

**STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM**

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

**ORDER DENYING DISCIPLINARY COUNSEL’S MOTION TO LIFT STAY
AND GRANTING RESPONDENT’S MOTION TO ENLARGE TIME**

Disciplinary Counsel¹ filed a Petition of Misconduct against Respondent Melvin Fink on February 20, 2019. Disciplinary Counsel alleged that Respondent violated Vermont Rule of Professional Conduct 8.4(b) by engaging in lewd and lascivious conduct toward J.H. on July 17, 2017, a felony violation of 13 V.S.A. § 2601. On February 27, 2019, Respondent denied the allegations in the Petition of Misconduct and requested a stay of the disciplinary proceedings pending resolution of a related criminal matter, *State v. Melvin Fink*, Docket No. 124-1-19 Bncr. Disciplinary Counsel did not oppose the stay. On March 28, 2019, the Hearing Panel issued a Ruling on Request to Lift Stay (“Ruling”) granting Respondent’s request to stay the disciplinary proceedings “pending the entry of judgment in the trial court in the related criminal proceeding.” Ruling at 6. Disciplinary Counsel filed a Motion to Lift Stay (“Motion”) on February 2, 2024.

In its Ruling, the Panel found good cause to grant the stay because Respondent’s privilege against self-incrimination had serious implications for both the criminal proceedings and the disciplinary proceedings, given how closely related the facts underlying the proceedings were. The Panel also considered how the court-ordered conditions of release that prohibited Respondent from having contact with J.H. might affect the disciplinary proceedings.

On November 3, 2023, the State notified the Bennington Superior Court Criminal Division that it had agreed to refer the criminal matter against Respondent to the Court Diversion Program (“Diversion”), provided Respondent admit to a stipulated set of facts under oath.

¹ Sarah Katz was Disciplinary Counsel at the time. Jon Alexander is currently Disciplinary Counsel.

Motion, Ex. 2. The set of facts included that, on July 17, 2017, Respondent “erroneously perceived that J.H. harbored romantic feelings for him... and without invitation, instigation or consent, express or implied, from J.H., Mr. Fink embraced her, putting his hands on her clothed buttocks and kissed her. He asked her if she wanted him to pleasure her. J.H. did not invite or consent to Mr. Fink’s advance.” *Id.* The criminal court held a hearing on November 7, 2023, and Respondent admitted the same set of facts under oath during the colloquy. *Id.*, Ex. 3 at 34-35. In order to make Respondent eligible for Diversion, the State amended the criminal charges against him from felony lewd and lascivious conduct in violation of 13 V.S.A. § 2601 to misdemeanor open and gross lewdness in violation of 13 V.S.A. § 2601a. *Id.*, Ex. 3 at 3-4, Ex. 4. On November 8, 2023, the State referred Respondent to Diversion to resolve the charges against him, and Respondent accepted the referral. *Id.*, Ex. 7. On November 27, 2023, the Rutland County Restorative Justice Center accepted Respondent into its Diversion program. *Id.*, Ex. 8.

In light of these developments in the criminal matter, Disciplinary Counsel argued for a lift of the stay in this disciplinary matter on grounds “there is little reason to expect prompt completion of Respondent Fink’s Diversion program or the entry of judgment in *State v. Fink* in the foreseeable future, if ever.” *Id.* at 9. He further argued that Respondent likely waived his privilege against self-incrimination when he made self-incriminating statements under oath in order to secure the referral to Diversion, obviating the rationale for the stay.

On February 21, 2024, Respondent filed a Motion to Enlarge Time and Opposition to Disciplinary Counsel’s Motion to Lift Stay. Under Vermont Rule of Civil Procedure 7(b)(4), The Opposition to Disciplinary Counsel’s Motion (“Opposition”) was due February 16, 2024, 14 days after service of Disciplinary Counsel’s Motion. *See* A.O. 9, Rule 20(B) (providing that the Vermont Rules of Civil Procedure generally apply in disciplinary proceedings). The Opposition

was therefore five days late. Disciplinary Counsel did not oppose Respondent's Motion to Enlarge Time. There is no indication any prejudice would result from granting Respondent a five-day enlargement of time. Accordingly, Respondent's Motion to Enlarge Time is granted, and the Hearing Panel will consider his Opposition.

In the Opposition, Respondent indicated that if he completes Diversion, the criminal court would enter judgment dismissing the charges against him, ending the stay in this matter, and if he does not complete Diversion, the State would resume prosecuting the charges. He represented that his Diversion contract with the Rutland County Restorative Justice Center must be fulfilled within 90 days. Opposition at 1-2. He argued that maintaining the stay would obviate the need for the Hearing Panel to resolve the very issues the stay was meant to avoid.

Disciplinary Counsel timely filed a Reply in Further Support of His Motion to Lift Stay ("Reply") on March 6, 2024. He noted that if Respondent successfully completes Diversion, the State would dismiss the criminal charges against Respondent, and the court would therefore not enter any judgment in the criminal matter.

Neither party identified the date on which Respondent must complete Diversion. Assuming the Diversion contract commenced no later than February 21, 2024, when Respondent filed his Opposition, he must fulfill the contract no later than May 21, 2024. Similarly, neither party addressed the status of the court-ordered conditions of release that prohibited Respondent from having any contact with J.H. Accordingly, the Panel must assume the condition remains in place, and its concerns about how the condition might affect the disciplinary proceedings stand.

Respondent will complete or fail to complete Diversion in less than 60 days. For practical reasons, lifting the five-year stay on these disciplinary proceedings less than 60 days from a significant change in factual circumstances is unwarranted. The Hearing Panel can foresee

significant discovery and evidentiary disputes which would arise from Respondent asserting his privilege against self-incrimination if the stay were lifted at this time. These disputes would be moot if the State dismisses the criminal charges against Respondent. Unnecessarily litigating these disputes would be an inefficient use of resources and likely prolong resolution of this disciplinary matter more than maintaining the stay for another 60 days or so.

To the extent Respondent fails to complete Diversion, and the State again pursues criminal charges against him, Respondent's privilege against self-incrimination would have potential implications on the criminal matter or these disciplinary proceedings. Until the criminal charges are in fact dismissed or judgment is entered in the criminal matter, these implications remain. *See, e.g., In re Hill*, 149 Vt. 431, 435, 545 A.2d 1019, 1022 (1988) ("We agree with respondent that her privilege with respect to her false swearing case remains alive. Despite the jury verdict against her, the Fifth Amendment privilege is available until the case is fully concluded, including any appeals."). The parties' submissions did not adequately address whether or to what extent Respondent's admissions pursuant to a resolution agreement (as opposed to self-incriminating statements made on the stand) operate as a waiver of his privilege against self-incrimination. *See, e.g., Mitchell v. United States*, 526 U.S. 314, 322-23 (1999) (holding defendant did not waive her privilege against self-incrimination at sentencing by making admissions during a plea colloquy, unlike a defendant who takes the stand and testifies).

With respect to Disciplinary Counsel's concern that there will be no judgment in the criminal matter, the Hearing Panel acknowledges that the stay would not be automatically lifted as a result of an entry of judgment. However, if the State dismisses the criminal charges, the Panel would likely consider such a dismissal a change in factual circumstances that warrants reconsideration of the stay.


* * *

Based upon the submissions of the parties, it is hereby ORDERED:

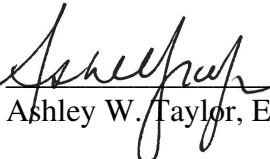
1. Respondent's Motion to Enlarge Time is GRANTED.
2. Disciplinary Counsel's Motion to Lift Stay is DENIED.
3. Within ten (10) days of the Rutland County Restorative Justice Center determining whether Respondent has successfully completed the Court Diversion Program or has failed to complete the Court Diversion Program, Respondent shall file notice of same with the Professional Responsibility Program for the Hearing Panel's consideration. Should the Rutland County Restorative Justice Center fail to make such a determination on or before May 21, 2024, Respondent shall file notice of same, along with an update on the status of Diversion and the criminal matter, with the Professional Responsibility Program for the Hearing Panel's consideration.

Dated March 27, 2024.


Hearing Panel No. 3

By: 

Gary F. Kameedy, Esq., Chair

By: 

Ashley W. Taylor, Esq.

By: 

Peter Zuk, Public Member