

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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

DISCIPLINARY COUNSEL'S REPLY
IN FURTHER SUPPORT OF HIS MOTION TO LIFT STAY

In response to Respondent Fink's February 21st Opposition and in further support of its February 2nd Motion to Lift Stay, 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 and appended **Exhibit 10**.

REPLY MEMORANDUM

Respondent Fink's cursory Opposition offers little reasoning and no applicable authority for denying Disciplinary Counsel's motion to lift the nearly five-year stay of proceedings in this disciplinary proceeding. Indeed, Respondent's Opposition is most notable for what it fails to state or controvert.

First, Attorney Fink does not dispute that, since the March 2019 imposition of the stay in this matter, the Supreme Court has indicated that attorney disciplinary proceedings should not normally be delayed or deferred pending resolution of related criminal prosecutions, notwithstanding the constitutional right against compelled self-incrimination in a criminal case. *See In re Legus*, 2020 VT 49, ¶¶ 9-10. Second, Attorney Fink does not deny that, given his self-incriminating testimonial admissions in *State v. Fink* as part of the diversion "Resolution Agreement," he has already waived or greatly undermined his right against self-incrimination, thereby vitiating any justification for a continued stay of these disciplinary proceedings. Respondent Fink's apparent acquiescence to these conclusions provides two independently sufficient reasons to grant Disciplinary Counsel's Motion to Lift Stay.

Attorney Fink does suggest that the stay will expire automatically in three months based on its own terminating condition of “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. He represents that “[h]e is expected to fulfill his obligations to the [Diversion] program in less than 90 days. If he completes the contract, the criminal case will be dismissed and a judgment entered.” Opp. at 1-2 (emphasis added). In predicting, with no citation to authority, that the Bennington Superior Court will enter a judgment of dismissal, pursuant to V.R.Cr. P. 32(b), upon his successful completion of his Diversion program, Attorney Fink is apparently ill-informed and mistaken.

The Vermont Judiciary’s own official forms indicate that upon a criminal defendant’s successful completion of a Diversion program, the State prosecutor will voluntarily dismiss the charges, pursuant to V.R.Cr. P. 48(a), rather than the Court entering any kind of judgment of dismissal. See Vermont Judiciary Form 375, “Notice of Right to have Records Sealed,” copy attached hereto as **Exhibit 10** (noting that “You have successfully completed your participation in the . . . Diversion Program. Your case will be dismissed by the State’s Attorney”); see also www.rutlandrestorativejustice.org/programs (“If a participant successfully completes all tasks outlined in the [Diversion] contract, the charge will be dismissed by the state.”). Once the State files this notice of dismissal, “the prosecution shall thereupon terminate,” V.R.Cr. P. 48(a), such that there is no longer any extant criminal case over which the Court would have jurisdiction to even enter judgment.

Likewise, the adult Diversion statute, 3 V.S.A. § 164, does not contemplate or even mention entry of any judgment after successful completion of Diversion. During the November 7, 2023 “diversion colloquy” hearing in *State v. Fink*, none of the attorneys, nor the Court itself referred, even in passing, to any judgment. For all these reasons apparently, Judge McDonald-

Cady stated that it was her expectation, after Respondent Fink has “successfully completed” Diversion, “to just have the case closed altogether,” rather than to enter a judgment. *See* Nov. 7, 2023 Hearing Tr. at 45:12-15, *State v. Fink*, **Ex. 3**.

Accordingly, when Attorney Fink successfully completes his Diversion program, as is expected by all, *State v. Fink* will terminate without entry of judgment, thereby leaving in place an indefinite stay of this attorney discipline proceeding. Such an absurd and unintended result clearly warrants the Hearing Panel’s reconsideration and lifting of its March 2019 stay order.

Next, Respondent asserts that “[m]aintaining the current stay for a short period will allow for the completion of the diversion contract or the resumption of the criminal prosecution.” *Opp.* at 2. However, Attorney Fink never explains why or how an immediate lifting of the stay in this matter would impede Diversion or the State’s prosecution. Rather, a continued stay of this matter is in no way necessary to “allow” for the resolution of *State v. Fink*. On the contrary, the Supreme Court indicated its expectation in *Legus* that factually-related criminal prosecutions and attorney disciplinary matters can (and often should) proceed simultaneously.

Finally, Respondent Fink rather cryptically insists that “[l]ifting the stay would necessitate resolution of the issues the stay was imposed to avoid.” *Id.* To the extent that Attorney Fink alludes to the perceived self-incrimination dilemmas sometimes imposed on lawyers faced with parallel criminal and disciplinary matters, the *Legus* Court suggested that there was no constitutionally impermissible dilemma because an attorney, during the course of a disciplinary proceeding, may simply invoke the right against criminal self-incrimination in response to specific questions posed by Disciplinary Counsel. *See Legus*, 2020 VT 49, ¶ 10. However, as impliedly conceded by Respondent’s Opposition, any such self-incrimination dilemma has already been resolved by the self-incriminating admissions of Attorney Fink in the November 2023 *State v. Fink*

Diversion hearing.

In sum, Attorney Fink offers no cogent rationale or legal basis for maintaining the stay of this attorney disciplinary proceeding now that his criminal liability for sexually assaulting J.H. has, unexpectedly, been resolved through non-adjudicatory Diversion, rather than by a judgment of conviction or acquittal.

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.

Dated at Burlington, Vermont this 6th day of March 2024.

OFFICE OF DISCIPLINARY COUNSEL

/s/ Jon T. Alexander

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EXHIBIT 10

Notice of Right to Have Records Sealed

- You have been convicted in Vermont Superior Court, Criminal Division of the commission of a crime and you were under 18 years of age at the time of the offense of the crime;

OR

- You have successfully completed your participation in the _____ County Court Diversion Program. Your case will be dismissed by the State's Attorney by _____

You have the right to apply to have your criminal records sealed two years after:

- the date of your conviction
- your discharge from correctional supervision
- the date your case was dismissed after successful completion of Diversion

If your records are sealed, no one would be able to see them or know that they exist. It would be the same as not having any criminal record at all.

Please note: If you are convicted of a crime between now and the time you apply to have your records sealed, your request may be denied.

An application form is at the bottom of this page. Keep it in a safe place. When you are eligible to have your records sealed (see the box checked above), fill out the form and send it to the court at the address at the bottom of this page. If you lose this form, send a letter requesting that your records be sealed or pick up an additional copy at the Court Clerk's Office.

If you have any questions and cannot afford an attorney, you should contact the Public Defender.

Petition to Have Records Sealed
(Please print or type)

STATE OF VERMONT

SUPERIOR COURT
_____ Unit

CRIMINAL DIVISION
Docket No. _____

STATE OF VERMONT	v.	Defendant's Name	DOB ____ / ____ / ____
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I wish to apply to have my records sealed.

My current mailing address is: _____

My telephone number is: _____

Please send form to:

Court Address:

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CERTIFICATE OF SERVICE

I certify that on March 6, 2024, Respondent Melvin Fink, Esq. was served with Disciplinary Counsel's Reply in further support of his Motion to Lift Stay and supporting Exhibit 10 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 6th day of March 2024.

OFFICE OF DISCIPLINARY COUNSEL

/s/ Jon T. Alexander

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