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I. INTRODUCTION

Following a two-day evidentiary hearing, the Board of Commissioners on Grievances and Discipline (the “Board”) found that Respondent had violated ten rules of professional conduct and recommended that he be suspended for one year (with six months stayed) based on (i) Respondent’s contractual relationship with a Michigan law firm, Estate Planning Legal Services (“EPLS”), (ii) the improper marketing and sale of living trusts to Grievants and others on Respondent’s behalf, (iii) Respondent’s arranging for the introduction of an insurance broker to Grievants and other clients without full disclosure (a) of Respondent’s or the broker’s relationship with EPLS, (b) of the broker’s intent to sell Grievants life insurance or annuities, or (c) of Respondent’s contractual obligation to introduce the broker; and (iv) Respondent improperly seeking to exonerate himself by conditioning a partial refund on Grievants’ providing him with a “full release.” Respondent objects to the Board’s findings by arguing that the violations were not supported by sufficient evidence and that his violations were not very serious because they did not involve assisting in the unauthorized practice of law (“UPL”). The CBA will refute each of these contentions below in the same order in which Respondent raised them.

II. STATEMENT OF FACTS

The Grievants in this case are Dr. B. Dale Trott and his wife, Betty. Dr. Trott is a semi-retired scientist who has worked at Battelle Memorial Institute since 1966. (Tr. 1, pp 19-20). His current job title is Senior Research Scientist.¹ (Tr. 1, p. 19). Dr. Trott earned his Bachelors and Masters degrees from Rensselaer Polytechnic Institute and his Ph.D in metallurgical engineering from the University of Illinois, but has not been trained in estate planning or probate

¹ As a Research Scientist, he works with energetic materials (like explosives and propellants) which are used in warheads, internal ballistics of guns, and blast containment, etc. One of his career achievements was the development a portable chamber for the safe transport of terrorist bombs. (Tr. 1, pp. 20, 43).

law. (Tr. 1, pp. 20-21, 55). He is currently 73 years old. (Tr. 1, p. 21). Betty Trott holds a Bachelors in Arts from Penn State University and is currently 73 years old. (Tr. 1, pp. 62-63). Grievants reside in Franklin County. (Tr. 1, p. 19).

Respondent began practicing law in 1976. (Tr. 1, p 234; Tr. 2, p. 26). For the majority of his career, he has served as general inside counsel to a number of companies and has been a solo practitioner since 2003 (although he periodically engaged in a general practice for approximately nine years before 1994). (Tr. 1, pp. 234-36). His home and office are located in Pickerington, Ohio. In early 2004, Respondent was exploring the internet and came upon an advertisement by EPLS, a Michigan law firm that was seeking attorneys in Ohio interested in estate planning. (Tr. 1, pp. 102, 130). He visited the EPLS office in Troy, Michigan and met with its managing partner, Renald Benczkowski. (Tr. 1, pp. 102-03).

EPLS is a trade name for the solo law practice of Benczkowski. (Tr. 1, p. 123-24).² Benczkowski provided Respondent – like other inquiring attorneys – a packet of information which included examples of (1) direct mail solicitations which EPLS directed to homeowners over the age of 55 in Michigan and Ohio with assets in excess of \$50,000, (2) EPLS’s standard contract with participating attorneys and (3) its standard living trust agreement which is “customized” to each client’s needs. (Tr. 1, pp. 132-33, 203). Benczkowski explained to Respondent that EPLS purchased lists of target individuals from wholesalers. (Tr. 1, pp. 15, 190). EPLS then contracted with Estate Information Services (“EIS”) – a corporation owned solely by Bryan Spencer³ – to have direct mail solicitations mailed to individuals on the lists and

² Benczkowski testified that it is permissible to use a trade name in Michigan, unlike Ohio. (Tr. 1, p. 169).

³ Bryan Spencer is a business partner of Benczkowski and jointly owns (along with Bryan’s father, Larry Spencer, and a few other individuals) the building in which the offices of EIS, EPLS and Secure Investors (the business owned by Larry Spencer where Bryan also works as an

to have EIS telemarketers contact individuals about the benefits of living trusts over probate. (Tr. 1, pp. 124-26). Although the direct mail pieces and telemarketing scripts were initially drafted by EIS, they were not used until they have been approved by EPLS and its affiliated attorneys, including Respondent. (Tr. 1, pp. 143-48). Benczkowski personally trained the eleven EIS telemarketers in how to present the information and respond to questions so as to convince the targets that they needed to meet with an estate planning attorney. One of those telemarketers was named Janice Tolbert. (Tr. 1, pp. 127-29, 142-43). EIS was paid \$495.00 by EPLS for each client which ultimately retained EPLS and/or its affiliated attorneys (such as Respondent). (Tr. 1, pp. 126-27).

Respondent met with Benczkowski on February 17, 2004, reviewed this Court's *Fishman* decision, and signed a contract with EPLS which provided, among other things:

That WILLETTE will use EPLS as his sole and exclusive agent for the marketing, sale and preparation of an Estate Planning Package (Revocable Living Trust, Guardianship, Durable Power of Attorney, Pour-over Will, etc. . .) for any clients referred to WILLETTE by EPLS in the State of Ohio.

That WILLETTE will interview the clients at his office or the Clients' home, prepare any necessary deeds relating to the Trust, prepare any future deeds relating to the Trust if Clients acquire more property, forward the appropriate information to EPLS for processing of the Clients' Estate Documents

That WILLETTE will pay EPLS the sum of Six Hundred Ninety Five dollars (\$695.00) per Clients' application as a marketing and document preparation fee. Said fee is due at the time that EPLS receives the Clients' completed application form.

At no time shall WILLETTE offer any financial advice to the Clients regarding the funding of said Trusts. All funding of the Trusts, except for Quit Claim Deeds, is the responsibility of EPLS. Any violation of this restriction will result in an immediate Breach of Contract by WILLETTE and severance of the parties' relationship. WILLETTE will also be liable to EPLS for actual damages, costs, and attorney fees caused by said Breach of Contract.

(Tr. 1, p. 103-04; Tr. 2, 113; Ex. 10).

employee) are located. (Tr. 1, pp. 153, 124-26, 162). Secure Investors is responsible for meeting with clients to discuss the financial aspects of the trusts created by EPLS. (Tr. 1, p. 162).

In early October 2004, Tolbert telephoned Grievants and convinced them to meet with Respondent. (Tr. 1, pp. 22-23, 64-65, 151-52; Tr. 2, p. 38). Respondent met with Grievants on October 16, 2004 to gather information, provided that information shortly thereafter to EPLS to prepare their trust documents, received completed trust documents from EPLS and finally provided these documents to Grievants on October 28, 2004 while they passed out candy on their front porch to trick-or-treating children. (Tr. 1, 54, 74, 112, 118, 121, 208-09; Tr. 2, p. 31). He also told Grievants that another person (who turned out to be Larry Spencer) would visit them to act as the second witness of their signatures and explain the financial aspects of the trust. (Tr. 1, pp. 29, 73, 79). Respondent did not explain that Spencer was an insurance broker paid solely on commission or that he was required to recommend Spencer to them pursuant to his contract with EPLS. (Tr. 1, 29, 30, 80). When Grievants became suspicious after being contacted by Spencer, they ultimately demanded a refund from Respondent, who in turn offered a partial refund in exchange for a "full release." (Tr. 1, pp. 31-33, 36-38, 82-87; Ex. 9).

III. ARGUMENT

A. Respondent was dishonest with Grievants in violation of DR 1-102(A)(4) when he failed to disclose information about his obligations to EPLS and Spencer before he arranged for Grievants to meet with Spencer and for EPLS to prepare their trust documents in exchange half of the legal fees they paid him.

The Board found that Respondent violated DR 1-102(A)(4) first by not informing Grievants that he had a contractual arrangement with EPLS which required him to use EPLS to complete the trust documents and to fund the trusts and also by not informing Grievants of the true role and intent of Larry Spencer (the insurance broker used by EPLS). (Bd. Op. at 2-4; Tr. 1, pp. 28-29, 50, 73, 78-80, 192, 210-13, 223-25). Respondent admits that he did not disclose to Grievants his contractual relationship with EPLS or mention EPLS by name. (Resp. Mem. at 5;

Tr. 1, p. 224).⁴ Although Respondent contends that he was free to ignore the EPLS contract, Ren Benczkowski, the managing partner of EPLS, testified that he considered the contract to be enforceable. (Tr. 1, pp. 131-32).

Respondent argues that the Board erred because he testified that he had informed Grievants that he was using a Michigan law firm “to assist with the document preparation.”⁵ However, the Board was clearly permitted to place greater emphasis on contradictory and unbiased testimony from Grievant, Dr. Dale Trott:

- 11 Q. Did he tell you that -- Well, at that
12 meeting, did he mention anything about the law
13 firm in Michigan called Estate Planning Legal
14 Services?
15 A. No.
16 Q. Did he say anything about having a
17 contract with Estate Planning Legal Services?
18 A. No.
19 Q. Did he say anything about him being
20 required by this contract to refer you to this
21 other individual?
22 A. No.

(Tr. 1, p. 28-30). Mrs. Trott testified likewise. (Tr. 1, p. 78).

Respondent also argues the Board confused the funding of the trust with solicitation of insurance products and erred because “[t]here is no evidence that [he] ‘set up his clients as sales prospects’ when he arranged for Grievants to meet with Spencer without telling them of Spencer’s intent to sell them insurance products. (Resp. Mem. at 6). However, both Respondent and Grievants testified otherwise. When asked about what Respondent had

⁴ Respondent freely admitted that he never told any of his clients that he had a contract with EPLS or that he paid any fees to EPLS. (Tr. 1, p. 224). As Benczkowski testified, “they [i.e., the clients] shouldn’t have even known we [i.e., EPLS] were there.” (Tr. 1, p. 192-93).

⁵ Respondent even suggested that Grievants should have known about EPLS by name because its name was at the top of the intake form he completed while gathering their financial information. (Tr. 2, p. 119-20; Tr. 1, p. 119).

explained to them about Larry Spencer, the insurance broker that Respondent arranged for Grievants to meet, Dr. Trott testified as follows:

- 15 Q. Did he mention that the individual was an
16 insurance broker?
17 A. Definitely did not.
18 Q. Did he mention that the individual would
19 try to sell you insurance or annuities?
20 A. Definitely did not.

(Tr. 1, p. 29-30, 50). In fact, Respondent engaged in dishonesty when he emphasized to Grievants that this person -- Spencer -- needed to act as the second witness for their signatures on the trust documents and discuss the financial aspects/funding of the trust when Respondent's actual motivation was to introduce them to Spencer (or one of his employees) for purposes of evaluating their investment portfolio and recommending alternative investments. (Tr. 1, pp. 79-80, 82-84; Tr. 2, pp. 85-90, 210-12).

When questioned by the panel, Respondent testified that:

- 23 Q. I'm left with the impression from the
24 overall testimony, however, that in most instances
25 you or someone from EPLS suggested that this
1 second signature was necessary and that
2 Mr. Spencer was to obtain that second signature.
3 Am I way off base?
4 A. Well, I think you are a little bit. That
5 was part of the reason, but the main reason was
6 the funding. That was something that
7 Mr. Benczkowski was concerned with. I wasn't
8 familiar, and still am not, with a lot of
9 different financial instruments, reading insurance
10 policies. There's so many variables.
11 The main reason, the overriding reason,
12 was the funding. I saw from the beginning it was
13 very necessary. The trust means nothing if it's
14 not funded properly.

....

- 1 Q. How did the subject come up? Did you say
2 that a second individual would be coming to
3 provide a second signature?
4 A. To do the funding and provide a second

5 signature, yes.
6 Q. So, in fact, you did tell the Trotts that
7 there was a dual purpose for that individual
8 coming?
9 A. Yes. A three-fold purpose for them, yes.
10 Q. Let's not talk over each other.
11 A. I'm sorry.
12 Q. In fact, you told the Trotts, Mr. and
13 Mrs. Trott, that there was a dual purpose for the
14 second person coming and that was, one, to fund
15 the trust, and, two, to provide the second
16 signature; am I correct?
17 A. Yes, your Honor. There was a third
18 purpose, too.
19 Q. And that is?
20 A. That third purpose was to get a second
21 opinion on their brokerage account. And they did
22 not tell me they didn't want that.⁶

(Tr. 2, pp. 85-88) (emphasis added). Notwithstanding these three purported reasons (i.e., (1) second signature, (2) funding the trust and (3) financial advice) for introducing the Grievants to Spencer (or one of Spencer's employees), Respondent admitted that a second witness is not legally required and that he had already partially funded the Trotts' trust before he left them on October 28, 2004. (Tr. 1, p. 75; Tr. 2, pp. 85-88, 93, 97, 135). Therefore, the only genuine motivation for Respondent introducing Spencer (or one of Spencer's employees) to the Grievants was to provide the Grievants with financial advice and sell them insurance. Yet, Grievants convincingly testified that Respondent never mentioned this to them.

Contrary to the protestations in his Objections, Respondent was aware that Spencer would travel to Columbus from Detroit in order to attempt to sell insurance products to the Grievants and would be compensated for his efforts only with a sales commission by an

⁶ The Grievants deny that Respondent ever mentioned this motivation to them. Otherwise, they would have declined because they were satisfied with their current financial advisor. (Tr. 1, pp. 29-30, 80-84; Ex. 1).

insurance company. (Tr. 1, p. 213).⁷ However, as the Grievants testified and Respondent admitted, he never told them that Spencer (or his employees) were insurance brokers or would attempt to sell them insurance products:

1 Q. Did you tell them that the person would
2 be an insurance broker?

3 A. I said that they were the financial
4 consultant.

....
18 Q. But I think my question was: Did you
19 tell them they would try to sell them insurance or
20 annuities?

21 A. I think I just testified what I would
22 have told them.

23 Q. So that's a "no"?

24 A. That is no.

....
8 Q. Did you ever tell the Trotts that your
9 contract with Estate Information Services [sic] required
10 you to refer them to a funding agent or individual
11 chosen by Estate Information Services [sic]?

12 A. No.

....
11 Q. You were aware that he would sometimes
12 sell annuities or life insurance to clients you
13 introduced him to?

14 A. If it was appropriate, yes.

15 Q. Were you aware that Mr. Spencer was
16 compensated, if at all, only by insurance
17 companies on a commission basis?

18 A. Yes.

(Tr. 1, pp. 210-11, 213). Respondent never introduced Spencer to his clients who had *not* been referred by EPLS. (Tr. 2, p. 68).

⁷ Because Spencer was "unavailable" at the hearing, his deposition previously filed with the Board on March 15, 2007 was submitted by stipulation pursuant to R.Civ. P. 32 and R. Evid. 804(B)(1). (Tr. 1, p. 243). Spencer testified in his deposition that he or his employees visited clients of EPLS and/or Respondent in Ohio and were paid a commission only if he sold insurance or annuities. (Spencer Tr. 18-19, 22-23, 27). He had sold insurance to 50 clients of EPLS and/or Respondent in Ohio and his employee, Mike Cave, sold to another 20-25 such clients. (*Id.* at 21, 25-29). Respondent never stayed for Spencer's meetings with these clients. (*Id.* at 26). Spencer left it to Respondent to explain their relationship. (*Id.* at 28-29). As shown above, Respondent never did so.

Even in the notorious *Fishman* case, the attorney informed the clients that the funding agent was an insurance salesperson. *Columbus Bar Association v. Fishman*, 98 Ohio St.3d 172,173, 174, 2002-Ohio-6726. In other cases, the attorney was excused from his failure to obtain informed consent because he did not know that insurance salespeople would attempt to solicit his clients. *Discip. Counsel v. Wheatley*, 107 Ohio St.3d 224, 232, 2005-Ohio-6266 at ¶ 31; *Cincinnati Bar Ass'n v. Heisler*, 113 Ohio St.3d 447, 2007-Ohio-2338, at ¶ 13 (same).

Finally, Respondent also asserts that that the Board erred because Exhibit 14 purportedly supports his assertion that the Grievants were informed of Spencer's true role before meeting with him. However, Exhibit 14 is a telemarketing script used by EIS/EPLS and there was no October 18, 2004 letter admitted as an exhibit at the evidentiary hearing in this matter.

In this case, Respondent was admittedly aware that Larry Spencer and his employees would attempt to solicit sales from Respondent's clients, yet he said nothing to these clients about the possibility before obtaining their agreement to meet with Spencer. He also said nothing to them about him being required to recommend Spencer by his contract with EPLS. Similarly dishonest omissions have been found to violate the disciplinary rules. *Disciplinary Counsel v. Zingarelli*, 89 Ohio St.3d 210, 218, 2000-Ohio-140 ("Although respondent's suspension order did not specifically instruct him that he had a duty to inform persons other than current clients and opposing counsel of his suspension, respondent did have a professional responsibility to provide accurate and honest information regarding the status of his law license."). Because sufficient evidence supports the Board's finding, each of Respondent's arguments to the contrary lack merit and should be overruled.

B. Respondent violated DR 2-101(A)(4) when he contracted with EPLS to market his legal services and EPLS made misleading and/or unverifiable public statements during that marketing campaign.

The Board concluded that Respondent violated DRs 2-101(A) through the direct mail utilized by EPLS and its marketing arm, EIS, on Respondent's behalf. (Bd. Op. at 4-5). While Respondent does not dispute that the direct mail pieces were misleading and/or unverifiable and that he engaged EPLS to market his services, he argues that he should not be held responsible because he was not actively involved in those marketing efforts on his behalf. However, as demonstrated below, there was clear and convincing evidence to the contrary.

First, Benczkowski testified that Respondent was shown samples of the direct mail pieces before he signed the contract with EPLS and had the opportunity to review and revise the direct mail and other marketing pieces before they were utilized. (Tr. 1, pp. 122, 132, 144-48, 153-61). This fact was further supported by Respondent's admission that he visited EPLS at least six times in 2004-05 (at which time he could have reviewed the telemarketing scripts and marketing pieces as Benczkowski testified). (Tr. 1, pp. 110, 144-49, 154-56, 159, 202, 203-04). Moreover, although Respondent disputed Benczkowski's deposition testimony, he admitted that he saw some of the EPLS direct mail pieces beginning at least as early as March 2005 (when the EPLS postcards were returned to a post office box in Pickerington, Ohio (where Respondent lives) instead of Troy, Michigan where EPLS and EIS are located). (Tr. 1, pp. 215-16, 222-23; Tr. 2, pp. 4, 66, 126, 128-30, 132-33).

In any event, Respondent testified that he never asked to see the direct mail pieces even though he knew that they were being mailed on his behalf. (Tr. 1, pp. 215-16, 218-19, 220; Tr. 2, p 66). His testimony on these points simply was not credible:

- 23 Q. If you could turn to Exhibit 2. Had you
24 ever seen this exhibit before?
25 A. Not until after this case had been filed.

1 Q. Have you seen anything like this before?

2 A. No.

....
6 Q. So you never saw any of the direct mail
7 pieces?

8 A. No, not until later.

....
14 Q. Did they ever show you any of the direct
15 mail pieces that they were sending out?

16 A. No.

17 Q. Never?

18 A. Not until I saw them on my own when I
19 picked them up at the post office box.

20 Q. Okay. **So you were aware that they were**
21 **sending them out?**

22 A. Yes.

....
10 THE WITNESS: The postcards were sent to
11 a post office box in Pickerington, but it wasn't
12 my box. It's an EPLS box.

13 BY MS. HAPNER:

14 Q. **But Estate Information Services, which is**
15 **located in Troy, Michigan, got a post office box**
16 **in Pickerington, Ohio, near your law office?**

17 A. They have a post office box in
18 Pickerington, Ohio, yes.

19 Q. **And are you the one who would pick up the**
20 **mail?**

21 A. **Only if they asked me to.**

22 Q. And you would pick up the postcards and
23 mail them back to Estate Planning Legal Services?

24 A. Yes.

25 Q. Did you review the postcards?

1 A. **That's when I first reviewed the**
2 **postcards, yes.**

....
5 THE WITNESS: In March of 2005, I was
6 asked to help EPLS set up a post office box in
7 Pickerington, Ohio under the name of EPLS and they
8 asked me to **occasionally, once a week**, go to the
9 P.O. Box and if there were any postcards in there,
10 to mail them to them. They said it would be **more**
11 **efficient**. They were having trouble to get a
12 **quick turnaround** the way they were doing it before
13 I didn't recall getting into detail about it.

- 4 Q. I believe you testified this morning that
5 the first time that you ever saw the cards that
6 EPLS was mailing out to individuals on your behalf
7 to market your legal services was around March of
8 2005; is that correct?
9 A. That's the first time I really read it,
10 yes.
11 Q. Okay. You had never tried to supervise
12 their activities before that time?
13 A. No.
14 Q. Did you keep any copies of any of the
15 mailings or the postcards that were delivered to
16 the Pickerington post office box after that time?
17 A. No.

(Tr. 1, pp. 215-18, Tr. 2, pp. 43, 66-68) (emphasis added).⁸ He then testified that he asked EPLS to mail different marketing letters on his behalf which he drafted himself in May 2005. (Tr. 1, pp. 221-22, Tr. 2, p. 44). However, he did not keep or produce a single copy of this self-drafted marketing letter, even though he had received a copy of the grievance against him from CBA in April 2005. (Tr. 1, pp. 221-22; Tr. 2, pp. 43, 66-68; Ex. 1). Respondent also continued receiving referrals and postcards from EPLS until August 2005 even though he had admittedly known since March 2005 that their marketing pieces did not comply with Ohio rules. (Tr. 2, pp. 27, 43, 126-29).

Respondent cannot avoid responsibility for the actions of EPLS when he knew that it was engaged in marketing on his behalf, he at best took no action to supervise those actions, he eventually became aware of their impropriety no later than March 2005 and he continued to accept the fruits of those improper efforts. DR 1-102(A)(2) provides that a lawyer, such as Respondent, cannot circumvent a disciplinary rule through the actions of another, such as EPLS or EIS. If his willful ignorance defense were allowed to prevail, Ohio attorneys could flout the

⁸ Needless to say, it makes no sense that it would be “quicker” or “more efficient” for EPLS to get the mail returned if the direct mail responses were mailed to Pickerington, Ohio and only returned by Respondent to EPLS in Troy, Michigan once each week.

Disciplinary Rules with impunity by merely delegating their obligations to others and then refuse to properly supervise or monitor those activities. In any event, Respondent also testified that after he became aware of the misleading mail pieces in March 2005, he continued to accept client referrals from EPLS for another five months.

C. Respondent violated DR 2-101(A), (C), and (F)(1) when he contracted with EPLS to promote his legal services and EPLS contracted with telemarketers on Respondent's behalf who telephoned Grievants to promote estate planning and solicit work for Respondent.

The Board found that Respondent violated DR 2-101(F)(1) when EIS employee Janice Tolbert solicited the Grievants by telephone to retain Respondent for estate planning services. (Bd. Op. at 5-6). Respondent now argues that the Board erred in crediting the testimony of the Grievants over him and Benczkowski on this issue.

The evidence provided at the hearing showed that sometime in early October 2004, Mrs. Trott received a telephone call from Tolbert, who attempted to engage Mrs. Trott in a discussion of her finances, concerns about Medicare/Medicaid and estate planning needs. Mrs. Trott refused to discuss those matters and referred Tolbert to Dr. Trott at his Battelle office. (Tr. 1, pp. 22, 64-65; Ex. 1). Tolbert then telephoned Dr. Trott and attempted to engage him into a discussion of his finances and estate planning needs. He informed her that he was not interested in that he already had a will and a good financial advisor, but would appreciate receiving information about how to shield his assets from being depleted through Medicare or Medicaid. Tolbert informed him that she could set up an appointment with him to meet with an Ohio attorney who could explain how estate planning could protect his assets from being depleted by these government programs. It was for this reason – and this reason alone – that Dr. Trott agreed to meet with Respondent.

Neither Dr. Trott nor Betty Trott completed or returned any direct mail solicitation requesting information about estate planning or to be called by a solicitor and Respondent concedes that they told him as much when they first met. (Tr.1, pp. 22-23, 65, 151-52; Tr. 2, p. 63). Admittedly, neither EPLS nor Respondent have produced any postcard that the Trotts signed and returned to EPLS inviting Tolbert's call. (Tr. 1, pp. 151-52; 230-31).

When the Trotts met with Respondent on October 16, 2004 and explained that their only interest in meeting with him was to learn how they could prevent the depletion of their assets from Medicare/Medicaid, he indicated that Tolbert never should have made such a representation and denied that he could assist them in that area. (Tr. 1, p. 25-27, 66, 226-27; Ex. 1). In fact, when he presented them with his previously prepared, "standard" engagement letter, it expressly disclaimed his ability to protect their assets from Medicaid. (Tr. 1, p. 27; Ex. 5). Although Respondent denies knowing that Tolbert was making these misrepresentations regarding Medicaid, he only began using this form of engagement letter after he began receiving clients from EPLS. (Tr. 1, p. 116-17, 222).

Respondent contends that he was unaware that EPLS relied on telemarketers to obtain clients on his behalf. In contrast, Benczkowski testified that he and EIS prepared marketing scripts (which were not used until they had been approved by EPLS and its affiliated attorneys, including Respondent). (Tr. 1, pp. 143-48; Exs. 13, 14). Benczkowski personally trained the eleven EIS telemarketers -- including Tolbert -- in how to present the information and respond to questions so as to convince the targets that they need to meet with an estate planning attorney. (Tr. 1, pp. 127-29, 142-43).

In light of this evidence, the Board did not err in crediting the testimony of Grievants (who had first hand knowledge of whether they returned a postcard inviting Tolbert's call) over that of Respondent and Benczkowski (who did not have first-hand knowledge of whether the

Grievants completed and returned a postcard to EPLS). Moreover, as discussed above, Respondent cannot avoid responsibility because he did not personally solicit the Grievants. See *Cincinnati Bar Ass'n v. Rinderknecht*, 79 Ohio St.3d 30, 32, 1997-Ohio-309.

D. Respondent violated DR 4-101(B) when he shared confidential financial and estate planning information about Grievants to EPLS without their knowledge or express consent so that EPLS could, among other things, arrange for an insurance broker to solicit Grievants which was not in the Grievants' best interests.

The Board found that Respondent violated DR 4-101(B) by sharing the Trotts' confidential financial information and social security numbers with EPLS without their knowledge or express consent and that EPLS shared this information with Larry Spencer in order to solicit them. (Bd. Op. at 9-10). Respondent admits that he shared this information with EPLS without the written consent of Grievants. (Tr. 1, p. 225). As discussed above, Grievants could not have consented in any way to the sharing of their confidential information because Respondent never mentioned EPLS to them. Nonetheless, without citing any case law or other authority, Respondent argues that an implied exception exists to this rule "for the purpose of assisting with document preparation." (Resp. Obj. at 7).

Respondent remarkably contends that there was no evidence that Spencer had any confidential information from him or EPLS about the Grievants, but rather, argues that it was all public information. (Resp. Obj. at 8). He makes no effort to explain how Spencer knew that the Grievants had a trust which arguably needed to be funded, required his signature or that Respondent had already met with Grievants. (Tr. 1, pp. 81-83; Spencer Tr. 24-29).

In a similar case, the Supreme Court found an attorney to have violated his clients' confidences and secrets by disseminating their financial information "to insurance agents whose primary purpose was to sell annuities on commission." *Fishman*, 98 Ohio St.3d at 175. The Court has likewise rejected Respondent's argument in this case that his sharing of information

with EPLS and Larry Spencer was similar to sharing it with a copier or “document preparation” service because the information was not being used in the clients’ best interests. *Id.*

E. Respondent violated DR 6-102 when he conditioned the payment of a partial refund to Grievants on their providing him with a “full release.”

The Board found that Respondent violated DR 6-102 by conditioning his offer to partially refund the Trotts’ legal fees on a “full release.” Respondent argues that this was an error in that he did not intend to exonerate himself from malpractice because he did not think that he had committed any. Nonetheless, he emphasizes that he was influenced because the Grievants had requested the refund only after consulting with other counsel who believed that the trust documents Respondent had provided them were unnecessary and should be reported to the CBA. (Resp. Obj. at 8).

Suspicious after Mrs. Trotts’ brief encounter with Spencer, Grievants called their financial advisor who in turn, put them in touch with a local attorney to review the trust agreement and arrangement with Respondent. (Tr. 1, pp 31-35, 83-85). Dr. Trott then telephoned Respondent in mid-January 2005, explained what he had learned, stated that he had been advised to file a complaint with the CBA and demanded a refund. (Tr. 1, pp. 36-38). Respondent wrote Dr. Trott on January 21, 2005, offering a partial refund, but only in exchange for a “full release.” (Tr. 1, p. 214; Tr. 2, pp. 63-66; Ex. 9).

Respondent now argues that he has not violated DR 6-102 because he did not mean “full release” when he used that phrase in his letter to the Grievants. Rather, Respondent now belatedly claims that his use of “full release” meant release only of his obligation to provide free estate planning services in the future. However, the actual wording of letter actually makes clear that the “full release” was in addition to relieving

Respondent from the obligation in the engagement letter (Exhibit 5) to provide future legal work:

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.

(Ex. 9)(emphasis added). Regardless of Respondent's after-the-fact subjective intent, both the Grievants and Respondent's expert witness, Geoffrey Stern, testified that they understood Respondent's reference to full release to mean a release of all claims. (Tr. 1, p. 38; Stern Tr. 35-36, 49-50). The Board likewise concluded that "the ordinary definition of 'full release'" encompassed all claims which Grievants could have had against Respondent, "including malpractice claims." (Bd. Op. at 12). Moreover, as an attorney with thirty years of experience, it should be reasonable to expect that Respondent would understand how his use of "full release" was likely to be interpreted by an average person or attorney.

This Court has imposed sanctions for less obvious misconduct than that admitted in this case. In one case, the attorney attempted to hide his failure to file a lawsuit within the limitations period by falsely claiming that a settlement offer had been made (which he intended to pay out of his own funds). *Disciplinary Counsel v. Keller*, 110 Ohio St.3d 240, 2006-Ohio-4354. In another, the attorney proposed to her client that: "You will release, dismiss and/or not file or otherwise pursue any and all criminal complaints and/or bar association/Supreme Court complaints against me or my firm." *Cleveland Bar Ass'n v. Kodish*, 110 Ohio St.3d 162, 166. 2006-Ohio-4090. In yet another, a violation was found where the attorney offered to provide free representation if the client withdrew an ethics grievance. *Cols Bar Ass'n v. Smith*, 108 Ohio St. 3d 146, 149, 2006-Ohio-43. Because Grievant did not request the "full release" until after Grievants threatened to file an ethics grievance on advice of other counsel, his argument -- that the violation should be dismissed because he did not commit malpractice -- is without merit.

F. Respondent has demonstrated a general unfitness to practice law as contemplated by DR 1-102(A)(6) through a pattern of violations and continued indifference to his professional obligations.

The Board also found that Respondent violated DR 1-102(A)(6) by failing to recognize the inherent conflict between his business relationship with EPLS and his duty to the Grievants, by refusing to recognize the form of his business relationship with EPLS and by refusing to view his conduct as unethical (including but not limited to, arguing that EPLS was essentially a word processing service and he was not attempting to exonerate himself by requesting a “full release.”). (Bd. Op. at 12-13).

DR 1-102(A)(6) is often found to apply in disciplinary matters in which there have been a number of other violations. In practice, it would seem to express a general sense that a respondent’s overall conduct and other violations call into question the lawyer’s ability to conform to the norms and expectations of the legal profession.

Unfortunately, this Court has not, insofar as the CBA has been able to discover, given any precise definition of this provision in its cases. As one commentator has observed:

. . . In the vast majority of cases, DR1-102(A)(6) is cited, not as an independent basis for discipline, but as a cumulative citation with others. . . .

* * *

Even in those instances where DR1-102(A)(6) is cited as an independent ground for discipline, little explicit attention is given to linking the conduct involved to fitness to practice concerns. In most instances it simply is presumed. . . .

Greenbaum, Arthur F., Lawyer’s Guide to the Ohio Code of Professional Responsibility (Banks Baldwin, 1996), §1.32, pp. 121-122 [citations omitted]

Recently the Court has approved the new Ohio Rule of Professional Conduct 8.4(h) which precisely tracks the language of the Code provision. Comment 2 following the Rule notes in pertinent part: “A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.”

The CBA contends that Respondent's actions here at issue indicate a "repeated pattern" indicating a certain "indifference" to his professional obligations. Respondent argues that Board erred in ruling against him for asserting his version of events and "his unwillingness to admit all violations charged." However, the fact that he committed so many violations and that he remains unable to see -- even now -- the unethical implications of all of his actions highlights his continuing indifference to his professional obligations and ability to conform to the norms and expectations of the legal profession:

- Respondent continues to assert that EPLS was nothing more than a document preparation service. (Resp. Obj. at 5, 7, 9. Cf. Tr. 1, pp. 120, 208-09, 231-33, 235, 237-41; Tr. 2, p 68-70).
- Respondent denies not only that he was attempting to exonerate himself, but also argues that this Court should "give[] weight in respondent's favor" that the Grievants only asked for the refund after retaining other counsel who advised them that his services were unnecessary and fees excessive. (Resp. Obj. at 8).
- Respondent also repeatedly refers to the Trotts' grievance as raising only the issue of excessive fees, even though it also raised issues of improper solicitation and exoneration. (Resp. Obj. at 3, 7, 8-9; Ex. 1).
- Respondent argues that his many violations are not that important compared to other violations which he did not commit, such as unauthorized practice of law, particularly if the Grievants did not initially raise these other potential violations in their grievance (presumably because they did not know enough facts or Disciplinary Rules to do so). (Resp. Obj. at 11-12, 1-2).
- Respondent argues that a "trust mill" can exist only in a UPL case. (Resp. Obj. at 4).
- Respondent argues that he should not be liable for the actions of EPLS (even though his testimony demonstrated that he turned a blind eye to the misconduct and made no effort to supervise any of the activities of EPLS taken on his behalf). (Resp. Obj. at 6, 12; Tr.1, pp. 214-22; Tr. 2, p. 66).
- During the hearing, Respondent testified that he felt that he had not committed any of the same violations as *Fishman* and remains completely oblivious to the issues surrounding his introduction of Spencer to his clients. (Tr. 2, p. 129-31; Resp. Obj. at 5-6).
- Respondent argues that he had no reason to refund any of the Grievants' fees when he did not commit malpractice, despite all of the other disciplinary violations found by the Board and his obligation to mitigate. (Resp. Obj. at 11).

G. Appropriate Sanction.

In addition to the above violations, the Board also found that Respondent violated DRs 2-103(B) and 3-102 by agreeing to pay EPLS half of each client fee Respondent received from clients referred to him by EPLS in part as a “marketing fee” and Respondent does not dispute those findings in his Objections. The Board also found that Respondent violated 5-101(A)(1) and Respondent has not disputed that finding in his Objections. Respondent also stipulated during the hearing to violating DR 2-103(C) after he contracted with and paid EPLS to solicit estate planning clients and refer them to him. (Tr. 1, p. 16).

The Board recommended that Respondent be suspended for one year with six months of that stayed. While the Board recognized that Respondent had no prior violations and was generally remorseful for his conduct, he remained in denial of 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.” (Bd. Op. at 13). The Board found his conduct to lie between the conduct of the attorneys in *Fishman* and *Wheatley*. In contrast, Respondent argues that his conduct is closer to that discussed in this Court’s *Heisler* and *Kramer* decisions. He argues that any suspension is inappropriate because he was never charged with or found to have assisted in UPL and seeks nothing more than a public reprimand. (Resp. Obj. at 12).

In accordance with the 1992 ABA Standards for Imposing Lawyer Sanctions and Standard 3.0 and Section 10 of the Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline, the Court considers a number of factors, including the nature of duties violated, the actual or potential injury caused, the attorney's mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases. *See Stark Cty. Bar Ass’n. v. Ake*, 111 Ohio St.3d 266, 2006-Ohio-5704; *Northwestern Ohio Bar Ass’n. v. Lauber*, 108 Ohio St.3d 143,

2006-Ohio-419; *Cuyahoga Cty. Bar Ass'n. v. Wise*, 108 Ohio St.3d 164, 2006-Ohio-550, 842 N.E.2d 35, at ¶ 28; *Stark Cty. Bar Ass'n. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743, 775 N.E.2d 818, ¶ 16. Aggravating factors include whether the respondent had committed prior disciplinary offenses, engaged in a pattern of misconduct, committed multiple offenses, failed to cooperate in the disciplinary process, acted with a dishonest or selfish motive, failed to acknowledge wrongfulness of misconduct, engaged in deceptive conduct during disciplinary process and harmed vulnerable victims. Mitigating factors include whether restitution has been made, the lack of prior disciplinary offense, the existence of chemical dependency or mental disability, and evidence of the respondent's character and reputation.

In this case, Respondent knowingly engaged in conduct which violated a number of disciplinary rules and, at the very least, acted in disregard to compliance with other rules. In addition, he continues to deny responsibility for improperly seeking exoneration, for the misleading and otherwise improper nature of the direct mail and telephone solicitations, and for entering into an inappropriate contract with EPLS that provided him with referrals while surrendering his undiluted duty of loyalty to his clients. Rather, he has fatuously insisted throughout these proceedings that EPLS was nothing more than a word processing service and that his contract with EPLS was never intended to be binding. Even in his Objections filed just a few weeks ago, he continues to refer to the Grievance as the "DR 2-106 complaint" even though the Grievants' stated concerns went beyond the cost of the unnecessary services, and also addressed, among other things, the telephone solicitation improper under DR 2-101(F)(1) and attempt to exonerate himself in violation of DR 6-102. (Ex. 1). Attorneys who have similarly put their own interests above those of their estate planning clients have been suspended for at least one year when they were aware of the improper activities of the insurance agents using their

entrée the association with the lawyer provided. *Fishman, supra. Cf. Wheatley*, 107 Ohio St.3d at 232, ¶ 39.

After the formal complaint was filed in this case, Respondent repaid the Trotts for their legal fees and he has practiced without prior disciplinary sanctions for thirty years. However, this, by itself is not controlling. The attorney in *Fishman* had practiced for 35 years without disciplinary sanctions without engaging in similar misconduct, had cooperated fully during the disciplinary process; nevertheless he was still suspended for one year. Like *Fishman*, Respondent in this case seems in denial about the impropriety of his actions. Unlike *Fishman, Heisler, Kramer, Wheatley* and other cases, however, Respondent had the admitted benefit of reviewing a number of well-publicized court decisions – including *Fishman*-- outlining similar misconduct *prior to affiliating with EPLS*. This guidance from the Supreme Court notwithstanding, Respondent chose to proceed in conflict with the rules anyway by engaging in virtually identical misconduct. (Tr. 2, pp. 130-31; Tr. 1, p. 104).

Respondent also argues that the Board erred in not specifically crediting the testimony and opinions of his character witnesses. However, Attorney Stern's good opinion was impeached in his deposition when he admitted that (i) he had no knowledge of any of the underlying facts or exhibits in this matter; (ii) he had not been aware that Respondent had sought a "full release" from Grievants and (iii) his discussions with Respondent focused on UPL, which was never an issue in this case (Stern Tr. 27-36, 44-45, 49-50).⁹ Mr. Hamer admitted that he did not know him Respondent on a personal level and has little personal contact with him (Tr. 2, p.

⁹ Mr. Stern's deposition transcript (which was filed with the Board on March 20, 2007) was entered by stipulation of the parties and the panel. (Tr. 2, p. 7).

23). Mr. Ross lived in Arizona until 1996 and has only gotten together socially with Respondent twice each year since then. (Tr. 2, pp. 142-43).¹⁰

Respondent is not claiming that his misconduct was caused by any mental or substance abuse issue and, unlike *Kramer* and *Moreland*, he is not new to the practice of law. *Disciplinary Counsel v. Kramer*, 113 Ohio St.3d 455, 2007-Ohio-2340, ¶ 1; *Columbus Bar Ass'n v. Moreland*, 97 Ohio St.3d 492, 2002-Ohio-6726. Rather, he claims that he was simply ignorant of his obligations despite his admission of having closely reviewed the *Fishman* case, *supra* before committing any of the alleged violations. (Tr. 2, pp. 130-31; Tr. 1, p 104).

Respondent contends that his misconduct is more closely akin to that in *Heisler* and *Kramer* than in *Fishman* or *Wheatley*. However, unlike this case, neither *Heisler* nor *Kramer* involved violations for improper attempts at exoneration, misleading and unverifiable public communications, or improper telephone solicitations. As mentioned, *Heisler* did not involve intentionally setting up clients for sales presentations by insurance brokers and did not involve intentionally hiding the attorney's relationship with the trust mill, unlike this case. Unlike this case, *Kramer* involved a new attorney who had worked for the trust mill even before he became an attorney. Unlike *Kramer*, Respondent did not draft or prepare the trust documents given to Grievants, although he repeatedly argued otherwise. (Tr.1, p. 133, 120, 208-09).

Respondent seeks this Court to let him to continue to support his family by practicing law (which he claims is the only way he has to do that). While he may be a very pleasant man and

¹⁰ Respondent objects to being assessed with some of the CBA's costs in this matter because the DR 2-106 allegation was dismissed. (Resp. Obj. at 12-13). However, the CBA's expert provided his opinion *pro bono* and thus was not part of any of the costs in this case. The CBA expended \$4,633.87 in costs in this matter for items, such as telephone conference calls between counsel and the panel chair, deposition transcripts for each of the primary witnesses (Grievants, Respondent, Benczkowski, Spencer, Bonasera, and Stern), the service of subpoenas in Michigan on Benczkowski and Spencer, etc. What costs should be assessed against Respondent are within the discretion of this Court.

no doubt a good husband and father, there are larger issues here that must be considered -- not the least of which are the interests of the profession and the public it serves. In the context of what happened to the Grievants, it may be tempting to say "no harm/no foul." But, from the perspective of the average elderly couple, these processes which Respondent allowed to be used in his name and his favor -- misleading mailings, misleading telemarketing, a secret entity in the background doing the drafting, the exclusive deal with a particular financial planner -- these rule violations have an awful potential to do great harm. That is why, in fact, we have these rules.

Moreover, since the commencement of their relationship on February 17, 2004, EPLS referred Respondent approximately 135 clients and was compensated by Respondent 50% of every fee he charged those clients. (Tr. 1, p. 111; Tr. 2, p. 72; Ex. 25).¹¹ None of the clients were told by Respondent that he would be paying any fees to EPLS and many were introduced to Spencer without knowledge of the conflict of interest, etc. (Tr. 1, p. 223-25, 210-13). Accordingly, each of these clients should also be notified of Respondent's wrongdoing so that they can take any necessary action to protect their financial and other interests.

Because Respondent knowingly acted against the best interests of his clients, financially benefited by more than \$100,000 from his misconduct, remains in denial about the wrongfulness of his misconduct, engaged in a pattern of misconduct and sought to exonerate himself when the Grievants objected to his duplicity, he should be sanctioned as least as much as the attorney in *Fishman* and suspended from practice for not less than one year.

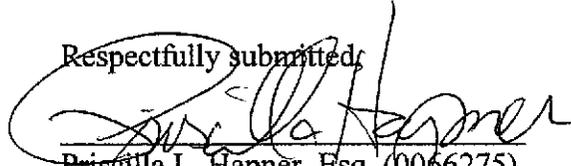
IV. CONCLUSION

As discussed above, there was clear and convincing evidence that Respondent violated the Rules as charged. His pattern of misconduct and continuing violation of the rules in

¹¹ This 50% amounted to \$101,250 (135 x \$750). Even though Respondent kept the other 50%, he testified that his income (after expenses) was only \$40,000. (Tr. 2, p. 73).

disregard for the best interests of his clients supports that he should be suspended from practice for at least one year. Accordingly, Relator urges the Court to accept the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners.

Respectfully submitted,



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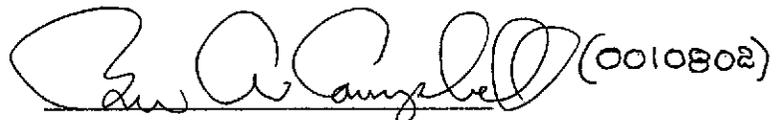
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CERTIFICATE OF SERVICE

The Undersigned hereby certifies that the a copy of the foregoing Pre-Hearing Brief of Relator Columbus Bar Association was served by first-class mail upon Respondent's Counsel, William Mann at Mitchell Allen Catalano & Boda, 580 South High Street, Suite 200, Columbus, Ohio 43215 and Jonathan W. Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 65 Front Street, 5th Floor, Columbus, Ohio 43215 this 5th day of September 2007.

 (0010802)