

FILED
APR 06 2016
DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re
MARY SIMON,

Lawyer (WSBA No. 17737)

Proceeding No. 14#00008

DISCIPLINARY BOARD CHAIR ORDER
DECLINING REFERRAL OF SUA SPONTE
CONSIDERATION ELC 11.3(b)

This matter came before the Chair of the Disciplinary Board for a determination whether to refer this matter to the full Board for consideration for sua sponte review pursuant to ELC 11.3(b). On April 4, 2016, the Clerk distributed the attached decision to the Chair.

IT IS HEREBY ORDERED THAT the Chair declines to refer this matter to the full Board for *sua sponte* consideration.

Dated this ^{4th} 6th day of April, 2016.

Stephanie Bloomfield
Stephanie Bloomfield
Disciplinary Board Chair

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Disciplinary Board Chair Order Declining Referral of Sua Sponte Consideration to be delivered to the Office of Disciplinary Counsel and to be mailed to Stephanie Seiner, Respondent/Respondent's Counsel at 45 Elliott Ave NW 3rd Floor Seattle WA 98109 by Certified/first class mail, postage prepaid on the 6th day of April, 2016.

[Signature]
Clerk/Counsel to the Disciplinary Board

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**BEFORE THE DISCIPLINARY BOARD
WASHINGTON STATE BAR ASSOCIATION**

In re:

MARY SIMON

Lawyer (Bar No. 17737)

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**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND HEARING OFFICER'S
RECOMMENDATION**

In accordance with Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC), a hearing was held before the undersigned Hearing Officer on August 17-21, 2015 in the WSBA Hearing Room, 6th Floor, 1325 4th Ave, Seattle, Washington. Respondent Mary Simon appeared at the hearing and was represented by counsel, Stephen C. Skinner. Senior Disciplinary Counsel Linda Eide and Disciplinary Counsel Francesca D'Angelo appeared for the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association (the Association).

FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

The Formal Complaint filed by Disciplinary Counsel charged Ms. Simon with the following counts of misconduct:

Count 1: By aiding or assisting Mr. Martinez in creating a sham structure for the sole purpose of evading taxes, Respondent violated RPC 1.2(d) and/or RPC 8.4(c).

DLB

1 Count 2: By obtaining a pecuniary interest in the Bothell property and/or
2 the assets of the Melmich PAC and/or Melmich Investment on terms that were
3 not fair or reasonable to Mr. Martinez, and /or were not disclosed and transmitted
4 in writing to Mr. Martinez and/or without advising Mr. Martinez in writing of the
5 desirability of seeking independent counsel, and /or without obtaining the informed
6 consent in writing of Mr. Martinez, Respondent violated RPC 1.8(a).
7

8 Count 3: By making one or more misrepresentations regarding her actions in
9 acquiring an interest in the Bothell property, and/or by making one or more
10 misrepresentations regarding the circumstances surrounding the transfer of the
11 Bothell property, and/or by making one or more misrepresentations regarding the
12 funds in the Melmich account, Respondent violated RPC 8.4(c).
13

14 EVIDENCIARY ISSUE

15 During the course of the hearing Professor Scott Schumacher was called by
16 the ODC to testify as an expert witness. After allowing testimony during direct
17 examination to include Professor Schumacher's opinion that the Private Annuity
18 Contract entered into in this matter was a "sham transaction,"¹ on cross examination
19 Professor Schumacher conceded he had no experience, prior to being contacted by
20 the ODC to serve as an expert witness in this matter with private annuity contracts,
21 had never even read a private annuity contract, and was not an expert with respect to
22 private annuity contracts. Thereafter Respondent's counsel re-raised a prior motion
23 (that had been denied) to strike the opinion testimony of Professor Schumacher with
24

25 _____
26 ¹ "Not what it purports to be." (Tr. 459: 11-15)

1 respect to the Private Annuity Contract in this matter being a "sham transaction."
2 While an expert may be permitted to testify with respect to "scientific, technical or
3 other specialized knowledge" based on "knowledge, skill, experience, training or
4 education," Professor Schumacher's reading of readily available materials specifically
5 in preparation for this proceeding would not qualify him as an expert on private
6 annuity contracts sufficiently to assist the trier of fact to understand the substantial
7 issues in this proceeding relating to private annuity contracts. The Respondent's
8 motion to strike Professor Schumacher's opinion was granted at the hearing. To
9 clarify the record the following portions of the record are stricken: Tr. 432:5 – 436:6.
10 The balance of Professor Schumacher's testimony will be permitted to stand as it is
11 found to assist the trier of fact in understanding the evidence and/or to assist in
12 determining a fact in issue.²
13
14

15 Based on the pleadings in the case, the testimony and exhibits at the hearing,
16 the Hearing Officer makes the following:

17 **FINDINGS OF FACT**

18 1. Respondent was admitted to the practice of law in the State of
19 Washington on or about May 31, 1988. She was a lawyer at all material times
20 herein.
21

22 _____
23 ² Even if Professor Schumacher's opinion testimony was allowed to stand, given his lack of
24 any understanding of private annuity contracts prior to his engagement in this proceeding by
25 ODC, given the testimony of Respondent (while self-serving, she had extensive experience
26 with private annuity contracts), that of Mr. Brislawn's expert testimony with greater
experience and understanding of private annuity contracts, as well as the BNA material REX
302, I would find Professor Schumacher's opinion of the private annuity contract herein being
a sham to have little weight.

1 2. In or around 2003, Respondent owned a business with her non-lawyer
2 husband, William Vigal ("Vigal"): Vigal & Simon, Inc.

3 3. At Vigal & Simon, Respondent provided tax and asset management
4 services for their clients. Vigal & Simon was not a law firm.

5 4. In 2003, Mark Martinez ("Martinez") was a plaintiff in a class action
6 lawsuit against Shell Oil Company for alleged discrimination.

7 5. In 2003, the class and Shell Oil agreed to settle all claims. As a result of
8 this settlement, Martinez received a net cash settlement of approximately \$802,500.

9 6. Martinez received a 1099 for the settlement and he understood he was
10 potentially liable for federal and California State income tax on the settlement.
11 Respondent was interested in strategies to defer federal income taxes to a later date.

12 7. By July 2003, Martinez was in constructive receipt of approximately
13 \$802,500 in the class action settlement monies as they had been received by his
14 California attorney. Martinez had by that point obtained dominion and control of the
15 money held by his California attorney.

16 8. Martinez was referred by a friend, Bill Gollhofer (Gollhofer), to
17 Respondent. Martinez understood Respondent to be a tax lawyer.

18 9. In May 2003 Martinez, Gollhofer and Jon Norton (Norton) met with
19 Respondent and Vigal at the Seattle offices of Vigal & Simon to discuss options
20 deferral of taxes and possibilities for investment of Martinez's class action settlement
21 monies.
22
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1 10. Respondent recommended a foreign private annuity contract ("PAC") to
2 Martinez.

3 11. Respondent explained to Martinez that a PAC was an unsecured
4 contract between two parties with a future promise to pay. She further explained that
5 under PAC related Internal Revenue Service ("IRS") rules and/or regulations he
6 would not be allowed to control the assets in the PAC. He could not avoid paying
7 taxes on the settlement proceeds. He could potentially defer paying taxes. He would
8 be obligated to pay taxes on any monies as they were received by way of annuity
9 payments or advances not repaid.
10

11 12. It is unclear under what theory (or IRC section, Regulation or Ruling)
12 the taxes on the settlement monies could be deferred, however from that point
13 forward Respondent and Martinez acted as if they believed Martinez did not owe
14 taxes on the portion of his settlement monies invested into the PAC in 2003 and that
15 the taxes could actually be deferred despite having prior constructive receipt of the
16 funds.
17

18 13. Respondent had placed other foreign PACs in the Isle of Man where
19 she had experience working with Gethin Taylor ("Taylor"). A ruling in the Isle of Man
20 determined private annuity contracts were not insurance contracts that required an
21 insurance license and could be done privately.
22

23 14. Martinez was attracted to the foreign PAC because, although the funds
24 would be sent overseas, they could be brought back to the United States and he
25
26

1 would be allowed to make recommendations regarding the investments of the funds
2 and he could borrow from the funds.

3 15. At the initial meeting Respondent did not provide legal services to
4 Martinez. The meeting was attended by Gollhofer and Norton in addition to
5 Respondent and her non-lawyer husband Vigil. Neither at that time, nor any other
6 time, was an attorney retention agreement discussed or signed. The advice given to
7 Martinez at that time related to how to defer taxes on his settlement funds, i.e. "tax
8 advice."
9

10 16. At or about the time Martinez first met with Respondent, he had
11 reviewed materials on the Vigil & Simon web site which included a description of a
12 PAC and which indicated that it was could not be used to avoid taxes, but to defer
13 them. Martinez understood these provisions.
14

15 17. The Vigil & Simon website materials did not suggest Vigil & Simon
16 was a law firm.

17 18. In approximately June 2003 Martinez agreed to put his settlement funds
18 into a foreign PAC as recommended by Respondent.

19 19. It was Martinez's unexpressed (to Respondent or Vigil) intention to
20 never pay income taxes on any of the funds received from the settlement. At no time
21 did Martinez every advise Respondent of this intention.
22

23 20. As part of the overall plan for Martinez's assets, Respondent prepared
24 testamentary documents for Martinez's parents as well as power of attorney, trust
25 and estate documents for Martinez. This constituted the practice of law.
26

1 21. Based on the preparation of the power of attorney and estate and trust
2 documents for Martinez, and in the context of providing advice on the investment of
3 his monies, interpretation of the Internal Revenue Code and regulations, the advice
4 concerning the PAC and the plan for Respondent to continue to participate in the
5 management of the PAC, Martinez reasonably believed that Respondent was and
6 would be in the future acting as his attorney in providing estate planning advice,
7 administration of the PAC and to some extent participating in managing the entities
8 created to own the funds.
9

10 22. On or about June 27, 2003 Martinez met with Respondent. He reviewed
11 and signed the PAC. The PAC was not drafted by Respondent. An executed copy
12 was provided to Martinez.
13

14 23. The original PAC was lost, destroyed or sent to Belize where further
15 access was not possible. No signed copy of the signed PAC was offered into
16 evidence in this proceeding and thus the exact terms of the PAC are unknown.
17 Respondent's Exhibit ("REX") 203 was received into evidence as a "specimen" PAC.
18 Based on the testimony of the witnesses, including Respondent and Martinez, REX
19 203 will be considered for all practical purposes what Martinez signed but for the lack
20 of any entries in the blanks, the details of which remain unknown.
21

22 24. The private annuity contract signed by Mr. Martinez would transfer his
23 property (a large portion of his settlement funds) to an Obligor in exchange for a
24 promise to make annuity payments commencing in the future. The obligation was
25 unsecured. Martinez was allowed to request advance payments, however those
26

1 advances were in the discretion of the Obligor and would accrue interest and have to
2 be repaid within ten years. Martinez, as the annuitant, warranted that he would pay
3 all income taxes due on any advances not repaid or any annuity payments received.

4 25. Martinez understood the terms and conditions of the PAC.

5
6 26. Under the PAC the value of the property (initial investment plus any
7 accumulations from investment returns) as of the date Martinez selected to annuitize
8 the property (together with his life expectancy) would determine the annuity
9 payments he would receive for the balance of his life. In addition to deferring taxes
10 on the money invested into the PAC, the ability to grow the property through
11 investments, with any taxes deferred on gains until the annuity began to payout, was
12 a potential economic advantage to Martinez.

13
14 27. To fund the private annuity contract Respondent, utilizing her power of
15 attorney from Martinez, directed the California counsel to wire 20% of the net
16 settlement proceeds directly to Martinez and the balance (approximately \$642,000) to
17 a chartered accountant located in the Isle of Man. Working with Respondent. Taylor,
18 the chartered accountant, set up a company, Casemore Limited ("Casemore"), to act
19 as the Obligor under the Private annuity contract. As the Obligor, Casemore would
20 own Mr. Martinez's settlement funds and would make annuity payments and take
21 such other action as permitted by the terms of the PAC.

22
23 28. In response to Respondent's request the California attorney wired to
24 Martinez approximately \$150,000 of the settlement amount (i.e. the 20%). Martinez
25 never declared the \$150,000 as income, nor did he ever pay state or federal taxes on
26

1 the money. At no time did Martinez ever advise Respondent of his intent and or plan
2 to not pay taxes on the \$150,000. At no time did Respondent advise Martinez that
3 he could avoid paying taxes on the \$150,000.

4 29. Several layers of entitles were created for the ostensible purpose of
5 holding and managing the assets of the PAC. Respondent did not create these
6 entities, nor draft the documents associated with the creation of these entities.
7

8 30. At time the funds were invested into the PAC, under the terms of the
9 PAC, the funds no longer belonged to Martinez, but rather the Obligor or his
10 successors and/or assigns.

11 31. On July 11, 2003, Melmich Investment Group SA ("Melmich
12 Investment") was formed in Belize to hold the funds for Melmich PAC.
13

14 32. On July 11, 2003, Respondent and Vigal were appointed directors of
15 Melmich Investment.

16 33. On July 11, 2003, a special purpose trust was formed in Belize called
17 Compass Melmich Trust Investment Group SA Special Purpose Trust (Compass
18 Melmich). It appointed as first Protector a committee comprised of John Goldsworth
19 ("Goldsworth"), Vigal and Respondent. The initial property invested into the
20 Compass Melmich trust was the entire share capital of Melmich Investment.
21

22 34. Compass Melmich Trust and Melmich Investment were formed in
23 Belize. In 2003 Belize was a tax haven jurisdiction. These Belizean entities were
24 under no obligation to provide documents to US taxing authorities. Investment in a
25 country designated a tax haven jurisdiction did not violate U.S. law.
26

1 35. Melmich Investment was the only property in the Compas Melmich
2 Trust.

3 36. The trust protectors for the Compass Melmich Trust had the power to
4 request information and accounts from the trustee and take action to protect the trust
5 corpus.

6 37. The transactions surrounding the creation of the PAC had several
7 potential economic purposes. It allowed for potential deferred taxation on the original
8 investment. It allowed for the growth of the principal investment into the PAC with
9 taxes deferred until the annuity payout started. It allowed for the protection of the
10 annuity from creditors of Martinez, as he longer owned the money. If in fact the
11 annuity payout was deferred into the future,³ it further served to benefit Martinez by
12 deferring any taxation on the monies invested as well as deferring taxation on any
13 accumulations from investments made until annuity payments were received at some
14 time in the future. The manner in which it was created also allowed for its existence
15 and ownership to be obscured. As established, it did not provide for control of the
16 funds by Martinez.

17 38. At the time of its creation, the PAC was not a sham structure created for
18 the sole purpose of evading taxes.

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24 _____
25 ³ Because no original or copy of the PAC is available it is unknown if an annuity start date
26 was selected. What is clear from the bank records is that at no time were annuity payments
ever initiated.

1 39. On July 21, 2003, Martinez signed a power of attorney appointing
2 Respondent as his attorney in fact for all financial matters. This was never revoked
3 with proper notice to Respondent.

4 40. On July 14, 2003 the Melmich Investment Board of Directors held its
5 first meeting in Belize. Present were Respondent, Vigal and Goldsworth. Among
6 other items of business was the resolution to open a bank account in Key Bank,
7 Seattle, Washington in the name of Melmich Investment; Respondent and Vigal were
8 to be named as signatory to the account.

9 41. On July 23, 2003 Respondent had opened up an account in Key Bank
10 in Seattle, the name of Melmich Investment. Respondent and Vigal were the sole
11 signatories on the account. As a U.S. address was required by Key Bank, a Vigal
12 and Simon address was used for the account. Based on the opening of the Key Bank
13 account, it was anticipated that the settlement funds would be deposited in an Isle of
14 Man bank and thereafter at least some of the funds would be returned to the United
15 States as property of Casemore, a foreign corporation (in the name of Melmich
16 Investment), as obligor on the PAC. It was likely anticipated that at least some of
17 these funds would be invested inside the United States.

18 42. In 2003 the Isle of Man was a tax haven country with bank secrecy
19 laws. A bank in the Isle of Man was under no obligation to provide information to
20 United States taxing authorities. Investment in a country designated a tax haven
21 jurisdiction did not violate U.S. law.

1 43. Under the PAC, Martinez was permitted to make investment
2 recommendations to the Obligor. In this capacity, Martinez recommended a
3 \$100,000 investment into property being developed in Bothell, Washington ("Bothell
4 property").

5 44. Martinez also, based on a recommendation from Respondent,
6 recommended an investment in the Merendon Mining Fund ("Merendon Mining").
7

8 45. The Obligor agreed to make these investments. Respondent directed
9 \$100,000 be forwarded to Norton as an investment in the development of Bothell
10 property as well as \$100,000 which was invested in Merendon Mining.

11 46. Shortly after the creation of the PAC the Isle of Man, Taylor became
12 concerned that the cost of administering a contract of this relatively small size was
13 not worth the benefit and suggested that Martinez consider some more cost-effective
14 jurisdiction.
15

16 47. Respondent suggested a transfer to individuals associated with Deloitte
17 Trust located in Belize, with whom she had a business relationship. Julian Castillo,
18 Claude Burrell and Giacomo Sanchez ("Castillo, Burrell & Sanchez" respectively)
19 were the principals associated with the Deloitte & Touche entities in Belize and who
20 were involved with Deloitte & Touche Corporate Services, the original trustee of the
21 Compass Melmich Investment Group SA Special Purpose Trust. It was subsequently
22 agreed that the private annuity contract with Martinez was transferred from the Isle of
23 Man to Belize.
24

1 48. With the transfer of the private annuity contract to Belize, the Obligor
2 under the private annuity contract became Melmich Investment Group SA (Melmich).
3 Melmich was a Belizean company formed by Deloitte Trust in 2003 for the specific
4 purpose of issuing and holding the private annuity contract for the benefit of Mr.
5 Martinez. Martinez never had an ownership interest in Melmich. Respondent was
6 not involved in the formation of the private annuity contract by Melmich. That
7 transaction was handled in Belize.
8

9 49. The beneficial owner of Melmich Investment Group SA was the sole
10 shareholder Melmich Investment Group SA Special Purpose Trust. Ownership in
11 foreign trusts and companies is referred to as beneficial ownership by the OECD
12 (Organization for Economic Co-operation and Development, based in Paris, France).
13 The beneficial owner of a purpose trust is the Trustee, which was Deloitte Trust. The
14 beneficial owners of Deloitte Trust were Castillo (who retired in 2006), Sanchez and
15 Burrell. Vigal and Respondent had no ownership interest in Deloitte or Melmich
16 Investment Group SA Special Purpose Trust. Melmich Investment did not have an
17 office or employees in Belize. Its sole purpose was to act as the Obligor for the PAC.
18

19 50. On or about August 27, 2003 the Respondent caused \$431,978.82 of
20 Martinez's settlement monies to be wired from the Isle of Man to the account she had
21 opened for Melmich Investment in Key Bank in Seattle. This was approximately 34
22 days after the funds were wired from the California attorney to the Isle of Man. This
23 represented the balance of the cash initially placed into the PAC, less expenses and
24 less the investments made previously on recommendation of Martinez.
25
26

1 51. Melmich Investment received a deed of trust against the Bothell
2 property to provide a security interest for the \$100,000 investment.

3 52. Melmich Investment's deed of trust was subordinate to a first mortgage
4 held by Flagstar Bank ["Flagstar"].

5 53. Between 2003 through 2005, Respondent and/or Mr. Vigal made 22
6 disbursements totaling \$269,000 from the Melmich account to Martinez directly or as
7 "investments" in companies that Mr. Martinez created.⁴

8 54. These included monies transferred to "Simply Successful Investing,
9 LLC," an entity created by Martinez and his daughter to "flip" houses, "Logozone," an
10 embroidery business, and on at least one occasion directly to Martinez (\$85,500 on
11 July 23, 2004).
12

13 55. The PAC allowed advances on the amounts due under the PAC. The
14 PAC specifically provided for repayment within ten years and that advances would
15 bear interest at the lowest rate permissible by the Internal Revenue Code, without
16 having to impute interest thereon. Additionally there was a loan document executed
17 similar to the specimen admitted as REX 212 which purports to create a \$1 million
18

19 _____
20 ⁴ With respect to the creation of the PAC, Count 1 was charged very narrowly, limiting the
21 charge to whether the creation of the PAC was a sham structure for the sole purpose of
22 evading taxes. After its creation, at some point the evidence suggested that the PAC was
23 not being administered as tightly as it was at first where there was clear oversight by the
24 Obligor over investments. At times later on (2004-2005) monies were being distributed to
25 Martinez with little apparent oversight; being paid regularly for "investment advice" with little
26 or no evidence that any such advice was actually being provided. Checks being distributed
as "loans" with little/no documentation as to the purpose or ultimate destination of the funds.
However, the charge was not directed to whether the PAC morphed into a sham, but strictly
whether it was created for the sole purpose of evading taxes. As no charge was directed to
the later administration of the PAC, no findings or conclusions will be offered in relation
thereto.

1 line of credit between Melmich Investment and Martinez. It is unclear whether the
2 monies distributed to Martinez were advances under the PAC or draws on the line of
3 credit. There is nothing in the record to show an accounting of interest charged or
4 paid, or the repayment of principle, as required by both the PAC and the line of credit.

5
6 56. Respondent and/or Vigal also made distributions to Martinez as
7 "advisor fees" for his purported investment advice to Melmich Investment. These
8 were in monthly check payable to Martinez in the amount of \$800 (at times there was
9 a single check for \$1600 covering two months). Most of these checks had nothing
10 entered under the "for" area of the check, some indicated they were a "loan" without
11 any further documentation as to the purpose of the loan. Over the period July 15,
12 2004 – January 27, 2005 approximately \$7,200 was paid to him.

13
14 57. Martinez did repay some of the advances (loans) in the approximate
15 amount of \$59,000.

16 58. The loans and partial repayment thereof and the ongoing discussions
17 between Respondent and Martinez regarding future loans (e.g. REX 301) support
18 the fact that, at the time of its creation and soon thereafter, the PAC was not a sham
19 but was serving the intended purposes of deferring taxation of the settlement
20 monies, and allowing Martinez the opportunity to grow the investment to ultimately
21 increase his annuity at the time payout commenced.

22
23 59. In or around April 2005, Norton defaulted on his loan obligation to
24 Flagstar and the Bothell property went into foreclosure.

1 60. The Notice of Default was sent to Melmich Investment in care of
2 Respondent and Mr. Vigil.

3 61. The Obligor was willing to use the funds in the Melmich Investment
4 account to cure the delinquency. Respondent and/or Mr. Vigil consulted with Mr.
5 Martinez who agreed with the plan.
6

7 62. In January 2006, Respondent and/or Mr. Vigil paid off the Flagstar loan
8 on the Bothell property using \$292,170.65 from the Melmich Account.

9 63. After this disbursement, approximately \$20,000 was left in the Melmich
10 account.

11 64. On January 11, 2006, Melmich Investment took title to the property.

12 65. No one, including Respondent, Vigil, or their attorney Marquardson
13 obtained title insurance on the property, or had a title search done with respect to the
14 property.
15

16 66. After Melmich Investment took title to the property Melmich began to
17 receive rental payments in the amount of \$900 per month. These monies were
18 deposited into the Melmich Investment account.

19 67. On May 11, 2006, Vigil for Melmich Investment quitclaimed the Bothell
20 property to Compass North America Executive Services, LLC ("Compass NA").
21

22 68. Compass NA was a corporation that Respondent and Vigil had formed
23 in Nevada, but had not previously used. Melmich Investments was transferred to
24 Compass NA and became its sole member.
25
26

1 69. Respondent recommended this transfer so that the rental incomes from
2 the property accrue to a domestic, rather than foreign, owner. Although it might not
3 change the tax levied, this prevented a large withholding from the rental payments.

4 70. Martinez agreed to this transfer.

5 71. Thereafter in 2006-2007 Respondent and Vigal made unsuccessful
6 attempts to contact Martinez. Emails were sent alerting Martinez about possible
7 changes in the IRS regulations on private annuity contracts, fees due Belize for
8 annual maintenance and the possible need to close Melmich. These emails were not
9 "returned." Martinez did not respond. Martinez later conceded he was not checking
10 that email account during the 2006 - 2007 time frame.

11 72. In October 2006, Respondent and Vigal received a notice of default of a
12 note secured by a deed of trust in the Bothell property ["Fretland Note"] in the amount
13 of \$38,500.

14 73. Neither Respondent nor Mr. Vigal was aware of this lien prior to paying
15 off the first mortgage on the Bothell property.

16 74. Respondent and Mr. Vigal attempted to but were unable to contact
17 Martinez to inform him about the notice of default.

18 75. In November 2006, in order to protect the interest of Compass NA and
19 thus indirectly to protect Martinez's interest in the PAC, Respondent paid off the
20 Fretland Note. At that time, the property remained owned by Compass, NA.

1 76. Having lost contact with Martinez, neither Respondent nor Mr. Vigal
2 was unable to inform him of this transfer, send copies of bank records or otherwise
3 communicate with him about the Bothell property.

4 77. After the transfer, rent from the Bothell property continued to be
5 deposited into the Compass NA account.

6 78. Etoile Holdings, LLC was created in Delaware in November 2003.
7 Respondent and Vigal were the mangers. The member was Etoile Holdings Trust in
8 Belize, with the Deloitte Trust Company Limited as the original trustee.

9 79. On June 19, 2007, Vigal quitclaimed, on behalf of Compass NA, the
10 Bothell property to Etoile Holdings LLC. Etoile Holdings, LLC also held some of
11 Respondent's property (she had paid of the Fretland Note with her own separate
12 funds, held by Etoile Holdings).
13

14 80. The same beneficial owners of Melmich Investment Group SA,
15 Sanchez and Burrell, owned Compass North America Executive Services LLC and
16 held the trustee role through the Etoile Holdings Trust with the Delaware series LLC,
17 Etoile Holdings, which held the Bothell Property as a separate series. The transfer to
18 Etoile Holdings was not a change of ownership, merely a change in form.
19

20 81. Etoile Holdings LLC was a series LLC. The assets and liabilities of
21 each series are maintained separate and segregated from the others in each
22 individual series. The Bothell property was allocated Series Five. Respondent and
23 Vigal had no interest in Series Five.
24

1 82. In January 2006 Respondent had assigned all her membership interest
2 in the Etoile Holdings, LLC series, other than bank accounts and brokerage accounts
3 (Etoile Holdings, Series Eight and Series Nine) to Etoile Holdings Trust, thus by the
4 time the Fretland note was paid, Respondent's interest in Etoile Holdings LLC was
5 limited to Series Eight and Series Nine.
6

7 83. While the parties thought the Bothell property might be worth as much
8 as \$6 Million once fully developed, substantial development need to be done with
9 unknown further costs to develop the property to that point.

10 84. At no time did Respondent obtain in the Bothell property an ownership
11 interest, possessory interest, security or pecuniary interest.
12

13 85. Neither Respondent nor Vigal at any time transferred the Bothell
14 property to an entity owned by Respondent.

15 86. Throughout 2007 the goal was to sell the Bothell property and distribute
16 the net proceeds to Melmich/Compass, to refund the PAC. It was listed for sale but
17 no offer was received for the property.

18 87. Legal problems had developed on the Bothell property. There was a
19 neighbor encroachment issue which resulted in litigation including claims involving
20 environmental issues. The beneficial owners of the property had no remaining funds
21 from the PAC to invest in the litigation and Respondent and Vigal paid the expenses
22 for the litigation, not settled until 2013.
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1 88. During the litigation it was discovered that much of the property was
2 wetlands and that only two acres were developable. The value of the property was
3 significantly less than had been previously thought.

4 89. In November 2007 Martinez, resurfaced, having "come out his hole,"
5 sending Respondent an email inquiry seeking to borrow money against the land
6 (presumably the Bothell property) to buy a liquor store.

7
8 90. Respondent responded that the property had been lost in a trustees
9 same and "you don't own the property anymore." She omitted any reference to how
10 she had paid the Fretland lien with her own personal money, how the property had
11 been transferred to another entity (Etoile Holdings) or that the beneficial owners still
12 had an interest in the property.

13
14 91. There was an email exchange and ultimately Respondent asked
15 Martinez for a mailing address to confirm his identity and so she could send an
16 explanation and financial records. In the interim there had been at least one phone
17 call from someone, likely Martinez daughter which included threats.

18 92. Slowed by the holidays, Respondent sent Martinez a Memorandum
19 dated January 10, 2008. Respondent's testimony that Vigal had primary
20 responsibility for drafting the Memorandum is credible. It purported to outline the
21 history of the structure created for Martinez benefit in 2003 and a plan for going
22 forward. It was sent via certified or registered mail, signed for on behalf of Martinez
23 and Respondent did not hear back from Martinez with respect to this Memorandum.

1 93. Although the Memorandum was drafted by Vigal, Respondent reviewed
2 it and it was send over Respondent's signature. It was not completely accurate
3 and/or complete.

4 94. The Memorandum indicates that the Fretland lien was paid with funds
5 belonging to Compass North America Executive Services LLC. In fact the lien was
6 paid with Respondent's own funds drawn from Etoile Holdings, LLC. It omits the
7 name of the LLC to which the property was conveyed: Etoile Holdings. By telling
8 Martinez that Compass North America Executive Services LLC had drawn from "its
9 own funds" to pay off the Fretland lien, Respondent misrepresented these facts.

10 95. The Memorandum did indicate an "immediate" conveyance of the
11 Bothell property to "another LLC" to remove Compass North America Services LLC
12 from the title, in fact that it was 7 months before the transfer was made.

13 96. The Memorandum indicated to Martinez that when the Bothell property
14 is sold in the future "Melmich Investment Group SA or Martinez" would receive part or
15 all of the proceeds that were invested in the Bothell property, minus fees and costs.
16 As the Bothell property, now owned by Etoile Holdings, remained in the beneficial
17 ownership of Sanchez and Burrell, there was in fact a likelihood that if the property
18 was sold at a sufficient price (this was before the litigation over the property and the
19 wetlands issues reduced its buildable acreage from nine to two) in fact Melmich
20 Investment would recoup monies into the Melmich Holdings PAC, to the benefit of
21 Martinez. It is unclear why Respondent suggested that these monies might come to
22 Martinez rather than Melmich Investment or the Melmich Holdings PAC.
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1 97. The Memorandum indicated that Melmich Holdings lost the property in
2 a foreclosure sale. This is not entirely true as a payoff of the Fretland lien was
3 negotiated and paid off by Respondent through her money held in Etoile Holdings,
4 LLC. However, this was triggered by the Fretland lien which was in default and with
5 a foreclosure pending if the note was not dealt with timely. Following the payoff of
6 the Fretland lien, the property did transfer to Etoile holdings via quitclaim deed but
7 the understanding all along was that Melmich Holding's interest would be protected
8 after the fees were paid. Respondent's testimony to that effect is credible. This is
9 supported by the Series Distribution List for Etoile Holdings LLC which continues to
10 show the Bothell property in Series Five, separate and apart from the other properties
11 held in Etoile Holdings LLC.
12

13
14 98. Respondent is charged with misrepresentation with respect to having
15 taken monies from the Melmich Holdings account and having transferred them to
16 Etoile Holdings. Respondent, under the terms of the trust agreements, as a
17 "protector" of the trust, was entitled to reimbursement for expenses including the
18 monies spent to pay off the Fretland lien, in addition to expenses incurred. The
19 monies in the Melmich Holdings account did not belong to Martinez, but rather the
20 Obligor. At that time the monies were transferred it was impossible to communicate
21 with Martinez about the payment as he was not responding to any attempt to
22 communicate. The transfer was approved by the owners of Compass North America,
23 the trustees of the purpose trust, Burrell and Sanchez – "the Obligor". I find credible
24
25
26

1 Respondent's testimony to that effect. Respondent did not misrepresent this to
2 Martinez.

3 99. In October 2009, to secure the rights to the Bothell property held by
4 Etoile Holdings LLC, a deed of trust was placed on the property by Bright Star Capital
5 Limited ("Bright Star"). Bright Star was a Dubai company owned by the same owners
6 as Melmich Investment and Compass Investment, Sanchez and Burrell. As such
7 there remained no change in beneficial ownership. In conjunction with this deed of
8 trust, a line of credit in the amount of \$6 Million was created. Respondent was one of
9 the eligible borrowers on the line of credit. The line of credit was never funded, nor
10 did Respondent ever borrow on it. It was unclear from the record why Respondent
11 was one of the eligible borrowers on the line of credit.
12

13
14 100. The Bright Star deed of trust was removed in December 2012 to
15 facilitate the settlement of the lawsuit and to obtain clear title insurance. After the title
16 insurance was issued a new deed of trust was recorded on the Bothell property in
17 2103 listing Etoile Holdings, LLC, Vigal and Respondent as the borrowers and Bright
18 Star (Burrell and Sanchez) as lenders. It confirmed Lenders first position on the
19 property with respect to the amount of \$260,000 with interest. It also indicated that
20 the purpose of the line of credit was to fund development of the property. The line of
21 credit was never funded and neither Respondent nor Vigal ever borrowed on this line
22 of credit; it was unclear why they were listed as borrowers on the note and deed of
23 trust.
24

1 101. After a long effort to sell the property, in March 2015 the Bothell
2 property sold for \$180,000, with approval of Bright Star. All proceeds were
3 transferred to the lienholder and beneficial owner, Bright Star.

4 102. Respondent and Vigal received nothing from the sale, despite their
5 investment of time and money to protect the property for the benefit of Melmich
6 Investment, its successors, the PAC and/or Burrell and Sanchez.

7 103. Martinez was contacted in May 2011 by Contract Management, Inc.
8 ("Contract Management") regarding his PAC. At that time he was informed the
9 Compass Trust had closed, Melmich Investments SA did not exist any longer and his
10 PAC had been cancelled. Respondent had no knowledge of, nor did she participate
11 in the decision to, cancel Martinez's PAC.
12

13 104. He was also advised that after the passage of the Foreign Account Tax
14 Compliance Act in 2010, Compass Trust ceased working with U.S. Clients. Compass
15 Trust was sued in Washington State and a \$24 Million default judgment had been
16 entered against it. Martinez's PAC was an unsecured promise to pay from Melmich
17 Investment and the Compass entities. As they were now gone, the contract was
18 cancelled.
19

20 105. Contract Management also advised him of the current status of the
21 Bothell property (in litigation) and that the best case scenario would be to resolve the
22 litigation favorably and sell the property at a decent price allowing for payment of all
23 costs and disbursal to Martinez of whatever was left (likely pennies on the dollar).
24
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1 106. By this point, with the PAC canceled, any remaining monies would be
2 returned to Martinez.

3 107. Finally Contract Management advised Martinez that before any
4 additional funds could be disbursed to him he would have to document that he had
5 complied with all reporting requirements with regard to paying taxes on all the
6 distributions made to him. "No exceptions."
7

8 108. Likely because Martinez could not document the reporting of any of the
9 Melmich Investment (or Compass companies) funds received by him to the IRS, he
10 never followed up with Contract Management regarding any further distribution of
11 funds from his now cancelled PAC.

12 109. Martinez did not maintain all records of his PAC, emails between
13 himself and Respondent or other relevant records over the 12 years since 2003.
14

15 110. The intervening 12 years since the initial PAC was created has caused
16 all concerned to have less accurate recollection of the events that occurred.

17 111. Respondent did not maintain all of her records relating to the PAC.
18 Some were lost to a computer server crash; some were lost when Compass Trust
19 asked Respondent and Vigal to return all files relating to Martinez PAC to Belize, a
20 request with which they complied in 2010. Later the individuals and entities in Belize
21 refused to cooperate with request to return the documents.
22

23 112. Respondent has been prejudiced by the extended delay in bringing
24 these proceedings.
25
26

1 113. Respondent cooperated with the ODC during the course of these
2 proceedings.

3 114. Neither the IRS, nor other governmental agency, has charged or made
4 a determination that the PAC entered into by Martinez was a "sham transaction."

5 115. The PAC, as initially set up, was not a sham transaction or an abusive
6 tax shelter. While it did provide an opportunity for Martinez to attempt to avoid paying
7 taxes by the fact that no 1099 would be filed on distributions or loans, the PAC did
8 serve several legitimate purposes to include allowing Martinez to defer taxes on the
9 moneys invested, defer taxes on accumulations made from investment of those
10 monies, provide him the opportunity to make recommendations on investments made
11 from the funds, and the opportunity to take loans from the funds, subject to interest
12 being charged and being considered as income, subject to taxation, if not repaid. It
13 also provided for asset protection to a certain extent by the fact that the investment
14 into the PAC was no longer his money, and that the investments made with PAC
15 funds were not in Martinez's name, nor title, except possibly those made with loans to
16 Martinez.
17
18

19 116. Throughout the entire process of setting up the PAC, Martinez was
20 repeatedly told, both in writing and orally, that the PAC would not shield him from
21 paying taxes on the investment made and would only defer the payment of taxes.
22

23 117. The fact that PAC was set up in a tax haven and transferred to another
24 tax haven did not result the structure being a sham structure.
25
26

1 118. The nature of the structure, its domicile in the Isle of Man and Belize,
2 given their status as tax havens, did provide an opportunity for Martinez to attempt to
3 evade his obligation to pay taxes by taking advantage of the lack of reporting
4 distributions to Martinez, however he was counseled throughout that it was his
5 obligation to report and pay tax on the monies distributed as annuity, payments for
6 investment advice, and/or advances not repaid.
7

8 119. Martinez's decision to evade taxation on his class action settlement was
9 his and his alone.

10 120. Martinez private criminal intent should not be imputed to Respondent as
11 there was no evidence that she had knowledge of his private plan to commit tax
12 fraud.
13

14 121. Martinez never held any ownership interest in the Bothell property, the
15 Key Bank account or funds held therein by Melmich and/or its successors, or
16 Melmich Investment, Melmich Investment Group Special Purpose Trust or Compass
17 North America Executive Services, LLC.

18 122. Respondent has no prior disciplinary record.

19 123. Respondent has a good legal reputation in the community.
20

21 Based on the foregoing Findings of Fact, the Hearing Officer makes the
22 following:

23 **CONCLUSIONS OF LAW**

24 1. Based on Martinez's reasonable belief that Respondent was acting as
25 his attorney from the time she prepared estate and related documents for him and his
26

1 family and counseled him on the investment into the PAC, an attorney client
2 relationship did exist starting in June 2003.

3 **Violations Analysis:**

4 The Hearing officer finds that the ODC failed to prove the following by a clear
5 preponderance of the evidence:

6
7 2. Count 1 – By aiding or assisting Mr. Martinez in creating a sham
8 structure for the sole purpose of evading taxes, Respondent violated RPC 1.2(d) or
9 RPC 8.4(c).

10 3. Count 2 - By obtaining a pecuniary interest in the Bothell property
11 and/or assets of the Melmich PAC and/or Melmich Investments on terms that were
12 not fair or reasonable to Mr. Martinez and/or were not disclosed or transmitted in
13 writing to Mr. Martinez and/or without advising Mr. Martinez in writing of the
14 desirability of seeking independent counsel and/or without obtaining the informed
15 consent of Mr. Martinez, Respondent violated RPC 1.8(a).

16
17 4. Count 3 (in part) - Respondent, while admitted to practice of law, made
18 misrepresentations to Mr. Martinez regarding her actions in acquiring an interest in
19 the Bothell property.

20 The Hearing Officer finds that the ODC did prove by a clear preponderance of
21 the evidence:

22
23 5. Count 3 (in part) – Respondent, while admitted to the practice of law,
24 made representations to Mr. Martinez regarding her actions regarding the

1 circumstances surrounding the transfer of the Bothell property and about the funds in
2 the Melmich account. In doing so Respondent violated RPC 8.4(c).

3 **Sanction Analysis:**

4 A presumptive sanction must be determined for each ethical violation. *In re*
5 *Anschell*, 149 Wn.2d 484, 69 P.3d 844, 852 (2003). The following standards of the
6 American Bar Association's Standards for Imposing Lawyer Sanctions (ABA
7 "Standards") (1991 Ed. & Feb. 1992 Supp.) are presumptively applicable in this case:
8

9 Count 3: RPC 8.4(c)

10 **5.1 Failure to Maintain Personal Integrity**

11 Absent aggravating or mitigating circumstances, upon application of the
12 factors set out in Standard 3.0, the following sanctions are generally appropriate
13 in cases involving commission of a criminal act that reflects adversely on the
14 lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in
15 cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

16 5.11 Disbarment is generally appropriate when:

17 (a) a lawyer engages in serious criminal conduct, a necessary element of which
18 includes intentional interference with the administration of justice, false swearing,
19 misrepresentation, fraud, extortion, misappropriation, or theft; or the sale,
20 distribution or importation of controlled substances; or the intentional killing of
21 another; or an attempt or conspiracy or solicitation of another to commit any of
22 these offenses; or

23 (b) a lawyer engages in any other intentional conduct involving dishonesty,
24 fraud, deceit, or misrepresentation that seriously adversely reflects on the
25 lawyer's fitness to practice.

26 5.12 Suspension is generally appropriate when a lawyer knowingly engages in
criminal conduct which does not contain the elements listed in Standard 5.11 and
that seriously adversely reflects on the lawyer's fitness to practice.

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in
any other conduct that involves dishonesty, fraud, deceit, or misrepresentation
and that adversely reflects on the lawyer's fitness to practice law.

1 5.14 Admonition is generally appropriate when a lawyer engages in any other
2 conduct that reflects adversely on the lawyer's fitness to practice law.

3 6. The Memorandum of January 10, 2008, sent over Respondent's
4 signature, to Martinez did contain several misrepresentations or omissions. These
5 include

- 6 (a) misstating who paid of the Fretland lien.
7 (b) omitting that the Bothell property was transferred: Etoile Holdings, LLC.
8 (c) the Bothell property was "immediately" transferred to another LLC.
9 (d) suggesting that the Bothell property was lost in a foreclosure sale.

10 7. While there is no evidence of dishonesty, fraud or deceit, the
11 communication did include a misrepresentation (and omission, tantamount to a
12 misrepresentation). Given the complexity of the historical background summarized in
13 the Memorandum, 100% accuracy would likely be impossible, but the nature of the
14 misrepresentations were clearly those the Respondent actively participated in and
15 would be expected to recall.

16 8. Based on the Findings of Fact and Conclusions of Law and application
17 of the ABA *Standards*, the appropriate presumptive sanction is Reprimand.

18 9. The following aggravating factors set for in §9.22 of the ABA *Standards*
19 are applicable in this case:

- 20 a. Refusal to acknowledge wrongful nature of conduct;
21 b. Substantial experience in the practice of law.

22 10. The following mitigating factors set for in §9.22 of the ABA *Standards*
23 are applicable in this case:

- 24 a. Absence of prior disciplinary record;
25
26

1 b. Full and free disclosure to disciplinary board and cooperative
2 attitude toward proceedings;

3 c. Delay in disciplinary proceedings and

4 d. Respondent has a good reputation in the legal community.

5 **RECOMMENDATION**

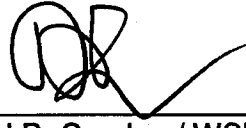
6 11. Based on the *ABA Standards* and the applicable aggravating and
7 mitigation factors the Hearing Officer recommends that Respondent receive an
8 Admonition. I believe the mitigating factors outweigh the aggravating factors,
9 particularly the passage of time between the initial acts leading the charges and filing
10 of the charges. Respondent was prejudiced by the delay through the loss of records
11 and the effects of the delay on the recollection of the events. Respondent did not
12 have a selfish motive. Even though the 2008 Memorandum contained some
13 misrepresentations, she did offer Martinez her continued cooperation and a plan to
14 try to refund his PAC. Respondent's refusal to acknowledge the wrongful nature of
15 her conduct is mitigated in that the misrepresentations were but a very small and
16 relatively insignificant part of the far more serious allegations of misconduct which
17 Respondent vigorously and successfully defended. All in all the conduct of
18 Respondent was such that it is an isolated instance and given the totality of the
19 circumstances would have caused little or no actual or potential injury to Martinez.
20 Respondent's efforts all along had been directed towards preserving Martinez's

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1 interest in the PAC and at the time she was still seeking a path forward.

2 Dated this 12th day of February, 2016.



3
4 David B. Condon / WSBA 5578
Hearing Officer

15
16
17 CERTIFICATE OF SERVICE

18 I certify that I caused a copy of the PDI letter in HO's Recommendation
19 to be delivered to the Office of Disciplinary Counsel and to be mailed
to STEPHEN SPUNKER Respondent Respondent's Counsel
at 145 E. 1st Ave W-550 Seattle WA 98101 by Certified first class mail,
20 postage prepaid on the 12th day of Feb., 2016

21 [Signature]
Clerk/Counsel to the Disciplinary Board