

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

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

RULING ON RESPONDENT'S MOTION TO RECONSIDER

On October 9, 2020, the Hearing Panel issued a decision in which it denied Respondent's Motion to Recuse and to Strike. The motion requested that the Panel: (1) recuse itself from adjudicating this matter; and (2) entertain requests by the Respondent to strike various allegations from the Petition on grounds that the evidence that will be proffered by Disciplinary Counsel in support of the allegations is inadmissible.

Respondent has moved for reconsideration of that ruling. In his current motion, Respondent takes the position that he has admitted, through his Answer, "all necessary facts" showing that he violated Vermont Rules of Professional Conduct 1.1 and 1.4(b) as alleged in the Petition of Misconduct. He asserts that his answers constitute binding judicial admissions and, based on this assertion, he asks the Panel to rule that "[n]o further evidence on Counts 2 and 3 is necessary," with the exception of "evidence [relevant] to the issue of sanctions," and that "[d]iscovery may continue related to Count 1." Motion to Reconsider dated 10/20/20, at 2.

Respondent's motion to reconsider is not responsive to the Panel's earlier ruling on his Motion to Recuse and to Strike. Indeed, Respondent asks for new and different relief. More importantly, Respondent does not challenge the conclusions set forth in the Panel's prior ruling – first, that Respondent has not justified his request for recusal of the Panel; and, second, that Respondent cannot use arguments regarding the admissibility of evidence to request that allegations in the Petition be stricken.

Respondent's requests appear to be aimed at narrowing the scope of this proceeding. Respondents' requests do not support reconsideration. *See* V.R.C.P. 59 and 60 (describing, generally, bases for reconsideration in civil matters). Accordingly, Respondent's Motion to Reconsider is hereby DENIED.

* * *

To the extent that Respondent is seeking to narrow the scope of this proceeding with respect to discovery and the merits hearing – and because he represents in his motion that Disciplinary Counsel does not oppose his requests – the Panel takes this opportunity to review the procedural posture of this proceeding and the pertinent provisions of the governing procedure for disciplinary proceedings, Administrative Order 9.

The current case was initiated by the filing of a petition of misconduct. A.O. 9 provides that “[i]f an answer to a petition of misconduct is filed, the hearing panel shall serve a notice of hearing upon disciplinary counsel and respondent . . .” A.O. 9, Rule 11(D)(4). It further provides that “[w]here proceedings have been initiated by petition, disciplinary counsel shall have the burden of proving the alleged violations by clear and convincing evidence.” *Id.*, Rule 11(D)(5)(b).

Under A.O. 9, the hearing panel makes an independent determination in every case – based on the evidence presented and its application of the Rules of Professional Conduct – as to whether the conduct in question rises to the level of a violation. A respondent's admissions in response to the allegations in the petition are not necessarily dispositive. Even in cases where a respondent has admitted certain allegations, the Panel interprets the ethical rules in question and applies them to the record presented by the parties through the lens of the “clear and convincing” standard of proof to determine whether the charges have been proven.

A.O. 9 does not allow the parties to stipulate that a violation of the Rules of Professional Conduct has occurred. It provides that even when the parties submit a stipulation of facts for the Panel's consideration, the stipulation must be submitted "along with any *proposed* legal conclusions . . ." *id.*, Rule 11(D)(1) (emphasis added). Moreover, A.O. 9 provides that "[t]he hearing panel shall *in every case* issue a decision containing its findings of fact, conclusions of law, and the sanction imposed, if any . . ." *Id.*, Rule 11(D)(5)(c) (emphasis added). In short, hearing panels have the responsibility in every case to make an independent determination on each of the charges presented in a petition.

The conclusion that the parties cannot utilize a stipulation to bind the Panel to an outcome is also supported by the "public interest" nature of this proceeding and the fact that the Supreme Court can order review of a panel decision on its own motion, even when neither party has appealed. *See id.*, Rule 11(D)(5)(c). In sum, the Panel must determine in this case, independent of any jointly proposed conclusions of the parties, whether the evidence that is proffered by Disciplinary Counsel and admitted into evidence at hearing (including any admissions by Respondent) is sufficient to prove each of the three counts alleged in the Petition.

With respect to Respondent's desire to limit the scope of discovery the Hearing Panel notes that, subject to the requirements of a scheduling order that will be issued shortly by the Panel in this matter,¹ the parties are free to limit the discovery they seek from each other, if they should want to do so. A.O. 9 confers the right to conduct discovery on each of the parties while leaving the actual pursuit of discovery to the initial decision making of the individual parties. Unless a dispute arises between the parties with respect to discovery, the manner and extent to

¹ At the conclusion of a telephone prehearing conference, the Panel set a December 8, 2020 deadline for the parties to submit either a jointly proposed order or separate proposed orders for the Panel's consideration.

which they conduct discovery is addressed by the parties without the Panel's involvement. Nothing in this ruling prevents the parties from limiting discovery if they agree among themselves to do so.

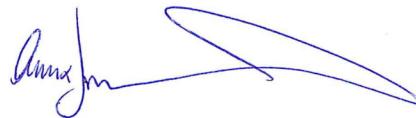
Dated: December 17, 2020

Hearing Panel No. 2



By:

James A. Valente, Esq., Chair



Amelia W.L. Darrow, Esq.



Deedee Jones, Public Member