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 **Dr. Elliott Kaufman's** Testimony

Respondent seeks to bar the proposed testimony of Pamela Binette's long-time psychiatrist, Dr. Elliott Kaufman, M. D. His Motion in Limine (ML) cites three basic justifications for preventing Dr. Kaufman from testifying:

(1) The proposed expert testimony is not "relevant" because it does not "prove that conduct by Respondent which violated the Rules of Professional Conduct is the cause of the psychological conditions." ML p. 2 (Respondent's emphasis);
(2) The proposed expert testimony is based on "inadmissible hearsay" ML, p. 1;
(3) The proposed expert testimony is not admissible because it is not based on a "forensic examination" of Ms. Binette. ML pp. 2-3

The Panel should deny Respondent's motion for the reasons set out more specifically below.

Background

Count II of the Petition charging Respondent with Unprofessional Conduct alleges that Respondent violated Rule 4.3 of the Vermont Rules of Professional Conduct:

> ". . . 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."

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)

Specific Allegations in Count II

The admissible evidence shows that when Pamela Binette went to work for Respondent in late January 2012, she was a 29-year-old woman, struggling with PTSD, who hoped to use her work in a law office to get ahead in life. The admissible evidence also shows that when Ms. Binette went to work for him, Respondent was a 50-year-lawyer, who was about to end a sexual relationship with Cynthia Mead, a divorce client and part-time employee at the tanning salon Respondent owned. This evidence shows further that as Respondent's interest in Ms. Mead waned, he developed a keen interest in having a sexual relationship with his new legal assistant – Ms. Binette.

The Petition alleges that Respondent used his knowledge and experience as a lawyer to take advantage of Ms. Binette by advising her to sign a document entitled "Notice of Intent to Engage in Mutually Welcomed Romantic Relationship And Waiver of Claims" [1](Waiver). By signing this document, Ms. Binette agreed to waive her right to sue Respondent for sexual harassment.

The Petition also alleges that in addition to capitalizing on his legal knowledge and experience, Respondent was also able to take advantage of Ms. Binette because (1) as Ms. Binette's employer, Respondent controlled her financial independence by giving her paychecks sporadically (in four to seven week intervals) thereby forcing her to come to him to ask for cash advances when she was short of money; [2](2) according to Respondent, Ms. Binette "had no legal skills" and (3) again in Respondent's own words, she suffered from mental health challenges that "at times seriously impaired her decision making.[3]"

Respondent's answer to the charges in the Petition is straightforward. He says he did not give Ms. Binette any legal advice when he asked her to sign the Waiver. According to Respondent, the fact he was a lawyer and her boss, had nothing to do with Ms. Binette's decision to sign the Waiver. He says Ms. Binette signed the Waiver knowingly and voluntarily simply because she wanted to have sex with him[4] - sex that was not restrained, or complicated, by legal rights and responsibilities.

Evolution of the Waiver

The key piece of evidence in Disciplinary Counsel's claim that Respondent violated Rule 4.3 is Waiver.[5]

In his July 2013 interview, Respondent explained to Detective Burnham that when he and Ms. Binette began "dating" he had asked his "brother", who is also a lawyer, to draw up a contract "to protect

[1] The Waiver is attached as DC-1

[2] A summary of Ms. Binette's pay, which is attached as Exhibit DC -2 and was provided by Respondent, shows that Ms. Binette received paychecks in uneven intervals -every four to seven weeks – and that she netted a total of $13,164.75 for the year she worked for Respondent (January 2012 through January 2013).

[3] Respondent's statements to Vermont State Police Detective Lance Burnham on July 3, 2013. These statements are admissible as "statements by a party opponent." Vermont Rules of Evidence (VRE) 801 (d) (2) (A)

[4] Respondent 's Answer (attached as DC-3), in response to allegations in Count II and III at ¶18: "Respondent does not recall the words he used during his interview with Detective Burnham but admits that he and Ms. Binette **signed an agreement confirming their desire to have consensual sexual relations**." (emphasis added)

[5] DC-1

Pam." [6] The evidence shows, however, that the Contract was never intended to "protect Pam." It was intended to protect the Respondent.

Deposition Testimony of Atty. M. Jerome ("Jerry") Diamond and Atty. Josh Diamond

Respondent told his step-father, Atty. Jerry Diamond that he intended to "date' his legal secretary, Ms. Binette, during a five-day trip that Respondent and Atty. Diamond took to Colorado in mid-May 2012. Jerry Diamond testified at his October 2 deposition that Respondent had described to him how Ms. Binette was "coming on" to Respondent in a sexually-suggestive manner at work. Atty. Jerry Diamond testified further that he advised his step-son to "get something in writing" from Ms. Binette which acknowledged that her relationship was "voluntary" and not the product of "undue influence." Respondent agreed "that would probably be a good idea." [7]

Atty. Jerry Diamond went on to testify that he told Respondent that Jerry's son, Atty. Josh Diamond (Respondent step-brother) did "a lot of employment law" and suggested Respondent might want to contact him. Jerry Diamond said that when he returned from the Colorado trip (probably in late May) he spoke to Atty. Josh Diamond in Josh's office in Montpelier and "explained." Jerry said he told Josh "he might want to give Glenn (Respondent) a call." [8]

Atty. Josh Diamond testified at his deposition that he called Respondent, probably on the same day his father, Jerry, spoke to him. He spoke to Respondent and Ms. Binette in Respondent's Newport office over a "speaker phone." He said that Respondent, who he said did most of the talking, and Ms. Binette were "contemplating dating each other" and that Respondent "wanted a form related to that." Atty. Josh Diamond testified further:

> "I don't recall the specifics of the conversation. My general recollections are that he asked that the document reflect that this was a mutual relationship, that there be a release from sexual harassment or gender discrimination claims and I generally recall some request that there be some type of mutuality reflected." [9]

Josh Diamond prepared the document Respondent requested and sent it to Respondent in Newport. The document[10] is a straight waiver of Ms. Binette's right to sue which provides no protection for her and does not require Respondent to give up anything[11].

The contract prepared by Josh Diamond was titled: "Notice of Intent To Engage in Mutually Welcomed Romantic Relationship And Waiver of Claims." It said:

> "1. Employer (Respondent) agrees to base all decisions on the terms and conditions of Employee's (Ms. Binette) employment on job performance and/ or economic conditions of the

[6] Detective Burnham's summary of his interview with Respondent. P.16
[7] Deposition of Atty. M. Jerome ("Jerry") Diamond in the afternoon of October 2, 2017 (Jerry Diamond) p.19: 1-p.20:14
[8] Jerry Diamond p. 20:15 -18
[9] Deposition testimony of Atty. Josh Diamond during the morning of October 2, 2017 (Josh Diamond) p.
[10] DC-4
[11] Josh Diamond testified at his deposition that paragraph #1 "could be read to infer" that Respondent gave up his right to fire Ms. Binette "at will." Josh Diamond p. 29:4-6

business. Employer shall not base any decision on the terms and conditions of Employee's employment based upon any Romantic relationship, or lack thereof.

2. Employee agrees that the romantic relationship with Employer (Respondent) is mutual consent and she welcomes the relationship with Employer. Employee agrees that her interest in pursuing a romantic relationship with Employer is done freely, voluntarily and without any undue coercion or duress."

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

Ms. Binette did not sign the proposed waiver of her rights. Roughly two months later, on August 7, 2012, Ms. Binette sent an "angry email" to Respondent which said in part:

"I will not be in the office today. I probably will not be in tomorrow either . . . I do not feel respected as an employee, individual or human being due to your recent behavior and comments. I have felt threatened and forced to cooperate and I am not going to let this happen any longer. . ."

Respondent replied by email the following day. He told Ms. Binette that if she didn't want to sign the "papers we drafted with Josh, that's fine." He went on to tell her that if she wanted a "professional relationship based only on your employment here, that's fine. . . The job is yours as long as you show up for work. . ." [12]

Ms. Binette held off signing the document for approximately two more months. She finally signed it on September 28, 2012. Respondent had added a fourth paragraph which said, in effect, that Ms. Binette could keep her job as long as she showed up for work.

"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 some 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 comes to work in spite of her condition."

Dr. Kaufman's Proposed Testimony

Dr. Kaufman is Board Certified in Psychiatry by the American Board of Psychiatry and Neurology. His testimony will be based on Dr. Kaufman's training and experience, most specifically his experience as Ms. Binette's treating psychiatrist. His proposed expert testimony is summarized in a letter he wrote to Disciplinary Counsel, on September 8, 2017[13] (Exhibit DC-1)

[12] Attached as DC-5.

[13] Disciplinary Counsel provided the letter to Attorney McGee on September 12, 2017 as Discovery Exhibits U. It is attached as Exhibit DC-6. Disciplinary Counsel filed his witness list on September 18, 2017. At that time, he was described as a witness (#8) who would testify as to his observations of Ms. Binette's mental and physical condition "during the relevant time period – Fall 2011 – Fall 2013." On September 28, 2017, I sent Attorney McGee the specific questions I would ask Dr. Kaufman at the Merits Hearing.

Dr. Kaufman's testimony is expected to consist of the observations and opinions he made in his letter September 8 letter:

- Dr. Kaufman has been treating Pamela Binette for a "mental health disorder" known as Post-Traumatic Stress Disorder (PTSD) "since prior to 2012" - the year Ms. Binette worked for Respondent. (DC-1, pp.1-3)
- Dr. Kaufman is expected to testify that Ms. Binette has "a history of adult and childhood trauma that makes her vulnerable to being re-traumatized when exposed to triggering events." He is expected to testify further that in his opinion, "this is what happened" in early September 2017 when she continued to face the prospect of "revisiting the history of what was a traumatic experience" at a deposition scheduled by Respondent for September 12, 2017.[14] DC-1, p.1
- Dr. Kaufman is expected to testify further that when he spoke to Ms. Binette in early September 2017 "she expressed self-harm thoughts and impulses" and that "her history does include acts of self-harm so I take such concerns very seriously." Id.
- Dr. Kaufman is expected to testify from his recollection and his "review to some extent, of prior medical records", that in 2012, Ms. Binette "was initially pleased to be working for an attorney (Respondent), then after some weeks expressed increasing distress as her experience at work seemed to trigger symptoms significantly." DC-1, p.2
- He is expected to testify further that "the basis of (his) understanding lies in what is known about Post Traumatic Stress Disorder (PTSD) and the role triggering events play in causing an exacerbation of symptoms which I believe occurred while at work at that time." Id. (emphasis added)
- Dr. Kaufman is expected to testify further that when Ms. Binette's PTSD is in "remission" Ms. Binette could perform at normal levels at work; but, that "when symptomatic" PTSD "can impair executive functions such as decision making." DC-1, p. 3

I. Dr. Kaufman's Proposed Testimony Is Relevant

The central claim in Respondent's motion to bar Dr. Kaufman's testimony is his claim that Dr. Kaufman testimony is not "relevant", because it will not prove Respondent's unprofessional conduct – advising or urging Ms. Binette to waive her right to sue him for sexual harassment- "caused" Ms. Binette's "psychological condition."

> "Whether Ms. Binette suffers from one or more psychological conditions is only relevant if Disciplinary Counsel has admissible evidence to prove that conduct by Respondent which violated the Rules of Professional Conduct is the cause of the psychological conditions." ML p. 2 (Respondent's emphasis)

[14] Pamela Binette described Respondent's demeaning, humiliating and threatening treatment of her to her parents, Diane and Chris Binette, while it was happening – i.e. during the latter half of the time she worked for him - July 2012 through January 2013. This treatment is described in more detail in Disciplinary Counsel's Reply to Respondent's Motion to Bar the Testimony of Ms. Binette's Parents which will be filed separately from this document.

Disciplinary Counsel is entitled to admit any relevant evidence to prove his case as long as the probative value of his evidence is not "substantially outweighed by the danger of unfair prejudice." Vermont Rules of Evidence (VRE) 402, 403.

VRE 401 defines "relevant evidence":

> "Relevant evidence" means evidence having any tendency to make the existence of **any fact that is of consequence** to the determination of the action more probable or **less probable** than it would be without the evidence." (emphasis added)

VRE 702 defines when expert testimony is admissible:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." (emphasis added)

Despite Respondent's claim to the contrary, Dr. Kaufman does not have "to prove that conduct by Respondent which violated the Rules of Professional Conduct is the cause of" (Ms. Binette's) "psychological conditions" in order to be "relevant."

Respondent has admitted that Ms. Binette, who was not represented by a lawyer, signed the waiver of her right to sue him for sexual harassment. He also appears to acknowledge that their interests were in conflict. That is, by waiving her right to sue Respondent for sexual harassment, Ms. Binette gave up a legal right which had the effect of conferring a benefit on him.

Respondent has chosen, instead, to base his defense on his claim that presenting the Waiver to Ms. Binette, and asking her to sign it, did not constitute "legal advice." According to Respondent the intent of the Waiver was to memorialize the parties' mutual "desire to have consensual sexual relations." According to Respondent's reasoning, the fact that Ms. Binette waived her right to sue him for sexual harassment is an incidental, unintended benefit.

Disciplinary Counsel contends, given the facts and circumstances surrounding Ms. Binette's signing of the contract, that it is not reasonable to believe, as Respondent claims, that she knowingly and voluntarily signed the Waiver because she wanted to have sex with Respondent. Dr. Kaufman's testimony will be offered to prove Respondent's claim is not reasonable.

As noted above, Dr. Kaufman is expected to testify that Ms. Binette suffered from chronic PTSD at the time she worked for Respondent. He will testify that she is vulnerable to being retraumatized by "triggering events." He will say that Ms. Binette "was initially pleased to be working for an attorney (Respondent), then after some weeks (she) expressed increasing distress as her experience at work seemed to trigger symptoms significantly." He is expected to testify further that the very prospect of "revisiting" the "history of the traumatic experience" that she lived through in working for Respondent caused her to consider "self-harm."

Respondent does not get to dictate what "fact of consequence" Dr. Kaufman may testify to. Dr. Kaufman's testimony will assist the Panel in deciding a "fact that is of consequence." i.e. whether to credit Respondent's claim that Ms. Binette waived her right to sue Respondent for sexual harassment solely because she wanted to have "consensual sexual relations with him."

His testimony will also help the Panel decide whether Ms. Binette's PTSD impaired her decision-making when she allegedly knowingly and voluntarily signed the Waiver of her right to sue and "consented" to engage in sexual activity with Respondent.

II. Dr. Kaufman's Proposed Testimony Is Relevant and Admissible

Respondent claims that Dr. Kaufman's testimony must be barred because it will be based on inadmissible hearsay:

> "Respondent Objects to the proffered testimony from the parents ***and the psychiatrist*** 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)

Rule 703 of the Vermont Rules of Evidence is clear - expert witnesses are entitled to rely on inadmissible, evidence, including hearsay, in reaching their opinions:

Rule 703 – Factual Bases of Opinion by Experts

> "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)

Again, Respondent has cited no law in support of his claim that Dr. Kaufman's expert testimony must be prohibited because it is based on inadmissible hearsay. Again, that is because there is none. Under VRE 703, Dr. Kaufman is entitled to rely on what Pamela Binette told him (e.g. she contemplated "self-harm" when she thought of testifying about her experiences as Respondent's employee) in reaching his expert opinion and explaining that opinion before the Panel.

III. Dr. Kaufman Testimony Will Assist the Panel in Understanding the Evidence and in Determining "a Fact in Issue"

Respondent contends that Dr. Kaufman should not be permitted to testify unless he has "conducted a forensic examination.'

> "Unless Dr. Kaufman has conducted a forensic examination that will provide the basis for expert testimony linking Ms. Binette's mental condition to professional misconduct by Respondent, he should not be permitted to testify." Respondent's Motion in Limine, p. 2

Disciplinary Counsel is familiar with "forensic examinations" conducted by "forensic psychiatrists" in criminal cases – often in homicide cases. These psychiatrists make their living by assessing whether a defendant is competent to stand trial (i.e. assist his lawyer in his defense). For instance, *State v. Beaudoin,* 185 Vt. 164. 166 (2008) forensic psychiatrist, Jonathan Weker testified in a "lewd and lascivious conduct with a child case" that he had performed "more than 1,000 competency evaluations. Forensic psychiatrists also testify as to whether a particular defendant had the requisite mental state at the time of the alleged crime to be held criminally responsible for his acts.

These experts then testify at trial, and occasionally at *Daubert* hearings, in support of their conclusions. Brief research suggests that most reported cases in Vermont involving "forensic psychiatrists" were criminal cases, or arose from criminal cases.[15]

Disciplinary Counsel is not aware of any statute or rule which prohibits a treating psychiatrist such as Dr. Kaufman, who has not conducted a so -called "forensic analysis" of his patient, from giving expert testimony describing his patient's PTSD and offering his opinion on its effect on his patient's judgment and mental and emotional condition. In fact, brief research again shows that there are dozens of cases throughout the country in which "treating psychiatrists" have given expert opinions at trial and depositions in civil and administrative cases concerning their patients' PTSD. [16]

As noted above under VRE 702, Disciplinary Counsel is entitled to present expert testimony when that expert's "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . ."

Dr. Kaufman's testimony will be uniquely helpful to the Panel because he is the only psychiatrist who can draw on his personal observations of Ms. Binette's mental condition during the period from June 2012 – September 2012 - the period during which Respondent was asking Ms. Binette to sign the waiver of her right to sue him for sexual harassment - a right which she ultimately gave up in exchange for Respondent's agreement to allow her to keep her job.

As noted above, Dr. Kaufman will assist the Panel in understanding why it is not reasonable to believe , as Respondent claims, that the fact that is an attorney and Ms. Binett'es employer, had nothing to do with Ms. Binette's decision to waive her rights and that the sole reason that she signed the Waiver was because she "welcomed" the opportunity to have sex with him.

As noted in Part I, above, his testimony will also tend to prove that it is not reasonable to believe that Ms. Binette knowingly and voluntarily waived her right to sue or consented to sex with Respondent. That is,

> "Dr. Kaufman is expected to testify further that when Ms. Binette's PTSD is in "remission" Ms. Binette could perform at normal levels at work; but, that "when symptomatic" PTSD "can impair executive functions such as decision making." DC-1, p. 3

In fact, Dr. Kaufman's testimony will corroborate Respondent's own assessment of the nature of Ms. Binette's mental health around the time he employed her. That is, he told Detective Burnham that he

[15] Google Scholar – Vermont cases – "forensic psychiatrists." "Screen shot" attached as DC-7
[16] Westlaw – "treating psychiatrist" /s PTSD" -DC-7

"liked Pam" – but he noted that she suffered "mental health concerns" that "at times seriously impaired her decision making."

Dr. Kaufman's proposed testimony is relevant and admissible. It will assist the Panel in determining two matters of consequence in this case: (1) whether it is reasonable to believe Ms. Binette signed the waiver of her right to sue Respondent for sexual harassment because she wanted to have sex with him and (2) whether it is reasonable to believe M.s Binette's PTSD impaired her decision-making during the period she worked for Respondent (January 2012 through January 2013).

Respondent's motion to prohibit Dr. Kaufman from giving expert testimony in this case should be denied.

"Independent Psychological Evaluation"

Respondent indicated in footnote 2 of his Motion in Limine that he claimed the right to conduct an "independent psychological evaluation" of Ms. Binette.

Disciplinary Counsel asks the Panel to prohibit an "independent psychological evaluation" of Ms. Binette. First, such an evaluation is likely to be harmful to her for reasons given by Dr. Kaufman in his September 8, 2017 letter (DC-6). Second, based on the representations made in footnote 2, it will unnecessarily delay this proceeding. Respondent has failed to demonstrate how a forensic psychiatrist, retained by Respondent, will assist the panel in assessing Ms. Binette's mental condition at the time she signed the waiver on September 28, 2012.

The potential harm to Ms. Binette, together with the unfairness to the other complainants, that would result from delay of the merits hearing in this matter far outweigh any potential assistance the testimony of a forensic psychiatrist would give to the Panel.

Deposition by Skype

If the Panel denies Respondent's motion to bar Dr. Kaufman's testimony, Disciplinary Counsel requests that the Panel issue an Order requiring Respondent to conduct his deposition of Dr. Kaufman by Skype. As discussed in more detail in the Witness List that Disciplinary Counsel filed on September 18, Dr. Kaufman, who will be 82-years-old on November 15, splits his practice between treating patients in Maine and Newport, Vermont. He only treats patients in Newport two days per week.

Attorney McGee and Dr. Kaufman have thus far been able to agree on a deposition date. Dr. Kaufman has suggested a deposition by Skype (or some other video-conferencing technology) as means of working out the conflicting schedules. Attorney McGee has refused. His refusal is not reasonable under the circumstances.

Accordingly, Disciplinary Counsel asks that the Panel issue an Order requiring that the deposition of Dr. Kaufman be conducted by Skype of some other video-conferencing technology.

Dated at Burlington, Vermont on October 18, 2017

Robert V. Simpson, Jr.
Disciplinary Counsel