STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re: Melvin Fink
PRB File No. 012-2019

DISCIPLINARY COUNSEL'S MOTION TO LIFT STAY

NOW COMES Petitioner Office of Disciplinary Counsel, pursuant to Supreme Court Administrative Order No. 9, Rule 20(G), and respectfully moves the Hearing Panel to immediately lift the stay of proceedings it approved in this matter "pending the entry of judgment in the trial court in the related criminal proceeding," *State v. Melvin Fink*, Docket No. 124-1-19 Bncr (hereinafter "*State v. Fink*"). *See* Mar. 28, 2019 Ruling on Request to Stay at 6. In support hereof, Petitioner Office of Disciplinary Counsel offers the following incorporated Memorandum of Law and appended **Exhibits 1-9**.

Undersigned Disciplinary Counsel represents that he attempted to obtain the consent of Respondent Fink's counsel to the relief requested by this Motion, but that Respondent Fink's counsel declined to agree that the stay in this matter should be lifted prior to any entry of judgment in *State v. Fink*.

MEMORANDUM OF LAW

Although no judgment has yet been rendered in the pending *State v. Fink* (and likely never will, as explained below), this criminal prosecution has now, for all practical intents and purposes, been resolved by the Attorney General Office's referral of Respondent Fink to a non-adjudicatory Diversion program. An immediate lifting of the stay on this disciplinary proceeding is therefore appropriate for the following three principal reasons:

1. The State and Respondent Fink have, through a November 2023 "Resolution Agreement" filed with and acknowledged by the Bennington Superior Court Criminal Division in *State v. Fink*, *see* **Exhibit 2**, agreed that Respondent Fink will participate in a Diversion program, pursuant to 3 V.S.A. § 164, which when completed successfully by him will

apparently result in the State's dismissal of all charges against Respondent Fink and termination of *State v. Fink* without entry of any judgment.

2. Since this Hearing Panel's March 2019 imposition of the stay in this matter, which was founded in part upon concerns that compelled or voluntary participation by Respondent Fink in this disciplinary proceeding might impair his constitutional right against self-incrimination in *State v. Fink*, the Supreme Court has indicated that attorney disciplinary proceedings should not normally be delayed or deferred pending resolution of related criminal prosecutions. *See In re Legus*, 2020 VT 49, ¶¶ 9-10.

3. However, as part of the November 2023 "Resolution Agreement" in *State v. Fink*, Respondent Fink voluntarily offered self-incriminating testimonial admissions during a hearing in the Bennington Superior Court Criminal Division concerning his July 2017 sexual assault on J.H. that forms the basis for both the criminal charges in *State v. Fink* and the disciplinary charges in this matter. *See* **Exhibit 3 at pp. 34:3-16, 35:8-12**. Thus, Respondent Fink has already waived or greatly undermined his constitutional right against self-incrimination in *State v. Fink* and thereby largely negated any rationale for a continued stay of these disciplinary proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 28, 2019, the State, represented by the Attorney General's Office, filed its criminal Information against Respondent Fink in *State v. Fink* charging him with two felony counts of Lewd and Lascivious Conduct in violation of 13 V.S.A. § 2601. The State alleged, based on the supporting attached Affidavit of Vermont State Police Detective Sergeant Jesse Robson, that on July 17, 2017, Respondent Fink "without lawful purpose or consent, grabbed the back of [J.H.'s] head, forced her face to his face, and inserted his tongue into her mouth and partially down her throat" as well as "pushed his fingers, through the clothing of [J.H.], into the anus of [J.H.]." The Bennington Superior Court Criminal Division found probable cause for the State's charges based on Detective Sergeant Robson's Affidavit. *See* Jan. 28, 2019 Information by Atty. Gen'l with attached Dec. 14, 2018 Aff. of VSP Det. Sgt. Jesse Robson, *State v. Fink,* copies attached as **Exhibit 1** hereto.

On February 20, 2019, predecessor Disciplinary Counsel filed a Petition of Misconduct

against Respondent Fink in the instant matter charging him with violation of Vermont Rule of Professional Conduct 8.4(b)'s prohibition on "serious crimes" by attorneys adversely reflecting on their "fitness as a lawyer" arising from Respondent Fink's July 17, 2017sexual assault on J.H. The Petition of Misconduct was based on the same material facts alleged by the Attorney General's Information in *State v. Fink* and sworn to by Detective Sergeant Robson in his supporting affidavit. *See* Feb. 20, 2019 Pet. of Misconduct at 2, *In re Fink*, PRB File No. 012-2019. By letter from his counsel dated February 27, 2019 and filed in this matter, Respondent Fink generally denied all allegations in the Petition of Misconduct and "request[ed] a stay of [the disciplinary] proceedings pending the resolution of the related criminal case," *State v. Fink*, from the Hearing Panel. *See* Feb. 27, 2019 Ltr. D. Sleigh to M. Grutchfield, *In re Fink*. Prior Disciplinary Counsel did "not object to the request for a stay" since "[t]he Petition of Misconduct facts alleged are nearly identical to what is charged in the criminal Information" and agreed that "a stay is appropriate and necessary in light of the constitutional rights that attach to Mr. Fink's criminal proceedings." *See* Feb. 28, 2019 Ltr. S. Katz to M. Grutchfield, *In re Fink*.

On March 28, 2019, this Hearing Panel issued its Ruling on Request to Stay in which it granted Respondent Fink's request to stay these disciplinary proceedings "pending the entry of judgment in the trial court in the related criminal proceeding," *State v. Fink*. *See* Mar. 28, 2019 Ruling on Request to Stay at 6. The Hearing Panel explained that "neither the right against self-incrimination nor any other constitutional right mandates that a related attorney disciplinary proceeding be stayed," but noted that "[n]evertheless, the right against self-incrimination does confer certain protections that have practical consequences in disciplinary proceedings and that therefore may, based on a case-by-case analysis, justify a stay as a discretionary matter." *Id.* at 2-3.

Relying upon a Supreme Court decision which ordered the stipulated continuance of a Judicial Conduct Board proceeding, this Hearing Panel observed that "the Vermont Supreme Court has strongly suggested that it would be appropriate to stay a disciplinary proceeding pending completion of a closely related criminal case" where the respondent attorney would likely assert the constitutional right against self-incrimination in the criminal matter. *See id.* at 5 (citing *Hill v. Wheel*, 149 Vt. 203, 204, 542 A.2d 274, 275-76 (1988)). "Against this legal background," the additional "fact that a criminal proceeding is pending" against Respondent Fink "and that the criminal proceeding and disciplinary proceedings are closely related," as well as Disciplinary Counsel's agreement to a stay, the Hearing Panel found that "there is good cause at this time to issue a stay . . . pending the entry of judgment" in *State v. Fink*. *Id.* at 5-6.[1]

The Hearing Panel's Ruling noted that this stay was "conditioned on the facts presently before the Panel. If the factual circumstances change, the ruling will be subject to reconsideration at any time." *Id.* at 6. The Hearing Panel's Ruling did not address the continuation of this stay should *State v. Fink* resolve or terminate other than by "entry of judgment," such as through the State's dismissal of criminal charges after Respondent Fink's completion of a Diversion program.

On November 3, 2023, shortly before the State and Respondent Fink were scheduled to select a jury and then commence trial in *State v. Fink*, they filed a "Notice of Resolution Agreement," signed by Respondent Fink, his counsel and Assistant Attorney General Paul Barkus, in which the Bennington Superior Court Criminal Division, the Honorable Kerry A.

[1] *Compare with* Vt. Supreme Court Admin. Order No. 9 (Permanent Rules Governing Establishment and Operation of the Prof'l Responsibility Program) ("A.O. 9"), Rule 20(G) ("The processing of a disciplinary matter shall not be delayed because of substantial similarity to the material allegations of pending criminal or civil litigation unless the Board or a hearing panel in its discretion authorizes a stay for good cause shown.").

McDonald-Cady presiding, was informed that "the State ha[d] agreed to refer the above-captioned case to Diversion provided that the Defendant [Fink] first admit to a stipulated set of facts under oath during a diversion referral colloquy with the Court." Nov. 3, 2023 Notice of Resolution Agreement, *State v. Fink*, copy attached as **Exhibit 2** hereto. The "Stipulated Factual Basis for [the] Diversion Referral" included Respondent Fink's party admissions that, on July 17, 2017, "[w]hile at J.H.'s house to review documents . . . 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. . . . J.H. did not invite or consent to Mr. Fink's advance." *Id.*

This requested "diversion referral colloquy" was subsequently had during a November 7, 2023 hearing in *State v. Fink*, previously scheduled as the jury draw. During this hearing, Respondent Fink, accompanied by counsel, was sworn under oath and admitted, consistent with the Resolution Agreement, that while at J.H.'s house on July 17, 2017, "without invitation, instigation, consent, express or implied from [J.H.], I embraced her, putting my hands on her clothed buttocks and kissed her. . . . She did not invite or consent to my advance." *See* Nov. 7, 2023 Hearing Tr. at 34:3-16, 35:8-12, *State v. Fink*, copy attached hereto as **Exhibit 3**.

Also on November 7, 2023, the State filed a Second Amended Information in which it "[d]ismissed pursuant to resolution agreement" the remaining felony charge of Lewd and Lascivious Conduct (Count 3) against Respondent Fink and added a misdemeanor charge of Prohibited Conduct in violation of 13 V.S.A. § 2601a (Count 4) for his conduct toward J.H. on July 17, 2017. *See* Nov. 7, 2023 2d Am. Information by Atty. Gen'l, *State v. Fink*, copy attached hereto as **Exhibit 4**.[2] Judge McDonald-Cady found probable cause for the Count 4

[2] Previously, the State had filed a First Amended Information in which it added a third felony Lewd and Lascivious Conduct charge (Count 3) for Respondent's actions toward J.H. in 2017. *See* Jan. 15, 2021 1st Am. Information by Atty. Gen'l, *State v. Fink*, copy attached hereto as

misdemeanor Prohibited Conduct charge based solely upon Detective Sergeant Robson's December 2018 Affidavit attached to the State's original Information. S*ee id.*

In contrast to Respondent Fink's self-incriminating yet self-serving testimony during the "diversion colloquy" that he merely "embraced" and "kissed" J.H. after erroneously perceiving that J.H. "harbored romantic feelings for" him, *see* **Ex. 3** at p. 35:6-10, Detective Sergeant Robson's Affidavit related that J.H. had told him that Respondent Fink had violently and invasively "grabbed the back of her head and pulled it toward her with strength and pushed his tongue into her mouth" and "his other hand went down to her backside with his fingers pushing onto her anus outside her clothing which was pants and underwear." *See* Dec. 14, 2018 Aff. of VSP Det. Sgt. Jesse Robson at 2, *State v. Fink*, **Ex. 1**. Consistent with this Affidavit, J.H. continued to maintain in a written Victim Impact Statement filed with the Court on November 7, 2023 (which she read in open Court the same day) that, notwithstanding Respondent Fink's "diversion colloquy" and the State's Second Amended Information, on July 17, 2017 Respondent Fink entered her house on the pretext of legal consultation and "grabbed me put me in a head lock, forced his tongue down my throat and proceeded to assault me from behind with his other hand." *See* Nov. 7, 2023 J.H. Victim Impact Statement at 2, *State v. Fink*, copy attached as **Exhibit 9**; *see also* Nov. 7, 2023 Hearing Tr. at 38:12-15, *State v. Fink*, **Ex. 3**

The only apparent reason why the Attorney General's Office filed the Second Amended Information, dismissed the remaining Lewd and Lascivious Conduct felony charge and re-characterized Respondent Fink's violent sexual assault on J.H. as misdemeanor Prohibited Conduct was to make Respondent Fink statutorily eligible for a Diversion referral under 3

Exhibit 5. The State later dismissed the felony Lewd and Lascivious Conduct Counts 1 and 2, leaving the Count 3 Lewd and Lascivious Conduct as the State's sole charge prior to November 7, 2023. See **Ex. 4**.

V.S.A. § 164. *See* Nov. 13, 2023 Decision on Motion at 2 & n.1, *State v. Fink*, copy attached as **Exhibit 6** hereto ("Here, the Attorney General's Office may refer count four to diversion [under 3 V.S.A. § 164] as it is a misdemeanor, first offense. Additionally, the amended count four is not a violent felony, nor a sexually violent offense like count three lewd and lascivious conduct that would not be eligible for a referral to diversion . . . At a status conference held in this case on November 6, 2023," one day prior to the filing of Second Amended Information, "the Court advised the attorneys that a diversion referral for count three, felony lewd and lascivious conduct, was prohibited"); *see also* Nov. 7, 2023 Hearing Tr. at 3:14-22, *State v. Fink*, **Ex. 3** (Assistant Attorney General Barkus representing to Court that "I think we found a way to continue with the proposed [Diversion] resolution that doesn't run afoul of the statute. State will amend the charges for 2601a for prohibited conduct which makes a misdemeanor . . . which then qualifies for the [Diversion] referral.").

On November 8, 2023, after addressing Judge McDonald-Cady's concerns about the legality of referring a sexually violent felony to Diversion, the Attorney General's Office formally referred Respondent Fink to the "Diversion Program . . . to resolve the offense(s)" re-charged as a misdemeanor in *State v. Fink* and Respondent Fink accepted this Diversion referral. *See* Nov. 8, 2023 Notice of Intent to Refer to Program, *State v. Fink*, copy attached as **Exhibit 7** hereto. On November 28, 2023, the "Rutland County Restorative Justice Center" accepted Respondent Fink into its Diversion program. *See* Nov. 28, 2023 Court Diversion/Tamarack Status Report, *State v. Fink*, copy attached as **Exhibit 8** hereto.

According to the Rutland County Restorative Justice Center's website, "Diversion is a voluntary and confidential[3] community-based alternative to the formal court process for certain

[3] The Attorney General's Office and Respondent Fink have agreed to waive all statutory

juvenile and adult offenders." *See* www.rutlandrestorativejustice.org/programs. "If accepted, participants meet with their Diversion case manager and a restorative panel of trained volunteers. During this meeting, all parties will be involved in developing a contract, which outlines specific ways the participant can repair the harm caused by the offense and prevent the offense from happening again." *Id.* "Example contract conditions include: Community service . . . Participate in an educational program . . . Engage in mental health and/or substance abuse counseling . . . Letter of apology . . . Restitution." *Id.* "If a participant successfully completes all tasks outlined in the contract, the charge will be dismissed by the state." *Id.* "If, however, the participant does not adhere to his/her contract, the participant will be returned to court for prosecution." *Id.*

Undersigned Disciplinary Counsel has made recent inquiries to both the Rutland County Restorative Justice Center and the Attorney General's Office concerning the schedule for Respondent Fink's Diversion program and its expected completion date, but has received no clarification in this regard. However, undersigned Disciplinary Counsel has been recently notified by J.H., Respondent Fink's victim, that she has been invited to attend a Diversion program meeting at the Rutland County Restorative Justice Center on February 9, 2024 that may also be attended by Respondent Fink.

To the extent that this initial February 9th meeting has been called for the purpose of "developing a contract, which outlines specific ways the participant can repair the harm caused by the offense and prevent the offense from happening again," *id.*, then it may be many more

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confidentiality provisions associated with the referral of a criminal case to Diversion until such time that Respondent Fink "successfully completes" his Diversion program. *See* Nov. 7, 2023 Hearing Tr. at 42:25—43:1-12, *State v. Fink*, **Ex. 3**; *see also* Nov. 13, 2023 Decision on Motion at 2, *State v. Fink*, **Ex. 6** ("Mr. Barkus, Esq. and Mr. Sleigh, Esq. also agreed that while this case (through count four) was referred to diversion, the matter would not be confidential as otherwise presumed by the statute by agreement of the parties. 3 V.S.A. §164(e)(1).").

months before Respondent Fink has actually fulfilled his "contract" and completed the Diversion program.[4]

II. ARGUMENT

Given that it has taken two months to schedule even an initial discussion on how Respondent Fink might complete the Diversion program, 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. Meanwhile, this attorney disciplinary proceeding remains stayed, as it has been for nearly five years, and Respondent Fink's law license remains unencumbered and unsanctioned for his now-admitted (albeit deliberately minimized) sexual assault on J.H. during the course of his practice of law.

A. The Stay Should be Lifted Because *State v. Fink* Will Likely Terminate Without Any "Entry of Judgment," Contrary to the Stay Order's Contemplation.

This Hearing Panel's March 28, 2019 Ruling on Request to Stay granted Respondent Fink's request to stay these disciplinary proceedings "pending the entry of judgment in the trial court in the related criminal proceeding," *State v. Fink*. *See* Mar. 28, 2019 Ruling on Request to Stay at 6. However, as disclosed in the November 3, 2023 "Resolution Agreement," **Ex. 2**, and November 8, 2023 "Notice of Intent to Refer to Program," **Ex. 6**, it is the shared intent of the Attorney General's Office and Respondent Fink "to resolve the offense(s)" charged in *State v. Fink* through Respondent Fink's successful completion of a Diversion program, pursuant to 3

[4] At the November 7, 2023 hearing in *State v. Fink* concerning Respondent Fink's Diversion program referral, Judge McDonald-Cady stated that it was the Court's hope that "diversion would see this as a case . . .that ideally would be able to be resolved in a matter of months and not multiple months" but that "the [Court's] intention is not to speed this unnecessarily, to make this process a meaningful process for everyone, including Mr. Fink." Nov. 7, 2023 Hearing Tr. at 43:25—44:1-11, *State v. Fink*, **Ex. 3**.

V.S.A. § 164, rather than by any Court "judgment" of conviction or acquittal. *See* **Ex. 6**.

The Attorney General's Office has not formally committed to dismissing its charges in *State v. Fink* once Respondent Fink successfully completes his Diversion program -- at least in any accessible filings with or statements to the Bennington Superior Court. However, such a dismissal would be entirely consistent with the State's past practice in Diversion-referred cases[5] and the only conceivable inducement for Respondent Fink's sworn self-incriminating admissions concerning his assault on J.H made during the November 7th "diversion colloquy" before the Court. The Attorney General's Office has the absolute right, prior to trial and subject to any disclosed or undisclosed agreements made with Respondent Fink, to terminate *State v. Fink* at any time and for any reason without Court approval. *See* Vt. R. Crim. P. 48(a) ("The attorney for the state may file a written dismissal of an indictment or information and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant") (emphasis added); *see also* Vt. R. Crim. P. 48 Reporter's Notes ("Rule 48(a) gives the state an absolute right to *nol pros* prior to trial but requires the consent of the defendant during trial. The rule changes prior Vermont practice, under which court approval, rather than consent of the defendant, was required for a *nol pros* during trial.").

The State's expected termination of *State v. Fink*, perhaps many months from now, through a voluntary dismissal of its Second Amended Information would not require or allow for Court approval, nor would the State's Rule 48(a) notice of dismissal constitute (or be memorialized in) any Court "judgment." *Compare with* Vt. R. Crim. P. 32(b) (providing that a

[5] *See, e.g., Obolensky v. Trombley*, 2015 VT 34, ¶ 4 ("The [criminal] charge was dismissed after Mrs. Obolensky successfully completed a diversion program"); *In re Doherty*, 162 Vt. 631, 632, 650 A.2d 522, 523 (1994) ("Criminal charges were dismissed after Mr. Berk successfully completed a pretrial diversion program.").

"judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence or conditions of deferment thereof. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly."). It appears to be Judge McDonald-Cady's expectation, after Respondent Fink has "successfully completed" Diversion, "to just have the case closed altogether," rather than to enter any form of judgment, which is an outcome that "sounds great" to AAG Barkus. *See* Nov. 7, 2023 Hearing Tr. at 45:12-16, *State v. Fink*, **Ex. 3**

Only if Respondent Fink were ultimately deemed by the Rutland County Restorative Justice Center and/or the Attorney General's Office, for whatever reason, to have not successfully completed the Diversion program would Respondent Fink "be returned to court for prosecution," *see* www.rutlandrestorativejustice.org/programs, and the possibility of some future "judgment" of conviction or acquittal, should the Attorney General's Office even elect to pursue prosecution at that point. However, it is far more likely that *State v. Fink* will terminate, many months from now, through voluntary dismissal rather than by any "entry of judgment," as contemplated by this Hearing Panel's March 2019 stay order. This previously unforeseen deal that Respondent Fink and the Attorney General's Office struck on the eve of trial to abandon the *State v. Fink* prosecution in favor of non-adjudicatory misdemeanor Diversion, combined with the indeterminate duration of Respondent Fink's Diversion, militate urgently in favor of immediately lifting the 5-year stay on these attorney disciplinary proceedings.

B. After this Hearing Panel's Stay Order, the Supreme Court Clarified that Attorney Disciplinary Proceedings Should Not be Stayed to Preserve an Attorney's Right Against Self-Incrimination in Related Criminal Matters.

Citing a 1988 decision arising from a judicial misconduct case, the Hearing Panel's March 2019 Ruling on Request to Stay discerned that "the Vermont Supreme Court has strongly

suggested that it would be appropriate to stay a disciplinary proceeding pending completion of a closely related criminal case" when a respondent attorney would likely invoke the constitutional right against self-incrimination in the criminal case. *See* Mar. 28, 2019 Ruling on Request to Stay at 5 (citing *Hill v. Wheel*, 149 Vt. 203, 204, 542 A.2d 274, 275-76 (1988)). However, the Supreme Court has since indicated that an attorney disciplinary proceeding should not normally be stayed during the pendency of a parallel criminal prosecution in order to avoid any waiver or impairment of the attorney's right against self-incrimination in the criminal case. *See In re Legus*, 2020 VT 49, ¶ 9 ("*Legus II*"). Rather than a blanket stay, the attorney may choose to assert his right against self-incrimination during the course of the disciplinary proceedings and selectively decline to answer any questions whose answers might waive this right or tend to incriminate the attorney in the criminal matter. *See id.* ¶ 10.

In *Legus I*, the Supreme Court ordered the immediate interim suspension of an attorney's law license for failure to respond to Disciplinary Counsel's inquiries to the attorney arising out of an investigation opened after the attorney was criminally charged for allegedly pointing a loaded firearm at a store clerk. *See In re Legus*, 2020 VT 40, ¶¶ 2-5 (*"Legus I*"). In *Legus II,* the Court denied the attorney's subsequent motion to dissolve the interim suspension because the attorney continued to refuse to respond to Disciplinary Counsel's investigatory inquiries. *See* 2020 VT 49, ¶¶ 1, 8, 13. Specifically in response to "Disciplinary Counsel's request to interview her, respondent . . . declined to participate in this process," *id.* ¶ 8, and "emphasize[d] that she is entitled to invoke her Fifth Amendment rights in declining to answer Disciplinary Counsel's inquiries." *Id.* ¶ 4.

However, the *Legus II* Court observed, like "numerous other courts, that 'simultaneous civil and criminal proceedings do not necessarily run afoul of the Fifth and Fourteenth

Amendments.'" *Id.* ¶ 9 (quoting *State ex rel. Oklahoma Bar Ass'n v. Gasaway*, 863 P.2d 1189, 1196 (Okla. 1993)). In addition, the Supreme Court noted that "our rules also recognize that '[t]he processing of a disciplinary matter shall not be delayed because of substantial similarity to the material allegations of pending criminal . . . litigation' unless a stay is authorized by the Board or a hearing panel 'for good cause shown.'" *Id.* (quoting A.O. 9, Rule 16(G), re-codified as Rule 20(G)).

The Supreme Court did confirm that an attorney "in responding to Disciplinary Counsel . . . is not required to waive her Fifth Amendment rights in connection with the criminal charge she faces." *Id.* Therefore, an attorney subject to a disciplinary proceeding or investigation "is not required to answer questions that implicate her right against self-incrimination and may invoke that right if Disciplinary Counsel asks a question that would require such a waiver." *Id.* ¶ 10. However, the Supreme Court held, the respondent attorney in *Legus II* was not entitled to peremptorily refuse all investigative inquiries, even on the basis of her constitutional right against self-incrimination, because "at least some of the matters Disciplinary Counsel has indicated she seeks to investigate may not implicate respondent's Fifth Amendment privilege," *id.*, such as "requests for information about her current law practice, active cases, trust accounts, [and] whether a disability status may be warranted." *Id.* ¶ 8.

Applied to this disciplinary proceeding against Respondent Fink, *Legus II* clarifies that deferring or delaying an attorney disciplinary proceeding on account of a related pending criminal case is no longer the Supreme Court's favored course, notwithstanding the constitutional right against self-incrimination. Instead, the attorney may properly refuse to answer certain specific questions in the ongoing disciplinary proceeding whose answers would adversely affect this right in the criminal case.

Admittedly, *Legus II* does not address the dilemma of an attorney who wishes to volunteer information or testimony in the disciplinary proceeding, but avoid the admission of these statements as potentially incriminating evidence in the criminal case. Conversely, the attorney may refuse to testify in the disciplinary proceeding on grounds of self-incrimination in the criminal case, but realize that this may compromise their ability to mount an effective defense against the disciplinary charges and that a PRB Hearing Panel would be justified in drawing an adverse inference from the attorney's refusal and silence when considering the merit of the underlying disciplinary charges.[6] However, any unwillingness by the Supreme Court to solve these dilemmas for attorneys facing parallel disciplinary and criminal matters may merely confirm another court's widely-endorsed observation that "[m]anifestly, difficult choices confront an individual who is the subject of simultaneous criminal and civil or administrative proceedings . . . [and] such an individual has no constitutional right to be relieved of the choice whether or not to testify, and civil proceedings will not be enjoined pending the disposition of the criminal charges." *Attorney Grievance Comm'n v. Unnamed Attorney*, 467 A.2d 517, 521 (Md. Ct. App. 1983) (quoted by Mar. 28, 2019 Ruling on Request to Stay at 2).

[6] In "[a] disciplinary proceeding for the revocation of a professional or business license or other sanctions . . . . [w]hile a defendant may invoke the privilege against self-incrimination and decline to answer questions tending to self-incriminate [and] rise to criminal liability . . . the privilege cannot be claimed on grounds that the testimony which it is sought to elicit may lead to disbarment [and] [t]he finder of fact is permitted to draw an adverse inference when the professional subject to disciplinary proceedings refuses to answer on self-incrimination grounds." 98 C.J.S. *Witnesses* § 592 "Privilege against self-incrimination in disciplinary proceedings."

C. Respondent Fink Has Waived or Seriously Impaired His Right Against Self-Incrimination in *State v. Fink*, Thereby Obviating the Rationale for the Stay.

Even if protecting the right against self-incrimination in a related pending criminal prosecution continued to justify staying a Vermont attorney disciplinary proceeding, this principle no longer applies to Respondent Fink. To secure his Diversion referral from the Attorney General's Office, he voluntarily provided sworn testimony in open court during the November 7, 2023 "diversion colloquy" concerning his July 2017 sexual assault on J.H. This testimony, though self-serving and carefully negotiated with the Attorney General's Office to seemingly minimize his criminal culpability, was nevertheless clearly self-incriminating. *See* Nov. 7, 2023 Hearing Tr. at 34:3-16, 35:8-12, *State v. Fink*, **Ex. 3** (admitting that, without invitation or consent, he "embraced" J.H., put his "hands on her clothed buttocks and kissed her," which would constitute one or more crimes).

Accordingly, Respondent Fink has likely waived his constitutional right to refuse trial examination on this subject -- his July 2017 attack on J.H. -- in *State v. Fink* should Respondent Fink unexpectedly fail the Diversion program and the Attorney General's Office elects to try him for misdemeanor Prohibited Conduct. *See State v. Merchant*, 173 Vt. 249, 258, 790 A.2d 386, 393 (2001) ("W]hen a party to a case chooses to testify, he 'cannot reasonably claim that the Fifth Amendment gives him not only this choice but . . . an immunity from cross-examination on the matters he has himself put in dispute'" (quoting *Brown v. United States*, 356 U.S. 148, 155-56 (1958)); *see also Mitchell v. United States*, 526 U.S. 314, 321 (1999) ("It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details. The privilege is waived for the matters to which the witness testifies, and the scope of the 'waiver is determined by the scope of relevant cross-examination'" (citations omitted)). Even if Respondent Fink were

not compelled by waiver to testify live at any subsequent trial in *State v. Fink*, the transcript of his testimonial admissions during the "diversion colloquy" would be independently admissible at such a criminal trial, as well as the forthcoming merits hearing in this disciplinary matter, thereby vitiating the value of any remaining right against self-incrimination. *See United States v. Norrie*, No. 5:11-CR-94, 2013 WL 1285864, at *20 (D. Vt. Mar. 26, 2013) ("'[S]elf-incriminating statements made by witnesses (whether or not subpoenaed) while testifying in judicial proceedings are admissible against them in later prosecutions notwithstanding the absence of *Miranda* warnings'" (quoting *United States v. Melendez*, 228 F.3d 19, 23 (1st Cir. 2000)).[7] Therefore, the underlying rationale for continuing a stay of these disciplinary proceedings has been negated by Respondent Fink's own voluntary testimony in *State v. Fink*.

CONCLUSION

WHEREFORE, Petitioner Office of Disciplinary Counsel respectfully requests that the Hearing Panel (1) immediately lift the stay of proceedings in this matter; and (2) order the parties to promptly submit a stipulated proposed Scheduling Order for this matter.

[7] *See also United States v. Toombs*, 713 F.3d 1273, 1279 (10th Cir. 2013) ("[T]he use of prior testimony does not violate a defendant's Fifth Amendment right against self-incrimination" in a subsequent legal proceeding, provided that testimony is otherwise admissible as the relevant admission of a party-opponent or upon some other evidentiary basis); *State v. Garrett*, 825 S.W.2d 954, 959 (Mo. Ct. App. 1992) (although "a witness who testifies in one proceeding may not be compelled to give further testimony in a different proceeding . . . . 'testimony voluntarily given by defendant in a former trial [of] himself or another may be received in evidence as an admission' . . . the introduction of his or her admissions at a later trial does not 'compel him to testify' in violation of the Constitutional privilege against self-incrimination" (citations omitted)).

Dated at Burlington, Vermont this 2nd day of February 2024.

OFFICE OF DISCIPLINARY COUNSEL

/s/ Jon T. Alexander

Jon T. Alexander
Disciplinary Counsel
32 Cherry Street, Suite 213
Burlington, VT 05401
(802) 859-3001
jon.alexander@vermont.gov

Counsel for Petitioner Office of Disciplinary Counsel

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re: Melvin Fink
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CERTIFICATE OF SERVICE

I certify that on February 2, 2024, Respondent Melvin Fink, Esq. was served with Disciplinary Counsel's Motion to Lift Stay, supporting Exhibits 1-9, and Notice of Appearance of Disciplinary Counsel Jon T. Alexander in the above-referenced matter by email only to the following counsel of record:

David C. Sleigh, Esq.
Sleigh Law, PC
364 Railroad Street, Suite E
PO Box 278
St. Johnsbury, VT 05819
david.sleigh@sleighlaw.com

in accordance with A.O. 9, Rule 18(B) and Vermont Rule of Civil Procedure 5.

Dated at Burlington, Vermont this 2nd day of February 2024.

OFFICE OF DISCIPLINARY COUNSEL

/s/ Jon T. Alexander
Jon T. Alexander
Disciplinary Counsel
32 Cherry Street, Suite 213
Burlington, VT 05401
(802) 859-3001
jon.alexander@vermont.gov

Counsel for Petitioner Office of Disciplinary Counsel