

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

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

Disciplinary Counsel’s Motion in Limine to Admit Statements by Pamela Binette Which Are Contained in Medical Records

Pamela Binette will testify at the merits hearing that during the period she worked for Respondent – January 2012 through January 2013- Respondent engaged in bizarre and demeaning unwelcome conduct of a “sexual nature” by masturbating in her presence and throwing paper clips at her breasts and into her cleavage. Ms. Binette made these claims to Vermont State Police Detective Lance Burnham when he interviewed her in May 2013. These are the claims which Counts II and III in the Petition of Misconduct are based on.

Claim Ms. Binette Fabricated Her Complaint Against Respondent

Respondent intends to introduce evidence¹ that in 2014, roughly one year *after* she made her complaint to Detective Burnham, Ms. Binette admitted she fabricated the statements she made to Detective Burnham in 2013. That is, Respondent will introduce an exchange of texts between Ms. Binette and Respondent in August 2014. Ms. Binette indicated in the texts that she wanted Respondent to allow her “back into (Respondent’s) life.” Respondent replied in the texts that he would “not be opposed” to having Ms. Binette back in his life “on one condition.” He said Ms. Binette “owed (him) an apology” for the “lies” she had told about him to “state police.”

Ms. Binette did apologize in responsive texts. She said she had been motivated to lie out of “self-pity” and “selfish(ness).”

Evidence Which Rebuts Claims That Ms. Binette’s Claims Were Fabricated

Ms. Binette will testify that she did not lie in her complaint to VSP Detective Burnham in May 2013. Her testimony will be consistent with what she told Detective Burnham. Just as significantly, her testimony will also be consistent with statements (“I”, below) she made to her longtime psychiatrist, Dr. Elliott Kaufman, in 2012 – while she was working in Respondent’s law office. This is more than one year *before* she spoke to Detective Burnham -at a time when she had absolutely no motive to lie about how respondent was treating her.

Dr. Kaufman works for Northeast Kingdom Human Services (NKHS) in Derby, Vermont. Dr. Kaufman’s regular practice is to create treatment records by, in part, taking contemporaneous notes on statements and comments which patients make to him during regularly-scheduled appointments (monthly or biweekly). These contemporaneous records are kept and maintained, as part of Dr. Kaufman’s regular business activity and that of his employer, NKHS.

¹ E. G. Respondent’s Exhibit BB

Dr. Kaufman took contemporaneous treatment notes² which recorded, among other things, Ms. Binette's comments on how Respondent treated her at work. These contemporaneous records clearly show that Respondent "sexually harassed" Ms. Binette. They also back up what Ms. Binette later told Detective Burnham. That is, they clearly demonstrate that Ms. Binette wanted, and needed, to work in Respondent's law office so badly that she stayed on despite having been treated with bizarre and disturbing conduct of a sexual nature on more than one occasion.

I. Notes Made by Ms. Binette's Psychiatrist: February 2012 - March 2013

I have copied (below) portions of the contemporaneous notes Dr. Kaufman took while he was treating Pamela Binette. Ms. Binette made the statements and comments quoted in Dr. Kaufman records during the period Ms. Binette worked for Respondent (January 2012 through January 2013) and in the two months that followed.

2012

2/18/2012

Pam Binette (Pam) has a job with an attorney – "loves the work"³

4/24/2012

Pam appears with her mother – "Major stressor seems to be work, or more specifically, her boss is making unwanted advances toward her according to Pam."

"Pam and her mother will meet employer in two weeks to address the situation"⁴

5/18/2012

"Pam has worked things out with her boss and feels much more hopeful about working."⁵

7/17/2012

"Pam came late for her appt., upset because her boss is "coming on to her."

"Tearful as she talks about her boss. . . quite anxious"

"PTSD symptoms being exacerbated by unwanted sexual advances from her boss according to patient"⁶

7/31/12

Pam came late, was clearly upset and spoke very briefly about her job and more specifically about her boss being the cause of her distress."⁷

² Dr. Kaufman's notes did not become available to Disciplinary Counsel until December 1, 2017, when Atty. James Lillicrap, attorney for Northeast Kingdom Human Services, made them available to Respondent and Disciplinary Counsel in response to Respondent's subpoena duces tecum for Dr. Kaufman's records of his treatment of Ms. Binette.

³ DC-26

⁴ DC-27

⁵ DC-28

⁶ DC-29

⁷ DC-29

12/18/2012

“Pam states she is enjoying her work, relationship with her boss is better and she believes it is because he is in therapy”⁸

2013

1/29/2013 – Record indicates Ms. Binette is a “no show” for her appointment

2/12/2013 – Record indicates Ms. Binette’s appointment was “rescheduled”⁹

2/26/2013 -- Pam came late for appointment– “defensive” – “She said she had lost her job and had quit because of sexual harassment but she did not elaborate.”¹⁰

3/12/2013 - Pam is unhappy. “Pam states she is very unhappy not working. She states she had quit her job when her employer masturbated at work. Her family has urged her to file a complaint. She went on to say that she had returned to work in the past when this had happened the first time on condition that he see a therapist which he supposedly had done.”¹¹

II. Dr. Kaufman’s Records Are Admissible Under the Vermont Rules of Evidence (VRE)

Dr. Kaufman’s records of what Ms. Binette told him during the period from February 2012 through March 2013 are admissible under at least two exceptions to the hearsay rule – VRE 803 (4) and VRE 803 (6). They are also admissible as “non-hearsay” under VRE 801 (d) (1) (B). Because these statements are independently admissible, Dr. Kaufman may also refer to them when explaining his opinions regarding Ms. Binette’s mental health from the time she began working for Respondent (January 2012) to present.

A. Exceptions to the Hearsay Rule

1. Business Records Exception -VRE 803 (6)

VRE 803 (b) – the “business records” exceptions to the hearsay rule – says that “records” are not excluded under the hearsay rule if they are:

(6) Records of Regularly Conducted Business Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with Rule 902(11), . . . The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

⁸ DC-30

⁹ DC-31

¹⁰ DC -32

¹¹ DC-33

In *Ortiz v. New York City, et al.*, 2017 WL 5613735 (S. D. NY, 2017), the judge found that medical records were admissible under the “business records” exception to the hearsay rule. She noted that the provisions of the “business records exception” ensure that these records are not “testimonial.” That is, they are not created in order to prove a fact at trial. The judge cited a Second Circuit case that said: “The purpose of the rule is to ensure that documents were not created for personal purposes or in anticipation of any litigation so that the creator of the document had no motive to falsify the record. (citation omitted).” The judge in *Ortiz* went on to say that the Second Circuit had said that the business records exception “favors the admission of evidence rather than its exclusion if it has any probative value at all.” (citation omitted)

Dr. Kaufman will testify that in the regular course of his treatment of patients/ clients he creates records from his contemporaneous notes of his observations of patients, including statements he elicits from his patients, during regularly-scheduled appointments. That is, his records are created by a “person with knowledge” (Dr. Kaufman) during the regular course of treatment activity and these records are kept, and maintained as a regular practice of his business and that of his employer NKHS.

Medical records, including psychiatric records, can be admissible under Federal Rule of Evidence 803(6), provided they are prepared in the regular course of business, near the time of occurrence, by a person with knowledge and are properly authenticated. *Hodges v. Keane*, 886 F. Supp. 352, 855-56 (S.D., N. Y., 1995).

Statements Attributed to Ms. Binette in Dr. Kaufman’s Records Are Admissible Under VRE 803 (6)

Not all statements in medical records may be admissible under the business records exception. *Romano v. Howarth*, 998 F2d 101, 108 (2d Cir. 1998).

However, the statements attributed to Ms. Binette in the business records are admissible under VRE 803 (6). Dr. Kaufman will be subject to cross examination regarding any claim that he did not record Ms. Binette’s statements accurately. The statements, themselves, are independently admissible under VRE 803 (4) (discussed below). That is, the fact that the statements were elicited for the purpose of treating Ms. Binette is a sufficient indication of their “reliability” for the statements to be admitted. More importantly, unlike traditional “hearsay” situations, Ms. Binette, herself, will be available for cross-examination. The Panel will be able to assess the accuracy of the statements contained in the records while she is being cross-examined.

2. Records Created and Maintained for the Purpose of Treatment – VRE 803(4)

The “purpose of treatment” exception to the hearsay rules - VRE 803 (4) – says that “statements” are not excluded under the Hearsay Rule if they are:

“(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations.”

The eight records which Disciplinary Counsel seeks to admit contain statements by Ms. Binette

which Dr. Kaufman has elicited from her in order to treat her mental health problems most effectively. The judge in *Ortiz* (above) found that exceptions such as the “statements made for the purpose of treatment” exception “rest on the belief that certain statements are, by their nature, made for a purpose other than use in a prosecution and therefore should not be barred by hearsay prohibitions.” *Ortiz v. New York City, et al.*, 2017 WL 5613735 (S. D. NY, 2017)

B. Dr. Kaufman’s Records Are Also Admissible to Rebut Respondent’s Evidence that Ms. Binette’s Statement to Detective Burnham Were Fabricated

As noted above, Respondent will introduce evidence that Ms. Binette said, in an exchange of texts with Respondent in August 2014, that she had lied, and acted out of selfishness and self-pity when she made her complaint to Detective Burnham in May 2013.

VRE 801(d) (1) (B) says that a statement is not hearsay if the “declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is ... (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . .” (emphasis added)

Ms. Binette will testify at the Merits Hearing that she did not lie in her complaint to VSP Detective Burnham in May 2013. Her testimony will be consistent with statements she made to Dr. Kaufman -statements which were made well prior to the time she made her complaint to Detective Burnham. These are the statements contained in the eight records Disciplinary Counsel seeks to admit through this motion.

The Reporter’s Notes to the Vermont Rules of Evidence say:

Rule 801(d)(1)(B) treats prior consistent statements as nonhearsay when offered for the limited purpose of rebutting a charge of recent fabrication or improper influence or motive. The effect of the rule is to allow statements offered for such purposes to be used not only to support credibility but for the truth of the matter asserted, on the theory that the door has been opened and the witness is there for cross-examination. See Federal Advisory Committee’s Note to Rule 801(d)(1)(B); McCormick, *supra* § 251 at 604. In a recent decision the Court expressly adopted the provisions of the Federal Rule for Vermont. *State v. Roy*, 140 Vt. 219, 227, 436 A.2d 1090, 1093 (1981).

The Vermont Supreme Court explained its reasoning when it adopted what was to become VRE 801(d)(1) in *State v. Roy*, 140 Vt. 219, 227 (1980):

“Most courts in reconsidering this area of evidentiary law allow prior consistent statements into evidence as nonhearsay evidence, and, therefore, as substantive evidence. See Federal Rules of Evidence 801(d)(1)(B). These courts have concluded that since both the source of the statements is before the jury for scrutiny and the person who heard the prior consistent statement is in court to testify, the statements are inherently as reliable as any other testimonial evidence. See McCormick on Evidence § 251, at 604 (2d ed. 1972); *United States v. Quinto*, 582 F.2d 224, 233-34 (2d Cir.1978). We find this reasoning persuasive, and consequently adopt the rule allowing the admission of prior consistent statements into evidence as substantive evidence when (1) the prior consistent statement corroborates the witness’s in-court testimony; (2) the party offering the prior consistent statement establishes that the statement is being offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive; and (3) the

statement is shown to have been made prior to the time that the supposed motive to falsify arose. See *id.* at 233-34.”

The records disciplinary counsel seeks to admit meet the criteria established in *Roy*.

First, Ms. Binette and Dr. Kaufman will testify at the Merits Hearing and be subject to cross-examination on these records and the statements in them.

Second, the statements in the records are consistent with the statement Ms. Binette gave to VSP Detective Burnham. They will also be consistent with Ms. Binette’s testimony at the Merits Hearing.

Third, the statements in the records will tend to rebut Respondent’s evidence in the August 2014 text messages that Ms. Binette fabricated her statements to “state police” out of “self-pity” and “selfishness.”

Finally, the records, themselves, make it clear Ms. Binette had no motive to fabricate her sexual harassment claims at the time she made them (April 2012 through March 2013). The records show Ms. Binette loved working at a law office. They show further that Ms. Binette struggled to continue to work in Respondent’s office *after* he engaged in demeaning and disturbing conduct of a sexual nature while she was working for him.

C. Because the Statements in the Records in Issue Are Independently Admissible, Dr. Kaufman Is Entitled to Refer to the Statements Ms. Binette Made in Explaining the Bases for His Expert Opinions

The Rules of Evidence, specifically VRE 705¹², permit an expert to offer her/his opinion and give the “reasons” for that opinion without disclosing the “facts or data” that the expert relied on in reaching his/her opinion. However, if the expert does intend to disclose the underlying “facts or data” s/he relied on in the course of explaining the basis for his/her opinion. These “facts or data” must be “independently admissible.” In other words, the expert is not entitled to refer to inadmissible hearsay to bolster his/her opinion and then “bootstrap” a justification for the disclosure simply on the basis that s/he relied on this inadmissible evidence in reaching his/her opinion.

VRE 703 includes the rule on disclosing underlying “facts or data”:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are *otherwise inadmissible* shall not be disclosed to the jury by the proponent of the opinion or inference *unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.* (emphasis added)

¹² VRE 795 says:

“The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.”

As set out in II A and B, above, Ms. Binette's statements to Dr. Kaufman are "independently admissible" as statements in medical records (VRE 803 (6) or statements made for purposes of treatment (VRE 803 (4) or as "non-hearsay" statements admitted into evidence to rebut a charge that a claim has been fabricated. Accordingly, Dr. Kaufman is entitled to refer to Ms. Binette's statements in his records in explaining the bases for the opinions he offers.

If the Panel finds that these statements are not independently admissible, Disciplinary Counsel respectfully asks the Panel to find, as provided in VRE 703, that the probative value of these statements "in assisting the (Panel) to evaluate" Dr. Kaufman's opinion substantially outweighs any unfairly prejudicial effect this evidence may have on the Panel.

Request

For the reasons set out above, Disciplinary Counsel respectfully requests that (1) Dr. Kaufman's records (DC26-33) be admitted into evidence; (2) statements attributed to Ms. Binette in these records be admitted substantively and (3) Dr. Kaufman be authorized to refer to these statements in explaining his opinions to the Panel.

Dated at Burlington, Vermont on December 14, 2017.

Robert V. Simpson, Jr.
Disciplinary Counsel