

STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY BOARD

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

**POST-TRIAL RULING ON PARTIES' OBJECTIONS TO PROFFERED EXHIBITS**

During the merits hearing in the above matter, the parties objected to various exhibits that were proffered. The parties stipulated at the merits hearing that the Panel could conclude the hearing and rule on the admissibility of the disputed exhibits after the parties were provided with an opportunity to submit post-hearing memoranda on the evidentiary issues. Both parties did submit supplemental pleadings. As detailed below, some exhibits were subsets of other exhibits, some were offered substantively while others offered just for impeachment, and finally some exhibits were not produced pre-trial consistent with the required disclosure to the opposing party.

After reviewing the record in this case, including oral arguments, the pretrial orders and the written submission of the parties, the Hearing Panel rules as follows:

**Respondent's Exhibit C** – Exhibit C is an excerpt of several pages from the testimony of Dr. Gunther during the course of an involuntary guardianship probate proceeding which focused on the competency of Respondent's client (hereinafter referred to as E.M). The exhibit bears highlighting on portions of the document that, presumably, Respondent's counsel placed on the document some time prior to the hearing. In his memorandum dated November 8, 2021, Respondent failed to explain or provide any justification for the highlighting. Respondent maintains that he is not offering the statement as substantive evidence but rather that he utilized it at the hearing, pursuant to V.R.E. 613, to impeach a prior inconsistent statement by Dr. Gunther made during the hearing in this matter.

In her opposition dated October 27, 2021, Disciplinary Counsel objects to the highlighting but does not object to the content of the exhibit, provided it is offered only as impeachment evidence and not as substantive evidence. Further, Disciplinary Counsel requests pursuant to V.R.E. 106 that the

entire transcript of Dr. Gunther's testimony in the probate proceeding, set forth in Exhibit DC-24 (which includes the excerpts in Respondent's Exhibit C), be admitted in place of Respondent's Exhibit C in order to provide the context of Dr. Gunther's testimony in that proceeding.

**Exhibit DC-24 is admitted into evidence for impeachment purposes only; Respondent's Exhibit C is excluded from the evidentiary record.**

\* \* \*

**Respondent's Exhibit D** – Exhibit D is a two-page document which purports to be derived from a source published in 1975 that consists of a list of questions, scoring guidelines, and interpretive guidelines for the Mini-Mental State Examination (MMSE). It was utilized by Respondent's counsel during cross-examination of Dr. Gunther, Disciplinary Counsel's expert witness, on the first day of trial on the issue of his understanding of the MMSE; however, it was not offered into evidence until the conclusion of the second day of hearing. Dr. Gunther, it should be noted, testified as both an expert and a fact witness as E.M.'s primary care physician of long standing.

Disciplinary Counsel objects on numerous grounds. She asserts that : (1) the document was not provided to Disciplinary Counsel by Respondent in advance of the merits hearing, as required by the Panel's pretrial scheduling order, and Respondent did not provide a copy to Disciplinary Counsel until four days after the document was used in the hearing to cross-examine Dr. Gunther, thereby impairing her ability to investigate the authenticity and current status of what appeared to be a document derived from a 45-year old publication; to conduct appropriate research in advance of the hearing; and to consider adequately and prepare for the possibility of any redirect examination of Dr. Gunther regarding the proposed exhibit during his testimony; (2) Respondent failed to present any foundation evidence for admission of the document.

Respondent maintains that the document is self-authenticating under V.R.E. 902(6) (providing for self-authentication of “[p]rinted materials purporting to be newspapers or periodicals”).

Respondent does not dispute Disciplinary Counsel’s assertion that the document was not listed as an exhibit and provided prior to the cross-examination of Dr. Gunther.

The Panel concludes that it would be unfair to Disciplinary Counsel to allow admission of the document. Dr. Gunther’s testimony did not come as a surprise to Respondent. He deposed Dr. Gunther before the hearing and has suggested no reason he could not identify the exhibit in advance of the hearing for Disciplinary Counsel to review, as required by paragraph 10 of the Panel’s January 8, 2021 scheduling order. In addition, there was no foundation presented for admission of the document. Dr. Gunther was not qualified as an expert on the MMSE and Respondent presented no witness who could provide foundational evidence that would validate admission of the document.

**Respondent’s proposed Exhibit D is excluded from the evidentiary record.**

\* \* \*

**Disciplinary Counsel’s Exhibit DC-3** – The document appears to one of E.M.’s medical records generated by Dr. Gunther on February 12, 2014. Respondent argues (1) that the document was not produced to Respondent from the medical records archive in response to a subpoena to Dr. Gunther seeking E.M.’s medical records and, instead, that another record was produced for that day; and (2) that Dr. Gunther could not otherwise authenticate the record. Dr. Gunther testified that it was a medical record of his visit with his patient on that date. He testified that the format of various medical records can look different, that the electronic system for storing records had transitioned to a different system with different formats over time, and that the phone number and address on the record were correct. He testified that he could not identify the handwriting on the document. He did not have his medical records with him during his testimony.

While it is not surprising that Dr. Gunther would be unable to identify with specificity any individual medical record – given that he is not the custodian of the records at this point in time – and even though it is possible, even likely, that the document is in fact one of Dr. Gunther’s records, Disciplinary Counsel was unable to identify the source of the document or present proof that the document was a final form record.

**Accordingly, Proposed Exhibit DC-3 is excluded from the evidentiary record.**

\* \* \*

**Disciplinary Counsel’s Exhibit DC-15** – This exhibit is a two page Order from the Superior Court, Chittenden Unit, Probate Division in an involuntary guardianship petition involving E.M. Respondent objected to the admission of this Order, arguing that it is from a different case involving different parties (not including Respondent) with different burdens of proof. Moreover, he argues that the Order is cumulative given that the findings contained therein are largely reflective of testimony by Dr. Peter Gunther, E.M.’s long time primary care physician. Dr. Gunter testified in the instant matter and was subject to direct and cross examination. The *decision* of the Chittenden County Probate Judge, invalidating the advance care directive of E.M. which appointed her son John McDonald as her health care agent, is not disputed. It is the factual basis for that decision, the Probate Court findings, to which the Respondent objects.

Disciplinary Counsel counters that the factual findings are admissible pursuant to V.R.E. 201 - Judicial Notice of Adjudicative Facts. Further, she argues that since the Probate Hearing transcript was used for impeachment and marked for identification as DC-23 & 24, a claim of dissimilarities of the parties has been waived, particularly after this Panel heard a witness testify what her recollection of the Order was. Finally, she asserts that any objection to the Order goes to its weight, not its admissibility.

The mental health of E.M. is an issue in this case. Respondent was not present nor did he participate in the probate matter. Respondent's point of contact with his client was her son John McDonald, who was present and was represented by Counsel. Nonetheless, the Probate Court's findings regarding E.M.'s declining mental health are not "adjudicative facts" as that term is used in VRE 201(b), that is, the kinds of facts that are generally known or capable of accurate and ready determination, such as laws of nature, or the distance between two towns. Therefore, the Court's findings are not admissible under VRE 201. Most importantly, however, the key fact for this Hearing Panel is that the advanced care directive and John McDonald's appointment as health care agent for E.M, prepared by Respondent, was invalidated by the Chittenden County Probate Judge. This the parties agree upon, and those facts are before this Panel for any purpose. Given that, the Probate Court's reasoning in a guardianship case is not relevant to our mission.

**Respondent's objection to DC-15 is sustained and the Probate Court Order will not be received in evidence.**

Dated: June 29, 2022

**Hearing Panel No. 2**

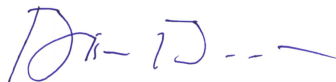
By:



James A. Valente, Esq., Chair



Amelia W.L. Darrow, Esq.



Brian Bannon, Public Member