

STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY BOARD

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

**RULING ON PARTIES' PROPOSED STIPULATION OF FACTS**

Disciplinary Counsel and Respondent, C. Robert Manby, Jr., Esq., have requested that the Hearing Panel accept a stipulation of facts ("the stipulation") and jointly proposed conclusions of law to resolve this matter. The stipulation, dated November 18, 2019, consists of eight pages and forty-one numbered paragraphs. Fourteen exhibits have also been attached to and are referenced in the paragraphs of the stipulation. The exhibits include a 75-page transcript of a deposition of Respondent that was taken in another proceeding, correspondence, various legal and financial documents, and several court decisions. Disciplinary Counsel filed a memorandum of law on or about January 3, 2020. Disciplinary Counsel's memorandum of law includes arguments that cite not only to the statements of fact set forth in the stipulation, but also to the exhibits attached to the stipulation.

Respondent filed a memorandum of law dated January 17, 2020 and a supplemental memorandum dated February 18, 2020. Notwithstanding Respondent's prior approval of the stipulation, in his memorandum he is now asserting evidentiary objections to various statements of fact in the stipulation and to one of the exhibits that was submitted with the stipulation, Exhibit 13. *See* Respondent's Memorandum, 1/17/20, at 2-3. He argues that certain statements of fact should be "excluded."

Under Administrative Order 9, Disciplinary Counsel can initiate a disciplinary proceeding by filing a petition of misconduct or by filing a stipulation of facts. *See* A.O. 9,

Rule 11(D)(1). Rule 11(D)(5) provides further that:

[w]here proceedings have been initiated by stipulated facts, the hearing panel shall review the stipulation and either: (i) reject the stipulation, in which case the parties may amend and resubmit it, or disciplinary counsel may reinstitute proceedings by filing a petition of misconduct in accordance with this rule; or (ii) accept the stipulation and adopt it as its own findings of fact, although the panel may take further evidence on the issue of sanctions.

A.O. 9, Rule 11(D)(5)(a).

The Panel has reviewed the stipulation and has decided to reject it for two reasons. First, Disciplinary Counsel's extensive citation to various exhibits, apart from the statements of fact set forth in the stipulation, is not consistent with the procedure set forth in Rule 11(D)(5). Rule 11(D)(5) contemplates the submission of "stipulated facts" which, if accepted, are then "adopted as [the panel's] own findings of fact." The rule anticipates that the parties will submit a comprehensive statement of facts which, if accepted, serves as the panel's findings of fact. The purpose of the rule is to eliminate any uncertainty and potential disputes between the parties regarding the findings of fact that will serve as the basis for the panel's decision. The rule does not contemplate the submission of documentary evidence as an adjunct to stipulated facts.

The procedure that applies when a proceeding is initiated with a stipulation of facts stands in contrast to the process for determining the facts when a proceeding has been initiated with a petition of misconduct. When a petition of misconduct is filed, an evidentiary hearing is held on the merits of the petition. Evidence is presented during the hearing, which can include documentary evidence, and the panel rules on any evidentiary objections that are asserted by a party. During the hearing the parties may, in addition to presenting witnesses, stipulate to facts or stipulate to the admission of documentary evidence. All evidence admitted into evidence during the hearing, consisting of testimony and/or documents, become part of the "record" from

which the panel will make its findings of fact. The panel weighs the evidence that has been admitted and makes findings of fact through the lens of two important standards: First, the burden of proof is on disciplinary counsel, *see* A.O. 9, Rule 16(D); second, the applicable evidentiary standard of proof requires that the facts be established by “clear and convincing evidence.” A.O. 9, Rule 16(C).

By contrast, when a proceeding is initiated by filing a stipulation of facts under Rule 11(D)(5), there is no evidence for the panel to consider and weigh and there are no objections to be considered. There are only facts to which the parties have stipulated and which form the totality of the facts to be considered by the panel in making its decision. Likewise, there is no need to cite to underlying evidence because the facts are agreed to by the parties.

The problem with the submission of the exhibits in this case, as attachments to a stipulation, is illustrated by Exhibit 1. It consists of a 75-page transcript of a deposition of Respondent that was taken in a different proceeding. It contains extensive factual material in a question-and-answer format. In her legal memorandum, Disciplinary Counsel cites extensively to different portions of Exhibit 1. Moreover, the wording of the deposition excerpts to which she cites is not identical to the statements of fact in the stipulation. They are not co-extensive.

The parties’ obligation is to distill a comprehensive statement of facts into a stipulation for the panel to consider. The parties should not be providing raw factual material that can result in unspecified factual considerations by the panel. The point of the procedure is to eliminate uncertainty with respect to the operative facts on which a decision will be based. In sum, under Rule 11(D)(5) the panel is unable to proceed because of the parties’ submission of extensive exhibits as an adjunct to the statements of fact in the stipulation.<sup>1</sup>

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<sup>1</sup> For the parties’ benefit in the event of any future discussions between them following this ruling, the panel observes that there does not appear to be any reason to submit a deposition transcript as an



Secondly, apart from this procedural defect, it appears that the parties did not have the same intentions in mind relating to the submission of exhibits. Disciplinary Counsel is proceeding as if all statements made in the exhibits may be considered to be facts by the Panel. Respondent, by contrast, is attempting to assert a variety of evidentiary objections to some of the exhibits, including but not limited to Exhibit 13. In several instances, Respondent even asserts that express statements of fact in the stipulation should not be considered by the Panel because of objections to an underlying exhibit. *See* Respondent's Memorandum, 1/17/20 at 2 ("Any Fact which relies on Exhibit 13 must be excluded and not considered by the Hearing Panel"); *see also id.* (maintaining that the panel should not consider Facts 35, 36, and 41 because they derive from Exhibit 13.).

While it is questionable whether Respondent can reasonably expect to be able to object to a statement of fact set forth in the stipulation after having signed the stipulation, the lack of clarity regarding the import of the various exhibits, including Exhibit 13, is problematic. For example, paragraph 41 of the stipulation is framed as setting forth the "report" of an investigator regarding his conversation with JJM, and the paragraph then quotes from Exhibit 13. Paragraph 41 is not a straight-forward statement of facts for consideration by the panel. The fact that an investigator stated something in his report does not necessarily make what was stated by the investigator true. Requesting a finding by the panel that an investigator stated in a report that another person said something to him or her is ambiguous. Were the parties stipulating that the

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attachment to a statement of facts. If, from disciplinary counsel's perspective, the parties are unable to negotiate a stipulation of facts that is sufficiently detailed by itself for submission to a panel, then the appropriate course of action for disciplinary counsel to take is to file a petition of misconduct and proceed to an evidentiary hearing. And while it might be helpful for a panel reviewing a stipulation to consider a document that is central to a potential violation, provided the parties are in agreement as to the admissibility of the document, there is no need to attach a document to a stipulation as evidentiary support for a statement of fact contained in the stipulation.

investigator wrote a report containing those statements? Or that the statements in the report are true? Or both?<sup>2</sup> These questions are raised by the reference in paragraph 41 of the stipulation to Exhibit 13, but not resolved.

In sum, there is ambiguity with respect to the exhibits. The panel cannot issue a decision in this proceeding where the parties have different ideas about the panel's ability to consider the exhibits in arriving at a decision.<sup>3</sup>

For these reasons, the stipulation of facts is hereby rejected. As provided by Rule 11(D)(5), this proceeding can be reinstituted either by the parties amending and resubmitting a stipulation of facts, consistent with the guidance in this ruling, or by Disciplinary Counsel filing a petition of misconduct. In advance of any further proceeding, the parties are advised that the panel members reviewed all of the exhibits in the course of considering the parties' stipulation and their respective memoranda of law. The panel members believe that, because a panel functions in a manner that is more akin to that of a judge presiding over a matter and less like a jury, the panel's review of the exhibits would not be cause for prejudice to either of the parties in the event that one or more of the exhibits were not presented for consideration in a future proceeding. However, in the event of a further proceeding, if either of the parties believes that this hearing panel's review of any exhibit would be prejudicial to a future adjudication, the party

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<sup>2</sup> In an evidentiary hearing a party can stipulate to the admission of a document into evidence or, alternatively, to the authenticity of a document while at the same time objecting to the admissibility of the document into evidence.

<sup>3</sup> Respondent's supplemental memorandum dated February 18, 2020 purports to clarify Respondent's earlier memorandum. While it does state that Respondent is not seeking to withdraw from the parties' stipulation and wishes to proceed on that basis without a hearing, it does not alter Respondent's objections to the exhibits and to various statements of fact. *See* Supplemental Response at 1 (stating that purpose of the memorandum "was to alert the Hearing Panel to issues Respondent believes pertain to the Stipulated Facts."). Respondent is seeking to alter the stipulation by contending that the panel should not consider certain paragraphs and should not consider Exhibit 13. Respondent cannot expect to proceed without a hearing while challenging portions of a stipulation he signed and exhibits that are referenced in the stipulation.

should, within 10 business days of initiation of the proceeding, file a motion requesting that a different hearing panel be assigned to the matter and identify the grounds for its request. In the absence of a timely motion, any such objection to assignment of the current hearing panel will be deemed to have been waived by the parties.

#### ORDER


The parties' Stipulation of Facts is rejected. Under Rule 11(D)(5)(a)(i), the parties may reinstitute this proceeding either by resubmitting an amended stipulation for the Panel's consideration or, alternatively, by Disciplinary Counsel filing a petition of misconduct.


Dated: March 6, 2020

#### Hearing Panel No. 2

By:

  
James A. Valente, Esq., Chair

  
Amelia W.L. Darrow, Esq.

  
Deedee Jones, Public Member