

No. 2007201

IN THE WASHINGTON STATE SUPREME COURT

IN RE
RICHARD DALE SHEPARD
LAWYER (WSB #16194)

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APPEAL FROM THE DISCIPLINARY BOARD OF THE
WASHINGTON STATE BAR ASSOCIATION

Public No. 07#00037

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The Washington State Bar Association Disciplinary Board erred when it determined that Mr. Shepard associated with a non-lawyer who gave legal advise to clients or to potential clients.

2. The Washington State Bar Association Disciplinary Board erred when it concluded that the appropriate sanction is a two-year suspension.

3. The Washington State Bar Association Disciplinary Board erred when it struck the mitigating factors of lack of dishonest or selfish motive, full and free disclosure and cooperative attitude toward proceedings.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Shepard associated with a non-lawyer in the practice of law when the sale of legal forms does not constitute the practice of law pursuant to GR 24? (Assignments of Error #1).

2. Whether Mr. Shepard should be suspended for two years when his conduct while representing his clients caused actual injury as opposed to serious or potentially serious injury? (Assignments of Error #2).

3. Whether all of the mitigating factors listed by the Hearing Officer should be accepted when substantial evidence supported all of the Hearing Officer's findings, conclusions and recommendations? (Assignments of Error #3).

III. STATEMENT OF THE CASE

A. Procedural History

On July 30, 2007, the Washington State Bar Association (hereinafter WSBA), filed a Formal Complaint against Richard D. Shepard alleging four violations of the Rules of Professional Conduct. BF 2. On November 1, 2007, the WSBA filed an amended complaint adding a fifth count. BF 21. The violations surrounded Mr. Shepard's involvement of reviewing living trusts that were sold by a non-lawyer, Stephen Cuccia, the President of Corrandra Living Trust Services (Corrandra).

On November 28, 2008, Hearing Officer Greg Wall issued Findings of Fact and Conclusions of Law and recommended a six-month suspension along with restitution to all clients Mr. Shepard obtained through his association with Corrandra. See BF 57 (FFCLR 1-107).

On June 23, 2009, the Disciplinary Board adopted the Hearing Officer's Findings of Fact, but struck Conclusion of Law, Paragraph 94, asserting that the record and the Findings of Fact proved a violation of Count 2, i.e., that Mr.

Shepard affiliated himself with a non-lawyer who gave legal advice to clients or potential clients in violation of former RPC 5.5(b). BF 79. The Board recommended increasing the sanction to a two-year suspension. Id.

On June 30, 2009, Mr. Shepard filed his notice of appeal and this appeal follows. BF 80.

B. Facts

The facts are not in dispute as neither party challenged the findings of fact issued by the Hearing Officer. BF 57 (all references to the Findings of Fact and Conclusions of Law will identify specific paragraphs).

Richard Shepard was admitted to practice on October 29, 1986, and he practices as a sole practitioner in Tacoma. FFCLR 1 & 2. He has some expertise in estate planning with basic estate planning comprising about one-third of his practice. FFCLR 2.

In mid-2003, Mr. Shepard was contacted by Steven Cuccia, the president of Corrandia Living Trust Service (Corrandia) an Auburn company. FFCLR 3.

During their initial meeting, Mr. Cuccia offered to enter into an arrangement with Mr. Shepard wherein Mr. Cuccia would refer purchasers of a living trust product he was marketing to retain Mr. Shepard, if the purchasers so desired, to obtain legal services relating to the trust. Under this arrangement, Mr. Shepard would receive a flat fee of \$200.00 per client. FFCLR 6 & 7. From June 2003 through August 2005, Corranda sold living trust packages to Washington residents. FFCLR 4.

Mr. Shepard was aware that Mr. Cuccia would be presenting Mr. Shepard's fee agreement to the purchasers of the living trusts, if the individuals agreed to purchase the trusts and asked for Mr. Shepard's services. After completing the questionnaire and obtaining the signatures on the fee agreement, Mr. Cuccia would collect two checks from the client, one of which was \$200.00 payable to Mr. Shepard pursuant to his fee agreement. At no time did Mr. Shepard accompany Mr. Cuccia on a home sales visit. FFCLR 42.

Mr. Shepard knew that Mr. Cuccia was not a lawyer, but represented himself to be a certified estate planner. FFCLR 9 & 10. Additionally, Mr. Shepard was unaware that Mr. Cuccia was a convicted felon from the State of California, having been convicted of fraudulent annuity sales. FFCLR 11.

After affiliating with Mr. Shepard, Mr. Cuccia began selling living trusts to senior citizens in Western Washington. FFCLR 19. Although Mr. Shepard was aware that Mr. Cuccia would be selling the living trusts, he was not aware of Mr. Cuccia's selling tactics. FFCLR 20.

Mr. Shepard's services were limited to a review of the forms collected from customers by Mr. Cuccia to insure that they were filled out correctly and then sent to ATDS, a contract paralegal service engaged in the business of providing legal forms to attorneys. FFCLR 23 & FFCLR 13.

When the completed documents were received back from ATDS, Mr. Shepard would review them for accuracy, attach a form letter of instructions to the clients and mail them to the client. This

letter gave the clients instructions on how to fill out the documents. FFCLR 24.

Once the documents were completed, Mr. Cuccia would deliver the documents, including Mr. Shepard's letter of instructions to the client. FFCLR 50. Although the documents were complex legal documents and Mr. Shepard's letter instructed the clients on how to correctly execute the documents, most of the clients relied on Mr. Cuccia to show them how to execute the documents. FFCLR 51.

At some point in 2003, Mr. Shepard met Mr. Cuccia's brother, Anthony Cuccia, an insurance agent. Steven Cuccia told Mr. Shepard that Anthony Cuccia would be working with him, offering insurance products to the clients. Unbeknownst to Mr. Shepard, Mr. Cuccia, his wife, Michelle, Anthony Cuccia, and another individual, Richard Souza, conspired to use information obtained from the sale of the trust documents to sell clients annuities and reverse mortgages by fraudulent means. Mr. Shepard first became aware of these activities in March of 2004 when one of his client's daughters came to his office and

complained about the aforementioned individual's conduct. FFCLR 71, 72 & 73.

In a March 14, 2004, the Washington State Bar News published an article on "Living Trust Mills." That article suggested that attorneys could be violating the Rules of Professional Conduct by participating in these operations. FFCLR 78.

Later that year, Mr. Shepard sent a letter to Chris Sutton, an attorney on the RPC committee for the Washington State Bar Association, seeking advice about his dealings with Mr. Cuccia. FFCLR 79. Mr. Shepard's letter detailed the manner in which the living trusts were sold and prepared by Mr. Cuccia. Mr. Shepard did not receive a response to his December 9, 2004 letter to the Bar Association. FFCLR 80.

In late February 2005, Mr. Shepard was informed by the Office of the Insurance Commission, through investigator Victor Overholt, that Mr. Cuccia had been incarcerated in California for insurance and securities fraud before moving to Washington. FFCLR 77.

On or about April 20, 2006, Mr. Shepard wrote a letter to his clients regarding the

investigation into the sale of the Corranda Living Trust. He informed his clients that three separate investigations were occurring, one by the Office of the Insurance Commissioner, one by the Washington State Bar Association and one by the Office of the Attorney General. He asked his clients to call him and arrange an appointment to review their documents to insure that they were executed correctly. FFCLR 81.

On January 29, 2007, clients received a follow-up letter, again urging them to contact Mr. Shepard or another attorney about the documents that they had received. FFCLR 81.

Several of Mr. Shepard's clients were happy with his services and noted that Mr. Shepard corrected the mistakes in the execution of their documents and helped them to be complete. Some of Mr. Shepard's clients, however, did not contact Mr. Shepard to modify the documents in any fashion. As a result of Mr. Shepard's involvement with Mr. Cuccia, Mr. Shepard obtained over 70 new estate planning clients. FFCLR 82, 83, 86 & 87.

The evidence established that Mr. Shepard's arrangement with Corranda was a single aberration

and involved a lack of good judgment rather than a pattern of misconduct. Mr. Shepard was truly remorseful about the damages that his clients sustained and in no fashion sought to injure his clients. FFCLR 95 & 96.

IV. ARGUMENT

1. The Disciplinary Board Erred When it Determined that Mr. Shepard Associated with a Non-Lawyer who Provided Legal Advice to Clients.

The WSBA alleged that Mr. Shepard's conduct violated the following RPC's: RPC 1.3 and/or former RPC 1.4(a) and 1.4(b) (Count 1); RPC 5.5(b) (Count 2); RPC 1.7(b) (Count 3); RPC 5.4(a) (Count 4); and RPC 5.3(a) (Count 5). BF 21. The Hearing Officer concluded, based upon the evidence, that the WSBA had proved Counts 1, 3 & 5, but not 2 and 4. FFCLR 97, 98. The Disciplinary Board concluded that the record and Findings of Fact also proved a violation of Count 2 by a preponderance of the evidence and that the violations warranted a two-year suspension. BF 79.

Respectfully, Mr. Shepard urges this Court to adopt the findings of fact and conclusions of law of the Hearing Officer in their entirety, as well as his recommended sanction of a six-month

suspension plus restitution to all clients he obtained through Corranda Living Trust.

A. The Hearing Officer Properly Dismissed Count 2.

Although this court gives considerable weight to the Board's recommendation, this court is also the definitive authority for bar discipline cases in Washington. In Re Disciplinary Proceeding Against Kuvara, 149 Wn.2d 237, 246, 66 P.3d 1057 (2003). This court "accept[s] as true any unchallenged factual findings made by the hearing officer and approved by the Board." Id. at 246. "If challenged, the Board's findings of fact will not be overturned if supported by a clear preponderance of the evidence. Id. Although they are not conclusive, we give considerable weight to the hearing officer's findings, particularly when they involve the credibility and veracity of the witnesses." Id. This court "reviews conclusions of law *de novo* and requires that they be supported by the findings of fact." In Re Disciplinary Proceeding Against Holcomb, 162 Wn.2d 563, 577, 173 P.3d 898 (2007).

Here, the Board struck the conclusion in findings of fact 94, stating that the record and

the findings of fact proved a violation of Count 2 by a clear preponderance of the evidence.

In Count 2, Mr. Shepard was alleged to have violated former RPC 5.5(b): "by affiliating himself with a non-lawyer who gave legal advice to clients or potential clients through the marketing of living trusts, and/or in delegating legal functions to a non-lawyer." The Hearing Officer dismissed Count 2 stating that he did not find that Mr. Shepard aided in the unlawful practice of law, although acknowledging that Mr. Cuccia was selling a trust package that had legal implications.

The Disciplinary Board, in its analysis, referred to GR 24, which defines the practice of law and provides a non-exhaustive list of what might constitute the practice of law. Importantly, however, what GR 24 specifically excludes from the practice of law is "the sale of legal forms in any format." GR 24(b)(8).

Clearly, what Mr. Cuccia was doing was selling legal forms. FFCLR 4, 19. Based upon this exclusion, the sale of these forms is not the practice of law. Further, Mr. Shepard knew Mr.

Cuccia was not a lawyer and that he was not representing himself to be a lawyer. FFCLR 9, 10. Mr. Shepard was unaware, however, of how or by what tactics Mr. Cuccia was selling the trust documents. FFCLR 20.

Contrary to the Disciplinary Board's decision, the Hearing Officer's dismissal was appropriate, and the case cited supports the Hearing Officer's ruling. See In re Estate of Knowles, 135 Wn.App. 351, 143 P.2d 864 (2006).

In Knowles, a will contest, one question presented was whether the decedent's son, who filled out handwritten parts of the will and received the bulk of the estate, was engaged in the practice of law. Knowles, 135 Wn.2d at 356. The court, in determining that the son's conduct did not constitute the practice of law, focused on the degree of control that occurred at the time of the will's formation.

The Knowles court also reviewed In Re Estate of Marks, 91 Wn.App. 325, 957 P.2d 235 (1998). There, a close personal friend of Marks selected a will kit, discussed with Marks the distribution of assets, arranged for its signing, and also

substantially benefitted from the will. Marks, 91 Wn.App. at 335.

The Knowles court differentiated its case from Marks by the degree of control exercised:

In short, Marks relied on cases where parties executed a much greater degree of control than Randy exercised here. Generally, a person begins to practice law by either directly or indirectly (selection of appropriate documents) giving advice. Here, Wall presented no evidence that Randy selected the will form or advised Merle about his dispositions.

Knowles, 135 Wn.App at 365-66.

Mr. Shepard's case is closer to Knowles than to Marks. Mr. Cuccia sold a product and offered Mr. Shepard as an attorney who could review the appropriateness of such documentation. That Mr. Shepard knew Mr. Cuccia was selling a product is clear. He also knew that these individuals would be referred to him for a review of their estate planning. But the Hearing Officer's conclusion that Mr. Shepard was not affiliated with someone who was engaging in the practice of law should be upheld as Mr. Shepard was not controlled, nor bound, by what Mr. Cuccia was selling, nor is the selling of forms the practice of law pursuant to GR 24(b)(8). Further, all that Mr. Shepard did was

review the forms to see if they were completed accurately. As such, this Court should uphold the Hearing Officer's decision that Count 2 was not proved by a clear preponderance of the evidence.

2. The Washington State Bar Association Disciplinary Board Erred when it Concluded that the Appropriate Sanction is a Two-Year Suspension.

This Court applies the American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) in all lawyer discipline cases. In re Disciplinary Proceedings Against Halverson, 140 Wn.2d 475, 492, 998 P.2d 833 (2000). Applying the ABA Standards to arrive at a disciplinary sanction involves a two-stage process. First, the presumptive sanction is determined by considering (1) the ethical duty violated, (2) the lawyer's mental state, and (3) the extent of the actual or potential harm caused by the misconduct. In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 77, 9600 P.2d 416 (1988). Second, the court considers any aggravating or mitigating factors that might alter the presumptive sanction. Id.

This Court should affirm the Hearing Officer's findings and conclusions in his sanction

analysis. With all respect to the Disciplinary Board, the Hearing Officer's sanction analysis was appropriate.

ABA Standard 4.4 applies to lack of diligence and failure to communicate and violations of RPC 1.3 and/or former RPC 1.4(a) and/or former RPC 1.4(b). Standard 4.4 provides as follows:

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.

The Board's disagreement with the Hearing Officer's conclusion regarding the appropriate sanction focuses on the nature of the "injuries" sustained by Mr. Shepard's clients. Under such circumstances, this Court's discussion in In re the Disciplinary Proceedings Against Holcomb, 162 Wn.2d 563, 173 P.3d 898 (2007) is instructive.

In Holcomb, this Court discussed the ABA Standards' definition of "injuries" and held that because Holcomb acted knowingly and caused "actual" and potential injury, the presumptive sanction was suspension. Holcomb 162 Wn.2nd at 5686.

In Mr. Shepard's case, the Hearing Officer also found that Mr. Shepard caused "actual" injury to his clients. FFCLR 88. Given that the Hearing Officer heard all of the evidence and gave it the appropriate consideration, his determination that Mr. Shepard caused "actual" injury and that the appropriate sanction is suspension should not be changed. If the Hearing Officer had determined a "serious" injury or "potential" serious injury

occurred, he would have set forth the nature of the injury in his findings. Given the deference afforded to the Hearing Officer who presided over this matter, this Court should not presume any different "injury" and should not presume anything more than what was set forth in the findings and conclusions.

3. The Hearing Officer Correctly Applied the Aggravating and Mitigating Factors.

The Hearing Officer concluded that the following aggravating factors from ABA Standards § 9.22 applied:

(c) a pattern of misconduct (misconduct involved many clients over an eighteen month period);

(d) multiple offenses (violation of numerous RPCs);

(i) substantial experience in the practice of law (Respondent was admitted in 1986).

The Hearing Officer also concluded the following mitigating factors from ABA Standards § 9.32 applied:

(a) absence of a prior disciplinary record;

(e) absence of a dishonest or selfish motive; (Charging a fee for service is not a dishonest or selfish motive);

(d) timely good faith effort to make restitution or rectify consequences of misconduct;

(e) full and free disclosure to the disciplinary board or cooperative attitude toward proceedings;

(g) character or reputation;

(l) remorse.

Respectfully, respondent urges that both the aggravating and mitigating factors were supported by substantial evidence as determined by the Hearing Officer, who was in the best position to hear the evidence and render a decision.

The Hearing Officer set forth in his findings the basis for his conclusions, and because the findings were not challenged, they are verities.

Although the Board determined that the record did not support all of the mitigating factors, Respondent respectfully disagrees. First, although Mr. Shepard may not have provided all of the legal assistance as set forth in the fee agreement, he did provide some service, and a fee

of \$200.00 cannot be considered selfish in any manner. Additionally, part of the sanction recommended was the return of the \$200.00 fee to all clients, and not to those potentially harmed.

Additionally, Mr. Shepard did not "assist" Mr. Cuccia in any capacity as to what Mr. Cuccia was doing and disclosed information to the Association, albeit through a hypothetical. Finally, in his hypothetical, Mr. Shepard sought assistance from the Association, but no guidance was provided.

Significantly, Mr. Shepard has no prior disciplinary matters, he is a person of high moral character, and he has a good reputation.

Mr. Shepard recognizes that Mr. Cuccia took advantage of individuals for which he feels horrible, yet he had no knowledge that this was occurring. Mr. Shepard's actions, however, were not motivated by selfishness. He saw a need for his services and provided them, albeit negligently. Further, when he found that Mr. Cuccia had been taking advantage of him and his clients, he contacted his clients to try to mitigate any damage that might have been caused.

Accordingly, all of the mitigating factors found by the Hearing Officer should apply in this case.

After considering both the aggravating and mitigating factors, the Hearing Officer succinctly stated in his sanction recommendation that Mr. Shepard "did not intend to defraud his clients or make them prey for Mr. Cuccia and his cohorts." FFCLR 107. Clearly, the Hearing Officer recognized that Mr. Shepard was also a pawn of Mr. Cuccia's.

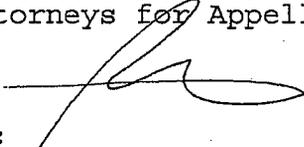
Further, his recommendation recognized that Mr. Shepard clearly understands the nature of his violations and that his remorse for injuring his clients was genuine. FFCLR 107. That Mr. Shepard sought the Association's guidance, but never received any, when confronted with his concerns (see FFCLR 78-81), lends support to the Hearing Officer's ultimate recommendation, which neither exonerates Mr. Shepard for his actions, nor rewards the Association for its inactions. Accordingly, this Court should affirm the Hearing Officer's ruling in its entirety.

V. CONCLUSION

Based upon the aforementioned, Mr. Shepard respectfully urges this court to adopt, in its entirety, the recommendation of the Hearing Officer.

RESPECTFULLY SUBMITTED this 5th day of October, 2009.

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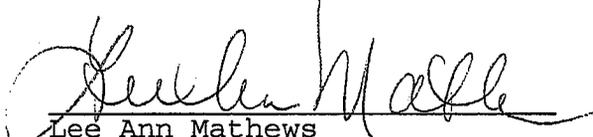
CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 5th day of October, 2009.


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