STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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

DISCIPLINARY COUNSEL'S REPLY IN FURTHER SUPPORT OF MOTION TO AMEND PETITION OF MISCONDUCT

In reply to Respondent Fink's February 26, 2024 Opposition and in further support of its February 13th Motion to Amend the Petition of Misconduct, Petitioner Office of Disciplinary Counsel, pursuant to A.O. 9, Rule 20(B) and V.R.C.P. 7(b)(4), offers the following Reply Memorandum.

REPLY MEMORANDUM

Respondent Fink's Opposition does not deny that "[b]oth the Vermont rules of civil procedure and the common law tradition of this state encourage liberality in allowing amendments to pleadings where there is no prejudice to the other party." *In re PRB No. 2013-145*, 2017 VT 8, ¶ 1, 204 Vt. 612, 616, 165 A.3d 130, 136. It is only "[i]n rare cases" that "denial of a motion under Rule 15(a) may be justified." *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 4. Specifically, "the court may deny permission based on '(1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party.'" *Wells Fargo Bank, N.A. v. Ndibalema*, No. 2020-153, 2021 WL 3020740, at *2 (Vt. July 16, 2021) (quoting *Perkins v. Windsor Hosp. Corp.*, 142 Vt. 305, 313, 455 A.2d 810, 815 (1982)).

Attorney Fink's Opposition does not claim that Disciplinary Counsel's proposed amendments to the Petition of Misconduct were unduly delayed, asserted in bad faith or would cause unfair prejudice to him. Rather, Respondent's sole basis for opposing amendment is the claimed futility of the proposed amendments. However, instead of assessing whether

Disciplinary Counsel's new factual allegations, if assumed to be true, are legally sufficient to state violations of Vermont Rules of Professional Conduct 8.1(a), 8.4(c) and 3.3(a)(1), Respondent Fink improperly seeks to dispute the merits of the proposed new claims by asserting his own self-serving version of the facts. Respondent's preview of his factual defenses at the eventual merits hearing in this matter is premature and should be disregarded for purposes of this Motion to Amend. When evaluated according to the proper legal standard, Disciplinary Counsel's proposed amendments to the Petition of Misconduct are legally sufficient and not futile. Leave to amend should therefore be granted pursuant to the liberal standard of V.R.C.P. 15(a).

I. Respondent's Own Factual Assertions Cannot Justify Denial of Disciplinary Counsel's Motion to Amend

"[A] court may deny a motion to amend when, among other reasons, amendment would be futile." *Vasseur v. State*, 2021 VT 53, ¶ 7. "The party opposing the amendment has the burden of demonstrating that a proposed amendment would be futile." *Max Impact, LLC v. Sherwood Group, Inc.*, No. 09 CIV. 902 LMM HBP, 2012 WL 3831535, at *1 (S.D.N.Y. Aug. 16, 2012). "Amendment is futile if the amended complaint cannot withstand a motion to dismiss." *Vasseur*, 2021 VT 53, ¶ 7.

"In determining whether a complaint can survive a motion to dismiss under Vermont Rule of Civil Procedure 12(b)(6) . . . [w]e assume that the facts pleaded in the complaint are true and make all reasonable inferences in plaintiffs' favor and will only dismiss a claim if 'it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff[s] to relief.'" *Sutton v. Vermont Reg'l Ctr.*, 2019 VT 71A, ¶ 20 (citation omitted).[1] Likewise. "[i]n

[1] "The purpose of a dismissal motion 'is to test the law of the claim, not the facts which support it.'" *Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, ¶ 10 (citation omitted). "Because

assessing the claimed futility of a proposed amended pleading, the court must assume the truth of the factual allegations set forth in the proposed amended pleading." *Max Impact*, 2012 WL 3831535, at *2.

"[I]nformation outside of the pleadings" and other "extrinsic material is, generally, not properly considered on a motion to amend. As with a motion to dismiss under [Rule]12(b)(6), in making futility determinations, the court must limit itself to the allegations in the complaint, as well as to any documents attached to the complaint as exhibits or incorporated by reference." *Id.* at *4 (citation omitted); *see also Prose Shipping Ltd. v. Integr8 Fuels Inc.*, No. 21-CV-341 (VSB), 2022 WL 280456, at *2 (S.D.N.Y. Jan. 31, 2022) ("[A] court's review of a motion for leave to amend is generally limited to 'the facts as asserted within the four corners' of the proposed pleading" (citation omitted)).

In this case, Disciplinary Counsel's proposed First Amended Petition of Misconduct, copy provided as **Exhibit 1** to the Motion to Amend, alleges that in an August 24, 2018 letter from his counsel, Respondent falsely stated to prior Disciplinary Counsel that any physical contact he had with JH during a July 17, 2017 meeting was "consensual" and that "[a]t no time" during this meeting did he "touch [JH's] butt or other intimate areas of her body." 1st Am. Pet. Misconduct ¶¶ 11-12, **Ex. 1**. In support of proposed Count 2 of the First Amended Petition of Misconduct, Disciplinary Counsel alleges that these statements by Respondent were knowingly false when made, in violation of V. R. Pr. C. 8.1(a) and 8.4(c), because in November 2023 he made "directly contradictory" sworn representations to the Bennington Superior Court in *State v. Fink* that he initiated physical contact with JH during the July 2017 meeting "without invitation,

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this 'threshold a plaintiff must cross in order to meet our notice-pleading standard' is such a low one, '[m]otions to dismiss for failure to state a claim are disfavored and should be rarely granted.'" *Id.* (citation omitted).

instigation, consent, express or implied from [JH]" by "putting my hands on her clothed buttocks." *Id.* ¶¶ 15, 19.

Respondent's Opposition argues that the supplemental "facts alleged are facially insufficient to support a finding of deceit and/ or misrepresentation." Opp. at 1. However, in presenting his futility argument, Respondent does not assume the truth of the proposed First Amended Petition's allegations or draw all reasonable inferences in Disciplinary Counsel's favor when assessing their legal sufficiency.

Instead, in an effort to rebut the proposed allegations, Attorney Fink improperly asserts his own competing set of facts and inferences related to his "evolutionary" state of mind and "reconsideration of the events" between August 2018 and November 2023 concerning whether JH consented to his conduct and the areas of her body that he touched. *Id.* at 3-4. Respondent conjures up this alternative version of the facts in order to dispute the reasonable inference to be drawn from the proposed First Amended Petition of Misconduct -- that Attorney Fink, as shown by his November 2023 admissions, was knowingly dishonest and "boldly false" with prior Disciplinary Counsel in August 2018 on the non-consensual and lewd nature of the encounter with JH. Opp. at 3.

In particular, Respondent argues that, in November 2023,"[a]fter four years of litigation and after a thorough explanation by JH regarding her assessment of the occurrence, Respondent came to realize and accept that his attempt to kiss her was unwelcome. That was not his perception at the time," in 2017 and 2018. *Id.* at 3. Respondent claims that his irreconcilable "admissions to the Bennington Court reflect his reconsideration of the events of 2017." *Id.*[2]

[2] Although not strictly necessary to decide the pending Motion to Amend, it is revealing that the August 2018 letter from Respondent's counsel to prior Disciplinary Counsel did not qualify its assertions in terms of Attorney Fink's own subjective "perceptions" of J.H.'s consent at the time.

Attorney Fink also claims that, in his counsel's August 2018 letter which plainly denied "touch[ing] [JH's] butt or other intimate areas of her body," his actual but unstated "purpose was to deny violating a truly intimate area of JH's body," that is, digital penetration of her. *See id.* at 3-4.[3]

These inventive attempts by Respondent to explain away the patent contradictions in his August 2018 and November 2023 accounts of his July 2017 assault on JH cannot be considered in determining whether the proposed amendments to the Petition of Misconduct state claims for violations of Rules of Professional Conduct 8.1(a), 8.4(c) and 3.3(a)(1). "All of [Respondent's] arguments go to the merits of" Disciplinary Counsel's proposed additional allegations "rather than the sufficiency of the proposed allegations [and] rely completely on information outside of the pleadings." *Max Impact*, 2012 WL 3831535, at *2. Although Respondent is free to offer these explanations in his own defense at the merits hearing in this matter, his self-serving and unsubstantiated version of the facts must be disregarded for purposes of deciding the legal sufficiency of the factual allegations in Disciplinary Counsel's proposed First Amended Petition of Misconduct.[4]

Rather, Respondent's counsel made the broad assertion that "[a]ny physical contact between Mr. Fink and [J.H.] was consensual" as an objective and incontrovertible fact. Conversely, Attorney Fink did not preface his November 2023 admissions to the Bennington Superior Court by indicating that they "reflect his reconsideration" of the July 2017 meeting with J.H. or his "evolutionary" understanding of consent. Opp. at 3. Instead, Respondent's testimony, on its face, indicates that he has always understood that what he did to JH was non-consensual, notwithstanding his August 2018 misrepresentations to Disciplinary Counsel.

[3] Respondent's digressive comments concerning JH's deposition in *State v. Fink*, examination of her medical records, and JH's supposed involvement in negotiating Attorney Fink's November 2023 admissions, *see* Opp. at 2, also constitute new factual assertions by Attorney Fink extrinsic to the pleadings that cannot be properly considered in deciding Disciplinary Counsel's Motion to Amend.

[4] Attorney Fink's references to V.R.C.P. 12(c) and 56, *see* Opp. at 1, are misplaced and unavailing. "On a V.R.C.P. 12(c) motion for judgment on the pleadings, the issue is whether,

II. Respondent Misunderstands Disciplinary Counsel's Proposed Additional Claim for Lack of Candor to the Tribunal (Count 3)

Respondent Fink erroneously argues that the gravamen of proposed Count 3 is "that Respondent deceived the Bennington County Court by failing to admit each detail of the initially charged offenses" but argues that he was not "obligated to admit or deny those allegations in the Bennington Court." Opp. at 4. What Disciplinary Counsel actually alleges is that Respondent's November 2023 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; **Ex. 7** at 35:910, knowingly and misleadingly omitted disclosure to the Court of material facts concerning the highly aggressive, sexually violent and physically invasive nature of his July 2017 assault on

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once the pleadings are closed, 'the movant is entitled to judgment as a matter of law on the basis of the pleadings'" and "[f]or the purposes of a motion for judgment on the pleadings 'all well pleaded factual allegations in the nonmovant's pleadings and all reasonable inferences that can be drawn therefrom are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false.'" *Messier v. Bushman*, 2018 VT 93, ¶ 9 (citation omitted). Thus, even if Respondent averred in his Answer to the proposed First Amended Petition that he did not knowingly mislead Disciplinary Counsel in August 2018, such a contravening assertion would be taken as false in deciding any Rule 12(c) motion for judgment on the pleadings.

Likewise, a hypothetical future motion for summary judgment pursuant to V.R.C.P. 56 based on Respondent's mere factual assertions, rather than evidence presented in admissible form, provides no basis to deny the Motion to Amend the Petition. *See Tissue Prod. Tech. Corp. v. Factory Mut. Ins. Co.*, No. 07-C-771, 2008 WL 11345876, at *1 & n.2 (E.D. Wis. Aug. 21, 2008) (noting that "the fact that futility may sometimes constitute a reason for denial of a motion to amend is not a general invitation to explore the merits of novel proposed claims or to raise defenses that require analysis of matters outside the pleadings. The futility defense to a motion to amend is not, in short, a substitute for a motion to dismiss or a motion for summary judgment" particularly "[w]hen a case is not finished with discovery . . . it is seldom appropriate to consider a motion to amend as the proper method of testing whether a claim would survive summary judgment.").

JH, all in violation of his duty of candor to the Court under Rule of Professional Conduct 3.3(a)(1).

Specifically, Respondent did not inform 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." *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**. Although Respondent was constitutionally privileged to remain silent in the face of the State's original allegations against him and say nothing at all about his July 17, 2017 meeting with JH, once he chose to provide personal representations and testimony to the Bennington Superior Court in November 2023 concerning this encounter, he was prohibited by Rule 3.3 from providing the Court with an account so materially incomplete, anodyne and sanitized that it "is the equivalent of an affirmative misrepresentation" about the true character and nature of Attorney Fink's conduct toward JH. Vt. R. Pr. C. 3.3, cmt. 1 The alleged Rule 3.3 violation arises not from Respondent Fink's mere refusal to admit his alleged misconduct, but from his decision to affirmatively mislead the Court through selective admissions and self-serving omissions designed to minimize his criminal culpability.

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 11th day of March 2024.

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CERTIFICATE OF SERVICE

I certify that on March 11, 2024, Respondent Melvin Fink, Esq. was served with Disciplinary Counsel's Reply in further support of Motion to Amend Petition of Misconduct in the above-referenced matter by email only to the following counsel of record:

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

Dated at Burlington, Vermont this 11th day of March 2024.

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