

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

IN RE: MELVIN FINK

PRB-012-2019

**RESPONDENT'S OPPOSITION TO DISCIPLINARY COUNSEL'S MOTION TO
AMEND PETITION OF MISCONDUCT**

COMES NOW your Respondent, by and through counsel, and respectfully submits his opposition to Disciplinary Counsel's Motion to Amend Petition of Misconduct.

I – Standard to Permit Amendment

Disciplinary Counsel may seek an amendment to the pending Petition. AO9, Rule 20B; V.R.C.P. 15 (a). The amendment, however, must state a claim that meets the standard of V.R.C.P. 12 (c), 56. See, AO9, Rule 20B.

Here, Disciplinary Counsel alleges that Respondent, through the undersigned, made false statements in his initial response to Disciplinary Counsel and that the falsity of those prior statements is established by admissions Respondent made in connection with the resolution of criminal charges that prompted this proceeding. Despite Disciplinary Counsel's fervid rhetoric, the facts alleged are facially insufficient to support a finding of deceit and/or misrepresentation. There being no genuine dispute as to any material fact, Respondent would be entitled to judgment on the pleadings if the Motion to Amend were granted. V.R.C.P. 12 (c), 56.

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II – The Underlying Criminal Case

On, or about, January 25, 2019, the Vermont Attorney General filed a two-count information alleging that, on July 17, 2017, Respondent had engaged in lewd and lascivious conduct¹ with JH by: grabbing the back of her head, forcing her face to his face, inserting his tongue into her mouth and partially down her throat; and, by pushing his fingers through JH's clothes into her anus. Respondent entered a not guilty plea and the case was actively litigated over the course of the ensuing 4 years.

Discovery in the case was extensive. JH was deposed and, as a result of her own claim of memory impairment attributable to an unrelated traumatic brain injury, her medical records were produced and examined. Resolution negotiations took place throughout the pendency of the case. As trial finally approached, a resolution agreement was reached. As part of the resolution, Respondent made admissions to certain wrongful, but not criminal, conduct. The text of that admission was negotiated with JH and was accepted and approved by her. The case was referred to diversion, a process that is in progress and with which both JH and Respondent will participate.

The instant petition was filed by Disciplinary Counsel's predecessor and, as required, Respondent, by and through the undersigned, responded to the allegations. Current Disciplinary Counsel finds Respondent's response materially false in two regards. First, Respondent's description of the events as consensual is claimed to be at odds with his resolution admission that the physical contact between him and JH was not welcomed. Second, his admission in his resolution statement that during his attempt to

¹ Respondent was never charged with sexual assault.

kiss JH, he embraced her and touched her clothed buttocks is similarly said not to precisely square with his counsel's representation to Ms. Katz.

As to the first alleged discrepancy, the perception of consent in initializing romantic contact is often viewed differently, but not entirely unreasonably, by those perceiving it. After 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. His acceptance that his overtures were unwelcome was evolutionary and involved considering the notion of "consent", a rethinking that has permeated society at large in the recent past and present. The allegations that their encounter was unwelcome were not raised for almost two years, during which time Respondent and JH continued to communicate.

His admissions to the Bennington Court reflect his reconsideration of the events of 2017. In no way does his conduct approach that in the *Cobb* case cited by DC. Cobb was being questioned about the nature and quality of his work in defending a client in a serious criminal matter. He produced falsified and fraudulent time records in an attempt to demonstrate his work had met the standard of care he was accused of violating. Those efforts were boldly false and made in a direct attempt to avoid sanction. Such is not the case here.

Regarding the intimate touching, this Panel should consider the specific nature of the conduct alleged, i.e., penetrating JH's anus with a finger, and put Respondent's denial of intimate contact in context. His resolution admission acknowledges that during his attempt to embrace JH, his hand touched her clothed buttocks. At the time of his response

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to Ms. Katz, the allegations of intimate contact were much more invasive. While Respondent's denial of touching her "butt" may now be read more expansively, the purpose was to deny violating a truly intimate area of JH's body.

On the facts as alleged there is no basis to find Respondent willfully and/or materially mislead Disciplinary Counsel in his 2019 response.

III – Respondent's Failure to Admit the Charged Conduct

Disciplinary Counsel, in proposed Count III, asserts that Respondent deceived the Bennington County Court by failing to admit each detail of the initially charged offenses set forth in the Attorney General's information. Disciplinary Counsel has no evidence that Respondent, other than pleading Not Guilty, was ever obligated to admit or deny those allegations in the Bennington Court.

IV – Conclusion

Viewing the evidence adduced by Disciplinary Counsel even when viewed in light most favorable to him, fails to establish that Respondent knowingly provided false information in his initial response to then Disciplinary Counsel in 2019. The Panel should deny the Motion to Amend.

DATED at St. Johnsbury, Vermont on February 26, 2024.

Respectfully Submitted,



David C. Sleigh
Counsel for Respondent Melvin Fink

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CERTIFICATE OF SERVICE

COMES NOW the Respondent, Melvin Fink, by and through counsel, David C. Sleigh, and certifies that on February 26, 2024, the *Respondent's Opposition to Disciplinary Counsel's Motion to Amend Petition of Misconduct* was served via e-mail on the Disciplinary Counsel's attorney of record in this matter to:

Jon Alexander
Disciplinary Counsel
32 Cherry Street, Ste. 213
Burlington, VT 05401
jon.alexander@vermont.gov

DATED at St. Johnsbury, Vermont on February 26, 2024.

Respectfully submitted,



David C. Sleigh
Counsel for Respondent Melvin Fink

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