STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY PROGRAM

In re: C. Robert Manby, Jr.

PRB File No. 2019-089

**RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION TO DISCIPLINARY COUNSEL'S MEMORANDUM OF LAW ADDRESSING JOINTLY PROPOSED CONCLUSIONS OF LAW AND RECOMMENDING 14-DAY SUSPENSION**

Respondent C. Robert Manby, Jr. ("Attorney Manby"), submits the following memorandum of law in opposition to Disciplinary Counsel's Memorandum of Law Addressing Jointly Proposed Conclusions of Law and Recommending 14 Day Suspension (DC's Memo).

## INTRODUCTION

Even the most well-intentioned attorneys make mistakes.

By way of example, DC's Memo, at page 2, wrongly states: "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."

In fact, the opposite is true. Omitted in DC's Memo is Facts ¶ 38, which correctly states: "Respondent was not aware of these diagnoses and relied on his own observations and JJM's specific representations and (sic) to him that EM had the capacity to understand the transactions she was conducting and what EM's wishes were." Facts at ¶ 38. Emphasis added. DC's Memo also ignores and does not include Facts ¶ 8 which states: "At the time, EM was 91 years old and JJM was living with her in her Burlington home. When asked by Respondent, JJM represented to Respondent that EM had no issues regarding her competency or mental capacity. JJM represented to Respondent that she was "feeble" but "doing okay" and able to understand "who she is" and "what's going on." See Facts at ¶ 8.

### Standard for Review of Facts

Disciplinary Counsel and Respondent's "Stipulation of Facts" dated November 18, 2019 requests that the Hearing Panel accept and approve the Stipulation of Facts (herein "Facts") "pursuant to ...11 D(5)(a)(ii)." See Stipulation of Facts. Rule 11 D(5)(a)(ii) states the hearing panel may "accept the stipulation and adopt it as its own findings of

fact, although the panel may take further evidence on the issue of sanctions." Emphasis added. See Rule 11 D(5)(a)(ii). Here the Hearing Panel must reject certain Facts and Exhibits because they violate the Vermont Rules of Evidence and would result in clearly inadmissible evidence being considered by the Hearing Panel in violation of the purpose of the Rules.

**Inadmissible Facts and Exhibits**

The following Facts and Exhibits are inadmissible and should not be considered by the Hearing Panel for the reasons stated.

Exhibit 13, Decker's APS investigative, Confidential Report, "Not Subject to Public Disclosure" violates V.R.E. 802, is not an exception to the hearsay rule under V.R.E. 803(8)(B) and must be excluded. Additionally, Exhibit 13, the investigative report, violates V.R.E. 701, 702, 703, and other rules of evidence. Even if it did not, Exhibit 13 should be excluded under V.R.E. 403. Any Fact which relies on Exhibit 13 must be excluded and not considered by the Hearing Panel.

Fact 31 is not relevant. PS's "alarm," being "aware" of a supposed diagnosis, and "belief(s)" are not relevant to any claim that Respondent violated any duty to his client, EM, or any Rule of Professional Conduct to which this Hearing Panel found probable cause. Any such testimony must be excluded and not considered by the Hearing Panel.

Fact 32 is not relevant. What PS and her sister GW did is not relevant to any claim that Respondent violated any duty to his client, EM, or any Rule of Professional Conduct to which this Hearing Panel found probable cause.

Fact 33 is not relevant. What PS and her sister GW did is not relevant to any claim that Respondent violated any duty to his client, EM, or any Rule of Professional Conduct to which this Hearing Panel found probable cause.

Fact 34 is not relevant, incorporates double hearsay, and is a finding from another proceeding to which Respondent was not a party or witness.

Fact 35 is based on Exhibit 13 and therefore must be excluded.

Fact 36 is based on Exhibit 13 and therefore must be excluded.

Fact 37 refers to medical records from 2009 and 2014, which are not part of this proceeding and are not relevant because they do not show EM's state of mind at the time she met with Respondent.

Fact 39 is not relevant or admissible as evidence to prove a violation for which this Hearing Panel found probable cause.

Fact 40, a court order to which Respondent was not a party or a witness is not relevant or admissible as evidence to prove a violation for which this Hearing Panel found probable cause.

Fact 41 is based on Exhibit 13 and is therefore inadmissible.

**Admissible Facts and Exhibits**

Attorney Manby is a solo general practitioner in White River Junction, Vermont, and has been in law practice since 1980. *See* Facts at ¶¶ 1-2. In February 2015, Attorney Manby was approached by a professional acquaintance, JJM, whom he had known for over thirty years regarding a deed and other matters for JJM's elderly mother's home. Facts at ¶¶ 3-6. JJM represented to Attorney Manby that while his mother was 91 years old and living with JJM, she was "doing okay" and able to understand "who she is" and "what's going on." Facts ¶ 8. JJM also explained to Attorney Manby that he had EM's power of attorney from 2011 "that empowered him". Facts at ¶ 11 referencing Exhibit 1 at 11 – the correct reference is Exhibit 1 at 10.

Attorney Manby "relied on his own observations and JJM's specific representations to him that EM had the capacity to understand the transactions she was conducting and what EM's wishes were". Facts at ¶ 38. JJM told Respondent that EM's plan was to remain in her own home, living with JJM, who would help her with her daily needs. Facts at ¶ 18. Based on JJM's representations and his power of attorney, Attorney Manby drafted the documents requested and met with EM and JJM in late June 2015 to execute them. Facts ¶¶ 19-20. At all times, Attorney Manby understood himself to be representing EM and not JJM. At the signing of the first deed Attorney Manby had a direct conversation with EM about the meaning of these documents "... by opening the passenger door of the car so [Attorney Manby] while squatting outside the car, could have a face to face meeting with EM ... while her back was to JJM" Facts at 22. That day and over the next several months, Attorney Manby helped EM execute other documents which

Attorney Manby explained to EM, and EM indicated would carry out her intentions. Facts ¶¶ 20-29.

DC's Memo ignores the "Affirmation by Witness" on Exhibit 9 that EM appeared "...to be of sound mind, was not under duress, and was aware of the nature or this Power of attorney and signed it freely and voluntarily."

**Alleged Violations**

Attorney Manby acknowledges that he should have engaged in a more in-depth inquiry directly with EM and should not have relied to any degree on JJM's representations regarding EM's capacity. However, as discussed above, it has been stipulated that JJM held EM's Power of Attorney, which she executed in 2011. Together with EM's wishes as she communicated them to Attorney Manby, the power of attorney and the fact that JJM was caring for EM convinced Attorney Manby that he was helping EM carry out her own legal goals.

Despite Admissible Facts which clearly show Attorney Manby believed he was helping his client, DC's Memo continues its initial mistake and conformational bias, casting all of Attorney Manby's actions in the false light that Respondent "acted knowingly." When Attorney Manby's actions are viewed without this bias, Attorney Manby was simply negligent as admitted herein.

DC's Memo improperly follows its wrongly viewed Facts to a harsh conclusion requesting a suspension. Attorney Manby requests the Panel disregard all of Disciplinary Counsel's conclusions that stem from this mistaken analysis of excludable and unsupported Facts and Exhibits.

**Appropriate Sanction**

The American Bar Association Standards for Lawyer Discipline and Disability Proceedings "do not attempt to recommend the type of discipline to be imposed in any particular case. The Standards merely state that the discipline to be imposed 'should depend upon the facts and circumstances of the case, should be fashioned in light of the purpose of lawyer discipline, and may take into account aggravating or mitigating circumstances.'" ABA Standards for Imposing Lawyer Sanctions at I-A. It is appropriate to look to the ABA Standards for Imposing Lawyer Discipline as well as case law, for determining the appropriate sanction in a disciplinary matter. *In re Andres*, 177 Vt. 511, 513 (2004), citing *In re Warren*, 167 Vt. 259, 261 (1997).

Attorney Manby suggests that anything other than a private reprimand is unwarranted in this matter under what he acknowledges was negligence but well intentioned. Rather, based on the analysis below, these facts fit within Section 4.4 of the ABA Standards which provides that admonishment is "appropriate when a lawyer is negligent and does not act with reasonable diligence when representing a client and causes little or no injury or potential injury to a client." Here there is no claim of injury to the client and no support for any claim that Attorney Manby's representation was more than negligent.

**Analysis**

The ABA Standards require the Panel to consider the duty violated, the lawyer's mental state, and the actual or potential injury to arrive at a tentative sanction. The Panel then looks to the aggravating and mitigating factors to determine if that sanction should be modified. Addressing the purpose of disciplinary sanctions, the Vermont Supreme Court said in *In re Hunter*, that "disciplinary sanctions are not intended to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct." 167 Vt. 219, 226 (1997). Each ABA required consideration is considered below.

**Duty Owed**

Attorney Manby agrees that the duties owed under Rules 1.1, 1.4(a), and 1.14(b) were owed EM as his client. Attorney Manby did not find EM's capacity to make decisions in connection with his representation to be diminished and believed that he was accommodating a frail but competent elderly lady with whom Attorney Manby communicated "... by opening the passenger door of the car so [Attorney Manby] while squatting outside the car, could have a face to face meeting with EM ... while her back was to JJM." Attorney Manby then relied on his own observations.

**Mental State**

Attorney Manby concedes that his conduct violated Vermont Rules of Professional Conduct 1.4(b). Attorney Manby disagrees with Disciplinary Counsel's conclusion that his conduct was "knowing." A reading of Exhibit 1 clearly shows Attorney Manby was attempting to help EM fulfill what he honestly believed to be her wishes. He found her to be a "delightful elderly lady." Exhibit 1 at p 19.

The ABA Standards define negligence as "a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *ABA Standards IV Definitions.*

It is worth noting here that under V.R.P.C. 1.14(a), attorneys are required to maintain normal attorney/client relationships with clients with diminished capacity to the fullest extent possible. Comment 1 makes it clear that clients with diminished capacity are not automatically incapable of making or participating in legal decisions. V.R.P.C. 1.14(a), Comment [1]. Attorney Manby's interactions with EM did not indicate to him that she was suffering from any condition that would keep her from understanding the transactions they were discussing.

In fact, Attorney Manby had a duty to respect EM's ability to make her own decisions. The same Comment goes on to say that "a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.... it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions." *Id.* It is undisputed that Attorney Manby believed, based on his own observations and JJM's representations, that EM was capable of making the legal decisions he assisted her with. The Comment makes it clear that under that belief, Attorney Manby acted properly.

**Injury or Potential Injury Caused to Client by Misconduct**

The ABA Standards consider "the actual or potential injury caused by the lawyer's misconduct." ABA Standards § 3.0(c), at 26. The term "injury" is defined as "harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from 'serious' injury to 'little or no' injury." *Id.*, Definitions, at 9. The term "potential injury" refers to harm that is "reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." *Id.* Under the ABA Standards, "[t]he extent of the injury is defined by the type of duty violated and the extent of actual or potential harm." *Id.* at 6.

As stated above, the ABA rules require that the conduct cause "injury or potential injury *to a client*." *See* ABA Standard 4.4. In her analysis, Disciplinary counsel relies heavily on injury allegedly caused EM's daughters due to Attorney Manby's conduct. There are no stipulated facts as to any actual injury to EM, the client. Furthermore, Disciplinary Counsel has failed to articulate how EM was actually or potentially injured. Attorney Manby would concede that EM's heirs could have been potentially injured if JJM had not been found responsible for exploiting his mother, but the stipulated facts strongly

support the conclusion that that JJM would have otherwise continued to live with and care for her. Because the stipulated facts show that Attorney Manby's actions caused little or no potential injury to EM herself, the ABA standards would suggest admonishment is the appropriate sanction.

**Aggravating and Mitigating Factors Analysis**

Next, the Panel considers any aggravating and mitigating factors and whether they call for increasing or reducing the presumptive sanction of public reprimand. Under the ABA Standards, aggravating standards are "any considerations, or factors that may justify an increase in the degree of discipline to be imposed." ABA Standards § 9.21, at 50. Mitigating factors are "any considerations or factors that may justify a reduction in the degree of discipline to be imposed." *Id.* § 9.31, at 50. Following this analysis, the Panel must decide on the ultimate sanction that will be imposed in this proceeding.

**(a) Aggravating Factors** Based on the stipulated facts presented, the following aggravating factors under the ABA Standards are present:

**§ 9.22(i) (substantial experience in the practice of law)** — Respondent had over thirty years of practice at the time of the violations.

**(b) Mitigating Factors**

Based on the stipulated facts and supplemental evidence presented, the following mitigating factors under the ABA Standards are present:

**§ 9.32(a) (absence of a prior disciplinary record)**— Respondent has no record of any prior disciplinary action having been taken against him.

**§ 9.32(b) (absence of a dishonest or selfish motive)** — Respondent did not engage in any dishonest conduct, nor did he seek to advance his own interests.

**§ 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings)** — Respondent was cooperative during the course of the disciplinary process.

**§ 9.32(g) (character or reputation)** — Respondent has a good reputation in his fields of practice. He is highly respected and trusted by his peers and well regarded in the community.

**§ 9.32(l) (remorse)** — Respondent has expressed remorse for his misconduct.

**(c) Weighing the Aggravating Mitigating Factors**

The mitigating factors substantially outnumber and outweigh the aggravating factors and justify a reduction of the presumptive sanction. The appropriate sanction in this case is a

private admonition. Having in mind that "[i]n general, meaningful comparisons of attorney sanction cases are difficult as the behavior that leads to sanction varies so widely between cases," *In re Strouse*, 2011 VT 77, ¶ 43, 190 Vt. 170, 34 A.3d 329 (Dooley, J., dissenting), the Panel considers whether a private admonition is consistent with past disciplinary determinations.

Here, Attorney Manby urges the Panel to place significant weight on the fact that there was no actual injury to his client EM and that his actions were in keeping with his client's wishes.

Even if this Hearing Panel concludes that potential injury to EM's heirs is enough to justify a finding of potential injury within the meaning of the Standards, the presence of only one aggravating factor and many mitigating factors still justify the lighter sanction of private admonition.

## CONCLUSION

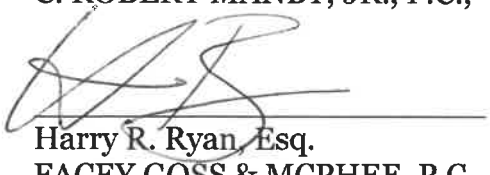
Attorney Manby did not know EM had been diagnosed with Alzheimer's in the months before his involvement; however, such a diagnosis would not have necessarily prevented him from serving EM's legal needs as he would any other client. Attorney Manby admits, with great regret, that he deviated from the normal standard of care a reasonable attorney would exercise when he failed to meet privately with EM regarding her estate plan and discuss it in greater detail with her. However, Attorney Manby's negligence did not cause any injury to EM. Taking all of these factors into account, and after balancing the aggravating and mitigating factors, Attorney Manby respectfully submits that the proper sanction is a private admonishment. If the Hearing Panel concludes otherwise, the Standards and the case law do not indicate a sanction any more severe than public admonishment.

## V.R.C.P. 5(h) CERTIFICATE OF SERVICE

The undersigned attorney for the filing party certifies, that subject to V.R.C.P. 5(h)(1) and V.R.C.P. 11, a copy of every document filed with the court herewith has, on the same date as this filing, been served by mailing or other means of delivery, upon every other party to the case required to be served under V.R.C.P. 5(a), listed below in this certificate, giving the name and address of each person or entity served and, as required by V.R.C.P. 5(h)(2)(B), stating the manner of service upon each person or entity served.

Dated at Rutland, Vermont, January 17, 2020.

C. ROBERT MANBY, JR. and
C. ROBERT MANBY, JR., P.C.,

By: 

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