STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY PROGRAM

In Re: Glenn Robinson, Esq., Respondent
PRB Docket No. 2013-172

RESPONDENT'S REPLY MEMORANDUM TO DISCIPLINARY COUNSEL'S PROPOSED CONCLUSIONS RE COUNTS II AND III

Counts II and III of the Petition allege very specific violations of the Rules of Professional Conduct. The evidence introduced at hearing must be weighed in relation to the charged violations and must not be based on broader issues of morality and conduct norms that are not material to the charged violations. As discussed below, Disciplinary Counsel has engaged in a subterfuge in his filings on Counts II and III. He misstates the essential elements of each Count that must be proven, and he then goes on to describe how he has proven the misstated elements. Respondent has a due process right to be judged in relation to the charged violations, and Disciplinary Counsel must demonstrate that he has proven by clear and convincing evidence each essential element of the charged violations. He has failed to do so.

I Count II

Count II alleges that Respondent violated Rule 4.3 of the Vermont Rules of Professional Conduct by giving legal advice to an unrepresented person at a time when Respondent was dealing on behalf of a client. (Emphasis added as to two key elements of a Rule 4.3 violation).

Disciplinary Counsel misstates the essential elements of the Rule 4.3 violation charged in Count II [1] and then argues that he has proven by clear and convincing evidence the elements that he listed, incorrectly, as the essential elements of a Rule 4.3 violation. Respondent's conduct must be evaluated with respect to the elements of the 4.3 violation that has been charged in Count II. Rule 4.3 contains two key elements that are at issue in this case: first, whether Respondent was "dealing on behalf of a client" when he gave advice to an unrepresented person; and second, whether any advice he gave was legal advice.

With respect to the first element, Rule 4.3 applies only to situations where an attorney is "dealing on behalf of a client." Disciplinary Counsel did not address that issue in his filing. Respondent relies on the analysis he previously provided to the Panel on that issue.

With respect to the second element, the issue for the Panel is whether Disciplinary Counsel established by clear and convincing evidence that Respondent gave "legal advice" to Ms. Binette in connection with the review and signing of the agreement.

The official Comment to Rule 4.3 makes clear that an attorney who is dealing on behalf of a client may engage in discussions with an unrepresented person in regard to documents presented for signing and may discuss the terms and benefits contained in the document without violating the Rule against giving legal advice. Comment [2] states in pertinent part:

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[1] At page 3 of Disciplinary Counsel's Conclusions of Law memorandum he lists what he characterizes as the "Elements DC Must Prove," to establish a violation of Count II, but he omits two essential elements of a Rule 4.3 violation that he must prove to establish a violation. Those two omitted essential elements were contested at the hearing, namely, (1) whether Respondent was "dealing on behalf of a client" when he discussed the agreement with Ms. Binette and (2) whether he gave "legal advice" to Ms. Binette. Having failed to identify two essential elements of a Rule 4.3 violation that he must prove by clear and convincing evidence, Special Counsel goes on to discuss non-issues and then claims he has met his burden of proof.

> This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person ... [T]he lawyer may explain the lawyers's own view of the meaning of the document or the lawyer's view of the underlying legal obligations

The Rule prohibits only giving legal advice to the unrepresented person. That did not happen here. No evidence was introduced at hearing to prove that Respondent gave legal advice to Ms. Binette in regard to the romantic relationship agreement. Disciplinary Counsel had the burden to prove by clear and convincing evidence that Respondent gave legal advice to Ms. Binette. There was no such evidence. The evidence presented with respect to the signing of the document was in conflict. Ms. Binette claimed that she signed the document because Attorney Diamond was coming to the office and Respondent told her that they would both be in trouble if the contract was not signed when he got to the office. T 778. She gave no further explanation for that claim, and there was no evidence that Attorney Diamond ever met Ms. Binette or visited the office or was planning to visit the office when Ms. Binette was working at the office. The reason she offered for why she signed the agreement lacks credibility; but more importantly, if the comments she attributes to Respondent had been made, they do not constitute giving legal advice. Asking an unrepresented person to sign an agreement does not constitute giving legal advice.

Respondent testified that in late September, 2012, Ms. Binette wanted to again engage in sexualized conduct with him at the office as she had on an earlier occasion. He refused to engage in that conduct unless and until she signed the relationship agreement they had discussed by phone with Josh Diamond months earlier. It was at that point that Ms. Binette said words to the effect of, " well, then, let's get it signed." She retrieved the agreement and discussed with

Respondent changes she wanted made. Respondent made those changes. There was conflict in the testimony as to whether she took the agreement home a second time, as Respondent indicated, or whether she signed it the same day that the changes were made, but either way, changes were made at her request, and she and Respondent then signed the agreement.

None of this evidence, regardless of whose testimony is given greater credit, establishes that Respondent gave legal advice to Ms. Binette with respect to the agreement or with respect to signing the agreement. There is a dearth of evidence to support the allegation that Respondent gave legal advice to Ms. Binette with respect to the romantic relationship agreement. The agreement and its terms were discussed, but such discussions do not constitute giving legal advice. Without clear and convincing evidence that legal advice was given, the charge set out in Count II must fail.

The charge set out in Count II of the Petition was not proven by clear and convincing evidence and should be decided in Respondent's favor.

II Count III

As he did with Count II, Disciplinary Counsel lists in his Conclusions of Law filing what he characterizes to be the essential elements of Count III, but he fails to correctly list the actual essential elements that he must prove to prevail on Count III. He states, incorrectly, that he must prove that "Respondent made submission to sexual harassment a 'term' or 'condition' of her employment." That is not what Count III charges. Count III is quite specific. It charges, in substance, that Respondent advised Pamela Binette to sign the romantic relationship agreement

in exchange for Respondent's promise to continue employing Ms. Binette. [2] No evidence was introduced to support that charge, and Disciplinary Counsel introduced no evidence that Respondent gave such a direction to Ms. Binette. There were conflicts in the testimony on a number of points, but there was no evidence that Respondent advised Ms. Binette that her continued employment was conditioned on signing the agreement.

As noted in the discussion under Count II, there was a conflict between Ms. Binette's testimony as to why she signed the agreement and Respondent's testimony as to why she signed, but there was no evidence that Respondent told Ms. Binette that her continued employment was dependent on her signing the agreement. The only testimony that suggested a relationship between the agreement and Ms. Binette's employment was Ms Binette's testimony that she was told she was required to sign the agreement "in the beginning of being hired," but she then noted that she "didn't even sign an application" for her position when she was hired, and she "didn't know why there would need to be a contract." T 763. She then stated, candidly, that, in fact, she did not sign the agreement. T 762-763. If she had the misimpression that she was required to sign the agreement "in the beginning of being hired," she remedied that requirement by not signing, as she stated. Her testimony did not make sense, and it did not establish the charged violation. The fact that she and Respondent signed the agreement nine months after she was hired refutes any notion that signing the agreement was tied to her continued employment. Respondent's testimony that Ms. Binette signed the agreement so that Respondent would engage in sexual conduct with her is supported by the consensual sexual interactions admitted by Pamela

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[2] Shortened to its essence, the violation charged in Count III is that "Respondent violated Rule 8.4(g) by ... advising ... Pamela Binette ... to sign a contract ... in exchange for Respondent's ... promise to continue ... to employ Ms. Binette.

Binette that took place in the several months after the agreement was signed. Signing was a condition of having further sexual relations, it was not a condition of continued employment. The evidence is at best mixed as to why the agreement was signed but, taken as a whole, the evidence adduced at hearing did not establish by clear and convincing evidence that Respondent advised Ms. Binette to sign as a condition of keeping her employment. [3]

III Other Evidence addressed by Special Counsel which is not applicable to the misconduct charged in the petition

Many threads in the testimony raised questions about what happened in and out of the office between Ms. Binette and Respondent. The Panel is not required to resolve those different threads. They are not material to the violation charged in Count III of the Petition. Respondent would, however, like to comment on some of them because Disciplinary Counsel has made them the centerpiece of his filing with the Panel.

A. Dr. Kaufman

Dr. Kaufman is a well-credentialed, experienced psychiatrist. He candidly acknowledged that Ms. Binette suffers from significant mental challenges related to her diagnosed illnesses of PTSD and ADHD. He readily acknowledged that persons with her diagnosis can suffer from

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[3] Disciplinary Counsel's own exhibit DC-3 (August 7, 2012 email chain) documents that Respondent made clear to Ms. Binette that she did not need to sign the agreement. In response to Ms. Binette's email of August 7, 2013, Respondent stated in a reply email to Ms. Binette on August 8, which is a part of the email chain in DC -3: "This is the first time you have mentioned being uncomfortable. *If you do not want to sign the papers we drafted with Josh, that's fine.* If you do not wish to follow-through on dating, that's fine too. If you want a professional relationship, based only on your employment here, that's fine. I have told you that several times. The job is still yours to have, as long as you show up for work." (emphasis added)

delusions and be paranoid and can say things that are untrue and make up stories and accusations about other people.

Dr. Kaufman provided no testimony linking any specific conduct by Respondent at the office place with any of Ms. Binette's symptoms. He did correlate increased symptoms he observed in Ms. Binette to time periods when she was working at Respondent's office, but his testimony did not connect any of those symptoms to any specific conduct of Respondent.

Disciplinary Counsel has taken Dr. Kaufman's notes – notes which reflect what Ms. Binette told him, not what Dr. Kaufman concluded to be true or accurate reflections of reality – and has argued that the notes establish that Ms. Binette's testimony was true. That is not a permissible argument. The notes were not admitted to establish the truth of the information relayed by Ms. Binette to Dr. Kaufman. They were admitted solely for the purpose of assessing Dr. Kaufman's treatment of Ms. Binette. That was a specific ruling of the Panel confirmed during the hearing when Disciplinary sought to introduced testimony about what Ms. Binette told him. T 942-43. It is improper for Disciplinary Counsel to now use those notes to suggest that comments made by Ms. Binette to Dr. Kaufman, which he never validated as accurate depictions of reality, were accurate.

B. Paperclips

Ms. Binette's allegations against Respondent with respect to the demeaning conduct of throwing paperclips at her breasts and having others come to his office to engage in the same conduct, was disturbing. It was also untrue. It was a manifestation of her illness that she took flirtatious interactions between herself and Respondent and grossly distorted them into something they weren't and then enlarged on them to create an entire scenario that was an absolute and

outrageous fabrication. She told her mother that Respondent had invited his friends to come to his office to join him in the conference room while Ms. Binette sat across from them and to take turns throwing paperclips at her breasts. She told her mother the names of two of the participants, Jamie Roy and Alan Franklin. By the time of the hearing, she realized that Respondent had subpoenaed those two alleged participants to testify at the hearing. She knew what they would say. She, therefore, changed her testimony to claim that her mother must have misheard her. Her mother did not mishear her. Her mother did not come up with those names out of the blue. Her mother confirmed that Pamela Binette told her that Jamie Roy and Alan Franklin were among the participants who threw paperclips at her breasts and cleavage. That never occurred. The paperclips story is an illustration of the warped and delusional beliefs that Pam Binette formed not just with respect to the paperclips but with respect to other interactions as well. Sadly, she may well have believed what her delusional mind conjured, just as she and her mother testified and appear to have believed that two black men from Connecticut came to Newport and attempted to drown Ms. Binette in Lake Memphremagog by holding her head under the water until she was able to escape. None of that was true, as even Disciplinary Counsel admits in his Sanctions Memorandum at p 3 where he refers to this allegation as an "admittedly paranoid claim."

C. Pamela Binette Distortions

Pamela Binette appears to have experienced delusions and paranoia with respect to her sexualized conduct with Respondent. She told her mother highly distorted versions of her interactions with Respondent. She clearly told her mother a story about paperclips that was embellished beyond recognition and untrue. Why she choose to denigrate Respondent in

describing these events to her mother is unknown. Perhaps she was embarrassed when she told her mother of her sexualized encounters and was more comfortable making it appear that she had not willingly participated in those interactions. We can only speculate about why she portrayed events to her mother in a false light, but we do know that she enjoyed, encouraged and initiated sexualized conduct with Respondent both at the office and at his condominium. This is not a "he said," "she said" issue. Ms. Binette admitted at the hearing that she had engaged, voluntarily, in sex with Respondent. She admitted she had gone to Respondent's condominium on several occasions to have sexual interactions with him and that she had sexual intercourse on one of those occasions.

Ms. Binette was not inexperienced in sexual relations with men. She admitted she had sexually teased Respondent, but she put a spin on that to suggest that it was Respondent's initiative, not hers. Her testimony at hearing must be weighed against the undisputed and admitted facts that she initiated and engaged in sexual interactions with Respondent on multiple occasions, both at the office and at his condominium, and against her emailed and texted messages to Respondent, after she had ended her employment, expressing her positive and fond memories of their experiences together. See Exhibits R-1 and R-2..

D. Sexual Evening at Office with Erin Oeschger and Respondent

Disciplinary Counsel's filing asserts that it was Erin Oeschger who invited Respondent to join Ms. Oeschger and Ms. Binette at Respondent's office one night to engage in sexual interactions and that it was Ms. Oeschger who invited him in, but the credible evidence was otherwise. The evidence showed that, contrary to Ms. Binette's testimony, the incident occurred on a weekend. Ms. Binette was not at the office when Ms. Oeschger called her. Ms. Oeschger

did not call the office phone as Ms. Binette testified; rather, she called Ms. Binette's cell phone. Ms. Binette picked up Ms. Oeschger because Ms. Oeschger did not have a car at the time. They drove together in Ms. Binette's car to the office. They drank beer and champagne at the office and began engaging in intimate sexual conduct. Ms. Binette then called Respondent and invited Respondent to come join them. The fact that Respondent ended up having sexual contact with Ms. Oeschger rather than with Ms. Binette may have been a cause for anger by Ms. Binette, but it doesn't change the central nature of the event. Contrary to Ms. Binette's testimony, Ms. Oeschger did not drive to the office to Ms. Binette. When Ms. Binette stormed out of the sexual encounter, Ms. Oeschger had no way to get home. Ms. Oeschger went home with Respondent to Respondent's condominium that evening. There was no dispute about that at the hearing.

E. Discussions on the phone with Josh Diamond regarding the Romantic Relationship Agreement

Respondent asked his brother to prepare an agreement that would make clear that he and Ms. Binette would be entering into a mutually desired relationship so that there would not be any later claim that the relationship was abusive or constituted harassment. Josh Diamond's summary of the points that Respondent wanted included may be accurate, but the words Josh Diamond used at hearing to describe the conversation were Josh Diamond's words, not Respondent's. This conversation between Respondent and his brother occurred in late May or early June of 2012, more than 5 ½ years prior to the date of the hearing. It was a one-time, short conversation, and Josh Diamond had no further involvement after his short conversation with Respondent and Ms. Binette by phone. It is not surprising that 5 ½ years later, his recollection of a conversation he had not had any reason to remember or think about for five years may differ

from Respondent's recollection. The important point is that Respondent wanted to confirm a mutual agreement in writing before engaging in a sexual relationship with Ms. Binette to avoid any later claim that the relationship constituted harassment or discrimination.

Respondent testified that he had not wanted or expected the legalese language that his brother included in the draft agreement. Respondent's testimony on that point became confused when he testified he believed it had been removed. Clearly it had not been. Respondent had provided a copy of the agreement Disciplinary Counsel, and it was an admitted exhibit at the hearing. Respondent's confused testimony on that point reflects the confusion that can occur when a persons is testifying about events that occurred five years earlier. Respondent was explaining what he recalled of his thought process at the time with respect to the language. The agreement speaks for itself.

F. Relationship Reflected in Exhibit R-2

Exhibit R-2, the extended exchange of text messages between Ms. Binette and Respondent in August, 2014, provides significant corroboration that Ms. Binette enjoyed engaging in sexual interactions with Respondent. Those texts messages were initiated by Ms. Binette. They contain very personal and intimate discussions regarding the conduct that Ms. Binette and Respondent engaged in when she was working at his office. This is not, as Disciplinary Counsel has portrayed, a defensive or protective exchange initiated by Ms. Binette out of fear for what Respondent might do to her if she did not act friendly toward him; rather, the language and detail in R-2 confirms the substance of Respondent's testimony about his relationship with Ms. Binette when she was working in his office.

With respect to the sexual "tease" activity in Respondent's office, Respondent and Ms. Binette reflected on that activity with mutual delight in their text exchanges of August 16, 2014 set out in Exhbit R-2, beginning at page 20 of 55, where the following exchange occurs:

PB I miss watching u (you) cook

GAR I miss watching u too

PB: Always so yummy too :-) :-) :-) :-)

PB And such great laughs together :-)

PB Amazing u r (are)

GAR I so remember u making me watch u. Torturing me. And yet, I loved it all

PB I remember ... wow ... yes, we did :-)

PB The black lace and pink bra ... still have it

GAR I'd so let you torture me again ... ;)

PB To me, its considered yours :-)

PB I bet id like u to do that to me too. Now im much more comfortable with myself

PB I wad (was) my problem. Never you. Im much more certain and clear now also I'm very ....

GAR You can if you want to

PB (continuing from her previous text) Curious about new sexual experiences ... but I have not been successful in having feelings for anyone else since the begining (sic) of us

PB Wow huh?

This extended series of text exchanges between Ms. Binette and Respondent puts the lie to the characterization of events testified to by Ms. Binette at hearing in portraying Respondent as a sexually aggressive and abusive person. The texts reflect and confirm Respondent's testimony about his interactions with Ms. Binette and are fully consistent with the messages between the two written on Exhibit R-6 which is the flirt sheet of paper on which Respondent and Ms. Binette wrote comments about Respondent's sexual excitement over Ms. Binette.

Ms. Binette's allegations to third parties of abusive treatment by Respondent and unwanted sexual interactions cannot be squared with her own admitted conduct and statements.

G. From the Heart Email from Ms. Binette to Respondent in Exhibit R-1

We can only speculate about why Ms. Binette emailed Attorney Wilkel alleging abusive treatment by Respondent at a time when, in truth and in fact, she wanted to return to Respondent's office and continue working for him and professed her deep affection for him. Her March 4, 2013 email (R-1) is a testament to her deep feelings for Respondent. R-1 is not an email from someone who is making up a story. The detail and the feelings described in the email are too personal and open to be discounted. Disciplinary Counsel has attempted to spin that email by weaving a story that Ms. Binette was cozying up to Respondent to protect herself from him. That explanation does not fly. Ms. Binette had worked for Respondent for nearly a year. Contrary to her testimony at hearing that she was afraid of Respondent and did not want to be near him, she had been engaging in consensual sexual interactions with Respondent, including masturbation and sexual intercourse that she admitted she initiated, right to the end of her employment. She had gone to his condominium to have sex with him on at least several occasions, and in early January 2013, near the end of her employment, she drove by his

condominium with a friend. She admitted that they stopped and entered Respondent's condominium and partied with Respondent. She also admitted that she went to Respondent's condominium on December 31, 2012 and had sexual intercourse with him, as Respondent also confirmed in his testimony. Those are facts. They cannot be changed, and they do not square with Disciplinary Counsel's characterizations. They are consistent with the emotional message she emailed Respondent on March 4 expressing her regret that she was no longer his assistant.

Given Dr. Kaufman's candid testimony about the symptoms of Ms. Binette's mental illness and the tendency of persons with that illness to make false accusations against others and to be paranoid and delusional, we can only speculate that Ms. Binette was going through a down and delusional period in July and August of 2012 which led her to send an email to Respondent expressing unhappiness. The Panel is left to speculate as to what brought about the email and whether, as Ms. Binette told Respondent, she wrote it to appease her mother. The cc on the email to her mother certainly appears to corroborate that notion. The email is at direct odds with substantial other evidence confirming that Ms. Binette was happy at work and with Respondent.

H. Testimony by Ms. Binette re Sexualized Tease Conduct and Pulling Respondent's Tie.

Disciplinary Counsel relates portions of Ms. Binette's testimony regarding the masturbation incident that occurred at Respondent's office. There are clear differences between Ms. Binette's account and Respondent's account. One of them is the embellishment she added about pulling his tie. Christian Cornelius testified at hearing about a conversation he had with Ms. Binette. Mr. Cornelius was a long-time acquaintance with Ms. Binette from high school days. He testified that Ms. Binette described pulling Respondent's tie. Mr. Cornelius believed, at

first, that Ms. Binette was describing some type of kinky sexual behavior, but as the conversation proceeded, Ms. Binette explained that what she was referring to in regard to pulling Respondent's tie was that she would sometimes straighten Respondent's tie for him before a hearing. Testimony of Christian Cornelius. T 1092-93. The tie comment is typical of the gross distortion that Ms. Binette threw into her testimony, whether wittingly or unwittingly, which created a very negative impression of Respondent which was untrue.

I. Exhibit R-6 Documentation of Office Culture and Relationship

The office sheet of paper marked Exhibit R-6, contains flirtatious exchanges between Respondent and Ms. Binette and reflects communications that occurred after they had both signed the relationship agreement. The Exhibit is evidence that speaks strongly about the true nature of Respondent's relationship with Ms. Binette at the time. That sheet of paper shows Respondent discussing quite openly with Ms. Binette how she makes him feel and the sexual urges she produces in him. She responds with a twinkle of her pen that she knows that and wishes him well with the "craziness in your pants" and signs off "Love you." This is a contemporaneous note reflecting what was actually happening at the time in the fall of 2012, not what Ms. Binette testified was happening five years later in January 2018 .

IV Final Comments

Counts II and III each assert a violation of the Rules of Professional Conduct <u>based on advice</u> Respondent is alleged to have given to Ms. Binette. Neither count asserts a violation <u>based on conduct</u> that Respondent engaged in with Ms. Binette. That distinction is central to the Panel's review and determination of whether Respondent violated the Rules of Conduct as charged in Count II or III with respect to his discussions with Ms. Binette regarding the

agreement. The violations charged in the Petition is based on advice, not conduct. That distinction is important to recognize in connection with the determination of whether Special Counsel has proven by clear and convincing evidence a violation of either Count.

If, however, the Panel should decide that the relationship between Ms. Binette and Respondent is relevant to the Panel's determination of whether a violation occurred, Respondent submits that the weight of the evidence establishes that he and Ms. Binette had a consensual relationship, enjoyed by both at the time, and initiated on multiple occasions by Ms. Binette, both at the office and at Respondent's home; but Respondent wishes to emphasize that his sexualized interactions with Ms. Binette is not the basis of or determinative of the violations charged in Counts II or III.

WHEREFORE, for the reasons previously stated in Respondent's memorandum of law regarding Counts II and III and as further discussed herein, Respondent asks the Panel to find in Respondent's favor on Counts II and III on account of Disciplinary Counsel's failure to prove by clear and convincing evidence that Respondent gave legal advice to Ms. Binette in connection with the signing of the relationship agreement or that Respondent advised Ms. Binette to sign the relationship agreement as condition of continuing to employ her.

Dated this 12 day of March, 2018.

Respondent, Glenn Robinson

By: _____

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