct under 13 V.S.A. § 2601.

The Vermont Supreme Court has consistently applied § 2601 to conduct that is

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grossly offensive to community standards of decency, including genital exposure and public sexual acts. See *State v. Discola*, 2018 VT 7; *State v. Beaudoin*, 2008 VT 133; *State v. Penn*, 2003 VT 110; *State v. Benoit*, 158 Vt. 359 (1992); *State v. Ovitt*, 148 Vt. 398 (1987); *State v. Purvis*, 146 Vt. 441 (1985); *State v. Millard*, 18 Vt. 574 (1846). A brief romantic advance between adults in a private home does not meet that threshold, even if it is unwelcome. The conduct admitted by Respondent — a brief kiss and touching of clothed buttocks inside a private residence — does not resemble the conduct found criminal in those cases.

The Complainant's account given shortly after the incident contained no allegation of improper touching. Only later — following an adverse ruling in John's custody case — did Ms. Howell advance a markedly different account, alleging that Respondent placed her in a headlock and digitally penetrated her anus. Although she claimed to have disclosed detailed allegations to her then-fiancé, Mr. Coscia, shortly after the incident, he made no report until both went to law enforcement in September 2018. Even then, his description of events was materially more restrained than Ms. Howell's account. No phone records were produced to corroborate his assertion that she called him while en route to Connecticut, and Ms. Howell denied making any such calls.

A more plausible account is that, after spending an extended period in close proximity to Ms. Howell, Respondent mistakenly perceived mutual interest. He embraced and kissed her expecting reciprocity, but quickly realized he had misread the situation. He stepped back and, in essence, asked whether his attention was welcome to clarify the moment (i.e., "Do you want me to pleasure you?"). Ms. Howell declined

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and explained that it was too soon after her husband's passing for her to consider a relationship. The interaction ended there.

Instances of a widow's brief acquiescence to a suitor's attempt to kiss, followed by a quick rebuff, are common plot themes in books, plays, and moves. See, e.g., Plays and Novels: Anthony Trollope, *The Small House of Allington* (1864); Thomas Hardy, *Far From the Maddening Crowd* (1874); George Meredith, *Diane of the Crossways* (1885); Julie Quinn, *When He Was Wicked* (2004); Amy Carol Reeves, *How to Grieve Like a Victorian* (2025); Films: *Random Harvest* (1942); *The Amazing Mr. X* (1948); *P.S. I love You* (2007). An attempt to kiss someone, even if that turns out to be unwelcome, is not an afront to community standards.

Ms. Howell's denial of animus towards Respondent is refuted by the record. She maintained contact with Respondent about John's case after the incident and did not file a complaint until immediately following the ruling awarding Ms. Pare sole custody of Mia. Nothing in the record substantiates her claim that fear delayed disclosure.

Because the allegation of penetration is not proven and the conduct admitted does not constitute open and gross lewdness under Vermont law, Disciplinary Counsel has failed to establish a criminal act as required by Rule 8.4(b).

V. PROPOSED CONCLUSIONS OF LAW

Attorney discipline must rest on reliable proof. The evidence establishes that Respondent made an unwelcome romantic advance that he acknowledges and regrets. The record does not establish the felony offense alleged in the complaint by clear and convincing evidence. Accordingly, the Panel should conclude that Disciplinary

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Counsel has failed to prove a violation of Rule 8.4(b) and should dismiss the complaint.

DATED at St. Johnsbury, VT on March 16, 2026

Respectfully submitted,

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Counsel for Melvin Fink

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