STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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

MOTION *IN LIMINE* TO EXCLUDE OPINION TESTIMONY OF WITNESSES INCLUDING DICIPLINARY COUNSEL'S DISCLOSED EXPERTS DR. WILLIAM NASH AND DR. PETER GUNTHER

Respondent moves *in limine* under V.R.E. 401, 602, 701 and 702 to exclude unsupported, irrelevant, inadmissible opinion evidence, intended to be offered by Disciplinary Counsel including Disciplinary Counsel's disclosed experts.

OPINION TESTIMONY

Disciplinary Counsel has alleged Respondent failed to maintain a normal client-lawyer relationship with E.M. who was a client with diminished capacity, in violation of Vermont Rule of Professional Conduct 1.14(a). (Petition of Misconduct Count 1 of 3.) Comment 1 of Rule 1.14(a) states: 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.

As Hearing Panel 2 pointed out in its Ruling on Respondent's Motion to Recuse and to Strike: 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. Ruling at page 5.

Disciplinary Counsel must prove, with admissible evidence, that Respondent did not make the assumption that EM, when properly advised and assisted, was capable of making decisions about the documents she was signing when she signed them. This burden for evidence supporting Count 1 should not be confused with or comingled with the burdens supporting a violation of Counts 2 and 3 which burden is significantly different from the burden and evidence to prove a violation of Count 1.

This case centers on Respondent's face to face meetings with E.M. and her son John on specific dates, June 25, 2015, September 29, 2015, February 4, 2016, and March 20, 2016 (the "relevant dates"). It is undisputed that E.M. had dementia which worsened over time. It is also undisputed that individuals with dementia have "good days and bad days." None of the opinion evidence intended to be offered by Disciplinary Counsel relate to a relevant date. Most of the opinion evidence intended to be offered by Disciplinary Counsel is based on interviews with E.M. well after the relevant dates. No witness intended to be offered by Disciplinary Counsel could testify as to E.M.'s capability of making decisions at any relevant date. Witnesses who could testify as to E.M.'s capability of making decisions on any relevant date are her son John and Respondent who were with her on the relevant dates.

DISCIPLINARY COUNSEL'S DISCLOSURE OF INTENT TO USE OPINION EVIDENCE

Disciplinary Counsel has disclosed Dr. William Nash and Dr. Peter Gunther to offer opinion testimony. Disciplinary Counsel's disclosure (the "disclosure") states "Each witness is expected to testify that it would have been evident that Mrs. McDonald was an individual with diminished capacity had your client taken any time to meet with her individually about the estate-related documents he assisted her with."

DR. WILLIAM NASH

Disciplinary Counsel's expert disclosure states: "The grounds for Dr. Nash's opinion are set out in his May 2016 psychological evaluation performed for the guardianship proceeding."

Relying on the disclosure, Respondent deposed Dr. Nash on March 15, 2021. Dr. Nash disclosed he had not been retained by Disciplinary Counsel (Exhibit A, p12) but had been retained in relation to a guardianship proceeding in probate court. Exhibit A, p6. Dr. Nash only has his report of evaluating E.M. and nothing else. Exhibit A, p10,19. Though it is a specialized area of psychology (Exhibit A, p 22), Dr. Nash has no certification and is not a psychologist who has any specialized training with regard to Alzheimer's disease. Exhibit A, p21. In rendering his report Dr. Nash requested nothing but was given selected incomplete records from Dr. Gunther's medical records on E.M. (from someone) and he spoke with E.M.'s daughter (he thinks) who was attempting to be appointed E.M.'s guardian, but he admits he is really not sure. Exhibit A, p23, 24,25.

Dr. Nash was unsure if E.M. was taking any medication for Alzheimer's and never bothered to ask. Exhibit A, 26. Dr. Nash attempted to testify on the effects of medications for Alzheimer's but embarrassed himself finally admitting he does not even know the name of any Alzheimer's medication. Exhibit A, p26, 27, 28, 29.

Contrary to the disclosure Dr. Nash testified:

- Dr. Nash cannot testify beyond anything that is not in his report to the probate court dated May 9, 2016. Exhibit A, 17.
- Dr. Nash was never asked, cannot evaluate and never rendered an opinion on E.M.'s competence on any date other than the date he was actually with E.M. Exhibit A, 17, 18.
- Dr. Nash had done no study, conducted no investigation, and admitted he could render no opinion on E.M.'s cognitive function other than the day he was actually with E.M. Exhibit A, 29.
- Dr. Nash claimed he had read studies on "symptom fluctuation" in Alzheimer's patients but could not remember the name of any studies he claimed he had read. Exhibit A, p28.

In short, Dr. Nash testified:

Q Okay. So as we sit here today you cannot give an opinion as to whether or not [EM], on a particular date, was experiencing cognitive impairment, or the degree of cognitive impairment? True or not true.

A That is true. With the exception of the day that I met her.

Dr. Nash must not be allowed to offer any opinion regarding E.M.'s capability of making decisions at any relevant date having admitted he has no such opinion. In any event Dr. Nash is not qualified as required V.R.E. 702 to render any opinion as disclosed in his deposition.

DR. PETER GUNTHER

Disciplinary Counsel's expert disclosure "The grounds for Dr. Gunther's opinion are his regular treatment and interaction with [E.M.] as her PCP from 2001 until the time of her death, including monthly visits with her in 2015 through the time of her death."

Respondent, needing the "The grounds for Dr. Gunther's opinion" served a subpoena on Dr. Gunther for all information on E.M. in preparation for Dr. Gunther's

deposition. The information was not produced. Respondent filed a motion asking for additional time to depose Dr. Gunther following production of the information and was allowed until "close of business on March 30, 2021." (HP Ruling dated March 19, 2021 provided to Disciplinary Counsel and Respondent on March 29, 2021.) (The "Dr. Gunther ruling.")

Before receiving the Dr. Gunther ruling the subpoenaed information had not been produced. In attempts to obtain the information Respondent was informed by Dr. Gunther's employer, Community Heath Centers of Burlington Inc., that a waiver was necessary for the production and that counsel for E.M.'s daughters informed him that they did not want Respondent to obtain the information and would not sign a waiver allowing its production.

Dr. Gunther should not be allowed to offer any opinion for multiple reasons including that daughters (also witnesses disclosed to give opinions) will not allow production of the information set forth in the subpoena.

ARGUMENT

Attempting to meet her burden of proof, Disciplinary Counsel intends to offer opinion evidence in violation of V.R.E. 402, 602, 701 and 702 and ask Hearing Panel 2 to impermissibly speculate in reaching its decision.

The only evidence that would not violate V.R.E. 602 is the testimony of E.M.'s son John and Respondent, who made personal observations of E.M.'s capability of making decisions on any relevant date.

Without reliable admissible testimony of "symptom fluctuation" no opinion should be allowed as to E.M.'s capability to make decisions on any relevant date.

LEGAL STANDARD

Lay opinion evidence is limited to a witness who is not testifying as an expert. The witness' testimony is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702. V.R.E. 701.

Expert opinion evidence is controlled by V.R.E. 702 and requires that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge,

skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

SPECULATION

Any opinion testimony must be stricken because it could only lead a fact finder to speculate.

The testimony of a witness may be excluded or stricken unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses. V.R.E. 602. Even "speculative expert testimony is irrelevant and is not admissible." *Turgeon v. Schneider*, 150 Vt. 268, 275 (1988). *Fuller v. City of Rutland*, 122 Vt. 284, 289 (1961) (affirming directed verdict for defendant where the evidence did not "connect the fact of the injury to an act or agency that was the responsibility of the defendant" except by "pure speculation" which is "insufficient foundation for a verdict."); *Wellman v. Wales*, 97 Vt. 245, 255 (1923) (reversing judgment for plaintiff; "Conjecture is no proof in him who is bound to make proof.") *See also Mello v. Cohen*, 168 Vt. 639, 641 (1998) (affirming summary judgment for defendant medical malpractice informed consent case; "plaintiff's own conjectures, formulated through the benefit of hindsight, were insufficient as a matter of law" to meet his burden of proving that treatment options existed). *Peterson v. Post*, 119 Vt. 445, 451 (1957) (reversing judgment for plaintiff because evidence failed to show that car accident resulted from defendant's negligence).

"[W]hile inferences of negligence may be drawn from circumstantial evidence, those inferences must be the only ones which reasonably could be drawn from the evidence presented, and if the circumstantial evidence presented lends itself equally to several conflicting inferences, the trier of fact is not permitted to select the inference it prefers, since to do so would be the equivalent of engaging in pure speculation about the facts." *Mehra v. Bentz,* 529 F.2d 1137, 1139 (2nd Cir. 1975)(affirming trial court's grant of defendant's motion for JNOV); *Westinghouse Electric Corporation v. Dolly Madison Leasing & Furniture Corporation,* 326 N.E.2d 651, 656 (1975)(citing the general rule

that where the facts from which an inference of probable proximate cause must be drawn are such that it is as reasonable to infer other causes, plaintiff has failed to supply proof of probable cause); *Mississippi Valley Gas Company v. Estate of Walker*, 725 So.2d 139 (Miss. 1998) (holding that where the evidence shows that it is just as likely that an accident might have occurred from causes other than the defendant's negligence, the inference that his negligence was the proximate cause may not be drawn).

CONCLUSION

For the reasons stated Hearing Panel 2 should not allow opinion testimony at the hearing regarding E.M.'s capability of making decisions at any relevant date, including the opinion testimony of Disciplinary Counsel's disclosed "experts."

Dated: March 31, 2021

C. ROBERT MANBY JR.
Respondent

By: _____

Harry R. Ryan, Esq., Bar# 1106
FACEY GOSS & MCPHEE, P.C.
71 Allen St., Ste. 401 / P.O. Box 578
Rutland, VT 05702
(802) 236-2129
hryan@fgmvt.com

CERTIFICATE OF SERVICE

The above signed attorney certifies, subject to V.R.C.P. 5(h)(1) and in accordance with A.O. 9 and Rule 14A, that a copy of the *Motion In Limine To Exclude Opinion Testimony of Witnesses Including Disciplinary Counsel's Disclosed Experts Dr. William Nash and Dr. Peter Gunther* was filed with the Hearing Panel by email, and on the same date as this filing, has been served by email upon every other party to the case required to be served, stating the manner of service upon each.

By Email: Attorney for the State:
Sarah Katz, *Disciplinary Counsel*
Professional Responsibility Program
Costello Courthouse / 32 Cherry St., Suite 213
Burlington, VT 05401
(802) 859-3000 / sarah.katz@vermont.gov