No. 200,720-1

SANDERS, J. (dissenting) — Attorney Richard Dale Shepard should be suspended from the practice of law for violating our Rules of Professional Conduct (RPCs). The majority, however, misperceives the legal and factual components of this case and, as a result, imposes too long a suspension. Because I would suspend Shepard for six months instead of two years, I dissent.

ANALYSIS

When determining the appropriateness of Washington State Bar Association Disciplinary Board (Board) recommendations, we first inquire whether the Board properly established the presumptive sanction. *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 342, 157 P.3d 859 (2007). This inquiry demands that we establish (1) the ethical duties violated, (2) the lawyer's mental state, and (3) the actual or potential injury caused by the lawyer's misconduct. *Id*. Next, we consider aggravating and mitigating factors. *Id*.

"The responsibility for disciplining Washington lawyers ultimately rests with this court." *In re Disciplinary Proceeding Against Preszler*, 169 Wn.2d 1, 15, 232 P.3d 1118 (2010). We exercise plenary authority in matters of attorney discipline. *In*

re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582, 593, 48 P.3d 311 (2002). "Although they are not conclusive, we give considerable weight to the hearing officer's findings, particularly when they involve the credibility and veracity of the witnesses." *In re Disciplinary Proceeding Against Kuvara*, 149 Wn.2d 237, 246, 66 P.3d 1057 (2003).

I. Assisting in the Unauthorized Practice of Law

The majority properly finds violations based on count 1 (failure to act with reasonable diligence), count 3 (failure to disclose possible conflict of interest), and count 5 (failure to make reasonable efforts to ensure associate's behavior harmonized with RPCs).[1] However, it improperly finds a violation based on count 2 (assisting in the unauthorized practice of law). Majority at 14. I agree with the hearing officer that Shepard did not assist Steven Cuccia in the unauthorized practice of law.

The Board found Shepard "aided Mr. Cuccia's unauthorized practice of law by agreeing to represent clients in these transactions and allowing his name and title to add legitimacy to the sale." Clerk's Papers (CP) at 30 (Disciplinary Board Order at 7). But this statement mischaracterizes the facts. Shepard did not aid Cuccia by *agreeing* to represent these clients. In fact, Shepard's agreement to represent the clients could have conceivably worked against Cuccia's interests because Shepard could have advised clients against purchasing the living trusts. The problem here, instead, was

[1] Shepard does not challenge these violations.

that Shepard represented his clients poorly. Shepard's conduct violated a lawyer's duty to provide reasonable diligence, but it did not amount to assisting Cuccia in the unauthorized practice of law.

The majority also alleges that by allowing Cuccia to refer clients to Shepard, Shepard assisted Cuccia in the unauthorized practice of law (apparently it added "legitimacy" to Cuccia's operation). Majority at 14. A lawyer's name and title do not guarantee legitimacy. Merely lending one's name to a nonlawyer's operation does not rise to assisting in the unauthorized practice of law.[2]

The majority focuses on the "practice of law," but skips over the "assisting" requirement. It improperly punishes Shepard for Cuccia's transgressions. *See* majority at 11-14. There is no doubt Cuccia practiced law by marketing, selecting, and selling living trusts to clients. But Shepard's assistance to Cuccia's actual marketing, selection, and sale of trusts—the practice of law here—is an illusion. The majority overstates the case when it says, "Shepard delegated the legal services he had agreed to in his fee agreement to Cuccia." Majority at 14. In reality Shepard did not delegate any legal services to Cuccia. He simply failed to perform some of them, and he performed others poorly. Shepard's lack of diligence is a violation based on count 1, not count 2.

[2] Moreover, as the hearing officer recognized, while clients may have felt more secure knowing a lawyer would review the paperwork, that security should have been tempered by the fact that Cuccia himself—the salesman—referred Shepard's office. *See* CP at 125 (Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation (FFCL) at 9, ¶ 53).

II. Presumptive Sanction

The majority erroneously finds the presumptive sanction for count 1 to be disbarment.[3] Majority at 17-18. The hearing officer, on the other hand, correctly identified the proper presumptive sanction: Suspension. *See* CP at 136 (Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation (FFCL) at 20, ¶ 104).

The American Bar Association's (ABA) *Standards for Imposing Lawyer Sanctions* standard 4.4 (1991 & Supp. 1992) (ABA *Standards*) spells out, in broad terms, failures of reasonable diligence and promptness that qualify for disbarment or suspension. The difference hinges on whether the injury or potential injury to the lawyer's client was "serious." ABA Standards stds. 4.41-4.42.

The facts here do not support a finding of serious or potentially serious injury to Shepard's clients for at least two reasons. First, the majority finds compelling that "Shepard's negligence was not limited to one or even just a few clients." Majority at 17. But this factor does not weigh heavily upon the seriousness of the violation. If it did, it would render meaningless ABA *Standards* std. 4.42(b), which expressly finds nonserious injury can result from a "pattern of neglect." *Id*. It also flies in the face of the hearing officer's finding that only "actual injury"—not serious injury—resulted

[3] While the majority does not articulate the presumptive sanctions for the remaining counts, the WSBA concedes suspension is appropriate for each. Answering Br. of the WSBA at 31-32. I note as well that even if Shepard had assisted Cuccia in the unauthorized practice of law (count 2), the presumptive sanction for that violation would also be suspension. *Id*.

from the "large number of clients, over 70 . . . [which] constitute a *pattern* of neglect." CP at 130-31 (FFCL at 14-15, ¶¶ 88-89 (emphasis added)). Shepard here engaged in a pattern of neglect, but that pattern, by itself, does not make the injury serious.

Second, and determinatively, "'[u]nchallenged findings of fact made by the hearing officer and unchanged by the Board are viewed as verities on appeal.'" *In re Disciplinary Proceeding Against Hicks*, 166 Wn.2d 774, 781, 214 P.3d 897 (2009) (quoting *In re Disciplinary Proceeding Against Perez-Pena,* 161 Wn.2d 820, 829, 168 P.3d 408 (2007)). Here, the hearing officer found Shepard caused "actual injury"—not serious injury. CP at 130 (FFCL at 14, ¶ 88). We recently found suspension—not disbarment—to be the presumptive sanction for "actual and potential injury." *In re Disciplinary Proceeding Against Holcomb*, 162 Wn.2d 563, 586, 173 P.3d 898 (2007). Moreover, we recently held that failure to challenge an injury as serious binds our analysis to the hearing officer's determination. *See Hicks*, 166 Wn.2d at 787. We held:

> The hearing officer also found that Hicks' conduct "causes injury or potential injury to a client, the public, or the legal system." She did not, however, find that the injury was "serious or potentially serious." Nor did the Board see fit to find Hicks' actions caused serious or potentially serious injury. Consequently, by the unchallenged findings of the hearing officer and the unanimous Board, [the ABA Standard for disbarment] does not apply.

Id. (citations omitted) (quoting Clerk's Papers at 210).[4]

Hicks is directly on point and determines the outcome of this issue. Here, the

Board expressly adopted the hearing officer's findings of fact (CP at 24 (Disciplinary Board Order at 1)), including the finding of "actual injury" (quoting CP at 130 (FFCL at 14, ¶ 88)). By adopting the hearing officer's work, the Board did not "see fit to find [the lawyer's] actions caused serious or potentially serious injury." *See Hicks*, 166 Wn.2d at 787. Because the hearing officer's finding of actual injury was not challenged on appeal, we must assume the injury to Shepard's clients was not serious injury for purposes of the ABA *Standards*. The hearing officer correctly determined the presumptive sanction to be suspension.

III. Aggravating and Mitigating Factors

When we apply the proper mitigating factors to the proper presumptive sanction, it becomes clear the majority attempts too much. The majority relies on the Board to dismiss several mitigating factors, including (1) absence of dishonest of selfish motive and (2) full and free disclosure or cooperation with disciplinary board proceedings. Majority at 18-19.

While it is true Shepard accepted a fee for substandard work, it is unfair to suggest he did absolutely no work at all. *See* majority at 19 ("Shepard received $200 from over 70 clients for performing no real legal work."). He made (admittedly brief) phone calls to each of his clients. He also reviewed the trust documents Cuccia

[4] *Hicks* involved ABA *Standards* stds. 7.1 and 7.2, instead of ABA *Standards* stds. 4.41 and 4.42, but both make the same distinction between serious injury (leading to disbarment) and nonserious injury (leading to suspension).

provided to his clients and enclosed a letter instructing clients how to execute them. CP at 121-22 (FFCL at 5-6). The majority's position today seems to suggest that when a lawyer accepts a fee for work that reflects a lack of reasonable diligence, the lawyer automatically acts with dishonest or selfish motive. I am not prepared to make that leap. Furthermore I believe Shepard has cooperated in these proceedings, as well as attempted to fully disclose his actions to the Board. I would give these mitigating factors their proper influence.[5]

To spotlight a separate mitigator, it bears noting that Shepard made a strong, timely, and good faith effort to rectify the consequences of his misconduct. When Shepard learned from an article in the *Washington State Bar News* that a lawyer's involvement in living trust operations could be improper, he wrote a "very detailed" letter to the Bar seeking guidance. CP at 128-29 (FFCL at 12-13, ¶¶ 78-79). The letter set out a hypothetical situation, which closely resembled the facts of Shepard's arrangement with Cuccia. The Bar ignored this letter. CP at 129 (FFCL at 13, ¶ 80). The majority faults Shepard for not penning a perfect recitation of the facts in his hypothetical situation, but perfection is not required. The point is that Shepard came to realize he might have made a mistake by dealing with Cuccia, and he took action to see if his conduct complied with the Rules. He could have ignored his actions and

[5] Conversely, I agree that Shepard's lack of diligence harmed vulnerable victims, some of whom were incompetent to execute the living trusts. *See* majority at 19. Accordingly, I would include this as an aggravating factor.

simply hoped they never came to light. But when it became clear that he had made a poor decision, Shepard wrote a letter to his clients to inform them of the State's investigation of Cuccia, and to urge them to schedule an appointment with him or another attorney. *Id*. (FFCL at 13, ¶ 81). He sent a follow-up letter to clients who did not respond to the first letter. *Id*. In light of these actions, I give Shepard's good faith effort to rectify his misconduct considerable weight.

At the end of the day, mitigators[6] outnumber aggravators[7] by a score of six to four. Against the backdrop of the proper presumptive sanction—suspension—I agree with the hearing officer that Shepard should be suspended from the practice of law for six months instead of two years. He has shown genuine remorse and has taken significant steps to make things right. A lengthier suspension will serve no useful purpose as this lawyer has already learned a hard lesson.

[6] Mitigating factors included: (1) absence of prior disciplinary record; (2) absence of dishonest or selfish motive; (3) timely good faith effort to make restitution or rectify consequences of misconduct; (4) full and free disclosure to Board or cooperative attitude toward proceedings; (5) character or reputation; and (6) remorse.

[7] Aggravating factors included: (1) pattern of misconduct; (2) multiple offenses; (3) substantial experience in the practice of law; and (4) vulnerable victims.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: