STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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

Disciplinary Counsel's Proposed Findings, Memorandum of Law and Recommendation of Five-Month Suspension

Disciplinary Counsel requests that the panel make the following findings of fact, conclude that Respondent violated Vermont Rules of Professional Conduct 1.1, 1.4(b), and 1.14(a), and impose a Five-month suspension.

Facts

1. Respondent was admitted to practice law in Vermont in 1980. Answer ¶ 1.

2. He maintains a solo general practice in White River Junction. Answer ¶ 2.

3. Between February 2015 and March 31, 2016, Respondent assisted elderly client EM in executing the following estate-related changes:

    a. Deed dated June 25, 2015 transferring EM's home to a shared ownership interest with son JJM. DC-5.

    b. June 25, 2015 IRA distribution of approximately $14,000 to son JJM. DC-6.

    c. June 25, 2015 Declaration of Trust listing JJM as the sole beneficiary. DC-7.

    d. Deed dated September 29, 2015 transferring EM's home to exclusive ownership of son JJM. DC-8.

    e. Power of attorney dated September 29, 2015 granting powers to son

JJM. DC-9.

f. Advance healthcare directive dated February 4, 2016. DC-10.

g. Revocation of previous power of attorney with powers to daughter PS dated March 30, 2016. DC-25 at 8.

4. Respondent helped carry out these estate changes for EM at the direction of her son JJM and without ever speaking to EM independently in any level of detail about their significance or possible consequences.

5. Respondent first met JJM approximately 30 years ago and thereafter worked with JMM in connection with multiple real estate transactions involving the real estate brokering firm where JJM was employed. Answer ¶ 3.

6. Respondent's contact with JJM after those transactions included representation in the purchase and subsequent sale of JJM's residence in Strafford, VT; sale of a business in White River Junction, VT, and several other minor matters, all occurring approximately 20 years ago. Answer ¶ 4.

7. After the sale of JJM's home, Respondent did not speak to JJM again until February 2015, when JJM contacted him requesting help with arranging his elderly mother's (EM) affairs. Answer ¶ 5.

8. Specifically, JJM asked Respondent to help EM arrange for a deed that would transfer title to EM's house, discuss EM's bank accounts, and learn about what the options and possibilities might be to avoid probate. Answer ¶ 6.

9. On February 17, 2015, Respondent met with JJM at his office to further discuss

the issues. EM was not present. Answer ¶ 7.

10. 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 EM was feeble but doing okay and generally able to understand who she is and what was going on. Answer ¶ 8.

11. JJM did tell Respondent that EM's memory was not perfect and that "she had her good days; some days are better than others." Oct. 22 Tr. at 77.

12. In reality, EM had been in cognitive decline since around 2010 and had been diagnosed with Alzheimer's disease in 2014. R-A, R-B, R-I; Oct. 22 Tr. at 155-60; Oct. 29 Tr. at 13-17, 92-130.

13. Without speaking to EM or consulting with EM directly, Respondent agreed he would represent EM in connection with the house transfer of her house to benefit JJM, believing he would be working to achieve EM's objective. Answer ¶ 10.

14. At the February 2015 meeting, JJM told Respondent that he had a power of attorney over EM's affairs dated 2011 but he did not have it with him. JJM spoke with Respondent at the meeting about EM's checking account, car, life insurance policy, and real estate. Answer ¶ 11.

15. Respondent asked JJM to send him a copy of the power of attorney, but Respondent did not receive a copy until September 22, 2015. Answer ¶ 12.

16. Respondent's notes from the February 17, 2015 meeting with JJM indicate that

JJM's objective was that all of EM's assets would go to JJM. There were no specific notes explaining that this was EM's objective. DC-25 at 46; Oct. 22 Tr. at 11-19.

17. Respondent's representation of EM lasted from February 2015 through around May 2016. During that time, he helped her execute seven estate-related documents which changed her end-of-life care decisions, ownership of her residence, and distribution of other assets to benefit JJM. DC-25.

18. During the entire time Respondent represented EM, she was an elderly person of diminished capacity, unable to perform most activities of daily living without considerable assistance. Oct. 29 Tr. at 13-17.

19. During the time Respondent represented EM, she was not able to reliably identify her children by name, routinely forgot that her husband had passed away, and her ability to communicate was severely limited. Oct. 22 Tr. at 115-24, 135-37, 155-60; Oct. 29 Tr. at 13-17, 92-94.

20. During the time Respondent represented EM, "within . . . five minutes of spending time with her, it would be apparent that she was significantly impaired." Oct. 22 Tr. at 60.

21. Respondent was aware that EM had other children who visited her regularly. On several occasions, JJM represented to Respondent that his sisters PS and GW caused EM repeated annoyance and distress in their visits. Respondent never inquired of EM about her perspective on the distress caused by PS and GW.

Answer ¶ 14.

22. JJM specifically wanted Respondent to draft a deed that would change the ownership of EM's residence to a form of ownership that included JJM. Respondent and JJM discussed possible types of changes in the form of ownership and how some might impact EM's eligibility for long-term care funding through Medicaid, though not in great detail, and without EM's involvement. DC-25 at 46-47; Oct. 22 Tr. at 20.

23. On April 17, 2015 Respondent and JJM spoke by telephone and JJM asked Respondent to prepare a joint tenancy with right of survivorship deed from EM to EM and JJM. Answer ¶ 16.

24. Respondent was aware this type of deed would potentially affect EM's eligibility for long-term care funding through Medicaid and was a transfer of a major asset to JJM. Respondent did not contact EM or consult with her independently regarding the options available to her and possible financial consequences. He prepared the deed as directed by JJM. Answer ¶ 17; Oct. 22 Tr. at 22-27.

25. Respondent was told by JJM that EM's long-term care plans were to remain in her home and have JJM care for her, although he did not discuss this with her directly and never asked what EM's plans were in the event JJM became unable to care for EM. Answer ¶ 18.

26. Shortly after the April 17, 2015 phone call with JJM and without speaking directly to EM (the client), Respondent prepared a draft deed and cover letter addressed to

JJM and sent it to JJM on April 21, 2015. The deed conveyed EM's home to EM and JJM jointly, as requested by JJM. Answer ¶ 19; DC-25 at 16-18.

27. On June 25, 2015, Respondent drove from White River Junction to Burlington where he met EM for the first time and communicated with her for the first time. In the parking lot of her church, she signed the deed Respondent had prepared conveying her ownership of her Burlington home to both her and JJM as joint tenants with right of survivorship. Answer ¶ 20; Oct. 22 Tr. at 22-34.

28. On the same day, JJM asked Respondent to notarize two additional documents. Respondent watched EM sign the documents, took her acknowledgements and notarized EM's signature on a Key Bank form requesting total payout liquidation to JJM from an IRA valued at approximately $14,000 and a Declaration of Trust listing JJM as the sole beneficiary. Answer ¶ 21; Oct. 22 Tr. at 22-34.

29. Respondent had a brief and direct conversation with EM about the meaning of each document while JJM was seated next to her in the car. Respondent conversed with EM by opening the passenger door of the car so Respondent, while squatting outside the car, could have a face-to-face meeting with EM. During this face-to-face discussion with EM, EM's back was to JJM. Respondent did not meet or converse with her alone or explore whether she was subject to any undue influence by JJM in transferring him these assets. Answer ¶ 22; Oct. 22 Tr. at 22-34, 80.

30. Respondent did explain the effect of each document generally to EM and when

Respondent asked her if she understood, and she stated "yes." EM did not speak any other words other than "yes." Respondent then watched EM sign the documents and he notarized the signatures, after Respondent took EM's acknowledgement. Answer ¶ 23; Oct. 22 Tr. at 22-34, 132-33.

31. At no time did Respondent ask EM any general questions along the lines of what her intentions were. Answer ¶ 24; Oct. 22 Tr. at 22-42.

32. On September 29, 2015, EM and JJM met with Respondent in White River Junction. At JJM's representation that it was EM's wish, Respondent had prepared a new deed conveying EM's remaining shared interest in her home to JJM and a new durable power of attorney giving durable power of attorney to JJM. Respondent prepared the deed without consulting with EM and presented it for her signature. EM signed the new deed and the new power of attorney and Respondent notarized both signatures. Answer ¶ 25; Oct. 22 Tr. at 36-43.

33. A few days before the September 2015 meeting with EM and JJM to obtain signatures on the second deed and the new durable power of attorney, Respondent received a fax from JJM with a copy of the 2011 existing power of attorney. He did not specifically review the scope of the change relative to the new power of attorney with EM or meet with her outside the presence of JJM. Answer ¶ 26

34. The 2011 power of attorney naming JJM gave JJM authority to sign EM's name on all documents that required her signature and carry out banking transactions to pay EM's bills and legal obligations. The 2011 power of attorney to JJM gave

JJM the authority to retain an attorney for EM but not for the specific purpose of transferring title to EM's real property. Answer ¶ 27.

35. On February 4, 2016, Respondent witnessed EM's signature on an advanced directive on health care. He did not meet with EM outside JJM's presence to ask her questions aimed at assessing whether EM understood the effect of the document. Answer ¶ 28.

36. In early 2016, JJM asked Respondent for some advice on how to revoke an earlier power of attorney. Based upon Respondent's advice, JJM prepared a letter from EM to his sister PS, which revoked a previous durable power of attorney EM had granted to PS in 2009. Oct. 22 Tr. at 46-50, 80.

37. On March 30, 2016, Respondent met briefly with EM and JJM and he notarized EM's signature on the letter (drafted by JJM with advice from Respondent) revoking PS's power of attorney. Respondent generally explained the effect of the letter, but he did not meet with EM outside JJM's presence to ask her questions aimed at assessing whether she understood the effect of the document or its relationship to other documents he had prepared for her signature in February, September and June of the previous year. Answer ¶ 29; Oct. 22 Tr. at 46-50.

38. EM had an existing last will and testament. Respondent never obtained or reviewed a copy of the will or discussed with EM whether any of the changes to her estate planning were related in any way to the content of her will. Answer ¶ 30.

39. At the end of March 2016, JJM telephoned his sister PS and told her that he would not permit her to come to EM's home anymore for daily visits and that JJM was joint owner of EM's residence. Oct. 29 Tr. at 24.

40. On April 15, 2016, PS received notice of the March 30 revocation of the power of attorney in the mail. This caused PS great shock because she did not believe EM had sufficient cognitive functioning to understand what the revocation meant. PS's perceptions and beliefs about EM's capacity were based upon her almost daily visits with EM and upon her accompanying EM to her doctors' appointments. Oct. 29 Tr. at 12-25.

41. PS and her sister GW then sought legal help, initiated a guardianship action, were appointed emergency temporary guardians of EM on April 27, 2016 and co-guardians by order dated June 14, 2016. Oct. 29 Tr. at 25-26.

42. In connection with the guardianship proceeding, the probate court appointed forensic psychologist William D. Nash, Ph.D to perform an evaluation of EM. Dr. Nash visited EM in her home on May 6, 2016. Dr. Nash observed that EM could not identify the name of her son or any of her children and was not oriented in any sphere. As of May 6, 2016, Dr. Nash concluded it was apparent that EM required the help of a guardian for management of her personal, medical and financial affairs and made that recommendation to the probate court. Oct. 29 Tr. at 91-130.

43. EM's primary care physician, Peter Gunther, M.D, also provided testimony in support of the involuntary guardianship. Oct. 22 Tr. at 160-61.

44. Dr. Gunther testified at Respondent's disciplinary hearing that in 2015 and 2016, he had visits with EM about every six weeks and that EM had advancing Alzheimer's disease, very limited ability to communicate, and nearly no ability to care for herself. Oct. 22 Tr. at 159-60.

45. Around the same time as the guardianship proceeding, the State Adult Protective Services unit (APS) opened a matter to look into whether EM was a possible victim of abuse or exploitation by JJM. APS investigator Walter Decker went to EM's home to interview her on two days in early May 2016. Oct. 22 Tr. at 113-137.

46. Decker observed that EM was non-verbal, and unable to greet him or engage in any dialogue. Oct. 22 Tr. at 115-24.

47. As guardians, PS and GW obtained Respondent's client file for their mother EM and learned for the first time of the seven other estate-related changes Respondent had helped EM execute between February 2015 and March 30, 2016. Oct. 29 Tr. at 28-30.

48. JJM was present during the guardianship proceedings and opposed PS and GW's appointment. Oct. 29 Tr. at 36.

49. During the same timeframe, a relief from abuse order was entered against JJM as a result of the APS investigation. Oct. 29 Tr. at 36, Oct. 22 Tr. at 84, 87, 90.

50. Following the appointment of PS and GW as EM's guardians in June 2016, the probate court revoked the advanced directive for healthcare dated February 4,

2016 on the basis that there was clear and convincing evidence that EM lacked the capacity to understand the nature of the document she signed. Oct. 29 Tr. at 30.

51. All billing, attorney correspondence and communication about the transactions involving EM's assets and health care directive were handled between Respondent and JJM without any private consultation between Respondent and EM at any time. Answer ¶ 42.

52. Respondent's billing records show that invoices or statements that payment was due were sent on March 3, 2015, March 26, 2015, May 1, 2015, May 31, 2015, July 1, 2015, July 31, 2015, and May 3, 2016. DC-25 at 32-42.

53. With the exception of the May 3, 2016 invoice, the billing records also document payment received.

54. At some point during Respondent's representation of EM, he received $1,000 cash in the mail from JJM, which is not reflected on any billing records in EM's file. DC-25 at 32-42; Oct. 22 Tr. at 58, 94-95.

55. Upon receipt of the cash, Respondent called JJM. Oct. 22 Tr. at 94-95.

56. Each witness gave conflicting testimony about what the other said on that phone call. Respondent testified that he told JJM that no money was owed and that JJM insisted it was a "gift" Respondent should keep. JJM testified that the payment was owed for work performed or possibly for future work, and that Respondent accepted it as such. Oct. 22 Tr. at 58-59, 94-95, 100.

57. Neither JJM nor Respondent could narrow the time frame of when the cash was

mailed or received, but it seems it may have been some time in the middle of the representation that occurred between February 2015 and May 2016. Oct. 22 Tr. at 99-100.

58. EM passed away in July 2017.

59. The documents executed by EM with Respondent's assistance were later invalidated in subsequent probate court and estate-related litigation, but as of October 29, 2021, EM's estate remained open. Oct. 29 Tr. at 41-42, 65-66, 79-81.

60. PS testified that the past five and half years of probate and civil litigation to undo many of the estate changes took great emotional and financial toll upon her and her family and caused her out-of-pocket legal expenses not reimbursed by the estate.

61. Another solo Vermont practitioner with similar years of experience to Respondent gave testimony regarding her own general standard of practice for representing elderly clients seeking to change estate documents.[1]

62. The practitioner's described practice differed greatly from what Respondent did with EM.

63. This practitioner testified that if a family member contacted her about representing the elderly relative, she would generally tell the family member to have the relative call her directly and would expect to have a private, independent

[1] A portion of this witness' testimony apparently was not recorded by the recording equipment and is therefore not available in the Oct. 29 transcript.

conversation with that relative.

64. She further testified that if changes were made to benefit one relative, she would be asking questions to explore any potential issues of undue influence.

65. The practitioner identified other steps aimed at ensuring any work performed was undertaken in such a way to identify that client's needs and wishes and to protect their interests and confidentiality. All steps included meeting privately with the client and having sufficient dialogue to be sure the client understood the meaning and consequences of the requested changes, which the practitioner believed was required under a lawyer's ethical duties to a client.

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.

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 at 18-20 (2005). Comment 6 to Rule 1.14 elaborates on the duty to

assess:

> In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

In assessing a client's capacity, lawyers are not required to perform psychological or neurological tests, nor is it recommended they do so without appropriate professional training. ABA Comm'n on Law and Aging, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers at 3; Sandra Glazier, et al., Undue Influence and Vulnerable Adults at 12 (American Bar Association 2020). The lawyer should instead "carefully observe the client" and consider a variety of factors such as the client's ability to state the reasons for his or her decision and ability to appreciate the consequences of a decision. Sandra Glazier, et al., Undue Influence and Vulnerable Adults at 12-13.

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); *see also* ABA Formal Ethics Op. 500 at 5-6 (2021) (noting that the duty rests with the lawyer to ensure that the client understands the lawyer and the lawyer understands the client and that "Model Rule 1.1 and 1.4 obligations do not change when a client's ability to receive information from or convey information to a lawyer is impeded because the lawyer and the client do not share a common language, or when a client is a person with a non-cognitive physical condition, such as a hearing, speech, or vision disability.").

Here, the record shows that EM was 91 when Respondent took her on as a client in February 2015. Respondent accepted JJM's representations that she was functioning without diminished capacity, without making his own assessment. The facts established at the hearing are that EM was diagnosed with Alzheimer's disease and showed advanced cognitive decline by 2014. While she certainly may have had some days that were better than others, by the time Respondent helped her execute her estate changes, she was unable to reliably recognize her own daughter, who came to visit her nearly every day. Her primary care physician, a court-appointed forensic psychologist and an Adult Protective Services investigator all testified that it was apparent to anyone spending more than a few minutes with EM that she suffered from diminished capacity. Each of these individuals met EM less than six weeks after the last time Respondent saw her.

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. Respondent never once met with EM individually or spoke with her about her own objectives, concerns, or wishes. Had he attempted to, the evidence shows the capacity limitations would have been obvious.

In *In re Coffey's Case*, 152 N.H. 503 (2005), the respondent's client was 81 years old and owed past and anticipated future legal fees. As purported payment for the fees, the respondent entered into a transaction with the client whereby he purchased property from her at well-below assessed value. At the time of the transaction, the respondent had known the client for 20 years and represented her for the eight years, but she had deteriorated mentally and physically as a result of dementia in the time frame just before the purchase. Like the respondent in this case, no one specifically informed the respondent in *Coffey* that his client was suffering from dementia. *Id.* at 508-10. Also similar to the facts of this case, the respondent suggested there was no way for him to have known of the client's situation, so he was not at fault. This argument was rejected by the fact finder and affirmed on appeal:

> To the extent that the respondent asserts that he was "absolutely unaware" of [the client's] deteriorating mental condition, the referee found by clear and convincing evidence that this was by choice and that the respondent turned a "blind eye" towards [the client's] mental condition. Indeed, the respondent testified, "[U]nless someone took it upon themselves to tell me that there was something wrong with [the client], there was no way for me to know it." Although he had many opportunities to do so, the respondent made no effort to ascertain whether she had the mental capacity to make informed decisions.

Id. at 509. As in *Coffey*, Respondent's conduct here establishes that he also turned a blind eye towards EM's mental condition. He took no steps and no responsibility towards his established

ethical duty to assess her ability to understand what the estate changes meant, their consequences, and the reasoning behind her decisions.

In any event, whether or not Respondent knew or should have known of EM's cognitive limitations, he was clearly aware of her other capacity limitations – her advanced age and physical limitations, and still did not treat her the way he would treat any other client. Oct. 22 Tr. at 24. 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. He did all of these things for her while in the presence of her son, who stood to benefit financially from many of the changes. There was nothing normal about Respondent's attorney-client relationship with EM, and no effort made by Respondent to have any sort of normal attorney-client relationship with her.

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 her son's statements that her memory was not perfect and that she had some days better than others.

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 Respondent 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.

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. But, the manner in which this was done was not sufficient to permit EM to make informed decisions. 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: five-month 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 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. PS was also quite stressed and alarmed when she received

mailed notice of her power of attorney being revoked. As of the date of the hearing, EM's estate remained open, supporting the inference that Respondent's conduct contributed to the extended period required to wind up the estate. 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 and taking steps on his own to arrange EM's estate to benefit himself, so it is not accurate to presume that Respondent could have prevented all of the changes to EM's estate.

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.

<u>Aggravating factors under ABA Standard 9.22</u>

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. Respondent admits his conduct violated Rules 1.1 and 1.4(b).

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. Any delay that occurred is attributable to Respondent's withdrawal from a stipulation filed in 2020.

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

l. remorse: This factor does not apply.

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

In light of the baseline sanction and a rough 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 addition, a handful of recent cases tend to support the propriety of a short period of suspension, including *In re Adamski*; 2020 VT 7, *In re Kulig*, PRB Decision No. 240 (2021) and *In re Bowen*, 2021 VT 7. The decisions in each of these three cases post-dates undersigned counsel's initial sanctions recommendation of a 14-day suspension, filed January 3, 2020, and is the primary basis for changed recommendation from the one made initially in the stipulated facts filed by the parties and rejected by the panel in 2020.

In *Adamski*, the respondent received a fifteen-day suspension for engaging in dishonest conduct towards her law firm in connection with a settlement check. In *Kulig*, the respondent received a three-month suspension for conflicts of interest surrounding the disposition of a client's estate property. In *Bowen*, the respondent received a three-month suspension for using information relating to the representation of a client to the disadvantage of the client in a property transaction and for disclosing confidential client information. Although the underlying facts of each of these cases differ from this one, they share two important similarities relevant to a proportionality analysis. First, in each of these recent cases, the respondent-lawyer was a highly experienced practitioner with no prior disciplinary record. Second, each engaged in knowing violations of the rules of professional conduct. The same description applies to this case, and a five-month suspension is appropriate and in line with these recent cases.

In sum, the ABA Standards indicate suspension is warranted. And, proportionality analysis also indicates a five-month suspension is appropriate. A five-month 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.

In the event the panel finds a period of suspension is warranted, disciplinary counsel requests that an effective date of the order be delayed 30 days to allow Respondent sufficient time to address client needs and/or provide him opportunity to appeal.

DATED: July 29, 2022

Respectfully submitted,

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