

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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

**Disciplinary Counsel's Statement of No Position on Respondent's Request for a New
Hearing Panel and Objection to the Motion to "Strike" the Petition of Misconduct**

Disciplinary counsel files this pleading in response to Respondent's August 14, 2020 pleading in which he (1) requests assignment of the matter to a new hearing panel; and (2) requests that this panel "strike" portions of the petition of misconduct filed August 5, 2020.

I. Background

On November 27, 2020, the parties jointly initiated this public disciplinary matter by filing a stipulation of facts along with then-agreed-upon supporting documentary evidence. Subsequently, Respondent filed a memorandum of law and supplemental memorandum of law in which he either disputed or withdrew from the previously stipulated submissions. By order dated March 6, 2020, hearing panel 2 rejected the parties' stipulated submissions and directed the parties to either amend the stipulation or proceed by petition of misconduct. In that order, the panel further notified the parties that it would entertain a timely motion by either party to have the matter reassigned to a different panel.

II. Statement of no position on Respondent's request for a different panel

As the hearing panel stated in its March 6, 2020 order, panels function more like a judge than a jury. It observed that the parties' previously stipulated submissions, from which Respondent later withdrew, would "not be cause for prejudice" if some of the submissions were not presented in later proceedings even though the panel had reviewed them. Order at 5. At the same time, the panel invited either party to request reassignment if it believed the panel's

examination of the parties' submissions, which the panel rejected, would be prejudicial.

Respondent asserts that the panel is now "tainted" and he is entitled to reassignment, but identifies no legal authority and no specific facts in support of his assertion.

Undersigned counsel concurs with the panel's characterization of its role and accepts the panel at its word that it would treat Respondent fairly, giving him every fair opportunity to vigorously defend against the charges. Nevertheless, assignment to a new panel presents neither prejudice nor hardship in any way to the office of disciplinary counsel. In addition, if the minor administrative adjustment of changing panels helps Respondent feel the matter was handled fairly, this would likely promote efficiency and finality of any outcome by eliminating the possibility for him to raise any such argument to the contrary on appeal.

In sum, while undersigned counsel is not aware of any legal support for the position that reassignment is required, I take no position on the matter because it would have no impact on the way I would proceed upon the petition of misconduct and would not prejudice my ability to present the charges in any way.

III. No procedural mechanism exists to "strike" portions of a petition of misconduct or request pre-trial evidentiary hearings before filing an Answer.

In his filing dated August 14, 2020, Respondent seeks to "strike" portions of the petition of misconduct and asks that this panel allow him to "challenge alleged facts" he believes are "inadmissible." Nothing in A.O. 9 allows a respondent or a panel to amend or change a charging document. Likewise, the panel has no mechanism to entertain a premature pre-trial motion to exclude evidence before the filing of an Answer and a scheduling order.

Disciplinary proceedings are neither criminal nor civil but are characterized as *sui generis*, expressly governed by Supreme Court A.O. 9. *See* A.O. 9, Rule 16.A. Disciplinary

counsel commences formal disciplinary proceedings by filing a petition of misconduct and bears the burden of proof by clear and convincing evidence. A petition of misconduct must be “sufficiently clear to inform respondent of the alleged misconduct and the rules alleged to have been violated.” A.O. 9, Rule 11.D(1)(b). A respondent must file an “Answer” to the petition within 20 days of service. A.O. 9, Rule 11.D(3).

Respondent is apparently objecting to the contents of the petition. He has an opportunity to state his view on the contents of the petition - by filing a proper Answer as the rules require. Disciplinary counsel is required by the rules governing disciplinary proceedings to set out specific facts alleged in support of a petition of misconduct as has done so appropriately here. Indeed, failure to specify the basis for the alleged misconduct could result in a lack of proper notice and lack of compliance with the requirement that petition of misconduct be “sufficiently clear to inform respondent of the alleged misconduct and the rules alleged to have been violated.” A.O. 9, Rule 11.D(1)(b). Lack of specificity in a petition of misconduct would cause any “Answer” filed by a respondent to be limited to a simple general denial or general admission, which does nothing to help a panel begin to narrow the scope of what issues are before it.

To the extent Respondent is requesting that the panel rule on admissibility of documents or testimony he believes disciplinary counsel will seek to introduce later at a hearing on the merits, he will have ample opportunity at the proper time to do so. Scheduling orders generally include motions deadlines and deadlines for the parties to exchange proposed exhibits. And, A.O. 9, Rule 15.B(1) requires the parties to “exchange the names and addresses of all persons having knowledge of relevant facts and/or of witnesses” within 20 days of the filing of an Answer. At this point, undersigned counsel has not provided Respondent with either a witness

list or a list proposed exhibits, so there is nothing to move to exclude and nothing for a panel to rule on. Respondent has elected not to proceed by stipulation but rather to put disciplinary counsel to her burden of proof, as is his right to do so. Correspondingly, both parties must adhere to the pre-trial procedure set out in A.O. 9 and the panel must give disciplinary counsel the opportunity to allege and prove the conduct that forms the basis for the charged violations.

WHEREFORE, disciplinary counsel respectfully requests that the panel (1) rule upon Respondent's request for reassignment as it sees fit and (2) order Respondent to file an Answer to the petition of misconduct filed August 5, 2020 no later than August 25, 2020.

Dated: August 18, 2020



Sarah Katz, Disciplinary Counsel
Costello Courthouse
32 Cherry Street, Suite 213
Burlington, Vermont 05401
(802) 859-3001