STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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

Disciplinary Counsel's Objection to Respondent's Motion to Exclude Witness Testimony from Drs. Nash and Gunther

Disciplinary counsel files this objection to Respondent's March 31, 2021 pleading in which he seeks to exclude anticipated testimony from two witnesses listed on disciplinary counsel's witness disclosure, Dr. Nash and Dr. Gunther.

I. William Nash, PhD

Dr. Nash was appointed by the Probate Division in April or May 2016 to evaluate EM in connection with a guardianship proceeding, docket No. 645-4-16 Cnpr. The methodology, findings, and conclusions are detailed in the report he filed with the court, and the report may be offered into evidence with proper foundation at the hearing in this matter. The report notes that Dr. Nash met with EM in her home on May 6, 2016 and reviewed some of her medical records. Dr. Nash was disclosed as an expert in this disciplinary proceeding, and a copy of his report provided to Respondent, because Dr. Nash, a forensic psychologist, may be called to testify to evidence both within his personal observations of EM on May 6, 2016 and as to the technical or scientific bases for the conclusions that he drew in his report for the probate court. Dr. Nash is not expected to offer expert opinion testimony as to whether EM was competent on any specific date before he evaluated her, nor would such evidence be necessary to meet the burden of proof for the contested rule violation 1.14(a).

The time frame for EM's evaluation, May 2016, is a little over one month following a meeting Respondent had with EM in which EM signed a letter revoking her daughter's durable

power of attorney, drafted with Respondent's advice and assistance. *See* Respondent's Answer ¶ 29. May 2016 is approximately three months after Respondent met with EM to assist her in signing an advance health care directive. *See* Respondent's Answer ¶ 28. Further, Dr. Nash's evaluation occurred at a time when Respondent and EM had an existing ongoing attorney-client relationship which dated back to February 2015.

As Respondent's counsel emphasized, and as Dr. Nash readily admitted, he is not qualified to offer expert testimony on "symptom fluctuation" studies in Alzheimer's patients and is not being called at the hearing to do so. Expert testimony on "symptom fluctuation" is not required to prove the violations charged. If Respondent wished to introduce such evidence as part of his defense, he should have retained his own expert on that topic. Whether or not Dr. Nash possesses expertise on "symptom fluctuation" or Alzheimer's medications, Dr. Nash is unquestionably qualified to offer evidence as to what he did do with EM and what he did observe, the methodology for the evaluation and the basis for the conclusions in his report. Notably, Respondent's counsel asked Dr. Nash almost no questions about these topics in deposing him.

To be sure, some of the evidence from Dr. Nash may consist of information derived both from his direct observations and from his scientific training and experience. That is not a legal basis under the Vermont Rules of Evidence upon which to exclude relevant testimony which goes to EM's capacity during the 14 to 16 months Respondent represented her. *See, e.g. Walsh v. Clubba*, 2015 VT 2 ¶¶ 10-13 (allowing broad discretion for lay opinion where it may be helpful to the tribunal); Reporter's notes to Vt. R. of Evid. 701 ("It should also be noted that a witness may be an 'expert' for purposes of these rules even if he has not been formally offered as such. *See Batchelder v. Mantak*, 136 Vt. 456, 463, 392 A.2d 945, 949 (1978). The only requirement is

that a foundation showing the qualifications of 'knowledge, skill, experience, training, or education' required by Rule 702 be laid. If those qualifications appear for a particular matter in the testimony of the witness, he is in effect qualified on the spot as an 'expert' for that matter."). The testimony Respondent seeks to exclude will be relevant, reliable and helpful to the panel. It is within the panel's purview to weigh or discount that evidence as it sees fit.

II. Dr. Gunther

Dr. Peter Gunther was EM's primary care physician from 2001 until the time of her death. During the time Respondent represented 91 year-old EM, Dr. Gunther saw EM on a monthly basis. Both his personal observations and knowledge of EM during the time frame at issue are highly relevant evidence for the panel to be able to consider. In finding facts, the panel may need to consider what degree of attention to EM by Respondent would have made it apparent that she was a person whose capacity was diminished.

Respondent seeks a pre-trial ruling by the panel excluding Dr. Gunther from testifying entirely. The basis for this appears to be that he has been unable to successfully obtain documents he subpoenaed or depose Dr. Gunther, possibly due to EM's relatives' failure to sign an authorization.

There is no legal basis for excluding a witness from testifying based upon these circumstances. In any event, as the hearing panel stated in its March 19, 2021 order, Respondent has taken no steps to enforce his subpoena in the Superior Court or otherwise negotiate some type of authorization with the estate for all or part of the records he seeks. As stated in my letter to the panel dated March 15, 2021, I do not object to offering a reasonable extension of time to depose Dr. Gunther once Respondent is able to obtain some or all of the records he seeks.

Other arguments raised about the admissibility of both Doctors' testimony go the weight,

not the admissibility of the evidence. None of the authority cited by Respondent support that it would be proper to exclude a witness from testifying without giving the prosecution some opportunity to offer the evidence first. Respondent will have ample opportunity at trial to cross examine these witnesses and to object to any "speculative" testimony or testimony without proper foundation at the time it is introduced.

III. Vermont Rule of Professional Conduct 1.14(a)

The remainder of arguments raised in Respondent's motion demonstrate a misunderstanding of what Rule 1.14(a) proscribes. Under Rule 1.14, a lawyer must make an effort to maintain a normal client relationship with a client who has diminished capacity of any type. While evidence of a specific condition or diagnosis may assist the trier of fact on the issue of diminished capacity, the rule does not require any specific condition. "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." Rule 1.14(a). The lawyer has a duty to assess for himself the client's capacity. *See* ABA Comm'n on Law and Aging, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005).

A "normal" client relationship means one that includes the duty of loyalty and confidentiality and is "based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters." Cmt. 1. "The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect." Cmt. 2. In cases where a client "may wish to have family members . . . participate in discussions with the lawyer . . . the lawyer must keep the client's interests foremost and . . . look

to the client and not family members to make decisions on the client's behalf." Cmt. 3. The lawyer's obligation under Rule 1.14 "implies that the lawyer should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to take action consistent with the client's directions and decisions." ABA formal Ethics. Op. 96-404 (1996).

Here, nothing about the way Respondent worked with and interacted with 91 year-old EM was consistent with the mandate of Rule 1.14 to treat her with attention and respect. Respondent admits that he agreed to take EM as a client without ever meeting or speaking to her, and that she was "feeble." Respondent's Answer ¶¶ 1-10. He helped her execute seven documents affecting her estate and end of life plans without ever having any sort of private meeting with her and while accepting guidance and direction from her son. Respondent's Answer ¶¶ 19, 20, 21, 22, 25, 28, 29. He never discussed with her possible alternatives or the potential impact some of the changes might have. Respondent's Answer ¶¶ 17, 30. Nothing about Respondent's admitted conduct supports the existence of a "normal" client relationship. Whether or not Respondent possessed actual knowledge of some degree of diminished capacity, the rule imposes an affirmative obligation on Respondent to take the time and effort to inquire when a 91-year old "feeble" client appears and her son asks for help to re-do some estate documents to benefit the son. Respondent owed EM the same duties of confidentiality and loyalty as he would to any other client "as far as reasonably possible," V.R.P.C. 1.14(a), and his failure to take any time to meet with her individually did not meet his obligations under the rule.

Conclusion

For the reasons set forth above, the panel must deny Respondent's pre-trial request to exclude witness testimony. Contemporaneous, specific objections can be properly addressed by

the panel if timely raised during trial and such an approach allows disciplinary counsel to put on evidence without any prejudice to Respondent.

Dated: April 6, 2021

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