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SUPREME COURT  
STATE OF WASHINGTON

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Supreme Court No. 200,270-1  
200, 720-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE DISCIPLINARY PROCEEDING AGAINST

RICHARD DALE SHEPARD,

Lawyer (Bar No. 16194).

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ANSWERING BRIEF OF THE  
WASHINGTON STATE BAR ASSOCIATION

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Kevin M. Bank  
Bar No. 28935  
Senior Disciplinary Counsel

WASHINGTON STATE BAR ASSOCIATION  
1325 4<sup>th</sup> Avenue, Suite 600  
Seattle, Washington 98101-2539  
(206) 733-5909

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. With Respondent's knowledge and agreement, a living trust salesman provided legal advice to Washington seniors about estate planning, sold them a generic package of living trust documents, and then helped the seniors execute the documents. The salesman persuaded the clients to sign Respondent's fee agreement, which promised an independent review of their estate plans. Respondent's only contact with the seniors was a brief telephone call in which he gave no legal advice. The unanimous Disciplinary Board concluded Respondent knowingly assisted the salesman in the unauthorized practice of law. Should the Court affirm?

2. Because of Respondent's failure to provide the legal advice he promised, almost all of the trusts sold by the salesman, at a cost of about \$1,400 each, were overly complex for the seniors' needs or did not accurately reflect their testamentary intent. Some are useless because they are legally defective due to improper execution or mental incompetence of the client. The unanimous Disciplinary Board concluded that Respondent was negligent where he failed to provide services and to communicate with over seventy vulnerable clients, and that these clients suffered not just "injury" but "serious injury." Was the Disciplinary Board correct in determining that the injury was serious?

3. Where the hearing officer and Disciplinary Board disagree on sanction, the Court gives greater weight to the Disciplinary Board's recommendation because the Board is the only body that hears the full range of lawyer disciplinary matters. The Disciplinary Board recommended a two-year suspension for Respondent's multiple acts of negligence, knowing assistance in the unauthorized practice law, knowing conflict of interest and knowing failure to supervise, all of which resulted in serious injury. Should the Court adopt the Disciplinary Board's unanimous recommendation?

## **II. COUNTERSTATEMENT OF THE CASE**

### **A. PROCEDURAL FACTS**

On July 30, 2007, the Washington State Bar Association ("Association") filed a four-count complaint against Respondent. Bar File (BF) 2. On November 1, 2007, the Association filed an amended complaint adding a fifth count. BF 21. The amended complaint charged Respondent as follows: (1) failing to adequately explain to his clients the risks and benefits of living trusts versus other estate planning options for their specific situations, in violation of Rule 1.3 and/or Rule 1.4 of the Rules of Professional Conduct (RPC) (Count 1);<sup>1</sup> (2) affiliating himself

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<sup>1</sup> Some of the RPC were amended on September 1, 2006. Citations to the RPC are to the rules in effect at the time of the alleged misconduct. Copies of these rules are attached as Appendix A.

with a non-lawyer who gave legal advice to clients or potential clients through marketing living trusts, and/or delegating legal functions to a non-lawyer, in violation of RPC 5.5(b) (Count 2); (3) entering into a continuing business relationship with a living trust company where he would receive a set fee for each living trust sold by the company, without first obtaining informed consent from his clients to the fact that he had a personal interest in maintaining a continuing business arrangement with the company, in violation of RPC 1.7(b) (Count 3); (4) sharing fees with the living trust company, in violation of RPC 5.4(a) (Count 4); and (5) failing to make reasonable efforts to ensure that he and/or his firm had in effect measures giving reasonable assurance that the conduct of the living trust company and its president was compatible with the professional obligations of a lawyer, in violation of RPC 5.3(a). BF 21

A hearing occurred on July 21-23, 2008. BF 57 at 1. Over fourteen hours of videotaped testimony of Respondent's former clients was admitted into evidence. Transcript (TR) 398-99. On November 26, 2008, the hearing officer filed Findings of Fact and Conclusions of Law and Hearing Officer's Recommendation (FFCLR). BF 57. The hearing officer concluded that Respondent had violated Counts 1, 3, and 5. FFCLR ¶ 97. He concluded that the presumptive sanction for each of those counts is suspension under the American Bar Association's

Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (“ABA Standards”) (attached as Appendix B). FFCLR ¶ 104. After applying three aggravating factors (pattern of misconduct, multiple offenses, and substantial experience in the practice of law) and six mitigating factors (absence of prior disciplinary record, absence of dishonest or selfish motive, timely good faith effort to make restitution or rectify consequences of misconduct, full and free disclosure, character or reputation, and remorse), the hearing officer recommended a six-month suspension. FFCLR ¶ 105-07. He further recommended that any reinstatement be conditioned upon payment of restitution to all 73 clients Respondent obtained through his association with the living trust salesman. Id. ¶ 107.

The Disciplinary Board reviewed the matter under Rule 11.2 of the Rules for Enforcement of Lawyer Conduct (“ELC”). On June 23, 2009, the Disciplinary Board unanimously adopted all of the hearing officer’s Findings of Fact and also adopting his conclusions of law with respect to Count 3 (conflict of interest) and Count 5 (failure to supervise). BF 79 at 1. The Disciplinary Board struck the hearing officer’s conclusion that the Association had not proved Count 2 (assisting unauthorized practice of law) by a clear preponderance of the evidence, and determined that the presumptive sanction for this violation was suspension under ABA

Standard 7.2. Id. at 1-8. In addition, the Disciplinary Board held that the presumptive sanction for Respondent's lack of diligence and communication (Count 1) was disbarment, not suspension, because Respondent had engaged in a "pattern of neglect" that caused "serious or potentially serious injury" to clients. Id. at 8 n.3

The Disciplinary Board also concluded that the hearing officer had erred in applying the aggravating and mitigating factors. Id. at 8-10. Specifically, the Disciplinary Board found that evidence supported one additional aggravating factor, vulnerability of victim, and did not support two mitigating factors, absence of dishonest or selfish motive and full and free disclosure to the Disciplinary Board. Id. at 9. After determining that there were four aggravating factors (pattern of misconduct, multiple offenses, substantial experience in the practice of law and vulnerable victim) and four mitigating factors (absence of prior disciplinary record, timely good faith effort to make restitution or rectify consequences of misconduct, character and reputation and remorse), the Disciplinary Board concluded that disbarment was not necessary to protect the public and educate other lawyers. Instead, the Disciplinary Board unanimously recommended a two-year suspension. Id. at 10-11.

On July 13, 2009, the Association filed a motion with the Disciplinary Board to clarify if it had intended to adopt the portion of the

hearing officer's decision ordering Respondent to pay restitution to the 73 clients he obtained through his association with the living trust salesman. BF 81. On November 18, 2009, The Disciplinary Board granted the motion. BF 82.

## **B. SUBSTANTIVE FACTS**

### **1. Background**

Respondent is a solo practitioner with offices in Tacoma. FFCLR ¶ 2; TR 93. He has experience in estate planning. During the period of the violations, estate planning comprised approximately one-third of his practice. FFCLR ¶ 2; TR 93-94.

In mid-2003, Respondent was contacted by a non-lawyer, Steven Cuccia, the president of Coranda Living Trust Services (Coranda), about a business arrangement under which Cuccia would refer estate planning clients to Respondent. FFCLR ¶¶ 3, 6; TR 94, 96, 540, 546. Cuccia was in the process of moving from California to Washington and was setting up a business of selling living trust "packages" to Washington residents. FFCLR ¶ 4; TR 96, 546; Association's Exhibit (ASSN EX) 102 at 000004. Respondent did not conduct any investigation into the professional or personal background of Cuccia. FFCLR ¶ 11; TR 95. Prior to moving to Washington in 2003, Cuccia had been convicted in California of insurance and securities fraud and spent 18 months in federal

prison. FFCLR ¶ 11, 77; TR 59. Respondent was not aware of this until February 2005. FFCLR ¶¶ 11, 77.

In late July 2003, Cuccia introduced Respondent to James Wood, President of Attorneys' Trust Document Services, Inc. (ATDS), a California company that describes itself as a contract paralegal service engaged in the business of providing living trust legal forms to attorneys. FFCLR ¶¶ 12-13; TR 96, 543, 609-10. ATDS provided the templates for and prepared the living trusts sold by Coranda. FFCLR ¶ 15. Respondent was aware that Cuccia was not a lawyer and did not inquire as to whether Wood was a lawyer. FFCLR ¶¶ 9, 14; TR 98-99. Wood is not a lawyer. FFCLR ¶ 14.

The contacts among Respondent, Cuccia, and Wood led to an agreement. FFCLR ¶¶ 8, 17; TR 96, 99-100. Under the agreement, Cuccia would sell living trusts to seniors, FFCLR ¶ 8; TR 97, 546, and Respondent would contact the purchasers after Cuccia had made the sale, purportedly to consult with clients regarding the client's estate plan. FFCLR ¶ 22; TR 548-49. After this contact, Respondent would authorize ATDS to produce and collate the actual trust documents, which would then be sent to Respondent for a "review." FFCLR ¶¶ 22, 24; TR 121, 123, 557. Cuccia was responsible for delivering the final trust documents to the clients and for overseeing the execution, notarization, and

witnessing of the final documents. FFCLR ¶¶ 50, 67; TR 557-58. As a result of his two-year affiliation with Cuccia, Respondent obtained more than 70 new estate planning clients. FFCLR ¶ 86, TR 123.

**2. The Home and Sales Visit**

After securing Respondent's oral agreement to participate, Cuccia began selling living trusts to senior citizens in Western Washington. FFCLR ¶ 19. He went to his elderly prospects' homes and gave mostly inaccurate presentations regarding the benefits of using living trusts purchased from his company, rather than simpler estate planning tools such as wills or community property agreements. FFCLR ¶¶ 28-29; ASSN EX 708 at 9-11, 1412 at 12-13. During his presentation, he provided an informational pamphlet to potential purchasers. FFCLR ¶ 32; ASSN EX 402 at 20-21. Most of the information was incorrect and misleading regarding Washington probate law and the cost of probate. FFCLR ¶ 32; TR 344-51. Respondent knew that Cuccia was distributing the pamphlet to potential purchasers of living trusts, but never reviewed the pamphlet for accuracy. TR 96-97.

Respondent never accompanied Cuccia on a home sales visit. FFCLR ¶ 42. Although Respondent was not aware of the selling tactics of Mr. Cuccia, FFCLR ¶ 20; TR 112, Respondent knew that Cuccia was going to recommend to prospective clients that they should purchase a

Coranda Living Trust Package. BF 79 at 7; FFCLR ¶ 33. Most of the Coranda clients were unsophisticated persons who were not told the possible alternatives or drawbacks of using a living trust. FFCLR ¶ 34. The clients did not understand the effect of placing their assets in a living trust and Respondent never explained this to them. FFCLR ¶ 31; ASSN EX 304 at 20, 402 at 31.

If a client purchased the Coranda Living Trust Package, Cuccia and the purchaser would complete a questionnaire that included detailed information regarding the purchaser's personal finances and the names, ages, and addresses of the desired beneficiaries. FFCLR ¶¶ 35-36; TR 104. Mr. Cuccia also provided the purchasers with a "Shepard Law Office Attorney-Client Fee Agreement," drafted by ATDS. FFCLR ¶¶ 21, 37; TR 110. Respondent knew that Cuccia would be presenting the clients with this fee agreement. BF 79 at 7. The fee arrangement provided that, in exchange for a \$200 fee, Respondent would provide the following services:

A. Independent review of clients [sic] estate planning needs to make recommendations regarding appropriate planning tools and supporting documents. Includes a personal telephone consultation to verify key information and provide answers to client(s) legal questions; B. Review available financial and real estate documents for proper title designation. Order and supervise drafting of all plan documents, review final documents, and issue an opinion letter with plan documents.

FFCLR ¶ 22; ASSN EX 305 at 000002. The fee agreement also provided that an "in-office consultation is required if undue influence or incapacity issues appear possible." FFCLR ¶ 25; TR 127.

After completing the questionnaire and obtaining the client signature(s) on Respondent's fee agreement, Cuccia sent the client's questionnaire to ATDS, which generated a short table summarizing the information. FFLCR ¶ 43. Shortly thereafter, ATDS provided the summary table to Respondent. FFCLR ¶ 44; TR 104, 116. Cuccia would also collect at the home visit two checks from the client, one for \$200 payable to Respondent and one for between \$350 and \$495 payable to Coranda. FFCLR ¶¶ 39-40; ASSN EX 402 at 27-28, 502 at 17-18. Cuccia either mailed or dropped off at Respondent's office the check for Respondent's services. FFCLR ¶ 41.

### **3. Respondent's Contacts with the Clients**

After receiving the summary table from ATDS, Respondent would make his first contact with the client. FFCLR ¶ 45; TR 116, 553. In the vast majority of cases, Respondent's only contact with the clients was by telephone. FFCLR ¶ 46. These were very brief telephone conversations, during which no legal advice was given. FFCLR ¶ 47; ASSN EX 502 at 19-20, 810 at 19-20. He generally confirmed basic factual information

already on the summary tables, such as the names of beneficiaries and successor trustees. FFCLR ¶ 47; ASSN EX 502 at 19-20, 810 at 19-20. Respondent did not inquire as to whether the client already had estate planning documents, the financial condition of the client, the potential size of the estate, or discuss any simpler estate planning devices. FFCLR ¶ 48; TR 114-15; ASSN EX 502 at 19-20, 810 at 19-20. Thus, Respondent did not provide his clients the legal services promised in his fee agreement. FFCLR ¶ 27. However, the clients believed the living trust documents were effective and tailored to their individual needs because of Respondent's name and status as an attorney. BF 79 at 7, 9; FFCLR ¶ 52.

During these telephone calls, Respondent did not disclose to his clients that he had an ongoing business relationship with Cuccia whereby Cuccia would obtain new clients for him, which presented a potential conflict of interest. FFCLR ¶ 53. Respondent's fee agreement did not include any disclosure and waiver provision regarding Respondent's conflict of interest. See Respondent's EX R7-R97.

In at least twelve instances, Respondent only spoke to one member of a couple, even though the clients had jointly purchased a couple's trust. FFCLR ¶¶ 25, 54; TR 116-21; ASSN EX 103-09, 115-18. In several instances, based on the telephone call, Respondent made note of his concerns about his client's competence or ability to understand the

Coranda Living Trust Package, but he did not make further efforts to ascertain for himself whether his client was competent to execute the trust documents. FFCLR ¶ 55. He also never required an in-office consultation, even though his own fee agreement mandated such a consultation when there were questions regarding a client's competency. FFCLR ¶¶ 25, 55-56; TR 127-31; ASSN EX 111-113, 115-18.

In the case of clients William and Lavera Bishop, William Bishop notified Respondent of his wife's incompetence during the telephone consultation; nevertheless, Respondent made no effort to investigate whether Lavera Bishop was legally competent, and did not require an in-office consultation with the Bishops. FFCLR ¶ 56; TR 127-28. When Cuccia delivered the documents to the Bishops, William Bishop signed the relevant Coranda Living Trust Package documents on behalf of Lavera Bishop, even though he did not have legal authority to do so. TR 357-58. If Respondent had actually investigated the Bishops' situation, he would have discovered that the Bishops had executed a will in 1997, that Lavera Bishop had appointed William Bishop as her Durable Power of Attorney (DPA) at that time (when she was still competent), and that the DPA specifically excluded from the powers granted to William Bishop that of signing or modifying testamentary documents on behalf of Lavera Bishop. See FFCLR ¶¶ 59, 60. As a result, the documents signed by William

Bishop on behalf of his incompetent wife (i.e., the living trust, community property agreement, pour-over will, new Durable Power of Attorney and Directive to Physicians) are legally invalid, either because William Bishop did not have authority to sign these documents on his wife's behalf under the 1997 DPA or because agents are not authorized to sign such documents in any circumstances. FFCLR ¶¶ 56-62; TR 352-57; TR 352-58.

Respondent was negligent in failing to address the issues of competency of the clients. FFCLR ¶ 90. The large number of clients, 73 in total, affected by this misconduct constituted a pattern of neglect of his clients. BF 79 at n.3; FFCLR ¶ 90.

As noted above, Respondent knew Cuccia was going to recommend the Coranda Living Trust Package to prospective clients. FFCLR ¶ 33; TR 97-98, 112-113. In several instances, Respondent instructed Cuccia to provide legal advice to his clients after they purchased the trust. For instance, he told Cuccia to advise a couple who both had children from prior marriages of the effects of signing the community property agreement included in the trust package. TR 590-91; ASSN EX 113.

#### 4. Delivery and Execution of the Trust Documents

Respondent emailed ATDS after his telephone "consultation" with the clients. TR 121. ATDS then printed and collated the Coranda Living Trust Package, and sent the completed trust packages to Respondent. FFCLR ¶ 64; TR 121. Respondent did not review the documents, other than to determine if the factual information, such as names, birthdates, and names of beneficiaries, was correct. FFCLR ¶ 65. Respondent claimed in his hearing testimony to have conducted a review of the documents prior to giving them to Cuccia for delivery, but the hearing officer did not find this claim credible. FFCLR ¶ 65; TR 121, 123, 557.

After "reviewing" the information, Respondent gave the trust packages to Cuccia for delivery and execution. FFCLR ¶ 67; TR 121. Respondent included with the trust packages a form letter on how the documents were to be executed. FFCLR ¶ 66; TR 122. Cuccia received the final installment of the payment for the Coranda Living Trust Package upon delivery of the documents to the client's home. FFCLR ¶ 68. Respondent delegated to Cuccia the legal task of ensuring that the trust documents were properly executed. BF 79 at 8; FFCLR ¶ 69; TR 125. As a result, many of the trust documents were improperly executed and thus invalid. TR 243, 323, 330-31, 396-97.

#### 4. Respondent's Knowledge of Cuccia's Activities

In March 2004, Respondent became aware that some of his clients had improperly executed the Coranda Living Trust Package documents delivered by Cuccia to his clients' homes. FFCLR ¶ 73. Respondent learned of this from Sharon Prendergast, the daughter of his clients Orville and Shirley Trulson. *Id.*; ASSN EX 1203 at 6, 23-24. Prendergast, who had worked as a legal assistant, met with Respondent and informed him that her parents' Coranda Living Trust Package trust documents had been executed improperly, which proved to be true. FFCLR ¶ 73; ASSN EX 1203 at 6, 24. She further informed him that her mother suffered from Alzheimer's disease, her father was bedridden, and they were not competent to execute legal documents. FFCLR ¶ 73; ASSN EX 1201 at 000004, 1203 at 24. On the same day of his meeting with Prendergast, Respondent learned from Cuccia that Cuccia's brother, Anthony, had visited the Trulsons at home and offered them long-term care insurance, annuities, and a reverse mortgage. FFCLR ¶ 74; TR 129-130; ASSN EX 1201 at 000006.

Respondent's meeting with Prendergast took place within nine months of Respondent's entering into the business arrangement with Cuccia. FFCLR ¶ 75. After meeting with Prendergast, Respondent continued to associate with Cuccia well into 2005. FFCLR ¶ 76; TR 139-140. Respondent made no changes to his practice of having Cuccia

deliver the trust documents to the clients. FFCLR ¶ 76. Respondent became aware his conduct might violate the RPC in 2004, TR 561, but he continued to assist Cuccia until 2005. BF 79 at 8-9; FFCLR ¶ 76.

In late February 2005, Respondent was informed by an Office of Insurance Commissioner (OIC) Investigator, Victor Overholt, that Cuccia had been incarcerated in California for insurance and securities fraud prior to moving to Washington. FFCLR ¶ 77; TR 59, 562. Despite being notified of Cuccia's criminal history, Respondent spoke with a client who had been "referred to him" by Cuccia on March 3, 2005. FFCLR ¶ 85; TR 135. Respondent memorialized his conversation with this client, Alice Loftus, in an email to ATDS with carbon copy to Cuccia. FFCLR ¶ 85; ASSN EX 1001 at 000154. In the email, Respondent instructed ATDS to produce the Coranda Living Trust Package. FFCLR ¶ 85; ASSN EX 1001 at 000154.

On August 31, 2005, Cuccia and Loftus came to Respondent's office for a conference. FFCLR ¶ 86; TR 139. Loftus executed the Coranda Living Trust Package, and Cuccia acted as a witness. FFCLR ¶ 86; TR 140. Loftus wrote a check to Coranda for \$400 dated August 31, 2005, supplementing a \$400 check she had written to Respondent on August 19, 2005. FFCLR ¶ 86; TR 138.

On April 20, 2006, more than a year after being notified of the Association's investigation into his conduct, Respondent wrote a letter to his clients regarding the investigation into the sale of the Coranda Living Trust Packages and financial products. FFCLR ¶ 81; ASSN EX 808. This letter informed the clients of investigations by the Association, the Office of the Insurance Commissioner, and the Attorney General. FFCLR ¶ 81; ASSN EX 808. Respondent asked the clients to make an appointment to review the documents. FFCLR ¶ 81; ASSN EX 808. Respondent did not offer his clients a refund, only a one-half hour consultation free of charge "to review and discuss your estate plan." ASSN EX 808. Respondent sent a similar letter to his clients on January 29, 2007. FFCLR ¶ 81; ASSN EX 808.

Respondent's actions and inactions resulted in serious injury to his clients and the legal profession as a whole. BF 79 at 8 n.3; see FFCLR 88. The hearing officer found that most of the clients who purchased the Coranda Living Trust Package did not need it, and in some cases, the purchase was detrimental to them. FFCLR ¶ 89. If Mr. Shepard had actually inquired of his clients as to their estate planning needs and assets, he would have been able to assist them in arranging their affairs in a simpler and less expensive way. Id. Some of the purchasers of the Coranda Living Trust Package probably still are relying on improperly

executed documents. FFCLR ¶ 84. Moreover, the Disciplinary Board noted that Respondent's failure to make himself aware of Mr. Cuccia's activities lead to Mr. Cuccia and others conspiring to use the information obtained in the sale of the trusts to sell the clients annuities and reverse mortgages by fraudulent means. BF 79 at 8; FFCLR ¶ 71. The large number of clients affected by this conduct constitutes a pattern of neglect by Respondent of his clients. BF 79 at 8; FFCLR ¶¶ 89-90.

### **III. SUMMARY OF ARGUMENT**

Respondent provided legitimacy to a living trust "mill" that sold and drafted living trusts by promising legal services to the mill's clients but not providing them. Respondent also knowingly assisted the living trust salesman in the unauthorized practice of law by allowing him to advise clients to purchase the trusts, and to oversee their execution. The clients were often vulnerable, in poor health, and, in several cases, mentally incompetent. They were induced to purchase complex living trusts that were usually inappropriate for their needs. The trusts were frequently improperly executed, invalid because the client was incompetent, or detrimental to the clients' interests in other respects. Respondent failed to determine his clients' actual estate planning needs or to adequately explain to his clients the risks and benefits of living trusts and the fact of his ongoing business relationship with the salesman.

The unanimous Disciplinary Board found that Respondent engaged in a pattern of neglect of his clients causing serious injury, knowingly assisted in the unauthorized practice of law, knowingly engaged in conflicts of interest, and knowingly failed to supervise the non-lawyer salesman. The Board unanimously recommended a two-year suspension and restitution of legal fees to more than seventy clients.

The Disciplinary Board Order affirmed all the findings of fact but corrected several errors made by the hearing officer. Specifically, the Board determined that the hearing officer had erred in finding that Respondent had not assisted in the unauthorized practice of law. The Disciplinary Board also concluded that, given the seriousness of the injury caused by Respondent's pattern of neglect, the presumptive sanction for that misconduct should be disbarment (rather than suspension, as recommended by the hearing officer). Finally, the Disciplinary Board struck two mitigating factors, added an aggravating factor, and determined that a two-year suspension would be the appropriate overall sanction.

Respondent asks the Court to reverse the Disciplinary Board's decisions in favor of those of the hearing officer. But this Court gives greater weight to a recommendation of the unanimous Disciplinary Board than to that of a hearing officer because the Board is the only body that

hears the full range of disciplinary matters. The Court should affirm the unanimous Board's two-year suspension recommendation.

#### IV. ARGUMENT

##### A. STANDARD OF REVIEW

This court has plenary authority in matters of attorney discipline. In re Disciplinary Proceeding Against Botimer, 166 Wn.2d 759, 767, 214 P.3d 133 (2009). Unchallenged factual findings are verities on appeal. In re Disciplinary Proceeding Against Christopher, 153 Wn.2d 669, 677, 105 P.3d 976 (2005). Conclusions of law are reviewed de novo. In re Disciplinary Proceeding Against Dornay, 160 Wn.2d 671, 680, 161 P.3d 333 (2007). The Court generally will affirm the Disciplinary Board's recommended sanction, and is more likely do so if the Disciplinary Board decision is unanimous. Id. at 688. Where the hearing officer and the Disciplinary Board disagree on sanction, the Court will give greater weight to the Disciplinary Board's conclusion because the Board is the only body that hears the full range of disciplinary matters, and it thus has a unique experience and perspective when deciding sanction. Christopher, 153 Wn.2d at 677.

**B. THE DISCIPLINARY BOARD CORRECTLY CONLUDED THAT RESPONDENT ASSISTED THE UNAUTHORIZED PRACTICE OF LAW**

The Disciplinary Board reversed the hearing officer's conclusion of law that the Association had not proved Count 2 of the Amended Complaint, which alleged a violation of RPC 5.5(b).<sup>2</sup> This Court should uphold the Disciplinary Board's unanimous decision that Respondent knowingly assisted Mr. Cuccia in the unauthorized practice of law.

The Disciplinary Board noted that General Rule (GR) 24 defines the practice of law as:

the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law. This includes but is not limited to: (1) giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration; (2) selecting, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s) . . .

BF 79 at 6. The Disciplinary Board further analyzed this Court's decisions as to what constitutes the practice of law, and the limited extent to which non-lawyers may engage in the practice of law. Id.; see Perkins v. CTX Mortgage Co., 137 Wn.2d 93, 106, 969 P.2d 93 (1999) (lenders

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<sup>2</sup> At the time of the misconduct, RPC 5.5(b) provided that a lawyer shall not assist a non-lawyer in the performance of an activity that constitutes the unauthorized practice of law. After the amendments to the RPC were adopted on September 1, 2006, this provision was reworded and renumbered as RPC 5.5(a).

are authorized to prepare legal documents incidental to their financing activities). The Disciplinary Board distinguished the use or drafting of standard documents from directly or indirectly giving legal advice. BF 79 at 6-7; see In re Estate of Knowles, 135 Wn. App. 351, 364-65, 143 P.2d 864 (2006) (a person begins to practice law by either directly or indirectly giving advice). It also referenced a recent Practice of Law Board opinion addressing the specific issues of (1) whether a person not admitted to practice law in Washington who gives advice relating to the sale of living trusts or other testamentary instruments for a fee engages in the practice of law; and (2) whether a lawyer admitted to the practice of law in Washington, who approves the final trust documents, is assisting in the unauthorized practice of law. BF 79 at 7; Washington State Practice of Law Board Advisory Opinion 04-18 (2004) ("POLB") (attached as Appendix C). Giving advice on testamentary instruments is the practice of law and is not incidental to other business activities. BF 79 at 7; POLB 4-18 at 2 (emphasis added). Lawyers who simply "approve" the final documents after the non-lawyer has already advised the client to purchase the trust are assisting in the unauthorized practice of law. See POLB 4-18 at 2. See also Columbus Bar Assn. v. Fishman, 98 Ohio St.3d 172, 174-75, 781 N.E.2d 204 (2002); People v. Macy, 789 P.2d 188, 188-89 (Colo. 1990).

The Disciplinary Board concluded that twenty-seven factual findings supported its conclusion that Cuccia engaged in the unauthorized practice of law and that Respondent assisted him in doing so. Among these were:

- Respondent knew Cuccia was not a lawyer. See BF 79 at 2; FFCLR ¶ 9.
- Respondent was aware Cuccia would be selling living trusts as estate planning devices to laypeople. BF 79 at 2; FFCLR ¶ 20.
- Respondent did not give much thought to how Cuccia planned to sell the trusts. Id.
- The legal documents comprising the Coranda Living Trust Package that Cuccia sold to clients had been selected and prepared by a paralegal company based in California, ATDS, and were reviewed by Respondent. BF 79 at 2; FFCLR ¶ 19.
- Respondent knew that Cuccia would recommend to prospective clients that they should purchase the Coranda Living Trust Package. BF 79 at 4; FFCLR ¶ 33.
- Respondent also knew that Cuccia would be presenting Respondent's fee agreement to the purchasers of the living trusts. BF 79 at 4; FFCLR ¶ 37.
- Respondent knew or show have known that when Cuccia delivered the Coranda Living Trust Package to the clients that Cuccia would be assisting the clients in the completion and execution of the documents, but did not impress on Cuccia the importance of proper execution. BF 79 at 5; FFCLR ¶ 69.
- Respondent never accompanied Cuccia to a client's home. BF 79 at 4; FFCLR ¶ 42.

- Respondent's contacts with his clients were limited to very brief telephone conversations in which no legal advice was given. BF 79 at 4; FFCLR ¶ 47.
- Respondent did not inquire as to the financial condition of the clients, the potential size of the estate, or discuss any simpler estate planning devices. BF 79 at 4; FFCLR ¶ 48.
- Respondent was also negligent in failing to deal with issues of competency of the clients. BF at 5-6; FFCLR ¶ 90.
- Respondent saw his role as facilitation of the sale of the living trust, not evaluating the need for the trust. BF 79 at 5; FFCLR ¶ 89.

BF 79 at 2-6. Based on these uncontested facts, as well as others, the Disciplinary Board correctly held that Respondent knowingly allowed Cuccia to advise clients that the Coranda Living Trust Package was appropriate for their needs, BF 79 at 7, and thus aided Cuccia in the unauthorized practice of law. Id.

Respondent contends that Cuccia was merely selling legal forms, and thus was not engaged in the practice of law. Respondent's Brief (RB) at 12-15. This argument must fail because the factual findings made by the hearing officer and adopted by the Disciplinary Board show that Cuccia did far more than sell legal forms. As noted above, the evidence established that Mr. Cuccia provided legal advice to prospective clients by recommending they purchase the Coranda Living Trust Package over other alternatives (like simple wills) and provided them with information

(which was inaccurate) about the operation of Washington's probate system. BF 79 at 3. Furthermore, he assisted the clients in the completion and execution of complex legal documents included in the Coranda Living Trust Package. BF 79 at 2, 3, 5. Thus, Mr. Cuccia was not merely selling standardized legal forms. He actively advised clients about their estate planning choices, and recommended one course of action over another.

The Disciplinary Board correctly reversed the hearing officer's error and reinstated Count 2. This court should affirm the Disciplinary Board's decision.

**C. THE DISCIPLINARY BOARD CORRECTLY CONCLUDED THAT DISBARMENT AND SUSPENSION ARE THE PRESUMPTIVE SANCTIONS FOR THE VIOLATIONS**

**1. The ABA Standards Govern the Sanction in Lawyer Discipline Cases**

The Washington State Supreme Court applies the ABA Standards in all lawyer discipline cases. In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 492, 998 P.2d 833 (2000).

Applying the ABA Standards involves a two-step process. The first is to determine a presumptive sanction by considering (1) the ethical duty violated, (2) the lawyer's mental state, and (3) the extent of the actual or potential injury caused by the misconduct. In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 77, 960 P.2d 416 (1998). The second is to consider any aggravating or mitigating factors that might alter

the presumptive sanction. Id.

In this context, “injury” means harm to a client, the public, the legal system or the profession that results from a lawyer’s misconduct. ABA Standards at 17. Injury may be actual or potential. Id. “[A] disciplinary proceeding does not require a showing of actual harm. . . . The rationale is the need for protection of the public and the integrity of the profession.” Halverson, 140 Wn.2d at 486.

**2. Disbarment is the Presumptive Sanction for a Pattern of Neglect of Vulnerable Clients Causing Serious Injury**

ABA Standard 4.41(c) applies when a lawyer’s lack of diligence and communication extends to multiple instances, matters and/or clients, and thus becomes a pattern of neglect that causes serious injury. BF 79 at 8. The presumptive sanction for the violation of Count 1 of the Amended Complaint is, therefore, disbarment.<sup>3</sup>

The Disciplinary Board applied ABA Standard 4.41(c) (disbarment), reversing the hearing officer’s determination that Standard 4.42(b) (suspension) was applicable. The only distinction between ABA Standard 4.41(c) and 4.42(b) is the degree of injury to the client or clients. The hearing officer found that Respondent’s misconduct resulted in

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<sup>3</sup> Count 1 charged that Respondent failed to adequately explain to his clients the risks and benefits of living trusts versus other estate planning options for their specific situation, in violation of RPC 1.3 (diligence) and/or RPC 1.4(a) and/or RPC 1.4(b) (communication). BF 2 ¶ 49.

“actual injury to his clients and the profession as a whole,” FFPCR ¶ 88, while the Disciplinary Board concluded that Respondent’s neglect of more than 70 mostly elderly clients caused serious or potentially serious injury. BF 79 at 8 n.3.

Respondent asks the Court to adopt the hearing officer’s recommendation and disregard the Disciplinary Board. Respondent’s argument must be rejected, because, under established case law, the Court gives greater weight to the Disciplinary Board than to a hearing officer regarding sanction. Moreover, the Disciplinary Board’s determination was correct. Respondent’s clients were mostly elderly, unsophisticated and vulnerable to exploitation. BF 79 at 4, 9. Some of these clients were physically disabled, mentally disabled and/or not legally competent to execute legal documents. FFPCR ¶¶ 25, 73, 90; ASSN EX 402 at 15-16 (client with severe dementia), ASSN EX 1412 at 10, ASSN EX 1414 at 7-9 (client with bipolar disorder), ASSN EX 402 at 11-12 (client with disabling arthritis and heart condition), ASSN EX 202 at 11-12 (client with severe emphysema requiring oxygen, and osteoporosis). In several instances, Respondent made note of clients’ disabilities and/or incompetence but took no action to stop the process of the living trust sale. FFPCR ¶¶ 25, 55, 90. To the contrary, Respondent allowed Cuccia to advise the clients that the Coranda Living Trust Package was appropriate

for their needs, to provide the clients with a pamphlet containing incorrect and misleading statements, to deliver estate planning documents to clients whose mental capacity he doubted, and to handle the execution of legal documents without any supervision. BF 79 at 7-8.

Additionally, although Respondent took money from these very vulnerable clients, he never performed the estate planning services he promised them. BF 79 at 9; FFCLR ¶¶ 23, 47-49. He never even discussed their individual estate planning needs with them. BF 79 at 7; FFCLR ¶ 23. As a result, almost all of the clients received unnecessarily complex documents and many received legally defective documents. FFCLR ¶ 89. In the Bishop matter, a competent husband was told that he could sign the Coranda Living Trust Package on behalf of his legally incompetent wife (who had advanced Alzheimer's disease), even though he did not have legal authority to sign on her behalf. BF 79 at 8; FFCLR ¶¶ 56-63. The Bishop's Coranda Living Trust Package is, therefore, legally invalid.

In some cases, the clients' living trusts were not just unnecessary but also detrimental because of careless drafting. For example, clients Gerald and Virginia Koistinen clearly stated their intent that they wanted an estate plan that would assure their separate property would be left to their children from prior marriages, not to each other, yet these clients

received a "disclaimer" trust which could defeat this intention because it grants the surviving spouse powers to use the deceased spouse's separate property for any purpose they wish. TR 373-76. Additionally, client Judith Weigel, who already had a prior trust that was usable and reflected her wishes to completely disinherit certain children and step-children, was persuaded to purchase a Coranda Living Trust Package that she was told needed to include a nominal \$100 bequest to the disinherited children (supposedly to prevent a legal challenge). The effect of these bequests is that these children will have to be located after Ms. Weigel's death, that accountings will have to be made to them, and that they will have standing to challenge the successor trustee's decisions, even though the purpose was to disinherit them. TR 381-84.

In several cases, the clients bought the \$1,400 Coranda Living Trust Package but they had absolutely no need for it, as they already had valid wills or trusts. TR 328, 360-61, 392. Other clients, concerned about the execution problems and the complexity of the trust, hired and paid other lawyers to prepare more appropriate, simpler, will-based estate plans. TR 203-04, 241-42. Other clients are still relying on invalid or inaccurate Coranda Living Trust Packages. FFCLR ¶ 84.

In some instances, the injury was not limited to problems with the Coranda Living Trust Package documents themselves. Respondent's

failure to make himself aware of Cuccia's activities led to Cuccia and others conspiring to "use the information obtained in the sale of the trusts to sell the clients annuities and reverse mortgages by fraudulent means." BF 79 at 8; FFCLR ¶ 71. For many of Respondent's clients, the extent of the damage may not become apparent until after they die, when their heirs and successors are left with the task of assessing the legal validity of the documents or with interpreting confusing and contradictory provisions in the Coranda Living Trust Packages, annuity contracts, or reverse mortgages.

Where a lawyer's misconduct results in financial exploitation of elderly and vulnerable clients, the injury is serious. See, e.g., In re Disciplinary Proceeding Against McMullen, 127 Wn.2d 150, 169-70, 896 P.2d 1281 (1995) (lawyer borrowed money from elderly and vulnerable client because of his own financial problems, resulting in funds not being available to client when she needed it for her care; injury was serious even though lawyer was gradually repaying the loan). Respondent's misconduct also damaged the reputation of the profession, as he allowed his name and status to be used to convince vulnerable clients to purchase living trust documents (many of which were inappropriate or invalid) from a non-lawyer. BF 79 at 9.

Because Respondent neglected multiple clients and the injury to those clients was serious, the Court should affirm the Disciplinary Board's application of ABA Standard 4.41(c).

**3. Suspension is the Presumptive Sanction for Counts 2, 3, 4 and 5**

After reinstating Count 2, the Disciplinary Board determined the presumptive sanction for Respondent's knowing assistance in the unauthorized practice of law to be suspension. BF 79 at 8. The standard that applies when a lawyer knowingly assists a non-lawyer in the unauthorized practice of law is ABA Standard 7.2 (violation of duties owed as a professional)

Knowledge is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." ABA Standards at 17. The Disciplinary Board specifically found that Respondent's conduct in assisting Cuccia was knowing because Respondent had actual knowledge that Cuccia was going to advise the clients that the Coranda Living Trust Package was appropriate for their needs. BF 79 at 7. Furthermore, he was aware and allowed Cuccia to provide clients with inaccurate information about Washington probate, BF 79 at 7-8, to assess his clients' legal competency and needs, id., and to handle execution of legal documents.

See BF 79 at 8. Respondent's delegation of legal functions to Cuccia caused actual injury to clients because Cuccia persuaded Respondent's clients to purchase the Coranda Living Trust Package based on inaccurate information, BF 79 at 3; FFCLR ¶ 29, because the Coranda Living Trust Package often was inappropriate for the client's needs, BF 79 at 5; FFCLR ¶ 89, and because some of the documents were improperly executed and are, therefore, legally invalid. FFCLR ¶¶ 69, 84.<sup>4</sup>

**D. THE DISCIPLINARY BOARD PROPERLY APPLIED THE AGGRAVATING AND MITIGATING FACTORS**

The Disciplinary Board unanimously concluded that the hearing officer improperly applied two mitigating factors, and that he erred in excluding an aggravating factor.

First, the Disciplinary Board struck the mitigating factor of "absence of dishonest or selfish motive." BF 79 at 9. The Board correctly determined that this mitigating factor is inappropriate where the evidence shows that Respondent accepted fees from more than 70 clients, promised in his fee agreement that he would provide an independent review of the client's estate planning needs and make recommendations based on that

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<sup>4</sup> The Disciplinary Board also affirmed the hearing officer's conclusion that the presumptive sanction for Respondent's knowing conflict of interest is suspension (Count 3), and that the presumptive sanction for his knowing failure to supervise Cuccia is also suspension (Count 5). Respondent has not challenged these conclusions. They should be affirmed.

review, and then failed to provide these services. BF 79 at 9; FFCLR ¶¶ 22, 23, 27, 39.

Respondent has the burden of establishing that his motives were not selfish. In re Disciplinary Proceeding Against Trejo, 163 Wn.2d 701, 730, 185 P.3d 1160 (2008). The evidence established that Respondent collected over \$14,000 for doing no real legal work for his clients. FFCLR ¶¶ 7, 23, 89. Even after receiving information in March 2004 from the daughter of two elderly living trust purchasers that Cuccia and his cohorts were targeting clients like her parents, who were vulnerable and ill, Respondent did not change his practice of delegating virtually all functions to Cuccia, including delivery of the trusts. BF 79 at 7-8, FFCLR ¶¶ 23, 73, 76. It is a reasonable inference that Respondent wanted to generate as much money as he could from Cuccia's sales scheme.

Respondent failed to meet his burden of establishing that his motives were unselfish. His only argument is that Respondent provided "some service" to his clients, without specifying what those services were. RB 19-20. He provides no evidence to rebut the Disciplinary Board's conclusion that he selfishly took client money and provided no substantive services.

The Disciplinary Board also properly struck the mitigating factor of "full and free disclosure to the disciplinary board or cooperative attitude

towards proceedings.” BF 79 at 9. This mitigating factor is appropriate where an attorney “goes above and beyond the compliance required in a disciplinary investigation or proceeding . . . . [t]he disciplined attorney must show that his or her disclosure or cooperation surpassed what is required from all attorneys.” Trejo, 163 Wn.2d at 732-33. Respondent’s cooperation did not meet this standard. In fact, Respondent was not even fully cooperative during discovery in this matter.<sup>5</sup> Moreover, Respondent provided less than truthful testimony on at least two occasions at hearing, which hardly indicates “full and free disclosure.” For instance, Respondent testified that he had made substantial revisions to the ATDS generated attorney-client fee agreement, but the hearing officer found, based on the testimony of Wood at ATDS, that this assertion was untrue. FFCLR ¶ 21. He also testified that he reviewed the Coranda Living Trust Package documents produced by ATDS before they were delivered to his clients. The hearing officer concluded that this self-serving testimony was also not true. FFCLR ¶ 65.

Respondent argues that this mitigating factor is applicable because Respondent “disclosed information to the Association, albeit through a hypothetical” and that this shows that Respondent wanted the

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<sup>5</sup> Following Respondent’s repeated failure to produce documents subpoenaed by the Association, the Association was forced to file a motion to compel, BF 41, which the hearing officer granted. BF 44.

Association's assistance. RB at 20. Respondent appears to be referring to his December 9, 2004 letter to "Christopher Sutton, RPC Committee." See Respondent's Exhibit R2. Respondent testified about it at hearing. In his testimony, Respondent stated that he had sent the letter to Mr. Sutton prior to being notified of the grievance in this matter and that Mr. Sutton had told him on at least one occasion that the Committee had tabled the matter for its next meeting, and then informed him in approximately March 2005 that the RPC Committee could not provide an opinion because of a pending investigation into Respondent's conduct. TR 561-62.

But Respondent fails to mention that both the Disciplinary Board and the hearing officer found that many of the hypothetical facts presented by Respondent to the RPC Committee were not accurate in that they implied that Respondent had more involvement in advising and communicating with his clients than was actually the case. BF 79 at 9; FFCLR ¶ 79. Thus, Respondent's purported "disclosure" to the Association of his conduct was not in good faith. There is no evidentiary basis for applying the mitigating factor of cooperation or full and free disclosure.

Finally, the Disciplinary Board properly applied the aggravating factor of vulnerability of victim. BF 79 at 9. The victims were "elderly

and unknowledgeable” and they were convinced to buy estate planning documents from a non-lawyer, based on the false premise that the documents were individually recommended and reviewed by Respondent. Id. There was ample evidence that many of the victims were elderly, FFCLR ¶ 19, legally and financially unsophisticated, FFCLR ¶¶ 31, 34, and that several were mentally incompetent FFCLR ¶¶ 25, 55, 56, 90, or physically ill, FFCLR ¶ 73. The aggravating factor is appropriate when the lawyer’s misconduct affects clients who are elderly and unsophisticated. See, e.g., McMullen, 127 Wn.2d at 165, 171. The Disciplinary Board was correct in concluding that Respondent’s victims were vulnerable.

**E. THE DISCIPLINARY BOARD PROPERLY RECOMMENDED THAT RESPONDENT BE SUSPENDED FOR TWO YEARS**

After determining the presumptive sanction to be disbarment for Count 1 and suspension for Counts 2, 3, 4 and 5, the Disciplinary Board weighed the four aggravating factors (pattern of misconduct, multiple offenses, vulnerability of victim and substantial experience in the practice of law) and the four remaining mitigating factors (absence of prior discipline, timely good faith effort to make restitution or rectify consequences of misconduct, character and reputation, and remorse) and recommended a two-year suspension. BF 79 at 8-10. The Disciplinary

Board properly increased the hearing officer's six-month suspension recommendation based on its reinstatement of Count 2, for which the presumptive sanction is suspension, BF 79 at 8, its increase of the presumptive sanction for Count 1 from suspension to disbarment,<sup>6</sup> id., and its striking of two mitigating factors and adding of one aggravating factor. BF 79 at 9. Ordinarily, the Court does not reject the Disciplinary Board's unanimous sanction recommendation unless it can articulate a specific reason to do so. Botimer, 166 Wn.2d at 768. Here, Respondent has failed to supply clear reasons why the Court should reject the Disciplinary Board's decision in this case. The Disciplinary Board appropriately considered the presumptive sanctions for each count, weighed the aggravators and mitigators, and determined that a two-year suspension would serve the public interest. BF 79. The Court should affirm the Disciplinary Board's two-year suspension recommendation and affirm the Disciplinary Board's order that Respondent pay restitution to all 73 clients.

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<sup>6</sup> Even if the Court were to find that suspension rather than disbarment was the presumptive sanction for Respondent's pattern of neglect, the Disciplinary Board's recommendation of a two-year suspension should still be affirmed because Respondent's mental state on all four counts would still be knowing, and the violation of each count alone warrants a suspension. See ABA Standards 4.32, 4.42(b), 7.2. A two-year suspension would be an appropriate cumulative sanction.

V. CONCLUSION

Respondent's neglect of more than 70 vulnerable estate planning clients caused serious injury to many of them. The Court should affirm the Disciplinary Board's unanimous recommendation that Respondent be suspended for two years.

RESPECTFULLY SUBMITTED this 19th day of November, 2009.

WASHINGTON STATE BAR ASSOCIATION

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Kevin M. Bank, Bar No. 28935  
Senior Disciplinary Counsel

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BY RONALD R. CARPENTER

  
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re

RICHARD D. SHEPARD,  
Lawyer (Bar No. 16194)

Public No. ~~200,270-1~~ 200 720-1

DISCIPLINARY COUNSEL'S  
DECLARATION OF SERVICE BY  
MAIL

The undersigned Disciplinary Counsel of the Washington State Bar Association declares that he caused a copy of the Association's Answering Brief to be mailed by regular first class mail with postage prepaid on November 19, 2009 to:

Brett Purtzer  
Attorney at Law  
Hester Law Group, P.S.  
1008 S. Yakima Avenue  
Suite 302  
Tacoma, WA 98405

The undersigned declares under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

Seattle WA, November 19, 2009  
Date and Place

  
Kevin M. Bank, Bar No. 28935  
Senior Disciplinary Counsel  
1325 4<sup>th</sup> Avenue, Suite 600  
Seattle, WA 98101-2539  
(206) 733-5909

ORIGINAL

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ATTACHMENT TO EMAIL

## **APPENDIX A**

agreement limiting the scope of a representation shall consider the applicability of rule 4.2 to the representation:

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

(f) A lawyer shall not willfully purport to act as a lawyer for any person without the authority of that person.

[Amended effective October 1, 2002; amended effective October 29, 2002.]

**RULE 1.3 DILIGENCE**

A lawyer shall act with reasonable diligence and promptness in representing a client.

**RULE 1.4 COMMUNICATION**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**RULE 1.5 FEES**

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly and the terms of the fee agreement between the lawyer and client;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved in the matter on which legal services are rendered and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable

and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

(b) When the lawyer has not regularly represented the client, or if the fee agreement is substantially different than that previously used by the parties, the basis or rate of the fee or factors involved in determining the charges for legal services and the lawyer's billing practices shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. Upon the request of the client in any matter, the lawyer shall communicate to the client in writing the basis or rate of the fee.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by section (d) or other law.

(1) A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(2) A contingent fee consisting of a percentage of the monetary amount recovered for a claimant, in which all or part of the recovery is to be paid in the future, shall be paid only (i) by applying the percentage to the amounts recovered as they are received by the client or (ii) by applying the percentage to the actual cost of the settlement or award to the defendant.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a dissolution or annulment of marriage or upon the amount of maintenance or support, or property settlement in lieu thereof (except in postdissolution proceedings); or

(2) A contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) The division is between the lawyer and a duly authorized lawyer referral service of either the Washington State Bar Association or of one of the county bar associations of this state; or

(2) The division is in proportion to the services provided by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; the client is advised of and does not

object to the participation of all the lawyers involved; and the total fee is reasonable.

[Amended effective September 1, 1990; amendment to RPC(c)(2) effective September 18, 1990, suspended September 18, 1990; suspension lifted December 12, 1990.]

### RULE 1.6 CONFIDENTIALITY

(a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in sections (b) and (c).

(b) A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime; or

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, to respond to allegations in any proceeding concerning the lawyer's representation of the client, or pursuant to court order.

(c) A lawyer may reveal to the tribunal confidences or secrets which disclose any breach of fiduciary responsibility by a client who is a guardian, personal representative, receiver, or other court appointed fiduciary. [Amended effective September 1, 1990.]

### RULE 1.7 CONFLICT OF INTEREST; GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) For purposes of this rule, when a lawyer who is not a public officer or employee represents a discrete

governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, and not the broader governmental entity of which the agency or unit is a part, unless:

(1) Otherwise provided in a written agreement between the lawyer and the governmental agency or unit; or

(2) The broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in the absence of such designation, by the chief executive officer of the entity.

[Amended effective September 1, 1995.]

### RULE 1.8 CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS; CURRENT CLIENT

A lawyer who is representing a client in a matter:

(a) Shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) The client consents thereto.

(b) Shall not use information relating to representation of a client to the disadvantage of the client unless the client consents in writing after consultation.

(c) Shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Shall not, prior to the conclusion of representation of a client, make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) Shall not, while representing a client in connection with contemplated or pending litigation, advance or guarantee financial assistance to his or her client, except that:

(1) A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses; and

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

### **RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

### **RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) A nonlawyer is a corporate director or officer (other than as secretary or treasurer) thereof; or

(3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

### **RULE 5.5 UNAUTHORIZED PRACTICE OF LAW**

A lawyer shall not:

(a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;

(b) Assist a person who is not a member of the Bar in the performance of activity that constitutes the unauthorized practice of law;

(c) permit his or her name to be used as a lawyer by another person who is not a lawyer authorized to practice law in the state of Washington;

(d) engage in any of the following with an individual who is a disbarred or suspended lawyer or who has resigned in lieu of disbarment:

(1) practice law with or in cooperation with such an individual;

(2) maintain an office for the practice of law in a room or office occupied or used in whole or in part by such an individual;

(3) permit such an individual to use the lawyer's name for the practice of law;

(4) practice law for or on behalf of such an individual;

(5) practice law under any arrangement or understanding for division of fees or compensation of any kind with such an individual; or

(e) engage in the practice of law while on inactive status, or while suspended from the practice of law for any cause.

[Amended effective October 1, 2002.]

### **RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE**

A lawyer shall not participate in offering or making:

(a) A partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) An agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

## **APPENDIX B**

## ABA Standards

### **4.3 *Failure to Avoid Conflicts of Interest***

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest:

- 4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):
- (a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or
  - (b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or
  - (c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another and causes serious or potentially serious injury to a client.
- 4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.
- 4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.
- 4.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

### **4.4 *Lack of Diligence***

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client:

- 4.41 Disbarment is generally appropriate when:
- (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
  - (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
  - (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.
- 4.42 Suspension is generally appropriate when:
- (a) a lawyer knowingly fails to perform services for a client and causes injury

- or potential injury to a client, or
- (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.
- 4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.
- 4.44 Admonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

### ***7.0 Violations of Duties Owed as a Professional***

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.

- 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.
- 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
- 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
- 7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

## **APPENDIX C**

**PRACTICE OF LAW BOARD  
STATE OF WASHINGTON**

**ADVISORY OPINION (Inquiry # 04-18)  
August 13, 2004**

**GIVING ADVICE RELATIVE TO THE SALE OF LIVING TRUSTS OR OTHER  
TESTAMENTARY INSTRUMENTS BY PERSONS NOT ADMITTED TO PRACTICE  
LAW IN WASHINGTON**

**ISSUES:**

1. Whether a person, not admitted to practice law in Washington, who gives advice relating to the sale of living trusts or other testamentary instruments for a fee, is engaged in the practice of law.
2. Whether a lawyer, admitted to practice law in Washington, approves the final document, is assisting the unauthorized practice of law.

**BRIEF ANSWERS:**

1. A nonlawyer may not give advice or counsel to others as to their legal rights or responsibilities whether or not for fees or other consideration. GR 24(a)(1).
2. A lawyer involved in advising persons who were purchasing testamentary instruments from nonlawyers would need to comply with Rule 5.3 and other provisions of the Rules of Professional Conduct.

**ANALYSIS:**

1. Advising individuals whether or not a particular form of testamentary device is appropriate to protect their legal rights or to meet their intended legal responsibilities is the practice of law. GR 24(1)(a). Only lawyers admitted to practice in this state may practice law in Washington.

In *Perkins v. CTX Mortgage Co.*, 137 Wn. 2d 93, 969 P. 2d 93 (1999), the Washington Supreme Court held that a mortgage lender engages in the practice of law when producing and completing residential home loan documents. Similarly, in *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 45 P. 3d 1068 (2002), the Supreme Court held that actions of an insurance claims adjuster constituted the practice of law when she completed legal forms, advised unrepresented claimants, and advised claimants to sign settlement and release agreements without advising them there were potential legal consequences or referring them to independent counsel.

In *Perkins*, the Supreme Court said,

Our underlying goal in unauthorized practice of law cases has always been the promotion of the public interest. Consequently, we have prohibited only those activities that involved the lay exercise of legal discretion because of the potential for public harm.

*Perkins*, at 102. In that case, the Court found that "lenders are authorized to prepare the types of legal documents that are *ordinarily incident to their financing activities* when lay employees participating in such document preparation do not exercise any legal discretion." Similarly in *Jones v. Allstate*, the Supreme Court held that insurance claims adjusters may prepare and complete legal documents *incidental to the business of claims adjusting*. *Jones* at 305. The Court also held in both cases that the persons engaging in such activities must comply with the standard of care of a practicing attorney.

The marketing of living trusts and other testamentary instruments is unlike the activities in *Perkins* and *Jones*. In those cases, the activities constituting the practice of law were *incidental* to the business of the defendants. In the case of advising individuals on the selection and use of testamentary instruments, that itself is the practice of law, whether or not for a fee or other consideration. It is not "incidental" to anything else. It is the practice of law and may only be engaged in by persons admitted to practice by the Washington Supreme Court.

In *The Florida Bar Re Advisory Opinion--Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426 (Fla. 1992), the Florida Supreme Court held "the assembly, drafting, execution, and funding of a living trust document constitute the practice of law." also, in *The Florida Bar v. American Senior Citizens Alliance, Inc.*, 689 So. 2d 255 (Fla. 1997), that court said:

Under the untenable guise of "gathering information," nonlawyer ASCA employees answered specific legal questions; determined the appropriateness of a living trust based on a customer's particular needs and circumstances; assembled, drafted and executed the documents; and funded the living trusts . . . . The particularized legal advice and services rendered by ASCA's nonlawyer employees clearly constituted the unlicensed practice of law.

We conclude that a person who is not admitted to practice law in Washington, and who gives advice relating to the sale of living trusts or other testamentary instruments, whether or not for a fee or other consideration, is engaged in the practice of law.

2. A lawyer involved in the marketing of living trusts and other legal instruments with a nonlawyer must comply with RPC 5.3 Responsibilities Regarding Nonlawyer Assistants and other provisions of the RPCs, such as those concerning sharing fees with nonlawyers, conflicts of interest, etc. Specific advice on those requirements is beyond the authority of the Practice of Law Board.

The Board notes, however, that this issue was addressed by the Florida Supreme Court in *Florida Bar Re Advisory Opinion, supra*:

The question posed by petitioner also presents a potential conflict of interest for a lawyer employed by a corporation or other entity involved in the sale of living trusts. Loyalty is an essential element in the lawyer's relationship to a client. In advising a client about the disposition of property after death, the lawyer must first determine whether a living trust is appropriate for that client. If so, the lawyer must then ensure that the living trust meets the client's needs. If the lawyer is employed by the corporation selling the living trust rather than by the client, then the lawyer's duty of loyalty to the client could be compromised. [*citations to Florida rules nearly identical to Washington RPC 1.7 (b) and 1.8(f) omitted*] In light of this duty of loyalty to the client, a lawyer who assembles, reviews, executes, and funds a living trust document should be an independent counsel paid by the client and representing the client's interests alone.

**(Advisory opinions are issued by the Practice of Law Board by authority of General Rule 25(c)(1) and are published at the direction of the Board).**

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Case Number: Supreme Court No. 200,270-1

Name of Person filing: Kevin M. Bank

Bar No. : 28935

Email address: [Kevinb@wsba.org](mailto:Kevinb@wsba.org)

Telephone: (206) 7335909

Address: 1325 4<sup>th</sup> Avenue, Suite 600, Seattle WA 98101-2539

**Kevin M. Bank**

Senior Disciplinary Counsel

Washington State Bar Association

(206) 7335909

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