STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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

Disciplinary Counsel's Memorandum of Law Addressing Jointly Proposed Conclusions of Law and Recommending 14-day Suspension

Disciplinary Counsel submits the following memorandum of law regarding the charged violations and recommending a 14-day suspension based upon the stipulated facts and evidentiary record.

I. Summary of Facts

As set forth in the stipulated facts, Respondent drafted or facilitated the signing of seven estate planning-related documents over the course of 2015-2016 without ever once speaking privately with his elderly client EM, either on the telephone or in person. Instead, he accepted direction from her son JJM, under circumstances where JJM stood to benefit from most of the estate planning changes. Over the course of about a year, Respondent facilitated transfer of EM's home (exhs. 4, 5, 8), an IRA account (exh. 6), changes to her powers of attorney (exhs. 9, 11), a change to her healthcare directive (exh. 10), and creation of a living trust with JJM as the beneficiary (exh. 7). He helped carry out these changes for EM without speaking with her directly in any level of detail about their significance or possible consequences.

II. Violations

Vermont Rule of Professional Conduct 1.14(a)

Under Rule 1.14, a lawyer must make an effort to maintain a normal client relationship with a client who has a diminished capacity to make adequately considered decisions. "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." Vt. R. Pr. C. 1.14(a). Notably, the rule does not require any particular kind of diminished capacity or specific diagnosis. And, it is well-established that 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." Vt. R. Prof. C. 1.14, 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." *Id.* at 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." *Id.* at 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, the record shows that EM was 91 when he took her on as a client in February 2015 and he accepted JJM's representations that she was functioning without diminished capacity, without making his own evaluations or assessments. *See* Exh. 1 at 10, 13-15, 38-39; exh. 18 at 1; and exh. 19. What Respondent did know and did not ask about was that EM was diagnosed with Alzheimer's disease and showed advanced cognitive decline by 2014. Stipulation ¶¶ 36, 37. The

probate court found clear and convincing evidence that in February 2016, while Respondent was her attorney, EM lacked the capacity to understand the nature of the healthcare directive Respondent witnessed her signature on. Exh. 15 at 2. Respondent never met with EM individually or spoke with her about her own objectives, concerns, or wishes. Nothing about the way Respondent worked with EM was consistent with the mandate of Rule 1.14. He agreed to take EM as a client without ever meeting or speaking to her. He helped her execute seven documents affecting her estate and end of life plans without ever having any sort of private communication with her. He never discussed with her possible alternatives or the potential impact some of the changes might have. There was no effort made by Respondent to maintain any sort of normal attorney-client relationship.

Vermont Rule of Professional Conduct 1.1

Rule 1.1 requires that a lawyer provide competent representation to a client. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Vt. R. Pr. C. 1.1. The comments specify that "[c]ompetent handling of a particular matter includes . . . use of methods and procedures meeting the standards of competent practitioners." Vt. R. Pr. C. 1.1, cmt. 5. Here, Respondent failed to use the accepted methods and procedures for estate planning with an elderly client. In particular, he failed to meet or consult with her privately, failed to ask about whether EM had a will or other existing estate planning documents, failed to speak with her about how the changes she was implementing might relate to other important factors for her such as long-term care, and failed to assess her level of decision making capacity despite his own observation that she was in her 90s and "obviously enfeebled" and "not long for this world." Exh. 1 at 19.

Even if from Respondent's perspective he was just trying to help out an old acquaintance by helping out EM with a deed, once he became involved in a third or fourth document, all of which were drafted to benefit JJM, it was impossible for him to continue to believe he was being engaged for an isolated transaction. Had he taken the time to try to speak directly with EM, he would likely then have realized she was not capable of making these types of decisions about her assets and care, and Respondent could have either withdrawn or recognized a duty to take protective action. *See* Vt. R. Pr. C. 1.14(b).

Respondent's acts, omissions, and mistakes during the course of his representation played a role in JJM's exploitation of EM. Most of what Respondent facilitated had to be undone by the probate court once EM's daughters PS and GW were appointed guardians. *See* Exhs. 13, 15, 18, 19.

Vermont Rule of Professional Conduct 1.4(b)

Under Rule 1.4(b), "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The commentary to the rule specifies that "[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so." Cmt. 5. Annotations to the Model Rules further note that "a lawyer risks violating Rule 1.4 by communicating with a third party instead of directly with the client." ABA Center for Professional Responsibility, *Annotated Models Rules of Professional Conduct* at 65 (8th ed. 2015). And, "a lawyer must explain the legal effect of . . . executing a legal document." *Id.* at 68. "Explaining a legal matter includes advising the client of any possible adverse consequences." *Id.* at 69.

Here, there is some evidence that each document Respondent presented to EM for signature was described to her in some form as to its meaning or significance in the moments before she signed it, at least in a cursory fashion. *See, e.g.*, exh. 1 at 12-15, 38-39, 44; exh. 13 at 8. But, the manner in which this was done was not sufficient to permit EM to make informed decisions. *See* Stipulation ¶¶ 17, 18, 22, 24. And, no discussion or advice took place about the documents' relationship to each other, possible alternatives, or whether other documents existed (such as a will) that might be consistent or inconsistent with the documents EM was signing. There was not a single private meeting or phone consultation in which Respondent would have been able to have a back and forth exchange with EM about any questions or concerns. No discussion took place with EM as to what her wishes would be in the event JJM became unable to care for her.

III. Sanction: 14-day suspension is the appropriate sanction.

The purpose of sanctions imposed under the Rules of Professional Conduct is "to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar." *In re Berk*, 157 Vt. 524, 532 (1991). *See also In Re PRB Docket No. 2016-042*, 154 A.3d 949, 955 (Vt. 2016) ("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.") (quotations omitted).

In determining a sanction for misconduct, the panel looks to the ABA Standards for Imposing Lawyer Sanctions and prior case law. *In re Andres*, 2004 VT 71, ¶ 14. Under the ABA Standards, the panel considers (1) the duty violated; (2) the lawyer's mental state; and (3) the extent of the injury caused by the violation. Based upon these considerations, the ABA Standards

indicate a "presumptive sanction," which then may be modified by aggravating or mitigating factors. *See* ABA Standards § 3.0 (2015).

Here, a short period of suspension is an appropriate outcome under the ABA Standards for Imposing Lawyer Sanctions. It is also not inconsistent with Vermont cases.

A. ABA Standards

1. Duty violated

Under the ABA Sanctions, the panel must first identify whether the duty breached was owed to a client, the public, the legal system, or the profession. ABA Standards § 3.0 at 117. The most important ethical duties are those that lawyers owe to clients. ABA Standards, Theoretical Framework at 5.

Here, all three violations involved duties Respondent owed to his client. He owed EM the duty to try to maintain a normal client relationship despite her diminished capacity, he owed her the duty of competence in helping her organize her estate planning documents, and he owed her the duty to explain matters to her directly such that she could make informed decisions.

2. Mental state

Next, the panel evaluates whether, at the time of misconduct, the lawyer acted intentionally, knowingly, or negligently. Intentional or knowing conduct is sanctioned more severely than negligent conduct. ABA Standards § 3.0 at 120. A lawyer acts knowingly when "the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct" but without "the conscious objective or purpose to accomplish a particular result." ABA Standards, Theoretical Framework at xix. A lawyer acts negligently when "the lawyer fails to be aware of 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. *Id.*

In the context of lawyer discipline, the difference between negligent and knowing acts can be "difficult to discern." *In re Fink*, 2011 VT 42, ¶ 38. A lawyer's failure to understand what an ethics rule requires or prohibits does not render his conduct "negligent" where the underlying acts were carried out with a knowing state of mind. *See In re Robinson*, 2019 VT 8, ¶ 37 (rejecting the respondent's argument that his conduct was negligent instead of knowing where the respondent knew he entered into a sexual relationship with a divorce client but erroneously believed he could avoid a conflict of interest violation in doing so).

Here, Respondent acted knowingly by failing to communicate appropriately with EM. Although Respondent could likely not have known the full details of EM's capacity limitations because JJM was not being truthful in his representations about his mother, **the failure to meet with EM privately or have a private conversation with her at any time** was the underlying knowing misconduct. Had Respondent taken the time to meet with EM privately and ask her questions about her own objectives, he would likely have been able to tell she lacked the capacity to fully appreciate the changes JJM directed Respondent to draft or asked Respondent to notarize. He would then have been aware she was possibly subject to control or influence by JJM and might have been able to take steps to protect EM's interests.

The record also shows that even assuming JJM was at fault for misrepresenting the circumstances, Respondent conducted the lawyer-client relationship with some degree of knowledge and understanding that EM was a client with diminished capacity because he relied on JJM to communicate EM's objectives. Thus, he would have had to know that his ethical

obligations required him to try to maintain a normal relationship with her, even if it meant taking extra time to communicate with her directly. Instead, Respondent elected to communicate with EM's son because it was easier and faster. He knew of her limitations to at least some degree despite of JJM's misrepresentations and did nothing to try to maintain a normal attorney-client relationship. Likewise, Respondent knew he never called or met with her privately at any time, and that conduct could not be construed as negligent.

With respect to Respondent's lack of competence charge (Rule 1.1), the evidence might logically support that he acted negligently. Respondent appeared to realize the scope of some of the mistakes he made after the fact, which collectively form the basis for the charge. The series of mistakes may have been difficult to identify as missteps individually at the time each one occurred.

3. Extent of injury

The extent of injury is defined by "the type of duty violated and the extent of actual or potential harm." ABA Standards § 3.0 at 125. The actual injury required JJM's siblings to hire counsel and expend probate court resources to undo many of the estate planning documents Respondent helped EM facilitate. *See, e.g.*, Exh. 18. The siblings were also quite stressed and alarmed when they learned of EM's daughter's power of attorney having been revoked. Stipulation of Facts ¶ 31. The potential injury directly attributable to Respondent's role is perhaps more difficult to quantify. Certainly some of the impact of JJM's conduct could have been prevented if Respondent had simply taken the time to meet with and speak to his client. But, the evidence also supports that JJM was actively misrepresenting information to Respondent in such a way that he may not have been able to unravel the full state of the situation at the time.

4. Presumptive sanction

In sum, Respondent violated duties to a client, acted knowingly and negligently in doing so, and there was actual injury and potential injury. Standard 4.42(a) appears to be the closest fit and calls for a presumptive sanction of suspension. Standard 4.42(a) provides that suspension is generally appropriate when "a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client."

5. Aggravating and mitigating factors

The final step in analysis under the ABA Sanctions is to consider aggravating and mitigating factors that justify a departure from the presumptive sanction. ABA Standards § 3.0 at 128; 9.1 at 413. A list of factors which may be considered in aggravation and mitigation are set out at ABA Standards §§ 9.22 and 9.32.

Aggravating factors under ABA Standard 9.22

The panel may consider eleven enumerated factors in aggravation when determining an appropriate sanction. The evidence supports the following conclusions relevant to these factors.

a. Prior disciplinary offenses: Respondent has no prior record of discipline.

b. Dishonest or selfish motive: There is no evidence Respondent acts were dishonest or motivated by selfishness.

c. Pattern of misconduct: Respondent's conduct supports the inference of a pattern insofar as he had multiple instances where he should have met privately with EM and failed to do so each and every time.

d. multiple offenses: Respondent's conduct involves multiple offenses affecting a single client.

e. Bad faith obstruction of the disciplinary proceeding: This factor does not apply to the circumstances of Respondent's matter.

f. submission of false evidence, false statements, or other deceptive practices during the disciplinary process: This factor does not apply to the circumstances of Respondent's

matter.

g. refusal to acknowledge wrongful nature of conduct: This factor does not apply to the circumstances of Respondent's matter.

h. vulnerability of victim: This factor applies. The records supports that the client was elderly, feeble, and suffering from dementia.

i. substantial experience in the practice of law: Respondent has been practicing law continuously since 1980, which gives him approximately 40 years of practice, equating to substantial experience. *See* Stipulation of Facts ¶ 1; *In re Disciplinary Proceeding Against Ferguson*, 246 P.3d 1236, 1250 (Wash. 2011) (concluding that "substantial experience" means 10 or more years of practice at the time of the misconduct).

j. indifference to making restitution: This factor does not apply to the circumstances of Respondent's matter.

k. illegal conduct, including that involving the use of controlled substances: This factor does not apply to the circumstances of Respondent's matter.

Mitigating factors under ABA Standard 9.32

The panel may consider thirteen enumerated factors in mitigation when determining an appropriate sanction. The evidence supports the following conclusions relevant to these factors.

a. absence of a prior disciplinary record: This factor applies.

b. absence of a dishonest or selfish motive: This factor applies.

c. personal or emotional problems: This factor does not apply to the circumstances of Respondent's matter.

d. timely good faith effort to make restitution or to rectify consequences of misconduct: This factor does not apply to the circumstances of Respondent's matter.

e. full and free disclosure to disciplinary authority or cooperative attitude toward proceedings: This factor applies.

f. inexperience in the practice of law: This factor does not apply to the circumstances of Respondent's matter.

g. character or reputation: This factor does not apply to the circumstances of Respondent's matter.

h. physical disability: This factor does not apply to the circumstances of Respondent's matter.

i. mental disability or chemical dependency: This factor does not apply to the circumstances of Respondent's matter.

j. delay in disciplinary proceedings: This factor does not apply to the circumstances of Respondent's matter.

k. imposition of other penalties or sanctions: This factor does not apply to the circumstances of Respondent's matter.

l. remorse: Respondent expressed some remorse regarding the conduct.

m. remoteness of prior offenses: This factor does not apply.

In light of the baseline sanction and a general equal balance of aggravating and mitigating factors, the recommended period of suspension remains appropriate.

B. Prior Cases

When considering the issue of sanctions, panels also generally look to prior cases to compare the sanction and violations in those cases to the case before it, with the objective of achieving proportionality and consistency within the body of attorney discipline law. *See, e.g., In re Neisner*, 2010 VT 102, ¶ 26. As is often the circumstance, there is no Vermont case directly comparable to the conduct at issue in this case. Nevertheless, there are a few cases which present some helpful comparisons.

In some cases of lack of diligence and/or client communication, panels have imposed suspensions and in some, public reprimands. Cases resulting in public reprimands tend to involve negligent mental states and mitigating factors. *See, e.g., In re Vigue*, PRB Decision No. 206 (2018) (finding lack of diligence for failing to appear at hearing in an immigration matter and counseling client she need not appear); *In re Buckley*, PRB Decision No. 118 (2008), *In re*

Farrar, PRB Decision No. 82 (2005), and *In re Massucco*, PRB Decision 29 (2002).

By contrast, lack of diligence and client communication involving presumptive suspensions tend to involve a knowing mental state. *In re Robert Andres*, 2004 VT 71; *In re Mark Furlan*, PRB decision 65 (2004). For example, in *In re Mark Furlan*, PRB decision 65 (2004), the respondent was working under a Defender General contract and failed to appear at hearings for two separate clients, resulting in their post-conviction claims being dismissed. A hearing panel found that his neglect of the clients' matters was a violation of Rule 1.3 and his duty to under Rule 1.4 to keep the clients reasonably informed. The panel concluded that at least some of the conduct was knowing, and a presumptive sanction of suspension should apply. *Id.* Yet, the panel ultimately concluded that mitigating factors, including demonstrated remorse, warranted a reduction to public reprimand.

Another example of the knowing/negligent distinction is *In re Robert Andres*, 2004 VT 71. In that case, the respondent was found to have violated Rule 1.3 and received a two-month suspension when he knowingly failed to attend a pre-trial hearing and knowingly failed to respond to the State's motion for summary judgment in a post-conviction relief proceeding. On the other hand, unlike like Respondent here, the respondent in *Andres* had a prior disciplinary violation. *See also In re Blais*, 817 A.2d 1266 (Vt. 2002) (five-month suspension for neglecting several client matters).

Other jurisdictions take the approach that knowing misconduct is generally sanctioned more severely. "When the misconduct is 'knowingly,' the presumptive sanction or starting point in determining the appropriate sanction is suspension." *In re Disciplinary Proceeding against Cohen*, 67 P.3d 1086, 1093 (Wash. 2003). *See also People v. Varallo*, 913 P.2d 1 (Colo. 1996)

(observing that lawyer's mental state is the decisive element in determining level of discipline).

More recently, the Court has signaled considerable weight should be placed on the aggravating factor of vulnerability of the victim. In *In re Robinson*, 2019 VT 8, the Court increased a Respondent's two-year suspension to disbarment in part because his conduct was directed towards women in vulnerable circumstances. *Id.* at ¶¶ 62-65. Here, the evidence establishes that this is a factor that should be given weight in the panel's sanctions determination.

In sum, a short period of suspension would reflect the seriousness of the violations, deter future misconduct, preserve the public's confidence in the bar and fall in line with applicable standards.

DATED: January 3, 2020

Respectfully submitted,

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