

STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY PROGRAM

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

Disciplinary Counsel's Reply to Respondent's Proposed Findings and Conclusions

To accept Respondent's Proposed Findings and Conclusions, the Panel must find that the Respondent's testimony at the merits hearing was credible. The Panel should find that Respondent's testimony was not credible for the reasons set out below.

Discussion

Respondent engaged in unprofessional conduct, first by asking Ms. Pamela Binette to sign a document waiving her right to sue him for sexual harassment and later, after she declined to sign the agreement and sent an email charging him with violating her rights as an employee, by pressuring her into an unconscionable, negotiated agreement. Under the terms of the agreement, which was titled "Notice of Intent to Engage in Mutually Welcomed Romantic Relationship and Waiver of Claims" (Waiver Document -DC 5), Ms. Binette waived her right to sue Respondent for sexual harassment (§ 3 of the Waiver Document) and Respondent agreed that Ms. Binette could keep her job as long as she made her best efforts to show up for work on time (§ 4 of the Waiver Document).

During the merits hearing in this case in November 2017 and January 2018, Respondent concocted three, startlingly false stories in which he attempted to shed responsibility for the Waiver Document.

First, he claimed his brother, alone, was responsible for the provision in the Waiver Document in which Ms. Binette waived her right to sue Respondent for sexual harassment. Next, he claimed, that it was Ms. Binette, not Respondent, who had insisted on signing the Waiver Document. She did so, according to Respondent because she was in a hurry to have "sexual interaction" with him. Finally, in the waning hours of the hearing, Respondent claimed that he and Ms. Binette had signed, an as yet undisclosed document which, according to Respondent, did not include the provision (§ 3) in which Ms. Binette waives her right to sue Respondent for sexual harassment.

1. Respondent Makes the False Claim that He Never Intended to Ask Ms. Binette to Waive Her Right to Sue Him for Sexual Harassment and Blames His Brother

In May 2012, Respondent told his father, Atty. M. Jerome ("Jerry") Diamond that he planned to enter a dating relationship with his legal secretary (Ms. Binette). Jerry Diamond advised his son that it would be good idea to get an agreement "in writing" from Ms. Binette which confirmed that the relationship that she was about enter with Respondent was "voluntary." Respondent agreed that it would be a good idea. DC's Proposed Findings of Fact (F) 32 and Tr. 220:12-22

Atty. Jerry Diamond suggested that Respondent's step-brother, Attorney Joshua ("Josh") Diamond, who had experience in Employment Law, could draft the agreement. Jerry asked Josh to draft

the document. Josh agreed. F33-35 Since Atty. Josh Diamond practiced law in Montpelier, he called Respondent in Newport and they discussed what Respondent wanted in the agreement. Ms. Binette was also present. She listened as Respondent and Josh spoke over the speaker phone. F 36

Atty. Josh Diamond testified before this Panel during the morning of November 14, 2017. Atty. Diamond testified that Respondent told him that he (Respondent) wanted three provisions in the document:

“He asked for three things. One, that it reflect the relationship was mutual and welcoming; two that the document contain a release of sexual harassment or gender discrimination claims; and, three, he used some term of art, I think it was mutuality.” F37, Tr. 286:10-14 (emphasis added)

Atty. Josh Diamond testified that after the call, he drafted a document and emailed it to Respondent. F38 Atty. Josh Diamond testified further that the document he emailed to Respondent, which was admitted into evidence at the November 14 hearing as DC-2, contains the provisions Respondent had specifically asked for.

The document (DC-2) is titled: “Notice of Intent to Engage in Mutually Welcomed Romantic Relationship and Waiver of Claims.” It says in paragraph 2 that Ms. Binette has agreed to give up any claim that she has been coerced into a “romantic relationship” with Respondent. It says in paragraph 3 that she waives any right she may have to sue Respondent for sexual harassment or gender discrimination:

¶ 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.

¶ 3 Employee agrees to waive any and all demands, claims or other actions 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 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 (emphasis added)

If the Panel compares the document Atty. Josh Diamond drafted for Respondent (DC-2) with the document that Respondent and Ms. Binette signed on September 28, 2012, it will see that the document Ms. Binette and Respondent signed, which Respondent stipulated into evidence as DC-5 (Waiver Document), is the same in all material respects<sup>1</sup> as the document Respondent’s brother drafted for him in late May 2012.

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<sup>1</sup> The Waiver Document (DC-5) = the document that Ms. Binette and Respondent signed on September 28, 2012 - does contain an additional paragraph that Ms. Binette requested because she hoped to bolster job security (¶ 4) and another that requires Ms. Binette to agree to work weekends if necessary (¶ 5). **But**, it contains the same two paragraphs – paragraphs that are grossly unfair to Ms. Binette - that Atty. Josh Diamond included in the document (DC-2) that he drafted for Respondent:

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

Respondent's Testimony: Respondent testified before the Panel on the afternoon of November 14, 2017. He directly contradicted the testimony his brother, Atty. Josh Diamond, had given that morning. That is, he denied any responsibility for ¶ 3 - the paragraph which says Ms. Binette waives any claim she has for "gender discrimination" or "sexual harassment" . . . "arising against employer by virtue of her romantic relationship with Employer and her employment by Employer." F138, 139 In effect, Respondent testified under oath that his brother, Josh, was a liar.

Respondent testified that he was "disappointed" with what his brother, Josh, had drafted. He said he had "the impression that he (Josh) got it off the internet as a standard form. . . I did not, and neither did Pamela, ask him for a form that said to waive sexual harassment claims or anything like that." He said he had "disregarded the document." F 139 and Tr. 516: 9-25 (emphasis added)

Testimony of Vermont State Police (VSP) Detective Lance Burnham: Respondent's testimony not only contradicted his brother's testimony; but, it was also at odds with a statement Respondent had given to VSP Detective Lance Burnham in July 2013. Respondent's testimony was the first step in a steady retreat from the document his brother had drafted for him that continued throughout the merits hearing.

Detective Burnham interviewed Respondent on July 3, 2013 to get his reaction to complaints made by Andrea Poutre and Ms. Binette. Respondent did not tell Detective Burnham that he had "disregarded" the document his brother had sent him – far from it. He touted the document his brother had drafted for him. He claimed it "protected" him. In fact, he tried to convince Detective Burnham that the document not only provided "protection" for Respondent; but, according to Respondent, it provided protection for Ms. Binette as well.

Respondent explained to Detective Burnham that at some point before he and Ms. Binette agreed to "date," Respondent 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." F 108 Tr. 237: 16-25; Tr. 238:1-10

Detective Burnham recounted Respondent's explanation of the "contract" for the Panel.

"He said it was going to protect Pamela because if they did end up getting into a romantic relationship and if that relationship had ended badly this protected her, that she wouldn't be able to sue him, or either party wouldn't be liable for any type of lawsuit . . . because of her working relationship and because of their romantic relationship." TR 238: 1-9

Respondent continued to believe in the "protection" the Waiver Document (DC-5) afforded him well after his interview with Detective Burnham. Four months later, he sent the Waiver Document (DC-

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¶ 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. DC-5 (The italicized sections indicate minor "edits" done by Respondent. For instance, the word "against" was inadvertently left out of the document (DC-2) that Josh Diamond drafted.)

5) to former Disciplinary Counsel<sup>2</sup> while they were trying to decide whether to charge him with unprofessional conduct.

### Respondent's Testimony Is False

The Panel should reject, as false, Respondent's testimony that he "disregarded" the document his brother, Atty. Josh Diamond drafted for him and his testimony that he never asked his brother for a provision calling for Ms. Binette to waive her right to sue.

To accept Respondent's testimony, the Panel would have to believe that Atty. Josh Diamond and Detective Burnham did not tell the Panel the truth.

#### 2. Respondent Admits that He Masturbated in Front His Employee, Ms. Binette, in His Law Office - But He Blames Ms. Binette for Leading Him On

Ms. Binette told the Panel that in late July 2012 Respondent masturbated in her presence and ejaculated on his desk at his law office. F 50 This incident followed more than two months of bizarre, demeaning treatment of Ms. Binette by Respondent.

All agree that for the first two or three months of her employment, Ms. Binette was very happy working for Respondent. However, April 24, 2012, treatment notes written by Ms. Binette's psychiatrist, Dr. Elliot Kaufman, show that on that date Ms. Binette came to the office with her mother and complained of Respondent's "unwelcome advances" toward her. Dr. Kaufman's "assessment" of Ms. Binette was that she was "anxious" and that her "PTSD symptoms surfaced as problems emerged with her boss." F 29, DC 27

Ms. Binette testified that in the months that followed, Respondent grew unhappy with her for refusing to "cooperate" in easing his sexual frustration. He blamed his sexual frustration on her for the way she dressed. F 30 Respondent accused her of being "too immature to handle an at-work relationship". F46 He called her derogatory names and developed a bizarre and demeaning practice of occasionally throwing paper clips at Ms. Binette's breasts and cleavage with clients present. F31, DC 24

Sometime toward the end of July, Ms. Binette thought it was July 27, Ms. Binette gave in and played what she refers to as the "tease game." Ms. Binette said the "tease game" was Respondent's idea. He asked her to: "Give me a little show. Come on tease me. You know you want to". F 49

Much to her shame and humiliation, Ms. Binette complied. She told the Panel that: "I unbuttoned my shirt and dropped some bra strap and then it was over – I also had to pull on his tie." Tr. 763: 11-21 Respondent ejaculated on his desk. Tr. 765: 9-12 Ms. Binette was asked later to explain further about the "tie" – "sort of a chronology of events." Ms. Binette responded: "Okay, I unbuttoned my shirt, took a strap down, while he was masturbating he said, 'pull my tie' and I (reached) across the desk and pulled it." Tr. 814: 23-25; Tr. 815: 1-3, F 50

Dr. Kaufman's treatment notes corroborate Ms. Binette's testimony. His notes for July 17, 2012, show that he observed Ms. Binette was "tearful and upset" and his "assessment" was that, based on what Ms. Binette had told him, her "PTSD symptoms had become exacerbated by unwanted sexual advances from her boss." F 47, F 48, DC 29 In his treatment notes, taken during Ms. Binette's July 31, 2012 visit,

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<sup>2</sup> The "header information" on the Waiver Document (DC-5) shows Respondent faxed the document on November 20, 2013. DC-5, p. 1

Dr. Kaufman observed that Ms. Binette was “clearly upset” and that “there was a situation causing her much distress related to her job.” F 54, F 55, DC 30

Ms. Binette told the Panel that after Respondent masturbated and ejaculated on his desk following the “tease game,” she picked up her purse and went home and told her mother what had happened. She said was determined not to go back to work. She “boycotted” work - stayed out of work for the period from July 27 until sometime in the “middle of August.” F50

Ms. Binette’ testimony that she went directly home and told her mother what had happened was corroborated by her mother, Diane’s, testimony. Mrs. Binette confirmed that her daughter had told her that Respondent had masturbated in front of her at work and ejaculated his desk, on the same day the “masturbation incident” happened. Mrs. Binette testified that her daughter was home when Mrs. Binette got home from work. Her daughter was “clearly very upset”, “humiliated “– “felt terrible.” F 52

Pamela Binette’s testimony that she “boycotted” work until the “middle of August”, is corroborated by her pay records covering the period from late July through August and up to September 6, 2012. These records show that Ms. Binette worked less than 40 % of the available work hours during that period. F 60 Her testimony that she “boycotted” work until mid-August after the “masturbation incident” is further corroborated by an email she wrote to Respondent on August 7, 2012 (discussed in more detail below) in which she complains of Respondent’s treatment of her and says she will not be returning to work for a while. DC 3

#### Respondent’s Version of the July 2012 “Masturbation Incident

In his January 3, 2018, testimony, Respondent admitted that he had masturbated in front of his employee, Pamela Binette in July 2012. But, he went on to tell the Panel, as he had in November 2017 concerning another employee, Andrea Poutre, that he had only done so because his employee had led him on -in effect, he said, Ms. Binette made him do it.

Respondent 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 said 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. He told the Panel in detail how Ms. Binette allegedly removed her shirt, then her bra and exposed her breasts to him. Tr. 1078: 17-25; Tr. 1079: 1-22 Respondent continued with a detailed account of his efforts to resist her advances:

“. . . then I said, “we need to stop this.” She said “Why?” And I said: “Because I am getting very excited.” And she said: “I have no problem with that.” Well, she didn’t say it that way, but, she said: “That’s fine. Go ahead.” And I said, “I think – I have- and I have never done anything like that before in my life. It just happened. And-

Q. And did you - did you actually ejaculate under your pants?

A. I adjusted my pants, and she said: “What are you doing?” And I said: “I’m getting excited.” And she said, “I want you to.” And, so I put my hand outside my pants and made myself have an orgasm.

Q. Okay?

A. *And while I was doing that she encouraged it. And afterwards, she said: "That was kind of interesting." And, I was like, "Oh my God, I can't believe that just happened," And that was that, yeah.* Tr. 1079: 23-25; Tr. 1080: 1-15 (emphasis added)

#### Respondent's Version of July 2012 "Masturbation Incident" Was False

To believe Respondent's version of the incident, the Panel would not only have to believe Ms. Binette lied to the Panel; it would also have to ignore the corroborating testimony of Ms. Binette's mother, Dr. Kaufman's treatment notes, describing Ms. Binette's emotional condition during late July 2012 and the email to Respondent on August 7, 2012 (approximately two weeks after the incident), in which Ms. Binette said: ". . . I do not feel respected as an employee, individual or human being, due to your recent behavior and comments. . ." DC 3

In addition, the Panel would have to believe Respondent's claim that Ms. Binette found watching her boss masturbate in front of her in his law office "kind of interesting." Tr. 1080: 13-15

#### 3. Respondent Claims Ms. Binette Told Him that Her Email Charging That He Had Violated Her Rights Was Not Really About Him- It Was an Attempt to "Cover Up" Her Abortion

As set out above, Ms. Binette emailed Respondent on August 7, 2012. She not only told Respondent that she did not feel "respected as an employee, an individual or as a human being"; but, she also specifically complained of the "removal of (her) rights granted under the Vermont statutes as amended and Fair Employee Acts." She closed the email by saying 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 p.1

Although Respondent says he was "caught off guard" by Ms. Binette's email, his reply the following day makes it clear, he understood what she was talking about. First, he said: "If you do not want to sign the papers we drafted with Josh, that's fine."<sup>3</sup> Then he went on to threaten Ms. Binette's job. He wrote: "If you don't want to follow through on dating, that's fine too. If you want to have a professional relationship based only on your employment here, that's fine. I have told you that several times. The job is yours as long as you show up for work. Otherwise you need an excused absence from work. I have been very good with being flexible with you . . ." DC-3, F 56, 57

Although Respondent understood what Ms. Binette meant when he replied to her in August 2013, he testified at the January 3, 2018 merits hearing that Ms. Binette had later 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 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)

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<sup>3</sup> As noted earlier, Respondent testified that he had "disregarded" the email his brother, Josh Diamond, had written. (DC 2) His reply to Ms. Binette's email makes it clear that Respondent had not disregarded the agreement his brother had drafted. It also makes it clear that he had asked Ms. Binette to sign the agreement. DC 3, p.2

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"<sup>4</sup> 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

To believe Respondent's testimony, the Panel would have to believe that when Ms. Binette wrote the email complaining of Respondent's treatment of her (DC 3), Ms. Binette actually wrote the email to "cover up" her decision to have an abortion in 2011 from her mother – decision her mother was aware of and had supported.

#### Respondent's Treatment of the August 7, 2012 Email in His Memorandum of Law

Respondent says in his "Memorandum with Respect to Counts II and III" (R-Memo) that "the email caught him off guard and was inconsistent with his relationship with Ms. Binette, but, he immediately took steps to address the concerns she expressed". R - Memo, pp 3-4 (emphasis added)

Respondent never explains what these "steps" were. In fact, Respondent testified in response to a question from a Panel member that he only spoke to Ms. Binette about the email once ("abortion cover up" discussed above). After that, he never said, or did, anything to address the concerns Ms. Binette had expressed in the email. F 57

In fact, the only "step" Respondent took to "address" the concerns Ms. Binette expressed in her August 7, 2012 email was to use the knowledge and experience he had gained as a lawyer and the power he had as Ms. Binette's employer to pressure her into signing an unconscionable agreement - the Waiver Document (DC 5)

#### 4. More Nonsense - (1) Respondent Claims Ms. Binette Insisted on Signing the Waiver Document (DC 5) Because She Wanted to Have Sex with Him and (2) Respondent Claims the Document He and Ms. Binette Signed Did Not Contain a Waiver of Ms. Binette's Right to Sue

Ms. Binette testified on January 2, 2018, that she had signed the Waiver Document (DC 5) after Respondent had told her that his father, former Vermont Attorney General M. Jerome "Jerry" Diamond

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<sup>4</sup> 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

was on the way and that if they both hadn't signed the document before Jerry Diamond got there, they would "both be in a lot of trouble." F 67

When she signed the Waiver Document, Ms. Binette gave up the rights she had demanded in her August 7, 2012 email. That is, she gave up her right to sue (DC 5, ¶ 3) Respondent for his failure to respect her "as an employee, individual and human being." She also gave up her demand for an "agreement that would compensate her for her "loss of integrity, finances, employment and reputation." DC 3, p.1 For his part, Respondent agreed to continue to give Ms. Binette "latitude" (DC 5, ¶ 4) when she showed up late for work<sup>5</sup>.

Ms. Binette told the Panel that she felt she had been forced to sign the "contract." She said that she had asked for the "latitude" provision (¶ 4) because she felt that "if I was going to sign my rights away, I would at least not be fired." F 71, F 72 (Respondent had threatened to become less "flexible" about her being late for work when he replied to Ms. Binette's August 7 email<sup>6</sup>.)

Ms. Binette said that Respondent had not advised her to have her own attorney<sup>7</sup> review the contract before she signed it. F75 She told the Panel she went home after she signed the contract and told her father what had happened. She did not go to Respondent's condo and have "sexualized contact" with him. F66, Tr. 846: 1-9

#### Respondent's Version

Respondent testified the day after Ms. Binette testified. He made two claims that are at odds with the evidence and common sense.

Claim 1 Respondent testified that he did not pressure Ms. Binette into signing the Waiver Document (DC-5) She insisted on signing it.

Respondent testified that at some point "months" after the masturbation incident, Ms. Binette came to him in his office 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

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<sup>5</sup> Ms. Binette was often late for work. At one point, she explained to the Panel that she had "agoraphobia" – a "fear of leaving your own home." Tr. 750: 2-3 Ms. Binette testified that when she signed the Waiver Document on September 28, 2012 (DC 5), she had asked Respondent to add paragraph 4. "I was afraid I was going to be fired for being late so asked (Respondent) to put in paragraph, which states that he'll give me latitude for my lateness as long as I keep working on it . . ." Tr. 779:17-20

<sup>6</sup> "If you don't want to follow through on dating, that's fine too. If you want to have a professional relationship based only on your employment here, that's fine. I have told you that several times. The job is yours as long as you show up for work. Otherwise you need an excused absence from work. I have been very good with being flexible with you . . ." DC 3, p.2 (emphasis added)

<sup>7</sup> Ms. Binette's testimony is corroborated by the testimony of Detective Burnham. He told the Panel that when he interviewed Respondent on July 3, 2013, Respondent told him that Ms. Binette had taken the "contract" home to review it. But, Respondent made no mention of advising her to have her attorney review it before she signed it. F109, F110

Respondent told the Panel that the evening the Waiver Document was signed, September 8, 2012, 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 pulling her clothes off*” because “*she likes that sort of thing*” and he masturbated. Tr. 1084: 7-25; Tr. 1085: 1-11 (emphasis added)

Respondent’s claim 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” 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.

There is overwhelming evidence that Ms. Binette did not enjoy watching her boss masturbate. 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

Claim 2 - Although he lost track of his story at times, Respondent tried to tell the Panel that the document he and Ms. Binette signed on September 28, 2012 did not contain a waiver of Ms. Binette’s right to sue him for sexual harassment. Respondent testified that he and Ms. Binette went through the document his brother had drafted (DC-2) “paragraph by paragraph” (Tr. 1082: 13-14) until they came upon a paragraph neither of them understood:

... There was like four or five paragraphs in it. There was one section in it, she said, “I really don’t understand that section” and it had a number of references to legal cites or citations. And I said, “I don’t, quite honestly, know what it means either.” And, I can’t remember what it was, but I said, “If you’re okay with that, let’s just take it out.” And she said, “Fine.” And so we took that out. And I said is there anything that- I’m fine with this . . .” Tr. 1082: 13-22 (emphasis added)

If the Panel reviews the transcript of Respondent’s testimony, it will see that Respondent lost track of his narrative shortly after Respondent testified that Ms. Binette allegedly went to her car to retrieve the document that Josh Diamond had written (DC-2). Tr. 1081: 23-24 The next page of transcript (Tr. 1082: 1-25) is Respondent’s rambling narrative - not interrupted by questions from his attorney. It is studded with contradictions and false statements.

For the most part DC relies on the facts and arguments cited in his Proposed Conclusions of Law filed on February 26, 2018 (pp. 12-13) which address most of the false and contradictory statements. I would add only that:

- (1) Respondent has not sought to introduce the document he refers to at Tr. 1082: 17-21- a document that does not contain Ms. Binette’s waiver of her right to sue. This is because it does not exist.

- (2) Respondent's testimony that he "wasn't really aware" that Ms. Binette "had trouble coming to work in the morning" contradicts his reply to Ms. Binette's August 7, 2012 email in which he warns that if she wants a "professional relationship" (as opposed to a "dating" relationship), she is going to need to "show up for work" or have an "excused absence"- "I have been very good with being flexible with you." DC 3, p.2
- (3) In this detailed review (Tr.1082 through Tr. 1083: 1-15) of the steps he allegedly took to insure he accommodates Ms. Binette's needs, he does not mention that he advised her to have an attorney review the document before she signed it.<sup>8</sup>

Respondent has not introduced the document that he referred to in his testimony - the document without the provision calling for the waiver of Ms. Binette's right to sue him for sexual harassment<sup>9</sup>. Nor, has he introduced any other evidence to support his meandering, false claim. The Panel should reject it.

#### Respondent's False Statement to This Panel Should Be Considered as Independent Evidence of His Liability

Clearly portions of Respondent's testimony at the Merits Hearing were false and were made to avoid liability in this proceeding. DC asks the Panel to consider this when deciding whether to credit Ms. Binette's testimony. DC also asks the Panel to consider Respondent's multiple false statements in determining whether DC has met his burden in proving Counts II and III and in determining the appropriate sanction.

The Second Circuit has held that false exculpatory statement to law enforcement officers constitute circumstantial evidence which has "independent probative force." False statements to this Panel should have independent probative force as well.

"On that question, the trial judge commented that, "[o]rdinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement th[at] tends to establish the person's innocence." Although this instruction might well have been clarified, it correctly stated the law in this circuit. False exculpatory statements made to law enforcement officials are circumstantial evidence and have independent probative force. *US v. Durani*, 855 F2d 841 (2d Cir, 1987) fn. 16 (emphasis added)

#### Two More Issues

DC relies on his Proposed Findings and Conclusions filed on February 26, 2018 to address the remaining arguments Respondent raised in his Proposed Findings and Conclusions filed on the same date- with two exceptions: (1) Respondent mischaracterizes an important portion of Dr. Kaufman's testimony because Respondent quoted Dr. Kaufman's testimony out of context and (2) the Panel should not give any weight to the 55 pages of texts Respondent has admitted as R-2 (Apology Texts) in considering whether Ms. Binette has fabricated her claim that Respondent sexually harassed her.

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<sup>8</sup> Respondent did not remember that he had advised Ms. Binette to have an attorney review the document until questioned by a Panel member near the close of the hearing. Tr. 1267: 11-25 As noted earlier, his testimony on this point is contradicted by the testimony of Ms. Binette and Detective Burnham.

<sup>9</sup> Paragraph 3, the provision that confirmed Ms. Binette had waived her right to sue Respondent for sexual harassment, was the only paragraph in the document with "legal cites and citations."

1. Dr. Kaufman's Testimony Is Taken Out of Context

DC has argued from the outset that Ms. Binette had no motive, no incentive, to make false accusations that Respondent threw paper clips at her breasts or that he asked to pull on his tie while he masturbated. Ms. Binette enjoyed working for Respondent for three months before the sexual harassment began. She would gain nothing from making false accusations against him

Respondent called multiple witnesses but none of them offered evidence on motive - why Ms. Binette would make false claims against Respondent. However, on the last day of the hearings, in questioning Dr. Kauffman over the phone, Respondent tried to suggest there was a reason Ms. Binette did not have a motive – she was mentally ill. That is, he tried to get Dr. Kaufman to admit that it was a symptom of Ms. Binette's PTSD that she would make "false accusations." Dr. Kaufman refused to adopt Atty. McGee's theory.

However, in his "Memorandum with Respect to Counts II and III" (R-Memo), Atty. McGee asserts:

"Her psychiatrist acknowledged that one of the symptoms of her mental illness was that she would and could make false accusations and believe they were true. T. 1209 -1215 Pertinent parts of Dr. Kaufman's testimony at the hearing are set out below." R-Memo -p.14

He then quotes Dr. Kaufman out of context. The portions of the transcript Respondent did quote on page 14 of his memo are in "bold" below – those portions he did not quote are in "italics."

**Q. Making, having a, having distortion, and then even acting on that distortion can be part of post-traumatic stress.**

**A. Yes I remember that (testifying to that at deposition). T 1211, II 14-17**

*Q. And that's true right; that's your testimony?*

*A. Well that is- it's true that's my testimony out of context. T. 1211: 18-20*

**Q. And that's the case, is that right, that someone with her symptoms may well up demonstrably false accusations because that's part of what this symptoms- this sort of mental illness can do to people-**

**A. Right T. 1212: II 12-17**

*Q. Is that correct?*

*A. You just added a line here, "because that is what these symptoms can do to people."*

*Q. Right*

*A. You just added that line. What you're asking me is not correct.*

*Q. Okay will you agree with me that-*

*A.- But I- T. 1212: II 18-25*

*T. 1213:II 1-13*

*Q. Doctor-*

*A. On line –*

*Chairwoman Ware: Let him explain Scott. I'm sorry but his is not a proper use of a deposition.*

*A. I'm not supposed to –*

*Q. You're supposed to answer my questions and I would like to confine you to my questions.*

*A. It-*

*Q. So let me start again. Doctor –*

*Attorney Lillicrap (by telephone) I'm going to object. The witness is being badgered at this point. He is being visibly frustrated. Allow him to finish his answer. T1213: II 1-13*

There is also a flaw in Respondent's theory that laymen can grasp.

Respondent admitted he masturbated in front of Ms. Binette in his law office. He testified that Ms. Binette had *enjoyed* watching him masturbate. In fact, according to Respondent, she insisted on signing the Waiver Document because she wanted to get another chance to watch him masturbate. Ms. Binette has repeatedly denied that she enjoyed watching Respondent masturbate. So, in the context of Respondent's testimony, Ms. Binette's "false accusation" is her testimony that *she did not enjoy* watching Respondent masturbate. Reasonable people would agree that this is not a "symptom"/ "sign" of mental illness.

## 2. Apology Texts (R-2)

On August 11, 2014, roughly two years after Ms. Binette signed the Waiver Document DC-5), Ms. Binette made an unexpected visit to Respondent's condo. Within a day of the unexpected visit, Ms. Binette initiated a series of text exchanges with Respondent that lasted until mid-October 2014. R-2

Respondent relies heavily on a one-hour text exchange between Respondent and Ms. Binette (10:35p.m. – 11:34 p.m.) on August 16. R2, pp. 7-15, F116-119

At 10:35 p.m. Ms. Binette texted Respondent and told him that she felt she had lost her "best friend" (Respondent). R2-p.7 In a text exchange between 11 p.m. and 11:20 p.m. Respondent told Ms. Binette that he would let her "back in (his) life on one condition" - the condition was that she "apologize" for the "lies" she had told "state police." R-2, pp. 11-13 Ms. Binette quickly agreed to apologize. At 11:27-29, Ms. Binette said she needed "the truth to be known." She said Respondent was "never bad to (her) - ever." She said that she was the "bad guy" and she wanted her "falseness to be known." She said she had "lied out of self-pity." R-2, pp. 14-15

Respondent concludes his Proposed Findings of Fact (RF) with the following:

"The exchanges set out on Exhibit R-2 reflect the truthful, unrehearsed recollections of Ms. Binette regarding her past conduct. R-2

The text exchanges continued, with, at one point, Ms. Binette and Respondent fondly recalling events that occurred in the office in which Ms. Binette had revealed her bra as described in earlier findings. R-2

The exchanges also confirmed the parties prior consensual and mutually desired and enjoyed sexual liaisons. R-2

The exchanges wholly refute the claim at hearing that Ms. Binette was unhappy at work and had not been treated well by Respondent and had not wanted to continue working for him. R-2"

The Panel should reject Respondent's characterization of the "Apology Texts." They have limited probative value on the question central to the "Binette Counts" (Counts II and III) - whether Respondent engaged in unprofessional conduct during the period two years earlier (May 2012 -September 28, 2012) At that time, Respondent first asked Ms. Binette to sign a waiver of her right to sue him for sexual harassment and then, after she emailed him claiming he had violated her rights, he pressured her into an unconscionable agreement ( Waiver Document DC-5) in which Ms. Binette waived her right to sue Respondent for sexual harassment in exchange for his promise to allow her to keep her job, despite

the fact that she has a “condition” (“agoraphobia”) which makes it difficult for Ms. Binette to come to work on time.

Ms. Binette’s does “apologize”; but, it is general, focused on meeting Respondent’s “condition” for getting “back” into his life. Everything is her fault. She is the “bad guy” – not Respondent. She “lied out of self-pity.”

Ms. Binette clearly couldn’t apologize for the key piece of evidence in Counts II and III – the “Notice of Intent to Engage in Mutually Welcomed Romantic Relationship and Waiver of Claims.” This is because she did not write the document, which included the waiver of her right to sue Respondent for sexual harassment.

Respondent could not stake his defense on the “Binette Counts” on a claim that Ms. Binette “lied” when she said he masturbated in front of her in the work place. He admitted it – first to Detective Burnham and then to this Panel. Instead, he has staked his defense on the claim that Ms. Binette has been lying to you when she said she did not “welcome” the opportunity to watch him masturbate. But, he cannot claim, credibly, that Dr. Kaufman fabricated his July 2012 treatment notes which describe Ms. Binette’s distress at the time of the first “masturbation” incident. And, he has still not come up with a motive – reasonable explanation for what incentive she would have, for instance, to write the August 7, 2012 email complaining that Respondent, who she had loved working for, had not “respected” her as an “employee, individual or a human being.”

#### Ms. Binette’s Mental Condition in August 2014 – The Time of the “Apology Texts”

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, F133; Tr. 837: 9-16

Dr. Kaufman explained, in discussing Ms. Binette’s condition, that when PTSD is triggered it “overwhelms your capacity to think straight.” Ms. Binette can appear “delusional” to others. Dr. Kaufman told the Panel that Ms. Binette has adopted “coping mechanisms” for dealing with Ms. Binette sees as a potential threat, F 134, Tr. 951: 1-25; Tr. 952: 1-5

Dr. Kaufman explained further that one way that Ms. Binette copes with a perceived threat is “withdrawal” - she withdraws to her room and avoids “social engagements.” Tr. 952: 5-9 But, there are also times when Ms. Binette copes by doing the opposite of “withdrawal” - she “engages” what she sees as a potential threat: “Some people see it as counterphobic - you’re afraid of that so a way to deal with it is to be involved with it and make things better by altering whatever that threat is.” Dr. Kaufman explained that Ms. Binette goes “back and forth” between withdrawing from the potential threat and engaging and embracing it in an effort to “make things better.” According to Dr. Kaufman, this is a “familiar pattern” to those who practice psychiatry. F 135; Tr. 952: 9-17; Tr. 953: 24-25; Tr. 954: 1-5

Dr. Kaufman said that it is not unusual in his experience for women who are in abusive, or clearly “destructive relationships” to stay, or return, to those relationships. In the past, he said, people have tended to blame the woman for causing her own problems – “saying why don’t get out of the relationship.” That’s “wrong” he said. “That is one of the things that happens in that kind of a

relationship. You stay in it for a variety of reasons, trying to make it better. I see it every day. Tr. 952: 22-25; Tr. 953: 1-1

### Respondent Knew of Respondent's Mental "Challenges"

Respondent was aware of Ms. Binette's mental health challenges. When he spoke to Detective Burnham in July 2013, he volunteered his assessment that at times Ms. Binette's mental condition affected her decision-making at work. F12, F 13. He says in his answer to the Petition in this case that he became more aware of her mental "challenges" after she stopped working for him:

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."<sup>10</sup> Tr. 1247: 23-25; Tr. 1248 through 1251: 1-3 (emphasis added)

### Ms. Binette Experiences Episodes of Paranoia – July 31, 2014 – September 1, 2015

Ms. Binette first began to experience of paranoia after she had worked for Respondent for a while. Before that, Ms. Binette had not been plagued by the fear of being "locked in" (Respondent's office) , or of Respondent causing her to become a "speed bump" or of being abducted after being given a "pink pill" or of "black men from Connecticut" dunking her in Lake Memphremagog Tr. 1044:10-25; Tr. 1045: 1-25; Tr. 1046: 1-5

Ms. Binette and her mother acknowledged on cross-examination that Ms. Binette experienced episodes of paranoia in 2014- 2015. For instance, Ms. Binette told her mother that she was abducted in Milton on September 1, 2015 after someone had given her a "pink pill." Tr. 835: 17-25; 836: 1-10; Tr. 1030: 18-24 Ms. Binette also developed a fear that there was a "motorcycle gang" after her. F 122, Tr. 838: 4-11.

### July 31, 2014 – August 16, 2014

Ms. Binette acknowledged on cross examination that at some point she told her mother that she was afraid that Respondent was trying to kill her. F 133, Tr. 836: 12-18

Respondent was particularly vigorous in getting Ms. Binette and her mother to admit that Ms. Binette had told her mother that two black men had come up from Connecticut on July 31, 2014 to try to intimidate Ms. Binette for filing a complaint against Respondent. She said the men had dragged her into Lake Memphremagog and held her body under water as a "fear tactic." F 114, Tr. 833: 16-17; Tr. 834: 8-18 Ms. Binette's mother, Diane, knew "something was not right" with her daughter in early August 2014 -right after the alleged Memphremagog incident. Tr. 1044:2-25; Tr. 1045: 1-4 and 20-21

On August 11, 2014, roughly two weeks after the alleged incident with the "black men," Ms. Binette made an unexpected visit to Respondent's condo. She said that she did so because she wanted to convince Respondent "not to have (her) killed." Tr. 833: 18-24 Ms. Binette initiated the exchange of texts referred to as the "Apology Texts" on the following day. R-1

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<sup>10</sup> 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's PTSD Overwhelmed Her Ability to Think Rationally When She Wrote the Apology Texts

The evidence show that it is more likely than not that Ms. Binette was not thinking rationally when she wrote the "Apology Texts. It is reasonable to believe she was "coping" with her (irrational) fear that Respondent was trying kill her by "engaging" and "trying to make things better" - the "coping mechanism" described by Dr. Kaufman (above)

The evidence also shows that Respondent understood that Ms. Binette was suffering from "mental challenges" when she unexpectedly came back into Respondent's life in mid-August 2014. Respondent is not treating Ms. Binette like an equal. He is in control and knows it.

DC asks the Panel to consider the tone of the texts – particularly after she wrote the "apology." Once she had met his pre-condition for getting back into his life, he quickly adopted a condescending, controlling style. Within minutes he was talking about, and asking for, sex.

At 11:34 p.m., roughly five minutes after Respondent had Ms. Binette "locked in" to her apology, Respondent texted that he was really "impressed" with Ms. Binette's apology. - "You know what – I think you are no longer a girl. You are a woman now." R-2, p.15

At 11:40 p.m. Respondent texted to Ms. Binette: "I can be with you now." A few minutes later he texted that he had never forgotten Ms. Binette and said now that she had apologized he could "start healing." Approximately half an hour later (00:14 on August 17) Ms. Binette accepted Respondent's invitation to spend the night at his condo. (11:45 p.m.) R-2, pp. 17-18, pp.20-24

It is not reasonable to believe that Ms. Binette was in a condition, mentally, to knowingly and voluntarily, "consent" to sex at that point. The evidence shows that Respondent not only took unfair advantage of Ms. Binette when he pressured her to sign the Waiver Document(DC-5) in September 2012; but, it also shows that he took unfair advantage of her roughly two years later, in August 2014.

The Panel should reject Respondent's Proposed Findings and Conclusions and find that Disciplinary Counsel has met his burden with respect to Counts II and III.

Dated at Burlington, Vermont on March 12, 2018

Robert V. Simpson, Jr.  
Disciplinary Counsel