STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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

RESPONDENT'S REPLY TO DISCIPLINARY COUNSEL'S OPPOSITION (STYLED OBJECTION) TO RESPONDENT'S MOTION IN LIMINE TO EXCLUDE OPINION TESTIMONY

Disciplinary Counsel's (DC) Objection (Objection) to Respondent's Motion in Limine (Motion) ignores that the Motion and the proffered opinions relate only to Count 1. The Objection cites only two cases. Both are inapplicable and outdated. The Objection ignores and never mentions *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See Legal Standard for the Admissibility of Opinion Testimony pages 4 and 5 below.

The Objection confuses the burden of proof for V.R.Pr.C. 1.14 with DC's burden of proof for Counts 2 and 3, ignores the disclosure fails to meet the requirements of V.R.E. 702 and should be excluded under V.R.E. 403.

Count 1, alleges a violation of V.R.Pr.C. 1.14 that "a lawyer must make an effort to maintain a normal client relationship with a client with diminished capacity."

Count 2, alleges a violation of V.R.Pr.C. 1.1 that Respondent "failed to meet with [EM] privately and discuss with her what her objectives and concerns."

Counts 3, alleges a violation of V.R.Pr.C. 1.4(b) that Respondent "failed to adequately communicate with his client EM."

The Objection claims "Respondent's motion demonstrate[s] a misunderstanding of what Rule 1.14(a) proscribes" that "a lawyer must make an effort to maintain a normal client relationship with a client with diminished capacity." But the Objection demonstrates that DC does not understand the basis for the violation of Rule 1.14 that DC alleged. Count 1 alleges:

"[Respondent] failed to maintain a normal client-lawyer relationship with ... EM ... a client with diminished capacity; to wit: accepted client EM's son's representations about EM's wishes without inquiring with EM directly or consulting with her about her own wishes, objectives, and concerns, in violation of Vermont Rule of Professional Conduct 1.14(a)."

The crux of the Count 1 allegation is not that EM was "old" and "feeble" as the Objection suggests. Count 1 alleges Respondent failed to maintain a normal client-lawyer relationship with with diminished mental capacity by accepting EM's son's representation about EM's wishes and failing to meet with EM directly. The proffered opinion evidence has nothing to do with old and feeble or "failed to maintain a normal client-lawyer relationship" The proffered opinion evidence has to do with *diminished mental capacity*. DC's expert witness disclosure clearly states the opinions DC believes are relevant: "Each witness [Dr. Nash and Dr. Gunther][1] is expected to testify that it would have been evident that [EM] 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."

Count 1 is an allegation that Respondent "failed to maintain a normal client-lawyer relationship". To prevail on Count 1 DC must present opinion evidence that Respondent knew of EM's diminished mental capacity and despite that knowledge, failed to "maintain a normal client-lawyer relationship with the client." Where is evidence that DC failed to "maintain a normal client-lawyer relationship with the client" in the proffered opinions? Nowhere. The "opinion" evidence DC seeks to offer is that it "would have been evident that Mrs. McDonald was an individual with diminished capacity" **IF** Respondent had "taken any time to meet with

[1] Dr. Gunther's information, the subject of Respondent's subpoena to him, still has not been produced. Upon contacting Dr. Gunther's counsel, the undersigned was informed that the doctor has received authorization from the Estate, but, as of this date, has not yet decided if he will produce the information requested in the Subpoena.

her individually about the estate-related documents he assisted her with." It "would have been evident that Mrs. McDonald was an individual with diminished capacity" **IF** Respondent had a medical degree and expertise in diminished capacity. But that is not a violation of V.R.Pr.C. 1.14. It "would have been evident that Mrs. McDonald was an individual with diminished capacity" **IF** Respondent had EM examined by a qualified psychologist. Failing to meet with EM individually is not a violation of V.R.Pr.C. 1.14. Failing to meet with EM individually is alleged as a violation of V.R.Pr.C. 1.1 in Count 2. If failing to meet with EM individually proves a violation V.R.Pr.C. 1.14 the HP does not need the proffered opinion testimony to make that proof.

If failing to "maintain a normal client-lawyer relationship" means failure to discover a client's diminished capacity, then what? Hindsight will be new standard. The uncontroverted V.R.E. 602 testimony will be that Respondent met with EM, face to face, discussed with her the effect of the documents, believed she understood them and obtained her consent. The proffered opinion testimony has nothing to do with Respondent not meeting with EM privately. The proffered opinion testimony is for some other undisclosed purpose.

THE RULES AT ISSUE

1. **V.R.E. 402**. The proffered opinion evidence is not relevant and therefore not admissible. See V.R.E. 402. The Objection's commingled arguments for allowing opinion evidence supporting Count 2 and Count 3 with argument for allowing opinion evidence supporting Count 1 is a smokescreen to conceal that the proffered opinion evidence serves no real purpose. The Hearing Panel has sufficient evidence on Counts 2 and 3 from Respondent's Answer to Disciplinary Counsel's Petition of Misconduct. To allow questionable unsupported opinion evidence that it would have been evident to Respondent that EM was an

individual with diminished capacity **IF** Respondent had "taken any time to meet with her individually" is unsupported, unnecessary and misleading and confusing as to how it relates to a violation of V.R.Pr.C. 1.14, and should be excluded under V.R.E. 403.

2. **V.R.E. 403.** V.R.E. 403 requires that, even if somehow relevant, the proffered opinion evidence should be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the [Hearing Panel], or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." V.R.E. 403.

3. **V.R.E. 701 and 702.** Opinion evidence, to be admissible, in addition to being relevant under V.R.E. 402, and not excludable under V.R.E. 403, must meet the requirements of V.R.E. 701 or V.R.E. 702.

Legal Standard for the Admissibility of Opinion Testimony

The Objection cites Walsh v Clubba, 2015 VT 2 for support that DC's expert Nash is misplaced. Walsh is a landlord tenant case about repairs to property. "Apart from the fact that Cluba [sic] fails to cite specific testimony that was the subject of his general Rule 701 objection, we find no merit to his objection to Walsh's testimony concerning the repair work that was done. Walsh testified as to his personal knowledge of the condition of the premises both when he leased it to Cluba [sic] and when defendants vacated it. He also testified that he personally audited the invoices for the work done to repair the premises. Thus, his testimony regarding the repairs was rationally based on his own perceptions, and the trial court did not abuse its discretion in admitting it." This is personal knowledge not V.R.E. 701 opinion.

The Objection fails to inform the HP that V.R.E. 701 was "amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple

expedient of proffering an expert in lay witness clothing." Advisory Committee's Note to V.R.E. 701. The lay opinions DC seeks to offer must be relevant under 402, not excludable under V.R.E. 403 and comply with V.R.E. 701 and V.R.E. 702. DC has disclosed "expert" witnesses to offer V.R.E. 702 opinions related to EM's competence.

Next (apparently in opposition to the Motion) the Objection cites Batchelder v. Mantak, 136 Vt. 456 (1978). 36 Vt. 456. Batchelder, a 1978 case involving expert opinion by a surveyor concerning the reasonableness of his bill is not good law and has been distinguished by Sweet v St. Pierre 209 VT 1 (2018).

The relevant case, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), decided in 1993, was never mentioned in the Objection.

Courts [and this HP] do not admit opinions that fail to close the "analytical gap between the data and the opinion proffered," but links the two "only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997); *Lasek v. Vermont Vapor, Inc.*, 2014 VT 33, ¶ 12 (affirming the exclusion of opinion by the plaintiff's expert on causation because it was based on speculation and unreliable).

The opinions DC seeks to have the HP allow fail to meet or even come close to the threshold for admissibility under V.R.E. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The opinion testimony would not be helpful as required by V.R.E. 702 and must be excluded because it would allow (actually require) the HP to impermissibly speculate in its findings of fact. See *Wellman v. Wales*, 97 Vt. 245, 255 (1923). *See also Mello v. Cohen*, 168 Vt. 639, 641 (1998).

The Federal Rules of Evidence, [and the Vermont Rules of Evidence as explained below] as construed by the Supreme Court in the landmark case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), "require[ ] expert

scientific evidence to be both reliable and relevant pursuant to Rule 702," such that it "appropriately assists the trier of fact." *United States v. Henderson,* 409 F.3d 1293, 1302 (11th Cir.2005).[5] In that regard, "[t]he court serves as a gatekeeper, charged with screening out experts whose methods are untrustworthy or whose expertise is irrelevant to the issue at hand." *Corwin v. Walt Disney Co.,* 475 F.3d 1239, 1250 (11th Cir.2007). This gatekeeping function is guided by the well-established principle that "[t]he proponent of the expert testimony carries a substantial burden under Rule 702" to show admissibility of that testimony by a preponderance of the evidence. *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.,* 402 F.3d 1092, 1107 (11th Cir.2005); *see also Boca Raton Community Hosp., Inc. v. Tenet Health Care Corp.,* 582 F.3d 1227, 1232 (11th Cir.2009) ("The offering party must show that the opinion meets the *Daubert* criteria, including reliable methodology and helpfulness to the factfinder ... by a preponderance of the evidence.").

As a general proposition, "[i]n determining the admissibility of expert testimony under Rule 702, a district court considers whether (1) the expert is qualified to testify competently regarding the matter he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert;* and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *United States v. Douglas,* 489 F.3d 1117, 1124-25 (11th Cir.2007); *see also Maiz v. Virani,* 253 F.3d 641, 665 (11th Cir.2001) (similar). That said, "[t]he rules relating to *Daubert* issues are not precisely calibrated and must be applied in case-specific evidentiary circumstances that often defy generalization." *United States v. Brown,* 415 F.3d 1257, 1266 (11th Cir.2005). For that reason, courts have stressed that the *Daubert* inquiry is "a flexible one," that the *Daubert* factors are mere guidelines for applying Rule 702, and that "expert

testimony that does not meet all or most of the *Daubert* factors may sometimes be admissible" based on the particular circumstances involved. *Brown,* 415 F.3d at 1267-68. In performing a *Daubert* analysis, the Court's focus must be "solely on principles and methodology, not on the conclusions that they generate"; thus, it matters not whether the proposed expert testimony is scientifically correct, so long as it is shown to be reliable. *Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1312 (11th Cir.1999). *Abrams v. Ciba Specialty Chemicals Corp.*, CIV.A. 08-0068-WS-B, 2010 WL 779283, at *2–3 (S.D. Ala. Mar. 2, 2010)

The Vermont Rules of Evidence, like the above quoted decision on the Federal Rule, mandate that trial courts in Vermont police the admission of expert testimony. *See* Vt. R. Evid. 702; *see also Daubert* 509 U.S. 579 (1993). This obligation requires that courts must determine whether the proffered testimony is relevant and reliable. *See Daubert*, 509 U.S. at 597; *985 Assocs., Ltd. v. Daewoo Elecs. Am., Inc.*, 2008 VT 14, ¶ 6, 183 Vt. 208, 945 A.2d 381. The framework for reliability, as outlined in V.R.E. 702, demands that the testimony: (1) be based upon sufficient facts or data, (2) be the product of reliable principles and methods, and (3) that the witness has applied the principles and methods reliably to the facts of the case. Vt. R. Evid. 702. Therefore, in deciding whether a step in an expert's analysis is unreliable, if a trial judge finds that that the data, methodology or the studies upon which the expert's opinion is based are inadequate to support the expert's conclusions—then the court must exclude the expert's testimony. *See Estate of George v. Vermont League of Cities & Towns*, 2010 VT 1, ¶ 36, 187 Vt. 229, 250-51 (citing *Amorgianos v. AMTRAK,* 303 F.3d 256, 266 (2d Cir. 2002)); *In re New England Telephone and Telegraph Company,* 135 Vt. 527, 536, 382 A.2d 826, 833 (1978) ("[o]pinions must be based on facts disclosed by the evidence in the case and **not in whole or in part upon speculation** of the witness as to what might have been such evidence.") (emphasis supplied) (citations omitted).

If allowed, the proffered opinion evidence, would be a Ruling by the Panel that the Rules of Evidence in disciplinary matters do not apply.

For the reasons stated in Respondent's original Motion in Limine and in this Reply to Disciplinary Counsel's Objection, HP must exclude the proffered opinion testimony of Disciplinary Counsel's two experts and lay opinion evidence on competency because the proffered opinions do not comply with the requirements of V.R.E. 402, V.R.E. 701 or V.R.E. 702. In any event, even if otherwise allowable as relevant and reliable under V.R.E. 701 or V.R.E. 702 the proffered opinions should be excluded under V.R.E. 403.

DATED: April 11, 2021

C. ROBERT MANBY JR.

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 *Respondent's Reply to Disciplinary Counsel's Motion In Limine To Exclude Opinion Testimony* 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