

BEFORE THE BOARD OF COMMISSIONERS  
ON  
GRIEVANCES AND DISCIPLINE  
OF  
THE SUPREME COURT OF OHIO

07-1195

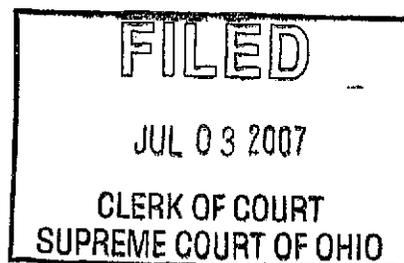
**In Re:** :  
**Complaint against** : **Case No. 06-052**  
**Philip Brian Willette** : **Findings of Fact,**  
**Attorney Reg. No. 0019940** : **Conclusions of Law and**  
: **Recommendation of the**  
**Respondent** : **Board of Commissioners on**  
: **Grievances and Discipline of**  
**Columbus Bar Association** : **the Supreme Court of Ohio**  
:  
**Relator** :  
:

**PROCEDURAL MATTERS**

This matter was heard on March 26-27, 2007, upon the Complaint of the Columbus Bar Association, Relator, against Philip Willette, Attorney Registration No. 0019940. Mr. Willette was admitted to practice in Ohio in 1976.

The members of the hearing panel were Judge Beth Whitmore, Lynn Jacobs and Francis E. Sweeney, Jr., Chair. None of the panel members is from the appellate district from which the complaint arose or served as members of the probable cause panel that certified the matter to the Board of Commissioners on Grievances and Discipline of the Supreme Court (Board).

Priscilla Hapner, Esq. appeared as counsel for Relator. William Mann, Esq. appeared as counsel for Respondent.



## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case involves what this Board has come to know as out of state "Trust mills." In February 2004 Respondent entered into a contract with a Michigan company known as Estate Legal Planning Services ("EPLS") to sell living trusts in Ohio. As a result of mass mailings and phone solicitation (conducted by Estate Information Services Company or "EIS", the marketing arm of EPLS), EPLS would refer contacts to Respondent which he would then prospect. As a result of this information Respondent met with and was retained by Dale and Betty Trott who subsequently purchasing a standard living trust for \$ 1,500.00.

After purchasing this living trust from the Respondent and concurrent with the finalization of the documentation, the Trotts were contacted by Mr. Larry Spencer. Spencer, affiliated with EPLS, "funded" the living trusts with a variety of insurance investments. Soon thereafter, becoming suspicious and concerned, the Trotts filed a grievance with the Columbus Bar Association.

As to Count I, II, and III, Respondent did not stipulate to any facts. As to Count IV, Respondent stipulated during the hearing to a violation DR 2-101(F)(1). As to Count V, Respondent did not stipulate to any facts. As to Count VI, Respondent admitted in his answer that he violated DR 2-103(C). As to the remaining Counts, VII through XI, Respondent has not stipulated to any facts. The evidence presented at hearing, by clear and convincing evidence, establishes the following:

**Count I – DR 1-102(A)(4) – a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.**

Relator asserted that Respondent violated the above rule by failing to inform his clients, the Trotts, of pertinent information. Previously, the Ohio Supreme Court has held that omissions may form a violation of DR 1-102(A)(4). See *Columbus Bar Assn. v. Farmer*, 111 Ohio St.3d 137, 140, 2006-Ohio-5342, at ¶18.

The Panel finds clear and convincing evidence was presented that Respondent engaged in misrepresentation through his omissions. Respondent admitted during these proceedings that he never informed the Trotts of his contract with EPLS, a law firm in Michigan. Respondent's contract, by its plain language, required him to use EPLS for the financial advice associated with the trusts he was offering to the Trotts. Respondent never informed the Trotts that he was contractually obligated to use EPLS to complete their trusts.

The Panel further finds by clear and convincing evidence that Respondent failed to inform the Trotts of the role of Larry Spencer. While Respondent testified that he always informed his clients of Mr. Spencer's role in selling insurance. Respondent, however, had no specific recollection regarding the Trotts. In contrast, the Trotts gave a detailed account of their encounter with Respondent. The Trotts testified via deposition that they were unaware entirely of the purpose of meeting with Mr. Spencer and that Respondent had never informed them of the involvement of this third party. The involvement of Mr. Spencer created such suspicion in the Trotts that they contacted their own financial advisor to look into the matter. As a result, the Panel finds that clear and convincing evidence was presented to demonstrate that Respondent failed to inform his clients of Mr. Spencer's role and effectively "set up his clients as sales prospects for insurance agents with no overriding commitment to their financial and personal security." *Columbus Bar Assn. v.*

*Fishman*, 98 Ohio St.3d 172, 2002-Ohio-7086, at ¶20. Accordingly, we find that Respondent violated DR 1-102(A)(4) through his numerous omissions. Count II is dealt with at the end of these findings.

**Count III – DR 2-101(A) – a lawyer shall not use any advertisement that is false, fraudulent or misleading or contains any claims that are not verifiable.**

It is undisputed that EPLS, by itself or through other companies, sent out advertisements on behalf of Respondent. Presumably, these mailings were made as a part of EPLS' agreement to be Respondent's exclusive marketing agent.

During his deposition, Respondent admitted that a document titled "What Lawyers Don't Want You to Know" contained statements which could be misleading and contained statements that could not be verified. Specifically, the document contained statements such as the following:

- 1) "But today trusts have almost become a necessity for middle income people."
- 2) "But the exemption adopted by lawmakers may mean estates are more taxable than ever. And lawyers love the exemption cap because estates subject to tax mean additional legal work."
- 3) "The process of probate was designed to serve lawyers almost as much as the owner and beneficiaries of the will."
- 4) "If you want to leave a relative out of your inheritance, a trust will make it much more difficult for the relative to dispute or contest your wishes."

The postcard that accompanied this brochure stated that "Unnecessary fees can deplete assets by more than 5% of the estate's value" and stated that the enclosed brochure purportedly "gives you hard facts and straight answers" about living trusts.

The Panel finds that none of the above four statements are verifiable, nor has Respondent attempted to verify any of those statements. Moreover, the Panel finds several of the statements to be misleading. The statement that probate laws were designed to benefit lawyers is misleading. Moreover, Respondent admittedly targeted middle income families because he believed that his services were valuable to such clients. As such, the federal exemption for estate taxes was rarely, if ever, at issue. Despite this fact, recipients of the above brochure were informed that more estates than ever were subject to taxation. Finally, the brochure again makes misleading statements that lawyers “love the exemption” because it creates additional work and fees. Accordingly, the Panel finds that Respondent violated DR 2-101(A) by using advertisements that contained misleading statements and statements that are not verifiable.

**Count IV – DR 2-101(F)(1) – a lawyer shall not solicit legal business by telephone.**

Relator asserted in its filings before the Panel that Respondent had stipulated to a violation of DR 2-101(F)(1). However, a review of those filings indicates that Respondent admitted to violating DR 2-101(F)(2)(e) by failing to properly mark his mailed advertisements. Relator, however, did not charge Respondent with a violation of DR 2-101(F)(2)(e). As such, Respondent’s admission to violating such a provision is not considered with respect to Count IV.

During the hearing before this Panel, Dale Trott testified unequivocally that Janice Tolbert telephoned both him and his wife in an attempt to solicit business on behalf of Respondent. Mr. Trott was also clear that neither he nor his wife requested that Ms. Tolbert call them. Mrs. Trott reiterated this point in her testimony, asserting that she never

sent in a postcard requesting to be contacted by Ms. Tolbert. In response, Respondent presented testimony that this was not the typical procedure used by EPLS. Respondent, however, produced no evidence that the Trotts had requested information from EPLS. Respondent, therefore, produced no evidence to contradict the Trotts' testimony that Ms. Tolbert's telephone call was unsolicited.

Additionally, while Respondent has challenged the admissibility of statements made by Ms. Tolbert on the grounds of hearsay, the Panel finds such a challenge not well taken. Respondent has never challenged the contention that Ms. Tolbert's phone calls were designed to solicit business on his behalf. Rather, he has solely challenged whether the phone call at issue was unsolicited. Moreover, Respondent is not relieved of a violation solely due to the fact that he did not personally make the phone call. See *Cincinnati Bar Assn. v. Rinderknecht*, 79 Ohio St.3d 30, 32, 1997-Ohio-309 (finding a violation of DR 2-101(F)(1) when an attorney used a separate organization to solicit clients via telephone on his behalf). As the sole evidence before the Panel indicates that such a call was unsolicited, we find by clear and convincing evidence that Respondent violated DR 2-101(F)(1).

**Count V – DR 2-103(B) – a lawyer shall not compensate an organization for a referral.**

Respondent does not dispute that he paid EPLS for the "marketing" services that they provided. Respondent, in fact, testified that he paid EPLS fifty percent of the fees that were generated from the individuals referred to him. The Panel is hard-pressed to find any term that defines this relationship other than a paid referral. EPLS solicited clients and then put them in touch with Respondent. Respondent then paid EPLS for this referral in

contravention of DR 2-103(B). In his closing statement, Respondent admitted a violation of 2-103(B). Accordingly, the Panel finds by clear and convincing evidence that Respondent violated DR 2-103(B).

**Count VI – DR 2-103(C) – a lawyer shall not request an organization to recommend the use of his services.**

Respondent admitted in his answer to the complaint a violation of DR 2-103(C). Specifically, Respondent answered as follows: “Mr. Willette expressly admits that he violated DR 2-103(C) in that he had an arrangement with EPLS to market his legal services.”

**Count VII – DR 2-106 – a lawyer shall not charge or collect a clearly excessive fee.**

Relator has asserted that Respondent violated DR 2-106 because the services for which he billed the Trotts were unnecessary. The Panel finds that clear and convincing evidence of such a violation is not present.

Both Relator and Respondent produced reports from experts regarding the necessity of a living trust for the Trotts. While both experts agree that the trust in question was poorly drafted and verbose, they disagree over its necessity. Upon review, the Panel finds that the use of a living trust in the instant matter was one within the discretion of professional judgment. There is no question that a living trust provides some benefits and some drawbacks as compared to probate. Moreover, it is undisputed that Respondent’s fee of \$1,500 included an agreement by Respondent to complete any future work on the trust, such as modifying beneficiaries. The record also contains evidence that probating the Trotts’ estate could cost as little as \$1,500 or nearly double that amount.

Moreover, it is undisputed that Respondent met with the Trotts on several occasions for numerous hours. In the end, the Trotts received a living trust that was several hundred pages long. The Panel notes, that a bulk of that trust was a form used by Respondent and thus the time used in its creation was not properly chargeable to the Trotts. The record, however, provides no indication that Trotts were charged for such time. As experts disagreed in the record over the necessity of the trust produced by Respondent, we cannot say that the record contains clear and convincing evidence that Respondent performed unnecessary legal actions that resulted in his fees being excessive.

**Count VIII – DR 3-102 – a lawyer shall not share legal fees with a nonlawyer.**

Initially, the Panel notes that Relator argued in its pretrial brief that Respondent also violated DR 2-107(A), splitting legal fees without consent. However, the complaint against Respondent did not charge such a violation, so the Panel did not review such a claim.

With respect to Count VIII, it is undisputed that EPLS is a law firm in the State of Michigan and that none of the attorneys that Respondent dealt with was licensed to practice in the State of Ohio. Accordingly, EPLS and its attorneys are properly termed “nonlawyers” for the purposes of DR 3-102. See, e.g., *Cleveland Bar Assn. v. Reed*, 94 Ohio St.3d 139, 2002-Ohio-322.

Moreover, it is also undisputed that Respondent paid EPLS fifty percent of the fees he received from each client referred to him by EPLS. Respondent testified, however, that this fee was paid for marketing and secretarial services. Specifically, Respondent asserted that after he had met with clients, EPLS was nothing more than a copying service. Again, the Panel cannot indulge in Respondent’s conclusion. Respondent did not pay EPLS like

they were a copying service. He was not charged by the hour or per page copied and printed. Rather, he split his fees in half with EPLS regardless of the respective work performed by each party. Accordingly, the Panel finds by clear and convincing evidence that Respondent violated DR 3-102.

**Count IX – DR 4-101 – a lawyer shall not reveal a confidence of his client.**

In *Fishman*, the Ohio Supreme Court was confronted with similar facts and held as follows:

“Respondent violated DR 4-101(D) by failing to reasonably protect his clients from the improper use of their confidences and secrets by associates and others whose services he engaged. Respondent facilitated the arrangement through which a client’s private information was disseminated to insurance agents whose primary purpose was to sell annuities on commission. He then obtained the client’s permission to be solicited without first exercising any real independent judgment as to whether the solicitation was for the client’s benefit. Again, despite respondent’s arguments to the contrary, this practice is simply not analogous to the use of copier or courier services, as is practical and necessary, in furthering the best interests of the client.” *Fishman* at ¶16.

In the instant matter, Respondent gave the Trotts personal information to EPLS. That information was then provided to Larry Spencer who used the information to attempt to sell insurance to the Trotts. Unlike *Fishman*, the Trotts testified that Respondent never received their permission to be solicited by Spencer. Rather, the Trotts testified that Respondent never informed them of Spencer’s role in their transaction at all. On the other hand, Respondent testified that he informed the Trotts of Mr. Spencer’s role.

Regardless of whether the Trotts were informed of Mr. Spencer’s role, there is no evidence that they consented to the release of their financial information to Mr. Spencer. Furthermore, there is no evidence in the record that the Trotts consented to being solicited by Mr. Spencer. Like the attorney in *Fishman*, there is no evidence that Respondent

exercised any professional judgment in determining whether the solicitation was in the Trotts' best interests. Accordingly, the Panel finds that Respondent violated DR 4-101 by failing to preserve the confidences of his clients.

**Count X – DR 5-101(A)(1) – a lawyer shall not accept employment without the consent of the client if his professional judgment may be affected by his business interests.**

It is undisputed that Respondent did not inform the Trotts of his contractual relationship with EPLS. Respondent also admitted that the plain language of his contract required him to use the services of EPLS to aid his clients in funding their trusts. In an attempt to avoid a conclusion that his judgment was affected by this relationship, Respondent asserted during his testimony that he ignored any provision in his contract that may have violated his ethical duties.

Assuming arguendo that the Panel accepts Respondent's statement that his contractual terms were "selectively enforced," we still find that Respondent violated DR 5-101(A)(1). Without consent, Respondent was not permitted to accept employment that "may be reasonably affected" by his business interests. In the instant matter, Respondent accepted referrals from EPLS. In exchange, he was expected to use the services of EPLS. Even if Respondent was not contractually obligated to use those services, which he was obligated to do under the plain language of his contract, such a relationship may reasonably affect his judgment. EPLS referred a substantial number of clients to Respondent. To continue this relationship, undoubtedly Respondent was expected to use the services provided by EPLS. Respondent, however, failed to get the consent of the

Trotts despite this business relationship. Accordingly, the Panel finds that clear and convincing evidence of a violation of DR 5-101(A)(1) was presented.

**Count XI – DR 6-102 – a lawyer shall not attempt to exonerate himself from liability to a client for malpractice.**

With respect to Count XI, it is undisputed that the Trotts requested a full refund from Respondent. It is further undisputed that Respondent wrote to the Trotts offering a partial refund. Specifically, Respondent’s letter stated as follows:

“I am willing to return \$500 of my fee in exchange for a full release and with the understanding that you are responsible for the remaining funding of the trust and any changes that may be needed in the future.”

In response to Relator’s charge, Respondent asserted that the term “full release” in his letter was not meant to include any liability for malpractice. Specifically, Respondent has argued that the term “full release” in the context of his letter meant a release from the future work he had promised to perform in his contract with the Trotts.

The Panel cannot agree with Respondent’s interpretation. First, we note that the Trotts sought a refund of the entire amount they had paid to Respondent. This request made it clear that the Trotts wanted no further business relationship with Respondent. Accordingly, the Panel cannot find Respondent’s position, that he needed a release from future work, reasonable.

Moreover, the plain language of the letter is at odds with Respondent’s interpretation. The above quoted portion of the letter is written in the conjunctive. Respondent agreed to refund a portion of his fees in exchange for a full release “and” with the understanding that Respondent would perform no future services. Accordingly, the

Panel cannot conclude that the term “full release” only applied to Respondent’s future services.

Accordingly, the Panel applies the ordinary definition of “full release” which would release all claims that the Trotts had against Respondent arising from his services, including malpractice claims. The Panel, therefore, finds by clear and convincing evidence that Respondent violated DR 6-102.

**Count II – DR 1-102(A)(6) – a lawyer shall not engage in any conduct that adversely reflects on the lawyer’s fitness to practice law.**

Relator asserted that the alleged conduct herein demonstrates that Respondent has engaged in conduct that adversely reflects on the lawyer’s fitness to practice law. The Panel agrees.

Throughout his relationship with the Trotts, Respondent failed to recognize the inherent conflict between his business relationship with EPLS and his duty to the Trotts. Respondent has testified that he did not disclose his contract with EPLS because it was not an issue. As noted above, however, this contract reasonably affected Respondent’s judgment and by its plain language obligated him to use EPLS to perform his duties for the Trotts. Moreover, Respondent admitted that he worked together with attorneys at EPLS to create the standard form he used for trusts. However, when questioned about EPLS, Respondent adamantly denied that EPLS performed any tasks other than marketing and copying. Respondent’s refusal to recognize the form of his business relationship with an out-of-state law firm reflects adversely on his fitness to practice law.

The testimony elicited from Respondent indicates that he testified regarding his relationship with EPLS, his contractual obligations with EPLS, and the services provided

by EPLS in a manner inconsistent with the facts in order to avoid admitting ethical violations. This seeming unwillingness to view his conduct as unethical adversely reflects on Respondent's fitness to practice law. As such, the Panel finds by clear and convincing evidence that Respondent violated DR 1-102(A)(6).

### **MITIGATION AND AGGRAVATION**

#### **Mitigation:**

The parties did not stipulate to any mitigating factors.

The Panel finds that Respondent has been licensed in Ohio since 1976 and has no prior disciplinary history. Furthermore, Respondent did eventually return the entire fee that the Trotts paid for his services. Respondent was generally cooperative with the Panel during the disciplinary proceedings and was generally remorseful for his conduct. Respondent is no longer associated with EPLS.

#### **Aggravation:**

The parties did not stipulate to any aggravating factors.

As detailed above, Respondent committed multiple violations of the ethical rules. While not actively dishonest with the Trotts, Respondent did conceal material information about his relationship with EPLS. Further, while Respondent did return the fees the Trotts had paid, he first attempt to return only a portion of those fees in exchange for a full release. It was only later in the proceedings that the Trotts received a full refund. As such, the mitigating effect of that refund is somewhat tempered.

Furthermore, while remorseful for segments of his conduct, Respondent does not seem to recognize the wrongful nature of his conduct. He has routinely described the duties performed by EPLS as purely secretarial, a description that is at odds with the facts.

He has also described his payments to EPLS as fees for marketing and copying. As noted above, however, Respondent paid EPLS a percentage of his total fee – an agreement at odds with Respondent’s description of those fees.

#### **RELATOR’S RECOMMENDATION SANCTION**

Relator has recommended that Respondent be suspended from the practice of law for one year.

#### **RESPONDENT’S RECOMMENDED SANCTION**

Respondent has advised the Panel that he would willingly accept any sanction imposed by the Panel if it does not result in an actual suspension.

#### **RECOMMENDED SANCTION**

We find that the sanction recommended by the Relator is too severe under the facts presented herein. Accordingly, we recommend a one-year suspension with six months stayed.

In *Disciplinary Counsel v. Wheatley*, 107 Ohio St.3d 224, 2005-Ohio-6266, the attorney engaged in similar misconduct and received a six-month suspension. In *Wheatley*, the attorney was found to have violated DR 2-103(C) (improperly using an organization or person to promote a lawyer’s services), DR 3-101(A) (aiding a nonlawyer in the unauthorized practice of law), DR 3-102(A) (sharing fees with a nonlawyer). Like Respondent, Wheatley engaged the services of a “financial planning” company that performed activities similar to those provided by EPLS.

In contrast, the attorney in *Fishman* received a one-year suspension. Like Respondent, the attorney in *Fishman* became involved in a business relationship with an out-of-state company. In *Fishman*, that company sold fixed annuities as opposed to the living trusts sold by EPLS. In *Fishman*, the attorney was found to have violated DR 2-103(C) (improperly using an organization or person to promote a lawyer's services), DR 3-101(A) (aiding a nonlawyer in the unauthorized practice of law), DR 3-102(A) (sharing fees with a nonlawyer), DR 4-101(D) (failing to reasonably protect client confidences), DR 9-101(A) (failing to deposit client funds in a identifiable Ohio trust account), and DR 9-102(B)(3) (failing to render appropriate accounts).

We find that Respondent's conduct falls between the conduct of the attorneys in *Wheatley* and *Fishman*. Unlike the attorney in *Wheatley*, Respondent spoke with and advised his potential clients prior to their purchase of the trust, making Respondent's conduct less egregious. However, unlike the attorney in *Wheatley*, Respondent attempted to shield himself from liability through a full release, aggravating the underlying ethical violation. Additionally, Respondent was found to have violated numerous disciplinary rules not at issue in *Wheatley*, including advertising his services with statements which misrepresented certain facts.

Similar to the attorney in *Fishman*, Respondent violated his duty of confidentiality to his client. Furthermore, unlike the attorney in *Fishman*, Respondent did not receive his client's consent to be solicited by Mr. Spencer, making his conduct more egregious in that respect. On the other hand, Respondent herein performed the initial interviews with his clients, rather than permitting a nonattorney to perform those interviews as had occurred in *Fishman*. Moreover, Respondent was not found to have improperly accounted for client

funds or to have commingled client funds in an out-of-state account like the attorney in *Fishman*.

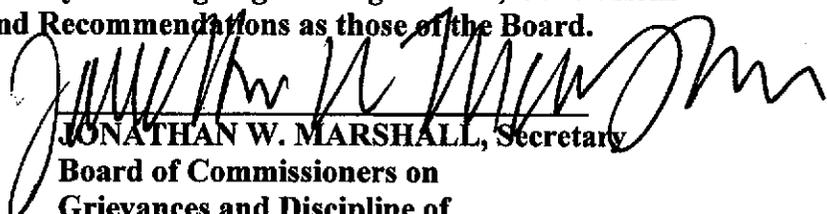
Accordingly, we find that Respondent's misconduct overall is more egregious than the conduct discussed in *Wheatley* and therefore warrants more than a six month suspension. However, we find that Respondent's conduct was not as aggravated as the misconduct in *Fishman* that led to a one year suspension.

Based on the evidence before us, the panel recommends that Respondent receive a one year suspension from the practice of law with six months stayed.

### **BOARD RECOMMENDATION**

Pursuant to Gov. Bar R. V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on June 8, 2007. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that the Respondent, Philip Brian Willette, be suspended from the practice of law for a period of twelve months with six months stayed. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.**

  
**JONATHAN W. MARSHALL, Secretary**  
**Board of Commissioners on**  
**Grievances and Discipline of**  
**The Supreme Court of Ohio**