

IN THE SUPREME COURT OF OHIO

In Re:

07-1195

Case No. 06-052

**Complaint Against
Philip Brian Willette
Attorney Registration No. 0019940**

Respondent

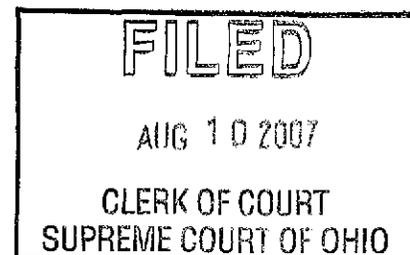
Columbus Bar Association

Relator

**Respondent's Objections to Finding of Fact, Conclusions of Law and
Recommendations of the Board of Commissioners on Grievances and Discipline of
the Supreme Court of Ohio and Memorandum in Support thereof.**

COUNSEL OF RECORD FOR RESPONDENT:

**William Mann (0024253)
Mitchell, Allen, Catalano & Boda Co.
580 S. High Street, Suite 200
Columbus, Ohio 43215
Phone (614) 224-4114**



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In Re:

**Complaint Against
Philip Brian Willette
Attorney Registration No. 0019940**

Case No. 06-052

Respondent

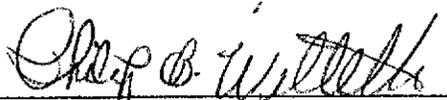
Columbus Bar Association

Relator

**Respondent's Objections to Finding of Fact, Conclusions of Law and
Recommendations of the Board of Commissioners on Grievances and Discipline of
the Supreme Court of Ohio**

For the reasons set forth in the attached Memorandum, Respondent objects to certain of the Findings of Fact, Conclusions of Law and Recommendations of the Board of Commissioners on Grievances and Discipline.

Respectfully Submitted,



Philip B. Willette, Pro se
(Supreme Court # 0019940)
9095 Cotswold Drive
Pickerington, Ohio 43147
(614) 499-1425
Respondent

COUNSEL OF RECORD FOR RESPONDENT:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the within Objections and Memorandum in Support was served upon the parties by mailing a copy thereof by ordinary U. S. Mail, postage prepaid on August 10, 2007 to :

Jonathan W. Marshall
Secretary
Board of Commissioners on Grievances and Discipline
65 Front Street
5th Floor
Columbus, Ohio 43215

Priscilla Hapner
P.O. Box 91106
Columbus, Ohio 43209

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Philip B. Willette

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IN THE SUPREME COURT OF OHIO

In Re:

**Complaint against
Philip Brian Willette
Attorney Registration No. 0019940**

Case No. 06-052

Respondent

Columbus Bar Association

Relator

**Memorandum in Support of Respondent's Objections to Finding of Fact,
Conclusions of Law and Recommendations of the Board of Commissioners on
Grievances and Discipline of the Supreme Court of Ohio.**

STATEMENT OF FACTS

This matter arose out of a complaint filed with the Columbus Bar Association ("CBA") by Mr. and Mrs. Trott against Respondent. The Trotts alleged that Respondent charged them an excessive fee for unnecessary legal services in the preparation of a revocable living trust and other estate planning documents, in violation of DR 2-106. In the course of its investigation of that allegation, the CBA broadened its investigation and alleged a number of other ethical violations, some of which Respondent has admitted and other violations which were found by the The Board of Commissioners on Grievances and Discipline ("The Board") to have been committed by Respondent. The Trott's DR 2-106

alleged violation was found by the Board not to be present. The Board reveals its overall perspective on this case in the first line of its Findings of Fact and Conclusions of Law (Appendix 1). The Board states that this case involves a “Trust mill”. Although not a legal term, “Trust mill” is used in connection with allegations of the Unauthorized Practice of Law (“UPL”). However, UPL was never an issue or allegation in this case. In fact, it is the absence of UPL that distinguishes this case from all other Ohio Supreme Court disciplinary cases cited by the Board. The Board refers to the Michigan law firm that assisted Respondent as “a Michigan company “for no apparent reason other than to maintain its Trust mill theme. The evidence in this case established that EPLS, the Michigan law firm, was earlier investigated by the Office of Disciplinary Counsel and was found not to be engaged in the unauthorized practice of law in Ohio. The Board uses the sales terms “prospect” and “selling living trusts”, which are terms associated with UPL, trust mills and their non-attorney salesmen who prey upon unsuspecting individuals. Finally, the Board mentions Larry Spencer “funding” the trust for the complaining witnesses, Mr. and Mrs. Trott, with insurance investments. As was made clear in the testimony of Respondent, and witnesses Mr. Benczkowski and Mr. Spencer, “funding” refers to the process of transferring title of existing assets owned by the client into the name of the Living Trust. The evidence in this case clearly established that Mr. Spencer had a brief telephone conversation with Mrs. Trott, never spoke to Mr. Trott, never met with the Trotts and what investment, if any, Mr. Spencer may have recommended to the Trotts (had he met with them) is pure speculation and is not evidence in this case. Respondent submits that the Board’s emphasis on the above errors

and characterizations in its Findings of Fact serves no purpose other than to support its recommended sanctions by reference to other cases where UPL was involved.

ARGUMENT

COUNT 1- DRI-102 (A) (4)

The Panel has found that Respondent violated this Disciplinary Rule as a result of omissions. While Respondent has admitted that he did not disclose the fact that he had a contract with EPLS, Respondent testified that he told the Trotts that he was using EPLS to assist with the document preparation. Mr. Benczkowski, the Michigan attorney affiliated with EPLS, testified at the Hearing of this matter that, notwithstanding the language of the one-page contract, it was agreed that Respondent was free to exercise his independent legal judgment to determine if and when the services of a funding agent, such as Larry Spencer, was needed. This testimony was not controverted by any evidence proffered by Relator. While the Trotts testified that they did not know the purpose of the meeting with Mr. Spencer, Relator has introduced evidence, supplied by the Trotts, contradicting such testimony. The letter dated October 18, 2004 from Respondent to the Trotts (marked as "Exhibit 14") asks the Trotts to have their financial records available for the purpose of funding the Trust. Therefore, there is clear and convincing evidence that the Trotts did know the purpose of assembling their financial records. Respondent testified that he told the Trotts that a funding agent would be contacting them. Respondent testified that he did not mention Mr. Spencer by name because he did not know who the funding agent would be. It appears that the Panel has confused the

“funding “of the Trust with solicitation for the sale of investment products. There is no evidence that Respondent “set up his clients as sales prospects”, but rather Respondent testified that he informed the Trotts that there would be a meeting with a funding agent to properly transfer their existing assets into the Trust. Since Mr. Spencer never met with the Trotts, Respondent cannot be held accountable for what the Panel speculated that Mr. Spencer would have done had he met with the Trotts.

COUNT III DR 2-101(A)

The panel found that Respondent violated the above referenced Rule as a result of expert testimony at the Hearing that the subject advertisements were false, misleading or not verifiable. While Respondent did not dispute such testimony or findings by the panel, the uncontroverted testimony at the Hearing by Respondent and Mr. Benczkowski of EPLS clearly established that Respondent had no knowledge, involvement or approval over the design, content or mailing of the subject advertisements, which did not mention Respondent by name. While Respondent has admitted that he engaged the services of EPLS to market his services (See Count V, below) Respondent should not be held accountable for the independent actions of EPLS that were unknown to Respondent.

COUNT IV- DR2-101(F) (1)

As with Count III, the Panel has found that Respondent has violated a Rule based on the alleged conduct of a third party. The only testimony that Relator has offered in support of this violation is the testimony of the Trotts. However, both Respondent and Mr. Benczkowski have testified at the Hearing that Ms Tolbert only called to set up

appointments after receiving a return post card and that no “solicitation” was involved. This testimony contradicts the Trotts testimony and yet the Panel states that Respondent has offered no evidence to contradict this testimony. The implication of this finding is that the testimony of Respondent and Mr. Benczkowski are not to be accepted or believed unless corroborated with a piece of physical evidence, i.e., a return post card. The weight of the evidence falls on the side of Respondent and the Panel should have found that this violation was not present.

COUNT VII- DR 2-106

The Panel found that Respondent did not charge a clearly excessive fee or charge for unnecessary legal work. It is important to mention that this Count was the only allegation that the Trotts charged in their Complaint with Relator. All other Counts were developed by Relator during its investigation and are not based on any complaints from the Trotts or any other client of Respondent.

COUNT IX- DR4-101

The panel has found that Respondent violated this Rule as a result of providing confidential information about the Trotts to EPLS and Larry Spencer. With respect to EPLS, providing client information to a third party for the purpose of assisting with document preparation is a permitted exception. As there was uncontroverted testimony from Respondent and Mr. Benczkowski that the Trotts personal information was provided to EPLS for the purpose of document preparation, such actions are not a violation of this Rule.

As far as Mr. Spencer is concerned, there is no testimony or other evidence to support the allegation that Mr. Spencer had any information about the Trotts, confidential or otherwise, other than the Trotts name, address and telephone number, all of which is public information. Due to a lack of any evidence, this Count IX clearly should have been dismissed.

COUNT XI –DR 6-102

The Panel found that Respondent violated this Rule solely on the basis of a sentence in Respondent's letter to the Trotts that referred to a "full release". The Panel found that full release includes malpractice claims and that therefore Respondent is guilty of attempting to release himself from malpractice claims. The Panel made this finding notwithstanding the remaining part of the sentence and the testimony of both Respondent and the Trotts that no litigation was contemplated and that there was any thought or concern about malpractice claims. The Trotts testified that they were being represented by attorney Constance Sharma at the time that the Trotts asked for a refund and when Respondent wrote the letter to the Trotts. The Trotts existing legal representation should have been taken into consideration and given weight in Respondent's favor. Moreover, Respondent testified that the language referred only to release from his contract with the Trotts, as is stated in the letter and this testimony was not contradicted by the Trotts. The Panel has lost sight of the fact that the Trotts wanted a refund based on their unfounded allegation that the legal services provided by Respondent were unnecessary and that Respondent charged an excessive fee. Since that allegation is the only allegation charged that could

have given rise to a malpractice claim, and the Panel has found that this allegation was unfounded (Count VII), Count XI likewise should have been dismissed.

COUNT II- DR 1-102(A) (6)

The Panel has found several violations and Respondent has admitted several additional violations of the Disciplinary Rules. The Board points out in its discussion of this Count that Respondent made conflicting statements regarding the work performed by EPLS. Respondent has testified that he worked with EPLS on the drafting of the language of the estate planning documents. Respondent also testified that he paid EPLS for marketing and word processing services. There is no conflict between those statements. What the Board failed to mention is that Respondent did not pay EPLS for drafting changes to the estate planning documents requested by Respondent. The statements are “apples and oranges” and there is no inconsistency in Respondent’s testimony on this matter.

While Respondent disagrees with several of the Panel and Board’s findings of violations, such disagreement should not be held against Respondent in the form of a finding of a violation of DR1-102(A)(6). Respondent is entitled to put forth his defenses and has given testimony under oath which is entitled to be believed. Finding that Respondent has committed a violation of this Disciplinary Rule when he does not admit, in good faith, to the truth of the violations that are subsequently found to exist by clear and convincing evidence has a chilling effect on the disciplinary process and should not be permitted.

There is a difference between a frivolous defense and a good faith defense. The facts in this case and Respondent’s testimony do not support the finding by the Board that a

violation of DR1-102(A) (6) exists as a result of Respondent's unwillingness to admit all violations charged.

MITIGATION AND AGGRAVATION

The Board failed to mention that three witnesses appeared on behalf of Respondent at the Hearing and testified as to Respondent's good character and fitness to practice law. The Board failed to mention that Respondent met with attorney Geoffrey Stern for a series of counseling sessions on ethical issues and questions similar to those at issue in this case. Mr. Stern, in his November 2, 2006 letter (attached as Exhibit 2 to Mr. Stern's deposition submitted as evidence in this case), states,

“ I believe that the consultations with Mr. Willette were mutually productive , that he became acquainted with the larger picture of the issues that might be involved in this case, that he appreciates the professional and ethical responsibilities of an attorney involved in estate planning... and that , at no time, does it appear that he put matters of his own interest ahead of his clients or the legal system...his professionalism and solid intentions towards clients and the legal system are quite clear to me.”

Respondent submits that such consultation and the above quoted statement from Mr. Stern be accepted as a mitigating factor and in support of Respondent's good character and fitness to practice law.

As far as Aggravating factors are concerned, the Board found it necessary to mention that Respondent did not immediately refund the legal fees to the Trotts, and that this “tempered” the mitigating effect of the refund. The Board finds that Respondent provided

value to the Trotts for his legal fee (Count VII) and yet he is criticized for not refunding that fee quick enough. The Board does not mention that Respondent had no reason to return his legal fee to the Trotts at any time in light of the Board's findings under Count VII that the legal services provided to the Trotts had value and that there was no excessive fee.

RECOMMENDED SANCTION

The Board recommends a suspension of 12 months with 6 months stayed. The Respondent has recommended a Public Reprimand. While the panel states that Respondent would accept any sanction that did not result in actual suspension, such discussions were off the record and were only offered to the Relator during settlement discussions during a break in the Panel Hearing.

The cases, **Cincinnati Bar Association v. Heisler 13 Ohio St. 3d 447**, and **Columbus Bar Association v. Fishman 98 Ohio St. 3d 172** are cited by the Board as being the cases closest to the violations committed by Respondent. Respondent submits that the more recent 2007 Supreme Court cases of *Cincinnati Bar Association v. Heisler*, 113 Ohio St. 3d 447 and *Disciplinary Counsel v. Kramer* 113 Ohio St. 3d 455 both of which imposed a stayed suspension are more indicative of the sanctions that are appropriate in this case. However, in all of the above cited cases, the Unauthorized Practice of Law was found to exist. Such UPL is not involved in this case. The Board mentions in its finding that Respondent attempted to relieve himself from malpractice and engaged in misleading advertising as factor not present in the *Fishman* and *Wheatley* cases. However, in weighing wrongdoing, Respondent submits that assisting a non-lawyer in the

unauthorized practice of law is a much more serious offence causing greater harm to clients than the violations found by the Board which did not cause any harm to the Trotts. The DR 2-101(A) and DR 2-101(F)(1) violations that were found by the Board were committed by third parties and attributed to Respondent even though Respondent testified that he has no knowledge of the facts that gave rise to the violations. Respondent submits that it is not the number of violations but rather the nature of those violations that should be given the greater weight.

In **Disciplinary Counsel v. O'Neill** 103 Ohio St. 3d 204, this Court stated that the primary purpose of disciplinary sanctions is not to punish the offender but to protect the public. It has been over two years since any of the violations occurred and Respondent has not been involved with the Michigan law firm since then. Respondent has practiced law for over 30 years and the Trott's DR 2-106 complaint (which was found not to have merit) was the first time that Respondent has had a complaint filed against him by a client in any forum. Respondent sincerely apologizes for the misconduct that he did commit. Respondent asks this court to impose a Public Reprimand in light of the more recent **Heisler** and **Kramer** cases and the unique facts in this case that weigh in favor of a lesser Sanction than that recommended by the Board.

STATEMENT OF NECESSARY EXPENSES

The Board has asked that expenses totaling \$7,019.48 be taxed to Respondent.

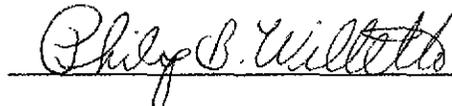
Respondent objects to the suggested reimbursement to the CBA of \$2,953.51. Neither the CBA nor the Board has provided Respondent with an itemization of these claimed

expenses. However, the CBA initiated its investigation and expended considerable time and expense attempting to prove that Respondent violated DR 2-106. As this allegation was not found to have merit, Respondent asks this Court not to tax any expenses from the CBA to Respondent.

COUNSEL OF RECORD

This Memorandum has been prepared and submitted by Relator rather than William Mann, Esquire, Counsel of Record, for financial reasons. Relator has expended substantial funds in legal fees and expenses defending himself in this case and can no longer afford to do so. Mr. Mann continues as Counsel of Record and will represent Respondent in oral argument before this Court at the Hearing of this case.

Respectfully Submitted:

A handwritten signature in cursive script, reading "Philip B. Willette", is written over a horizontal line.

Philip B. Willette
Supreme Court # 0019940
9095 Cotswold Drive
Pickerington, Ohio 43147
(614) 499-1425
RESPONDENT

APPENDIX

Appendix 1

Order to Show Cause

Appendix 2

**Findings of Fact, Conclusions of Law and
Recommendation of the Board of Commissioners on
Grievances and Discipline of the Supreme Court of
Ohio**

The Supreme Court of Ohio

JUL 24 2007

CLERK OF COURT
SUPREME COURT OF OHIO

Columbus Bar Association,
Relator,
v.
Philip Brian Willette,
Respondent.

Case No. 2007-1195

ORDER TO SHOW CAUSE

The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio has filed a Final Report in the office of the clerk of this court. This Final Report recommended that pursuant to Rule V(6)(B)(3) of the Supreme Court Rules for the Government of the Bar of Ohio the Respondent, Philip Brian Willette, Attorney Registration Number 0019940, be suspended from the practice of law for twelve months with six months stayed. The Board further recommends that the costs of these proceedings be taxed to the respondent in any disciplinary order entered, so that execution may issue. Upon consideration thereof,

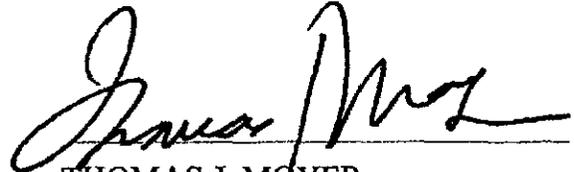
It is ordered by the court that the respondent show cause why the recommendation of the Board should not be confirmed by the court and the disciplinary order so entered.

It is further ordered that any objections to the findings of fact and recommendation of the Board, together with a brief in support thereof, shall be due on or before 20 days from the date of this order. It is further ordered that an answer brief may be filed on or before 15 days after any brief in support of objections has been filed.

After a hearing on the objections or if no objections are filed within the prescribed time, the court shall enter such order as it may find proper which may be the discipline recommended by the Board or which may be more severe or less severe than said recommendation.

It is further ordered, sua sponte, that all documents filed with this court in this case shall meet the filing requirements set forth in the Rules of Practice of the Supreme Court of Ohio, including requirements as to form, number, and timeliness of filings and further that unless clearly inapplicable, the Rules of Practice shall apply to these proceedings.

It is further ordered, sua sponte, that service shall be deemed made on respondent by sending this order, and all other orders in this case, by certified mail to the most recent address respondent has given to the Office of Attorney Registration and CLE.



THOMAS J. MOYER
Chief Justice

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

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*.

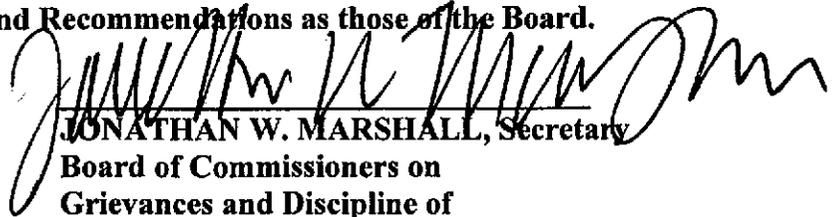
Accordingly, we find that Respondent's misconduct overall is more egregious than the conduct discussed in *Wheatley* and therefore warrants more than a six month suspension. However, we find that Respondent's conduct was not as aggravated as the misconduct in *Fishman* that led to a one year suspension.

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