STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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

RESPONDENT'S PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

INTRODUCTORY STATEMENT

Petitioner's allegations against Respondent required proof by clear and convincing evidence. AO 9, Rules 13 D(5)(b) and 20-C.

The Petitioner's expert witness concerning a standard to which attorneys must adhere to determine if a client has *diminished capacity* was attorney Carolyn Thompson. Ms. Thompson testified that she has considerable experience in dealing with the problem of determining if an older client has diminished capacity. Ms. Thompson's testimony made it clear that an attorney, such as Respondent, is left to make her or his own determination of whether a client has diminished capacity. Ms. Thompson testified "I don't know of any standard except that a lawyer is under an obligation to only prepare documents for a client that **seems [to the lawyer] to have testamentary capacity**." That is the standard. Respondent met the standard.

The only evidence satisfying the requirements of V.R.E. 602 on Respondent's meetings with EM is the testimony of Respondent and JJM. The uncontroverted testimony of Respondent is conclusive evidence that Respondent met the standard. Respondent testified he met face to face with EM, conversed with EM, reviewed, and explained documents to EM, and concluded from EM's responses that EM understood the documents being discussed and had "testamentary capacity."

Unless the Hearing Panel accepts conjecture as "clear and convincing evidence," the Hearing Panel must find that Respondent met the standard.

Hindsight bias[1] is apparent in the testimony of Dr. Gunther, the Petitioner's lead medical expert. Dr. Gunther's testimony is a good example of not clear or convincing evidence. Dr. Gunther's testimony in probate court regarding EM's Mini Mental Status Scale was incorrect and misleading. Dr. Gunther's testimony in probate court regarding the Alzheimer's Disease Assessment Scale was the same. Dr. Gunther then repeated the misleading incorrect information to this Hearing Panel and, when challenged, claimed he simply "recalled incorrectly" how the Mini Mental Status Scale and Alzheimer's Disease Assessment Scale were scored and what was a low score and what was a high score. Dr. Gunther was either providing incorrect and misleading information to Hearing Panel 2 because he recalled incorrectly, or Dr. Gunther was mistaken about something so basic and well known in the medical community his competence must be questioned.

On September 23, 2015, just six (6) days before Respondent's meeting with EM on September 29, 2015, EM's medical records, signed by Dr. Gunther, stated:

> **Exam: Const:** Appears well. No signs of acute distress present. Patient is cooperative and overall behavior is appropriate.
> **Psych: Mood/Affect:** Mood is normal. Patient describes mood as normal. Affect is normal.
> **Language/Thought:** Speech is clear. No aphasia noted while speaking. Thought process appears clear, appropriate, coherent, and logical.
> **Cognition:** Alert and oriented X3. Memory is grossly intact. Judgement and insight are grossly intact.

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[1] Hindsight bias, also known as the knew-it-all-along phenomenon or creeping determinism, is the common tendency for people to perceive past events as having been more predictable than they actually were. People often believe that after an event has occurred, they would have predicted or perhaps even would have known with a high degree of certainty what the outcome of the event would have been before the event occurred. Hindsight bias may cause distortions of memories of what was known or believed before an event occurred, and is a significant source of overconfidence regarding an individual's ability to predict the outcomes of future events. Examples of hindsight bias can be seen in the writings of historians describing outcomes of battles, physicians recalling clinical trials, and in judicial systems as individuals attribute responsibility on the basis of the supposed predictability of accidents. Wikipedia

Dr. Gunther's testimony that his medical record of EM's condition dated September 23, 2015, Exhibit A (quoted above) was "templated examination" already inserted on the medical record was shown to be *incorrect* by EM's medical records on all other dates which did not have "templated examination".

How much "*recalled incorrectly*" and "*templated examination*" is allowed? The testimony of Dr. Peter Gunther which would be used to support an allegation of misconduct against Respondent must not be relied upon by Hearing Panel 2 as "clear and convincing" evidence.

The Petitioner's only other medical expert, Dr. William Nash, confirmed that EM was only at the initial stages of dementia and explained Symptom Fluctuation – "good days and bad days." Dr. Nash's testimony supported the testimony of JJM and Respondent about EM's mental status on the occasions in 2015 and early 2016 when Respondent met with EM.

The Hearing Panel should not consider as evidence, much less clear and convincing evidence any probate court rulings or orders concerning EM because Respondent was not a party to any probate proceeding concerning EM. Respondent was not asked to testify or made aware of those probate proceedings. More importantly, the probate court orders are based, at least in part, on the misleading testimony of Dr. Gunther when he "recalled incorrectly" how the Mini Mental Status Scale and Alzheimer's Disease Assessment Scale were scored and testified to scores that did not exist and testified that the score indicated something that was not true.

It is still unexplained how Dr. Nash could had those exact same incorrect scores in his report, except for his testimony of "Woops".

The Petitioner's failure to meet its burden of proof, by clear and convincing evidence, is outlined for each Count below.

COUNT 1

Count 1 alleging, *failure to maintain a normal client relationship with a client with diminished capacity*, required the Petitioner to prove, by clear and convincing evidence, all three of the following:

1. That EM was, and Respondent knew EM was, mentally impaired when Respondent met with EM on each (or at least one) of two occasions in 2015 and two occasions in early 2016;
   and,
2. That EM seemed mentally impaired to Respondent when he met with her; and,
3. That Respondent *"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."*

1. **Not met.** No direct evidence was presented that EM was mentally impaired, or seemed mentally impaired, on any occasion when Respondent met with EM;
2. **Not met.** All direct evidence is that when EM met with respondent, on every occasion, EM seemed, to Respondent, to be competent;
3. **Not met.** It is uncontroverted that Respondent had direct face to face conversations with EM at each meeting with EM. It is uncontroverted that at each meeting, before EM signed any document, Respondent explained the meaning of the document to EM, inquired of EM concerning the meaning of the document so Respondent could be sure EM understood the document and that it reflected EM's intent and was consistent with her wishes. There is no evidence to the contrary.

Even if, on other dates, EM showed signs of diminished capacity, Dr. Gunther explained that people with mental impairments such as EM can have good days and bad days – Symptom Fluctuation. Testimony from Respondent and JJM provided "clear and convincing evidence" that EM did not seem to Respondent to have diminished capacity.

Respondent met "face to face" with EM, inquired directly of EM concerning each document to be sure EM understood the document, that it reflected EM's wishes. Thus

Respondent assessed for himself that EM was competent to conduct the transactions and understood their consequences. It is uncontroverted that, at each meeting, from Respondent's face to face interactions with EM and discussions with EM, that EM seemed to Respondent, to be competent.

To counter that direct testimony the Petitioner has only offered conjecture. The Petitioner did not prove, by clear and convincing evidence, that Respondent violated V.R.P.C. 1.14(a) as alleged.

COUNT 2

Count 2, makes no reference to, or any allegation of, mental impairment of the client, alleging a violation of V.R.P.C. 1.1, - *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.* **Count 2** alleges Respondent violated V.R.P.C. 1.1 **by *failing to meet with [EM] privately*** *and discuss with [EM] what her objectives and concerns were in arranging her estate and failed to advise her of possible consequences of property transfers to JJM.*

To prevail on **Count 2**, the Petitioner was required to prove, by clear and convincing evidence, that Respondent failed to provide *competent representation* to EM because Respondent did not meet with EM *privately* to discuss with EM her *objectives, concerns, and consequences* of the transfers.

But the direct uncontroverted evidence is that Respondent did discuss EM's objectives with her "face to face" while her back was to JJM. Because JJM did not interfere with or participate in communications between Respondent and EM, Respondent did not ask JJM to leave, which Respondent admits, would have been the better practice. Respondent felt that the face to face meetings with EM was private enough for Respondent to be confident that each

document EM signed was understood and consistent with her wishes. From Respondent's face to face interactions and discussions with EM, Respondent determined for himself that EM seemed to be competent.

To counter that direct testimony the Petitioner has only offered conjecture. The Petitioner did not prove, by clear and convincing evidence, that Respondent violated V.R.P.C. 1.1 as alleged.

COUNT 3

Count 3 also makes no reference to or allegation of mental impairment of the client, alleging Respondent "**failed to adequately communicate** with his client EM; to wit: drafted, and/or presented to EM for signature multiple documents affecting EM's interest in her own assets without explaining the documents to her or the possible consequences to the extent reasonably necessary to permit her to make informed decisions, in violation of" V.R.P.C. 1.4(b) that "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

To prevail on **Count 3**, the Petitioner was required to prove, by clear and convincing evidence, that Respondent failed to *explain a matter* [the documents] *to the extent reasonably necessary to permit the client to make informed decisions.*

The direct testimony is that, before EM signed any document, Respondent explained the meaning of the document to EM, inquired of EM concerning the document to be sure EM understood the document and that the document reflected EM's intent and was consistent with her wishes. The direct and credible evidence is that Respondent discussed EM's objectives and was sure that each document EM signed was what she wanted and was consistent with her wishes.

Respondent testified that, "in hindsight," he could have been, and possibly should have been, more thorough. But even if Respondent's discussions with EM could have been more thorough, Respondent discussed each document with EM thoroughly enough, and to the extent Respondent felt necessary, to be sure that each document EM signed was an informed decision.

This matter concerns meetings between Respondent and his client EM in 2015 and early 2016. All "evidence" supporting the Petitioner's allegations of misconduct is supported only by conjecture and does not meet the requirement of "clear and convincing" evidence necessary to prove a violation.

FINDINGS OF FACT

H1 refers to hearing testimony on 10/22 and **H2** to hearing testimony on 10/29.

1. Respondent, C. Robert Manby, Jr. is an attorney licensed to practice law in Vermont. He attended Brown University and graduated from Vermont Law School in 1979. Respondent was admitted to practice in 1980 and maintains a solo practice in White River Junction. H1-31:00 – 32.

2. Respondent's practice consists of real property and probate matters, representation of municipalities, and commercial transactions. H1-32:00 – 32:30.

3. Respondent has had no complaints filed against him prior to this one.

4. Respondent's character and reputation are excellent.

5. Respondent has willingly and openly cooperated with Disciplinary Counsel in these proceedings.

Facts 6-18 are the only admissible facts allowed under V.R.E. 602 regarding Respondent's meetings with EM.

6. Before meeting with EM Respondent inquired about EM's mental condition and was told by JJM that though EM was physically feeble, mentally EM was "entirely OK." (H1, 2:12-2:13)

7. Respondent asked and was told that EM met regularly with her doctor and EM's doctor had not diagnosed or indicated that EM had any mental impairment, or cognition or memory problems. (H1, 2:13 – 2:14)

8. Respondent met with EM on June 25, 2015, September 29, 2015, February 4, 2016 and in March 2016 to witness documents that Respondent did not prepare which was the last time Respondent met with EM.

9. At the June 25, 2015, meeting with EM, Respondent "knelt down [outside the open car door] so that [Respondent] could have direct eye to eye contact with EM", (H2-00:53-00:55.). Before EM signed any document, Respondent explained the meaning of the document to EM, inquired of EM concerning the document to be sure EM understood the document and that the document reflected EM's intent and was consistent with her wishes before EM signed the document. (H1, 00:53 – 00:55. 1:21, 2:12 – 2:15)

10. EM told Respondent that the document represented her wishes saying "yes, she was engaging with me, we were looking at each other, ... we were face to face with each other." (H1, 00:54 – 00:55:30)

11. Before meeting with EM Respondent inquired about EM's mental condition and was told by JJM that though EM was physically feeble but mentally EM was "entirely OK." (H1 2:12-2:13)

12. Before meeting with EM Respondent asked and was told that EM's doctor had not diagnosed or indicated that EM had any mental condition or problem with memory. (H1 2:13 – 2:14)

13. When speaking with EM at each meeting with her EM never gave Respondent any indication that EM was not aware of what was going or that EM had any mental problems. (H1, 2:14:44 – 2:15:10)

14. JJM confirmed that before Respondent handed any document to EM that Respondent "squatted down" (H1 – 00:54) and before Respondent handed any document to EM, Respondent "talked to her, got to know her a little bit and then he handed the document to her and went over it with her". (H1 2:28 – 2:29:26)

15. JJM testified that at their first meeting Respondent "explained the document to [EM], what the document would accomplish, pointed to a line here or a line there and asked her if that was what she wanted to do, if that was her free will." (H1, 2:29-2:30:30)

16. JJM testified, with regard to the IRA that Respondent "made sure she understood it ... he took time to be sure [EM] understood everything about it, which she did, and that it was what she wanted to do." (H1, 2:30:30- 2:30:30)

17. JJM testified that Respondent explained the other documents to EM in a way like what Respondent had done in their first meeting to make sure that EM understood each document and that it was what she wanted to do. (H1, 2:30)

18. JJM testified Respondent specifically asked JJM if EM had any mental issues or memory problems. JJM testified that he told Respondent that EM was "old and feeble but otherwise fine." (H1, 2:55)

DR. PETER GUNTHER

19. Dr. Peter Gunther testified he is not an expert on Alzheimer's disease. (H1, 4:56:50)

20. Dr. Gunther testified the last timer he had read a medical article on symptom fluctuation for patients with dementia such as EM, "good days and bad days" was in May of 2001. Dr. Gunther could not remember the name of the article, the author, the publisher and did not keep a copy. (H1, 5:06-5:07:30)

21. Dr. Gunther's testimony in probate court regarding EM's scores on the Mini Mental Status Exam (MMSE) was not only wrong it was misleading. (H1, 5:17-5:21)

22. Dr. Gunther's testimony in probate court regarding the Alzheimer's Disease Assessment Scale (ADAS) was not only wrong it was misleading. (H1 5:23-5:27)

23. Dr. Gunther, in his testimony at the probate hearing and at the Hearing, was either intentionally wrong in his testimony about EM's ADAS and MMSE scores or Dr. Gunther was mistaken about something so basic and well known in the medical community his competence must be questioned. Hearing at 5:00 - .

10. Dr. Gunther testified at the probate hearing, Exhibit C, and at the Hearing, that he could not testify with any degree of medical certainty as to EM's cognitive condition on February 4th 2016, the date she signed the advance directive – "That's true. I didn't see her that day." H1, 5:26:30.

11. Dr. Gunther admitted, after significant attempts to avoid a direct answer, admitted that he could not testify with any degree of medical certainty as to EM's cognitive condition on any date EM met with Respondent. (H1, 5:26 – 5:28)

12. Dr. Gunther again testified that keeping accurate medical records for a patient is "very important because other doctors have to rely on them." (H1, 5:29)

13. Dr. Gunther admitted that Exhibit A was EM's medical record for EM's examination by Dr. Gunther on September 23, 2015. Hearing at 5:29.

14. Dr. Gunther's medical records for EM on September 23, 2015, (Exhibit A) signed by Dr. Gunther on September 23, 2015, just six (6) days before Respondent's meeting with EM on September 29, 2015, stated:

> **Exam: Const:** Appears well. No signs of acute distress present. Patient is cooperative and overall behavior is appropriate.
>
> **Psych: Mood/Affect:** Mood is normal. Patient describes mood as normal. Affect is normal.
>
> **Language/Thought:** Speech is clear. No aphasia noted while speaking. Thought process appears clear, appropriate, coherent, and logical.
>
> **Cognition:** Alert and oriented X3. Memory is grossly intact. Judgement and insight are grossly intact.

15. Dr. Gunther after again testifying that keeping accurate medical records for a patient is "very important" (H2, 3:20-3:30) testified, under oath, that the above quoted record, Exhibit A, was "templated examination." (H1, 5:30. 6:37)

16. Dr. Gunther, when confronted with EM's next medical record, Exhibit B, completed by his nurse practitioner Clodagh Coghlan, APRN, on January 7, 2016, made it apparent Dr. Gunther's testimony about "templated examination" was in error. (H1, 5:29 - 5:36)

17. Dr. Gunther admitted that EM's medical records, Exhibit A and Exhibit B showed that EM had no trouble speaking in 2015 or early 2016. (H1, 5:33-5:34)

18. Dr. Gunther admitted that patients such as EM have good days and bad days.

19. Dr. Gunther provided no proof, by clear and convincing evidence, that Respondent violated any Vermont Rule of Professional Conduct as alleged. There is no certainty that Dr. Gunther remembered anything correctly.

DR. WILLIAM NASH

20. Dr. William Nash testified that he has no formal specialized training in Alzheimer's disease. (H2, 3:07)

21. Dr. Nash testified that the only reason and purpose of his evaluation of EM was to determine if EM needed a guardian as of May 9, 2016. (H2, 3:06)

22. Dr. Nash testified that the progression of Alzheimer's stages "can vary widely, quite widely." (H2, 2:58)

23. Dr. Nash could not testify as to the how quickly EM had progressed to the stage dementia he found when he examined EM but would need to look at previous records. (H2, 2:55 – 3:00)

24. Dr. Nash testified that the medical records he was provided came from the probate court and that the probate court got the medical records from attorney Kurt Hughes. (H2, 3:09-3:10)

25. Dr. Nash testified that he never checked if the medical records he was provided were complete or had been altered or checked to determine where the medical records came from (H2, 3:10-3:12:10).

26. When Dr. Nash was told the scores for EM's MMSE in his Psychological Evaluation of EM (Exhibit DC-12) were incorrect, his response was "Woops". Left unexplained were how Dr. Nash's incorrect scores were the exact same incorrect scores as the incorrect scores Dr. Gunther "*recalled incorrectly*" in his court testimony. (H2, 16)

27. Dr. Nash testified, after reviewing EM's medical record of September 23, 2015, Exhibit A, that as of that date EM was only in the early stages of dementia. (H2, 3:44:30-3:46)

28. Dr. Nash had not reviewed any articles on system fluctuation, "good days and bad days", prior to his testimony. (H2, 3:07)

29. Other than the day he met EM on May 9, 2016, Dr. Nash could not "give an opinion as to whether or not [EM], on a particular date, was experiencing cognitive impairment, or the degree of any cognitive impairment". (H2, 3:08:20)

30. Dr. Nash provided no proof, by clear and convincing evidence, that Respondent violated any Vermont Rule of Professional Conduct as alleged.

ATTORNEY KURT HUGHES

31. Attorney Kurt Hughes had no idea if the medical records he was provided were complete or altered before they were given to him for use in court. (H2, 4:09)

32. Attorney Kurt Hughes provided no proof, by clear and convincing evidence, that Respondent violated any Vermont Rule of Professional Conduct as alleged.

ATTORNEY CAROLYN THOMPSON

33. Attorney Carolyn Thompson's direct testimony was not included on the tape provided to Respondent's counsel.

34. The Petitioner offered Attorney Carolyn Thompson to explain the standard for how attorneys determine if a client has diminished capacity. (H2, 11:00)

35. Ms. Thompson testified "I don't know of any standard except a lawyer is under the obligation to only prepare documents for a client **that seems to [the lawyer],** if it's a will, to have testamentary capacity, **according to what the lawyer is seeing and hearing** or for a power of attorney to make a contract." (H2, 14:44 – 15:44)

36. Ms. Thompson knows of no case law, VBA guideline, or ethics rule that states how an attorney is to determine if a client has a cognitive disorder (H2, 17:00- 19:00).

37. Ms. Thompson, when asked if there is a standard that an attorney need to conduct in a certain way to determine is a client has diminished capacity testified "I would just consult the Vermont ethics rules, that's what I have done." but she could not identify any such rule, (H 17:13 -17:50).

38. Attorney Carolyn Thompson provided no proof, by clear and convincing evidence, that Respondent violated any Vermont Rule of Professional Conduct as alleged.

PATRICIA SUNDBERG

39. Patricia Sundberg had private meetings, email and telephone communications with Dr. Gunther, which were not reflected anywhere in EM's medical records. (H2, 1:52 – 1:67) and obtained "some of" EM's records in 2016 (H2, 2:09 – 2:10) which she gave to Attorney Kurt Hughes for the probate hearing.

40. Mrs. Sundberg does not know the date range of EM's medical records that Dr. Gunther gave to her or that she provided to Mr. Hughes. (H2, 2:18)

41. All documents which EM signed which were prepared by Respondent or witnessed by Respondent have been voided. (H2, 2:28)

42. Mrs. Sundberg testified that EM's estate was compensated in full for all alleged losses resulting from Respondent actions, including all costs and attorney's fees, (H2, 2:04:00-2:04:33) and the reimbursement included the bills and expenses of Kurt Hughes for his work associated with the probate court petitions and hearings.
(H2, 4:22:54-4:23:10)

43. Mrs. Sundberg testified that all documents prepared or witnessed by Respondent were voided. (H2, 2:28:00-2:28:30)

44. Mrs. Sundberg was not asked and did not address that in March 2011, EM had given JJM a broad Durable Power of Attorney allowing JJM to, among other things, "To sign my name on all documents that may require my signature" (See Exhibit DC-25) and how that Durable Power of Attorney would affect the allegations against Respondent.

45. Patricia Sundberg provided no proof, by clear and convincing evidence, that Respondent violated any Vermont Rule of Professional Conduct as alleged.

WALTER C. DECKER

46. Walter Decker's testimony concerned interviews long after any meeting Respondent had with EM. (H1, 3:31- 4:00)

47. Mr. Decker confirmed that Respondent was adamant that EM "fully understood what was going on, understood the documents and signed them because that's what she wanted to do." (H1, 4:00)

48. Walter Decker provided no proof, by clear and convincing evidence, that Respondent violated any Vermont Rule of Professional Conduct as alleged.

CONCLUSIONS OF LAW

The allegations against Respondent required proof by clear and convincing evidence. AO 9, Rules 13 D(5)(b) and 20-C. The clear and convincing evidence standard does not require that evidence in support of a fact be uncontradicted but does require that the fact's existence be "highly probable." *In re E.T.*, 865 A.2d 416, 421 (Vt. 2004) at 512. "[I]t should be understood that the clear and convincing evidence standard represents a very demanding measure of proof. *In re N.H.*, 724 A.2d 467, 469 (Vt. 1998). It is Special Counsel's burden to prove that Mr. Kane violated the alleged Canons *637 by clear and convincing evidence. R.S.C.D.C.J. 10(1); BALIVET, 2014 VT 41, ¶ 20, 196 Vt. 425, 98 A.3d 794. "Clear and convincing evidence is a 'very demanding' standard, requiring somewhat less than evidence beyond a reasonable doubt, but more than a preponderance of the evidence. [It] does not require that evidence in support of a fact be uncontradicted, but does require that the fact's existence be 'highly

probable.' " *In re* **E.T.**, 2004 VT 111, ¶ 12, 177 Vt. 405, 865 A.2d 416 (citation omitted). *In re Kane*, 169 A.3d 180, 183 (Vt. 2017).

No evidence elicited at the hearing met the required burden of proof that Respondent violated any rule of professional conduct as alleged by Petitioner.

Conclusion 1.

Allegation – Count 1:

Petitioner alleges: In 2015 and 2016, C. Robert Manby, Jr., a licensed Vermont attorney, failed to maintain a normal client-lawyer relationship with 91-year-old client EM who was 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). Emphasis added.

V.R.P.C 1.14(a) states: *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.*
V.R.P.C 1.14(a) which presumes the lawyer knew the client had diminished capacity. V.R.P.C 1.14(a) does not say "knew or should have known" or when a lawyer "reasonably believes that the client has diminished capacity" which is the criteria of V.R.P.C 1.14(b).

Petitioner offered no proof, by clear and convincing evidence, that Respondent knew EM was of diminished capacity when Respondent met with her on any occasion. All credible evidence is that Respondent did not know or believe EM was of diminished capacity when Respondent met with her on any occasion. Respondent checked and was told she was feeble but mentally fine and that no doctor had said EM had any mental problems. All evidence

meeting the requirements of V.R.E. 602 was that Respondent met face to face with EM and that he explained everything EM signed to her and that it was Respondent's opinion, [that it seemed to him, according to what he was seeing and hearing] that EM understood each document and that the document represented EM's wishes and that the document was what EM wanted. Facts, 6-18.

Petitioner offered no evidence to the contrary. Both of Petitioner's medical experts testified that they could not testify as to EM's mental condition on any date EM met with Respondent. Facts, 10 and 11. Petitioner's other witnesses offered only conjecture. Facts, 19-40.

The evidence is that Respondent did not accept JJM's representations about EM's wishes without inquiring with EM directly or consulting with her about her own wishes, objectives, and concerns, but instead had direct face to face conversations with EM at each meeting and before EM signed any document, Respondent explained the meaning of the document to EM, inquired of EM concerning the meaning of the document so Respondent could be sure EM understood the document and that it reflected EM's intent and was consistent with her wishes. Facts, 6-18. Petitioner offered no "proof by clear and convincing evidence" to the contrary. Facts, 19-40.

Conclusion 2.

Allegation - Count 2.

Petitioner alleges: In 2015 and 2016, C. Robert Manby, Jr., a licensed Vermont attorney, failed to provide competent representation to EM; to wit: failed to meet with her privately and discuss with her what her objectives and concerns were in arranging her estate and failed to advise her of possible consequences of property transfers to JJM in violation of Vermont Rule of Professional Conduct 1.1.

V.R.P.C 1.1 states: *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

Petitioner offered no proof, by clear and convincing evidence, that Respondent's representation of EM was not "competent" because JJM was present. Respondent was engaged with EM in face-to-face discussions and there is no proof that JJM's presence affected communications between Respondent and EM. Facts, 6-18 and 40.

Conclusion 3.

Allegation - Count 3.

Petitioner alleges: In 2015 and 2016, C. Robert Manby, Jr., a licensed Vermont attorney, failed to adequately communicate with his client EM; to wit: drafted, and/or presented to EM for signature multiple documents affecting EM's interest in her own assets without explaining the documents to her or the possible consequences to the extent reasonably necessary to permit her to make informed decisions, in violation of Vermont Rule of Professional Conduct 1.4(b).

V.R.P.C 1.4(b) states: *A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.*

Petitioner offered no proof, by clear and convincing evidence, that Respondent *"drafted, and/or presented to EM for signature multiple documents affecting EM's interest in her own assets without explaining the documents to her or the possible consequences to the extent reasonably necessary to permit her to make informed decisions."*

The credible evidence is to the contrary, that Respondent had direct face to face conversations with EM at each meeting with EM and that before EM signed any document, Respondent explained the meaning of the document to EM, inquired of EM concerning the

meaning of the document so Respondent could be sure EM understood the document and that it reflected EM's intent and was consistent with her wishes. Facts, 6-18. There is no proof, by clear and convincing evidence, to the contrary.

CONCLUSION

The Panel should, in fairness, consider the hindsight bias of the witnesses and not fall prey to hindsight bias in evaluating the allegations against Respondent.

Respondent has been a member of the Vermont bar since 1980. He is a solo practitioner whose practice consists of real property and probate matters, representation of municipalities, and commercial transactions. Respondent's character and reputation are excellent. Respondent has had no complaints filed against him prior to this one. Respondent has willingly and openly cooperated with Disciplinary Counsel in these proceedings. The client suffered no harm from any alleged violation, all documents have been voided and in the settlement of a lawsuit by EM's estate paid all claimed damages and the settlement included reimbursement of all costs and all attorney's fees.

All of the credible testimony, based on Respondent's personal observation, is that on the days EM met with respondent, EM seemed to Respondent from his personal observations of her to have no cognitive impairment and that EM understood what she was doing. The evidence and testimony made it clear that Respondent neither knew, nor had any reason to believe, that EM's judgment and comprehension were affected by any diminished capacity.

The Petitioner did not prove otherwise. The Petitioner failed to satisfy the burden of presenting clear and convincing evidence or proof to support the allegations that Respondent violated any Vermont Rule of Professional Conduct.

POSSIBLE SANCTION

The Vermont Rules of Professional Conduct "are 'intended to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar.' " IN RE PRB DOCKET NO. 2006-167, 2007 VT 50, ¶ 9, 181 Vt. 625, 925 A.2d 1026 (mem) (quoting IN RE BERK, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991)). **147 "The purpose of sanctions is not 'to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct.' " IN RE OBREGON, 2016 VT 32, ¶ 19, 201 Vt. 463, 145 A.3d 226 (quoting IN RE HUNTER, 167 Vt. 219, 226, 704 A.2d 1154, 1158 (1997

The public is protected when sanctions are imposed that are commensurate with the nature and gravity of the violations and the intent with which they were committed. *Attorney Grievance Comm'n v. Awuah,* 346 Md. 420, 435, 697 A.2d 446, 454 (1997). *Atty. Grievance Commn. of Maryland v. Stein,* 819 A.2d 372, 375 (Md. 2003), 831 A.2d 1 (Md. 2003)

The ABA Standards recommend sanctions and require the Hearing Panel weigh four factors in determining the appropriate sanctions: (1) the duty violated, (2) the attorney's mental state, (3) the actual or potential injury caused by the misconduct, and (4) the existence of aggravating or mitigating factors. WARREN, 167 Vt. at 261, 704 A.2d at 791 (citing ABA Standards § 3.0, at 26). *In re Neisner,* 16 A.3d 587, 592 (Vt. 2010)

If, [] the conduct is an isolated instance of negligence that causes little or no actual or potential injury, the Standards recommend an admonition. *In re Warren,* 704 A.2d 789, 791 (Vt. 1997).

To the extent Respondent committed a violation by not being more thorough it was not the kind of violation that would warrant suspension. Any harm has been rectified through a civil action against Respondent which compensated EM's estate, in full, for all alleged losses resulting from Respondent actions, including all costs and attorney's fees.

Respondent's conduct resulted in no injury to the client, the legal system, or the profession and there is no likelihood Respondent would ever repeat the conduct. The violation was certainly not intentional and not serious enough to warrant suspension. There is no possibility Respondent would ever repeat the violation.

ABA Standard 4.13 indicates a "[r]eprimand is the presumptive sanction "when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client." *In re PRB Dkt. No. 2012.155*, 121 A.3d 675, 677 (Vt. 2015) "Negligence" is defined as "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *In re PRB Dkt. No. 2012.155*, 121 A.3d 675, 677 (Vt. 2015).

In any event, Respondents conduct was not a knowing or intentional misconduct or a knowing or intentional violation of any alleged Vermont Rule of Professional Conduct warranting a sanction greater than a reprimand.

DATED: July 29, 2022

Respectfully submitted,

C. ROBERT MANBY, JR.
Respondent

By: _____
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