STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

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

Disciplinary Counsel's Reply to Respondent's Motion to Bar Introduction of Three Emails

Disciplinary Counsel does not claim that the fact that Ms. Binette will testify "make(s) any hearsay argument moot" as Respondent argues. Disciplinary Counsel has relied, instead, on provisions in the Vermont Rules of Evidence and the Vermont Administrative Procedures Act which are discussed briefly below.

Vermont Rules of Evidence

DC-3 - Email Chain -8/7/2012 (attached)

This email chain begins with Pamela Binette's email to Respondent on August 7, 2012. Ms. Binette says, in part, that she will not be coming to work that day because she was not being "treated as a human being". She also alleges violations of her rights under a statute which says she has a right to be free from sexual harassment in the workplace. Respondent replies the following day. His email says, in part, that Ms. Binette does not have to sign the documents "we drafted with Josh."

Respondent's statement is admissible as a non-hearsay admission of a "party opponent." VRE 801 (d) (2) (A). The statements in Ms. Binette's emails are admissible because they provide "context" for the Respondent's "admissions." *Arista Records, LLC v. Lime Group,* 784 F Supp. 2d 398, 420 (SD, N.Y. 2011)

Arista was cited in Disciplinary Counsel's November 10, 2017 Motion to Admit Email Chain (attached). The judge in *Arista* held that a statement by a representative of a "party opponent" was admissible as an admission under FRE 801 (d) (2). The judge in *Arista* also held that emails responding to the opponent's statements are admissible to give "context"/ "meaning" to the party opponent's statement.

In Disciplinary Counsel's experience, this principle applies routinely in jury trials. For instance, a police officer would be allowed to give testimony which gives context to a defendant's 801 (d) (2) (A) "admission" (e. g. "No. I just watched.") by telling jurors the question that prompted the "admission" ("You killed him, didn't you?")

Ms. Binette's statements are also admissible under VRE 803 (3) – the "state of mind" exception to the hearsay rule. The application of Rule 803 (3) to this email chain (DC-3) is discussed in detail in the November 10 motion.

Emails DC 24 and 25 - (attached)

The admissibility of these emails is discussed in detail in Disciplinary Counsel's December 14, 2017 "Motion to Admit Three Emails." (attached)

These emails are admissible to rebut a charge of "implied fabrication." Respondent's exhibit BB contains a portion of a multi -page text exchange between Respondent and Pamela Binette which took place in August 2014. In the text exchange, Ms. Binette apologizes for lying to the "state police" (Detective Lance Burnham) about Respondent's treatment of her and says she lied for "selfish and unrealistic reasons."

VRE 801 (d) (1) (B) says that a prior, "statement by a witness is admissible as "non-hearsay" if the "declarant" (Ms. Binette) testifies at trial and the "prior statement" (in the emails) is "consistent with the witness' testimony at trial" 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 that she did not lie to "state police." Respondent has indicated that he will confront her with the fact that she apologized to Respondent for lying to "state police" about Respondent's treatment of her. By confronting her with these statements, Respondent will be making "an implied charge" that Ms. Binette fabricated her statement to "state police." As discussed in more detail in Disciplinary Counsel's December 14 Motion to Admit Three emails[1], DC 24 and DC 25 are admissible under VRE 801 (d) (1) (B) to rebut the charge that Ms. Binette lied to "state police" about Respondent's treatment of her.

The fact that Ms. Binette will testify and be available for cross-examination is crucial because, according to the Vermont Rules of Evidence, this fact makes the statements in the emails "non-hearsay:"

> "Rule 801(d) excludes from "hearsay" by definition certain prior statements of witnesses and all admissions of parties. These matters have conventionally been treated as hearsay exceptions. *Prior statements are viewed as nonhearsay under the rules even when offered for the truth of the matter asserted because the basic requirements of the hearsay rule are met by the present availability of the declarant for cross-examination in the presence of the trier of fact.*"

These emails are also admissible under VRE 803(3) - the "state of mind" exception to the Hearsay Rule. (Again, the applicability of this exception is discussed in the November 10 motion which is attached and referred to above.)

[1] VRE 801(d) (1) (B) and a leading Vermont case on this rule – *State v. Roy* - are discussed in detail in Disciplinary Counsel's December 14, 2017 motion to admit statements made by Ms. Binette which are contained in Dr. Kaufman's medical records. (attached)

Vermont Administrative Procedures Act - 3 V. S. A. 810 (1)

The statements in these emails (DC-3, DC -24 and DC 25) are highly relevant in that they tend to show not only that Respondent subjected Ms. Binette to sexual harassment during the time she worked for Respondent; but also, that her state of mind during that period makes it highly unlikely that she signed the waiver of her right to sue for sexual harassment because she wanted to enter into consensual sexual relationship with Respondent, as Respondent has claimed.

If the Panel decides that the provisions of the Vermont Rules of Evidence that Disciplinary Counsel has cited in this motion and earlier motions do not apply, Disciplinary Counsel asks the Panel to admit these email under 3 V. S.A, 810 (1) which says, in pertinent part:

(1) ". . . The Rules of Evidence as applied in civil cases in the Superior Courts of this State shall be followed. *When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law.* Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

The Vermont Supreme Court referred to 3 V. S. A. 810 (1) when it reversed a decision of the Vermont Public Service Board:

> "*The exclusion of relevant evidence in an administrative proceeding is presumptively invalid.* The Board's own regulations adopt the standards outlined in the Administrative Procedure Act, 3 V.S.A. § 810(1), to govern the admissibility of evidence . . ." *In Re Central Vermont Public Service Corporation,* 141 Vt. 284, 292 (1982)

When considering whether Ms. Binette's statements in these emails would be relied on by a "prudent" person, it is important to consider the fact that she will be present and available for cross-examination.

Conclusion

For the reasons set out above, Disciplinary Counsel respectfully asks the Panel to admit DC-3, DC-24 and DC-25.

Dated at Burlington, Vermont on December 28, 2017

Robert V. Simpson, Jr.
Disciplinary Counsel