STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: Glenn Robinson, Esq.
PRP File No. 2013- 172

Motion to Admit "Email Chain"

Disciplinary Counsel seeks to admit an email chain[1] consisting of messages between Respondent and Pamela Binette during the period between August 7, 2012 and August 15, 2012. At the November 6 Pre-Hearing Conference, Attorney McGee said that he intended to object to the admission of the "email chain" (proposed exhibit DC-3) on grounds that it was inadmissible hearsay.

The "email chain" (attached) should be admitted for the reasons set out below.

Background

Pamela Binette emailed Respondent on August 7, 2012, two months after Respondent and his step-brother, Atty. Josh Diamond had proposed a draft waiver of her right to sue Respondent for sexual harassment and gender discrimination under the ". . . Vermont Fair Employment Practices Act, as amended."

Ms. Binette's email said in part:

> "I will not be in the office today. I will probably not be in tomorrow either. I am trying to communicate with you that the issues which lead to my absence are the direct result of the removal of my rights and protections under the Vermont Statutes, as amended, and Fair Employee Acts . . . I do not feel respected as an employee, individual, or human being as a result of your recent behavior and comments. I have felt threatened and forced to cooperate and I am not going to let this happen to me anymore. I have not been treated as an employee. I have not been paid as an employee should . . ." (emphasis added)

Respondent replied by email the following day. He told Ms. Binette that if she didn't want to sign the "papers we drafted with Josh, that's fine. If you do not wish to follow through on dating that is fine too." He went on to tell her that if she wanted a "professional relationship based only on your employment here, that's fine. . . The job is yours as long as you show up for work. . ."

Discussion

The statements by Respondent in his reply to Ms. Binette are admissible as non-hearsay "admissions" under VRE 801 (d) (2) (A).

[1] The email chain is attached as DC-3.

The statements by Ms. Binette are admissible to provide context for Respondent's statement (e.g. "If you do not wish to follow through on dating that is fine too."). [2] They are also admissible for a relevant, non-hearsay purpose. For instance, Ms. Binette says:

> ". . . I do not feel respected as an employee, individual, or human being as a result of your recent behavior and comments. I have felt threatened and forced to cooperate and I am not going to let this happen to me anymore."

In his answer to Counts II and III, Respondent claims that he and Ms. Binette signed the document in which she waives her right to sue Respondent for sexual harassment because she wanted to confirm her "desire to engage in consensual sexual relations" with Respondent. (Answer to Counts II and III, ¶ 18) Ms. Binette says that she does "not feel respected as an employee, individual, or human being. . ." This is non-hearsay evidence of a relevant mental state. That is, regardless of whether it is true that she is not being "respected . . . as a human being", the fact that she made the statement, true or not, tends to prove that she did not sign the waiver of her right to sue Respondent for sexual harassment because she wanted to have sex with Respondent - as Respondent claims in his Answer.

This is the point disciplinary counsel made in his reply to Respondent's motion to bar the testimony of Ms. Binette's parents. Ms. Binette's mother will testify that she came home from work and found her daughter was already home. That was unusual. Diane Binette will testify that her daughter was upset and "shaking." Diane Binette will testify further that while in this state, Pamela Binette told her mother that Respondent had masturbated in front of her at work.

Pamela Binette's statement to her mother - that Respondent had masturbated in front of her at work- is admissible substantively under VRE 803 (2) (excited utterance) as substantive evidence to prove Respondent sexually harassed Pamela Binette. It is also admissible for a relevant, non-hearsay purpose. That is, her statement to her mother that Respondent masturbated in her presence is also admissible, not for "the truth of the matter asserted;" but, as circumstantial evidence of her mental state during the time she was being asked to sign the waiver of her right to sue for sexual harassment. Again, the fact that she said Respondent masturbated in front of her at work tends to make it "less probable" that she agreed to sign the Waiver because she wanted to "confirm" her desire to have "consensual sexual relations" with Respondent.

The VRE Reporter's Notes to Rule 803 sections 1-4 make this point.

> "It should be noted that many statements offered to show mental state will not be hearsay at all under the definition in Rule 801(c), because they are offered not for their own truth but as circumstantial evidence of mental state (e.g., "Harold is the finest of my sons" to show declarant's special affection for Harold). See Reporter's Note to Rule 801(c). Technically, the exception of Rule 803(3) is necessary only for direct assertions of mental state (e.g., "I care more for Harold than for my other sons"). There should be no need for finespun arguments as to the hearsay status

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2."Where a statement is deemed admissible as an admission by a party-opponent under FRE 801 (d) (2), the surrounding statements providing essential context may also be considered."*See United States v. Dupre,* 462 F.3d 131, 136–137 (2d Cir.2006), *United States v. Dupre*, 462 F.3d 131, 136–137 (2d Cir.2006) (email messages sent by third parties to defendants were admissible to provide context for email messages sent by defendants in response); *see, e.g., Metro–Goldwyn–Mayer Studios, Inc. v. Grokster, Ltd.,* 454 F.Supp.2d 966, 974 (C.D.Cal.2006) ("*Grokster Remand* ") (email chains and online exchanges deemed admissible as nonhearsay on the ground that the messages were offered to establish defendant's knowledge and state of mind as to the activities of its software users)."
*Arista Records, LLC v. Lime Group LLC,* 784 F. Supp. 2d 398. 420 (S.D, New York, 2013)

of such statements, because they may come in on one ground or the other. See McCormick, supra § 249 at 590-91, § 294 at 694."

Dated at Burlington, Vermont on November 10, 2017.

Robert V. Simpson, Jr.
Disciplinary Counsel