STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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

DISCIPLINARY COUNSEL'S MOTION TO AMEND
PETITION OF MISCONDUCT

NOW COMES Petitioner Office of Disciplinary Counsel, pursuant to Supreme Court Administrative Order No. 9, Rule 20(B) and V.R.C.P. 15(a), and respectfully moves the Hearing Panel to grant it leave to amend its February 20, 2019 Petition of Misconduct in this matter by filing in its place Disciplinary Counsel's proposed First Amended Petition of Misconduct. This Motion to Amend is contingent upon the Hearing Panel first lifting its existing March 28, 2019 stay of this proceeding, as requested by Disciplinary Counsel's pending February 2, 2024 Motion to Lift Stay. In support hereof, Petitioner Office of Disciplinary Counsel offers the following incorporated Memorandum of Law and appended **Exhibits 1-8**.

A copy of Disciplinary Counsel's proposed First Amended Petition of Misconduct is provided herewith as **Exhibit 1** in which proposed deletions from the February 20, 2019 Petition of Misconduct are shown in ~~strikethrough~~ and proposed additions are shown in ***bolded italicized and underlined*** text.

MEMORANDUM OF LAW

In November 2023, as part of a Diversion Resolution Agreement with the Attorney General's Office, Respondent provided certain personal representations of fact and sworn testimony to the Bennington Superior Court Criminal Division in order to resolve a parallel criminal prosecution of him, *State v. Fink*. This prosecution concerned the same July 17, 2017 sexual assault by Respondent on JH that formed the original basis for this disciplinary proceeding. Respondent's recent representations and testimonial admissions to the Bennington

Superior Court concerning the non-consensual nature of his July 17, 2017 encounter with JH and the intimate areas of her body touched by him directly contradict written representations made by Respondent, through his counsel, to predecessor Disciplinary Counsel in an August 2018 letter.

Therefore, in keeping with Vermont Rule of Civil Procedure 15(a)'s directive that leave to amend "shall be freely given when justice so requires," Disciplinary Counsel seeks to amend the February 2019 Petition of Misconduct in this matter to allege additional disciplinary rule violations against Respondent under Vermont Rules of Professional Conduct 8.1(a), 8.4(c) and 3.3(a)(1). The proposed amendments seek to charge Respondent with (1) making false representations to Disciplinary Counsel in August 2018 when he unequivocally denied his now-admitted coercive and lewd physical contact with JH during a July 17, 2017 meeting (proposed Count 2); and (2) for making false statements and/or misleading omissions to the Bennington Superior Court in November 2023 about the full extent and true nature of his sexually violent conduct toward JH on July 17, 2017 (proposed Count 3).

I. PROPOSED SUPPLEMENTAL FACTUAL ALLEGATIONS

On July 12, 2018, the Vermont Professional Responsibility Program received a written complaint from JH dated July 10, 2018 in which she alleged, *inter alia*, that Respondent had sexually assaulted her in her home during a July 17, 2017 meeting with him. *See* July 10, 2018 Ltr. JH to M. Kennedy at 3-5, redacted copy attached as **Exhibit 2** hereto. By letter to Respondent dated July 17, 2018, Professional Responsibility Program staff forwarded to Respondent a copy of JH's July 10, 2018 complaint and requested that he provide Disciplinary Counsel "with a written response to the complaint" by August 10, 2018. *See* July 17, 2018 Ltr. M. Kennedy to M. Fink, copy attached as **Exhibit 3** hereto.

Respondent's counsel, Mr. Sleigh, wrote to Disciplinary Counsel on August 9, 2018 to

inform her that he had been retained to represent Respondent. *See* Aug. 9, 2018 Ltr. D. Sleigh to S. Katz, copy attached as **Exhibit 4** hereto. Mr. Sleigh requested an extension until August 24, 2018 to provide Disciplinary Counsel with a written response to JH's complaint. *See id.*

By letter from Respondent's counsel, Mr. Sleigh, to Disciplinary Counsel dated August 24, 2018, Respondent provided the requested written response to JH's complaint against him. *See* Aug. 24, 2018 Ltr. D. Sleigh to S. Katz, copy attached as **Exhibit 5** hereto. In this letter from his counsel, Respondent knowingly made three false statements of material fact in connection with the instant disciplinary matter.

First, Respondent falsely stated, through counsel, that during the July 17, 2017 meeting between Respondent and JH "[a]ny physical contact between Mr. Fink and [JH] was consensual." *Id.* at 4. Second, Respondent falsely stated that "[a]t no time" during the July 17, 2017 meeting "did Mr. Fink grab, push, thrust or otherwise touch [JH's] butt or other intimate areas of her body." *Id.* at 3. Third, Respondent falsely stated that during the July 17, 2017 meeting, "[a]ny physical contact between Mr. Fink and [JH] . . . involved no contact of areas one would normally consider intimate." *Id.* at 4. These three false statements of material fact, conveyed through counsel, also independently constitute conduct by Respondent involving dishonesty, deceit or misrepresentation.

The three above-quoted statements by Respondent in his counsel's August 24, 2018 letter to Disciplinary Counsel were made by Respondent with knowledge of their falsity in light of certain directly contradictory November 2023 statements, personal representations of fact and testimony by Respondent to the Bennington Superior Court in a criminal prosecution of Respondent, captioned *State v. Melvin Fink*, Docket No. 124-1-19 Bncr (hereinafter *"State v. Fink*"). *State v. Fink* arises out of Respondent's July 17, 2017 sexual assault on JH that also

forms the original basis for this attorney disciplinary proceeding.

On November 3, 2023, a document entitled "Notice of Resolution Agreement" was filed in *State v. Fink*. *See* Nov. 3, 2023 Notice of Resolution Agreement, *State v. Fink*, copy attached as **Exhibit 6** hereto. This "Notice of Resolution Agreement" was signed personally by Respondent, his counsel Mr. Sleigh and Assistant Attorney General Paul Barkus. *Id.* In the "Notice of Resolution Agreement," contrary to Respondent's above-quoted statements in his counsel's August 24, 2018 letter to Disciplinary Counsel, Respondent stated and personally represented to the Bennington Superior Court that, during his July 17, 2017 meeting with JH, he "without invitation, instigation, 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" which was "unwanted conduct" by Respondent directed toward JH. *Id.* ¶¶ 3, 5.

During a subsequent November 7, 2023 hearing in *State v. Fink*, Respondent was sworn under oath and voluntarily testified to the Bennington Superior Court, the Honorable Kerry A. McDonald-Cady presiding, concerning his July 17, 2017 sexual assault on JH during their meeting. Again contrary to Respondent's above-quoted statements in his counsel's August 24, 2018 letter to Disciplinary Counsel, Respondent testified that during his July 17, 2017 meeting with JH, Respondent "without invitation, instigation, consent, express or implied from [JH], I embraced her, putting my hands on her clothed buttocks and kissed her. . . . She did not invite or consent to my advance" which was "unwanted conduct" by Respondent directed toward JH. *See* Nov. 7, 2023 Hearing Tr. at 35:8-17, *State v. Fink*, copy attached hereto as **Exhibit 7**.

Neither Respondent nor his counsel, Mr. Sleigh, ever informed Disciplinary Counsel of his November 2023 representations and testimony to the Bennington Superior Court in *State v. Fink* concerning his July 17, 2017 meeting with JH, which is also the subject matter of this

attorney disciplinary proceeding. Likewise, neither Respondent nor his counsel, Mr. Sleigh, ever contacted Disciplinary Counsel to explain, clarify or amend the directly contradictory statements Respondent gave to Disciplinary Counsel in August 2018 concerning Respondent's July 17, 2017 meeting with JH.

To the extent that Respondent's false statements in his counsel's August 24, 2018 letter to Disciplinary Counsel are determined by the Hearing Panel in this proceeding to be true, then, alternatively, Respondent's above-quoted statements, personal representations of fact and testimony to the Bennington Superior Court in the November 3, 2023 "Notice of Resolution Agreement" and during the November 7, 2023 hearing in *State v. Fink* must then constitute knowingly false statements and personal misrepresentations of fact by Respondent to a tribunal. Respondent's above-quoted November 2023 statements, personal representations of fact and testimony to the Bennington Superior Court, if determined to be false, would also independently constitute conduct by Respondent involving dishonesty, deceit and misrepresentation.

Finally, Respondent's November 2023 statements and testimony to the Bennington Superior Court misleadingly omitted material facts necessary to convey to the Court an accurate understanding of the highly aggressive, sexually violent and physically invasive nature of his July 17, 2017 conduct toward JH. Specifically, Respondent knowingly failed to disclose and admit to the Court that he "grabbed the back of [JH's] head, forced her face to his face, and inserted his tongue into her mouth and partially down her throat" or that Respondent also "pushed his fingers through the clothing of [JH], into her anus," as alleged by the State's original Information in *State v. Fink* based on the supporting attached Affidavit of Vermont State Police Detective Sergeant Jesse Robson. *See* Jan. 28, 2019 Information by Atty. Gen'l with Dec. 14, 2018 Aff. of VSP Det. Sgt. Jesse Robson, *State v. Fink,* copies attached as **Exhibit 8** hereto.

II. ARGUMENT

A. Legal Standard for Amendment of a Petition of Misconduct

"Disciplinary matters are governed by the Vermont Rules of Civil Procedure." *In re PRB No. 2013-145*, 2017 VT 8, ¶ 1, 204 Vt. 612, 616, 165 A.3d 130, 136 (2017); *see also* Vt. Supreme Court Admin. Order No. 9 (Permanent Rules Governing Establishment and Operation of the Prof'l Responsibility Program) ("A.O. 9"), Rule 20(B) ("Except as otherwise provided in these rules, the Vermont Rules of Civil Procedure and the Vermont Rules of Evidence apply in discipline and disability cases."). Vermont Rule of Civil Procedure 15(a) provides in pertinent part that "[a] party may amend the party's pleading . . . by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." V.R.C.P. 15(a).

"In considering motions under Rule 15(a), trial courts must be mindful of the Vermont tradition of liberally allowing amendments to pleadings where there is no prejudice to the other party." *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 4. "'When there is no prejudice to the objecting party, and when the proposed amendment is not obviously frivolous nor made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny the motion.'" *In re PRB No. 2013-145*, 2017 VT 8, ¶ 1, 204 Vt. at 616, 165 A.3d at 136 (quoting *Bevins v. King*, 143 Vt. 252, 254-55, 465 A.2d 282, 283 (1983)).

"The principal reasons underlying the liberal amendment policy are (1) to provide maximum opportunity for each claim to be decided on its merits rather than on a procedural technicality, (2) to give notice of the nature of the claim or defense, and (3) to enable a party to assert matters that were overlooked or unknown to him at an earlier stage in the proceedings." *Bevins*, 143 Vt. at 252, 465 A.2d at 283. "In rare cases, however, denial of a motion under Rule 15(a) may be justified based upon a consideration of the following factors: '(1) undue delay; (2)

bad faith; (3) futility of amendment; and (4) prejudice to the opposing party.'" *Colby*, 2008 VT 20, ¶ 4 (quoting *Perkins v. Windsor Hosp. Corp.*, 142 Vt. 305, 313, 455 A.2d 810, 815 (1982)).

In a pleading or amended pleading, "[a] party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses" and "may also state as many separate claims or defenses as the party has regardless of consistency." V.R.C.P. 8(e)(2); *see also Beldock v. VWSD, LLC*, 2023 VT 35, ¶ 79 (Rule 8(e)(2) "permits parties to plead alternative and inconsistent claims."). "The presentation of inconsistent claims is permissible under Rule 8(e)(2) . . . and a proposed amendment, otherwise proper, would not be barred on that account." *Tracy v. Vinton Motors, Inc.*, 130 Vt. 512, 514, 296 A.2d 269, 271 (1972).

B. The Hearing Panel Should Grant Disciplinary Counsel Leave to Amend the Petition of Misconduct

In this case, Vermont's liberal amendment policy for pleadings counsels in favor of allowing Disciplinary Counsel to file the proposed First Amended Petition of Misconduct, **Ex. 1**. The Amended Petition states additional recently-discovered professional misconduct violations against Respondent for (1) making false and misleading statements to Disciplinary Counsel in August 2018 concerning his now-admitted non-consensual physical contact with JH during a July 17, 2017 meeting (proposed Count 2), and (2) for making untrue statements and/or misleading omissions to the Bennington Superior Court in November 2023 about the coercive and sexually violent nature of this July 17, 2017 encounter (proposed Count 3).

The proposed amendments are neither dilatory, frivolous, nor unfairly prejudicial to Respondent. The factual basis for Respondent's additional rule violations arose only in November 2023 when it was discovered that he had just given representations and sworn testimony to the Bennington Superior Court that directly contradicted certain August 2018

representations that he made to predecessor Disciplinary Counsel. Moreover, this attorney disciplinary matter has been stayed by order of this Hearing Panel since March 28, 2019. When proceedings resume, Respondent will no doubt be permitted adequate time to conduct discovery and prepare his defenses to the newly proposed disciplinary charges.

1. Respondent Made Misleading Statements to Disciplinary Counsel

In August 2018, Respondent assured Disciplinary Counsel, through counsel, that during their July 17, 2017 meeting "[a]ny physical contact between Mr. Fink and [JH] was consensual." **Ex. 5** at 4 (emphasis added). However, in November 2023, Respondent volunteered to Judge McDonald-Cady the very opposite -- that all of his physical contact with JH at this meeting was "without invitation, instigation, consent, express or implied from J.H." and was "unwanted conduct" by JH *See* **Ex. 6** ¶¶ 3, 5 (emphasis added); *see also* **Ex. 7** at 35:8-17. Likewise, Respondent attested to Disciplinary Counsel in his counsel's August 2018 letter that he did not "touch [JH's] butt" or any other "areas one would normally consider intimate." **Ex. 5** at 3-4. Yet in November 2023, Respondent plainly contradicted these prior statements by admitting to Judge McDonald-Cady that he had "put[] his hands on [JH's] clothed buttocks." *See* **Ex. 6** ¶ 3 (emphasis added); *see also* **Ex. 7** at 35:10.

Respondent's clearly conflicting November 2023 representations and sworn testimony to the Bennington Superior Court in *State v. Fink* concerning his July 17, 2017 meeting with JH notified Disciplinary Counsel for the first time that Respondent's August 2018 letter to predecessor Disciplinary Counsel contained knowing and demonstrable falsehoods made in connection with this disciplinary matter (which has been stayed since March 2019), contrary to Vermont Rule of Professional Conduct 8.1(a). *See In re Watts*, PRB Nos. 102-2019, 011-2020, Decision No. 254 at 30-31 (PRB Hrg. Panel No. 9 Sept. 22, 2023) (concluding that respondent

attorney had violated Rule 8.1 by giving Special Disciplinary Counsel a knowingly false assurance that he had already returned the undisputed portion of his client's retainer payment because respondent attorney did not ask his bank to issue the client a retainer refund check until two weeks later).[1]

In making these false August 2018 statements through counsel, Respondent also engaged in conduct involving dishonesty, deceit and misrepresentation, in violation of Vermont Rule of Professional Conduct 8.4(c). *See In re Cobb*, PRB Nos. 099-2020, 103-2020, Decision No. 246 at 27-29 (PRB Hrg. Panel No. 1 May 24, 2022) (concluding that respondent attorney had dishonestly misrepresented to Disciplinary Counsel the substance and circumstances of his timekeeping records in violation of Rule 8.4(c); specifically, that he produced to Disciplinary Counsel "what he claimed, through counsel, were eight months' worth of 'contemporaneous' time entries of work allegedly performed in MK's case" but which he later admitted at hearing "were not created contemporaneously with work done on the MK file and were only recreated after the fact in response to Disciplinary Counsel's request"), *aff'd*, 2022 VT 51.

2. Respondent Made Misleading Statements and Omissions to the Bennington Superior Court

Alternatively, if it is ultimately determined that Respondent was indeed truthful to Disciplinary Counsel in his August 2018 statement that "[a]ny physical contact between Mr. Fink and [JH] was consensual," **Ex. 5** at 4, then his contrary November 2023 representations

[1] In addition, by failing to inform Disciplinary Counsel, through his counsel, of his November 2023 representations and testimony to the Bennington Superior Court in *State v. Fink* concerning his July 17, 2017 meeting with JH, or seeking to explain, clarify or amend, through counsel, his directly contradictory statements to Disciplinary Counsel in August 2018 about this meeting, Respondent "fail[ed] to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the [disciplinary] matter." Vt. R. Pr. C. 8.1(b).

and testimony to the Bennington Superior Court in *State v. Fink* that his physical contact with JH was "without invitation, instigation, consent, express or implied from J.H.," *see* **Ex. 6 ¶¶** 3; **Ex. 7** at 35:8-17, would necessarily be false or misleading. Similarly, if Respondent honestly stated to Disciplinary Counsel in August 2018 that he did not "touch [JH's] butt" or any other "areas one would normally consider intimate." **Ex. 5** at 3-4, then he was apparently untruthful in his November 2023 representations and testimony to the Bennington Superior Court that he "put[] his hands on [JH's] clothed buttocks." **Ex. 6 ¶** 3 (emphasis added); *see also* **Ex. 7** at 35:10.

Such statements to the Court, if untrue, would violate Respondent's duty to "not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Vt. R. Pr. C. 3.3(a)(1). The possibility that Respondent may have only made these statements to the Court in order to secure the State's agreement to refer him to a non-adjudicatory Diversion program, *see* **Ex. 6**, would not excuse or mitigate any knowingly false or misleading factual representations (or omissions) by Respondent to the Court.

Although normally Rule 3.3 "governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal," Vt. R. Pr. C. 3.3, cmt. 1, and the lawyer "is usually not required to have personal knowledge of matters asserted therein . . . an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." *Id.* cmt. 3; *see also In re Wysolmerski*, 2020 VT 54, ¶ 31 (holding that attorney respondent had violated Rule 3.3(a)(1) duty of candor toward tribunal when, while representing client in civil matter against mortgage lender, attorney knowingly submitted affidavit in support of default judgment after agreeing to an open-ended

extension of time for lender to answer, and failed to disclose to court the concerns the parties had over the proper identity of the lender-defendant in the matter).

Here, Respondent made personal representations of fact to the Bennington Superior Court -- in a written filing bearing his own signature, *see* **Ex. 6**, and in testimony he gave in open court under oath. *See* **Ex. 7** at 34:14-16. These representations directly and knowingly contradict his specific August 2018 representations to Disciplinary Counsel about JH's consent to physical contact with him and the intimate body areas of JH touched (or not touched) by Respondent. Simply put, Respondent either lied to Disciplinary Counsel in August 2018 or he lied to Judge McDonald-Cady in November 2023.

A third possibility is that Respondent will be shown to have been untruthful and misleading to <u>both</u> Disciplinary Counsel and the Bennington Superior Court. "There are circumstances where failure to make a disclosure" to a tribunal "is the equivalent of an affirmative misrepresentation." Vt. R. Pr. C. 3.3, cmt. 1; *cf. In re Wysolmerski*, 2020 VT 54, ¶ 34 ("'A review of the cases throughout the country clearly illustrate that the general duty of candor may be thwarted through an attorney's silence'" (quoting *Gum v. Dudley*, 505 S.E.2d 391, 400 (W. Va. 1997))).

By assuring Disciplinary Counsel in August 2018 that "[a]ny physical contact between Mr. Fink and [JH] was consensual" and that "[a]t no time" during the July 17, 2017 meeting "did Mr. Fink grab, push, thrust or otherwise touch [JH's] butt or other intimate areas of her body," **Ex. 5**, Respondent was affirmatively dishonest, as shown by his later contradictory statements to the Bennington Superior Court. However, in addition, Respondent's representations and testimony to the Bennington Superior Court that he merely "embraced [JH], putting his hands on her clothed buttocks and kissed her," **Ex. 6** ¶ 3; *see also* **Ex. 7** at 35:910, deliberately minimizes

and fundamentally mischaracterizes the highly aggressive, sexually violent and physically invasive nature of his July 2017 assault on JH through its material factual omissions.

Specifically, Respondent's November 2023 account of the July 2017 meeting with JH knowingly omitted any disclosure or admission to the Court that Respondent "grabbed the back of JH's head, forced her face to his face, and inserted his tongue into her mouth and partially down her throat" or that Respondent "also pushed his fingers through the clothing of JH, into her anus." *See* Jan. 28, 2019 Information by Atty. Gen'l with attached Dec. 14, 2018 Aff. of VSP Det. Sgt. Jesse Robson, *State v. Fink,* **Ex. 8**; *see also* Feb. 20, 2019 Pet. of Misconduct ¶ 4(d).

Although Respondent was constitutionally privileged to speak or remain silent in *State v. Fink* about his July 17, 2017 meeting with JH, once he chose to provide personal written representations and sworn testimony to the Court on this subject, his ethical duty of candor to the tribunal under Rule 3.3 barred him from making affirmative misrepresentations or misleading omissions to the Court about the true nature and full extent of his conduct in order to obtain his Diversion referral. Accordingly, this Hearing Panel would be justified in finding that Respondent misled both Disciplinary Counsel (proposed Count 2) and the Bennington Superior Court (proposed Count 3) through his lies of commission and omission.

CONCLUSION

WHEREFORE, Petitioner Office of Disciplinary Counsel respectfully requests that the Hearing Panel grant it leave to amend its February 20, 2019 Petition of Misconduct in this matter by filing its proposed First Amended Petition of Misconduct, subject to future termination of the pending stay of proceedings in this matter.

Dated at Burlington, Vermont this 13th 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

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CERTIFICATE OF SERVICE

I certify that on February 13, 2024, Respondent Melvin Fink, Esq. was served with Disciplinary Counsel's Motion to Amend Petition of Misconduct and supporting Exhibits 1-8 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 13th 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