STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

PRB Decision No. 248

In Re: C. Robert Manby, Jr., Esq.
PRB File No. 2019-089

This matter came on for a trial on the merits utilizing the Webex system. The two day merits trial was held on October 22 and October 29, 2021. The hearing panel was chaired by James A. Valente, Esq, and included Amelia W.L. Darrow, Esq and Brian Bannon. The late Mark J. DiStefano, Esq was present throughout the hearing and served as Hearing Panel Counsel. The matter was prosecuted by Sarah Katz, Esq, Disciplinary Counsel. Respondent C. Robert Manby, Jr was present and was represented by counsel Harry R. Ryan, Esq. and Vanessa E. Robertson, Esq. Attorney Robertson withdrew on May 25, 2022.

Following the untimely passing of Hearing Panel Counsel DiStefano, Special Hearing Panel Counsel Steven A. Adler, Esq assumed that role. During the pendency of this matter, Jessica L. Burke, Esq. entered her appearance as Special Disciplinary Counsel.

Factual Predicate

Respondent C. Robert Manby, Jr (hereinafter Respondent) represented 91 year old EM in 2015 and 2016. His representation included preparing documents that disposed of many of her assets at the direction of her son. She was not legally competent during the period of her representation by Respondent.

Procedural History

On November 27, 2019, the parties filed a signed Stipulation of Facts and jointly Proposed Conclusions of Law dated November 18, 2019. This is one way for Disciplinary Counsel to initiate a disciplinary proceeding. See A.O. 9, Rule 11(D)(1). However, subsequent to filing this "stipulation," Respondent challenged some of the factual assertions and a variety of the exhibits on which they were purportedly based. In contrast, Disciplinary Counsel filed pleadings explicitly based on the stipulation and the exhibits filed therewith. Both parties briefed why the "Stipulation" should or should not be considered as binding. This Panel determined that there was no "meeting of the minds" with regard to the Stipulation and therefore rejected it in a ruling dated March 6, 2020.

On August 5, 2020, Disciplinary Counsel filed a three count formal petition of misconduct. Respondent filed his answer on August 25, 2020. As always when a matter proceeds by Petition of Miscount, rather than by admitted facts, the burden of proof is on Disciplinary Counsel, who must prove misconduct by clear and convincing evidence. A.O. 9, Rule 16 (C) and (D).

Respondent then sought to recuse the entire Hearing Panel, alleging that its review of the jointly

submitted Stipulation of Facts created bias in the Panel. That motion and a companion motion to strike allegations as not being factually based, were denied on October 9, 2020[1]. A pretrial scheduling order was issued on January 8, 2021. After additional motion practice, certain discovery deadlines were extended in contemplation of a merits hearing sometime from late July to late August, 2021. Rulings on evidentiary Motions in Limine were deferred until trial, which was further delayed due to a medical emergency for counsel until October 22 and 29, 2021.

The Hearing Panel's decision on various evidentiary issues was delayed until June 29, 2022, secondary to the passing of Hearing Panel counsel. On July 29, 2022, both parties filed proposed Findings of Fact and Conclusions of Law, with Special Disciplinary Counsel also filing a Sanctions memo. By agreement of the parties, the hearing was then deemed "concluded," triggering the 60 day time frame for this Hearing Panel's decision. A.O. 9, Rule 11(D)(5)(c). This Hearing Panel's decision should thus issue by September 30, 2022. However, the time frames in the procedural rules are themselves directory and not jurisdictional, and do not justify the abatement of any disciplinary proceedings. A.O. 9, Rule 16(I).

Alleged Misconduct

Disciplinary Counsel alleges that Respondent C. Robert Manby Jr violated three rules of professional conduct. Specifically, it is alleged that Respondent violated:

Count 1: Vermont Rule of Professional Conduct 1.14(a), by failing to maintain a normal client-lawyer relationship with 91 year old EM, who had diminished capacity; and by accepting EM's son's representations without consulting directly with EM.

Count 2: Vermont Rule of Professional Conduct Rule 1.1, by failing to provide competent representation in not meeting with EM privately to discuss her estate planning objectives.

Count 3: Vermont Rule of Professional Conduct 1.4(b), by failing to adequately communicate with EM in having EM sign documents which affected her interest in her major assets without adequate explanation.

Respondent timely answered the complaint as follows:

Count 1: While admitting some of the predicate facts, Respondent denies that he knew EM had a diagnosis of dementia or Alzheimer and asserts that he did consult with EM directly while squatting outside a car in which she was a passenger.

Count 2: Respondent admits that he negligently violated Vermont Rule of Professional Conduct 1.1 by failing to meet privately with EM, which would have been a better practice. However, he asserts that while EM's son was present during his meetings with her, the son did not interfere

[1] Averments in pleadings are good faith allegations. V.R.C.P. 11(b). The factual basis of the allegations are generally determined at a merits hearing or after discovery.

and thus the meetings were "private enough" for Respondent to determine that EM was competent.

Count 3: Respondent admits that he could have been more thorough in discussing the documents with EM to make sure she understood them, but asserts that EM's level of understanding in the relevant time frame of 2015-2016 is a matter of conjecture and does not meet the clear and convincing standard.

FINDING OF FACT

1. Respondent is an attorney licensed to practice law in Vermont since 1980. He maintains a solo practice in White River Junction focused on real property and probate matters.[2] H1 31-32.[3]

2. In February of 2015, Respondent was contacted by JJM, whom Respondent had represented in various real estate transactions 20-30 years earlier. Answer ¶¶ 3-4.

3. JJM told Respondent during an initial communication and thereafter at an in-person meeting at Respondent's office on February 17, 2015 that he was assisting his elderly mother, EM, in transferring title to her home in Burlington and wanted to avoid probate. EM was not present at the meeting. Answer ¶¶ 6-7.

4. At the time, EM was 91 years old, living in her own home in Burlington with JJM. Respondent was aware of this, and also knew that EM had two daughters, PS and GW, who visited her regularly. Answer ¶¶ 8 & 14.

5. Without communicating directly with EM, Respondent agreed that he would represent her and prepare documents transferring her home to a joint tenancy with right of survivorship with her son, JJM, even though such a transfer might affect EM's eligibility for long term care funding through Medicaid. Respondent never discussed this issue with EM and relied on representations by JJM as to EM's wishes. Answer ¶¶ 16-19

6. Respondent prepared the deed requested by JJM and sent it to JJM on April 21, 2015. As of that date, Respondent still had not communicated directly with EM. Answer ¶ 19.

7. At JJM's request, Respondent drove to Burlington on June 25, 2015 where, for the first time, he met with EM and communicated with her. Prior to that date, Respondent had not

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[2] Respondent has other practice areas, including municipal work and commercial transactions, not directly relevant to the allegations herein.

[3] Citations throughout are to H1, referring to the transcript of the merits hearing on October 22, 2021 and H2, referring to the hearing on October 29, 2021. The numbers refer to the hearing transcript page and line.

spoken to or met EM. Answer ¶ 20.

8. Respondent believed he was being asked to drive from White River Junction to Burlington because there was not a convenient way to have the deed he had mailed to JJM notarized in Burlington. H1 22/24.

9. Respondent met JJM and EM in a supermarket parking lot off the Interstate, got into their car and the three drove about a mile to EM's church parking lot.[4] H1 24/4.

10. Once at the church, Respondent got out of the back seat of the car and opened the passenger side door where EM was sitting. She was very elderly, not able to turn around and crane her neck, and was hard of hearing. H1 124/6.

11. Respondent "kind of knelt down and stooped ...[to]...have direct eye contact with her." He gave a brief explanation of what the deed did, told her she was conveying her home to herself and her son jointly and asked if that was her wish. EM responded "yes." H1 24/15. JJM was still in the car sitting in the driver's seat next to EM for most of the time, although at some point Respondent testified that he got out of the car and stood outside. H1 25/8. Respondent does not recall discussing other estate planning options with EM outside of JJM's presence. H1 27/6. Respondent notarized EM's signature after she again said "yes" when asked if it was her free act and deed. H1 24/21

12. If EM said anything beyond "yes," Respondent has no specific recollection of that. Respondent at trial thought that JJM might have been out of earshot at certain times when he exited the car, but admits that in an earlier deposition, he had recalled that JJM was still sitting in the car when he spoke to his client EM. The Panel finds that JJM was sitting in the car during the majority of Respondent's conversation with EM, and could hear it.

13. If Respondent discussed any advantages or disadvantages of the transfer with EM while squatting outside JJM's car, he cannot recall that. Respondent also did not discuss any possible waiver of attorney client privilege which might occur when confidential matters were discussed in the presence of JJM. Respondent admits, and this Panel finds, that he should have addressed the possible privilege waiver. H1 27/18.[5]

14. In short, Respondent never met with or spoke to his client alone, outside the presence of her son JJM. More critically, Respondent never engaged her in conversation or asked her questions to which more than a single word response of "yes" was required. He never

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[4] EM and her husband attended this church daily until he passed away in 2014.

[5] But see, VRPC 1.14, Comment [3] providing that the presence of family members or other third persons needed to assist in representation generally does not affect the attorney-client evidentiary privilege.

made even basic inquiry such as asking her the names of her children, her health status, or to summarize the nature and extent of her assets.

15. At the same parking lot meeting on June 25, 2015, JJM produced two other documents, DC Exhibit 6 & 7, neither of which Respondent had previously seen.[6] The first, DC 6, gave JJM ownership of an account belonging to EM which contained approximately $14,000. The second, DC 7, established or modified a Trust to make JJM the beneficiary of EM's major assets. H1 33/17 & 34/4. With JJM sitting in the car next to EM for most of the time, Respondent notarized these two additional documents, attesting that she understood the paperwork and that she was signing as her free act and deed. Answer ¶ 21.

16. On September 29, 2015, Respondent had his second meeting with EM. In the 3 months since the first meeting, he had never called her, spoken to her, written to her, or communicated with her in any way.

17. During that period, Respondent spoke regularly with JJM, who called him often. H1 36/3. In fact, on more than one occasion, Respondent had to remind JJM that EM was the client, and that Respondent did not represent JJM. H1 54/17.

18. During these conversations, JJM told Respondent that his mother had changed her mind and now wanted her home transferred solely to JJM, and further wanted JJM to have greater control over any remaining assets. To his surprise, Respondent also learned that JJM had never recorded the previous deed in the land records. H1 36/14 and DC Exhibit 8.

18. Acting on JJM's instructions, and without contacting EM directly, Respondent prepared a new deed and power of attorney. JJM drove his mother to White River Junction, where Respondent again met with his client while she was seated next to JJM in her son's car. H1 35/4 & 37/13. JJM was present during the entire meeting but said nothing and was not part of the conversation. H1 79-80. During that second parking lot meeting, Respondent never asked EM if she understood the documents. Instead, he simply "explained what the document did." H1 39/16.

19. Respondent, despite recognizing that EM was very elderly and frail and not ambulatory, had the impression that she recognized him from their prior meeting, although he never asked her that question directly. Instead, his impression was based on EM smiling at him, and possibly saying hello, with a look of what Respondent took to be recognition. H1 41/10.

20. Respondent was aware of the five year "look back" period and that having EM convey her home outright to her son could potentially disqualify her from significant long term

[6] Exhibits are referenced by the party introducing them; thus, DC is Disciplinary Counsel.

care benefits of Medicaid. He was also aware that there were alternatives such as an enhanced life estate deed. Although Respondent discussed these alternatives with JJM, he never discussed them with his actual client, EM. He simply followed JJM's instructions because JJM was "insistent" that title to the house be transferred immediately, despite the potentially adverse consequences. H1 42/22. Respondent never asked his client what she wanted or what her long term care plans were. H1 42-43

21. Respondent did not communicate with his client in any way until their next meeting (the third meeting) on or about February 4, 2016 when JJM drove his mother to White River Junction to have Respondent witness an Advanced Health Care Directive. DC 10, H1 43/15.

22. Once again, Respondent did not meet privately with his client before witnessing her signature, nor did he inquire why his client needed to ride from Burlington to White River Junction just to get a document witnessed. H1 45/18[7] JJM recalls that at one of the White River Junction meetings, he left the car to use the bathroom in Respondent's office, then lingered outside the door before returning to the car to give EM and Respondent a chance to speak privately. H1 80/22. Respondent recalls the White River Junction meetings as fairly brief and did not recall JJM's bathroom trip. H1 51/5 and 57/7.

23. In late February or early March of 2016, JJM called Respondent to find out how one would revoke a power of attorney. Then on March 30, 2016 (their last meeting), JJM came to Respondent's office with his mother EM and asked Respondent to notarize a document Respondent had never seen before. Respondent added a notary jurat to the document, by which his client EM revoked her 2009 durable power of attorney which had appointed her daughter PS as agent. H1 49/5. Respondent asked EM if this was her wish, to which she responded "yes." This occurred all in JJM's presence. Respondent never engaged EM in a conversation to see if she understood how these series of documents had changed her estate plan, and never obtained or reviewed a copy of her previous estate planning documents. Answer ¶ 30.

24. From October of 2014 when her father died until March 16, 2016, EM's daughter PS would visit her mother almost daily, often bringing her dog, which EM enjoyed. PS would spend about five hours with her mother. H2 13/6. However, EM was suffering from dementia and Alzheimer's disease throughout this period, the latter of which she had prior to her husband's death.[8]

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[7] Respondent had observed that EM was not ambulatory, very physically feeble, there was no wheelchair in the car, and that except to the extent that JJM may have left the vehicle at the June 2015 meeting in Burlington, mother and son were together in the car throughout all three meetings. H1 34-35.

[8] As this Panel finds *infra*, EM's primary care physician had her tested for dementia as early as 2009 and had observed her failing memory over at least a six year period prior to the involvement of Respondent.

25. EM was not able to recognize her daughter, or read books, or recall that her husband had passed away in 2014. She was not able to mange self care or attend to her finances. She could not recall her husband's name. Although EM enjoying getting out for a car ride, it was painful for her to ride long distances because of back pain H2 14-17.

26. On March 19, 2016, PS was driving to Burlington for her regular visit with EM when she got a call from her brother JJM who told her she was no longer allowed to visit with EM without his permission. H2 24/10. That ended PS's daily visits until she obtained an emergency court order, as described *infra.*

27. Dr. Peter Gunther was EM's primary care physician from 2001 until her death in 2017. H1 155. Although Disciplinary Counsel did not provide foundational evidence of his credentials, during cross examination, evidence was elucidated to establish his ability to testify as an expert witness pursuant to V.R.E. 702.

28. Dr. Gunther is Board Certified in adult internal medicine. He was also EM's late husband's doctor. He has attended multiple continuing education seminars that have addressed dementia and Alzheimer's disease throughout his career. H1 162/23. He has specialized medical knowledge, as well as personal knowledge of EM, and his observations and opinions assist this Hearing Panel in determining EM's cognitive abilities and how apparent her decline was during the relevant time frame.

29. Dr. Gunther was EM's physician in 2015 -2016, during the time frame when Respondent was acting as EM's attorney. During that period, Dr. Gunther would visit EM at her home approximately every 6 weeks, often spending 45 minutes per visit. H1 156/11.

30. Dr. Gunther testified that after EM's husband died in 2014, EM suffered a precipitous decline in her ability to function mentally and physically. H1 160/2. During 2015-2016, although she had multiple medical issues, her most significant condition was her advancing Alzheimer's disease. H1 158/22.

31. During 2015-16, EM had almost no ability to care for herself, could not read books, write letters, make phone calls, or communicate. She would say "yes and no" but her answers were not clearly related to the questions asked. H1 159.

32. During 2015-2016, EM's loss of mental functioning was so profound that spending just five minutes with her would make it apparent that she was significantly impaired, often speaking in "word salad" where she would mumble different words at times that were nonsensical and unrelated. H1 160/8.

33. Although on some days EM would be more awake or alert, her cognitive abilities did not improve and continued to decline during a six year period prior to her death. H1 160/20.[9]

[9] Dr. Gunther's observations of EM in 2015-2016 were corroborated by PS. EM's "good days" where those where her back was not so painful or her Crohn's disease was not flaring up.

Dr. Gunther's longitudinal knowledge of EM establishes a time line for her mental decline, as he had worked her up for dementia as early as 2008. He also referred her to the Memory Disorders Clinic at University of Vermont Medical Center for a comprehensive evaluation which confirmed Dr. Gunther's diagnosis and treatment plan. H1 161/14 and 165/8.

34. There is some uncertainty about whether, in 2009, EM's Alzheimer's disease was in the "moderate," "moderate to severe" or "severe" category. H1, 172-173 *et seq*. However, there is no dispute and this Panel finds that EM's cognitive abilities continued to decline from 2009 until her passing in 2017. It is reasonable to conclude that EM's Alzheimer's disease was worse in 2015-16 than in 2009 because it is a progressive disease and based on Dr. Gunther's observation of EM's sharp decline in cognitive abilities after her husband passed away in 2014. H1, 196/14[10]

35. Although Dr. Gunther did not see EM on the specific dates in 2015 and 2016 when she signed the documents in front of Respondent in a parking lot in Burlington and White River Junction, he had been her physician for 17 years, and saw her the month before and the month after those dates. During that period, EM had significant cognitive deficits, was primarily nonverbal, and would not have been able to even minimally understand the legal documents she signed (or the consequences thereof). H1 180/13.

36. On March 3, 2015, Respondent sent his first invoice for his legal work. It was addressed and sent to JJM. H1, 53/5; D.C. Exhibit 25 at p. 32. The second invoice, also to JJM, was on May 1, 2015. The third invoice, on July 1, 2015, was addressed by Respondent's bookkeeper to EM instead of her son JJM, at Respondent's direction. H1 56/21

37. The final invoice was dated May 3, 2016, with the entry: "March 31, 2016, long conversation with [JJM] re issues with sisters." H1 57/10. JJM was seeking advice from Respondent about his sisters' reaction to learning of the deed conveying ownership of their mother's house to JJM. Respondent was at that point still unaware that EM was already subject to an emergency temporary guardianship order. H1 58/16. Respondent recalls that he declined to give JJM advice during the "long conversation." H1 57-58.

38. At some point during his representation of EM, Respondent received an envelope with $1,000 in cash from JJM. He immediately called JJM and told him that no legal fees were due to him. JJM insisted that Respondent keep the money "as a gift." H1 59-60. Respondent kept the money and did not credit it to EM's client ledger.

However, even on "good days," she could not recall her children's names and did not recognize them. H2 16-17.

[10] Respondent noted a potential scoring error in EM's cognitive skills testing which this Hearing Panel finds outweighed by PS and Dr. Gunther's testimony. Respondent does not dispute that EM's dementia was a progressive disease which was significantly worse in 2015 than it had been when first diagnosed in 2008 or 2009.

39. In mid April 2016, PS, EM's daughter, received the letter authored by JJM which revoked PS's power of attorney. DC-11.[11]

40. Shortly thereafter, PS and her sister, GW, retained a lawyer and filed a petition for an emergency guardianship. The Chittenden County Superior Court, Probate Division, granted PS and GW co-guardianship of their mother, appointed an attorney to represent EM, and thereafter invalidated the multiple documents prepared by, witnessed or notarized by Respondent.[12] H2 31/16

41. Walter Decker has been an investigator since 2012 with Adult Protective Services (APS), a division within the Agency of Human Services. H1 113/14. Prior to working for APS, he was a police officer for 28 years with the City of Burlington, the majority of time doing investigative work. H1 114/3. He become involved in this matter as a result of a report that EM allegedly was the victim of financial exploitation. H1 114/22. [13]

42. On May 2, 2016, Mr. Decker meet with EM and JJM. (This was just over a month since Respondent's third meeting with EM). Mr. Decker spent 30-40 minutes with EM and JJM during which time EM was nonverbal, did not engage in any dialog, and in response to direct questions stared blankly at the wall. H1 118/24.

43. Mr. Decker visited EM again on May 10, 2016, and although he spent approximately 15 minutes at the entrance to her bedroom talking to JJM, EM gave no indication she was

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[11] PS actually received an non-notarized copy of the revocation letter; she did not see the notarized version until sometime later, when it was produced as a part of Respondent's file in discovery. However, insofar as the charges at bar are concerned, this distinction has little relevance.

[12] Respondent does not contest this fact or its admissibility, but objects to the Probate Court's *reasons* for invalidating these documents. This Panel agrees that the Court's rationale is not binding in this context, although the fact that multiple documents were found to be invalid and that at the time of the merits hearings, the family was still in litigation 5 ½ years later is relevant insofar as Respondent argues that there were no damages incurred as a result of his alleged ethical violations. As discussed *infra*, actual or potential damages are relevant to sanctions.

[13] Respondent objects the any consideration of evidence of EM's level of functioning on dates after Respondent had represented EM. As detailed in these Findings of Fact, the last meeting Respondent had with EM was on March 30, 2016 (FOF 23). However, Respondent's defense is premised almost entirely on his conclusion that EM was competent when he met with her, and that it was reasonable for him to rely on JJM's representations about his mother's mental acuity. Having thus opened the door, Respondent may not now complain that this Hearing Panel weights evidence of other third party observers, particularly given the uncontested evidence that EM's Alzeheimers was progressive. In short, independent evidence of her presentation both before and after those meetings is probative of how she was on those dates. V.R.E. 403

aware of his presence. H1 124/6.

44. Mr. Decker also met with Respondent as part of the investigation into financial exploitation of a vulnerable adult. H1 63/23.[14] There, Respondent learned for the first time that there was a Chittenden County probate proceeding and that EM had been diagnosed with Alzheimer disease for some period of time. H1 64/23 - 65/1. After the meeting, Respondent tried unsuccessfully to reach JJM by phone. He did not try to reach his client EM. H1 67/14.

45. Mr. Decker met again with Respondent on July 13, 2016. H1 124/16. Respondent was adamant that EM could clearly understand what she was signing and that it reflected her wishes. H1 125/11. As an explanation for meeting EM in a parking lot rather than in her home 3 blocks away, Respondent said he believed he was following the instructions "they" had given him, referring jointly to EM and JJM. H1 126-127.

46. In connection with the Probate Court emergency guardianship proceedings, Dr. William Nash was appointed to evaluate EM for competency. H2 91/25. Dr. Nash worked for approximately twenty years as a clinical psychologist and another 15-20 years as a forensic psychologist. He visited with EM at her home on May 9, 2016. H2 92/9.

47. In response to his questions, EM did not recall that her husband had died several years earlier and could not identify her son JJM, who lived in her house. She could not name her children. EM did not know the extent of her assets, and she did not know what medications she took or whether she had eaten that day. In fact, during Dr. Nash's interview of EM, she dozed off. When Dr. Nash roused her, she did not know who he was. H2 93-94 She was not able to maintain a conversation, and would respond to questions with a benign smile or a one or two word sentence. H2 94/10.

48. Dr Nash concluded, and this Panel finds, that on May 9, 2016, EM was in the final stage of dementia, as evidenced by her not knowing where she was at that moment, that her husband had died, or who her son was. She was not oriented as to person, place, or time. H2 96/21 & 93/10. In other words, she didn't know the people around her, where she was and when it was. H2 96/6.

49. In forming his opinions, Dr. Nash also reviewed EM's medical records, which helped him rule out other possible causes of cognitive decline, such as a stroke or overmedication. H2 100/21.

50. Dr. Nash reviewed the November 8, 2010 UVM Heath Care Memory Clinic, as well as records from Dr. Gunther from February 12, 2014-March 15, 2016. The records show a

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[14] Respondent recalls that the first meeting he had with Mr. Decker was on May 9, 2016 and that he declined to provide APS with a copy of his file without a court order. The exact date of the meeting is not relevant to this Panel's decision, although it finds that there were two meetings, the second after the Court order that Respondent provide his file.

standard, steady progress of Alzheimer's and dementia. H2 100/10.

51. Although there were or may have been some errors in the medical records cited by Dr. Nash in his report, they do not affect his conclusion that on May 9, 2016, EM was not competent and was in the advanced stages of dementia and in need of a guardian. DC-12 and H2 130/23.

52. Respondent does not contest Dr. Nash's conclusion; Respondent concedes that EM was not competent on May 9, 2016. H2 131/4.

CONCLUSIONS OF LAW

Disciplinary Counsel bears the burden of proof in this matter. The applicable standard is that proof be by "clear and convincing evidence." A.O. 9 Rule 20(C). This standard "represents a very demanding measure of proof. Although something less than proof beyond a reasonable doubt, it is substantially more rigorous than the mere preponderance standard usually applied in the civil context, and is generally said to require proof that the existence of the contested fact is 'highly probable' rather than merely more probable than not." *In re N.H.* 168, VT 508, 512 (1998).

Clear and convincing evidence does not mean that the evidence must be wholly uncontradicted or unimpeached. *Id.*; *Lanfear v. Ruggerio,* 213 VT 322, 329 (2020). However, the Hearing Panel must be satisfied that the testimony and other supporting evidence compels the fact finder to give it credence, and place confidence in it above and beyond evidence submitted by the opposing party. *In re Kelton Motors, Inc,* 130 B.R. 170 (1991). This is true even with conflicting evidence between experts and witnesses generally. This Panel is entitled to weigh the testimony of witnesses and consider their respective opportunities to observe, and their interests in the outcome. See, e.g. *Vermont Woman's Health Center v. Operation Rescue,* 159 VT 141, 147 (1992).

We have laid out in our Findings of Fact in considerable detail the extent of Respondent's contact with his client. We do this because Respondent asserts we must conclude that there is no standard explicit in our Code of Professional Responsibility by which a lawyer is required to evaluate a client's competency. While this is true, it misses the point. We need not pronounce that a lawyer undertake what amounts to a medical evaluation in order to decide the case here. In the Panel's view, it is neither necessary nor appropriate to announce a specific way to determine competency of a client. *C.f. In re Paul Kulig,* 2022 VT 33¶ 37 (7/15/22)(neither necessary nor appropriate for Hearing Panel to determine whether an oral trust existed). The lawyer must, however, at least attempt to assess a client's competence in a reasonable way. Here, Respondent's only attempt to do so - by concluding that EM appeared to recognize him without asking her whether she did - was not enough to maintain a lawyer-client relationship or provide competent representation though adequate communication.

In reaching this conclusion, we find significant the many "red flags" that Respondent knew of:

- Respondent never once met with EM alone. JJM was always present.
- Respondent relied on assurances from JJM that EM was fully competent. Yet, as Respondent knew, JJM was the sole person to benefit from the changes he was being asked to make by removing as beneficiaries and agents under EM's power of attorney and advance directive JJM's two sisters.
- Respondent took directions for his work solely from JJM without verifying in any way that EM understood JJM's directions.
- As far as Respondent can recall, EM never had much more than a single word response to his questions: "yes."
- Respondent's work created a wholesale change in EM's estate plan, in such a way that his client would likely be disadvantaged should she need to move into long term care. Respondent knew that there were better ways to deal with major assets, given the so called "look back" period for Medicaid. Yet he never asked his client why she wanted to make this change or discussed alternatives with her.
- Respondent prepared two deeds to change title to EM's house, at JJM's insistence. He did not inquire of EM about these transfers even after he learned, and was surprised, that JJM had not recorded the first deed.
- JJM would drive his frail mother across the state just to get a signature witnessed, or a document notarized, with no explanation.
- Meeting in a parking lot only a few blocks from EM's home where she could have met Respondent in comfort and privacy.
- Respondent accepted a cash gift from JJM even though no legal fees were due.

Respondent concedes that his client was incompetent on May 9, 2016 when examined by Dr. Nash. No expert witness contradicted Drs Nash and Gunther, or Investigator Decker. His challenges to their opinions are based on minor inaccuracies in their reports, but he does not challenge the evidence that his client showed signs of dementia as early as 2008, which progressed thereafter, particularly after 2014.

Respondent makes much of the fact that no expert saw EM on the dates when she met with him to sign documents. Thus, he reasons, Disciplinary Counsel has not met the high burden of proving a lack on competence on those specific dates, since perhaps EM was having a "good day" on those occasions. However, this is contradicted by the record on what a "good day" is for someone with advanced Alzheimer's disease. Having a "good day" for EM in 2015-16 was not equivalent to legal competency. She still could not recognize or name her children. If Respondent truly did not recognize that his client was incompetent on June 25 or September 29, 2015, or on February 4 or March 30, 2016, he should have. He failed to ask a single open ended question that required more than a one word answer. Central to the representation of a client, and certainly of a competent adult client, is asking that client what he or she wants to accomplish. This Respondent never did.

Adopting the standard advocated by Respondent would make it virtually impossible to prove violations of our Rules of Professional Conduct in these circumstances, because of the minimal probability that a qualified witness can testify as to a client's condition on the exact day they met with counsel. It is sufficient instead to offer evidence that a client's "ceiling" would not

allow them to understand the lawyer or the gravity of major changes to their estate plan advocated by those who stood to benefit from the changes, and that the client's condition would have been obvious to a lawyer making minimal basic inquiries as to the client's desires, medical history, and assets. This is consistent with competent practice.

Ordinarily, a lawyer handling an estate plan will discuss with his or her client two things: what do you have, and who are the people closest to you. In legal jargon, that is often characterized as: who are the natural objects of your bounty; and what is the nature and extent of your estate. Here, Respondent need only have asked his client for the names of her children to discover her cognitive impairment.

Respondent is charged with violating three separate but related Rules of Professional Conduct.

COUNT ONE

Vermont Rules of Professional Conduct § 1.14(a), provides:

> *When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.*
> *Comment [1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.*
> *Comment [3] The client may wish to have family members or other persons participate in discussions with the lawyer...Nevertheless, the lawyer must keep the client's interests foremost and...must look to the client, and not family members, to make decisions on the client's behalf.*

Disciplinary Counsel alleges that Respondent failed to maintain a normal client-lawyer relationship with EM, who had a diminished capacity, because he never made any attempt to assess EM's cognitive abilities. Respondent counters that there was no "direct evidence" presented to rebut his own assertion that he thought she was competent. He argues through counsel that he "had direct face to face *conversations* with EM at each meeting with EM...and inquired of EM concerning the meaning of the document so Respondent could be sure EM understood the document and that it reflected EM's intent and was consistent with her wishes." Respondent's Proposed Findings of Fact and Conclusions of law at p. 4.

Respondent's argument stretches the meaning of "conversation" too far. It is undisputed that Respondent never called or wrote to his client, or communicated in any way, until their first meeting, on June 25, 2015, in a parking lot in Burlington when the documents EM signed were already prepared. H1 19/14 and DC-5. Respondent remembers that he "presented the deed, gave a brief explanation of what the deed did, and asked if those were her wishes. She responded "yes." H1 24. He could recall no back and forth conversation, and certainly did not say that he asked EM to explain what her wishes were. Had he done so, and had she been able to respond

cogently, we would have a different case. Respondent concedes that he never discussed the pros and cons of her signing the deed he prepared, whether or not in JJM's presence.

The only explanation for Respondent's actions was that he was relying entirely on JJM's directions and representations. This is not a client-lawyer communication; nor did EM ever demonstrate her understanding of the meaning of any document, or articulate her wishes.

There are parallels between this case and *In re Coffey's Case,* 152 NH 503 (2005) cited by Disciplinary Counsel. In *Coffey's*, the 81 year old client was well known to Respondent Coffey, but had deteriorated secondary to dementia. The client ended up conveying valuable real estate to Mr. Coffey. Coffey asserted that he was "absolutely unaware" of the client's cognitive abilities, arguing that "lawyers are trained to perform legal services not psychological services." *Id* at 509.

This argument was unavailing in the face of the Respondent having turned a blind eye toward his client's condition. "Although he had many opportunities to do so, the Respondent made no effort to ascertain whether she had the mental capacity to make informed decisions."*Id* at 509. Similarly, Respondent here made no effort to engage his client in any conversation, or talk to other family members. Like Mr. Coffey, Respondent turned a blind eye.

As the population ages, the role of the "elder law attorney" becomes increasingly important, and the comments to Vermont's Rules of Professional Conduct § 1.14 are reflective of that. Had Respondent not turned a blind eye, he could not have failed to recognize that that EM's cognitive abilities were diminished. In Comment 6 to § 1.14, when a lawyer seeks to determine the *extent* of diminished capacity, he or she should consider such things as the client's ability to articulate reasoning behind the decision making, whether the client has an appreciation of the consequences of a decision, and the substantive fairness of decisions. Here, all substantive discussions Respondent had were not with EM but with her son who quite obviously had a vested interest in having his mother's estate plan changed. No credible evidence has been presented to this Panel that EM ever told Respondent what she wanted to do with her property, or the reasons therefor. Thus, this Hearing Panel need not consider how specifically a lawyer should go about assessing client competency when no attempt was made here.

Respondent implies in his proposed Findings that proof may only be relied upon if it is "direct evidence." As the Vermont Supreme Court has said, "The law makes no distinction between the weight given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. Indeed, certain types of circumstantial evidence may be more trustworthy than certain types of direct evidence." *State v. McAllister,* 2008 VT 3 ¶ 17, 183 VT 126, 134[15] (affirming convictions for drug offenses proven

[15]*State v McAllister* was a criminal case requiring the higher standard of proof beyond a reasonable doubt. The Supreme Court upheld Ms. McAllister's conviction for drug possession based entirely on circumstantial evidence, reminding that "when reviewing a case based largely on circumstantial evidence, the evidence 'must be considered together, not separately, even if defendant can explain each individual piece of evidence in a way that is inconsistent with guilt.'"

beyond a reasonable doubt based on circumstantial evidence; *State v. Baird,* 2006 VT 86 ¶ 29 *et seq* (holding that circumstantial evidence alone could support a conviction).

This Hearing Panel is reminded of the time worn example of compelling circumstantial evidence: one goes to sleep with dry ground outside and wakes up in the morning to see the ground snow covered. Although not observing it snow during the night, one may reliably conclude that it snowed. Here, Respondent concedes that his client was incompetent in May of 2016; the Panel has found that EM's dementia was documented at least 6 years earlier and that the disease is progressive. Barring evidence of recovery, Disciplinary counsel has proven by clear and convincing circumstantial evidence that on the dates in 2015 and the two meetings in 2016, EM was obviously unable to articulate her desires to her lawyer, but Respondent attempted to represent her as if she understood the proposed changes and could discuss her wishes. In doing so, Respondent violated Vermont Rules of Professional Conduct § 1.14(a).

COUNT TWO

Vermont Rules of Professional Conduct § 1.1 provides :

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Disciplinary Counsel argues that, in accordance with the Comments section of this Ethical Rule, Respondent was required to use methods and procedures meeting the standards of competent practitioners. That required at a minimum meeting and giving EM privately an opportunity to consult. For estate planning attorneys, that would include determining what her estate plan wishes were and that the plan he was devising for her was her own and not that of her son, (something Respondent neglected to do entirely), and discussing with the client her long term care considerations, particularly since she was 91, in frail physical health, and barely ambulatory.

Respondent argues that his face to face meeting in the parking lot should suffice because JJM did not interfere and that EM's back was to her son. This, he argues, was "private enough." This overlooks Respondent's essential duty to his client. He had a duty to determine that the estate plan he was crafting reflected EM's wishes, but made no effort to assess the cognitive abilities of his client. We need not decide when a lawyer should seek guidance from an appropriate diagnostician to determine cognitive capacity. *C.f. § 1.14 Comment 6;* indeed, the Comments point out that different levels of capacity may be needed for different purposes. *Id. Comment 1.* The point remains that Respondent never found out because he did not engage EM in conversation or get her to talk beyond one word answers.

Id (citations omitted). Each piece of circumstantial evidence must be evaluated in its evidentiary context, not in a vacuum. *Id.* As applied here, taking all the "red flags" together, Respondent failed completely to "maintain a normal client-lawyer relationship."

Respondent repeats his argument that without "direct evidence," we are left with conjecture that EM did not have capacity. But this is not necessary to establish, when Respondent did not even attempt to determine if he was making changes that his client in fact wanted. Given our finding of EM's advanced dementia, we conclude that Disciplinary Counsel has established by clear and convincing evidence that Respondent failed to provide competent representation to EM in violation of Vermont Rules of Professional Conduct § 1.1.

COUNT THREE

Vermont Rules of Professional Conduct § 1.4(b) provides in relevant part

COMMUNICATION: A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Disciplinary Counsel argues, consistent with the Comments to this Rule, that the communicating must be with the client and not a third party, and that "the client should have sufficient information to participate intelligently in decisions concerning the objective of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so." Comment 5. Respondent counters that, while he could have been more thorough, he did explain each document to his client and subjectively "was sure that each document EM signed was what she wanted and was consistent with her wishes." Respondent's Proposed Findings of Fact at p. 6.

Respondent's argument presupposes "a client who is a comprehending and responsible adult." *Id, Comment 6*. We have found that she was not competent, and there was no evidence adduced by Respondent that EM engaged intelligently in any decision about her estate plan.

This Panel finds that there is substantial evidence of EM's advanced dementia in 2015 and 2016, consistent with the findings of the Chittenden Probate Court, and the testifying experts. We find that Respondent failed to explain the documents he had his client sign so that she could make an informed decision. Had Respondent tried to determine whether EM understood what he was saying, he would have quickly known that she was not able to make life care decisions. This should have encouraged Respondent to explore other issues, such as long term care options for EM, or the role that all three of her children might play in EM's future care. Instead, without effectively communicating with his client, Respondent continued to take directions solely from JJM. In so doing, he violated Vermont Rule of Professional Conduct § 1.4(b).

Having determined that Respondent has violated Vermont Rules of Professional Conduct §§ 1.14(a), 1.1 and 1.4(b), we now must turn to sanctions.

SANCTIONS

In considering sanctions, the Panel must consider (a) the duty violated (b) the lawyer's mental state (c) the actual or potential injury caused by the lawyer's misconduct and (d)

aggravating or mitigating factors. *In re Paul Kulig,* 2022 VT 33, ¶40 *citing Wysolmerski,* 2020 VT 54 ¶27. We keep in mind that "the purpose of sanctions is not to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct." *Id.*

Hearing panels are instructed to heed the *ABA Standards for Imposing Lawyer Sanctions* (ABA 1986, amended 1992) (hereinafter *ABA Standards*) when determining the appropriate sanction. *In re Andres,* 2004 VT 71 ¶ 14. The *ABA Standards* provide a presumptive sanction, depending upon the importance of the duty violated, the level of the attorney's culpability, and the extent of the harm caused. From this presumptive sanction we may deviate up or down depending upon the existence of aggravating or mitigating factors. *In re Fink,* 2011 VT 42 ¶35.

DUTY VIOLATED

While a lawyer owes a duty to the general public, the legal system and the legal profession, the paramount duty is to the client.

There is perhaps no more basic duty to a client than understanding why one is being retained. It is impossible to carry out a client's wishes if the attorney never asks the client what they want to accomplish. Hearing a feeble client only through the voice of the son who was the beneficiary of proposed wholesale changes to an estate plan, and getting instructions to prepare a series of instruments by which the son gets his mother's entire estate to the exclusion of the client's daughters, is both out of the ordinary and suspicious on its face. Respondent did not have a normal attorney-client relationship with EM because he never once called or communicated with her privately, or asked her to articulate what she wanted. In doing so, he breached his duty to her.

MENTAL STATE

The ABA Standards require an analysis of a Respondent's mental state: intent, knowledge or negligence. *ABA Standards § 3.0 Commentary* at 27. Applied to this case, "intent" is when a lawyer acts with the conscious objective or purpose to accomplish a particular result. Thus, Respondent acted with "intent" if he set about to assist JJM in taking advantage of his vulnerable mother by moving all of her assets into his name to the disadvantage of his sisters. "Knowledge" exists where a lawyer acts with conscious awareness of the nature or attendant circumstances of his conduct but without the purpose of accomplishing a particular result. Thus, Respondent acted with "knowledge" if he consciously prepared documents to transfer title to real estate and bank accounts but without the intention to benefit the son and disadvantage the mother. Negligence exists where the lawyer fails to appreciate the risk that he creates which a reasonable lawyer in the exercise of due diligence would appreciate. See *ABA Standards, Theoretical Framework*, at 6; see also *ABA Standards* at 19 for definitions.

Based on the evidence presented and this Panel's Findings, we conclude that Respondent's state of mind under the circumstances is "knowing." Had his conduct ended after the first deed drafting, requested in February of 2015 by JJM and signed at the parking lot

meeting in June of 2015, what the Respondent characterized as a 'limited scope", we might conclude he was merely negligent. However, his representation of EM did not end and Respondent had many months to contemplate the transaction, call his client or her daughters, or in some way seek confirmation that he was carrying out EM's wishes and not those of her son. He nonetheless drafted documents, at son's insistence, despite knowing that this would likely affect EM's Medicaid benefits and disinherit EM's daughters. The danger of getting instructions only from the beneficiary was obvious.

The Hearing Panel is troubled by the $1,000 "gift" from JJM to Respondent, which suggests a personal benefit for representation which placed JJM's wishes ahead of EM. This issue was not pursued in any depth at trial and is not the basis for any specific finding of intent; but again, it is a fact that should have suggested to Respondent that he was not doing enough to competently represent EM.

INJURY AND POTENTIAL INJURY;

Injury is defined in the ABA Standards as "harm to a client, the public, the legal system or the profession which results from a lawyer's misconduct. The level of injury can range from 'serious' injury to 'little or no' injury." *Id. Definitions at 9*.

Respondent argues that, if his conduct is sanctionable at all, it caused little or no injury. He cites to *In re Warren,* 167 VT 259 (1997), a case in which the Respondent attorney misrepresented himself in the context of acrimonious divorce action and was reprimanded. While no injury occurred in that case, the Supreme Court nonetheless revisited the private admonition sanction and imposed a public reprimand. *Id.* at ¶5. Respondent also cites to *In re PRB Dkt. No. 2012,* 121 A.3d 675 (VT 2015). In that case, the attorney negligently commingled personal funds with client funds, and upon recognizing the error, promptly rectified it. No clients were injured. The hearing panel concluded, and the Supreme Court affirmed, that a private admonition was appropriate. *Id.* at ¶¶ 22 & 25.

In contrast, Respondent here argues that his actions caused no injury because in a subsequent civil suit against Respondent for malpractice, his carrier "compensated EM's estate, in full, for all alleged losses resulting from Respondent actions, including all costs and attorney's fees." Respondent's Proposed FOF p. 18. This argument does not address the undisputed fact that EM was deprived of regular contact with her daughters as a result of Respondent preparing documents giving the house to JJM, and revoking the daughter's power of attorney. It ignores the fact that the family had to retain counsel and proceed with an emergency guardianship hearing, then retain another attorney to pursue an action against Respondent for malpractice. PS testified without contradiction that having to retain attorneys to undo the work that Respondent did affected the entire family and soured their relationship with JJM's son with whom they had been particularly close. The fact, not fleshed out at trial but alluded to in the proposed findings, that the family was successful does not fully mitigate the damages and does nothing to lessen the potential damages - what if Respondent didn't have insurance?

Respondent's actions tied the family up in litigation for 5 ½ years. H2 41-42. At the time

of the merits hearing, Probate litigation was continuing. In this Panel's view, years of intra-family litigation are enormously damaging and have consequences that may well be permanent. Respondent defines "injury" as unrecovered monetary loss; but the fact that EM's family was apparently ultimately successful in recovering their economic losses through litigation does not mean there was no injury. If anything, it tends to show that there were in fact actual injuries, both economic and personal, caused by Respondent's misconduct. See *in re Bowen,* 2021 VT 7 ¶39 *(*The existence of ... stress and anxiety [from attorney misconduct] ... supports the conclusion that wife experienced actual injury); *In re Blais,* 174 VT 628 *(*recognizing clients' anxiety resulting from attorney's neglect and misrepresentations as 'actual injury'). Moreover, Respondent's argument fails to address the fact that losing the value of a house in Chittenden County - likely worth hundreds of thousands of dollars - for 5 ½ years is an actual loss in the time value that is diminished.

The fact that JJM actively misrepresented his mother's mental health as part of his apparent exploitation of her does not excuse Respondent from responsibility. In this Panel's view, Respondent accepted payment for carrying out JJM's objectives and in acting as he did, failed to take the most basic steps of a reasonably competent attorney and communicating with his client, resulting in potential loss of all of his client's assets and significant actual damages.

The presumptive sanction for knowingly causing actual or potential injury is dictated by ABA Standard 4.42(a): a suspension. This is also the presumptive sanction where a lawyer engages in a pattern of neglect that causes injury or potential injury to a client.[16]

Finally, this Panel considers whether a deviation from the presumptive sanction is appropriate, by analyzing the aggravating and mitigating facts from the ABA Standards §§ 9.22 and 9.32

In the Panel's view, the evidence supports the conclusion that there were the following aggravating factors from § 9.22:

1. There was a pattern of misconduct over more than a year. Respondent had ample opportunity to speak, or attempt to speak, to his client privately, both by phone and in person.
2. Respondent has not acknowledged the wrongful nature of his conduct, and in asserting that while he could have been more careful or done better, and that EM's family did not suffer damages, he shows a lack of remorse.
3. EM was a particularly vulnerable client, age 91 and in very fragile health. She also suffered from dementia.
4. Respondent had substantial experience in the practice of law, and was undertaking a matter squarely within his practice area. At the time he agreed to represent EM, he had been practicing law for approximately 35 years.

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[16] Disciplinary counsel suggests that some of Respondent's conduct may have been "merely" negligent, such as the initial deed drafting. If so, it was a pattern of negligence which began with the initial contact by JJM in February of 2015 and continued until the final meeting. with EM in March of 2016.

There are also mitigating factors, under ABA Standard § 9.32:

1. Respondent had no prior disciplinary record
2. There is no evidence of a dishonest or selfish motive, although the retention of a $1,000 "gift" from a nonclient who benefitted directly from Respondent's work, is troubling.
3. Respondent cooperated with the office of Disciplinary Counsel.[17]

On balance, we are guided by two recent Vermont Supreme Court decisions: *In re Robinson,* 2019 VT 8 and *In re Kulig,* 2022 VT 33. *In re Robinson supra* at ¶ 62-65, reminds us of the importance of the vulnerability of the victims, in accord with ABA Standard 9.22(h). The victims of Mr. Robinson were not elderly but had their own vulnerabilities. EM's advanced age, and her obvious inability to communicate in any depth, if at all, were serious red flags that should have put Respondent on high alert. Respondent's conduct did not approach or resemble the sexual behavior described in *Robinson*, which led to disbarment. Rather, *Robinson* is a reminder to this Panel of the importance to be placed on the vulnerability of the victim.

In re Kulig, supra, was decided on July 15, 2022, just weeks before the parties submitted their proposed Findings of Fact. In a factually analogous case, the Supreme Court accepted a Hearing Panel's Findings but increased the sanction from a three to a five month suspension in light of the severity of the harm caused.

In that case, Mr Kulig had represented his client LZ for many years and knew her both as a client and a family friend. In 2014, four years before her death, L.Z. requested assistance from Kulig with her estate plan. The Findings reflect discussions between LZ and Kulig, suggesting that she was fully competent to make informed choices. She apparently wanted to leave some or all of her assets to Kulig. The Hearing Panel in that case determined that a conflict of interest existed which, if it was ever disclosed to LZ, was at a minimum not documented. After LZ's passing, Kulig initially treated LZ's assets as his own, but when later confronted by presumptive beneficiaries of LZ's estate, claimed he was holding the property pursuant to an "oral trust."

He was found to have violated Vermont Rules of Professional Conduct §§ 1.7 and 1.8 by not obtaining informed consent for the conflict, and for preparing documents conveying the property to himself in a clear Rule violation.

We are also mindful of the recent case of *In re Bowen,* 2021 VT 7. Bowen was found to have violated Rules 1.8(b) and 1.9(c)(2) for revealing confidences and using information he gleaned from representing a former client to that former client's disadvantage. Bowen was motivated to so act in order to collect legal fees unpaid from a prior, unrelated representation. The Supreme Court affirmed a three month suspension.

As here, this was a knowing violation of an ethical duty, and it did cause actual harm.

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[17] We do not consider the aggressive defense mounted by Respondent's counsel as a failure to cooperate with Disciplinary Counsel. In the Panel's view, once formal charges were filed, Respondent was entitled to defend himself consistent with our Rules of Civil Procedure.

We perceive of no reason to depart from the presumptive sanction of suspension from the practice of law. Both *Kulig* and *Bowen* are factually distinguishable from this case. However, "meaningful comparisons of attorney sanction cases can be difficult as the behavior that leads to sanction varies so widely between cases." *Bowen, supra at ¶46.* That said, we cannot ignore the serious harm (real and especially potential) caused by Respondent's actions, and that he acted knowingly in following JJM's direction and failing to communicate with his client. We also remain troubled by the cash gift he accepted from JJM.

We are mindful that any sanction imposed should reflect some consistency with other professional responsibility cases. *In re Neisner,* 2010 VT 102 ¶ 26. However, as noted above, each professional responsibility case is unique and we are charged with considering whether the recommended sanction is appropriate. *Id ¶ 27.* We consider the facts in *In re Blais,* 174 VT 628, 631 (2002)(approving a five month suspension for multiple failures, despite a plea agreement with Disciplinary Counsel to a two month suspension). See also *In re Andres,* 2004 VT 71 (two month suspension for failure to attend a pretrial hearing, with a record of prior disciplinary action). We are also mindful that the *ABA Standards* for suspension provide that it should generally have a duration of at least six months. *Id, citing In re Rosenfeld,* 157 VT 537, 547 (1991).

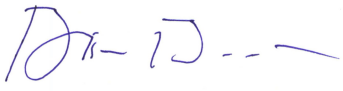
We conclude that a five month suspension is most appropriate on these facts. The suspension shall not take effect for thirty days from the date of this Order, to allow Respondent to appeal should he be so advised, or alternatively, to allow him to arrange his affairs at his solo law practice. See *A.O. 9, Rule 23.*

IT IS SO ORDERED

Dated: October 7, 2022

James A. Valente, Esq, Hearing Panel Chair

Amelia W.L. Darrow, Esq.



Brian Bannon