

**STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM**



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

RULING ON REQUEST TO STAY

A petition of misconduct has been filed against Respondent, Melvin Fink, Esq. The petition alleges that Respondent engaged in a serious crime in violation of Rule 8.4(b) of the Vermont Rules of Professional Conduct. The charge of misconduct is allegedly based on the same conduct that is the subject of charges separately pending against Respondent in a Criminal Division proceeding, *State v. Melvin Fink*, Docket No. 124-1-19 Bncr (“the criminal proceeding”). The petition of misconduct alleges that Respondent has been arraigned on an information that was filed by the Attorney General.

By letter dated February 27, 2019, Respondent requested a stay of this lawyer disciplinary proceeding pending resolution of the related criminal proceeding. No grounds for the request have been presented other than the pendency of the related criminal proceeding. By letter dated February 28, 2019, Disciplinary Counsel indicated that she does not object to the requested stay. In support of her position, Disciplinary Counsel states that “a stay is appropriate and necessary in light of the constitutional rights that attach to Mr. Fink’s criminal proceedings.” No legal briefing or further explanation of Disciplinary Counsel’s position has been provided to the Panel.

The Hearing Panel issued an order directing the parties to file in this proceeding a copy of the criminal information and any and all terms and conditions of release ordered in the criminal proceeding. The parties duly complied with the order. The trial court in the criminal proceeding has ordered, as a

condition of release, that Respondent not have any contact with the alleged victim.¹

Rule 16(G) of Administrative Order 9 provides as follows:

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.

A.O. 9, Rule 16(G).

The Panel is unable to find any support in the case law for Disciplinary Counsel's suggestion that constitutional law requires a stay of this disciplinary proceeding. It is true that Respondent is entitled to certain constitutional rights that relate to his criminal proceeding, including the right against self-incrimination under the Fifth Amendment of the U.S. Constitution and Chapter I, Article 10 of the Vermont Constitution. However, neither the right against self-incrimination nor any other constitutional right mandates that a related attorney disciplinary proceeding be stayed. This general principle has been widely recognized. *See, e.g., Attorney Grievance Commission v. Unnamed Attorney*, 467 A.2d 517, 521 (Md. Ct. App. 1983) ("Manifestly, difficult choices confront an individual who is the subject of simultaneous criminal and civil or administrative proceedings. It is well accepted that 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."); *Committee on Legal Ethics v. Pence*, 240 S.E.2d 668, 674 (W. Va. 1978) ("It has long been the law of this and many other states that

¹ The Panel notes that the alleged date of the crime set forth in the petition of misconduct – July 17, 2017 – is not the same date alleged in the criminal information that was provided to the Panel – June 17, 2017. Because the date of arraignment and criminal proceeding docket number alleged in the petition of misconduct are otherwise confirmed by the criminal information and conditions of release papers, it appears that Disciplinary Counsel may have made a clerical error in preparing the petition of misconduct. If that is the case, Disciplinary Counsel should promptly file an amended petition of misconduct to correct this error.

disciplinary proceedings may proceed against an attorney prior to the initiation or outcome of any criminal prosecution where the conduct alleged as grounds for disbarment relates to his professional duties.”); *Sternberg v. State Bar of Mich.*, 185 N.W.2d 395 (Mich. 1971) (reversing injunction that stayed disciplinary proceeding “based on the theory that [Respondent’s] Fifth Amendment right against self-incrimination would be infringed by conducting such a hearing while criminal charges based on some of the same issues were pending against him”); *De Vita v. Sills*, 422 F.2d 1172, 1178 (3d Cir. 1970) (“No authority has come to our attention for so broad a reading of the Fifth Amendment, and the countervailing possibilities of prejudice to civil litigants militates against any such extension of constitutional doctrine.”).

Nevertheless, 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. Under the U.S. Supreme Court’s decision in *Spevack v. Klein*, 385 U.S. 511, 514 (1967), an attorney may not be disciplined based on an assertion of the right against self-incrimination and attendant refusal to testify in a disciplinary proceeding. Moreover, while the Vermont Supreme Court has recognized, in the context of a Judicial Conduct Board proceeding, that a witness may be compelled to testify notwithstanding a Fifth Amendment assertion, such testimony may only be compelled subject to a grant of “use and fruits” immunity for the testimony given:

[W]hen a witness in such a proceeding asserts his or her Fifth Amendment privilege against self-incrimination, such witness may be compelled to testify, but will be protected by use and fruits immunity. *** [T]he witness may object to the introduction of any evidence taken or derived from his or her testimony before the Board. The burden will then be on the State to demonstrate an independent source for such evidence.

In re Hill, 149 Vt. 431, 439-40, 545 A.2d 1019, 1025 (1988).²

The holding and rationale in *Hill*, though limited by the facts to a Judicial Conduct Board proceeding, would appear to be equally compelling in the context of a lawyer disciplinary proceeding. In *Hill*, the Court arrived at this alternative response to an assertion of the Fifth Amendment both to recognize that a witness may actually wish to testify (while ensuring protection against self-incrimination) and “to assure the integrity of the Vermont Judiciary.” *Id.* at 439; *see also id.* (“[I]t is crucial that the Board be able to ascertain truth in an environment unfettered by extraneous concerns of its witnesses.”). The Supreme Court exercises disciplinary authority over both judges and attorneys. *See* Vt. Const. Ch. II, § 30 (“The Supreme Court shall have . . . disciplinary authority concerning all judicial officers and attorneys at law in the State.”). Allowing for a respondent’s desire to testify and ascertaining the truth in a lawyer disciplinary proceeding is arguably no less compelling than in a judicial conduct proceeding. In sum, there are strong reasons to believe that the immunity principle and attendant exclusionary rule recognized in *Hill* would be applicable in the context of a lawyer disciplinary proceeding where there is a related criminal proceeding.

In the face of these complex principles, the litigants in parallel criminal and disciplinary cases are faced with a threshold choice – either move to continue the disciplinary case pending resolution of the criminal case or allow both cases to proceed. *See Hill*, 149 Vt. at 437 (recognizing “two alternative solutions for such cases” consisting of either a continuance of the non-criminal proceeding or compelling a witness’s testimony in the non-criminal proceeding along with a grant of use and fruits

² Use and fruits immunity is less expansive than “transactional” immunity. The latter would act as a bar to any prosecution that pertained to the subject of the testimony given. In *Hill*, the Supreme Court rejected the respondent’s request for transactional immunity. *Id.* at 436-37.

immunity). If the disciplinary case proceeds and a witness asserts his or her right against self-incrimination, the prosecuting attorney faces a more difficult choice – either proceed without the testimony and attempt to meet the requisite burden of proof without that testimony or move to compel the testimony and confer use and fruits immunity, potentially affecting the criminal charges. In sum, the application of the rules surrounding the right against self-incrimination can have serious implications for both a disciplinary case and a related criminal case.

It is not surprising therefore that the prosecuting attorneys in such parallel proceedings have often requested continuances of the disciplinary proceedings when a closely related criminal case is pending. Moreover, 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. In an earlier companion case to *Hill*, the Court continued the pending Judicial Conduct Board proceeding at the request of both disciplinary counsel and a witness who would be called to testify in both proceedings and would likely assert her right against self-incrimination. *Hill v. Wheel*, 149 Vt. 203, 204, 542 A.2d 274, 275-76 (1988). Even though the witness in *Wheel* was not the respondent, the Court ordered a continuance. Moreover, the Court went on to observe that “if the judge against whom the Judicial Conduct Board complaint was filed was also subject to a related criminal proceeding, the right course would be to delay the judicial conduct proceeding.” *Id.* at 204. This strongly suggests that the Court would reach a similar conclusion or, at a minimum, favor that course of action if faced with the current situation.

Against this legal background, the Panel has considered whether in this particular case a stay is warranted – in other words, whether there is good cause to issue a stay. The fact that a criminal proceeding is pending and that the criminal proceeding and disciplinary proceedings are closely related

is relevant under the Vermont Supreme Court case law. Although there is no absolute rule, it appears that a continuance of the disciplinary proceeding is the favored approach under such circumstances. The Panel also takes into consideration the fact that terms and conditions of release have been issued in the criminal proceeding that require Attorney Fink to have no contact with the alleged victim. The trial court in the criminal proceeding is in a position to enforce the conditions and issue further conditions if necessary to protect the public. And, finally, the Panel takes into account that Disciplinary Counsel does not object to the stay and has not sought any interim relief in this disciplinary proceeding.

Accordingly, for all these reasons, the Panel determines that there is good cause at this time to issue a stay pending the. This ruling is conditioned on the facts presently before the Panel. If the factual circumstances change, the ruling will be subject to reconsideration at any time.

ORDER

It is hereby ORDERED as follows:

(1) Respondent's motion to stay is hereby GRANTED pending the entry of judgment in the trial court in the related criminal proceeding. The stay will take effect 30 days from the issuance of this Order so that Disciplinary Counsel may file any amended petition of misconduct and Respondent may file a response to any amended petition. Disciplinary Counsel shall file any amended petition within 7 days of the issuance of this Order and Respondent shall file his response within 20 days thereafter;


(2) Disciplinary Counsel shall monitor the related criminal proceeding and promptly advise the Hearing Panel when judgment in the criminal proceeding has been entered in the trial court on the charges;

(3) Within 15 days after the entry of judgment in the criminal proceeding, the parties shall file a

proposed pretrial order for the Panel's consideration in connection with this disciplinary proceeding.

Dated: March 28, 2019

Hearing Panel No. 3



Sheila M. Ware, Esq., Chair



Gary F. Kamedy, Esq.



Peter Zuk, Public Member