STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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

Disciplinary Counsel's Proposed Conclusions of Law Re: Counts II and III

Pamela Binette testified that she "loved" working for Attorney Glenn Robinson (Respondent) at first. But, in the summer of 2012, Respondent began to engage in bizarre and demeaning conduct of a "sexual nature" that continues to haunt her.

Disciplinary Counsel (DC) asks the Panel to credit Ms. Binette's testimony for four basic reasons.

First, Ms. Binette gained nothing[1] from recounting and reliving the humiliation and shame she endured at Respondent's law office or in reliving the five years of "cutting" and episodes of paranoia that she has suffered in the five years since she made her complaint. She did not have the backing of sympathetic supporters that have arisen with the "# Me Too Movement" because she complained years before many others found the courage to challenge powerful people.

Second, Ms. Binette had no incentive, or motive, to lie by making up a story about Respondent. Ms. Binette loved her job in the first few months she worked for Respondent. She admired Respondent. She was learning from him. She had to know that this would all end if she complained that he was sexually harassing her. She had no reason to make up stories about Respondent throwing paper clips at her breasts and cleavage or telling her to pull on his tie while he masturbated. Her life would have been a lot easier if she had kept quiet.

Third, as set out in more detail below, that Ms. Binette's account of Respondent's treatment of her during the summer and fall of 2012 was corroborated by contemporaneous records, such as her pay records and notes and "assessments" of her condition written by her psychiatrist, Dr. Elliot Kaufman, M.D. These records were made during treatment sessions in late July 2012. Ms. Binette's testimony was also corroborated by an email that she wrote on August 7, 2012. The email accused Respondent of violating her rights by failing to treat her as an "employee" and a "human being." These records were all made well before Andrea Poutre replaced Ms. Binette as Respondent's legal secretary in late January 2013, and well before she made her complaint in a recorded interview with Vermont State Police Detective Lance Burnham on July 3, 2012.

[1] It is true, though, that Ms. Binette did prove to herself, her parents and her community, that she had the strength and courage to stand up to a person she and her family considered to be a powerful lawyer, who was backed by a powerful, well-respected family. She kept fighting through hours of testimony and cross-examination both at the merits hearing and deposition to tell the Panel what Respondent had done to her and to regain her dignity. I have rarely seen such strength and courage in a witness.

Finally, the Panel should consider the similarities in the description of Respondent's conduct Ms. Binette gave and the description of Respondent's conduct that Andrea Poutre gave in her November 13, 2017 testimony. Both women told you of Respondent's obsession with sex and masturbation. Consider also the similarities in Respondent's reaction to each woman's testimony. In each case, Respondent admitted that he had, in fact, masturbated in the presence of these young women; but, then went on to give you a wildly improbable account of how each woman led him on.

COUNT II

Count II alleges:

> On or about September 28, 2012, Respondent violated Rule 4.3, by advising an "unrepresented person," his employee, **Pamela Binette**, a person who had an interest which Respondent knew was in conflict with his own interests, to sign a contract in which she agreed to waive any claim(s) she had to sue Respondent for sexual harassment.

Rule 4.3 of the Vermont Rules of Professional Conduct says:

> "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. *The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."* (emphasis added)

Purpose of Rule 4.3

The Court in *Monsanto v. Aetna Casualty and Surety*, 593 A.2d 1013 (Del. Super. 1990) cited with approval, a treatise that explained the purpose of rule 4.3:

> Professor Hazard in his treatise, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, comments on the disclosure required under Rules 4.2 and 4.3. Professor Hazard states:
>
> "This short Rule is taken virtually verbatim from DR 7-104(A)(1) of the Code of Professional Responsibility. In tandem with Rule 4.3, it *prevents* a lawyer from *taking advantage of a lay person* to secure admissions against interest or *to achieve an unconscionable settlement* of a dispute. The scheme of the two Rules is that while Rule 4.3 prevents a lawyer from overreaching an unrepresented person, Rule 4.2 prevents a lawyer from nullifying the protection a represented person has achieved by retaining counsel. . ."
>
> Hazard & Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, at 434 (Supp.1989)" (emphasis added)

593 A2d 1017

According to the treatise then, one of the purposes of Rule 4.3 is to prevent a situation where a lawyer takes advantage of his training and experience to reach an "unconscionable" result.

The evidence has shown that Respondent, a lawyer, acting on advice of his father, a lawyer, asked his brother, a lawyer, to draft a document that would pre-emptively deny Pamela Binette, an

"unrepresented person", of any right she might have, or might have in the future, to sue Respondent for sexual harassment. In short, Respondent engaged in the very conduct Rule 4.3 is designed to prevent. That is, he used his training and knowledge as a lawyer, and that of his brother, to attempt to ensure an unconscionable result.

Elements DC Must Prove

In order to prove Count II, DC must prove the following by clear and convincing evidence : (1) Respondent is a lawyer; (2) Ms. Binette was an "unrepresented" at the time she was asked to sign the "Notice of Intent to Engage in Mutually Welcomed Romantic Relationship and Waiver of Claims" (Waiver Document) and (3) Respondent knew, or should have known, that his interest in asking Ms. Binette to sign a document in which she eliminated her right to sue him for sexual harassment were in conflict with Ms. Binette's interests.

Element 1 - Respondent Is a Lawyer

Respondent has been licensed to practice in Vermont since 1999.

Element 2 – Pamela Binette Was an "Unrepresented Person"

DC must prove that Ms Binette was an "unrepresented person." The Panel quoted the following passage from a Comment in its August 28, 2017 decision denying Respondents Motion to Dismiss (Decision): "(w)hether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur." Decision, p.4

Ms. Binette was a 29-year old, high school graduate, who was living with her parents in Beebe Plain, Vermont when she went to work in Respondent's law office in Newport, Vermont. She had no legal training. It was her first office job. This alone would be enough to qualify her as an "unrepresented person. DC's Proposed Findings of Fact (F) 1-6 But, the evidence has also shown that during the relevant period- May 2012 through September 2012 – Ms. Binette was emotionally vulnerable and financially dependent on Respondent. This made her particularly deserving of the protection afforded by the Vermont Rules of Professional Conduct.

Ms. Binette Was Emotionally Vulnerable During the Period from May 2012-September 2012

Ms. Binette has been diagnosed with Post Traumatic Stress Disorder (PTSD) which resulted from trauma in the early 1990s. She has also been with diagnosed Attention Deficit Hyperactivity Disorder (ADHD). She has been taking the prescription drug Adderall since 2005. F-7

Dr. Elliot Kaufman M. D., a psychiatrist, has treated Ms. Binette since 2007. He testified that in his opinion, Ms. Binette's PTSD was "triggered" during the time Ms. Binette was employed by Respondent. F130

Dr. Kaufman's contemporaneous notes of two late July meetings with Ms Binette (July 17 and July31) show that Ms. Binette came to each meeting "tearful" and "upset." According to Dr. Kaufman's notes, Ms. Binette was "distressed" by the conduct of her "boss" in "coming on" to her. In the "Assessment" he made during the July 17 meeting, Dr. Kaufman wrote that Ms. Binette's "PTSD

symptoms (were) being exacerbated by unwanted sexual advances from her boss according to patient." DC-29, DC-30, F 46, 47, 53

Dr. Kaufman explained that people, like Ms. Binette, whose PTSD is triggered, can "disassociate" and "misinterpret" what is going around them in their environment to the point that their "judgment is impaired." At times, they can become paranoid.[2] He said that with Ms. Binette and others in her condition, the paranoia is episodic. It "eventually passes" and when it passes, "if you meet the person in the street, they're not paranoid." They are like "anybody else." F 133, Tr. 949: 7-25

Ms. Binette's mother, Diane, observed that beginning in the "summer months" of 2012, her daughter began having occasional episodes of fear that Respondent was going to lock her in the law office overnight or over the weekend. Ms. Binette's fear was unreasonable but real to Ms. Binette. At times her mother would come to the law office and sit and wait for Ms. Binette to help ease her fear. F 63, F 64

Respondent Falsely Claims He "Never" Knew of Ms. Binette's Mental Health "Challenges"

Respondent testified at the January 3, 2018 merits hearing that he "never" knew of Ms. Binette's mental health challenges.

This testimony contradicts what Respondent told VSP Detective Lance Burnham on July 3, 2013. Respondent told Detective Burnham twice in the July 2013 interview that he was aware of Ms. Binette's mental health problems. Early in the interview he told the VSP Detective that he was aware that Ms. Binette had "mental health issues" and that on occasions when Ms. Binette was not showing up for work, Respondent called Ms. Binette's parents because Respondent was concerned about her. F 112, Tr. 241: 5-21 Later, toward the end of the portion of the interview dealing with Ms. Binette, Detective Burnham asked Respondent if there was anything else he would like to say about Ms. Binette. Respondent told Detective Burnham that he liked Ms. Binette; but, her "mental health concerns were affecting her decision making while she was at work." F 112, Tr. 243: 7-25; Tr. 244: 15-19

Respondent's January 3, 2018 testimony also contradicts the Answer that he filed in Response to DC's Petition in this case:

> Answer, Count III, paragraph 13: "Respondent admits he told detective that Ms. Binette had "some mental health challenges that had adversely affected her work, but respondent had not recognized the extent of those challenges until the end of her employment when she stopped showing up for work, and the mental health challenges only became manifest in communications from Ms. Binette to respondent only after she was no longer employed by respondent."[3] F 144, Tr. 1247: 23-25; Tr. 1248 through 1251: 1-3 (emphasis added)

Respondent told the Panel that he was not aware of what his attorney had filed in his Answer (above.) F 143, 144

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[2] Ms. Binette admitted that she had experienced episodes of paranoia after working for Respondent. She had discussed it with Dr. Kaufman. "I have a tendency to become paranoid when my rational thinking checks out. And that does happen, and it is unfortunate, and it is hard to get through that and it's hard to navigate back to rational thinking, but I can do that it's very doable." F 132, Tr. 837: 9-16

[3] Respondent's Answer to allegation 13 in Counts II, III of the June 1, 2017 Petition Charging him with Unprofessional Conduct. Disciplinary Counsel asks the Panel to take "Official"/ Judicial Notice of the Answer Respondent filed. 3 VSA810 (4)

Ms. Binette Was Financially Dependent on Respondent from May 2012-September 2012

Ms. Binette, who was Respondent's sole employee, was not only vulnerable mentally and emotionally; she was also financially vulnerable. Respondent controlled Ms. Binette's financial existence at the time.

Ms. Binette started work in Respondent's office in January 2012 as a legal secretary. She started at $9 per hour and received a paycheck intermittently – every four to seven weeks.[4] If she needed money between paychecks, she needed to get an advance from Respondent.[5] DC 20 - DC 22 She worked for Respondent for one year. Her gross pay over that period was $13, 154.75. DC 20

Ms. Binette kept track of her own hours and reported them to Respondent's bookkeeper, Nekol Pyle. Ms. Binette's pay records (DC 20, 21) show that her attendance at work grew progressively worse from her first full pay period in February 2012 when she worked approximately 85% of available work hours[6] until it reached a low in late July-August 2012 when she worked less than 40 % of available hours[7]. DC 20, 21

When she returned to work for Respondent sometime in mid-August (3 weeks after the "masturbation incident") she did so, in part, because she was running out of money. F 60

On September 6, 2012, Ms. Binette received a $1,000 paycheck (less a $250 advance) for the pay period from July 19 through September 6. This was her last paycheck before she signed the Waiver

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[4] This practice violated Vermont law, specifically, 21 VSA "§ 342, which requires employees to be paid at least every two weeks:

(a) (1) Any employer having one or more employees doing and transacting business within the State shall pay each week, in lawful money or checks, the wages earned by each employee to a day not more than six days prior to the date of such payment."
(2) After giving written notice to the employee or employees, any employer having an employee or employees doing and transacting business within the State may, notwithstanding subdivision (1) of this subsection, pay biweekly or semimonthly in lawful money or checks each employee the wages earned by the employee to a day not more than six days prior to the date of the payment. If a collective bargaining agreement so provides, the payment may be made to a day not more than 13 days prior to the date of payment.

[5] Ms. Binette received six advances, totaling $2,200, in the year she worked for Respondent. DC 22

[6] Ms. Binette was paid $1,413 for the pay period February 2, 2012 through March 6, 2012. (DC 20) The Panel can take administrative/ judicial notice (3 VSA 810 (4)) that the 2012 calendar shows there were 23 work days during that pay period and 184 available work hours (23 * 8 = 184). She was paid $9 per hour at the time. If she had worked all 184 hours, she would have been paid $1,656 ($9 * 184 = $1,656). (DC 20) She was paid $1,413 for the pay period – 1,413/ 1,656 = 85%.

[7] Relevant pay period is July 19 - September 6. The Panel can take "administrative"/ "judicial notice" (3 VSA 810 (4) that there were 35 work days, and a total of 280 work hours (35*8 = 280), during that period in 2012. DC 20 shows that Ms. Binette was being paid $10 per hour at that time. DC 20 shows that Ms. Binette was only paid $1,000 during that pay period. That, in turn means that she only worked 100 hours (1,000/10 =100) of the 280 works in the pay period or 36%

Document. F 22, DC 20- 22 When she signed the Waiver Document, she asked Respondent to add a provision (paragraph 4) that would protect her job security.

There is clear and convincing evidence that Ms. Binette was financially dependent on Respondent.

Element 3- Respondent Knew His Personal Interests Were "In Conflict" With Ms. Binette's

In mid- May 2012, Respondent told his father, Atty. M. Jerome Diamond, an experienced lawyer, that he (Respondent) intended to date Ms. Binette. His father advised Respondent to "secure an agreement" from Ms. Binette before he began the relationship which stated that she was entering the relationship voluntarily. Finding of Fact[8] (F) 33.

In late May or early June 2012, Respondent, acting on his father's advice, asked his brother, Atty. Josh Diamond, to draft a document for Ms. Binette to sign which would contain two basic elements. One, the document would "reflect" that Ms. Binette agreed that the relationship Ms. Binette was entering with Respondent was "mutual and welcoming." Two, the document would "contain a release of sexual harassment and gender discrimination claims." F30 –34, 37

The document was titled "Notice of Intent to Engage in Mutually Welcomed Romantic Relationship and Waiver of Claims." (DC-2) It was designed to prevent Ms. Binette from filing a sexual harassment claim against Respondent in the event the relationship he intended to enter with Ms. Binette went badly. When VSP Detective Lance Burnham interviewed Respondent in July 2013, Respondent volunteered to Detective Burnham that at some point before he and Ms. Binette agreed to "date," Respondent had asked his brother, who was also an attorney, to draw up a contract for mutual "protection" so that they could not sue one another if the "relationship ended badly." The document Respondent's brother drafted only provided "protection" for Respondent. F 108, DC -2

Vermont law- 21 VSA 495 d (13)-defines sexual harassment as "unwelcome" sexual contact etc. DC-2 is not only titled "Notice of Intent to Engage in Mutually Welcomed Romantic Relationship and Waiver of Claim;" (Waiver Document) but; it also contained a specific provision to inoculate Respondent against a claim that Respondent's actions were not "welcome":

> ¶ 2 Employee agrees that any romantic relationship with Employer is mutual and she welcomes such a relationship with Employer. Employee agrees that her interest in pursuing a relationship with Employer is done freely, voluntarily and without any coercion or undue duress. DC-2 (emphasis added)

(Contrary to what paragraph 2 of the Waiver Document said, Ms. Binette had not agreed to a "romantic relationship" with Respondent. Ms. Binette was dating someone else at the time Respondent wanted to enter a "romantic relationship" with her. She had "no romantic or sexual feelings" for him. F 74.)

Paragraph 3 of the Waiver Document makes Respondent's immunization against a sexual harassment claim, Ms. Binette might file, complete:

> ¶ 3 Employee agrees to waive any and all demands, claims or other actions (against) Employer for gender discrimination and/ or sexual harassment pursuant to Title VII of

[8] DC has proposed 149 Findings of Fact (Part I, above.) Each proposed Finding cites to a page and line(s) in the hearing transcript.

> the Civil Rights Act, and as amended, and Vermont's Fair Employment Act, as amended, or any other legal or equitable claim arising against employer by virtue of her romantic relationship with Employer and her employment by Employer." DC-2

Ms. Binette did not sign the document (DC-2), which Atty. Josh Diamond had described during a "speaker phone" call. She did not understand why she needed to sign it. Ms. Binette left the document, unsigned on her desk for months. F 41-43, 74-75

During the months that followed the "speaker phone" call, Respondent engaged in bizarre and demeaning conduct that was prompted by Ms. Binette's refusal to "cooperate" and enter some type of sexual relationship with him. He blamed the way Ms. Binette dressed for his "sexual frustration." He belittled her by calling her names and throwing paper clips at her breasts[9]. Respondent continued this bizarre and demeaning practice throughout the time Ms. Binette worked for him – up to, and including, Ms. Binette's final week at work. F 30-31, 45, DC-24

In late July 2012, Ms. Binette gave in to Respondent's requests to "tease him." ("Give me a little show. Come on tease me. You know you want to.") She "unbuttoned (her) shirt and dropped some bra strap" while Respondent was masturbating. Respondent then ejaculated on his desk. F 48, 49

Ms. Binette was ashamed and angry at what had happened. She went home immediately after the "masturbation incident" and told her parents what had happened. She did not return to work until mid-August 2012. During that time, she also asked Respondent to see a therapist- ". . . thinking that would help him stop the behavior in the office." F50, 51

On August 7, 2012, during the time Ms. Binette stayed out of work, she wrote Respondent a long email complaining that he had violated her rights by not treating her as an "employee" or a "human being." Ms. Binette told Respondent in the email that she had felt "threatened and forced to cooperate" and that she was "not going to let that happen (to her) any longer." She said that she "hop(ed)" there could be an "agreement" that satisfied her "loss of integrity, finances, employment and reputation." She "copied" her mother, Diane Binette, on the email. DC-3

Respondent wrote in a reply email that if Ms. Binette did "not want to sign the papers we drafted with Josh" that was "fine"; but she would have to start showing up for work. He said he had been "very flexible;" but, she was going to need "excused" absences. DC-3, F 56, 57

Respondent spoke to Ms. Binette only once (discussed below) about the email. After that, he never said, or did, anything to address the concerns Ms. Binette had expressed in the email. F 57

Respondent Falsely Claims the Email (DC-3) Had Nothing To Do With His Treatment of Ms. Binette

Respondent testified at the January 3, 2018 merits hearing, that Ms. Binette had confided in him that, despite what the email (DC-3) said, the email had nothing to do with the way he had treated Ms. Binette. Instead, he claimed, Ms. Binette wrote the email to "cover up" the fact that Ms. Binette had an abortion. Respondent said Ms. Binette told him ". . . that (the email) was just something she had done to appease her parents, and then I told her I really didn't understand that, and then she said. Well, just between you me and a fence post, I don't want you to tell anybody about this, but I went and had an

[9] Respondent dismissed Ms. Binette's "paper clip testimony." He countered in testimony to the Board on January 3, 2018, with the improbable suggestion that Ms. Binette's (allegedly false) claim had been prompted by the fact that on one occasion, he had scooped up a handful of paper clips, tossed them in the air and that one of the paper clips happened to land in Ms. Binette's cleavage. F148

abortion, and I was like - What? And she said I, you know, words to the effect of I had to cover up what happened or something." F 145, Tr. 1119: 12-18 Tr. 1119: 3-411 (emphasis added)

Respondent's statement is false. It makes no sense. Ms. Binette's mother, Diane, had testified earlier about her daughter's abortion. She testified that in 2011, the year before she went to work for Respondent, Pamela had told her that she'd had an abortion. Mrs. Binette went on to tell the Panel that she had supported her daughter's decision. F 145 a., Tr. 1046: 6-19

Respondent was asked to explain how the email could be needed to "cover up" the fact that she had an abortion , when her mother had testified that her daughter had the abortion in 2011 and that she (Diane Binette) had supported her daughter's decision, Respondent recalibrated his claim that Ms. Binette had told him that she wrote the email to "cover up"[10] the fact she had an abortion. He changed his testimony and said only that he had "gotten the impression" that "(Ms. Binette) wanted to hide it (the abortion) from her parents." F 145 b., Tr. 1256: 22-25; Tr. 1257:1-4

Respondent had made minor "edits"[11] to the document his brother, Josh, had sent him (DC-2). He had also added two new provisions. But, the Waiver Document (DC-5) that Respondent and Ms. Binette signed still had the two provisions intended to protect Respondent from sexual harassment claims – the two provisions that he had asked his brother to include in the document he drafted for Respondent. That is, by signing the agreement she was confirming (falsely) that she was entering the "romantic relationship" voluntarily (paragraph 2). By signing the agreement, she was also waiving her right to sue Respondent for sexual harassment. DC– 2, DC-5

Ms. Binette still did not understand why the contract was necessary. F 74

Respondent testified that he had advised Ms. Binette to have her own attorney[12] review the Waiver Document. Tr. 1267: 11-23 This claim is false.

Ms. Binette testified that Respondent had not advised her to have her own lawyer review the Waiver Document. F75 Her testimony is corroborated by the testimony of VSP Detective Lance Burnham

[10] Respondent told the Panel that he had recorded the alleged conversation with Ms. Binette about the "cover up." But, he claimed, the recording was not available. At first, he testified that he had recorded the conversation on his old iPhone but "the button on it broke and AT&T could not resurrect the information." In addition, he said, the phone had "water damage" Tr. 1120:7-10 Later, at the close of Respondent's testimony, a Panel member asked Respondent about the recording that was "inadvertently destroyed" -the recording he allegedly made of his conversation with Ms. Binette after he received the August 7, 2012 email (DC-3) from Ms. Binette - Respondent said: "I don't believe it got destroyed, sir." He said he didn't remember what happened to it. "It's gone. I can't find it." F 146, Tr. 1270: 14-25

[11] In addition to adding paragraphs 4 and 5, Respondent edited paragraph 2 by substituting the words "by mutual agreement" (DC-5): for his brother's phrase "is mutual and she welcomes such a relationship with her employer" (DC-2) Respondent removed the word "demands" and added the word "against." DC-2, DC-5

[12] According to Respondent, Ms. Binette told him: "That's fine I don't need anybody to review this." Tr. 1267: 21-23 Even if Respondent had told Ms. Binette to have her own lawyer review the Waiver Document it would have been an empty gesture. Even if she could have afforded a lawyer, she felt she had to sign the contract. She wanted to keep the job and she needed the money it provided.

who interviewed Respondent on July 3, 2013. Respondent told Detective Burnham that Ms. Binette had time to review the Waiver Document before she signed it. He told the VSP detective that Ms. Binette had taken the document home to review it. But, Respondent said nothing about advising Ms. Binette about having her own attorney look at the document. F 109, F 110

On September 28, 2012, Respondent told Ms. Binette that his father, Atty. M. Jerome ("Jerry") Diamond[13] - the man who had advised Respondent to "get something in writing" - was going to "be here in 20 minutes" and "we need to both sign this before he gets here or we're both going to be in a lot of trouble." F 67 Ms. Binette felt she was being forced to "sign away (her) rights." F72, F 137

Ms. Binette's mental health was deteriorating. She needed the money her job in the law office provided. Respondent, a lawyer, went beyond "advising" Ms. Binette to "sign away" any legal right she might have to sue him. He used his power as her boss to pressure her into doing it. Rule 4.3 was written to prevent lawyers from applying this kind of pressure to "unrepresented persons" like Ms. Binette. He had violated Rule 4.3 in May when he asked her to sign the document his brother had drafted. Respondent compounded that violation four months later when he used his power and authority, and that of his father, to try to pressure Ms. Binette into signing the Waiver Document. The violation of Rule 4.3 was complete before Ms. Binette even signed the Waiver Document (DC-5).

COUNT III

Count III alleges:

> On or about September 28, 2012, Respondent violated Rule 8.4 (g) by engaging in sex discrimination through advising his employee, **Pamela Binette**, a person who Respondent knew suffered from a mental condition that at times impaired her decision-making, to sign a contract in which she agreed to waive any claim she might have to sue Respondent for sexual harassment in exchange for Respondent's qualified promise to continue to employ Ms. Binette - thereby explicitly and implicitly making Ms. Binette's agreement to submit to unwelcome verbal or physical conduct of a sexual nature a term or condition of her employment, all in violation of 21 VSA § 495 d (13) (A)

Relevant Rule

Rule 8.4 (g) of Professional Conduct says (in pertinent part):

It is professional misconduct for a lawyer to:
***
(g) discriminate against any individual because of his or her . . . sex. . ."

21 VSA §495d (13) says:

[13] Atty. Jerry Diamond was the person who had first urged Respondent to get "something in writing" that would provide evidence that any relationship Ms. Binette had entered with Respondent had been "voluntary." F32-F34

(13) "Sexual harassment" is a form of sex discrimination and means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(A)Submission to that conduct is made either explicitly or implicitly a term or condition of employment, or …. (emphasis added)

Elements DC Must Prove

DC must prove that (1) Ms. Binette was Respondent's employee and (2) Respondent either "explicitly" or "implicitly" made submission to sexual harassment a "term" or "condition" of her employment.

The evidence shows that Ms. Binette was Respondent's employee form January 2012 through late January 2013. DC-20

The evidence, as detailed in DC's Findings, also shows that Respondent subjected Ms. Binette to unwelcome verbal and physical conduct of a sexual nature before, and after, Ms. Binette signed the Waiver Document at Respondent' insistence. F29-31, 45- 59, 61-62, 80-81, 90. 93, 147.

The evidence shows further that Ms. Binette returned to work and eventually signed the Waiver Document even though she was being forced to "sign away (her) rights", because she needed money and wanted to keep her job. (DC-5). 71, 72

"¶ 2 Employee agrees that any romantic relationship with Employer is by mutual agreement. Employee agrees that her interest in pursuing a relationship with Employer is done freely, voluntarily and without any coercion or undue duress.

¶ 3 Employee agrees to waive any and all claims or other actions against Employer for gender discrimination and/ or sexual harassment pursuant to Title VII of the Civil Rights Act, and as amended, and Vermont's Fair Employment Practices Act, as amended, or any other legal or equitable claim arising against employer by virtue of their romantic relationship with Employer and her employment by Employer.

¶4. Employer hereby acknowledges that employee suffers from a condition that sometimes makes it difficult for her to be on time for the start of her workdays. Employer has in the past given Employee a certain amount of latitude regarding her showing up for work on time. The parties to this agreement hereby acknowledge Employee will continue to be afforded latitude regarding her showing up for work on time. Employee has and will continue to make reasonable efforts to see that she does come to work on time, in spite of her condition."

Respondent was aware that Ms. Binette felt that he had violated her rights as an "employee" and a "human being." (DC-3) There is clear and convincing evidence that he wanted provisions in ¶¶ 2and 3 (above) for protection against such claims.

There is also clear and convincing evidence that Ms. Binette knew at the time she signed the Waiver Document[14] that Respondent had engaged in unwelcome conduct of a sexual nature before she

[14] DC-5 is a copy of a document that Respondent faxed to prior Disciplinary Counsel. The "header information" shows that the document, which is marked "Original" was faxed from Respondent's office on November 20, 2013.

signed it and that she knew that it was reasonable for her to believe that Respondent would persist in this conduct after she signed it. (She was right. e.g. DC-24, F 62, F147, F149)

Respondent wanted protection from sexual harassment claims that ¶¶ 2 and 3 provided. F32-F40 Ms. Binette knew that she would have to endure this conduct (sexual harassment) in the future as "a condition of her employment" in order to keep her job. She felt she was being "forced" to "sign away" her rights. She asked for some job protection in exchange (¶4). F 72 Respondent agreed to add ¶4 to the "Notice of Intent to Engage in Mutually Welcomed Romantic and Waiver of Claims."

Conclusion

The evidence shows that at first Respondent asked Ms. Binette to sign a document waiving her right to sue him for sexual harassment. Four months later, after she had refused to sign the document and sent him an email charging him with violating her rights as an "employee "and a "human being," he used his knowledge as lawyer, and his power as Ms. Binette's boss, to force her to sign the document. Ms. Binette's mental health was deteriorating and Respondent had the power to control her financial well-being. It was easy for Respondent to take advantage of her.

Respondent's Defense to Counts II and III

Respondent's defense at the merits hearings was based on three dubious propositions. One, he claims it was his brother, not Respondent who was responsible for the Waiver Document. Two, he claims Ms. Binette insisted on signing a document waiving her right to sue him for sexual harassment because she wanted another opportunity to entice him into masturbating. Three, he claims Ms. Binette fabricated the statement she gave to VSP Detective Lance Burnham in May 2013 which alleged Respondent had sexually harassed her.

Some of the evidence Respondent introduced did make it clear that Ms. Binette has suffered from terrifying episodes of mental illness, during, and in the years after, the time she worked for him. In addition, Respondent did introduce evidence that he had left a "Post It" note telling Ms. Binette that she made his "pants crazy" – so "crazy" that it made him want to "M. B." (masturbate). And, he did put forth evidence that during the end of the time Ms. Binette worked for him he had sex with a client (divorce and criminal) in his law office conference room. But, he never made it clear how this evidence tended to prove Ms. Binette had fabricated the claims of sexual harassment she made against him.

Argument 1: Respondent testified at the November 2017 merits hearings that he was "disappointed" in the document (DC-2) that his brother, Atty. Josh Diamond, had drafted for him in May 2012 at the request of their father, Atty. M. Jerome ("Jerry") Diamond. He said he had he had "not asked" Josh for document that would "waive sexual harassment claims." F 139

This testimony directly contradicted the testimony his brother had given a day earlier. His brother, Josh Diamond testified Respondent "asked for" a document that would (1) the "reflect that the relationship was mutual and welcoming" and (2) contain a release of sexual harassment and gender discrimination claims." F 37 (emphasis added)

This is roughly four months after VSP Detective Burnham interviewed Respondent and told him of Ms. Binette's complaint - a time when Respondent still felt the Waiver Document protected him.

Two months later, at the January 3, 2018 merits hearing, Respondent testified that before he and Ms. Binette signed the Waiver Document on September 28, 2012, he "took out" a paragraph that they both couldn't understand. F140

Respondent explained that he had "disregarded" the document after Josh sent him because he wasn't "happy" with it. But, according to Respondent, he still (September 28, 2012) had Josh's document "on (Respondent's) computer." He told the Panel that he and Ms. Binette went through the document (DC-2) "paragraph by paragraph." He said there was one paragraph with "legal cites or citations" that neither he, nor Ms. Binette, understood, so they agreed to "just take it out." Respondent said they took "it out." Respondent says he told Ms. Binette that he was "fine" with the document once the paragraph with the legal citations was taken out[15]. He told the Panel he and Ms. Binette signed that document (as yet undisclosed) "together" on September 28, F 140, Tr. 1082: 11- 22, F 141, 1083: 1-25

Respondent's testimony that he and Ms. Binette signed a document that "took out" one of the paragraphs taken out is both confusing and probably false. The only paragraph in the document his brother Atty. Josh Diamond drafted that has "legal citations" in it is paragraph 3, the provision which calls for Ms. Binette to waive her right to sue Respondent for sexual harassment. (DC -2) While the record is not clear, it appeared Respondent was claiming in his testimony that the document he and Ms. Binette signed did not contain a waiver of the Ms. Binette's right to sue. If so, he is wrong.

The only document dated "September 28, 2012" that was admitted into evidence is the Waiver Document (DC-5). DC-5 is the document Ms Binette testified she signed. F 67 DC-5 not only has Ms Binette's signature; but, it also has Respondent's signature. DC-5 is the document (stamped "Original") that Respondent sent to prior Disciplinary Counsel on November 20, 2013, four months after Respondent's was first told of Ms. Binette's complaint – a time when he evidently thought the document still gave him protection. (DC-5, see "header" information at top).

In any event, Respondent's last minute "Hail Mary" attempt to avoid liability for his treatment of Ms. Binette would have failed even if his testimony had been true. He told the Panel he only "took out" one paragraph – the one with the "legal citations" in it. The document Respondent's brother drafted contained two paragraphs – either one of which would have snuffed out Ms. Binette's right to sue him for sexual harassment. If Respondent does have another document dated September 28, 2012 that both he and Ms. Binette have signed, it will contain paragraph 2 in the Document his brother drafted for him. (DC-2):

> ¶ 2 Employee agrees that any romantic relationship with Employer is mutual and she welcomes such a relationship with Employer. Employee agrees that her interest in pursuing a relationship with Employer is done freely, voluntarily and without any coercion or undue duress. (DC-2)

Paragraph 2 is also designed to immunize Respondent from liability from a sexual harassment lawsuit. Although there is clear and convincing evidence that Ms. Binette did not "welcome" any

[15] Respondent never identified, or sought to introduce, the document that he claimed had the t paragraph with the "legal citations taken out.

"romantic relationship" with Respondent;[16]but there is also clear and convincing evidence that Ms. Binette did sign a document which confirmed that false claim because she felt she was forced to do so. F 72, DC-5

In assessing Respondent's credibility on the, as yet undisclosed, document Respondent refers to in his testimony, the Panel should consider the fact that Respondent's testimony concerning this document not only contradicted Ms. Binette's testimony; but it also contradicted testimony that his brother (discussed above), Detective Burnham and Respondent, himself, had given earlier.

Respondent testified at the merits hearing that he never asked for the waiver of right to sue for sexual harassment provision that was in the document his brother drafted (DC-2). But, Detective Burnham testified that on July 3, 2013, Respondent told him that he had asked his brother to draft a document that provided "protection" against suit in the event his relationship with Ms. Binette ended "badly." F108 Respondent's testimony that he didn't understand the provision in the document with the "legal citations" in it is also contradicted his own testimony (quoted above) that he was "disappointed" with Josh's document because it contained a waiver of a right to sue for sexual harassment. He understood it well enough to be "disappointed" with it. Moreover, comparison between DC-2 and DC-5 further belies his claim that he disregarded the document his brother sent him. Comparison of the two documents shows he did minor "edits" (fn. 11, above) to DC -2 before he and Ms. Binette signed DC-5 on September 28, 2012.

Argument Two: Respondent told the Panel that Ms. Binette did a "terrific" job for the first ten months she worked for him and that he only replaced Ms. Binette with Ms. Poutre when Ms. Binette stopped showing up for work in December 2012 and January 2013. Tr. 1064: 22-25; Tr. 1065: 1- 14

He also told the Panel, Ms. Binette signaled that she had a sexual interest in him during the first week she worked for him. Tr. 1067: 1-14; Tr. 1068: 1-8

At first, he told the Panel he rejected Ms. Binette's advances as unprofessional. ("You're here to work.") Tr.1067: 18-25; Tr. 1068: 1-8 But, according to Respondent, Ms. Binette continued to be "flirtatious" until something "unexpected" happened in July 2012. Respondent told the Panel that Ms. Binette came into the office conference room where Respondent was working. She exposed her breasts and encouraged him to masturbate. Responded said he complied, reluctantly, and "put my hand on the outside of my pants and made myself have an orgasm." When he was finished, Ms. Binette allegedly told him: "That was kind of interesting." Tr.1078: 14-25 through Tr. 1080: 1-15

Two months later, according to Respondent, Ms. Binette came to him and asked him if he "liked what happened in the conference room that day." Respondent told the Panel that she asked him if he would like it to "happen again?" Respondent said he would like it to happen again; but not before the "document we talked about is signed because we don't want anybody to be unsure of the fact that this was a voluntary relationship we were entering into." According to Respondent, Ms. Binette said: "Then let's get it signed." Tr. 1081:4-14 Respondent told the Panel that the evening the Waiver Document was signed, he invited Ms. Binette to his condo. they ate together and then did "the same thing they had done in the conference room" in July. That is, according to Respondent, at some point, Ms. Binette "started

[16] e.g. F29-31, F45- F59, F61-F62, F80-81, F90. F93, F 100

pulling her clothes off" because "she likes that sort of thing" and he masturbated[17]. Tr. 1084: 7-25; Tr. 1085: 1-11 (emphasis added)

Respondent's argument that Ms. Binette pressured him into signing the Waiver Document is based on his claim that Ms. Binette had found causing him to masturbate in his conference room so exciting/ "interesting" and that that she insisted on waiving her right to sue him for sexual harassment so that that she could watch him do it again. The Panel should reject Respondent's claim.

First, it is absurd on its face.

Second, Ms Binette's denials that she enjoyed watching her boss masturbate at work (e.g. F74, 75) are corroborated by independent evidence. For instance, she left work immediately after the "conference room" incident in July 2012, complained to her parents about it immediately, and did not return to work until mid-August. F 52 Her testimony that she "boycotted" work is supported by her pay records. F65, DC-20, 21 She wrote an email (DC-3) charging Respondent with violating her rights and failing to treat her as a human being." Her claim that she was humiliated and embarrassed by what had happened is further corroborated by Dr. Kaufman's observation that Ms. Binette had come to meetings in late July "tearful and upset" and his "assessment" 2012 that Ms. Binette her PTSD symptoms had been "exacerbated" by her boss' conduct. And, that she was "clearly upset" and suffering" distress" from what had happened at "her job." F 46,47, 53, 54

Argument 3 - Respondent argues Ms. Binette fabricated all claims that she was subjected to sexual harassment during the year she worked for Respondent. He does so without suggesting a motive for why she would do so. The Panel should reject this claim as well.

First, the Panel should consider the fact that, unlike Respondent who is fighting to retain his law license, Ms. Binette had no reason to come before you and lie to you. As noted above, she gained nothing from recounting and reliving the humiliation and shame she endured at Respondent's law office or in reliving the five years of "cutting" and episodes of paranoia that she has suffered in the five years since she made her complaint.

Respondent points to emails from Ms. Binette, particularly the March 2013 email in which Ms. Binette says she loves Respondent. F97 The Panel should consider the fact these texts were bracketed by emails (DC-24, DC-25) in which Ms. Binette asks two women for help because she is "very afraid" of Respondent. F93, F100 The Panel should also recall the testimony of Dr. Kaufman. He testified that this pattern of "engagement" and "withdrawal" is often observed by psychiatrists. He explained that in the past, many tended to blame the victim for "engagement", for re-entering a "destructive relationship." He said that was "wrong" and that professionals in his field have come to recognize that this is the way many people in such relationships try to "cope[18]" – "try to make it better." F 135, 136

[17] Ms. Binette testified that she went straight home she had signed the contract. She did not go to Respondent's condo. F 66

[18] Lawyers who prosecute domestic violence cases see the pattern as well. Many victims of domestic violence call for police assistance while they are being assaulted or shortly after the assault and then "recant" within a few days and re-enter the relationship for many reasons, usually having nothing to do with the innocence of the alleged assailant. Laurie S. Cohn, The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim, 32 NYU L. & Soc. Change 191, 195-203 (2008)

Respondent also points to a chain of texts in August 2014 in which Ms. Binette "apologizes" to Respondent for "lying" to "State Police." R-2, (DC Sanctions Memo, pp. 2-3) There is strong evidence that Ms. Binette's PTSD symptoms had been triggered, her thinking was confused, and she was in the pattern of "withdrawal" and "engagement" described by Dr. Kaufman (above).

More importantly, there is overwhelming evidence that Ms. Binette did not fabricate her allegations of sexual harassment. Again, as noted above, Ms. Binette had no reason to make up a story – let alone such bizarre, detailed story – about Respondent. Ms. Binette loved her job in the first few months she worked for Respondent. She was happy. She was learning from Respondent. She saw him as a "smart", knowledgeable, "leader." F25-F28 She had no reason to make up stories about Respondent throwing paper clips at her breasts (e.g. F 31, F55) and cleavage or telling her to pull on his tie while he masturbated. F 49

The only reasonable explanation for the change her parents and Dr. Kaufman began to see in her during the spring and summer of 2012 (F29, F44) is that she was, in fact, being subjected to "unwelcome" conduct of s "sexual nature" at work. Again, her complaints about sexual harassment during the summer of 2012 are not only corroborated by the testimony of her mother; but also, by Dr. Kaufman's assessment that her PTSD symptoms had been exacerbated in late July 2012, by her work records corroborated her testimony that she stayed out of work for roughly three weeks immediately after says Respondent masturbated in front of her and that she wrote an email charging Respondent with violating her rights and failing to treat her as a human being during that period. e.g. DC-20, F44-F54

Conclusion

DC has presented clear and convincing evidence that Respondent, a lawyer attempted to take advantage of Ms. Binette in violation of Rule 4.3. DC has also presented clear and convincing evidence that Respondent, Ms Binette's boss, took advantage of his position, to sexually harass her in violation of Rule 8.4 (g) Respondent's testimony in his own defense should be rejected. It is riddled with false statements and contradictions.

DC respectfully requests the Panel find that Counts II and III have been proven.

Dated at Burlington, Vermont on February 26, 2018

Robert V. Simpson, Jr.
Disciplinary Counsel