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DISCIPLINARY BOARD

BEFORE THE DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re MARK K. PLUNKETT, Lawyer (Bar No. 16834).	Proceeding No. 12#00077 AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND HEARING OFFICER'S RECOMMENDATION

These Amended Findings of Fact, Conclusions of Law, and Hearing Officer's Recommendation supersede the Findings of Fact, Conclusions of Law, and Hearing Officer's Recommendation entered in this matter dated October 21, 2013.

In accordance with Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC), the undersigned Hearing Officer held a hearing on June 17, 2013 through June 20, 2013. Respondent Mark K. Plunkett appeared and was represented by attorney Philip Mahoney. Disciplinary Counsel Linda B. Eide appeared as attorney for the Washington State Bar Association (the Association).

The evidence at the hearing consisted of -

1. Testimony from 6 clients for whom Mark K. Plunkett prepared estate plans, namely Mae Williams, Walter and Hazel Richardson, Judy Clouse, and William and Diane Wenke;

2. Testimony from Olaf Turek, General Counsel for CLA Companies located in Frisco, TX;

3. Testimony from the grievant, Kevin Lehinger;

4. Testimony from attorney Pamela McClaren, called by the Association as an expert in estate planning;

5. Testimony from Respondent Mark K. Plunkett;

6. Six (6) exhibits offered by Respondent and admitted without objection; and

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7. Thirty-eight (38) exhibits offered by the Association and admitted without objection. Two (2) other exhibits were offered by the Association but were excluded following objection by Respondent.

Eight (8) of the admitted exhibits were documents consisting of, or otherwise relating to, estate plans prepared by Mr. Plunkett. The estate plans of 3 of the client witnesses identified above were among the admitted exhibits; the estate plans of 2 of the client witnesses were not among the admitted exhibits; and the estate plans of 6 clients who did not testify were among the admitted exhibits. (The estate plan for a couple is counted here as a single estate plan, while the testimony of both members of a couple is counted here as 2 witnesses.) Thus, a total of 11 estate plans were part of the hearing evidence.

I. FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

1.1 The Formal Complaint filed by Disciplinary Counsel dated November 12, 2012 charged Mark K. Plunkett with the following counts of misconduct:

Count 1 - "By failing to adequately explain to his clients the risks and/or benefits of living trusts versus other estate planning options for their specific situation and/or adequately explain the trusts to his clients, Respondent violated RPC 1.3, and/or RPC 1.4(a)(2), and/or RPC 1.4(b)."

Count 2 - "By entering into a continuing business relationship with CLA whereby CLA would obtain clients for him, without disclosing to his clients the nature of the relationship and his personal interest in maintaining it and/or by failing to obtain his clients' informed consent to the conflict of interest, Respondent violated RPC 1.7(a)(2) and/or RPC 1.7(b)(4)."

1.2 Respondent Mark K. Plunkett filed an answer denying he violated any ethical rules, including the RPCs cited in the Formal Complaint.

II. FINDINGS OF FACT

After considering all the testimony and exhibits admitted into evidence at the hearing, and considering the written and oral arguments of counsel, this Hearing Officer finds the following facts were proven by a clear preponderance of the evidence (ELC 10.14):

2.1 Mark K. Plunkett was admitted to practice law in Washington on June 2, 1987. He has practiced law in the Seattle area since his bar admission. He has had substantial experience in drafting real estate conveyancing and estate planning documents. He has attended many continuing legal education programs on the topic of estate planning. He maintains a solo law practice emphasizing estate planning. He currently has no employees.

2.2 Mark K. Plunkett has no prior disciplinary record.

2.3 CLA Estate Services (CLA) is a Texas company which sells a service package to persons (its clients) with estate plans. CLA's target clientele are older persons nearing retirement. CLA locates potential clients primarily using telemarketing. Potential clients usually attend a program presentation, at which a free meal is typically offered, during which non-attorney CLA representatives describe the service package sold by CLA. The presentation emphasizes the purported benefits of using a revocable living trust ("RLT") as part of an estate plan. A CLA client is not required to use an RLT in order to purchase or use CLA services.

2.4 CLA is affiliated with a company called CLA USA, which sells financial service products, including insurance and annuities.

2.5 According to the information given by CLA at the presentations, the purported benefits of using an RLT in an estate plan include avoidance of probate proceedings, avoidance of financial guardianships, and possible tax savings. Exhibits 31 and 32 are CLA materials used at its marketing presentations, which provide additional details about the information and arguments given to CLA's potential clients at its marketing presentations.

2.6 CLA represents the service package it sells as a bundle of services to help a CLA client manage an estate plan. Those services include: referring the client to an attorney, if requested, to prepare the legal documents which would comprise the estate plan (e.g., wills, trusts, durable powers of attorney, medical directives, deeds, etc.); after execution of the estate plan documents, assisting the client in various tasks related to managing an estate plan (e.g., recording deeds and funding trusts); providing an extensive written organizer in which the client would record important information for those who will become involved in the event of the client's incapacitation or death (see, e.g., Exhibit 18); conducting an in-person 3 month review after execution of the estate planning documents, followed by annual in-person reviews as long as the estate plan is in effect; and, after a death, providing in-person assistance to the surviving spouse and/or other family members to help with processing of forms (e.g., life insurance claims), distribution of assets in accordance with the estate plan, and other details involved in settling an estate. CLA clients also received a periodic newsletter with articles related to estate plans. (See, e.g., Exhibit 32.)

2.7 The following testimony by CLA's General Counsel, Olaf Turek, further explained the services provided under a CLA service package:

> "The Service Package would include an initial visit to go over where they are at in their current planning, which may include new documents created by their attorney, to make sure that they are following the instructions from the attorney regarding what they need to do to implement it. Then we typically do a 90-day follow-up to make sure that they are following those instructions, that they are doing what they are supposed to be doing to effectuate their planning, and that, you know, that also will include going within what their financial goals are and seeing, making sure they have got the proper financial plan in place.
>
> Then we do an annual review, we go out once a year to make sure everything is still current. You know, we ask basic questions like, let's say for somebody who has a will, is this executor still able to serve in that function or do you need to get some changes? For trusts, is your successor trustee still able to act in that capacity?
>
> If they do need some changes regarding their legal plan we refer them back to the attorney who created it to help them amend or change their estate plan, their legal estate plan, to indicate those changes.
>
> You know, we also make sure that beneficiary changes are still accurate. Especially on financial accounts, you know, things change, people die, and so we

make sure those things are still up to date. Then we do a, anytime a client needs some help we do customer request reviews, and then we also do what's called a death settlement review. When one of our clients dies we go out, we'll sit down with them. We kind of have a checklist of things they need to be doing like ordering eight, nine death certificates, contacting Social Security Administration regarding the death, if there's any type of pension people, life insurance.

We also highly recommend that the client has a CPA present to handle any potential tax issues that may come up. And then if a legal issue comes up regarding, you know, like, for example, if they need to probate a will, tell them they need to go down to the courthouse, the probate, get that started, you know. We can't help them with it but we can tell them where to go, or we tell them to contact their attorney who created their will to help them with their probate, if they need to.

And we do that on first death of a spouse and then, of course, when the surviving spouse dies we come back out and do that again and help the kids in that transition, making sure the proper things are being, that proper parties are being notified. And depending on what type of plan they have, whether there's a probate need, if they need to contact an attorney, maybe ask for some advice how to get that started, and if there's a trust in place, making sure that they, you know, get all the financial accounts in order and stuff like that." (TR 39:3 - 41:22.)

2.8 The price of the service package offered by CLA varies depending on the services desired by the CLA client. At one time, the price also depended on the value of the client's estate at the time of purchasing the CLA package. The price could be as much as several thousand dollars.

2.9 The CLA representatives who made the presentations at the marketing seminars were independent contractors to CLA. They were paid commissions by CLA of about $600 - 700 when someone purchased a CLA service program. Mark K. Plunkett never received any portion of those commissions nor did he receive any other compensation from the presenters or from CLA.

2.10 After the CLA presentations, potential CLA clients who indicated an interest in purchasing a service program were contacted by representatives of CLA. The contact was usually made by one of the presenters at the CLA presentation attended by the potential client.

Typically, the CLA representative would meet at the home of the potential CLA client. If the potential CLA client decided to purchase a CLA service package, the CLA representative would assist the new client in completing a client information sheet which collected information needed to

prepare an estate plan recommendation and documentation; for example, information about the person's assets, debts, family, and plans for property distribution on death. (See, e.g., Exhibit 1 at 000004 - 007.) The CLA representative would also take copies of the client's legal documents (e.g., former wills, deeds, and mortgages) to send along with the information sheet. The CLA representative also assisted the client in calculating the net worth.

Mark K. Plunkett was never involved in these contacts or meetings.

2.11 During the follow-up visit, the CLA representative discussed the need to draft the legal documents which would comprise the estate plan. CLA was concerned about potential problems it might face if it were found to be engaged in the unauthorized practice of law, so its representatives told potential and new clients that any wills, trusts, and other estate planning and legal documents would have to be drafted by an independent lawyer representing the client, not by CLA. Potential and new clients were told they could use an attorney of their choosing, and that CLA would refer them to an attorney if asked. If the client requested an attorney referral, the CLA representative would give the client the name of an attorney and ask the client to complete a form which identified for the attorney the best times and phone numbers to use to contact the client for consultation. (See, e.g., Exhibit 1 at 000008.)

2.12 In 2008, Mark K. Plunkett was approached by CLA and was asked if he would be willing to accept referrals of potential estate planning clients. He submitted a résumé and work sample and indicated his willingness. Mr. Plunkett began to receive CLA client referrals in September 2008,. There was no evidence suggesting that CLA made representations or promises to Mr. Plunkett regarding the number of referrals he might receive, nor was there evidence that CLA made any representations or promises regarding how long Mr. Plunkett might expect to continue to receive referrals.

2.13 The evidence was inconclusive whether Washington attorneys other than Mr. Plunkett received CLA referrals during the time when Mr. Plunkett received them. Olaf Turek testified that

CLA maintained a list of 2 or 3 potential referral attorneys in Washington, though he could not identify any other than Mr. Plunkett. Mr. Plunkett was the only attorney to whom CLA referred the 6 clients who testified as witnesses at the hearing.

2.14 In about September 2008, Mark K. Plunkett attended a CLA presentation in Bellevue as an observer, not as a presenter or speaker. He never wrote or contributed to the content of the information given to potential clients at the presentations by CLA. Mr. Plunkett knew no later than the date he attended this CLA presentation that CLA strongly advocated the use of revocable living trusts in estate plans.

2.15 Mark K. Plunkett was never an employee of, or independent contractor to, CLA. He had no contractual relationship with CLA. All fees for preparation of the estate plan documents were set by Mr. Plunkett and were paid by those CLA clients who retained him as their attorney. CLA did not provide forms, instruction, input, or in any other way have, or attempt to exercise, direct control over the amount of fees charged by Mr. Plunkett, or over the estate plan recommendations made by Mr. Plunkett, or over the contents of the documents prepared by Mr. Plunkett for his clients.

2.16 In those instances when the potential CLA client requested an attorney referral and the CLA representative referred the client to Mr. Plunkett, the process by which Mr. Plunkett prepared estate plan documents for those clients was usually as follows:

a) The CLA representative would send Mr. Plunkett the forms (sometimes called an application) containing the information (assets, distribution plans, etc.) and related documents (e.g., deeds) supplied by the client during the follow up visit, along with the contact form showing the best times and telephone numbers for Mr. Plunkett to use when calling the client for a consultation.

b) Upon receipt of this paperwork from CLA, Mr. Plunkett would send the client an engagement letter with a retainer agreement and a spousal conflict waiver form. (See, e.g., Exhibit 15 at 000006 - 009.)

c) Mr. Plunkett typically charged an attorney's fee of $550. No evidence was presented that this fee was an unreasonable fee for the estate plan documents Mr. Plunkett drafted.

d) The retainer agreement told the clients that, in return for the fee, they would get Mr. Plunkett's recommendation as to the appropriate estate planning documents. (See, e.g., the Attorney Retainer Agreement at Exhibit 5 at p. 21, which says, in part: "I will make a recommendation as to the type of estate plan documents that would best meet your needs.")

e) After he received the retainer fee and signed retainer agreement and spousal conflict waiver forms from the client, Mr. Plunkett would call the client to arrange a time for a consultation. At the arranged time, Mr. Plunkett would again call the clients to discuss their estate plan intentions and his recommendations. The 6 client-witnesses testified their conversations with Mr. Plunkett were relatively brief. For example, Judy Clouse testified her late husband Walt's discussion with Mr. Plunkett was "not very long", perhaps under 15 minutes, and that her conversation with him was "very short". (TR at 157:16 - 158:23.) William Wenke testified he never spoke to Mr. Plunkett (TR 377:3-6); his wife, Diane Wenke, testified she spoke with Mr. Plunkett once about making changes in the RLT document (TR 369:13-25). Mae Williams testified her conversation with Mr. Plunkett lasted probably less than 10 minutes, during which Mr. Plunkett asked her to send him copies of her and her husband's prior wills. Ms. Williams' husband, Ray, did not speak to Mr. Plunkett at all because he was deaf and unable to converse by telephone.

Mr. Plunkett testified that his telephonic consultations with clients typically lasted from 30 to 60 minutes. There was no evidence that CLA representatives were ever present during these consultations.

Considering the ages of the witnesses and the time since the conversations may have occurred, along with the nature and content of Mr. Plunkett's testimony on the issue, this

Hearing Officer finds that Mr. Plunkett did have conversations lasting at least 30 minutes with his clients before drafting their estate plan documents.

f) Mr. Plunkett testified he often took some notes during these consultations, usually writing them on the client information form sent by the CLA representative. (See, e.g., Exhibit 16 at p.11 and Exhibit 1 at p.5.) The notes in the 8 client files placed in evidence by the Association were sparse.

g) The clients whose estate plans were placed in evidence at the hearing had decided before their first communications with Mr. Plunkett that they wanted RLTs in their estate plans. They undoubtedly reached that decision largely because of the information they heard and read at the CLA presentations they attended, which was supplemented by the follow up visits by the CLA representatives. There was no evidence that Mr. Plunkett ever recommended that any of these 11 clients not include an RLT in their estate plans, though he did regularly discuss other estate plan instruments during his consultations.

h) Using the information supplied in the paperwork sent by the CLA representative and the consultation with the client, Mr. Plunkett used a computer program called Fore Trust Software to generate the estate planning documents he considered necessary and appropriate to effectuate the client's estate plan. Mr. Plunkett had owned and used this software before he started to receive CLA referrals.

i) The documents which Mr. Plunkett typically prepared for his CLA referred clients were: a revocable living trust; a declaration of trust; a certification of trust; a marital property agreement; an assignment of personal property; a form for the clients to write down their instructions for distribution of personal property; last will and testament with pour-over provisions (one for each spouse); a general power of attorney (one for each spouse); a durable health care power of attorney and health care directive (one for each spouse); a form for the clients to write down their burial instructions; a transfer deed (to transfer realty to

the RLT); a blank HIPAA Physician Orders for Life-Sustaining Treatment (POLST) (one for each spouse); and a summary of the overall estate plan. (See Exhibit 105, which is an exemplar of the binder full of estate plan documents which Mr. Plunkett would send to the clients.)

j) The document binder, with a cover letter signed by Mr. Plunkett addressed to the client, was sent to a CLA representative. That person was an independent contractor to CLA USA (the financial product affiliate of CLA Estate Services). These CLA representatives were all licensed to sell insurance in Washington. This fact was disclosed by CLA to its clients in writing. (See, e.g., Exhibit 16, p. 7, "Consumer Information and Disclosure", ¶5, signed by Walter and Judy Cl***.) There was no evidence that the CLA USA agents were deceptive regarding the fact they were insurance agents.

k) After receiving a client's document binder from Mr. Plunkett, the CLA USA agent would make arrangements to meet with the client, typically at the client's home. The CLA USA agent reviewed the estate plan documents with the clients, who then signed them, with the CLA USA agent serving as the notary when necessary. Mr. Plunkett was never present when the estate plan documents were executed in the presence of the CLA USA agent, though he was available by telephone to answer questions, when necessary.

l) CLA paid its representatives a small fee for notarizing the documents. There was no evidence that Mr. Plunkett either paid or received any portion of that fee, or that he paid to or received from CLA or its representatives any other amount in connection with the witnessing and notarizing of the documents.

m) At least until the estate plan was sent to the CLA representative for delivery to the client, CLA and Mr. Plunkett were able to keep track of each other's progress through a communication interface called iManager, which worked like a closed email system. (TR 98:13 - 99:2 and TR 549:5-14; see Exhibit 17.)

n) The document binder Mr. Plunkett sent to his clients via the CLA USA agent containing the estate plan documents (e.g., Exhibit 105) included deeds (see, e.g., Exhibit 15 at p. 10), Assignments of Personal Property (see, e.g., Exhibit 15 at p. 44), and similar documents to be used for transferring assets to the trust. Mr. Plunkett typically did not arrange for recording deeds or filing of other documents which might be related to the funding of a client's RLT, although he would assist upon request. The written instructions Mr. Plunkett sent with the estate plan documents told the clients it was important for them to take the steps necessary to transfer assets into the trust, and it included instructions for doing so.

For example, Exhibit 15 at p. 35 is a document sent to a CLA-referred married couple for whom Mr. Plunkett prepared an estate plan (Walt and Judy Cl***). The document is headed "Notice and Acknowledgement" in large, bold letters. It contained the following language:

> "I have advised you of the procedure to be followed to transfer your assets, whether presently owned or later acquired, from your individual names to the name of your Trust. In addition, I have included written instructions for funding the Trust with the Portfolio containing your estate planning documents; it is important that you take the time to review these instructions. Finally, it is understood that you may call the office at any time to ask questions concerning your trust, including questions pertaining to funding or retitling assets; however, questions relating to IRAs, pensions, Keoghs, 401(k)s and/or other retirement benefits (including beneficiary designations) should be directed to your tax advisor, as there could be important income tax considerations."

Both Walt and Judy signed this form beneath the quoted language.

There was no evidence that any of the CLA referred clients whose estate plans were part of the hearing evidence failed to properly transfer assets into their RLTs.

o) On the occasions when clients had questions or needed corrections in the estate plan documents he had prepared, Mr. Plunkett had additional conversations with them and, when necessary, modified the documents.

p) Mr. Plunkett did not consider the attorney-client relationship to have ended when he sent the estate plan documents to CLA for execution.

q) Mr. Plunkett did not retain copies of his clients' executed estate plan documents in his files. (TR 442:17-22.)

2.17 There was no testimony whether Mr. Plunkett ever met in person (face to face) with any CLA referred clients before preparing their estate plan documents. Mr. Plunkett's consultations with the 6 clients who testified at the hearing occurred by telephone. Further, the Attorney Retainer Agreement which Mr. Plunkett used with all the clients whose estate plan documents were placed in evidence said: "I will review all information on the attached Application and will have a telephone conversation with you." (See, e.g., Exhibit 5 at p. 21.) This Hearing Officer finds that it was Mr. Plunkett's practice to consult with CLA referred clients only by telephone.

Many of the CLA referred clients did not live near Seattle (see Exhibit 20A.) For example, three of the clients who testified at the hearing lived near Spokane and two lived in Bellingham. The sixth client-witness lived in Tacoma. All of Mr. Plunkett's consultations with these particular clients occurred by telephone. At least for the distant clients, telephone consultations were undoubtedly more convenient and less expensive than a meeting at Mr. Plunkett's office in Seattle. There was no evidence that any client preferred or asked for an in-person meeting with Mr. Plunkett.

2.18 After Mr. Plunkett prepared and delivered a client's estate plan documents, CLA retained the original client information forms with the clients' financial information.

2.19 The CLA USA representatives who met with the clients when the documents were executed were all licensed to sell insurance, including annuities, in Washington. That was true also for the CLA representatives who met with the clients for the 90 day and annual reviews. Those CLA representatives typically attempted to sell insurance or annuities to the CLA clients when they visited with them, including during the initial follow up meeting after the CLA presentation, during the meeting when the estate plan documents were signed, and during the subsequent 90 day and

annual review meetings. Mark K. Plunkett was not present during any of these discussions of insurance.

2.20 There was no evidence that any of Mr. Plunkett's clients purchased insurance or annuities from the CLA USA agents, although the agents attempted to sell to at least some of them. (See, e.g., the testimony of William Welke at TR 378:5-21 and of Mae Williams at TR 178:4-6.) There was no evidence that any illegal or deceptive sales practices were employed by those CLA USA agents.

2.21 Mr. Plunkett was not paid any financial or other benefit by CLA, CLA USA, or their representatives when insurance or annuities were purchased. There was no evidence that Mr. Plunkett ever spoke to any of his CLA referred clients about purchasing insurance or annuities from CLA USA.

2.22 It was undisputed that Mr. Plunkett drafted a revocable living trust as part of all 700+ estate plans he prepared for CLA referred clients. The estate plans he prepared for CLA referred clients also included wills, medical and financial powers of attorney, health care directives, community property agreements, and the other instruments described earlier. (See Findings ¶ 2.16(i) and, e.g., Exhibits 15 and 105.)

2.23 Mark K. Plunkett never paid any referral fees or other sums to CLA or CLA USA, or to their agents, or to anyone else in connection with his receipt of client referrals from CLA.

2.24 Mark K. Plunkett was never paid commissions, fees, or other amounts by CLA or CLA USA, or by their agents, or by anyone else in connection with his receipt of client referrals from CLA. The only sums he received were the attorneys fees paid by the clients who retained him to prepare their estate plans.

2.25 The Association requested, and received from Mr. Plunkett, a sampling of 64 files of CLA referred clients. Each client file consisted of both a paper file and a digital file. Using data found in the client files, the Association prepared a chart (Exhibit 20B) showing the estate values, fees paid

to CLA, and fees paid to Mr. Plunkett. The estate values in this sample ranged from $95,000 to $6 million. The median estate value in this sample was $402,500. The fees paid to CLA by those 64 clients ranged from $795 to $3,145. No evidence was presented explaining how each client's CLA fee was determined. Mark K. Plunkett did not receive any portion of the fees paid to CLA by any client. The chart also showed that for some clients with modest estates, the combined amounts paid to Mr. Plunkett and CLA were more than 2% of the estates' values.

2.26 The Association introduced exhibits indicating that Mr. Plunkett has opened four probates for CLA referred clients. (See Exhibits 37-40, TR 471:23 - 482:4.) When a probate proceeding becomes necessary or advisable, Mr. Plunkett charges an additional fee, usually $1,000 including costs. None of these 4 probate proceedings involved any of the 11 estate plans placed in evidence at the hearing, and no testimony was presented by anyone other than Mr. Plunkett about the reasons or circumstances. There was insufficient evidence for this Hearing Officer to determine why these probates were filed or whether they were necessitated by errors which Mr. Plunkett made in preparing the estate plans. To the extent the Association was attempting to use this evidence to prove the allegations and contentions in Count 1 or Count 2 of the Formal Complaint, it failed to meets its burden of proof by a clear preponderance of the evidence. (ELC 10.14(b).)

2.27 Mark K. Plunkett did not inform any of his CLA referred clients of the volume of work he received from CLA referrals or the percentage of his practice and income which came from CLA referrals. The 6 clients who testified at the hearing said they did not know how significant were the CLA referrals to Mr. Plunkett's practice. There was no evidence that any of the other 700+ CLA referred clients knew that information, either, though of course each of them knew that CLA had made the referral to Mr. Plunkett.

2.28 The service package sold by CLA provided useful and valuable estate plan management services which would have been worthwhile for at least some persons even without RLTs in their estate plans. For example, the CLA service programs included something it calls The CLA Estate

Organizer, which is a collection of forms on which the clients can record important information for their heirs, such as burial wishes, emergency contact information, wishes for distribution of personal property, and other matters. (See, e.g., Exhibit 18 at pp. 4-91.) The service packages also provide helpful services at the 90 day and annual reviews after an estate plan is implemented; for example, reminding the client of the need to transfer any newly acquired assets to the trust. The service packages also provide helpful services at the at the time of settlement after a death; especially for people living in non-urban areas and/or far from family members, these services can provide important information and assistance.

2.29 It is also true that the 90 day and annual reviews were opportunities for the CLA USA insurance agents to attempt to sell insurance products, but this Hearing Officer finds that fact does not negate the other useful aspects of the service programs. Also, it appears that all of the clients whose estate plans were placed in evidence at the hearing were able to resist any efforts to sell them insurance at these meetings.

2.30 The Association did not prove by a clear preponderance of the evidence (ELC 10.14(b)) that the 11 clients whose estate plans were placed in evidence by testimony and/or exhibits would not have signed up for, or benefitted from, a CLA service package had their estate plans not included RLTs.

2.31 The Association conceded, and this Hearing Officer finds, that Mr. Plunkett sincerely believes that an RLT is an essential part of virtually everyone's estate plan. He also believes everyone should have most or all of the other estate planning documents which he did, in fact, prepare for his CLA-referred clients, including durable financial and medical powers of attorney, and health care directives. (See Findings ¶ 2.16(i) and, e.g., Exhibits 15 and 105.)

2.32 There was no evidence that before Mr. Plunkett started to receive CLA referrals in September 2008 he had any idea how numerous or frequent would be the referrals. The business grew quickly. Between September 2008 and the end of that year, Mr. Plunkett had opened about

108 files for CLA referred clients. From January 2009 through July 2011 he received another 600 client or so referrals from CLA. (See Exhibit 20A.)

2.33 By 2010 - 2011, CLA referrals represented a large and significant percentage of Mr. Plunkett's practice, perhaps as large as 98%, according to Mr. Plunkett. (TR 407:5 - 410:5.)

2.34 Mr. Plunkett believes he did not face a conflict of interest between his CLA referred clients and CLA, or between his CLA referred clients himself, and therefore he had no obligation to disclose to, and receive informed consents from, his CLA referred clients based on the volume of business from the CLA referrals. His reasons include:

a) He contends he acted as an independent lawyer in representing the clients whose estate plans he drafted, who were the ones who paid his fees;

b) He did not solicit CLA for referrals nor did he solicit the clients for their business;

c) He was not controlled or influenced by CLA with respect to the fees he charged or the estate planning recommendations he gave his clients;

d) He owed no contractual or other obligations to CLA, he received no compensation from it, and he paid nothing to it (such as referral fees);

e) He contends his relationship with CLA did not create "a significant risk that the representation of [his CLA referred] clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." (RPC 1.7(a)(2).)

2.35 The Association presented testimony from Seattle attorney Pamela McClaren, who specializes in drafting estate plans, an area in which she is very well qualified. Ms. McClaren reviewed the estate plan files of 24 CLA referred clients of Mr. Plunkett. In general, Ms. McClaren was critical of including RLTs in the estate plans for at least some of Mr. Plunkett's clients because there were other, simpler means of accomplishing the client's estate plan goals, such as avoiding probate and estate taxes. Some of her criticisms, and Mr. Plunkett's responses, follow:

a) Ms. McClaren testified that smaller estates are not at risk of paying state or federal estate taxes, and so an RLT is not necessary to avoid taxes. The Washington state individual exemption is currently $2 million, which means a married couple could pass a total of $4 million without paying state estate taxes. The current federal exemption is currently $5.25 million, which means a married couple could pass a total of $10.5 million without paying federal estate taxes. The federal estate tax laws have changed significantly since September 2008 when Mr. Plunkett began to receive referrals from CLA, and they are subject to future changes.

Mr. Plunkett does not dispute these facts, though he believes the uncertainty about whether state and federal estate tax laws might change after the execution of an estate plan is a justification for including an RLT in his clients' estate plans. He also argues that a client's estate might later grow in net value to the point where it is taxable, and that having a funded RLT in place might avoid estate taxes.

b) Ms. McClaren testified that Washington law affords a number of ways to design an estate plan so as to avoid the need for a formal probate for many modest sized estates without using an RLT. For example, real estate may be held as joint tenants with rights of survivorship; bank accounts can include payable on death or transfer on death provisions; life insurance policies and IRAs or other investment accounts can be transferred at death by naming a beneficiary; a married couple can execute and record a three-prong community agreement; for couples with net estates under $200,000, the survivor could file an affidavit of small estate.

Mr. Plunkett does not disagree with these statements, but believes including an RLT in an estate plan is nevertheless prudent as a means to maximize the likelihood that a formal probate would not be needed to transfer assets in accordance with the clients' wishes. He also argues that a client's estate might later grow in net value to the point where it such

devices might not be available to avoid probate, and that having a funded RLT in place might avoid probate. He also testified that he discussed at least some of these options with his clients; in fact, he usually included community property agreements as part of his estate plans.

c) Ms. McClaren testified that people with modest estates can often avoid probate by using only wills, either with or without testamentary trust provisions, and so an RLT is not necessary to avoid probate. This is especially true when the plan is for spouses to leave all assets to the surviving spouse.

Mr. Plunkett does not disagree, but believes including an RLT in an estate plan is nevertheless prudent as a means to maximize the likelihood that a formal probate would not be needed to transfer assets in accordance with the clients' wishes. He also argues that a client's estate might later grow in net value to the point where it such devices might not be available to avoid probate, and that having a funded RLT in place might then avoid probate.

d) Ms. McClaren testified that, in certain circumstances, including a RLT in an estate plan can be an acceptable way to avoid probate, provided the RLT is fully funded.

Mr. Plunkett agreed it is important to fund the RLT to realize its purposes, although a failure to record a deed before death would not necessarily defeat the estate plan; for example, a successor trustee could execute a deed at that time.

e) Ms. McClaren testified that it is sometimes necessary to take real property out of an RLT in order to refinance the mortgage, and that this fact should have been explained to the clients when drafting their estate plans.

Mr. Plunkett agreed that banks often take this position, and said he has helped clients do that. He believes the benefits of an RLT outweigh this inconvenience.

f) Ms. McClaren testified that probate proceedings under Washington law are relatively efficient and inexpensive as compared with some other states.

Mr. Plunkett agreed, but believes including an RLT in an estate plan is nevertheless prudent. This is especially true when a client owns real property in a state with more cumbersome probate laws, such as California.

g) Ms. McClaren testified that guardianships under Washington law can be expensive, burdensome, and even demeaning, so an estate planner should try to minimize the likely need for such proceedings should a client become incapacitated.

Mr. Plunkett agreed, which is why is his typical estate plan included durable financial and medical powers of attorney.

h) Ms. McClaren testified that, in her opinion, it was "somewhat dangerous" for Mr. Plunkett not to actually meet with and talk to his clients before drafting an their estate plans -

> "to make sure the client is understanding what they are signing, how the various things fit together, what some of the more complex paragraphs mean, why they are included. And it's very hard to do that over the telephone, especially with older clients, what they understood or didn't understand, and so we would want to have the client there or go to the client." (TR 329:4-11.)

Mr. Plunkett disagrees with Ms. McClaren's opinion. He believes he was able to determine his clients' testamentary wishes, answer their questions, and to give appropriate advice adequately by telephone.

There was no evidence that any of Mr. Plunkett's CLA referred clients whose estate plans were part of the evidence presented at the hearing were incompetent.

i) Ms. McClaren testified that clients should be advised to notify their insurance carriers if property is transferred to a trust to avoid any claim by the insurer that coverage might not apply if the trust is not the named insured at the time of a claim. She said that none of the 24 files she reviewed included that instruction. She also testified that similar issues might arise regarding title insurance, and that title insurance also might be impacted when quit claim deeds are used instead of statutory warranty deeds to transfer property to a trust. There was

no evidence that any of Mr. Plunkett's CLA referred clients had experienced any such insurance or title insurance problems.

j) Ms. McClaren testified that making a revocable living trust the beneficiary of an IRA may negate the value of "stretch out" rules otherwise available under IRS regulations. There was no evidence that any of Mr. Plunkett's CLA referred clients had any such problems.

2.36 Ms. McClaren also criticized some of the provisions in some of the estate plans because they contained errors. For example -

a) In the Robert Be matter, the RLT drafted by Mr. Plunkett named one child twice, which resulted in giving away more than 100% of the estate and leaving nothing for the client's intended 10% gift to his church. (See Exhibit 3 at p. 4-5 and Exhibit 4 at p. 39-41; TR 272:8 - 273:1.)

b) In the Shahnaz A-G file, the client information form indicated that the client intended to dispose of her substantial estate by leaving $50,000 per year until exhausted to each of three young adult children, but the document drafted by Mr. Plunkett distributed the estate outright at the client's death. (See Exhibit 1 at p. 5 and Exhibit 2 at p. 41; TR 255:22 - 259:7.)

c) CLA referred couple William and Diane W*** both had children from prior marriages (which she called a "blended family"), and they had prior wills and a prenuptial agreement. Ms. McClaren testified that the purpose of the RLT was unclear, and some provisions of the estate plan drafted by Mr. Plunkett were inconsistent with others. She also said it was unclear whether certain property was to be characterized as separate or community property. She was also critical of the fact that the RLT was written so that the survivor of the couple could revoke the trust and exclude the children of the first to die, contrary to the stated intentions of the clients as expressed in the written information sent to Mr. Plunkett. Also, some tangible personal property was disposed of before specific bequests of tangible

personal property, thus negating the subsequent specific bequests. (See Exhibits 11 and 12.)

d) Ms. McClaren testified that, for blended families such as those represented by the clients in Exhibits 11 and 12 (William and Diane W***) and Exhibits 5 and 6 (Gordon and Bonnie Eg***), it would have been easier to accomplish their testamentary goals with two wills or two trusts, rather than a single RLT.

e) For CLA referred couple Charles and Edith Wi***, the estate planning documents drafted by Mr. Plunkett (see Exhibits 13 and 14) disposed of a family owned car wash business without clarifying whether that meant disposal of the real property, the equity in the business, or both, and it was not apparent whether Mr. Plunkett had considered that one of their three sons' wives appeared to have an interest in the business. TR 294-302.

f) Thomas Pe*** and Judith Ro*** (Exhibits 7 and 8, the Pe-Ro files) were an unmarried couple who described each other on the client information form as "God given mates." According to the client information form for Thomas, he wanted a $60,000 life insurance policy to go to Judith, but the documents drafted by Mr. Plunkett made Thomas's son his attorney-in-fact with the power to change beneficiaries on insurance policies and amend the trust. (See Exhibit 8 at pp. 50, 52.) A note accompanying the client information form to Mr. Plunkett reported that Thomas and Judith were not married, had been together for ten years, Judith had a reported $2,000 in assets, and that Thomas wanted a revocable living trust. (See Exhibit 8 at p. 2.) Ms. McClaren testified that that, by reason of Washington law regarding committed intimate relationships, Judith might have held ownership rights in half of at least some of the property Thomas owned, so she would have advised them to seek separate counsel and would not have considered the conflict waivable. (TR 250:7 - 252:3.) Ms. McClaren thought Thomas's RLT included many provisions which were unnecessary,

such as provisions to deal with environmental issues and subchapter S stock, even though Thomas apparently owned no such property at the time. (TR 252:17 - 253:2.)

2.37 CLA referred client Walter Richardson testified that the estate plan documents Mr. Plunkett drafted disrupted a prenuptial agreement and resulted in giving his wife, Hazel, rights in his pre-marital property which was not intended. (TR 193:4-6.) Mr. Richardson also testified he told Mr. Plunkett that he didn't want the new estate plan documents to interfere with an existing credit shelter trust. After speaking with his original lawyer, Mr. Richardson had his attorney prepare new estate plan documents to replace Mr. Plunkett's documents, for which he had to pay additional attorneys fees. (TR 198:13-18.)

2.38 Several of the clients who testified at the hearing said they did not understand the estate plan documents which Mr. Plunkett prepared for them. For example, Judy Clouse testified "I didn't understand a lot of what was going on and I definitely don't remember now." (TR 158:18-20). Mr. Clouse died in December 2010, and there was no testimony at all about his understanding of the estate plan documents. There was also no evidence that the Clouses told the CLA representatives they did not understand the documents when they executed them on 9/4/09 or when they met for their periodic review on 3/17/10. (See Exhibit 16 at pages 3 and 15 and Exhibit 17 at p. 1.) Such evidence is also absent with respect to the other client witnesses.

2.39 The Association did not prove by a clear preponderance of the evidence (ELC 10.14(b)) that Walter and Judy Clouse told Mr. Plunkett they did not understand their estate plan documents or that he otherwise knew of any lack of understanding. The bases for this finding are:

a) The evidence included a letter the Clouses received from Mr. Plunkett dated 8/19/09 along with the binder containing their estate plan documents which said, in part - "Please call me if you have any questions regarding the enclosed documents or if there are any changes which need to be made prior to signing." (Exhibit 15 at p. 23.)

b) The Clouses signed at least 2 documents indicating that they had read the estate plan documents prepared by Mr. Plunkett and they were all correct. (See Exhibit 16 at pages 3 and 15.)

c) There is another document signed by them in which they acknowledged receiving and understanding advice from Mr. Plunkett regarding the need to fund the RLT. (Exhibit 15 at p. 35.)

d) Mr. Plunkett testified that during his telephone consultations with the clients, including the Clouses, he explained the various estate plan documents. (TR 413:23 - 416:4.)

e) The binder sent by Mr. Plunkett containing each client's estate plan documents and the cover letter sent with the binder contained understandable descriptions and explanations of the purpose and effect of the various instruments in the estate plan. (See, e.g., Exhibit 15 at pages 20-33.)

2.40 Similarly, and for the same reasons, the Association did not prove by a clear preponderance of the evidence (ELC 10.14(b)) that the other 4 clients who testified told Mr. Plunkett they did not understand their estate plan documents or that he otherwise knew of any lack of understanding.

2.41 However, the fact that Mr. Plunkett did not participate in any meaningful way in the delivery and signing of the estate plan documents, but rather allowed those functions to be handled by the CLA USA insurance agents over whom he had no control or authority, is the reason that he was unaware of the clients' questions. Had Mr. Plunkett participated in a meaningful way in the delivery and signing of the documents he would have known which clients were confused or in need of further explanations about the purpose and effect of the estate plan documents.

2.42 The Association contends that CLA was willing to refer estate plan clients to Mr. Plunkett because of his willingness to include RLTs in the estate plans.

There was no direct evidence supporting the Association's contention. However, the fact

that the CLA presentations so forcefully advocated RLTs, coupled with the fact that 100% of the estate plans drafted by Mr. Plunkett included RLTs, and that there was no evidence he ever recommended against the use of an RLT, was strong circumstantial evidence of CLA's intentions.

2.43 This Hearing Officer therefore finds that CLA's willingness to refer estate plan clients to Mr. Plunkett was dependent on his willingness to include RLTs in the plans.

2.44 This Hearing Officer further finds that Mr. Plunkett was aware that CLA's referrals to him would most likely decrease if he significantly decreased his inclusion of RLTs in the estate plans of CLA referred clients.

No RPC 1.3 Violations.

2.45 This Hearing Officer finds that the Association offered insufficient evidence to support a finding that Mr. Plunkett failed to "act with reasonable diligence and promptness in representing a client."

No RPC 1.4(a)(2) Violations.

2.46 The Association contends Mr. Plunkett did not adequately communicate with his clients before drafting the estate plan documents.

2.47 This Hearing Officer finds that Mr. Plunkett's pre-drafting telephonic communications with his clients were brief but were not so inadequate as to support finding by a clear preponderance of the evidence that, while drafting the estate plan documents, Mr. Plunkett did not reasonably communicate with his clients "about the means by which the client's objectives are to be accomplished." (RPC 1.4(a)(2).) Mr. Plunkett did ask pertinent questions of his clients and did discuss with them what documents he intended to include with their estate plans.

RPC 1.4(b) Violations.

2.48 The Association contends that the estate plan errors described by Ms. McClaren and Walter Richardson demonstrate that Mr. Plunkett did not adequately communicate with his clients after drafting the estate plan documents.

2.49 Mr. Plunkett's communication with his clients after drafting the estate plan documents was very inadequate. Other than making himself available to answer questions by telephone if asked, he played no role in delivering the documents to the clients or in explaining the significance of the documents he drafted. The errors described above were strong evidence that these documents were complicated and these clients needed more guidance than was provided in the cover letter and written instructions which accompanied the document binder. The documents were delivered to the clients by non-attorneys (the CLA USA insurance agents) who were not in any way involved in drafting them. Most of the time, these persons were not involved in gathering the information and completing the application forms sent to Mr. Plunkett to use in drafting the plans, so their first contact with Mr. Plunkett's client was at the time the documents were executed. This means they knew virtually nothing about the client's estate plan goals apart from what they would learn from reading the documents themselves. Since those documents often contained errors, this would have been a poor way to understand the client's goals. By absenting himself from the process, Mr. Plunkett had no idea what information or explanations were given to his clients about the estate plan documents he had drafted. The written instructions which Mr. Plunkett sent with the estate plan documents (e.g., regarding the need to transfer assets into the RLT) were helpful but, by themselves, they were not adequate to assure that the clients understood the documents.

2.50 For the foregoing reasons, this Hearing Officer finds that Mr. Plunkett failed to "explain a matter [the estate plans] to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." (RPC 1.4(b).)

2.51 State of Mind. Mr. Plunkett acted with knowledge in connection with these communication failures because he was fully aware of who would be delivering the documents to his clients, the fact that they were not attorneys, and the fact that they knew virtually nothing about the clients. He also knew that by not participating in the delivery and explanation of the documents to his clients Mr. Plunkett was completely unaware of what the CLA representatives said to the clients.

2.52 Injury. Mr. Plunkett's conduct caused injury to his clients because many of them received inaccurate estate plan documents which did not implement their goals and because they did not receive adequate explanations to allow them to properly understand the documents. In addition, at least one client (Mr. Richardson) incurred additional legal fees when he hired another attorney to correct Mr. Plunkett's mistakes.

RPC 1.7(a)2) Violations

2.53 The Association contends that Mr. Plunkett was engaged in a continuing business relationship with CLA and that he became economically dependent on CLA referrals to the extent that his estate planning advice was "materially limited by [his] personal [financial] interest", in violation of RPC 1.7(a)(2) and/or RPC 1.7(a)(4). The Association contends this business relationship created a conflict of interest which obligated Mr. Plunkett to obtain written informed consent from his CLA referred clients under RPC 1.7(a)(2) and/or RPC 1.7(b)(4). Specifically, the Association contends Mr. Plunkett was required to inform his CLA referred clients of the volume of business he received from CLA referrals.

2.54 The Association further contends that CLA's business model required the participation of a lawyer like Mr. Plunkett to draft the estate plan documents, including an RLT, to convince CLA clients to pay up to several thousands of dollars for CLA's service package, and that Mr. Plunkett's willingness to include RLTs in every estate plan he drafted for CLA referred clients showed that he was not exercising independent legal judgment in advising the clients regarding their estate plans. Mr. Plunkett argues there was no a "continuing business relationship"; indeed, he argues there was no "relationship" at all. His argument is based primarily on the absence of a contract with CLA, the absence of CLA's control over him, and the absence of payments of any form of compensation. There is no need to pick sides in this semantical debate, as the applicability of RPC 1.7(a)(2) and RPC 1.7(a)(4) is not dependent on what label is used.

2.55 At some point very soon after the CLA referrals started in September 2008, Mr. Plunkett's clients and income came predominantly from CLA referrals. When this point was reached, the "pull" from Mr. Plunkett's personal interest in continuing to receive such referrals began to impact his ability to independently analyze each client's situation in order to give legal advice based only on each client's needs and goals. A critical fact in this finding is that there appears not to have been even one occasion when Mr. Plunkett recommended against the use of an RLT, or that he even discussed it. Once that point was reached, Mr. Plunkett was obliged to obtain his clients' written informed consent before he could agree to represent new CLA referred clients, which he never did.

2.56 This Hearing Officer therefore finds that Mr. Plunkett's estate planning advice was "materially limited by [his] personal [financial] interest" (RPC 1.7(a)(2)) and that he failed to obtain informed written consents from his clients.

2.57 State of Mind. This is a close call. Mr. Plunkett's failure to recognize the conflict of interest was, in a sense, negligent. This Hearing Officer does not believe Mr. Plunkett ever sought to deceive or mislead clients, or that he ever consciously recognized his conflict of interest. However, the definition of "knowledge" in the American Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards") (1991 ed. & Feb. 1992 Supp.) is controlling: "'Knowledge' is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result."

Mr. Plunkett acted with knowledge in connection with his failure to disclose to his clients the significance of CLA referrals to his practice. He knew the volume of work he received; he knew he did not disclose it to his clients; he knew there was no other way the clients could know the significance of CLA referrals to his financial circumstances; he knew CLA was interested in convincing clients to use RLTs and he knew he provided CLA with RLTs 100% of the time. Mr.

Plunkett had enough information that he had an obligation to bring the facts to the clients' attention and let them decide for themselves whether he was the right attorney for them.

2.58 Injury. Mr. Plunkett's conduct caused injury to his clients because they were deprived of the opportunity to make a fully informed whether to retain Mr. Plunkett as their attorney. Respondent's conduct caused actual injury to his clients who did not receive the benefit of independent legal advice.

III. CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, this Hearing Officer now makes the following Conclusions of Law:

A. Violations Analysis

3.1 This Hearing Officer concludes that the Association failed to prove the following by a clear preponderance of the evidence:

a) Count 1 - The Association did not prove violations of RPC 1.3 (*Diligence)* by Mr. Plunkett. That particular part of Count 1 is therefore dismissed.

Regardless of the wisdom of including RLTs in every estate plan he drafted, there was insufficient evidence to prove that Mr. Plunkett failed to "act with reasonable diligence and promptness" in his representation of his clients.

b) Count 1 - The Association did not prove violations of RPC 1.4(a)(2) (*Communication*) by Mr. Plunkett. That particular part of Count 1 is therefore dismissed.

Although Mr. Plunkett's pre-drafting communications were brief and always by telephone, this Hearing Officer concludes that the combined information exchange through the forms provided by the CLA representative and the telephone consultations were barely sufficient to meet his obligation to "reasonably consult with the client about the means by which the client's objectives are to be accomplished."

3.2 The Hearing Officer concludes that the Association proved the following by a clear preponderance of the evidence:

a) Count 1 - Respondent violated RPC 1.4(b) (*Communication*) by failing to meaningfully participate in delivering and explaining the estate plan documents he prepared for his clients, and instead allowing others over whom he had no authority or control to perform those functions. The result was that many clients received estate plans with mistakes and which they did not understand.

b) Count 2 - Respondent violated RPC 1.7(a)(2) and RPC 1.7(b)(4) (*Conflict of Interest*) by failing to disclose to his clients the fact and extent of his personal financial interest in continuing to receive client referrals from CLA and by failing to obtain his clients' informed written consent to representation by Mr. Plunkett in the face of the conflict of interest.

3.3 The Association argued that the issues in this matter are almost identical to those in *In re Disciplinary Proceeding Against Shepard*, 169 Wn.2d 697, 239 P.3d 1066 (2010), where the Washington Supreme Court suspended an attorney found to have aided the unlawful practice of law by someone conducting a "scam" by selling living trusts written by a non-attorney. This Hearing Officer disagrees. CLA sells a service, not estate plans or RLTs. This is an important distinction between the issues in this matter and the issues in *Shepard.* Further, the basis for the suspension in *Shepard*, violation of the proscription against assisting the unauthorized practice of law, was not charged in this matter. The Hearing Officer and Disciplinary Board in *Shepard* did address charges virtually identical to those alleged against Mr. Plunkett; namely, failing to adequately explain the risks and benefits of RLTs versus other estate planning options and failing to obtain informed consent based on the alleged continuing business relationship between the Respondent and CLA. However, the Supreme Court did not address those charges in its opinion and the opinion provides insufficient factual detail regarding the basis for those charges against Mr. Shepard to allow this Hearing Officer to conclude that *Shepard* provides a basis for deciding this matter.

3.4 A more helpful case is *In re William Pearcy*, 2000 WL 1357861, IL Disp. Op 98 SH 129 (Ill. Atty. Reg. Disp. Com. 2000), which held that an attorney violated RPC 1.7 when he recommended against using a living trust for fewer than five clients out of 445 referrals from North American Senior Association, which advocated revocable living trusts. "The Respondent clearly had conflicting loyalties." He received a six-month suspension. Another is *Committee on Professional Ethics and Conduct of the Iowa State Bar Assoc. v. Baker*, 492, NW 2d 695 (Iowa 1992), in which a lawyer was reprimanded for conflicts in accepting about 100 referrals from someone who touted living trusts at seminars to avoid probate and the lawyer never counseled against the living trust model. Another helpful authority is Utah State Bar Ethics Advisory Opinion No. 97-09, 1997 WL 433814, which discussed similar potential conflicts of interest

> "When Lawyer is receiving or expects to receive a significant number of referrals from Estate Planner, he may not accept the representation unless he reasonably believes that the representation will not be adversely affected and the client consents after consultation, including a disclosure of the potential limitations upon Lawyer's representation. Lawyer's reasonable belief that the representation will not be adversely affected will be tested by the standard of a disinterested lawyer."

B. Sanction Analysis

3.5 A presumptive sanction must be determined for each ethical violation. *In re Anschell*, 149 Wn.2d 484, 501, 69 P.2d 844 (2003). The following standards of the American Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards") (1991 ed. & Feb. 1992 Supp.) are presumptively applicable in this case.

Count 1

3.6 ABA Standard 4.5 is most applicable to the violations of RPC 1.4(b) in Count 1:

ABA Standard 4.5 - Lack of Competence

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to provide competent representation to a client:

4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.

4.52 Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.

4.53 Reprimand is generally appropriate when a lawyer:

(a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or

(b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.

4.54 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether he or she is competent to handle a legal matter, and causes little or no actual or potential injury to a client.

3.7 Based on the Findings of Fact and Conclusions of Law and application of the ABA Standards, the appropriate presumptive sanction for the violations of RPC 1.4(b) in Count 1 is Reprimand.

Count 2

3.8 ABA Standard 4.3 is most applicable to the violations of RPC 1.7(a)(2) and RPC 1.7(b)(4) in Count 2:

ABA Standard 4.3 - Failure to Avoid Conflicts of Interest

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest:

4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):

(a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or

(b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or

(c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another and causes serious or potentially serious injury to a client.

4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

4.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

3.9 Based on the Findings of Fact and Conclusions of Law and application of the ABA Standards, the appropriate presumptive sanction for the violations of RPC 1.7(a)(2) and RPC 1.7(b)(4) in Count 2 is Suspension.

3.10 When multiple ethical violations are found, the "ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations." *In re Petersen*, 120 Wn.2d 833, 854, 846 P.2d 1330 (1993). Thus, before considering aggravating and mitigating circumstances, the presumptive sanction is Suspension.

C. Aggravation and Mitigation

3.11 The following Findings of Fact related to aggravation and mitigation were proven by a clear preponderance of the evidence (ELC 10.14):

a) Respondent Mark K. Plunkett has no prior disciplinary record.

b) Mr. Plunkett was not motivated by dishonesty or selfishness. Although he carelessly failed to recognize the conflict of interest posed by the volume of work he received from CLA, he honestly believed he was providing quality legal services at a very fair price. In fact,

his fees were reasonable for what he gave his clients. To find a selfish motive would require more evidence than the Association offered of knowing misconduct.

c) Mr. Plunkett's conduct involved a pattern of misconduct and multiple offenses in the sense that the conduct was repeated many times. Because these factors (pattern and multiplicity) focus on exactly the same matters, this Hearing Officer does not believe that they should count as two separate aggravating factors in this case.

d) It appeared to this Hearing Officer that Mr. Plunkett was honest and cooperative during both the formal disciplinary proceedings and the investigation which preceded them.

e) Mr. Plunkett has not acknowledged the existence of the conflict of interest or the inadequacy of his communications with his clients in the delivery and execution of the estate plan documents. He did acknowledge many of the mistakes found by Pamela McClaren in the estate plan files she reviewed, and he indicated he was willing to fix at least some of the issues. On balance, in light of the fact that Mr. Plunkett's failure to recognize the conflict of interest was careless, this Hearing Officer does not find that Mr. Plunkett "refused" to recognize his errors.

f) Though Mr. Plunkett's CLA referred clients were all elderly, they were not vulnerable victims within the meaning of the ABA Standards.

g) Mr. Plunkett had substantial experience in the practice of law in Washington.

h) There was no evidence Mr. Plunkett was indifferent to making restitution or was involved in any illegal conduct.

i) There was no evidence that Mr. Plunkett suffered with any personal or emotional problems, physical disability, mental disability, or substance dependency issues which affected the conduct at issue.

j) No evidence was presented of Mr. Plunkett's character or reputation.

k) There was no evidence that Mr. Plunkett faced any other penalties or sanctions.

3.12 The following aggravating factors set forth in Section 9.22 of the ABA Standards apply in this case:

(c) a pattern of misconduct;
(d) multiple offenses;
(i) substantial experience in the practice of law.

3.13 The following mitigating factor set forth in Section 9.32 of the ABA Standards apply in this case:

(a) absence of a prior disciplinary record;
(b) absence of selfish or dishonest motives;
(e) full and free disclosure to disciplinary board and cooperative attitude toward proceedings.

IV. SANCTION RECOMMENDATION

Based on the ABA Standards and the applicable aggravating and mitigating factors, the Hearing Officer recommends to the Disciplinary Board that Respondent Mark K. Plunkett receive 2 reprimands (one for each Count). Further, the Hearing Officer recommends a six month probation period during which he shall be required to complete at least 10 hours of ethics training, particularly focusing on conflicts of interest.

DATE: November 5, 2013

William E. Fitzharris, Jr.
WSBA No. 7122
Hearing Officer

Certificate of Service

I certify that on this date I mailed the signed original of these *Amended Findings of Fact, Conclusions of Law, and Hearing Officer's Recommendation* to Allison Sato, Clerk to the WSBA Disciplinary Board, 1325 Fourth Avenue, Suite 600, Seattle, WA 98101-2539.

DATE: November 5, 2013.

William E. Fitzharris, Jr.

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Amended FOF, COL & HOR Recommendation
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Philip Mahoney Respondent/Respondent's Counsel
at 2410 Eastlake Ave. E. # 201 Seattle WA 98102 by Certified/~~First~~ class mail,
postage prepaid on the 6th day of November, 2013

Clerk/Counsel to the Disciplinary Board