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 Testimony of Complainant, **Pamela Binette's Parents**

Disciplinary Counsel intends to call Pamela Binette's parents, Chris and Diane Binette, to testify as to the changes they observed in their daughter during the time she worked in Respondent's law office and what their daughter told them of the humiliation and occasional fear, she felt while working for Respondent.

Respondent claims that Mr. and Mrs. Binette's testimony must be barred because it will be based on inadmissible hearsay:

> "Respondent Objects to the proferred testimony from the parents . . . on the grounds that the information Disciplinary Counsel seeks to elicit from each of them, as evidenced by his disclosures to Respondent's counsel, is based on their recollection of what Pam Binette told them. That information constitutes inadmissible hearsay." Respondent's Motion in Limine (ML) page 1 (emphasis added)

Background

The focus of Count II in the Petition is the "Notice of Intent to Engage in Mutually Welcoming Romantic Relationship and Waiver of Claims" (Waiver) which Pamela Binette signed on September 28, 2012. In signing this document, Ms. Binette agreed to waive her right to sue Respondent for sexual harassment.[1]

The evidence (set out in more detail below) shows that Respondent's step-father, Atty. M. Jerome ("Jerry") Diamond, advised Respondent to obtain a waiver from Ms. Binette

The admissible evidence shows that Ms. Binette did not sign the first draft of the Waiver, which was presented to her in late May 2012. They did not provide her with any protection or benefit of any kind[2]. The admissible evidence shows further that in August 2012, Ms. Binette refused for several days to go to work because, she alleged, Respondent had failed to treat her as an "employee, individual or human being."[3] It wasn't until late September 2012 that Ms. Binette finally signed the agreement waiving her right to sue Respondent for sexual harassment. She signed the agreement after a paragraph had been added which effectively provided that in exchange for Ms. Binette's agreement to waive her right to sue Respondent for sexual harassment, Respondent agreed that Ms. Binette could keep her job as long as she did her best to show up for work on time. [4]

[1] Waiver, attached as DC-1, p. 1
[2] Waiver drafted by Atty. Josh Diamond, DC-2
[3] August 7, 2014 email from Ms. Binette to Respondent. DC -3
[4] DC-1, p. 1

Parents' Testimony

On September 5, 2017, Disciplinary Counsel asked Pamela Binette's parents, Chris and Diane Binette, to describe any changes they had noticed in their daughter, Pamela, during the time she worked for Respondent (January 2012 through January 2013). Both parents gave recorded[5] statements.

Diane Binette was at times hesitant to talk about what she described as the "humiliating and embarrassing" treatment of her daughter by Respondent.

She was also concerned that Respondent and his step-father, Atty. M. Jerome ("Jerry") Diamond had a lot of power in the Newport Community:

> "I just see them as being so powerful. This Robinson and Diamond is so powerful over the years that whoever has been—who would ever beat them, who would ever – again that's my concern whether you win or lose, this is going to have an effect on my daughter and she has already wasted five years of her life just being in the house being afraid and cutting[6]."

Brief Summary of the Proposed Testimony of Chris Binette

Chris Binette, Pamela's father, will testify that when Pamela first went to work for Respondent she was "very energetic, very excited about working there" (for Respondent). She "talked a lot about, you know, not certain cases, but what activities go on in the courtrooms." His daughter was "very focused on that type of work." Pamela was happy.

Chris Binette will testify that "about halfway through the year roughly," things "started to go downhill." He will testify further that she complained about "certain activities" including Respondent masturbating "in the conference room" in front of his daughter. He will also testify about Respondent "tossing paper clips at her breasts or in her cleavage, and you know doing unrespectful things to her."

Brief Summary of the Proposed Testimony of Diane Binette

Diane Binette will testify that "at the beginning she was very excited about working there, loved her work, did a great job at it . . . dressed successfully . . . and she … just wanted to suck it all up and learn it all."

Diane Binette will testify that "months later" she noticed that her daughter was "not as happy." Diane Binette will tell the Panel that (Pamela) "was more open with me than she was with her father." She will testify that her daughter told her "many times what was going on" at work and that she told her daughter "quite often you don't need that crap." But, her daughter was "thankful to have a job, she was

[5] A transcript of the recording was provided to Atty. McGee, on or about, September 28, 2017.
[6] The "self-harm" referred to by Dr. Kaufman's September 8, 2017 letter to Disciplinary Counsel that advised against calling Pamela Binette to testify at deposition and merits hearing. The letter was discussed in detailed in my response to Respondent's Motion in Limine seeking to bar the testimony of Dr. Kaufman.

getting paid" and Pamela hoped that if she were able to work for a full year at Respondent's law office, it would improve her chances of getting a job with Border Patrol.

Diane Binette will testify that her daughter told her that Respondent had masturbated in front of Pamela more than once. In addition, she will testify that her daughter told her that Respondent "threw paper clips at her breasts" and that Respondent would allow clients "to all take turns throwing paper clips at Pam's breasts, and there's more . . . I mean they would slap her ass the clients and the –Glenn (Respondent. I mean you don't do that at work . . ."

Mr. and Mrs. Binette Are Entitled to Testify as to the Changes They Observed in Their Daughter

Respondent evidently does not dispute, nor could he, that Mr. and Mrs. Binette are entitled to testify as to the changes they observed in their daughter during the time she worked in Respondent's law office. They can testify, for instance, that they observed that Pam was proud and happy with her job during the first few months she worked for Respondent. They can also testify they observed a clear change in her during the summer and fall of 2012 – when they observed that she was upset, "humiliated" and "degraded" by what had happened to her at work.[7]

Respondent objects, however, to any testimony that would be "hearsay." Respondent has admitted masturbating in front of Pamela Binette in the conference room of his law office. However, Respondent objects to any testimony by the parents that recounts what their daughter told them of the masturbation incident. Pamela told her mother that she was shocked and somewhat frightened when Respondent masturbated in front of her in his law office. Respondent objects to the introduction of this testimony – testimony which would contradict Respondent's account to Detective Lance Burnham in July 2013. He told Detective Burnham then, that the masturbation incident was "consensual" in the sense that Ms. Binette had encouraged him to masturbate by exposing her breasts in the office conference and dancing provocatively.

Respondent also objects to testimony that recounts the fact that their daughter told them that Respondent threw papers clips at her breasts and into her cleavage, and allowed clients to do so as well, or testimony to the fact that their daughter told them that Respondent "slapped her ass" in front of clients while she was working in his law office.

I. The Parents Paperclip Testimony etc. Is Admissible Under VRE 803 (2)[8]

[7] Rule 701 of the Vermont Rules of Evidence permits lay witnesses to give opinions that are rationally based on their perceptions:
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

[8] It should be noted that the parents' testimony is also admissible as non-hearsay circumstantial evidence of Ms. Binette's "mental state." That is, her statements to her parents that Respondent masturbated in her presence, threw paper clips at her breasts and allowed clients to do so, are admissible, not for "the truth of the matter asserted;" but for the fact that she made them. The fact that she made them 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, as Respondent claims.

The paper clip testimony, as well as the masturbation testimony, are admissible under VRE 803 (2), the "excited utterance" exception to the hearsay rule:

> "Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

This testimony is direct evidence that Respondent "sexually harassed" Ms. Binette by engaging in "unwelcome physical conduct" of a "sexual nature" which had the effect of creating an "offensive" work environment in violation of 21 VSA §495d (13) (C). It is also compelling evidence that Ms. Binette did not agree to sign the document waiving her right to sue Respondent for sexual harassment for the reason Respondent claims she did – to "confirm" her desire to have sex with him.

The Vermont Supreme Court set out the elements of the "excited utterance" exception in *State v. Shattuck*, 450 A2d 1122, (Vt. 1982. The relevant facts in *Shattuck* were that the state sought to introduce the statement from a sexual assault to her aunt that she had "been raped." The statement came well after the sexual assault; but, it was made to the first person the victim contacted after the assault.

The Court said a hearsay statement is admissible as an "excited utterance", if:

> "(1) the statement must relate to the main event and in some way characterize that event; (2) it must be a natural statement growing out of the event rather than a narrative explaining the event[9]; (3) it must be a statement of fact rather than an expression of opinion; (4) it must be a spontaneous and instinctive utterance evoked by the fact, and not the product of reflection; (5) while the statement need not be completely contemporaneous with the event in question, the declaration must be sufficiently close in time as to exclude the possibility that it resulted from premeditation; and (6) the statement must have been made by either a participant or eyewitness of the event involved. *State v. Roy*, 140 Vt. 219, 224 (1981)

The Court went on to explain why the victim's statement to her aunt in *Shattuck*, and the events that led up to it in provided "sufficient assurances of accuracy" to qualify as an "excited utterance."

> The victim's statement to her aunt satisfies the standards outlined in *Roy*. Her spontaneous statement graphically "characterized the main event," and was presented as a statement of fact. The

---

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

[9] The scope of admissibility for "excited utterances" in criminal cases has narrowed since the *Crawford* decision by the U. S. Supreme Court in 2004. *State v. Shea*, 2008 Vt. 114. But, this change does not affect the statements here. First, this is not a criminal case implicating the 6th Amendment Confrontation Clause. Second, the statements made by Pamela Binette were not "testimonial." That is, they were not elicited by a law enforcement officer in anticipation of use at trial.

victim was emotionally overwrought, and her aunt was the first person she encountered after the incident. The circumstances of this case provide sufficient assurances of the accuracy of the statement. 141 Vt. 534

The circumstances of Pamela Binette's statements to her parents provide the assurance of "accuracy" required by *Roy* and *Shattuck.* That is, she was an eyewitness to the startling events, her parents were the first people she told as each startling incident happened and there was no chance for the "premeditation" that could lead to fabrication before she told her parents about the paper clips etc.

There were at least two reasons that there was little likelihood that the statements Pamela Binette made to her parents were fabricated.

First, Ms. Binette had no incentive to fabricate a story that showed that she had been subjected to such humiliating treatment at a job she had loved, by a boss she had learned from. Second, it is reasonable to believe that she was "under the stress of the excitement" caused by the paper clip incidents etc. when she spoke to her parents, regardless of whether it was the day the Respondent engaged in the disturbing conduct or days later.

In *US v. Lossiah,* Fed Appx. 434 (10th Cir. 2005) a panel of the 10th Circuit affirmed Lossiah's conviction for sexual assaulting a "child over the age of 12 but under the age of 16." Lossiah had argued that the trial judge committed reversible error by admitting testimony by the teacher of the victim's younger sister that the younger sister had told her (the teacher) "don't let him (defendant) check me out (of school). He raped me." The statement was made on December 19, 2000, the day Lossiah allegedly raped the child's older sister. The prosecution said the alleged rape of the younger sister - the child who made the excited utterance - had occurred on October 19, 2000.

The 10th Circuit panel said that the younger child's "excited utterance" which was made roughly three months after the "exciting event" (her alleged rape) was properly admitted. It held that that the event that triggered the "excited utterance" did not have to be the "startling event or condition," itself, it could be an event that "related to" the startling event which triggered the "stress of excitement" the alleged victim had felt at the time of the startling event. 129 Fed Appx. 436-38

In the case of the alleged victim in *Lossiah,* the triggering event was the allegation that her sister had just been sexually by Lossiah. In *Esssex v. Commonwealth,* 38 Va. App. 520,566 SE2d 876, 879 (2002), a case cited in *Lossiah,* the triggering event was the prospect that the alleged victim of a sexual assault would be returning to the home of her Aunt- the place where she said in an excited utterance that her aunt's boy-friend had raped her.

In Pamela Binette's case, she told her parents about the first masturbation incident immediately after it happened. She stayed out of several days as she tried to come to terms with what had happened. However, assuming for the sake of argument that Ms. Binette did not tell her parents about another masturbation incident or the paper clip incidents until sometime after these "startling" events took place, it is reasonable to believe that she was "under the stress of excitement" of these events when she told her parents about this bizarre and humiliating conduct. It is reasonable to believe Pamela Binette could not keep Respondent's treatment of her out of her mind despite Ms. Binette's best efforts "carry on" and keep her job.

Other "Assurances of Accuracy"

There are other facts and circumstances that corroborate and support the "accuracy" of what Pamela Binette told her parents about Respondent's treatment of her.

For instance, 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."[10]

Ms. Binette's email said in part:

> "I will not be in the office today. I will probably not be in tomorrow either[11]. 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 . . ." [12] (emphasis added)

Ms. Binette's complaints to her parents about Respondent's disturbing treatment of her at work will also be corroborated by Dr. Kaufman's testimony that in his opinion Ms. Binette's symptoms of Ms. Binette's PTSD were triggered by events that occurred during the latter part of the time she worked for Respondent in 2012 and by his opinion that these symptoms were triggered again by the prospect of "revisiting" her experiences when she testified at deposition and the merits hearing in this case.[13]

Finally, Ms. Binette's complaints to her parents are corroborated in the taped statement she gave to Detective Lance Burnham in May 2012. She told Detective Burnham at that time that Respondent had masturbated in front of her on two occasions in his law office and that he had thrown paper clips at her breasts with clients present. [14]

Ms. Binette's August 30, 2017 Recorded Statement

It is often true that admitting hearsay testimony under the "excited utterance" exception denies the opposing party the opportunity to test the credibility of the "declarant." That is not the case here. Respondent's investigator, Susan Randall, took a recorded statement from Pamela Binette at the home she shared with her parents in Beebe Plain, Vermont on August 30, 2017 around 5:30 p.m.

---

[10] Waiver drafted by Atty. Josh Diamond after discussion with Respondent and Pamela Binette in late May 2012. Attached as DC-2

[11] Ms. Binette's absence from work during August 2012 is corroborated by her paycheck records which show that her paycheck for the period from 7/19/2012 - 9/6/2012 (35 work days) was just $1,000 . Her paycheck for the preceding period 5/29/2012 -7/19/2012 (38 work days) was $1, 910. DC-

[12] August 7-8, 2012 email between Pamela Binette and Respondent. Attached as DC- , p.1

[13] The "triggering" of Ms. Binette's PTSD is discussed in more detail in Disciplinary Counsel's October 18 reply to the portion of Respondent's motion in limine which sought to prohibit Dr. Kaufman's testimony.

[14] Transcript of Pamela Binette's statement to Detective Burnham in May 9, 2012 at pp. 17-22 and 27-29. Discovery Exhibit N, provided to Respondent in June 2017.

Disciplinary Counsel, in turn. took recorded statements from Ms. Binette and each of her parents on the morning of August 31, 2017- the day after Ms. Randall interviewed Pamela Binette. Disciplinary Counsel sent transcripts of these statements to Attorney McGee, on, or about September 28, 2017.

Ms. Binette said Investigator Randall asked her about a text message in which Ms. Binette allegedly apologized to Respondent for bringing a false claim against him. Ms. Binette denied writing the text- "All I can say is I have never had a conversation like that in my life."

Ms. Binette said Investigator Randall asked Ms. Binette other questions - for instance:

> "And she asked if she could ask me a few questions about my mind state, about my mental health, and about what, you know, so – to clear some things up and that's the biggest questions she has is why -why would you go back to talk to him after your complaint."

It appeared until September 8, 2017 that Respondent would have another opportunity to challenge Ms. Binette on her claims re: paper clips and masturbation. At the time Investigator Randall served Ms. Binette with a subpoena to commanding to appear at a deposition on September 12, 2017. That deposition was cancelled after Dr. Kaufman advised Disciplinary Counsel in a September 8, 2017 letter that it would be harmful to Ms. Binette's mental and physical health for her to testify in this case.

Disciplinary counsel admits the record is confusing; but there are <u>legitimate questions</u> (raised below) as to whether Respondent intended ever intended to depose Ms. Binette on September 12, 2017:

- The subpoena duces tecum and the notice of deposition[15] Investigator Randall left for Pamela Binette required Ms. Binette to appear for deposition at "the Office of Glenn Robinson, PC, 100 Main Street, Suite 140, Newport, Vt. 05855" – Ms. Binette as upset that she would be deposed at the 100 Main Street, the office she worked in when she subjected to sexual harassment by Respondent.
    - Disciplinary Counsel has confirmed that Respondent *has not been in that office for roughly three years*.
    - Disciplinary Counsel found in the October 2, 2017 deposition of Respondent's step - father Atty. M. Jerome Diamond that Respondent has occupied an office at 328 Main Street, Newport since February 2014. [16]
- The subpoena commanded Ms. Binette to appear at deposition on <u>September 12</u>, 2017. This is *three days after* was supposed to "move out of state." According Attorney McGee a September 22, 2017 filing by Attorney McGee. Respondent expected Ms. Binette would moving out of state on <u>"September 9"</u> 2017.
    - "In late May of this year, Ms. Binette contacted Respondent and left him a message that she would be moving out of state on September 9 and invited him to join her for a send-off celebration. Respondent did not respond." "<u>Memorandum Response to Disciplinary Counsel's Motion for Protective Order and September 13, 2017</u> Memorandum" (Respondent's 9/22 Memorandum) p. 1
    - "<u>Given the fast approaching September 9 date</u> on which Ms. Binette said she was moving from the area, Respondent's attorney decided to arrange for the investigator to serve Ms. Binette with a subpoena for deposition and at the same time, have the investigator ask Ms. Binette whether she would speak to with the investigator. This was a proper step;

[15] The "Notice of Deposition Duces Tecum" is attached as DC- .
[16] Deposition of Atty. M. Jerome Diamond, October 2, 2017 at p.11: 10-14

failure to take this step would have represented a serious neglect of counsel's ethical responsibilities of diligence and competence." (Respondent's 9/22 Memorandum, pp. 3-4 (emphasis added)

- When she spoke with Ms. Binette on August 30, Investigator Randall seemed to suggest that Ms. Binette could avoid being deposed if she agreed to speak with Ms. Randall and Atty. McGee:

    - " . . . she asked me if I would be willing to meet with them and that I was probably going to be deposed and I was like I don't want to see any of them, and it -- I don't want to see any of them, and if—I don't want anything to do with it, and she's like well, you know maybe it would be in your best interest to give Scott and me a call. You know we've been - - it's ben expressed to me, she said, they would like to settle this without – without being on the record, and said I have no interest in that. No way. I don't yeah."

- The recording Investigator Randall made of her interview of Ms. Binette would clarify the record[17]. Disciplinary Counsel asked Atty. McGee for a copy of the recording on September 1, 2017 - the day after I met with Ms. Binette and her parents in Beebe Plain. He has refused to produce it.

The Panel Should Allow the Parents' Testimony Because Provides Fair Context

The testimony of Ms. Binette's parents regarding what their daughter told them: that Respondent tossed paper clips at her breasts and in her cleavage and allowed clients to do so is relevant. It tends to prove Respondent sexually harassed Ms. Binette. This testimony should be admitted under "excited utterance" exception to the hearsay rule.

The Vermont Supreme Court has said, in reversing a decision of the Vermont Public Service Board which had excluded "actual power costs" from a hearing to determine a utility's costs, that: "The exclusion of relevant evidence in an administrative proceeding is presumptively invalid." *In Re Central Vermont Public Corporation*, 141 Vt. 282, 292 (1982)

Respondent/s defense here is that Ms. Binette waived any right she might have to sue him for sexual harassment because she wanted to "confirm" her desire to have "consensual sexual relations" with him. Ms. Binette is unable to testify in this proceeding through no fault of her own. The Board should permit Ms. Binette's parents to testify as to what their daughter told them.

Dated at Burlington Vermont on October 23, 2017.

Robert V. Simpson, Jr.

Disciplinary Counsel

[17] Respondent's 9/22 Memorandum had an affidavit from Investigator Randall attached. In her affidavit, she confirmed that she had recorded her interview of Ms. Binette. But, the affidavit contains none of substance of what was said in the interview.