

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

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

RULING ON RESPONDENT’S MOTION TO RECUSE AND TO STRIKE

On November 27, 2019, Disciplinary Counsel and Respondent, C. Robert Manby, Jr., Esq., submitted a proposed stipulation, along with various exhibits referenced in the stipulation, for the Hearing Panel’s consideration pursuant to Administrative Order (A.O.) 9, Rule 11(D)(5). A separate “List of Exhibits” was also filed which identified by number and description each of the exhibits referenced in the stipulation. On the same date, proposed conclusions of law were filed – once again stipulated – in which the parties concluded summarily that Respondent’s conduct violated three provisions of the Code.

After an initial review of the parties’ submissions and in light of the summary nature of the parties’ proposed conclusions of law, the Hearing Panel issued an order on December 16, 2019 requiring Disciplinary Counsel to submit a legal memorandum or revised proposed conclusions of law. *See* Scheduling Order, 12/16/19, at 2 (“Disciplinary Counsel should explain in reasonable detail, for the benefit of the hearing panel, how she contends that each of the individual elements of a given violation have been satisfied by the factual record submitted.”). The panel also afforded Respondent an opportunity to respond.

On January 3, 2020, Disciplinary Counsel filed a legal memorandum in response to the order. On January 17, 2020, Respondent filed a responsive memorandum in which Respondent argued, for the first time, that various facts in the parties’ proposed stipulation of facts were not relevant and that the stipulation’s Exhibit 13 was not admissible in evidence and should not be considered by the hearing panel. In a supplemental memorandum filed on February 18, 2020,

Respondent attempted to clarify his position by stating – without any explanation – that he was not seeking to withdraw from the proposed stipulation and was only seeking to “alert the Hearing Panel to issues Respondent believes pertain to the Stipulated Facts.” Respondent further stated that he “wishe[d] the matter to go forward without Hearing on the Stipulated Facts.”

Supplemental Response, 2/18/20, at 1.

On March 6, 2020, the panel issued a decision rejecting the proposed stipulation based in part on the dispute between the parties regarding the extent to which the exhibits that were submitted with the proposed stipulation should be considered by the panel. Ruling, 3/6/20, at 4-5. The panel further observed that “Respondent cannot expect to proceed without a hearing while challenging portions of a stipulation he signed and exhibits that are referenced in the stipulation.” *Id.* at 5, n.3. The panel noted that Disciplinary Counsel could reinstitute the proceeding either by resubmitting an amended stipulation of facts addressing panel’s concerns or, if the parties were unable to reach agreement, by filing a petition of misconduct. Finally, the panel alerted the parties that the panel members had reviewed all of the exhibits that were submitted and, because Respondent’s position suggested that he would object to the admissibility of Exhibit 13 in any future proceeding, the panel ordered that in the event of any future petition of misconduct any motion to recuse the panel be filed promptly by Respondent.

* * *

On August 5, 2020, Disciplinary Counsel filed a petition of misconduct against Respondent and the matter was assigned to the same hearing panel that rejected the previous proposed stipulation of facts. Respondent has timely filed a motion in which he requests: (1) that the hearing panel recuse itself from this matter because it reviewed exhibits Respondent considers objectionable that were submitted with the prior proposed stipulation of facts and that

the matter be assigned to a new panel, Motion at 1; and (2) that the current hearing panel “allow Respondent to challenge alleged facts [in the petition of misconduct] Respondent believes are inadmissible” and strike them from the petition of misconduct before the petition is assigned to a new panel, *id.* at 2.

Respondent argues that the panel has necessarily formed either conscious or unconscious biases by reviewing the exhibits Respondent considers inadmissible that were submitted with the previous proposed stipulation of facts. *See* Motion at 1, This argument rests on Respondent’s general assertion that “numerous exhibits . . . were improperly submitted” to the panel in connection with the prior proposed stipulation of facts and “should not be considered by the finder of fact in this matter.” *Id.*

Respondent’s request for recusal fails for several reasons. To begin with, Respondent fails to explain how there could be any grounds for recusal when Respondent himself stipulated to the submission of each of the exhibits to the panel for its consideration along with the proposed stipulation citing those exhibits and only much later attempted to raise relevancy objections to various facts in the stipulation and an objection to admissibility of Exhibit 13. Under the circumstances presented, Respondent is foreclosed from challenging the panel’s review of the exhibits.

The proposed stipulation, signed by Respondent’s counsel, was filed by Disciplinary Counsel in November 2019, along with the exhibits and a list describing every exhibit that was referenced in the stipulation. Respondent did not file any objection at that time.¹ It was not until February 2020 – months after the filing of the petition of misconduct – that Respondent raised

¹ Moreover, the subsequent letter from the Program Administrator assigning the matter to this panel, dated December 9, 2019, referred specially to the “joint exhibits” and to the “joint list of exhibits.” Respondent’s counsel was copied on that letter and did not raise any objection at that time either.

any issue with *any* exhibit. Respondent could not delay in challenging Disciplinary Counsel's submission of the various exhibits. He had to act promptly. *See, e.g., Deyo v. Kinley*, 152 Vt. 196, 200 (1989) ("The purpose of requiring a timely objection is to bring the error to the attention of the trial court so that the court may have an opportunity to rule.") (internal quotation omitted).

Moreover, even after raising his objection to one of the exhibits and attempting to challenge various facts in the stipulation as irrelevant, Respondent did not ask the panel to recuse itself. Instead, in his supplemental memorandum he asked the panel to rule on his objections – which would require the panel to review the exhibits at issue – and proceed to decide the matter based on the proposed stipulation.

In his motion, Respondent has misconstrued the panel's decision as it pertained to the dispute between the parties over the exhibits. The panel did not conclude that any exhibit had been presented improperly to the panel. (Indeed, it could not do so given that the parties stipulated to admission of the exhibits.) Rather, it concluded that there was ambiguity as to the extent to which the parties intended to allow Disciplinary Counsel to prove, on the basis of the exhibits, facts outside the four corners of the proposed stipulation. That conclusion did not negate the panel's consideration of the exhibits in connection with the factual statements contained within the stipulation that referenced the exhibits. Under these circumstances – where Respondent stipulated to a set of facts and submission of exhibits referenced in the stipulated statement of facts – the exhibits were properly before the panel.

Respondent has not demonstrated any specific reason to believe that the panel would be biased as a result of previously reviewing the exhibits and there are ample procedural protections in disciplinary proceedings to guard against bias in decision-making. Any reliance by the panel

on an exhibit that was previously submitted with the stipulation can only occur *after* an evidentiary hearing during which Disciplinary Counsel must offer evidence and Respondent has the right to assert objections to the admissibility of any evidence proffered by Disciplinary Counsel. Under A.O. 9, Rule 16(B), the hearing panel is obligated to apply the Vermont Rules of Evidence and to make specific findings of facts following a merits hearing based only on the record of evidence that has been admitted at the hearing. It should also be noted that Disciplinary Counsel bears the burden of proof in a disciplinary proceeding and the applicable standard of proof – clear and convincing evidence – is more demanding than the standard in a typical civil case. *Id.*, Rule 16(D). And findings of fact must be supported by the evidence. In the face of this rigorous procedure, Respondent fails to explain how the panel’s review of any exhibit in connection with the prior proposed stipulation is grounds for recusal.

Finally, the panel observes that the hearing in this matter is not akin to a jury trial. Two of the three members of the panel are attorneys trained in the application of the Rules of Evidence.

For all these reasons, the request for recusal is denied.

* * *

The panel also denies the Respondent’s request that the panel initiate a process of making evidentiary rulings on allegations set forth in the petition of misconduct and striking allegations from the petition. The crux of Respondent’s argument seems to be that documents cited in the petition will not be admissible as evidence to support certain factual allegations that have been made. But the petition is nothing more than a set of allegations and it is the prerogative of Disciplinary Counsel to assemble the allegations contained therein.

Issues of proof are separate from the allegations in a petition. As is the case with other types of pleadings, the allegations in a petition are tested at subsequent stages of the proceeding. The function of a petition of misconduct is simply to provide notice to a Respondent of Disciplinary Counsel's factual allegations and related legal claims. Following the filing of a petition, Respondent is free to deny any allegation – through the filing an Answer² – and the rules provide a period of time for discovery, which allows Disciplinary Counsel and Respondent to identify the witnesses and documents their opponent intends to present at the hearing and to pursue other means of discovery. *See* A.O. 9, Rule 15(B). With the information obtained through discovery, a respondent can either challenge potential evidence in advance of the merits hearing by filing motions in limine or hold his or her objections until the point in time when evidence is proffered at the hearing by Disciplinary Counsel. Here, if Respondent wishes to object to any exhibit referenced in the petition of misconduct, he has procedural options to do so at later stages of this proceeding.

The panel will schedule a conference with the parties in the near future to discuss the issuance of a pre-hearing order. As part of a pre-hearing order the panel will allow motions in limine to be filed by either party in advance of a merits hearing.


ORDER

For all the foregoing reasons, Respondent's request for recusal and to strike allegations from the petition of misconduct is hereby DENIED. The hearing panel will proceed to schedule a telephonic conference with the parties to discuss the issuance of a pre-hearing order. The pre-hearing order to be issued by the panel will allow Respondent to file motions in limine in advance of a hearing on the merits.


² Respondent filed his Answer to the petition on August 25, 2020.

Dated: October 9, 2020


Hearing Panel No. 2

By: 

James A. Valente, Esq., Chair



Amelia W.L. Darrow, Esq.



Deedee Jones, Public Member