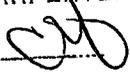


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STATE OF WASHINGTON

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No. 2007201

IN THE WASHINGTON STATE SUPREME COURT

IN RE

RICHARD DALE SHEPARD

LAWYER (WSB #16194)

APPEAL FROM THE DISCIPLINARY BOARD OF THE
WASHINGTON STATE BAR ASSOCIATION

Public No. 07#00037

REPLY BRIEF

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FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

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STATEMENT OF THE CASE

Appellant adopts the statement of the case as set forth in his opening brief.

ARGUMENT

- A. MR. SHEPARD DID NOT ENGAGE IN THE UNLAWFUL PRACTICE OF LAW WITH MR. CUCCIA.

Mr. Shepard relies upon the arguments set forth in his opening brief. Importantly, as noted by our appellate courts, whether a non-lawyer engages in the practice of law regarding estate issues depends on the amount of control exercised. See In Re Estate of Knowles, 135 Wn.App. 351, 365-66, 143 P.2d 864 (2006) (a person begins to practice law by either directly or indirectly giving advice in the estate process). Further, GR 24(b)(8) specifically excludes from the practice of law "the sale of legal forms in any format."

Although the Disciplinary Board reversed the hearing officer's conclusion that Mr. Shepard did not assist Mr. Cuccia in the unauthorized practice of law, it is unclear what amount of "control" was exercised by Mr. Cuccia over the individuals who bought the trust packages. Additionally, although the Association's brief references several

findings of fact considered by the Disciplinary Board, none of those findings of fact establish the requisite "control" necessary to establish that Mr. Cuccia engaged in the practice of law. As such, and absent such factual finding of control, the Disciplinary Board striking Conclusion of Law Paragraph 94 is in error.

Finally, the Association complains that Mr. Shepard didn't provide any service to the clients even though he receive a fee. If that argument has merit, then Mr. Shepard could not have violated RPC 5.5(b) because he didn't do anything for his clients, including associating with a non-lawyer.

Recently, our legislature determined that the marketing of living trusts by persons not authorized to practice law was unlawful because the marketing practice often leads to the financial exploitation of senior citizens. See Chapter 19.295 RCW. Given that no clear guidance existed as to what constituted the unauthorized practice of law in this area before this legislation was passed, this Court should consider Mr. Shepard's actions in seeking guidance from the

Association through his letter to Mr. Sutton, which went unanswered. As Mr. Shepard did not know whether his conduct was improper, and sought an opinion about the situation, Mr. Shepard respectfully urges this court to uphold the dismissal of Count 2 as appropriate under the circumstances.

B. THE HEARING OFFICER'S
RECOMMENDATIONS OF A SIX-MONTH
SUSPENSION IS SUPPORTED BY THE
FACTUAL FINDINGS.

As noted by both the Association and Mr. Shepard, unchallenged factual findings are verities on appeal. In Re Disciplinary Proceeding Against Christopher, 153 Wn.2d 669, 677, 105 P.3d 976 (2005); In Re Disciplinary Proceeding Against Kuvera, 149 Wn.2d 237, 246, 66 P.3d 1057 (2003). Here, in the Findings set forth by the hearing office, the hearings office noted that "respondent's actions and/or inactions resulted in **actual injury** to his clients in their legal profession as a whole." FFCLR 88. Neither party challenged this factual finding. As such, it is a verity on appeal.

This factual determination regarding the nature of the injury is significant, given the

nature of the ABA Standard to be applied, and this court's decision in In Re the Disciplinary Proceedings Against Holcomb, 162 Wn.2d 563, 173 P.3d 898 (2007), which is discussed in Mr. Shepard's opening brief.

The Association argues that Mr. Shepard was responsible for Mr. Cuccia's criminal conspiracy with other unscrupulous individuals who sold annuities and reverse mortgages to various trust clients. Importantly, however, the hearing officer noted that the Association did not prove "by a clear preponderance of the evidence, that Mr. Shepard was aware of this criminal conspiracy when he entered into the agreement with Mr. Cuccia." FFCLR 72. Accordingly, the suggestion that Mr. Shepard's conduct also caused additional harm beyond that found by the hearing officer is purely speculation and conjecture and was neither proved by the Association nor found by the hearing officer. As such, any additional harm caused by Mr. Cuccia and his associates cannot and should not be attributed to Mr. Shepard. As such, the level of injury is that which was set forth by the hearing officer.

C. THE MITIGATING AND AGGRAVATING
FACTORS DETERMINED BY THE HEARING
OFFICER WERE SUPPORTED BY THE
FINDINGS OF FACT.

As set forth previously, the findings of fact are verities on appeal. Although the Board struck two mitigating factors, it does not support this striking of the factors with a consideration of the record. Suggesting that the collection of "a fee" for services supports a selfish or dishonest motive does not properly account for the amount of the fee or what was received.

Mr. Shepard collected \$200.00 and nothing more. As noted by the Hearing Officer, not all of Mr. Shepard's clients were unhappy with his services, FFCLR 82, and Mr. Shepard did provide some legal services. FFCLR 23. Further, the Hearing Officer noted that charging a fee for services is not a dishonest or selfish motive.

Additionally, Mr. Shepard's full and free disclosure mitigating factor should also be accepted. First, the Hearing Officer did not make any findings that Mr. Shepard attempted to frustrate the investigative or hearing process. More importantly, Mr. Shepard sought guidance from

the Association and received none. Regardless of whether Mr. Shepard's hypothetical was "on all fours" with his situation, it was still presented as a hypothetical, and he received no response. Just as lawyers have a responsibility to their clients, the Association also has responsibilities to its members, and it failed to respond to Mr. Shepard's inquiry.

Finally, the Board determined that Mr. Shepard's name and status was "used to convince" elderly individuals to purchase the trust documents. Neither the findings of fact nor the record support this conclusion. Respectfully, this Court should not adopt this aggravating factor.

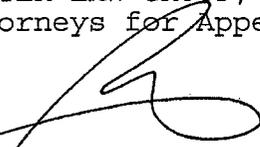
CONCLUSION

Respectfully, the Disciplinary Board's determination that Mr. Shepard's conduct caused serious or potentially serious injury is not supported by the Hearing Officer's findings of fact. Accordingly, a six-month suspension, with restitution, is the appropriate sanction as set

forth in Mr. Shepard's original opening brief and should be ordered by this court.

RESPECTFULLY SUBMITTED this 24th day of December, 2009.

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By: 

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CERTIFICATE OF SERVICE

CLERK 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 reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Washington State Bar Association
Attn: Kevin Bank
1325 4th Avenue, Suite 600
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Signed at Tacoma, Washington this 24th day of
December.


Lee Ann Mathews

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Attached please find our reply brief for filing.

Thank you.

Case Name: In Re Disciplinary Proceeding Against Richard Dale Shepard

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

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