

**STATE OF VERMONT
JUDICIAL CONDUCT BOARD**

In Re:
Judge Paul Kane

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JCB Docket No. 16.004

**SUPPLEMENTAL MOTION TO EXCLUDE
RESPONDENT EXHIBITS A, C, F, M AND Q**

Board Counsel respectfully submits this Supplemental Motion seeking to exclude Respondent's proposed exhibits A, C, F, M and Q. As Board Counsel argued in his *Motion In Limine* yesterday, all of Respondent's exhibits should be excluded because they were not submitted by the Board's mandated deadline. Board Counsel stands by that request. Evidently, however, that Motion spurred Respondent into action, as late last night his counsel submitted a series of exhibits (but still no witness list) via email. Upon initial review of those materials, it appears that the five exhibits referenced above are particularly deserving of exclusion because Respondent *never* produced these documents before, and all of them are responsive to document requests Board Counsel propounded more than six months ago on September 14, 2016. Among other things, those requests called for production of the following:

Request to Produce #1: All documents relating to Kay Tolaro's mental or physical health.

Request to Produce #6: All documents and communications relating to the Written Statement of Claim made by you and/or Attorney Moore on your behalf against Ms. Tolaro's estate.

Request to Produce #7: All documents relating to any repairs, renovations, maintenance, upgrades, or other physical alterations of any kind to Ms. Tolaro's Pleasant Street property.

Request to Produce #9: To the extent not covered by the preceding requests, all documents relating to Kay Tolaro.

Request to Produce #10: All documents or other materials you intend to introduce as evidence or otherwise use at trial.

The Exhibits that should be excluded are as follows:

- **Exhibit A** is a confusing hodgepodge of handwritten notes, typed notes, informal transcripts, attorney-client emails and attorney correspondence, much of which has handwritten commentary in the margins. To the extent this material can be understood (in the absence of deposition questioning, which *definitely* would have taken place on all of these documents if they had been timely produced) it all appears responsive to Requests 6, 9 and 10.
- **Exhibit C** is a similarly disjointed series of documents relating to Mr. Kane's statement of claim. Although Board Counsel believes he may have seen page 2 before, the rest appears to be new. These documents are also responsive to requests 6, 9 and 10. If these materials had been produced Board Counsel would likewise have deposed Mr. Kane about how his apparent early estimate of his Statement of Claim of less than \$200,000 grew to over \$800,000.
- **Exhibit F** appears to be a letter Mr. Kane wrote to Ms. Tolaro in large font. The content clearly shows Mr. Kane was aware of Ms. Tolaro's diminished cognitive functioning. This document should have been produced in response to Request 1.
- **Exhibit M** is a repeat of a page found in Exhibit A.
- **Exhibit Q** appears to be a letter Mr. Kane wrote to Attorney Chris Moore in the latter's capacity as the Tolaro Estate Administrator. It is responsive to Requests 7, 9 and 10.

The entire point of discovery is to avoid situations like this. Mr. Kane was deposed on December 7, 2016. After repeated demands for discovery production leading up to that deposition, Mr. Kane's counsel produced written responses, but no documents, just before the deposition. Not wanting to postpone the deposition further, Board Counsel stated as follows on the record:

To the extent, once I get those [documents], to the extent that there's any information . . . in there that I would have asked you about today had I received them on a timely basis, I'm going to ask that this deposition be reconvened at my office in Burlington, and I'm going to move to have you cover the cost of that second deposition, because there's no reason why I shouldn't have that discovery today, okay?

Kane Depo, at 29:13-22. The situation before the Board is decidedly more egregious than merely late discovery production – Mr. Kane's document production did arrive several weeks

later, but the materials at issue here were not included. As stated yesterday, this is litigation by ambush.

If the Board is disinclined to exclude these Exhibits altogether, there is an alternative: Mr. Kane should be directed to appear for deposition in Burlington, at his expense, on any topic raised by these eleventh hour disclosures. Unfortunately Board Counsel is currently in England meeting with witnesses in a different matter, and will not return to the United States until late Friday night. As a result, this Board should order Mr. Kane's deposition to take place at 2 p.m. this Sunday, March 19, with costs to include reasonable attorney fees, any excess charge necessary to secure a court reporter on a weekend, and any costs associated with obtaining a transcript for immediate use the following morning.

Dated in London, England, this 15th day of March, 2017.

*/s/ Ian P. Carleton, Esq.*¹

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¹ Apologies for the electronic signature, but that is the best that can be done from abroad.